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**A/CN.4/360 and Corr.1 (English and Spanish only)**

**Third report on international liability for injurious consequences arising out of acts not prohibited by international law, by Mr. Robert Q. Quentin-Baxter, Special Rapporteur**

Topic:  
**International liability for injurious consequences arising out of acts not prohibited by international law**

Extract from the Yearbook of the International Law Commission:-  
**1982, vol. II(1)**

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# INTERNATIONAL LIABILITY FOR INJURIOUS CONSEQUENCES ARISING OUT OF ACTS NOT PROHIBITED BY INTERNATIONAL LAW

[Agenda item 4]

DOCUMENT A/CN.4/360\*

## Third report on international liability for injurious consequences arising out of acts not prohibited by international law, by Mr. Robert Q. Quentin-Baxter, Special Rapporteur

[Original: English]  
[23 June 1982]

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## CHAPTER I

### A review and forecast of progress

#### A. Introduction

1. The preliminary and second reports on this topic<sup>1</sup> were mainly concerned with identifying its boundaries, its relationship with State responsibility, its motivations and its dynamic principles. In its report to the General Assembly on the work of its thirty-third session, the International Law Commission indicated that the focus of its attention would now turn to the inner content of the topic and that its early preoccupation with doctrinal considerations would begin to be balanced by greater attention to the practice of States in constructing

multilateral treaty régimes.<sup>2</sup> An examination of other aspects of State practice would follow in due course.

2. At the thirty-sixth session of the General Assembly, in the Sixth Committee, the Commission was given every encouragement to pursue this programme with a mixture of caution and boldness, finding firm foundations in existing law and building creatively upon those foundations a structure that would serve the cause of interdependence in the modern world. There was predominant support for principles that the Commission has already identified, and sufficient debate on points of substance to direct and inform the Commission's further course of action. In particular, there was virtually

\* Incorporating A/CN.4/360/Corr. 1.

<sup>1</sup> See *Yearbook* . . . 1980, vol. II (Part One), p. 247, document A/CN.4/334 and Add.1 and 2, and *Yearbook* . . . 1981, vol. II (Part One), p. 103, document A/CN.4/346 and Add.1 and 2, respectively.

<sup>2</sup> *Yearbook* . . . 1981, vol. II (Part Two), p. 151, para. 195.

complete agreement that the Commission had learned as much as it could by looking at the topic from the outside: some issues that had remained speculative might well be resolved if we were now to undertake an inventory of contents. Only then would the time be ripe to begin the construction of draft articles.

3. Indeed, several representatives suggested that the Special Rapporteur might now feel he had received sufficient guidance to enable him to produce a schematic outline of a set of draft articles.<sup>3</sup> The Special Rapporteur is grateful for the suggestion and believes that this is the best way to proceed. It is also a method which should suit the convenience of the Commission, and the exigencies of its timetable, during the current session. The General Assembly's immediate expectations can be met without placing any added strain upon a heavily burdened Drafting Committee. A bridge can be provided, in the interest of economy of effort, between the preliminary work of the Commission on this topic in the quinquennium that has just ended and the more substantive work that the newly constituted Commission must undertake. Moreover, while the topic of the non-navigational uses of international watercourses awaits the attention of a new Special Rapporteur, his work can be made a little easier by continued exploration of issues that are germane to every situation in which actions taken in one country produce effects in another.<sup>4</sup>

4. Of course, it should be made very clear that a schematic outline is not a substitute for the proof of any of the propositions it may briefly indicate. Every element in the schema must later be tested by reference to received principles of international law and emerging State practice, or acceptability to States in the light of their experience and perceived needs. If in any case that test is not satisfied, the schematic outline must be revised. Nevertheless, such an outline is likely to influence the final result of the Commission's work because it will set a pattern of inquiry and expectation. Therefore, while matters of detail are always important, they should at this stage be evaluated, not in isolation, but with an eye to the mosaic of which they form a part.

5. Accordingly, this report will contain two chapters only, and the second of these will comprise the schematic outline of the topic. So that the shape of this outline is not buried deep in commentary, it will be set out sparsely, and as far as possible, explanations will be relegated to footnotes. In the next section of the present chapter, it is proposed summarily to review the main aims upon which this report and the two previous reports were predicated. In this and the following sections, attention will be paid to each of the major areas of doubt or disagreement that have emerged in past debates, whether in the Commission or in the Sixth Committee. Modifications introduced in the present report to take account of views expressed in these

<sup>3</sup> See, for example, the observations in the Sixth Committee of the General Assembly, in 1981, of the representative of the United States of America, Mr. Rosenstock (*Official Records of the General Assembly, Thirty-sixth Session, Sixth Committee*, 45th meeting, para. 73) and the representative of Japan, Mr. Hayashi (*ibid.*, 48th meeting, para. 59).

<sup>4</sup> See in this volume, p. 65, the third report on the law of the non-navigational uses of international watercourses (document A/CN.4/348).

debates will also be noted, and there will be a brief review of other factors that have influenced the construction of the schematic outline. On the other hand, the outline itself should serve to dispel some misunderstandings that have arisen because there was no working model to which reference could be made.

## B. Three basic aims

### 1. ALIGNMENT WITH THE RÉGIME OF STATE RESPONSIBILITY

6. The Special Rapporteur's first concern was to align the new topic with that of State responsibility. In one sense, this was a mere matter of definition. State responsibility is engaged only when a wrongful act has been committed. The present topic is by definition concerned only with a situation where the conduct of the State having territorial or other controlling jurisdiction has not been shown to be wrongful.<sup>5</sup> Yet this truism does not dispose of the matter, because some have regarded the duty to provide reparation for loss or injury without reference to wrongfulness as a separate system of obligation. In their view, therefore, this different régime of responsibility (or, in the English language only, "liability")<sup>6</sup> is independent of the ordinary régime of State responsibility and can in appropriate cases be substituted for it.<sup>7</sup>

7. A more general view—as debates in the Commission and in the Sixth Committee would seem to have shown—is that "strict" or "absolute" or "no-fault" liability is at present a product only of particular conventional régimes, and that any attempt to generalize this principle would be resisted as an unwarranted intrusion upon the liberty of action of sovereign States.<sup>8</sup> On the other hand, many would hold that the latter principle is indispensable in limited contexts and must therefore be accorded a régime of its own, if it cannot be assigned an appropriate place within the orthodox structure of customary international law. A warning note to this effect was sounded in last year's debate in the Sixth Committee of the General Assembly.<sup>9</sup>

<sup>5</sup> See the preliminary report, para. 13 (*Yearbook . . . 1980*, vol. II (Part One), p. 251, document A/CN.4/334 and Add.1 and 2).

<sup>6</sup> For a discussion of the choice of the term "liability" in the English language title of the topic, see the preliminary report, paras. 10–12 (*ibid.*, pp. 250–251).

<sup>7</sup> See the preliminary report, paras. 19–25 and para. 51 (*ibid.*, pp. 253–254 and p. 262), and the second report, paras 15–21 (*Yearbook . . . 1981*, vol. II (Part One), pp. 107–108, document A/CN.4/346 and Add.1 and 2.).

<sup>8</sup> See the second report, paras. 11–12 (*Yearbook . . . 1981*, vol. II (Part One), p. 106, document A/CN.4/346 and Add.1 and 2). See also, for example, the observations at the thirty-third session of the Commission of Mr. Reuter (*Yearbook . . . 1981*, vol. I, p. 220, 1685th meeting, paras. 25–26; Mr. Sucharitkul (*ibid.*, p. 224, 1686th meeting, para. 20); and Mr. Ushakov (*ibid.*, p. 225, paras. 28–29). See the observations in the Sixth Committee of the General Assembly, in 1981, of the representative of the USSR, Mr. Verenikin (*Official Records of the General Assembly, Thirty-sixth Session, Sixth Committee*, 42nd meeting, para. 27); of the German Democratic Republic, Mr. Görner (*ibid.*, 46th meeting, para. 36); of Finland, Mr. Rotkirch (*ibid.*, 48th meeting, paras. 19 and 26); of Pakistan, Mr. Shah (*ibid.*, 49th meeting, para. 48); and of Austria, Mr. Klein (*ibid.*, 52nd meeting, para. 52).

<sup>9</sup> See, for example, the observations in the Sixth Committee of the General Assembly, in 1981, of the representative of Brazil, Mr. Calero Rodrigues (*ibid.*, 43rd meeting, para. 37); of the United States of America, Mr. Rosenstock (*ibid.*, 45th meeting, para. 72); of the German Democratic Republic, Mr. Görner (*ibid.*, 46th meeting, para. 35); of Algeria, Mr. Bedjaoui (*ibid.*, 47th meeting, para. 72); of Poland, Mr. Mickiewicz (*ibid.*, 48th meeting, para. 10); of Finland,

8. In summary, the position on this first doctrinal issue is as follows. Within the Commission, at its thirty-second and thirty-third sessions, there has been emphatic support, without any dissenting voice, for the view that this topic is concerned with "primary" rules of obligation, and that it in no way modifies the "secondary" rules of State responsibility.<sup>10</sup> In the Sixth Committee, the response has been almost—though not quite—as uniform; but, in both the Commission and the Sixth Committee, the decision carries with it a burden of doubts and anxieties. Chief among these is the fear that the desire for doctrinal orthodoxy will rob the present topic of its innovative character, submerging it in the old law it was designed to supplement. These and other worries are further considered in later sections of this chapter.

## 2. EMPHASIS UPON PREVENTION, AS WELL AS REPARATION

9. The Special Rapporteur's second major concern was to ensure that the topic would give pride of place to the duty, wherever possible, to avoid causing injuries, rather than to the substituted duty of providing reparation for injury caused.<sup>11</sup> There has in principle been complete support for this objective,<sup>12</sup> but again, there is a small, nagging doubt whether such an objective is compatible with others. To establish independently enforceable rules of prevention would be to depart entirely from the cardinal principle that the present topic is not concerned with rules of prohibition; and at that point, every fear referred to in the preceding paragraph would be justified.

Mr. Rotkirch (*ibid.*, para. 21); of Italy, Mr. Sperduti (*ibid.*, para. 40); of Spain, Mr. Lacleta Muñoz (*ibid.*, para. 51); of Egypt, Mr. El-Banhawy (*ibid.*, 49th meeting, para. 67); of Bulgaria, Mr. Kostov (*ibid.*, 51st meeting, para. 7); of Tunisia, Mr. Bouony (*ibid.*, 52nd meeting, paras. 6-7); of Morocco, Mr. Gharbi (*ibid.*, para. 45); of Austria, Mr. Klein (*ibid.*, para. 52); and of Mexico, Mr. Vallarta (*ibid.*, 53rd meeting, para. 22).

<sup>10</sup> See *Yearbook* . . . 1980, vol. II (Part Two), p. 160, para. 138, and *Yearbook* . . . 1981, vol. II (Part Two), p. 147, paras. 170-171.

<sup>11</sup> See the preliminary report, paras. 4-9 (*Yearbook* . . . 1980, vol. II (Part One), pp. 248-250, document A/CN.4/334 and Add.1 and 2), and the second report, paras 5-6 and 56-72 (*Yearbook* . . . 1981, vol. II (Part One), pp. 104-105 and 116-121, document A/CN.4/346 and Add.1 and 2). See also the report of the Commission on its thirty-third session, paras. 167 and 179 (*Yearbook* . . . 1981, vol. II (Part Two), pp. 146 and 148).

<sup>12</sup> See, for example, the observations at the thirty-third session of the Commission of Mr. Sucharitkul (*Yearbook* . . . 1981, vol. I, p. 224, 1686th meeting, paras. 23-24); Mr. Šahović (*ibid.*, p. 226, para. 37); Mr. Njenga (*ibid.*, p. 229, 1687th meeting, para. 19); Sir Francis Vallat (*ibid.*, p. 230, para. 29); and Mr. Tabibi (*ibid.*, p. 250, 1690th meeting, para. 33). However, see also the observations of Mr. Ushakov (*ibid.*, p. 225, 1686th meeting, para. 29, and pp. 254-255, 1690th meeting, para. 70). See also, for example, the observations in the Sixth Committee of the General Assembly, in 1981, of the representative of Brazil, Mr. Calero Rodrigues (*Official Records of the General Assembly, Thirty-sixth Session, Sixth Committee*, 43rd meeting, para. 36); of the United States of America, Mr. Rosenstock (*ibid.*, 45th meeting, paras. 70 and 72); of Argentina, Mr. Mahourat (*ibid.*, para. 62); of Iraq, Mr. Al-Qaysi (*ibid.*, 46th meeting, para. 71); of Romania, Mr. Mazilu (*ibid.*, 47th meeting, para. 46); of Algeria, Mr. Bedjaoui (*ibid.*, para. 72); of Finland, Mr. Rotkirch (*ibid.*, 48th meeting, para. 21); of the Bahamas, Mr. Maynard (*ibid.*, 51st meeting, para. 19); of Cyprus, Mr. Jacovides (*ibid.*, para. 50); of Tunisia, Mr. Bouony (*ibid.*, 52nd meeting, para. 7); of Morocco, Mr. Gharbi (*ibid.*, para. 45); of Austria, Mr. Klein (*ibid.*, para. 52); of Mexico, Mr. Vallarta (*ibid.*, 53rd meeting, paras. 22 and 24). On the other hand, see the observations of the representative of the United Kingdom, Sir Ian Sinclair (*ibid.*, 40th meeting, para. 9); of the USSR, Mr. Verinikin (*ibid.*, 42nd meeting, para. 27); of the Ukrainian SSR, Mr. Makarevitch (*ibid.*, 44th meeting, para. 15); and of the Byelorussian SSR, Mr. Rassolko (*ibid.*, 45th meeting, para. 26).

10. In fact, however, as the schematic outline will show, no departure has been proposed from the concept inherent in the present title of the topic. The obligation with which the topic is ultimately concerned is that of making reparation for a loss or injury actually sustained.<sup>13</sup> Under this topic, only a failure to comply with that obligation of reparation can engage the rules of State responsibility for wrongfulness.<sup>14</sup> Nevertheless, this melancholy end-result does not represent the main thrust or focus of the topic, which is concerned with minimizing the risk of loss or injury, and of making appropriate advance provision for such risks as cannot reasonably be avoided.

### 3. A BALANCE BETWEEN FREEDOM TO ACT AND DUTY NOT TO INJURE

11. This leads naturally to the last of the three major concerns that have preoccupied the Special Rapporteur in his earlier reports—namely, that the assessment of an obligation to make reparation under the present topic must always depend upon a balance of interest test broadly corresponding to Principle 21 of the Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration),<sup>15</sup> and that the duty to construct régimes to minimize loss or injury entails the same balance of interest test.<sup>16</sup> Once again, there has been in principle no opposition to this objective, and a great deal of support for it;<sup>17</sup> but there remains a pervasive uncertainty whether articles developed under the present topic can play a role that is different from, and compatible with, the rules that immediately engage State responsibility for the wrongfulness of causing loss or injury.

## C. Corollaries of achieving the basic aims

### 1. A SUPPORTIVE RELATIONSHIP WITH STATE RESPONSIBILITY

12. A key to resolving the uncertainty described in the preceding paragraph lies in the achievement of the

<sup>13</sup> See section 4 of the schematic outline, in chapter II below.

<sup>14</sup> *Ibid.*, sections 2 and 3 of the outline.

<sup>15</sup> "Principle 21

"States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or as areas beyond the limits of national jurisdiction." (*Report of the United Nations Conference on the Human Environment, Stockholm, 5-16 June 1972* (United Nations publication, Sales No. E.73.II.A.14), p. 5).

<sup>16</sup> See the preliminary report, paras. 54-61 (*Yearbook* . . . 1980, vol. II (Part One), pp. 263-265, document A/CN.4/334 and Add.1 and 2), and the second report, paras. 41-67 and 81 (*Yearbook* . . . 1981, vol. II (Part One), pp. 112-119 and 122, document A/CN.4/346 and Add.1 and 2). See also the Commission's report on its thirty-third session, paras. 143-144 (*Yearbook* . . . 1980, vol. II (Part Two), p. 161) and the report on its thirty-third session, paras. 175-177 and 180 (*Yearbook* . . . 1981, vol. II (Part Two), pp. 148-149).

<sup>17</sup> See, for example, the observations at the thirty-third session of the Commission of Mr. Riphagen (*Yearbook* . . . 1981, vol. I, pp. 221-222, 1686th meeting, paras. 2-3); Mr. Sucharitkul (*ibid.*, p. 224, para. 26); Mr. Njenga (*ibid.*, p. 229, 1687th meeting, para. 22) and Mr. Aldrich (*ibid.*, p. 251, 1690th meeting, para. 37). See also, for example, the observations in the Sixth Committee of the General Assembly, in 1981, of the representative of Mexico, Mr. Vallarta (*Official Records of the General Assembly, Thirty-sixth Session, Sixth Committee*, 53rd meeting, para. 22).

first aim, described in paragraphs 6–8. Once it has been established that the present topic is not an exception to the régime of State responsibility for wrongfulness and does not compete with that régime, there is no need to face the formidable problem of finding a dividing line between the two régimes. When the Commission first identified and named the present topic, it chose to speak not of “lawful acts”, but of “acts not prohibited by international law”. The Commission did so in the knowledge that it would often be highly controversial whether or not loss or injury of the kind with which this topic is concerned was caused wrongfully.<sup>18</sup> If rules made in pursuance of the present topic could not be applied until the question of lawfulness or unlawfulness had been resolved, they would be worthless—both because that prior question is so difficult to resolve and because the rules would in any case be limited to the scattered areas of known deficiency in the coverage afforded by existing obligations entailing State responsibility for wrongfulness.<sup>19</sup>

13. In fact, the boot is on the other foot. Sometimes it cannot be established whether loss or injury is caused by wrongfulness, except by recourse to the procedures for balancing interests that must be articulated in pursuance of the present topic. The *Trail Smelter*<sup>20</sup> tribunal, in its second and final award,<sup>21</sup> identified and applied in this way a broad rule of customary law containing a balance of interest test. As an example of such a rule in a conventional setting, paragraph 4 of article 194 of the recent Convention on the Law of the Sea<sup>22</sup> may be instanced:

4. In taking measures to prevent, reduce or control pollution of the marine environment, States shall refrain from unjustifiable interference with activities carried out by other States in the exercise of their rights and in pursuance of their duties in conformity with this Convention.

14. To give effect to such a rule, a balance of interest test has to be applied to find the point of intersection of harm and wrong. The importance and urgency of the measures taken to control pollution, and the reasonableness of the standards that govern its conduct, must be assessed in relation to their consequences for other States. This always entails a true weighing of opposing interests, putting a little more into one scale and taking a little from the other, until the parties to the negotiation or the adjudicator of the dispute perceive that the scales are evenly balanced. It is never a matter of putting everything into one scale and deciding, either that an activity gives rise to loss or injury and must therefore be stopped, or that the activity is beneficial and that the loss or injury it causes must therefore be endured.

15. Characteristically—and this is what happened in

the *Trail Smelter* case—when a need arises to fix the point of wrongfulness, attention will first be focused on the conditions subject to which the activity can be continued without entailing wrongfulness; and these conditions will often include an obligation to provide reparation for any loss or injury that may be caused.<sup>23</sup> Thus the determination of wrongfulness entailing State responsibility and the adjustment of the rights and interests of the parties pursuant to the present topic are simply two sides of the same coin.<sup>24</sup> It is especially significant that this bonding between the two systems of obligation is reflected in the construction of three key provisions of the Law of the Sea Convention:<sup>25</sup> article 139, relating to rights and obligations in the area of the sea-bed and ocean floor beyond national jurisdiction; article 235, relating to the protection and preservation of the marine environment; and article 263, relating to marine scientific research.<sup>26</sup> It is also noteworthy that

<sup>23</sup> See the second report, para. 39 (*Yearbook . . . 1981*, vol. II (Part One), p. 112, document A/CN.4/346 and Add.1 and 2).

<sup>24</sup> See in this connection the observations at the thirty-third session of the Commission of Sir Francis Vallat, who noted that the concepts of acts not prohibited by international law and of internationally wrongful acts were not mutually exclusive (*Yearbook . . . 1981*, vol. I, p. 230, 1687th meeting, para. 28), and of Mr. Reuter, who noted that the relationship to the concept of classical responsibility for internationally wrongful acts was a confirmation of the dual nature of the cases falling within the scope of the topic (*ibid.*, pp. 220–221, 1685th meeting, para. 28). See also the observations in the Sixth Committee of the General Assembly, in 1981, of the representative of the German Democratic Republic, Mr. Görner (*Official Records of the General Assembly, Thirty-sixth Session, Sixth Committee, 46th meeting*, para. 35).

<sup>25</sup> See footnote 22 above.

<sup>26</sup> “Article 139. Responsibility to ensure compliance and liability for damage

“1. States Parties shall have the responsibility to ensure that activities in the Area, whether carried out by States Parties, or state enterprises or natural or juridical persons which possess the nationality of States Parties or are effectively controlled by them or their nationals, shall be carried out in conformity with this Part. The same responsibility applies to international organizations for activities in the Area carried out by such organizations.

“2. Without prejudice to the rules of international law and Annex III, article 22, damage caused by the failure of a State Party or international organization to carry out its responsibilities under this Part shall entail liability; States Parties or international organizations acting together shall bear joint and several liability. A State Party shall not however be liable for damage caused by any failure to comply with this Part by a person whom it has sponsored under article 153, paragraph 2(b), if the State Party has taken all necessary and appropriate measures to secure effective compliance under article 153, paragraph 4, and Annex III, article 4, paragraph 4.

“3. States Parties that are members of international organizations shall take appropriate measures to ensure the implementation of this article with respect to such organizations.”

“Article 235. Responsibility and liability

“1. States are responsible for the fulfilment of their international obligations concerning the protection and preservation of the marine environment. They shall be liable in accordance with international law.

“2. States shall ensure that recourse is available in accordance with their legal systems for prompt and adequate compensation or other relief in respect of damage caused by pollution of the marine environment by natural or juridical persons under their jurisdiction.

“3. With the objective of assuring prompt and adequate compensation in respect of all damage caused by pollution of the marine environment, States shall co-operate in the implementation of existing international law and the further development of international law relating to responsibility and liability for the assessment of and compensation for damage and the settlement of related disputes, as well as, where appropriate, development of criteria and procedures for payment of adequate compensation, such as compulsory insurance or compensation funds.”

<sup>18</sup> See the preliminary report, para. 14 (*Yearbook . . . 1980*, vol. II (Part One), p. 251, document A/CN.4/334 and Add.1 and 2).

<sup>19</sup> See the preliminary report, paras. 26–31 (*ibid.*, pp. 254–256), and the second report, paras. 17–18 and 56–67 (*Yearbook . . . 1981*, vol. II (Part One), pp. 107–108 and 116–119, document A/CN.4/346 and Add.1 and 2).

<sup>20</sup> United Nations, *Reports of International Arbitral Awards*, vol. III (Sales No. 1949.V.2), pp. 1911 *et seq.* (first award) and pp. 1938 *et seq.* (second award).

<sup>21</sup> See the second report, paras. 22–40 (*Yearbook . . . 1981*, vol. II (Part One), pp. 108–112, document A/CN.4/346 and Add.1 and 2).

<sup>22</sup> Signed at Montego Bay (Jamaica) on 10 December 1982 (*Official Records of the Third United Nations Conference on the Law of the Sea*, vol. XVII, document A/CONF.60/122).

article 59 of the same convention, dealing with the basis for resolving conflicts regarding rights and jurisdiction in the exclusive economic zone, uses wording which suggests that these conflicts should be resolved within the ambit of the present topic and without reference to the question of wrongfulness.<sup>27</sup>

## 2. A CONCERN WITH THE PROGRESSIVE DEVELOPMENT OF INTERNATIONAL LAW

16. Of course, when dangers are foreseeable, it is far better that the rights and interests of the States concerned should be regulated before loss or injury occurs. That is the policy implicit, for example, in Principle 21 of the Stockholm Declaration,<sup>28</sup> and it is a view upon which States act in concluding the large and fast-growing number of global, regional and local treaties which deal with such questions.<sup>29</sup> Each of these treaties embodies a régime drawing upon principles that should be given general expression in articles developed pursuant to this topic. Moreover, from time to time, as in Principle 22 of the Stockholm Declaration<sup>30</sup> and in articles 139 and 235 of the Convention on the Law of the Sea, referred to in the preceding paragraph, States solemnly declare their duty to develop the law relating to these matters; and it is appropriate that the Commission should endeavour to assist States to discharge that duty.

17. In the submission of the Special Rapporteur,

### *"Article 263. Responsibility and liability*

"1. States and competent international organizations shall be responsible for ensuring that marine scientific research, whether undertaken by them or on their behalf, is conducted in accordance with this Convention.

"2. States and competent international organizations shall be responsible and liable for the measures they take in contravention of this Convention in respect of marine scientific research conducted by other States, their natural or juridical persons or by competent international organizations, and shall provide compensation for damage resulting from such measures.

"3. States and competent international organizations shall be responsible and liable pursuant to article 235 for damage caused by pollution of the marine environment arising out of marine scientific research undertaken by them or on their behalf."

The terminology used in these articles (which was that of the draft convention) is discussed at length in the preliminary report, footnote 17 (*Yearbook . . . 1980*, vol. II (Part One), pp. 250-251, document A/CN.4/334 and Add.1 and 2).

### <sup>27</sup> *"Article 59. Basis for the resolution of conflicts regarding the attribution of rights and jurisdiction in the exclusive economic zone*

"In cases where this Convention does not attribute rights or jurisdiction to the coastal State or to other States within the exclusive economic zone, and a conflict arises between the interests of the coastal State and any other State or States, the conflict should be resolved on the basis of equity and in the light of all the relevant circumstances, taking into account the respective importance of the interests involved to the parties as well as to the international community as a whole."

<sup>28</sup> See footnote 15 above.

<sup>29</sup> Some of these treaties are discussed in the preliminary report, paras. 21, 28, 48 and 58 (*Yearbook . . . 1980*, vol. II (Part One), pp. 253, 255, 261 and 264, document A/CN.4/334 and Add.1 and 2), and in the second report, paras. 17 and 70-72 (*Yearbook . . . 1981*, vol. II (Part One), pp. 107-108 and 119-121, document A/CN.4/346 and Add.1 and 2).

### <sup>30</sup> *"Principle 22*

"States shall co-operate to develop further the international law regarding liability and compensation for the victims of pollution and other environmental damage caused by activities within the jurisdiction or control of such States to areas beyond their jurisdiction." (*Report of the United Nations Conference on the Human Environment . . .*, p. 5).

Principles 21 and 22 of the Stockholm Declaration exactly represent the relationship between the goals of prevention and of reparation for which the Commission should strive. It is at the point of failure to make due reparation—and not until that point—that the procedures available under rules made pursuant to the present topic should become exhausted. Then—as in the case, for example, of the régime established by the Convention on International Liability for Damage caused by Space Objects<sup>31</sup>—it will be the failure to provide due reparation in respect of a loss or injury, and not the mere occurrence of that loss or injury, that engages the State's responsibility for wrongfulness.

18. Yet, long before that point is reached, the acting State—if the risk of loss or injury was foreseeable—will have had every encouragement to make proper provision, in consultation and negotiation with States likely to be affected, to minimize the risks and to arrange suitable coverage for any risks that are regarded as unavoidable and acceptable. Failing agreement, the acting State will have had the duty to make its own régime, based upon its own conscientious estimate of the dangers to which other States and their citizens might be exposed. Failing all else, if loss or injury does occur, the acting State can negotiate a settlement with the other State or States concerned on the basis of a reconstruction of its actual conduct in relation to the activity and the terms that a régime of prevention and reparation might reasonably have included. This must be the main thrust of rules developed pursuant to the present topic (see Chapter II below). It is in that sense that the topic may fairly be described as an auxiliary set of rules of a mainly procedural character.

## 3. FORESEEABILITY AND THE DUTY NOT TO CAUSE HARM

19. In the second report on this topic, the Special Rapporteur made a rather free and unguarded use of the expression "duty of care"<sup>32</sup>—partly because this concept has been a starting-point for learned writers who wished to trace the good foundations of the present topic in existing law,<sup>33</sup> and partly because the phrase connotes a level of obligation which, without automatic commitment to any strict or absolute standard, is proportionate to every foreseeable need.<sup>34</sup> As the debates in the Commission and the Sixth Committee have shown, the phrase has too many overtones to justify its retention in the vocabulary of the present topic. For some the phrase—even when applied to "acts not prohibited by international law"—suggests irresistibly a standard which, if neglected, will entail the responsibility of a State for a wrongful act.<sup>35</sup> For others,

<sup>31</sup> Convention commended by the General Assembly in its resolution 2777 (XXVI) of 29 November 1971, and signed on 29 March 1972 (United Nations, *Juridical Yearbook 1971* (Sales No. E.73.V.1), p. 111).

<sup>32</sup> See the second report, paras. 68-72 (*Yearbook . . . 1981*, vol. II (Part One), pp. 119-121, document A/CN.4/346 and Add.1 and 2).

<sup>33</sup> See, in particular, the authorities discussed in paras. 44-52 (*ibid.*, pp. 113-115).

<sup>34</sup> Cf. the observations of the Special Rapporteur on State responsibility (part 1), Mr. Ago, quoted in the preliminary report, para. 53 (*Yearbook . . . 1980*, vol. II (Part One), p. 263, document A/CN.4/334 and Add.1 and 2).

<sup>35</sup> See, for example, the observations at the thirty-third session of the Commission of Mr. Ushakov (*Yearbook . . . 1981*, vol. I, p. 225, 1686th meeting, paras. 28-33), Mr. Yankov (*ibid.*, p. 227, 1687th

(Continued on next page.)

there is an implication that the contrasted concept of "strict" or "absolute liability" has been wholly rejected, despite its continual use in the construction of conventional régimes—and especially those régimes concerned with activities which have a low accident rate, but a probability of extensive loss or injury if an accident does occur.<sup>36</sup>

20. With regard to this latter question, there can be no doubt at all that strict liability is a very important and frequent ingredient in the construction of conventional régimes<sup>37</sup> and must be appropriately identified in whatever provisions are drafted pursuant to the present topic. It is equally clear that no automatic commitment to a strict liability standard would be generally acceptable,<sup>38</sup> though some would be inclined to reserve the question whether such a standard might be prescribed for special situations such as those of "ultra-hazard" described at the end of the preceding paragraph.<sup>39</sup> There are objections to such a course. It would not be easy to agree upon a definition of "ultra-hazard".<sup>40</sup> Moreover, a strict liability régime does not necessarily give the best protection to poten-

tial victims: it may be merely a stepping-stone to a severe limitation of liability, or a less costly substitute for feasible preventive measures.<sup>41</sup>

21. In any case, no one appears to advocate separate provision for "ultra-hazard" until the more general provisions proposed in this report and in previous reports have been constructed and evaluated. One great advantage of these proposals is that they place side by side, and on the same level, elements of prevention and of reparation for future loss or injury. This encourages an objective evaluation of the levels of protection thought necessary and possible in any given situation. Elements of reparation then fall into their proper perspective as a commutation of the duty of prevention, when the prevention of all risks can be achieved only by desisting from the activity or when the costs of the latter duty are punitive in relation to the magnitude of the risk and the added financial burden upon a beneficial activity. This is in contrast to the perspective which seems to have prevailed within the general area of environmental protection, where modest efforts have been made to upgrade standards of protection, but the problems of reparation for loss or injury have appeared so forbidding that Principle 22 of the Stockholm Declaration has virtually been left in cold storage.<sup>42</sup>

22. In sum, the discussions of the present topic reveal a widespread readiness to make cautious advances on a broad front, provided that the guiding principles are flexible enough to be just to everybody, including developing countries whose special needs were stressed in Principle 23 of the Stockholm Declaration.<sup>43</sup> For reasons mentioned in paragraph 19, it would be unwise again to employ the expression "duty of care"; but, before dismissing the phrase, it should be noted that it evoked from many—including some who were not in favour of retaining the phrase—a very positive response. It was noted, for example, that the duty to weigh the consequences of actions, and by that standard to judge their reasonableness, was a mark of

(Footnote 35 continued.)

meeting, para. 5), Mr. Verosta (*ibid.*, pp. 227–228, para. 9) and Mr. Barboza (*ibid.*, p. 229, para. 16). See also, for example, the observations in the Sixth Committee of the General Assembly, in 1981, of the representative of the USSR, Mr. Verenikin (*Official Records of the General Assembly, Thirty-sixth Session, Sixth Committee*, 43rd meeting, paras. 36–37), of the Ukrainian SSR, Mr. Makarevitch (*ibid.*, 44th meeting, para. 15), of Finland, Mr. Rotkirch (*ibid.*, 48th meeting, para. 22) and of Italy, Mr. Sperduti (*ibid.*, para. 40).

<sup>36</sup> See, for example, the observations at the thirty-third session of the Commission of Mr. Sucharitkul (*Yearbook . . . 1981*, vol. I, p. 224, 1686th meeting, para. 23), and at the Sixth Committee of the General Assembly, in 1981, by the representative of Brazil, Mr. Calero Rodrigues (*Official Records of the General Assembly, Thirty-sixth Session, Sixth Committee*, 43rd meeting, paras. 36–37), of Italy, Mr. Sperduti (*ibid.*, 48th meeting, para. 40), of Spain, Mr. Laclela Muñoz (*ibid.*, para. 51) and of Austria, Mr. Klein (*ibid.*, 52nd meeting, para. 52).

<sup>37</sup> See, for example:

Convention on International Liability for Damage caused by Space Objects (1971) (see footnote 31 above);

Vienna Convention on Civil Liability for Nuclear Damage (1963) (IAEA, *International Conventions on Civil Liability for Nuclear Damage*, Legal Series, No. 4, rev. ed. (Vienna, 1976), p. 7);

Convention on Third Party Liability in the Field of Nuclear Energy (Paris, 1960) and Additional Protocol (Paris, 1964) (*ibid.*, p. 22);

Convention relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material (Brussels, 1971) (*ibid.*, p. 55);

Convention on the Liability of Operators of Nuclear Ships (Brussels, 1962) (*ibid.*, p. 34);

International Convention on Civil Liability for Oil Pollution Damage (Brussels, 1969) (IMCO publication, Sales No. 77.16.E);

International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (Brussels, 1971) (IMCO publication, Sales No. 1972.10.E);

Convention on Civil Liability for Oil Pollution Damage resulting from Exploration for and Exploitation of Seabed Mineral Resources (London, 1977) (United Kingdom, *Final Act of the Intergovernmental Conference on the Convention on Civil Liability for Oil Pollution Damage from Offshore Operations*, Cmnd. 6791 (London, H.M. Stationery Office, 1977), p. 7).

<sup>38</sup> See, for example, the observations referred to in footnote 8 above.

<sup>39</sup> See, for example, the observations at the thirty-third session of the Commission of Mr. Ushkov (*Yearbook . . . 1981*, vol. I, p. 225, 1686th meeting, paras. 29 and 31) and of Mr. Barboza (*ibid.*, p. 228, 1687th meeting, para. 14).

<sup>40</sup> See the preliminary report, para. 18 (*Yearbook . . . 1980*, vol. II

(Part One), p. 252, document A/CN.4/334 and Add.1 and 2) and the second report, para. 11 (*Yearbook . . . 1981*, vol. II (Part One), p. 106, document A/CN.4/346 and Add.1 and 2).

<sup>41</sup> See the discussion of this point by P. M. Dupuy, *La responsabilité internationale des Etats pour les dommages d'origine technologique et industrielle* (Paris, Pedone 1976), pp. 257 et seq.

<sup>42</sup> See, for example, the ECE Long-range Transboundary Air Pollution Convention, concluded on 13 November 1979 (ECE/HLM.1/2, annex I), which, in a footnote to the word "damage" in article 8 providing for the exchange of information on, *inter alia*, the effects of damage which may be attributed to long-range transboundary air pollution, records that the convention does not contain a rule on State liability as to damage.

<sup>43</sup> "Principle 23

"Without prejudice to such criteria as may be agreed upon by the international community, or to standards which will have to be determined nationally, it will be essential in all cases to consider the system of values prevailing in each country, and the extent of the applicability of standards which are valid for the most advanced countries but which may be inappropriate and of unwarranted social cost for the developing countries." (*Report of the United Nations Conference on the Human Environment . . .*, p. 5.)

See also, for example, the observations at the thirty-third session of the Commission of Mr. Sucharitkul (*Yearbook . . . 1981*, vol. I, p. 224, 1686th meeting, para. 26) and the observations in the Sixth Committee of the General Assembly, in 1981, of the representative of Venezuela, Mr. Díaz González (*Official Records of the General Assembly, Thirty-sixth Session, Sixth Committee*, 46th meeting, para. 28), of Algeria, Mr. Bedjaoui (*ibid.*, 47th meeting, para. 72), and of Mexico, Mr. Vallarta (*ibid.*, 53rd meeting, para. 24).

maturity in international law, paralleling developments that had long ago occurred in domestic legal systems.<sup>44</sup>

23. Some stressed that the first essential steps in reconciling interests—the duties to provide information, to consider representations and to negotiate in good faith—were triggered by the duty of care.<sup>45</sup> Some emphasized that it called, in the first instance, for measures to avoid or prevent harm, and not merely for a tariff to pay for harm done.<sup>46</sup> There was no disposition to doubt that a State's obligations in this area were commensurate with its means of knowledge and foresight about matters within its territory or control<sup>47</sup>—though it was pointed out that often developing States had limited means of knowledge about industries established in their territory.<sup>48</sup> The maxim *sic utere tuo ut alienum non laedas* had to be fashioned into a working rule of law,<sup>49</sup> and the criterion of foreseeability was fundamental, but would need to be supplemented by other relevant principles if such cases as those of unforeseen accidents were to be covered.<sup>50</sup>

#### 4. THE DISTRIBUTION OF COSTS AND BENEFITS

24. The other main principle derives from the balance of interest test. This principle is, first of all, a reminder that the underlying purpose of this topic is not merely to requite, or even to avoid, losses and injuries: it is to enable States to harmonize their aims and activities so that the benefit one State chooses to pursue does not entail the loss or injury another has to suffer. Every kind of factor may enter into the equation. For example, the common interest of the States concerned in ensuring the viability of an activity they all regard as essential may outweigh their desire to ensure that they and their citizens are fully protected or guaranteed against losses or injuries caused by that activity. This is part of the logic of an agreement which limits the quantum of reparation payable in respect of any one accident causing loss or injury.<sup>51</sup>

25. If the interests of the parties to such a negotiation

are not identical, other factors may be, for example, the importance of the activity in question to the national or regional economy of the country in which it is situated; its bearing upon employment opportunities in that country or region; the degree of difficulty and cost entailed in changing the site of the activity or its production methods, or in making different products and finding new markets for them; the probable frequency and severity of the losses or injuries that may be caused to the affected State and those within its protection; the ability and willingness of the affected State to contribute, financially or in other ways, to the solution of the problem. Again, it may be the main context of a negotiation to arrive at a formula for determining, in a given situation, the existence and scale of the harm with which the negotiations are concerned. The kinds and magnitude of loss or injury that are reparable may be determined by the application of such a formula, or in other agreed ways. The possibilities are necessarily as limitless as the freedom of the parties to reach their own agreements.

26. If consultation or negotiation between the States concerned fails to lead to the establishment of an agreed régime, and if loss or injury occurs, it is envisaged that the record of what transpired between them will still provide the best evidence of the context in which the affected State's right to receive reparation from the acting State must be assessed. Any past failure of either State to disclose relevant information will also provide an inference favourable to the other party. Subject to these matters of record, the negotiation between the States concerned to determine the affected State's entitlement to reparation will draw upon the same principles and wide range of factors as might have guided the original negotiation to establish an agreed régime. There will be, however, the important difference that a negotiation as to reparation would take place against the background of an obligation to provide the appropriate reparation for the loss or injury sustained, and that failure to reach a negotiated settlement would entail an obligatory reference to a disputes-settlement procedure.<sup>52</sup>

27. The reader may find it helpful to compare this brief account of the operation of the principle relating to the distribution of costs and benefits with the schematic outline contained in chapter II below. At the present juncture, the first point to emphasize is that the occurrence of loss or injury is a pure question of fact, and that its legal significance has to be estimated in whatever context the States concerned have themselves provided. If, for example, it is established that the States concerned had not regarded the kind of loss or injury that occurred as giving rise to any right of reparation—as might be the case where the loss or injury resulted from exposure to a level of pollution

<sup>44</sup> See the observations at the thirty-third session of the Commission of Sir Francis Vallat (*Yearbook . . . 1981*, vol. I, p. 230, 1687th meeting, paras. 29–30).

<sup>45</sup> See, for example, the observations in the Sixth Committee of the General Assembly, in 1981, by the representative of the United States of America, Mr. Rosenstock (*Official Records of the General Assembly, Thirty-sixth Session, Sixth Committee*, 45th Meeting, para. 72).

<sup>46</sup> See, for example, the observations referred to in footnote 12 above.

<sup>47</sup> See, for example, the observations in the Sixth Committee of the General Assembly, in 1981, of the representative of Venezuela, Mr. Díaz González (*ibid.*, 46th meeting, para. 26).

<sup>48</sup> See, for example, the observations referred to in footnote 43 above.

<sup>49</sup> See, for example, the observations in the Sixth Committee of the General Assembly, in 1981, of the representative of Finland, Mr. Rotkirch (*ibid.*, 48th meeting, para. 21), of Italy, Mr. Sperduti (*ibid.*, para. 38) and of Cyprus, Mr. Jacovides (*ibid.*, 51st meeting, para. 50).

<sup>50</sup> See, for example, the observations in the Sixth Committee of the representative of Brazil, Mr. Calero Rodrigues (*ibid.*, 43rd meeting, para. 36).

<sup>51</sup> See for example, art. 11 of the Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface (Rome, 7 October 1952) (*United Nations, Treaty Series*, vol. 310, p. 188); art. 111 of the Convention on the Liability of Operators of Nuclear Ships (Brussels, 25 May 1962) (see footnote 37 above); and art. V of the International Convention on Civil Liability for Oil Pollution Damage (Brussels, 29 November 1969) (see footnote 37 above).

See also, in this connection, the observations in the Sixth Committee of the General Assembly, in 1981, of the representative of Mexico, Mr. Vallarta (*Official Records of the General Assembly, Thirty-sixth Session, Sixth Committee*, 53rd meeting, para. 23).

<sup>52</sup> In relation to the need for a disputes-settlement procedure, see the observations at the thirty-third session of the Commission of Mr. Yankov (*Yearbook . . . 1981*, vol. I, p. 227, 1687th meeting, para. 6), and in the Sixth Committee of the General Assembly, in 1981, by the representative of Romania, Mr. Mazilu (*Official Records of the General Assembly, Thirty-sixth Session, Sixth Committee*, 47th meeting, para. 46).

which had always been tolerated<sup>53</sup>—that circumstance would clearly be decisive of any claim.

28. The second point to emphasize is that any failure of co-operation at an earlier stage may justify an inference in favour of an opposite party.<sup>54</sup> For example, if a loss or injury results from an activity about which the acting State has failed to disclose information or to negotiate, that failure will strengthen the claim of the affected State to receive as reparation the full value of the loss or injury sustained. If, on the other hand, an earlier negotiation to establish an agreed régime broke down only because the acting State considered as exorbitant the measures of prevention and indemnification demanded, and the acting State has since applied unilaterally a régime that accorded the levels of protection it believed to be reasonable, there is no adverse inference to be drawn and no new element in the criteria that were relevant to the earlier negotiation, except that the event has proved the existence of a risk of loss or injury.

29. The last point to emphasize is that the principle relating to the distribution of costs and benefits applies with added cogency in the case of unforeseen accident; for in such a case it is at least unlikely that the distribution of costs and benefits will do less than vindicate the claim of the affected State to receive full reparation in respect of the loss or injury suffered by an innocent victim. In this connection, it is worth recalling that although the occurrence of any given accident is by definition unpredictable, the risk of loss or injury associated with a particular activity can usually be foreseen: the risk of damage caused by space objects is a good illustration. Therefore the unforeseen accidents with which we are dealing here are few in number and truly exceptional—so exceptional as almost to be bizarre. On reflection, it seems to the Special Rapporteur neither just nor necessary that these “hard luck”

<sup>53</sup> Such a situation may, for example, account for the reservation in a footnote to the ECE Long-Range Transboundary Air Pollution Convention (see footnote 42 above).

<sup>54</sup> Cf., though the position is not fully parallel, the following observations of the ICJ in its Judgment of 9 April 1949 in the *Corfu Channel* case (Merits):

“It is clear that knowledge of the minelaying cannot be imputed to the Albanian Government by reason merely of the fact that a minefield discovered in Albanian territorial waters caused the explosions of which the British warships were the victims. It is true, as international practice shows, that a State on whose territory or in whose waters an act contrary to international law has occurred, may be called upon to give an explanation. It is also true that that State cannot evade such a request by limiting itself to a reply that it is ignorant of the circumstances of the act and of its authors. The State may, up to a certain point, be bound to supply particulars of the use made by it of the means of information and inquiry at its disposal. But it cannot be concluded from the mere fact of the control exercised by a State over its territory and waters that that State necessarily knew, or ought to have known, of any unlawful act perpetrated therein, nor yet that it necessarily knew, or should have known, the authors. This fact, by itself and apart from other circumstances, neither involves *prima facie* responsibility nor shifts the burden of proof.

“On the other hand, the fact of this exclusive territorial control exercised by a State within its frontiers has a bearing upon the methods of proof available to establish the knowledge of that State as to such events. By reason of this exclusive control, the other State, the victim of a breach of international law, is often unable to furnish direct proof of facts giving rise to responsibility. Such a State should be allowed a more liberal recourse to inferences of fact and circumstantial evidence. This indirect evidence is admitted in all systems of law, and its use is recognized by international decisions.” (*I.C.J. Reports 1949*, p. 18.)

cases—which fall outside the sphere of foreseeability, but well within the sphere of operation of the principle regulating the distribution of costs and benefits—should be deprived of the general protection which can be afforded by rules developed in pursuance of the present topic.<sup>55</sup>

#### D. Use of terms, causality, scope and related questions

##### 1. RULES AND GUIDELINES

30. The difficulties inherent in the use of the term “liability”—which, in English, is contrasted with the term “responsibility”, while in other official languages the same term serves both purposes—were discussed at some length in the preliminary report.<sup>56</sup> In English the term “liability” connotes precisely the subject-matter of the present topic—that is, obligations, arising without any breach of a rule of international law, to make reparation for losses or injuries suffered by other subjects of international law or by those within their protection. In this sense, the term “liability” has been used repeatedly in treaties concluded since the Second World War, including the recent Convention on the Law of the Sea.<sup>57</sup>

31. Nevertheless, the lack of suitable equivalents in other official languages make it inadvisable to use the term “liability” in drafts prepared pursuant to the present topic; and, indeed, there is no need to do so. Rights and obligations, however they arise, are commonly expressed in international agreements simply as statements of the conduct required to satisfy the right and comply with the obligation. The distinctive feature of the present topic is that no deviation from the rules it prescribes will engage the responsibility of the State for wrongfulness except ultimate failure, in case of loss or injury, to make the reparation that may then be required. In a sense, therefore, the whole of this topic, up to that final breakdown which at length engages the responsibility of the State for wrongfulness, deals with a conciliation procedure, conducted by the parties themselves or by any person or institution to whom they agree to turn for help.

32. A reference to the schematic outline in chapter II will show how this works out in practice. There is a preliminary phase of consultation and fact-finding, without substantive commitment by the States concerned. There is a second phase of negotiation among those States to establish a régime reconciling their conflicting interests; but the only sanctions for refusal to negotiate or failure to reach agreement are a continuation of the conflict of interest, and the possibility that a State which has failed to co-operate may be at some disadvantage if a loss or injury entailing questions of reparation subsequently occurs. The question therefore arises whether the courses of conduct prescribed in these two phases of interaction are requirements or recommendations, rules or guidelines.

33. There is in any case no doubt that the provisions as drafted must contain a clear indication that failure to

<sup>55</sup> Cf. the recommendation in this regard made in the second report, paras. 73–77 (*Yearbook . . . 1981*, vol. II (Part One), pp. 121–122, document A/CN.4/346 and Add.1 and 2), and the conclusions expressed in the report of the Commission on its thirty-third session, paras. 182–183 (*Yearbook . . . 1981*, vol. II (Part Two), p. 149).

<sup>56</sup> See footnote 6 above.

<sup>57</sup> See footnote 26 above.

comply with the course of conduct prescribed will not in itself engage the responsibility of the State for wrongfulness. One way of achieving this result is by the substitution of "should" for "shall", converting what would otherwise be a rule into a guideline.<sup>58</sup> The Special Rapporteur believes, however, that this is not a desirable solution, because it may imply—incorrectly—that it is without legal significance whether the prescribed courses of action are followed or disregarded. It represents the position more accurately to keep the prescriptions in the form of rules, but to include—as has been done in sections 2 and 3 of the schematic outline—explicit statements that failure to take any step required by the rules set forth in those sections shall not in itself give rise to any cause of action.

## 2. "LOSS OR INJURY": THE AMBIT OF REPARATION CLAIMS

34. In this report, the phrase "loss or injury" has been used to convey more concretely the same meaning that was expressed in earlier reports by the word "harm".<sup>59</sup> The phrase would be defined to include all kinds of loss or injury, whether material or non-material. It was explained in paragraph 27 above that loss or injury is a pure question of fact, but that its legal significance has to be estimated with regard to any available criteria that help to establish the shared expectations of the States concerned. There may, for example, be a record of partial agreement in an uncompleted negotiation for a régime to regulate questions of this kind; and, failing any express agreement, the national laws of the States concerned may reflect a common standard; or there may be a local or regional standard that both States apply; or relevant normative materials such as the standards, for example, of the 1951 *International Labour Code*.<sup>60</sup>

35. The policy of the schematic outline is that, when States are consulting or negotiating to establish a régime of prevention and reparation, the kinds of loss or injury they wish to cover and the scale of reparation they envisage are matters for their own choice—though it will of course be a policy goal that the innocent victim should not be left without adequate redress, and that prevailing standards of reparation should at least be maintained. On the other hand, when there is a negotiation as to reparation for loss or injury, it should be conducted within an existing frame of reference, whether expressed in earlier communications between the States concerned, or derived from any standard common to those States. Thus the references to "shared expectations" in section 4 of the schematic outline are a threshold provision applicable only in the context of that section. The concept of "potentiality" of loss or injury, which gave great difficulty in the context of the second report and the discussions in 1981, was not justified and has not been maintained. In relation to the establishment of régimes of prevention and reparation, all loss or injury is prospective; in relation to the

establishment of an obligation to provide reparation, all loss or injury is actual.

## 3. "ACTS" AND "ACTIVITIES": THE ROLE OF CAUSALITY

36. As has been noted, the phrase "acts not prohibited by international law", in the title of the present topic, was chosen for one important reason only, and that was to make it clear that the scope of this topic was not confined to lawful acts (see para. 12 above). On the contrary, the great merit of removing the topic from the immediate sphere of State responsibility for wrongfulness was to enable the problems of accommodating different interests to be considered on their factual merits, without reference to the question of their wrongfulness or non-wrongfulness. This was the more important because many of the practical problems would concern borderline areas in which new rules of prohibition might be in course of formation to meet new dangers—caused, for example, by advances in technology.

37. Instead of attempting to decide whether a particular territorial use, involving the risk of loss or injury affecting other States, was unlawful—and therefore prohibited—the States concerned would direct their attention to the less intractable question whether they could agree to the continuance of that particular use upon conditions that offered adequate safeguards, and perhaps a better distribution of costs and benefits. Of course, this alternative procedure would in no way derogate from any rights or obligations that any State concerned might have by reference to existing rules of prohibition. In practice, however, on the rare occasions on which States have resolved disputes governed by a prohibitory rule containing a balance of interest test, they have tended to proceed by discovering first what distribution of burdens and benefits would satisfy their particular circumstances, and to apply or vary the rule of prohibition in accordance with that finding (see para. 15 above).

38. While the expression "acts not prohibited by international law" meets the essential purpose explained in the two preceding paragraphs, it sits rather strangely in the title of the topic, causing some readers to wonder what "act" of the State can engage its liability (or responsibility) for "injurious consequences" that cannot be said to be caused by the act—or even the omission—of the State.<sup>61</sup> For those concerned about the doctrinal question, there are perhaps reasonably convincing answers. Instead of alleging a breach of a rule of prohibition, we have raised essentially the same issue in the opposite way: upon what conditions can this activity continue, without giving rise to any risk of engaging the responsibility of the territorial State for wrongfulness? Put in another way, the tolerance by a State within its territory of an activity entailing loss or injury to another State is—like the demarcation of the seaward limit of the territorial sea—never without legal significance: in either case,

<sup>58</sup> See, in this connection, the observations at the thirty-third session of the Commission of Mr. Reuter (*Yearbook* . . . 1981, vol. I, p. 220, 1685th meeting, para. 24).

<sup>59</sup> See the preliminary report, paras. 32–38 (*Yearbook* . . . 1980, vol. II (Part One), pp. 256–258, document A/CN.4/334 and Add.1 and 2), and the second report, paras. 22–60 (*Yearbook* . . . 1981, vol. II (Part One), pp. 108–117, document A/CN.4/346 and Add.1 and 2).

<sup>60</sup> ILO publication, 2 vols. (Geneva, 1954).

<sup>61</sup> See, for example, the question raised at the thirty-third session of the Commission by Mr. Ushakov (*Yearbook* . . . 1981, vol. I, pp. 219 and 220, 1685th meeting, paras. 16 and 21); the comments on the title of the topic made at that session by Mr. Reuter (*ibid.*, p. 221, para. 30); and the observations on the questions of attribution and causality made at that session by Mr. Sucharitkul (*ibid.*, p. 224, 1686th meeting, para. 22).

the acting State owes a duty to do whatever is necessary to ensure that the boundary is drawn fairly between its own interests and those of other States.

39. Of those who have spoken on this topic, many appear to prefer a more robust answer. Perhaps the most important policy aim of the present topic is to promote agreements between States in order to reconcile, rather than inhibit, activities which are predominantly beneficial, despite some nasty side-effects. The way of doing this is to remove the problem—at least temporarily—from the immediate sphere of State responsibility for wrongfulness, so that practical issues can be evaluated in a wider context. It is this removal which gives free play to the principle of the distribution of costs and benefits and expands the principle of foreseeability. In this way, account can be taken of the probability of accidents which are not foreseeable individually but are highly predictable as a class.

40. Then, indeed, we shall have entered into the realm of causality, where duties of reparation flow, not from the “act” (or omission) of the State, but from “activities” within the territory or control of the State, giving rise to loss or injury. It is, however, important to understand that all of the régime-building takes place at one remove from the domain of State responsibility for wrongfulness. It is also important to realize that the proposals made in this report will not entail any automatic commitment to construct régimes of strict liability. They are a policy choice open to the negotiators, having regard to the nature of the danger, the effectiveness of the planned measures of protection, the desire of the States concerned to limit liability in the interest of preserving the economic viability of an essential activity, the need to conform to a pattern already more widely established to deal with a problem that cannot be localized, the possibility of distributing costs within the communities that principally benefit, and so on. The building blocks, or “factors” of which such a régime may be made, are listed—but not exhaustively—in section 6 of the schematic outline; the building techniques, and the architectural choices that ought to be considered are listed—again not exhaustively—in section 7.

41. At the very end of the day, when all the opportunities of régime-building have been set aside—or, alternatively, when a loss or injury has occurred that nobody foresaw—there is a commitment, in the nature of strict liability, to make good the loss. The Special Rapporteur finds it hard to see how it could be otherwise, taking into account the realities of transboundary dangers and relations between States, and the existing elements of a developing chapter of international law. Every State needs to feel that law assures it large areas of liberty and initiative in its own territory, and more controlled areas of liberty and initiative in international sea and air space; but every State also needs to feel that the law does not leave it at the mercy of developments beyond its own borders. Yet, even at this final stage, the resort to strict liability is by no means automatic. The States concerned are compelled by nothing except the logic of their situations, the persuasiveness of the guiding principles in section 5, and the need to pay for damage done if no better arrangement can be worked out.

42. There are incidental questions that will call for consideration in due course. In this and in previous

reports, the term “activity” has been used in reference to anything done by human agency or at human instigation; but a perusal of the third report on the law of the non-navigational uses of international water-courses—and especially the draft article presented in paragraph 379<sup>62</sup>—has crystallized a suspicion that even this broad meaning should be cautiously extended to cover situations in which a danger is created by a human failure to act. If, for example, a convulsion of nature leaves an unstable crater lake impending over the territory of another State, and that other State is willing to shoulder the financial burden of activities to avert the danger, it is not unreasonable to place upon the first State a duty of co-operation.

#### 4. “TERRITORY OR CONTROL”: THE QUESTION OF SCOPE

43. In the second report, the content of the present topic was briefly compared and contrasted with that of State responsibility for the treatment of aliens.<sup>63</sup> It is common ground, not questioned by anyone, that matters relating to the treatment of aliens are outside the scope of the present topic.<sup>64</sup> In principle, though this is not always literally true, a transboundary element is an essential ingredient in the present topic: typically, the topic deals with activities in one country which produce adverse consequences in another country. Often, however, the distinction is only quasi-territorial: for example, the activities of one State’s ships on the high seas may give rise to incidental or accidental losses or injuries either to coastal States—in which case there is a literal transboundary element—or to other States which are users of the high seas—in which case the dividing line is between national jurisdictions.<sup>65</sup>

44. During the Commission’s discussion of the second report, there was a consensus that the term which best describes the quasi-territorial dividing line is “control”;<sup>66</sup> this meaning is fixed by the use of the term in the composite phrase “territory or control”. The ambit of this phrase does not extend to matters in which the territorial jurisdiction of a receiving State is paramount; it does extend to situations in which jurisdiction is evenly shared, as with rights of navigation through the territorial sea or through a maritime exclusive economic zone. A ship in innocent passage is within the concept, whereas a ship permitted to enter a foreign port is not. Immunity from local jurisdiction is not a relevant criterion, because it entails an increase, rather than abatement, in the responsibilities of the receiving State; but any abdication of territorial power or authority would go to the question of control.

45. In this way, the term “control” has a critical role to play in determining the scope of provisions elaborated in pursuance of this topic, and it must therefore be carefully defined. In earlier discussions, attention has been drawn to situations in which high technology industries are, so to speak, “exported” to countries in which economic conditions and regulatory standards

<sup>62</sup> See, in this volume, p. 65, document A/CN.4/348.

<sup>63</sup> *Yearbook . . . 1981*, vol. II (Part One), p. 105, document A/CN.4/346 and Add.1 and 2, para. 8.

<sup>64</sup> See the report of the Commission on its thirty-third session, para. 186 (*Yearbook . . . 1981*, vol. II (Part Two), p. 150).

<sup>65</sup> *Ibid.*

<sup>66</sup> *Ibid.*, para. 185.

allow cheaper production. It has been pointed out not only that this may entail the exporting of pollution, while profits of the industry are repatriated to the exporting country, but also that developing countries may lack the experience and high technology skills to regulate such an activity effectively.<sup>67</sup> Quite conceivably, there are situations of this kind in which the "exporting" State should be prepared to share with the receiving State authority and responsibility for the establishment and monitoring of appropriate technical standards; the arrangements made might have a bearing upon the definition and application of the term "control".

46. There is, however, a much broader question which attracts a great deal of interest and some unease. What are the natural boundaries of this topic? What unexpected consequences might arise from a failure to restrict its application to the areas in which practice is most developed? In particular, might the topic become either a rogue elephant or a useful beast of burden in connection with international economic issues—especially those relating to the adumbration of the new international economic order?<sup>68</sup> To avoid the paralyzing effects of uncertainty, the Special Rapporteur has twice put forward a possible boundary line. First, the topic could be limited to dangers arising out of the physical use of the environment.<sup>69</sup> Secondly, it could be said—for reasons that are again touched upon in paragraphs 13–15 and 36–37 of the present report—that the situations with which this topic deals do not arise unless there is, lurking in the background, some emerging or imperfectly formulated rule of obligation, or one which cannot be invoked because its application is precluded.<sup>70</sup>

47. Neither of these proposals gave anyone much comfort. A limitation based upon dangers arising from the physical uses of the environment would have been far too arbitrary—a judgment of Solomon that would require the baby to be cut in half.<sup>71</sup> The question of a direct connection with the physical environment may be less significant than the question whether the affected State is well placed to look after its own interests. For example, the régime of the Warsaw

Convention, limiting liability for the carriage of passengers on international air services,<sup>72</sup> is in some ways comparable with the conventional régimes concerned with accidents arising from the sea carriage of oil.<sup>73</sup> All these régimes concern the protection of an essential industry against contingent claims for which it might be difficult to make adequate advance provision: but, in the case of the Warsaw Convention, the purpose is to dissuade the affected State from making good its losses on whatever scale its domestic law may sanction. It is, therefore, probably true that neither the principles in section 5 of the schematic outline, nor the factors enumerated in section 6, are appropriate to the process that led to the striking of the balance represented by the Warsaw Convention.

48. On the other hand, a limitation in terms of relationship to existing or emerging rules of wrongfulness was difficult to formulate, and inappropriate: to the extent that such a limitation was valid, it did not need to be stated, and, as discussions in the Sixth Committee proved, it would increase fears that the present topic was becoming lost in the toils of State responsibility for wrongfulness.<sup>74</sup> The best course was to suspend judgment about the unresolved questions of scope until the content of the topic had been more fully explored. Meanwhile, it should be recognized that the materials on which the Special Rapporteur must rely would largely be found in the area of the use of the physical environment.<sup>75</sup> With this pragmatic approach to the question of scope, the Special Rapporteur is very content. He understands it to be his duty to keep that question under observation, despite the immediate preoccupation with the flood of materials relating to the physical uses of the environment.

49. In any event, it makes very good sense to proceed empirically, examining materials and demonstrating principles which appear to be consistently reflected in those materials. The Special Rapporteur takes this opportunity to draw attention to, and express appreciation for, the very substantial work being undertaken by the Codification Division of the United Nations Secretariat systematically to assemble, examine and classify international transactions of all kinds bearing on the subject matter of the present topic. Beginning with his next report, the Special Rapporteur hopes to make a proper use of these materials; and he has no doubt that they will also prove to be of great interest and assistance to his colleagues.

<sup>67</sup> See, for example, the observations at the thirty-second session of the Commission of Mr. Sucharitkul (*Yearbook . . . 1980*, vol. I, p. 246, 1631st meeting, paras 4–5), and also the observations referred to in footnote 43 above.

<sup>68</sup> See, for example, the observations at the thirty-third session of the Commission of Mr. Reuter (*Yearbook . . . 1981*, vol. I, p. 220, 1685th meeting, para. 27), and of Mr. Riphagen (*ibid.*, p. 221, 1686th meeting, para. 2). Cf. the observations in the Sixth Committee of the General Assembly, in 1981, of the representative of Jamaica, Mr. Robinson (*Official Records of the General Assembly, Thirty-sixth Session, Sixth Committee*, 41st meeting, para. 27) and of Algeria, Mr. Bedjaoui (*ibid.*, 47th meeting, paras. 70–72).

<sup>69</sup> See the preliminary report, para. 65 (*Yearbook . . . 1980*, vol. II (Part One), pp. 265–266, document A/CN.4/334 and Add.1 and 2).

<sup>70</sup> See the second report, paras. 82–84, and the draft article 1, subpara. (b), proposed in para. 93 (*Yearbook . . . 1981*, vol. II (Part One), pp. 122–123, document A/CN.4/346 and Add.1 and 2).

<sup>71</sup> See the report of the Commission on its thirty-second session, para. 139 (*Yearbook . . . 1980*, vol. II (Part Two), p. 160).

<sup>72</sup> Convention for the Unification of certain Rules regarding International Carriage by Air (Warsaw, 12 October 1929) (League of Nations, *Treaty Series*, vol. CXXXVII, p. 12).

<sup>73</sup> See footnote 37 above.

<sup>74</sup> See, for example, the observations referred to in footnote 35 above.

<sup>75</sup> See, in this connection, the observations in the Sixth Committee of the General Assembly, in 1981, of the representative of Algeria, Mr. Bedjaoui (*Official Records of the General Assembly, Thirty-sixth Session, Sixth Committee*, 47th meeting, para. 74). See also footnote 71 above.

## CHAPTER II

## Outline of the topic

50. Most questions affecting the schematic outline that follows have been discussed in the preceding chapter. Perhaps the final question is that of assessing the value of a proposed set of articles that contain many guidelines, but only one obligation the breach of which will engage international responsibility for a wrongful act. The justification must relate to the subject-matter of the topic. The wrongfulness of causing loss or injury in another State is not, in principle, doubtful; but it is equally clear in State practice that, if a State goes about its legitimate business in a reasonable manner, the causing of incidental loss or injury to another State will not necessarily engage the international responsibility of the acting State. Between these opposite poles there is a wilderness that cannot be reduced to order by prohibitory rules of general application. The boundaries of each State's rights and obligations towards others have to be charted in some detail and with mutual accommodations. A certain amount of this detailed charting from time to time gets done—in the form of large multilateral treaties dealing with particular global problems, regional treaties, and bilateral treaties regulating various aspects of the management of an international frontier or border zone.

51. All of these arrangements are ultimately based upon the free play of negotiation between States, guided by a shared sense of principle, as well as by the practical need to accommodate interests. Yet, in the large areas that remain unregulated, recourse to legal principle is apt to appear unhelpful. The balanced interests of Principle 21 of the Stockholm Declaration,<sup>76</sup> and even of conventional legal rules containing an unresolved balance of interest test, afford States little more than a point of departure upon a journey so vaguely indicated that the law may seem to leave its clients to their own devices. Worse than that, the law may retreat into a labyrinth of its own devising, agonising over the doctrinal curiosity of obligations that do not arise from a breach of State responsibility, and that are not contained within the ordinary limits of foreseeability.

52. These inadequacies of international law are probably not the main reason for the frequent failure of States to achieve the goals that they themselves have identified, but the weakness of legal precept is certainly a contributing reason. The extraordinary disparity between policy aims and achievements in the area of the human environment seems to arise from compartmentalized thinking: prevention of loss or injury is a worthwhile aim, but reparation for loss or injury conjures up a vision of absolute and automatic commitment to a mechanized legal process with a system of values not accessible to ordinary men. It therefore seems worthwhile to arrest these tendencies; to recognize, for example, that reparation is in essence a cheaper and imperfect substitute for prevention; that liabilities arising without wrongfulness are no more than obligations to pay a fair price; that the present topic—despite its apparently anomalous character—can be explained as a method of ensuring that legal balance of interest tests have full recourse to all of the elements

<sup>76</sup> See footnote 15 above.

that go to the making of an honest bargain; that there is no magic in legal formulas, but virtue in insisting that States which seek freedom to act and those which seek freedom from the adverse effects of such actions have equal protection in international law.

53. The following is the schematic outline:

## SCHEMATIC OUTLINE

## SECTION 1

1. *Scope*<sup>77</sup>

Activities within the territory of control of a State which give rise or may give rise<sup>78</sup> to loss or injury to persons or things within the territory or control of another State.

[NOTES: (1) It is a matter for later review whether this provision needs to be supplemented or adapted, when the operative provisions have been drafted and considered in relation to matters other than losses or injuries arising out of the physical use of the environment.

(2) Compare this provision, in particular, with the provision contained in section 4, article 1.]

2. *Definitions*

(a) "Acting State" and "affected State" have meanings corresponding to the terms of the provision describing the scope.

(b) "Activity" includes any human activity.<sup>79</sup>

[NOTE: Should "activity" also include a lack of activity to remove a natural danger which gives rise or may give rise to loss or injury to another State?]<sup>80</sup>

(c) "Loss or injury" means any loss or injury, whether to the property of a State or to any person or thing within the territory or control of a State.<sup>81</sup>

(d) "Territory or control" includes, in relation to places not within the territory of the acting State,

(i) any activity which takes place within the substantial control of that State; and

(ii) any activity conducted on ships or aircraft of the acting State, or by nationals of the acting State, and not within the territory or control of any other State, otherwise than by reason of the presence within that territory of a ship in course of innocent passage, or an aircraft in authorized overflight.<sup>82</sup>

3. *Saving*

Nothing contained in these articles shall affect any right or obligation arising independently of these articles.<sup>83</sup>

## SECTION 2

1. When an activity taking place within its territory or control gives or may give rise to loss or injury to persons or things within the territory or control of another State, the acting State has a duty to provide the affected State with all relevant and available information, including a specific indication of the kinds and degrees of loss or injury that it considers to be foreseeable, and the remedial measures it proposes.<sup>84</sup>

2. When a State has reason to believe that persons or things within its territory or control are being or may be subjected to loss or injury

<sup>77</sup> See paras. 46–48 above.

<sup>78</sup> See para. 35 above.

<sup>79</sup> See paras. 36–39 above.

<sup>80</sup> See para. 42 above.

<sup>81</sup> See paras. 27 and 34–35 above.

<sup>82</sup> See paras. 43–45 above.

<sup>83</sup> See para. 37 above.

<sup>84</sup> See paras. 19–23 and 39 above.

by an activity taking place within the territory or control of another State, the affected State may so inform the acting State, giving as far as its means of knowledge will permit, a specific indication of the kinds and degrees of loss or injury that it considers to be foreseeable; and the acting State has thereupon a duty to provide all relevant and available information, including a specific indication of the kinds and degrees of loss or injury that it considers to be foreseeable, and the remedial measures it proposes.

3. If, for reasons of national or industrial security, the acting State considers it necessary to withhold any relevant information that would otherwise be available, it must inform the affected State that information is being withheld. In any case, reasons of national or industrial security cannot justify a failure to give an affected State a clear indication of the kinds and degrees of loss or injury to which persons and things within the territory or control of that affected State are being or may be subjected; and the affected State is not obliged to rely upon assurances which it has no sufficient means of knowledge to verify.

4. If not satisfied that the measures being taken in relation to the loss or injury foreseen are sufficient to safeguard persons and things within its territory or control, the affected State may propose to the acting State that fact-finding be undertaken.

5. The acting State may itself propose that fact-finding be undertaken; and, when such a proposal is made by the affected State, the acting State has a duty to co-operate in good faith to reach agreement with the affected State upon the arrangements for and terms of reference of the inquiry, and upon the establishment of the fact-finding machinery. Both States shall furnish the inquiry with all relevant and available information.

6. Unless the States concerned otherwise agree,

(a) there should be joint fact-finding machinery, with reliance upon experts, to gather relevant information, assess its implications, and, to the extent possible, recommend solutions;

(b) the report should be advisory, not binding the States concerned.

7. The acting State and the affected State shall contribute to the costs of the fact-finding machinery on an equitable basis.

8. Failure to take any step required by the rules contained in this section shall not in itself give rise to any right of action. Nevertheless, unless it is otherwise agreed, the acting State has a continuing duty to keep under review the activity that gives or may give rise to loss or injury; to take whatever remedial measures it considers necessary and feasible to safeguard the interests of the affected State; and, as far as possible, to provide information to the affected State about the action it is taking.<sup>85</sup>

### SECTION 3

1. If (a) it does not prove possible within a reasonable time either to agree upon the establishment and terms of reference of fact-finding machinery or for the fact-finding machinery to complete its terms of reference, or (b) any State concerned is not satisfied with the findings or believes that other matters should be taken into consideration, or (c) the report of the fact-finding machinery so recommends, the States concerned have a duty to enter into negotiations at the request of any one of them with a view to determining whether a régime is necessary and what form it should take.

2. Unless the States concerned otherwise agree, the negotiations shall apply the principles set out in section 5; shall also take into account, as far as applicable, any relevant factor including those set out in section 6, and may be guided by reference to any of the matters set out in Section 7.

3. Any agreement concluded pursuant to the negotiations shall, in accordance with its terms, satisfy the rights and obligations of the States parties under the present articles;<sup>86</sup> and may also stipulate the extent to which these rights and obligations replace any other rights and obligations of the parties.

4. Failure to take any step required by the rules contained in this section shall not in itself give rise to any right of action. Nevertheless,

<sup>85</sup> See paras. 30–33 above.

<sup>86</sup> See paras. 24–25 and 40 above.

unless it is otherwise agreed, the acting State has a continuing duty to keep under review the activity that gives or may give rise to loss or injury; to take or continue whatever remedial measures it considers necessary and feasible to safeguard the interests of the affected State; and, as far as possible, to provide information to the affected State about the action it is taking.<sup>87</sup>

### SECTION 4

1. If any activity does give rise to loss or injury, and the rights and obligations of the acting and affected States under the present articles in respect of any such loss or injury have not been specified in an agreement between those States, those rights and obligations shall be determined in accordance with the provisions of this section. The States concerned shall negotiate in good faith to achieve this purpose.

2. Reparation shall be made by the acting State to the affected State in respect of any such loss or injury,<sup>88</sup> unless it is established that the making of reparation for a loss or injury of that kind or character is not in accordance with the shared expectations of those States.<sup>89</sup>

3. The reparation due to the affected State under the preceding article shall be ascertained in accordance with the shared expectations of the States concerned and the principles set out in section 5; and account shall be taken of the reasonableness of the conduct of the parties, having regard to the record of any exchange or negotiations between them and to the remedial measures taken by the acting State to safeguard the interests of the affected State.<sup>90</sup> Account may also be taken of any relevant factors, including those set out in section 6, and guidance may be obtained by reference to any of the matters set out in section 7.

4. In the two preceding articles, "shared expectations" include shared expectations which

(a) have been expressed in correspondence or other exchanges between the States concerned or, in so far as there are no such expressions,

(b) can be implied from common legislative or other standards or patterns of conduct normally observed by the States concerned, or in any regional or other grouping to which they both belong, or in the international community.

### SECTION 5

1. The aim and purpose of the present articles is to ensure to acting States as much freedom of choice, in relation to activities within their territory or control, as is compatible with adequate protection of the interests of affected States.<sup>91</sup>

2. Adequate protection requires measures of prevention that as far as possible avoid a risk of loss or injury and, in so far as that is not possible, measures of reparation;<sup>92</sup> but the standards of adequate protection should be determined with due regard to the importance of the activity and its economic viability.<sup>93</sup>

3. In so far as may be consistent with the preceding articles, an innocent victim should not be left to bear his loss or injury; the costs of adequate protection should be distributed with due regard to the distribution of the benefits of the activity; and standards of protection should take into account the means at the disposal of the acting State<sup>94</sup> and the standards applied in the affected State and in regional and international practice.

4. To the extent that an acting State has not made available to an affected State information that is more accessible to the acting State concerning the nature and effects of an activity, and the means of verifying and assessing that information, the affected State shall be allowed a liberal recourse to inferences of fact and circumstantial

<sup>87</sup> See paras. 30–33 above.

<sup>88</sup> See paras. 26, 29 and 41 above.

<sup>89</sup> See paras. 27 and 35 above.

<sup>90</sup> See paras. 26 and 32, and section 2, art. 8, and section 3, art. 4, above.

<sup>91</sup> See para. 10 above.

<sup>92</sup> See para. 9 above.

<sup>93</sup> See paras. 24–25 above.

<sup>94</sup> See paras. 22–23 above.

evidence in order to establish whether the activity does or may give rise to loss or injury.<sup>95</sup>

#### SECTION 6

Factors which may be relevant to a balancing of interests<sup>96</sup> include:

1. The degree of probability of loss or injury (i.e. how likely is it to happen?);
2. The seriousness of loss or injury (i.e. an assessment of quantum and degree of severity in terms of the consequences);
3. The probable cumulative effect of losses or injuries of the kind in question—in terms of conditions of life and security of the affected State, and more generally—if reliance is placed upon measures to ensure the provision of reparation rather than prevention (i.e. the acceptable mix between prevention and reparation);
4. The existence of means to prevent loss or injury, having regard to the highest known state of the art of carrying on the activity;
5. The feasibility of carrying on the activity by alternative means or in alternative places;
6. The importance of the activity to the acting State (i.e. how necessary is it to continue or undertake the activity, taking account of economic, social, security or other interests?);
7. The economic viability of the activity considered in relation to the cost of possible means of protection;
8. The availability of alternative activities;
9. The physical and technical capacities of the acting State (considered, for example, in relation to its ability to take measures of prevention or make reparation or to undertake alternative activities);
10. The way in which existing standards of protection compare with:
  - (a) the standards applied by the affected State; and
  - (b) the standards applied in regional and international practice;
11. The extent to which the acting State:
  - (a) has effective control over the activity; and
  - (b) obtains a real benefit from the activity;
12. The extent to which the affected State shares in the benefits of the activity;
13. The extent to which the adverse effects arise from or affect the use of a shared resource;
14. The extent to which the affected State is prepared to contribute to the cost of preventing or making reparation for loss or injury, or of maximizing its benefits from the activity;
15. The extent to which the interests of:
  - (a) the affected State, and
  - (b) the acting State
 are compatible with the interests of the general community;

<sup>95</sup> See paras. 28 and 32 above.

<sup>96</sup> *Idem.*

16. The extent to which assistance to the acting State is available from third States or from international organizations;

17. The applicability of relevant principles and rules of international law.

#### SECTION 7

Matters which may be relevant in negotiations concerning prevention and reparation<sup>97</sup> include:

##### I. *Fact-finding and prevention*

1. The identification of adverse effects and of material and non-material loss or injury to which they may give rise;
2. The establishment of procedural means for managing the activity and monitoring its effects;
3. The establishment of requirements concerning the structure and operation of the activity;
4. The taking of measures to assist the affected States in minimizing loss or injury.

##### II. *Compensation as a means of reparation*

1. A decision as to where primary and residual liability should lie, and whether the liability of some actors should be channelled through others;
2. A decision as to whether liability should be unlimited or limited;
3. The choice of a forum in which to determine the existing of liability and the amounts of compensation payable;
4. The establishment of procedures for the presentation of claims;
5. The identification of compensable loss or injury;
6. The test of the measure of compensation for loss or injury;
7. The establishment of forms and modalities for the payment of compensation awarded;
8. Consideration of the circumstances which might increase or diminish liability or provide an exoneration from it.

##### III. *Authorities competent to make decisions concerning fact-finding, prevention and compensation*

At different phases of the negotiations the States concerned may find it helpful to place in the hands of their national authorities or courts, international organizations or specially constituted commissions the responsibility for making recommendations or taking decisions as to the matters referred to under headings I and II.

#### SECTION 8

Settlement of disputes<sup>98</sup> (taking due account of recently concluded multilateral treaties that provide for such measures).

<sup>97</sup> See para. 40 above.

<sup>98</sup> See para. 26 above.