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Second report on international liability for injurious consequences arising out of acts not prohibited by international law, by Mr. Julio Barboza, Special Rapporteur

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

[Agenda item 7]

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Second report on international liability for injurious consequences arising out of acts not prohibited by international law, by Mr. Julio Barboza, Special Rapporteur

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CHAPTER I

Introduction

1. Although the present report will focus for the most part on the schematic outline proposed by the previous Special Rapporteur, Robert Q. Quentin-Baxter, in his third report, as amended in his fourth report,[1] it appears useful first to consider two important questions: the distinction between "responsibility" and "liability" in Anglo-Saxon legal terminology; and the unity of the topic.

A. Use of certain terms

2. The significance of the first question far transcends the simple question of terminology in one of the official languages of the United Nations, as will now be shown. In his preliminary report,[2] the previous Special Rapporteur explained that the choice of the term "liability" in the English title of the present topic stemmed from an exchange of views at the twenty-fifth session of the International Law Commission, when it was pointed out that "responsibility" referred in common law to the consequences of unlawful acts, whereas "liability" also referred to the very obligation imposed by the primary norm.[3] In French, since *responsabilité* was the only available word, it would be used to cover both mean-

* Incorporating documents A/CN.4/402/Corr.1, 2 and 4.

[1] See footnote 21 below.

[2] The preliminary report was submitted to the Commission at its thirty-second session: *Yearbook . . . 1980*, vol. II (Part One), p. 247, document A/CN.4/334 and Add.1 and 2.

The other reports submitted to the Commission by the previous Special Rapporteur, at the thirty-third to thirty-sixth sessions, were:

Second report: *Yearbook . . . 1981*, vol. II (Part One), p. 103, document A/CN.4/346 and Add.1 and 2;

Third report: *Yearbook . . . 1982*, vol. II (Part One), p. 51, document A/CN.4/360;

Fourth report: *Yearbook . . . 1983*, vol. II (Part One), p. 201, document A/CN.4/373;

Fifth report: *Yearbook . . . 1984*, vol. II (Part One), p. 155, document A/CN.4/383 and Add.1.

[3] Document A/CN.4/334 and Add.1 and 2 (see footnote 2 above), para. 10.

ings. It should be added that Spanish, which is also an official language of the United Nations, also does not make the same distinction as English, and the only available term is *responsabilidad*. In his fifth report, however, the previous Special Rapporteur appeared to reach different conclusions regarding the use of the two terms. On the basis of how the terms were used in certain treaties, specifically those relating to outer space and the marine environment, he concluded that the texts "make it clear that the term 'responsibility' has in these treaties quite a different meaning. It refers to the content of a primary obligation, not to its breach".[4]

3. For its part, the word "liability" was set in a somewhat different light in the fifth report, compared with the preliminary report. In considering article 235, paragraph 1, of the 1982 United Nations Convention on the Law of the Sea,[5] the previous Special Rapporteur noted that it was "clear that 'liability' may arise whether or not there has been a breach of an international obligation".[6] He added: "The phrase 'responsibility and liability', as used in the United Nations Convention on the Law of the Sea, therefore corresponds closely to the twin themes of prevention and reparation, which form the basis of the present topic."[7] In support of that conclusion, he made reference to many other legal norms.[8]

4. These apposite comments were confirmed by another writer versed in common law, L. F. E. Goldie. Examining the shades of difference between the English terms "responsibility" and "liability", and referring to their use in article 139, paragraphs 1 and 2, of the United Nations Convention on the Law of the Sea and in articles VI and XII of the 1972 Convention on International Liability for Damage Caused by Space Objects,[9] he observed that the two words

> . . . are used with different connotations. Thus, in both treaties, responsibility is taken to indicate a duty, or as denoting the standards which the legal system imposes on performing a social role, and liability is seen as designating the consequences of a failure to perform the duty, or to fulfil the standards of performance required. That is, liability connotes exposure to legal redress once responsibility and injury arising from a failure to fulfil that legal responsibility have been established. Although, at times, publicists and judges may employ the two terms (responsibility and liability) almost interchangeably or synonymously, in this presentation they will be used in the two distinct senses just stipulated.[10]

With reference to liability for risk in domestic law, and giving as examples the so-called "enterprise liability" and "products liability", Goldie stated:

> . . . All the categories under discussion have become predicated on notions of the actor's legally imposed social responsibilities. These are to observe the safest procedures and protective methods and, where necessary, to provide clear warnings. Alternatively the actor is called upon to compensate victims either for harms arising from his failure to observe his duties or, even when these are fully observed, still compensate for harms which nevertheless occur. . . . In this sense the term responsibility represents the law's perspective of what an actor in society owes.[11]

5. Accordingly, as stated in the quotation above (para. 3) from the fifth report, the distinction between the English terms "responsibility" and "liability" "corresponds closely to the twin themes of prevention and reparation". In short, the law considers that certain persons are responsible for specific obligations before the event that produces the injurious consequences. In that sense, responsibility refers to the host of obligations which the law imposes on persons because of the function they perform, which in the context of the present topic means the State, whose obligation to exert control derives from the exclusivity of the jurisdiction which it exercises in its territory. Thus, in the absence of an agreed régime for assigning direct responsibility to individuals in certain cases, the State not only would be liable when there were injurious consequences of certain activities carried out in its territory or under its control, but also would be responsible for obligations of prevention, i.e. all the duties involved in avoiding or minimizing such consequences. The term *responsabilidad* in Spanish (and no doubt *responsabilité* in French too), by encompassing the two separate connotations of the English terms, would cover the duty of prevention and the duty of reparation without difficulty, setting in a new light a strong objection that has been raised to the inclusion in the present topic of obligations of prevention, namely that, in law, liability is strictly confined to the consequences of the breach of an obligation. According to that viewpoint, prevention has nothing to do with liability.[12]

B. Unity of the topic

6. The extension of the scope of the term "liability" has made room in the title and in the topic itself for obligations of prevention and is thus consistent with the

[4] Document A/CN.4/383 and Add.1 (see footnote 2 above), para. 39.

[5] *Official Records of the Third United Nations Conference on the Law of the Sea*, vol. XVII (United Nations publication, Sales No. E.84.V.3), p. 151, document A/CONF.62/122.

[6] Document A/CN.4/383 and Add.1 (see footnote 2 above), para. 39.

[7] *Ibid.*, para. 40.

[8] *Ibid.*, footnotes 100 and 101.

[9] United Nations, *Treaty Series*, vol. 961, p. 187.

[10] L. F. E. Goldie, "Concepts of strict and absolute liability and the ranking of liability in terms of relative exposure to risk", *Netherlands Yearbook of International Law, 1985* (The Hague), vol. XVI, p. 180. Later in the article, he cited the following passage from an earlier study of his in which he had enunciated the same concepts:

> "The term responsibility thus includes the attribution of the consequences of conduct in terms of the duties of a man in society. Secondly, it can denote the role of the defendant, 'as the party responsible' for causing a harm. In this second sense it establishes the actor's contingent liability. Liability, on the other hand, may be used to contrast that notion and to indicate the consequences of a failure to perform those duties which derive from that responsibility—redress. That is to say, failure to observe one's responsibilities, or . . . being responsible in a causal sense for harm, carry the legal consequences (i.e. both the sanctioning and compensatory function) of incurring liability." ("Responsibility and liability in the common law", in *Legal Aspects of Transfrontier Pollution* (Paris, OECD, 1977), p. 344.)

He had concluded with an idea that is relevant to the present topic:

> "These pragmatic considerations point to the importance of distinguishing, in appropriate cases, between responsibility as a constant factor and liability as subject to a number of variable considerations in the process of decision." (*Ibid.*)

[11] "Concepts of strict and absolute liability . . .", *loc. cit.* (footnote 10 above), p. 181.

[12] See *Yearbook . . . 1982*, vol. I, p. 284, 1743rd meeting, para. 40, and p. 289, 1744th meeting, para. 26 (comments by Mr. Thiam).

views expressed both in the Commission and in the Sixth Committee of the General Assembly[13] to the effect that the various matters relating to this aspect should definitely not be left aside. Both aspects therefore have their place in the title; what remains to be identified is the intrinsic unifying link in this symbiosis between prevention and reparation, which may at first appear heterogeneous. For the previous Special Rapporteur, the basis of the prevention-reparation continuum lay in prevention, because all the aspects related to prevention were much more firmly established in State practice than the aspects related to reparation. Indeed, he stated in his fourth report:

> But what is "prevention" and what is "reparation"? Reparation has always the purpose of restoring as fully as possible a pre-existing situation; and, in the context of the present topic, it may often amount to prevention after the event. . . .[14]

The link between prevention and reparation would seem to lie in their practical application, since they are the same concept viewed from different perspectives or, alternatively, at different moments. As the previous Special Rapporteur stated in his second report,[15] "due diligence" or the "duty of care" even covers reparation for any injury that can be reasonably attributed to the lawful conduct of a lawful activity. However, treaty régimes provide ample evidence that compensation is a less adequate form of prevention, and it should not be allowed to become a tariff for causing avoidable harm.[16]

7. Finally, there would appear to be a conceptual difference between rules of prevention and rules of reparation only when the latter emanate from the wrongfulness of an act, in other words when they are secondary rules. In his fourth report, the previous Special Rapporteur stated that, from a formal standpoint, the subject-matter of the present topic "must be expressed as a compound 'primary' obligation that covers the whole field of preventing, minimizing and providing reparation for the occurrence of physical transboundary harm".[17] It should again be recalled that, as prevention and reparation fall within the domain of primary rules, it follows that, if injury is done which subsequently gives rise to the obligation to make reparation, that reparation is imposed by the primary rule in terms of the lawfulness of the activity in question; only if the source State fails in its primary obligation to make reparation does the question become one of secondary rules, with the notion of responsibility for the wrongful act which the State's violation of that primary obligation constitutes. Thus the present topic can be dealt with entirely within the context of primary rules.

8. Here, then, is a criterion for unity of form as referred to above (para. 6). What, however, would be the topic's unity of substance? To test a theory here one might perhaps look to the injury itself to discover the criterion which unifies prevention and reparation. Viewed in this way, the injury acts as a true magnet: everything revolves around it. In the case of reparation, it is the injury that has been done which is important; in the case of prevention, it is the potential injury that counts, in other words the risk. Reparation is justified by the injury done, which appears to be the suspensive condition whose fulfilment in turn entails an obligation. Obligations of prevention derive from the risk involved, from the likelihood of injury, from its characteristic predictability. If an activity entailed no risk, or if there were no likelihood of injury, obligations of prevention would be unnecessary.

9. The fact that injury, whether actual or potential, is such a key factor makes for a clear-cut distinction between the present topic and that of State responsibility for wrongful acts, placing the present topic squarely in the domain of international responsibility in the sense accepted thus far by the Commission. Actually, under part 1 of the topic of State responsibility, injury is not a *sine qua non* for responsibility, contrary to what many writers maintain is required under contemporary customary law.[18]

10. In fact, in his second report on State responsibility, the then Special Raporteur, Mr. Ago, said:

> One last point should be mentioned before concluding. In addition to the two elements, the subjective and the objective, that have been shown to be constituent elements of an internationally wrongful act which is *per se* a source of responsibility, reference is sometimes made to a third element, which is usually termed "damage". There is, however, some ambiguity in such references. In some instances, those who stress the requirement that a damage should exist are in fact thinking of the requirement that an external event should have occurred; as has been noted in the preceding paragraphs, such event must in some cases be present in addition to the actual conduct of the State if that conduct is to constitute a failure to carry out an international obligation. . . .[19]

He concluded by saying:

> . . . It therefore seems inappropriate to take this element of damage into consideration in defining the conditions for the existence of an internationally wrongful act.[20]

C. Scope of the topic

11. The schematic outline of the topic proposed by the previous Special Rapporteur[21] deals primarily with the duty of the source State to avoid, minimize or repair any

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[13] See the previous Special Rapporteur's third report, document A/CN.4/360 (see footnote 2 above), para. 9 and footnote 12; and his fourth report, document A/CN.4/373, para. 10 and footnote 31.

[14] Document A/CN.4/373 (see foootnote 2 above), para. 47.

[15] Document A/CN.4/346 and Add.1 and 2 (see footnote 2 above), para. 40.

[16] *Ibid.*, para. 91.

[17] Document A/CN.4/373 (see footnote 2 above), para. 40.

[18] See, for example, E. Jiménez de Aréchaga, "International responsibility", in *Manual of Public International Law*, M. Sorensen, ed. (London, Macmillan, 1968), p. 534. According to K. Zemanek: "Because claims for material damages sustained by nationals abroad were so often at the source of international judicial practice, damage came to be regarded, in judicial practice and doctrine, as a constituent element of responsibility." ("La responsabilité des Etats pour faits internationalement illicites ainsi que pour faits internationalement licites", *Responsabilité internationale* (Paris, Pedone, 1987), p. 19.)

[19] *Yearbook . . . 1970*, vol. II, p. 194, document A/CN.4/233, para. 53.

[20] *Ibid.*, p. 195, para. 54.

[21] For the text of the schematic outline, see the previous Special Rapporteur's third report, document A/CN.4/360 (see footnote 2 above), para. 53; and for the changes made to it, see the fourth report, document A/CN.4/373, paras. 63-64.

"appreciable" or "tangible" physical transboundary loss or injury when it is possible to foresee a risk of such loss or injury associated with a specific dangerous activity. Since that duty of the State is subject to factors such as the distribution of responsibility and of costs and benefits, it is seen to constitute, in the words of the previous Special Rapporteur in his fourth report, a "concomitant of the exclusive or dominant jurisdiction which international law reposes in the source State as a territorial or controlling authority".[22] Three major clarifications should be made with regard to this general statement:

(*a*) The scope of the topic will be confined to physical activities giving rise to physical transboundary harm, inasmuch as State practice is at present insufficiently developed in other areas.

(*b*) The statement of principles in section 5 of the schematic outline will be amplified and strengthened to the extent that a review of State practice is found to justify, and the statement of factors in section 6 will be adjusted accordingly. This process will determine "the degree to which the solutions contained in the schematic outline approach the standard of strict liability".[23]

(*c*) The scope may be influenced by an examination of the role which international organizations may play, not, in principle, by occupying the role of the source State, but rather to the extent that the procedures indicated in sections 2, 3 and 4 of the schematic outline "may all be substantially affected by the way in which States interact as members of international organizations".[24] Similarly, it would seem that the consultative procedures of international organizations and the technical services which they provide may fulfil the functions contemplated in section 3 or play a relevant role in the assessment of reparation under section 4.[25]

The present Special Rapporteur accepts these observations as a point of departure, contingent upon whatever the future development of the topic may suggest.

[22] Document A/CN.4/373 (see footnote 2 above), para. 63.

[23] *Ibid.*

[24] *Ibid.*, para. 64.

[25] *Ibid.*

Chapter II

The schematic outline

12. In his preliminary report, the present Special Rapporteur indicated his intention to concentrate his future work on what he considered to be the most important raw material for the present topic, the schematic outline.[26] The reason for this is that the general notions of the schematic outline have met with acceptance in the Commission and in the Sixth Committee of the General Assembly, despite some criticisms and suggestions for improvement. The first task, therefore, seems to be to review the schematic outline to try to get a clear idea of its dynamics, to re-examine its theoretical bases and to correlate it with State practice in the matter.

13. The present analysis, then, will have to be directed primarily towards understanding how the schematic outline works and bringing out the various obligations arising from it. At the present stage, we will work only on the outline itself and not on the amendments proposed in the first five draft articles submitted subsequently by the previous Special Rapporteur in his fifth report,[27] which will be considered separately and involve such important questions as whether the topic covers "situations" as well as "activities". Section 1 of the outline establishes the scope of the topic, gives the necessary definitions and makes one reservation. Some aspects of the scope have already been commented on above. Something else needs to be said, however, regarding the activities that constitute the very focus of the schematic outline and the substance of the topic. The activities in question are those "within the territory or control of a State which give rise or may give rise to loss or injury to persons or things within the territory or control of another State" (sect. 1.1). No indication is given of the kind of risk that is meant. Nothing is said about whether the risk lies in the existence of a very slight probability of catastrophic injury, for example, or whether we are to consider only the activities that Jenks termed "ultra-hazardous",[28] or again whether the risk lies in the certainty of minor injury with a cumulative effect, as in the case of pollution. Presumably, then, what is meant are activities that have a higher-than-normal likelihood of causing substantial injury within the territory of another State or in localities under its control.

14. In cases where an activity of the kind described is about to begin or has already begun, and the State within whose territory or control the activity takes place has become aware of its nature, that State has an initial obligation: to warn the State that might eventually be affected about the situation and to provide it 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" (sect. 2, para. 1). It would have the same obligation in a case where the affected State was the first to be aware of the circumstances and so informed the source State (sect. 2, para. 2).

[26] *Yearbook . . . 1985*, vol. II (Part One), pp. 100-101, document A/CN.4/394, paras. 14 *et seq.*

[27] Document A/CN.4/383 and Add.1 (see footnote 2 above), para. 1.

[28] See C. W. Jenks, "Liability for ultra-hazardous activities in international law", *Recueil des cours de l'Académie de droit international de La Haye, 1966-I* (Leyden, Sijthoff, 1967), vol. 117, p. 105.

15. If a dispute arises because the affected State does not agree that the measures proposed are sufficient to safeguard its interests, the source State has a second obligation: to "co-operate in good faith to reach agreement with the affected State" upon the establishment of fact-finding machinery, provided that the affected State has so proposed (sect. 2, para. 5). Such machinery actually aims at more than a mere investigation of the facts. It is a genuine conciliation procedure, since it can "assess . . . implications"—an entirely natural stipulation—but can also "to the extent possible, recommend solutions" (sect. 2, para. 6 (*a*)). The report made would be advisory, not binding (sect. 2, para. 6 (*b*)).

16. What is the nature of these first two obligations? Actually, the schematic outline distinguishes between the duty to provide information—section 5, paragraph 4, stipulating that the failure to do so shall entail certain adverse procedural consequences (liberal recourse to inferences of fact and circumstantial evidence in order to establish whether the activity does or may give rise to loss or injury)—and all other tasks that are part of the first two obligations (proposing preventive measures as part of the first obligation, co-operating in the establishment of fact-finding and conciliation machinery as part of the second). Failure to comply with the first two obligations in the outline does not in itself give rise to any right of action, as expressly stated in section 2, paragraph 8, and section 3, paragraph 4.

17. The matter, however, does not end there. The two paragraphs just mentioned stipulate a continuing duty that holds good until the original activity has ended, although the nature of that duty is not entirely clear in the outline, since the wording is somewhat ambiguous. Following the statement that the acting State "has a continuing duty to keep under review the activity that gives or may give rise to loss or injury", there is the phrase "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". Naturally that wording can be changed and made more objective when the relevant article is eventually drafted. If that is done, the text would set forth an obligation which, if an injury occurred, would justify a comparison between the preventive measures actually taken and those which would effectively have prevented that injurious result; and this would perhaps introduce into the topic a kind of "due diligence".

18. Under certain specific conditions, which are basically the failure of the fact-finding and conciliation machinery—either because more than a reasonable time has elapsed for its establishment or the completion of its terms of reference (sect. 3, para. 1 (*a*)), or because one of the States concerned is not satisfied with the findings (sect. 3, para. 1 (*b*))—or, of course, a recommendation to that effect in the report of the fact-finding machinery (sect. 3, para. 1 (*c*)), a third obligation arises for the States concerned 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" (*ibid., in fine*). Here the parties would be encouraged to apply the principles set out in section 5 and refer to the matters set out in section 7; but because provision is made for them to agree otherwise, they would not be obligated to do so. Likewise, paragraph 4 of section 3 stipulates that their duty to enter into negotiations does not entail any possibility of a right of action, and it reiterates the duty of care in terms identical with those of paragraph 8 of section 2.

19. Section 4 of the schematic outline is extremely important from the theoretical point of view: members of the Commission will recall the lengthy debates to which liability for risk, or "strict liability", has given rise. In fact, this is the very heart of the topic, since an attempt is being made to establish the rights of the parties when an activity of the type considered in the outline has caused injury and no agreed régime exists to determine those rights, either because the parties have not yet reached agreement—although negotiations have been initiated—or because one of them has refused to begin negotiations. At this point it is necessary again to enumerate the obligations referred to above. The first three mentioned are obligations to establish a régime; those considered below are obligations to make reparation for the injury caused. The obligation referred to in paragraph 17 above, on the other hand, relates entirely to prevention.

20. Section 4, paragraph 2, establishes the duty to make "reparation" in principle for "any such loss or injury". This should be read in conjunction with the principle—perhaps the most important one in the schematic outline—contained in section 5, paragraph 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". But this principle is subject to two major conditions. The first, also contained in section 4, paragraph 2, is: "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". The second condition, contained in section 4, paragraph 3, relates to the very process of negotiation: in addition to the previously mentioned expectations, "account shall be taken of the reasonableness of the conduct of the parties, having regard to the record of any exchanges or negotiations between them and to the remedial measures taken by the acting State [now termed "source State"] to safeguard the interests of the affected State". Furthermore, "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". It appears, therefore, that negotiations may result in reparation, the amount of which may vary according to such factors as the nature of the injury, the nature of the activity in question and the preventive measures taken. Conceivably, the parties might agree that reparation should not be made because of exceptional circumstances that make it inappropriate. To sum up, negotiation is an open process which should take numerous factors into account in settling the question of compensation.

21. The Spanish text of section 4, paragraph 2, reads: *. . . a menos que conste que la reparación . . . no responde a las expectativas compartidas de esos Estados.* The English text, on the other hand, reads:

". . . unless it is established that the making of reparation . . . is not in accordance with the shared expectations of those States". The words "unless it is established" could have been translated by their exact Spanish equivalent: *a menos que se establezca.* The expression *a menos que conste* could give rise to a much more strict interpretation with respect to the burden of proof. In the English text, this is not very clear; generally speaking, positive facts must be proven, not the lack of them. In any event, if it was the intention of the schematic outline to let the burden rest with the source State, the latter could no doubt rely on presumption and all the probative elements. In the Spanish text, however, the burden of proof undoubtedly lies with the source State, and in addition a form of negative proof is required of that State, namely that somewhere it should be expressly stated that reparation was not a shared expectation. That, at least, is a possible interpretation and one which would in fact cancel out any conditions and make reparation always appropriate in practice, because of the impossibility of proving the contrary. The foregoing comments do not, therefore, stem from mere semantic considerations, especially if it is taken into account that some forms of strict liability—the least strict—avail themselves of an inverted form of *onus probandi* as a technique for achieving their purposes.

22. The "shared expectations" are those that "(*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" (sect. 4, para. 4). What is the nature of these "shared expectations"? The expectations have a certain capacity to establish rights. This falls within the purview of the principle of good faith, of estoppel, or of what is known in some legal systems as the doctrine of "one's own acts". If one of the parties acts on the basis of expectations created by the other, it may have the right on more than one occasion to some reparation if, through the fault of the other party, those expectations are not met. There is a certain contractual or quasi-contractual force in this matter of expectations. Is that how they were intended to be characterized in the schematic outline? This hypothesis cannot be ruled out, at least if the text of section 4, paragraph 4 (*a*), is borne in mind: it indicates that expressions of shared expectations should be sought first in "correspondence or other exchanges between the States concerned" and elsewhere only "in so far as there are no such expressions". But the real intention here seems to have been to rely on the whole range of approaches common to both parties, or to a region, or lastly to the entire international community. Such expectations would base reparation on more or less customary, or quasi-customary, law. This is illustrated by certain cases cited below,[29] in one of which it was pointed out that, before a hazardous activity was begun, it was an accepted principle in Europe that mandatory negotiations would be held with any States that might be affected.

[29] See footnote 40 (*d*) below.

23. In short, the schematic outline has two basic objectives: to provide States with a procedure for the establishment of régimes to regulate activities which give rise or may give rise to transboundary injury; and to make provision for situations where such injury occurs prior to the establishment of such a régime.

24. With regard to the first objective, the source State is basically under two types of obligation:

(*a*) to notify the State which will presumably be affected about a dangerous activity being undertaken in the source State, to inform it of the characteristics of that activity in relation to the foreseeable damage and to propose remedial measures;

(*b*) to co-operate in good faith in the establishment of fact-finding and conciliation machinery if, in the view of the affected State, such measures are not sufficient.

The outline expressly provides that failure to fulfil either of these obligations does not in itself give rise to any right of action, although failure to inform the affected State entails certain adverse procedural consequences.

25. An additional obligation exists during the period when the source State fails to fulfil the first two obligations. It is safe to say that, in any event as soon as the dangers of an activity become known, the source State should continuously monitor such activity and take whatever measures it considers necessary and feasible to safeguard the interests of the affected State.

26. The second objective seems intended to establish a régime governing reparation for injury. Its theoretical basis has various elements: on the one hand, the previous Special Rapporteur sought to base it on obligations of prevention, in such a way that those obligations (whose incorporation into State practice and general international law seems to have been generally recognized) also include the obligation to make reparation in cases where injury has been sustained. Notwithstanding this, the obligation to make reparation is also based on a form of strict liability, the automatic nature of which is tempered by the two conditions already referred to: shared expectations and negotiation (see para. 20), which involve the matters embodied in section 7, so that formulas for balancing the respective interests are apparently sought through determination of the injury caused by a specific act and reparation for such injury.

27. Of the principles, factors and matters set out in the schematic outline, the principles in section 5 should be considered here in view of their great importance to the functioning of the mechanisms whose dynamics we are attempting to explain.

(*a*) The first principle (para. 1) seeks to reflect the content of Principle 21 of the United Nations Declaration on the Human Environment (Stockholm Declaration),[30] or, in other words, to ensure that all human activities in the territory of a particular State are conducted with as much freedom as is compatible with the interests of other States. This is the guiding principle in the whole matter, the principle that authorizes and

[30] *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 and corrigendum), part one, chap. I.

justifies the balance-of-interests test and is at the basis of all régimes, as well as of any compensation provided when no régime exists.

(*b*) The second principle (para. 2) is that of prevention and, where applicable, the related principle of reparation. The scope of preventive measures is determined in turn by the importance of the activity in question and its economic viability.

(*c*) The third principle (para. 3) is that an innocent victim should not be left to bear his loss or injury, subject to the conditions already referred to. A form of balancing of interests is also involved here, according to the distribution of the benefits of the dangerous activity, the means at the disposal of the source State and the standards applied in the affected State and in regional and international practice.

(*d*) Finally, there is a principle (para. 4) relating to legal procedure already commented on (para. 16 above): an affected State that has not received information from the source State concerning the nature and effects of an activity and the means of verifying and assessing that information is allowed liberal recourse to inferences of fact and circumstantial evidence in order to establish whether the activity does or may give rise to loss or injury. This principle seems intended to redress the imbalance which exists, with respect to the nature and effects of an activity, between the source State, which has exclusive jurisdiction over its territory, and the affected State, which cannot investigate that activity and its effects because of this exclusive jurisdiction.[31]

28. What is the nature of these principles? In the case of the institution of régimes, such principles can play a guiding role that would facilitate their establishment. In the case of injury caused when no régime exists, however, they seem to contain a more peremptory element. At least one of the parties may invoke them, and they may be dispensed with only if both parties so agree. The rest of the schematic outline, although relevant to the present topic, has no decisive influence on the dynamics of the outline. At any rate, its influence appears to be limited to the subjects mentioned in paragraph 26 above, namely the factors to be borne in mind by the parties (sect. 6), the matters concerning prevention and reparation (sect. 7) and the possible establishment of mechanisms for the settlement of disputes (sect. 8). All of these will be examined as work on the topic progresses.

[31] See the reasoning of the ICJ in the *Corfu Channel* case (merits), Judgment of 9 April 1949, *I.C.J. Reports 1949*, p. 18.

CHAPTER III

Critical analysis of the schematic outline

A. Activities

29. First, it should be noted that the schematic outline consistently considers "activities" which lead to injurious consequences, and not "acts", to which reference is made in both the English and Spanish titles of the topic. In this manner, without expressly stating so, it bridges the gap between those language versions and the French version, in which the title refers to *activités*. An activity comprises, in a certain perspective, a series of acts. It is activities which involve an element of danger and relate to the characteristic form (or even, in some cases, the statistical frequency) of injuries. It is activities, and not just isolated acts—the regulation of which is more difficult—which are the subject of consideration with a view to the establishment of a régime. It is easy to see the wide variety of acts of different kinds subsumed under an activity of the type being considered under the present topic, such as the activity of running a plant of the Trail Smelter type, and the many and varied acts by various persons which finally converge in the production of its harmful emissions. This position thus appears correct and, at some point, it might be worth amending the English and Spanish titles of the topic accordingly.

30. The activities dealt with in the schematic outline are those "which give rise or may give rise" to transboundary injury (sect. 1.1). In other words, they are activities which involve risk; but the type of risk involved is not specified. We have seen above (para. 13, *in fine*) that, depending on the degree of risk, various types of activities can be envisaged. Zemanek distinguishes between those which cause injury only in the event of an accident, and those which permanently cause the emission of harmful substances.[32] Gunther Handl, for his part, excludes one type of activity in the second category from the scope of the topic, namely activities in which the source State, because the emissions are constant and entirely foreseeable, has or should have not only knowledge of the significant transboundary injury caused, but also the capacity to prevent it. In such a case, we would be faced with an internationally

[32] Zemanek considers that:

"The term 'liability for risk' is frequently used for this type of liability. But the term is inappropriate in the present context since it must be applied to two situations, only one of which involves an element of risk proper:

"(*a*) the risky activity itself: in this case, injury does not arise in the normal performance of the activity, but may occur in the event of an accident. It is the extent of the injury which gives cause for concern, and this is why such activities are permitted only on condition that any resulting injury will be compensated for;

"(*b*) the permanent emission of harmful substances: in this case, society seems to accept a certain degree of pollution (which is frequently not clearly perceived by the individual), but if the limit established is exceeded, either by accident or by a change in technical standards, the resulting damage must be compensated for.

"We propose the use of the term 'absolute liability' to cover the two cases. The term also implies that such liability is not the consequence of a crime." (*Op. cit.* (footnote 18 above), p. 17.)

wrongful act.[33] Both writers admit the existence of a minimum amount of injury, or threshold, which, according to established custom, would be borne by the affected State; but Handl stresses that, if there at least exists an awareness that the threshold might be exceeded and if the source State has the capacity to prevent that, we would be faced, as already stated, with the question of responsibility for wrongful acts. That would certainly be the case when the substantial injury in question had been prohibited. Yet it should be noted here that, even in these cases of "permanent emission of harmful substances", as Zemanek terms them, there is a possibility of accident for which causal responsibility would arise, as was demonstrated in the *Trail Smelter* case.[34] There the arbitral tribunal laid down certain precepts and conditions for the prevention of a substantial degree of injury, but nevertheless established a régime for compensation in the event of accidental injury—even if the conditions for prevention had been met.

31. In short, if an activity has not been prohibited, even though it may be dangerous and liable to be prohibited in the future, it comes within the scope of the present topic. The qualification of "twilight zone" can be applied only to the shifting boundary of activities that are moving towards prohibition, and not to other aspects, since it is clear that within this topic there will be activities which, although they may cause significant injury, will be permitted because, on balance, the assessment of conflicting interests indicates continuation of the activity despite its risks and compensatable injury.

32. To these two types of activities, characterized by foreseeable risk and potential injury, should be added others in which injury is not foreseeable, as in the circumstances precluding wrongfulness on the grounds cited in articles 31 (*Force majeure* and fortuitous event), 32 (Distress) and 33 (State of necessity) of part 1 of the draft articles on State responsibility.[35] Article 35 of that draft provides: "Preclusion of the wrongfulness of an act of a State by virtue of the provisions of articles 29, 31, 32 or 33 does not prejudge any question that may arise in regard to compensation for damage caused by that act." That reservation would be followed up in the present draft with an obligation to compensate by virtue of the principle enunciated in section 4, paragraph 3, subject of course to the conditions already referred to (shared expectations, negotiations).

33. The activities and cases involved are certainly heterogeneous, but this does not undermine the unity of the topic, which is provided by the occurrence of injury. Moreover, it should be noted that in all legal systems responsibility for wrongful acts and liability for risk overlap, since the latter generally provides an appropriate complement to the former.[36]

B. Obligations

34. Analysis seems to demonstrate that there are two types of obligation relating to the régime: to inform and to negotiate.

35. The first obligation which arises is that of the source State to inform the State which might be affected that an activity has begun or will begin in its territory which it considers dangerous, and to provide that State with all the necessary data concerning the characteristics of the activity, the risks which it creates and the type of injury which it may cause, so that that State may make its own evaluation of the situation. The same obligation arises for the source State if the potentially affected State draws its attention to such an activity which has begun or is about to begin in the territory of the source State. This obligation seems to have two distinct objectives. One is the general objective of co-operating with the affected State in such circumstances. But it should not be forgotten what such circumstances involve, namely the existence of a risk and, therefore, possible injury for the affected State. Furthermore, according to the régime established in the schematic outline, this is injury for which the source State would in principle be liable, because the innocent victim, also in principle,

[33] Handl states:

". . . The basic question is, of course, as to when State conduct which is lawful *per se* because it is in itself expressive of a legitimate exercise of a sovereign right, but which produces harmful transboundary effects, must be deemed to be internationally wrongful. . . . Certainly, States are under a general obligation to refrain from causing transboundary harm. But this obligation does not imply that affected States enjoy absolute protection against transboundary environmental interference. For international practice clearly suggests that only 'substantial', 'significant' or similarly qualified transnational harm will amount to an infraction of the affected State's right. The *ex post facto* assessment of the 'substantiality' of the harmful transnational effects thus merely serves to determine whether one State's use of the shared natural resource, permissible *per se* as it is, has resulted in the violation of another's rights. A finding of such an infraction of itself does not, however, allow inferences as to the quality of the injury-causing conduct as internationally wrongful."

Immediately afterwards, however, he arrives at this important concept:

"Instead, a conclusion to this effect may be suggested by the nature of the transboundary pollution. If it is of the continuous kind, the source State is likely to know or might be presumed to know of the transborder flow of pollutants. Such knowledge will be increasingly presumable as States begin to establish environmental quality standards for the protection of human health and welfare and of natural resources. Standards of this sort entail the need for close monitoring of environmental concentrations of pollutants and the patterns of their dispersion; States are consequently bound to become more aware of significant transboundary flows of pollutants. Thus where States intentionally discharge pollutants in the knowledge that such discharge is bound to cause, or will cause with substantial certainty, significant harmful effects transnationally, the source State will clearly be held liable for the resulting damage. The causal conduct will be deemed internationally wrongful. Most cases of injurious transboundary environmental effects involve continuous transboundary pollution. Most of these situations consequently intrinsically involve questions of State responsibility."

(G. Handl, "Liability as an obligation established by a primary rule of international law: Some basic reflections on the International Law Commission's work", *Netherlands Yearbook of International Law, 1985* (The Hague), vol. XVI, pp. 56-59.)

[34] United Nations, *Reports of International Arbitral Awards*, vol. III (Sales No. 1949.V.2), p. 1905.

[35] *Yearbook . . . 1980*, vol. II (Part Two), pp. 30 *et seq.*

[36] According to Handl: "This expectation [of homogeneity of the content of the topic] appears, however, unreasonable in view of the fact that in most domestic legal systems there co-exist pockets of strict liability or liability without fault, whose rationale cannot necessarily be reduced to a common denominator." (*Loc. cit.* (footnote 33 above), p. 63.)

should not be left to bear it. The second objective is to prevent injury attributable to the source State. This gives greater force to the obligation than the simple, more or less general, duty to co-operate.

36. As an apparent corollary, the violation of this obligation authorizes the affected State to resort to means which would otherwise be prohibited in order to establish the dangerous nature of the activity (sect. 5, para. 4) and, it should be added—although the schematic outline does not expressly say so—if need be, in order to establish a presumption, unless the contrary is proved, that there is a causal relationship between the activity and the injury when injury has been caused before any régime has been agreed upon. The first hypothesis envisages the situation in which, in spite of the initial refusal, it has been possible to establish fact-finding machinery, and seems to be an adequate reflection of the reasoning of the ICJ in the *Corfu Channel* case,[37] since in rejecting the possibility that the United Kingdom could seek evidence in Albanian territory, the Court resorted to inferences concerning the Albanian Government's knowledge of the existence of the minefield. Indeed, what other possibility is there in view of the exclusive nature of territorial sovereignty? On the basis of what was stated above, therefore, we can consider this obligation to inform as one of the obligations of prevention.

37. The other obligations seem to be all subsumed under the obligation to negotiate. But to negotiate what? In general, the obligation is to negotiate a régime aimed at preventing, minimizing and possibly compensating for injury resulting from the activity in question. Under section 2, paragraph 1, the proposal of remedial measures is an additional aspect of the obligation to inform. Without prejudice to the fact that the source State, if it indeed intends to take preventive measures concerning that activity, must inform the affected State of them, it is quite obvious that, if it informs the affected State of the dangers arising from a new activity, it must also propose measures to prevent, minimize or compensate for any resulting injury. If it is the affected State which points out the danger of an activity which the source State does not consider dangerous, that would be a different matter. Then there would not yet exist an obligation to propose measures because there would not yet be agreement as to the facts. But it is clear that the source State has the obligation to inform the affected State of the characteristics of the activity with a view to determining whether or not it carries any risk. In the first situation, there would be an obligation to propose preventive measures, and this obligation is related to that of negotiating a régime, since such measures are the first step in any negotiation process.

38. Nevertheless, this general obligation to negotiate a régime actually presupposes a prior agreement by the parties as to the facts surrounding the activity in question. This is only logical. The obligation to negotiate must derive from some common basis, and if the parties do not agree that the activity is indeed dangerous, it will be necessary to establish that fact and determine its exact significance. Thus the schematic outline provides that, if the measures proposed seem insufficient to the affected State, fact-finding machinery should be established; and it should be added that the same action should be taken when the source State disagrees about the degree of danger posed by the activity in question (sect. 2, paras. 4-5). In both cases, the initial obligation to propose measures is transformed into another obligation—that of negotiating the establishment of the fact-finding and conciliation machinery. Therefore it cannot be said that a breach of the first two obligations set forth in section 2 does not entail any consequences: a breach of the obligation to inform entails an adverse procedural consequence for the source State; and the second obligation is transformed into another specific obligation: the obligation to establish the machinery.

39. The obligation to inform, however, relates not only to the establishment of a régime, but also to reparation, i.e. reparation for actual injury. It seems obvious that, if injury results from an activity carried out in one State, on the danger of which that State has failed to provide any information to States exposed to risk, the source State is put in a very unfavourable situation, not only from the procedural viewpoint (the presumptive cause-and-effect relationship between the activity and the injury), but also because its act is considered a wrongful act entailing all the consequences of such acts. Let us imagine, for example, that the United States of America had not issued warnings and had not taken all the precautionary measures which it took before beginning its nuclear tests. There can be little doubt that, in such circumstances, the significance of the "*Fukuryu Maru*" case (1954)[38] would have been very different. It is therefore inappropriate to provide in section 2, paragraph 8, that a breach of this obligation does not give rise to any right of action, particularly with regard to the causing of injury. Here, as with regard to the obligation to negotiate fact-finding machinery, there are three possibilities. The first is to leave the text of the outline as it stands in order to enable States to reach a consensus more easily and avoid the problems of being presented with a régime which imposes on them, from the beginning, obligations with serious consequences. The second possibility is to reflect those consequences explicitly in the draft. The last possibility is purely and simply to delete from section 2, paragraph 8, the sentence concerning the lack of a right of action.

40. In order to facilitate the Commission's task in taking a decision concerning these three possible approaches, reference should be made here to the nature of the obligation to negotiate, since it might be thought that it is an incomplete obligation, or so-called "soft law", in which case it might seem natural that a breach should not entail any consequences. This matter was studied by the Commission in the early reports on the law of the non-navigational uses of international watercourses, and there is no need to add much to what was stated there.[39] The above analysis shows that the obliga-

[37] See footnote 31 above.

[38] See M. M. Whiteman, ed. *Digest of International Law* (Washington, D.C.), vol. 8 (1967), p. 764.

[39] See in particular the first report of Mr. Schwebel on that topic: *Yearbook ... 1979*, vol. II (Part One), p. 165, document A/CN.4/320, paras. 86-87.

tion to negotiate is well established in international law as a means of resolving conflicts of interest, and that this is particularly true with regard to the conflicts considered here, where the obligation is linked to the prevention of injury for which one of the parties to the negotiations may be liable. Here the general prohibition against causing injury to another, as contained in the maxim *sic utere tuo ut alienum non laedas*, can have the effect of reinforcing the obligatory nature of negotiation as a necessary mechanism for compliance with that principle of law.[40] Indeed, the obligation to negotiate does not seem to be so much an incomplete obligation as one whose violation is not always easy to determine. It is helpful in this regard to refer to the *Lake Lanoux* arbitral award (1957), which set forth two concepts applicable to the line of argument being developed here:

> . . . Thus, one speaks, although often inaccurately, of the "obligation of negotiating an agreement". In reality, the engagements thus undertaken by States take very diverse forms and have a scope which varies according to the manner in which they are defined and according to the procedures intended for their execution; but the reality of the obligations thus undertaken is incontestable and sanctions can be applied in the event, for example, of an unjustified breaking off of the discussions, abnormal delays, disregard of the agreed procedures, systematic refusals to take into consideration adverse proposals or interests, and, more generally, in cases of violation of the rules of good faith.[41]

The two concepts of interest in this passage are: (*a*) that a real obligation is undeniably involved; (*b*) the examples of how that obligation may be violated.

41. As to the three possibilities which arise in relation to the obligation to negotiate in the present draft, the following considerations are relevant:

(*a*) Since there exists an obligation to negotiate, as concluded in the preceding paragraphs, there is reason to believe that its non-fulfilment by a State would normally entail some adverse consequence. For example, the affected State could very well neglect to carry out, as a form of retaliation, one of its obligations under another treaty whose provisions are particularly useful to the source State. This is possible if one takes into account article 73 of the 1969 Vienna Convention on the Law of Treaties.[42] If the text of the schematic outline is left as it is, the affected State might be prohibited from availing itself of this possibility given to it under general international law. It seems somewhat dangerous for the draft to deny any right of action, and the present argument would militate against the first possibility, namely that of leaving the text as it is.

(*b*) Should the Commission include sanctions in the draft? The Special Rapporteur believes that, if the draft is ever transformed into a treaty, the States parties would be able to resort to the provisions of article 60 of the 1969 Vienna Convention. Adding anything further to that régime would not seem to be very practical.

(*c*) The best approach therefore seems to be to delete the first sentence of paragraph 8 of section 2, and of paragraph 4 of section 3, of the schematic outline. We will see later what should be done to the second sentence of these two paragraphs.

C. Injury caused in the absence of a treaty régime

42. Section 4 of the schematic outline has given rise to the greatest difficulties in the Commission and in the Sixth Committee of the General Assembly, as well as in legal doctrine, because it envisages a situation in which, in the absence of a treaty régime establishing the rights of the parties, injury is caused to persons or things within the territory of one State as a result of activities carried out within the territory or control of another

[40] Mention should be made in this regard of Article 33 of the Charter of the United Nations, as well as:

(*a*) the provisions of numerous multilateral agreements in which this obligation has repeatedly been laid down, such as article 5 of the Convention on Long-range Transboundary Air Pollution (E/ECE/1010); article 142, paragraph 2, of the 1982 United Nations Convention on the Law of the Sea (see footnote 5 above); article III of the International Convention relating to Intervention on the High Seas in Cases of Oil Pollution Casualties (United Nations, *Treaty Series*, vol. 970, p. 211); article 12 of the Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region (*International Legal Materials* (Washington, D.C.), vol. XXII, No. 2 (1983), p. 227);

(*b*) the provisions of numerous bilateral treaties, such as articles II (1), IV and V of the 1975 Agreement between Canada and the United States of America relating to the exchange of information on weather modification activities (United Nations, *Treaty Series*, vol. 977, p. 385); articles 30 and 31 of the 1922 Agreement for the Settlement of Questions relating to Watercourses and Dikes on the German-Danish Frontier (League of Nations, *Treaty Series*, vol. X, p. 201); article 3 of the 1931 General Convention between Roumania and Yugoslavia concerning the hydraulic system (*ibid.*, vol. CXXXV, p. 31); article 14 of the 1929 Convention between Norway and Sweden on certain questions relating to the law on watercourses (*ibid.*, vol. CXX, p. 263);

(*c*) certain well-known legal decisions, such as the advisory opinion of the PCIJ of 15 October 1931 in the case concerning *Railway Traffic between Lithuania and Poland*, which for the first time defined the obligation to negotiate as "not only to enter into negotiations, but also to pursue them as far as possible, with a view to concluding agreements" (*P.C.I.J., Series A/B, No. 42*, p. 116); the judgment of the ICJ of 20 February 1969 in the *North Sea Continental Shelf* cases (*I.C.J. Reports 1969*, p. 3) and that of 25 June 1974 in the *Fisheries Jurisdiction (United Kingdom* v. *Iceland)* case (*I.C.J. Reports 1974*, p. 3); the *Lake Lanoux* arbitral award of 16 November 1957 (United Nations, *Reports of International Arbitral Awards*, vol. XII (Sales No. 63.V.3), p. 281; *International Law Reports, 1957* (London), vol. 24 (1961), p. 101; see also *Yearbook . . . 1974*, vol. II (Part Two), pp. 194 *et seq.*, document A/5409, paras. 1055-1068);

(*d*) State practice, which also offers interesting examples along the same lines as those cited above. Certain cases have already been referred to (para. 22, *in fine* above). One concerned the installation of a nuclear plant for the generation of electricity at Dukovany, Czechoslovakia, 35 kilometres from the Austrian border. In this case, the Czechoslovak Government agreed to hold discussions with the Austrian Government concerning the safety of the plant. Another case related to the construction of a nuclear plant at Rüthi, Switzerland, in the upper Rhine valley near the Austrian border. Following objections raised by the Austrian Government, negotiations were held between Switzerland and Austria and led to a total re-evaluation of the project by the Swiss Government. Yet another case concerned the construction of a refinery in Belgium near the border with the Netherlands. The latter State raised objections and pointed out that it was an accepted principle in Europe that, before beginning any activity that might cause injury to neighbouring States, the source State should negotiate with them. The Belgian Parliament itself expressed similar concern and asked the Government how it proposed to resolve the problem. (For further details on these cases and other precedents, see the Secretariat study on State practice relevant to international liability for injurious consequences arising out of acts not prohibited by international law: *Yearbook . . . 1985*, vol. II (Part One)/Add.1, document A/CN.4/384, paras. 97-113.)

[41] *International Law Reports, 1957 . . .*, p. 128.

[42] United Nations, *Juridical Yearbook 1969* (Sales No. E.71.V.4), p. 140.

State. Anticipating, for the sake of clarity, the commentary to section 5, we may note here that the schematic outline establishes the principle that "an innocent victim should not be left to bear his loss or injury" (para. 3), but of course only "in so far as may be consistent with the preceding articles". We have already seen (paras. 20-22 above) that, under the system followed, reparation is subject to two important conditions: (*a*) shared expectations, and (*b*) negotiation itself, which may possibly lead to other factors being taken into account.

43. Obviously, the purpose of these provisions is to mitigate the absolute liability of the source State for the injury caused, so that the automatic mechanisms deriving from that liability do not enter into play. This aspect is undoubtedly one of the major contributions of the schematic outline towards alleviating the difficulties which have arisen in the Commission and also among States in general regarding the possible operation of strict liability at the international level without any agreement regarding specific activities. We have already seen (para. 20 above) what it is that the parties are to negotiate about. To this we may add what the previous Special Rapporteur said in his fourth report regarding Caubet's opinions:

> . . . Failing an explicit stipulation in an applicable régime, there must always be room for evaluation of such issues as the way in which a loss or injury should be characterized, and whether that kind of loss or injury was foreseeable; whether the loss or injury is substantial; and whether the quantum of reparation is affected by any question of sharing, or by a change in the circumstances that existed when the activity which gave rise to the loss or injury was established. . . .[43]

In respect of this stage of negotiation, Handl notes that we are faced with a "negotiable duty", or a duty which is negotiable for the source State, and that "the prospect of acceptability" of the draft by States in general "comes at the cost of a significant dilution of the normative contents of liability".[44]

44. It remains to be seen whether that price has to be paid, and only time will tell. For now, negotiation is an inevitable step if there is no machinery for settling disputes in the draft itself. How else can the rights of the parties be brought into line with the principles laid down in section 5? Moreover, in the case of an activity for which there is no régime, and for which general principles therefore have to be applied, how can the amount of reparation be determined with a view to an eventual distribution of costs if preventive measures have been taken and other factors already mentioned or those referred to in section 6 have been considered? How can it be determined whether the injury is tangible, considerable or appreciable—or whatever term is to be used—and whether the threshold of tolerance which custom seems to have laid down in this respect has been crossed?

45. According to section 4, paragraph 1 (*in fine*), "the States concerned shall negotiate in good faith to achieve this purpose", i.e. to determine the rights and obligations of the parties. The aim of this provision seems to be to establish a further obligation to negotiate, this time not about a régime but about reparation for the injury caused. It may be noted that, in respect of this obligation to negotiate, the right of action is not denied, as it is in the case of the obligation to negotiate fact-finding machinery or a régime under section 3.

46. With regard to "strict" liability, previous reports made a considerable effort, first, as we have already seen, to minimize its effects, and secondly, to consider it as only one of several factors which provide legal justification for any reparation made in cases of injury occurring in the absence of a treaty régime. Indeed, we have seen that the obligation of reparation is based on the obligation of prevention, which is considered to be enshrined in international law: the obligation of reparation is really no more than "prevention after the event".[45] Furthermore, if examined closely, recourse to the concept of "shared expectations" may be interpreted as an attempt to find a second component of the obligation of reparation, which would naturally be in addition to its existing function as a factor limiting the automatic application of strict liability. This second component would derive, perhaps, from the "quasi-contractual" nature of shared expectations, when exchanges between the parties reveal areas of imperfect agreement between them, or else from the "quasi-customary" nature of the expectations (if that heterodox expression may be used), when they arise 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", as laid down in section 4, paragraph 4 (*b*).

47. Even if the foregoing is accepted, the third component of the obligation of reparation has to be strict liability. As the previous Special Rapporteur stated in his third report:

> 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. . . .[46]

Thus we move on to the much-debated subject of strict liability.

48. The first point to be made is that strict liability is not monolithic: its operation is far from uniform; in other words, there are various degrees of strictness. Indeed, the Special Rapporteur believes that it is necessary to talk of "forms" of strict liability. Goldie draws attention to differences in Anglo-Saxon law between "strict liability" and "absolute liability", depending on how rigorously they are applied.[47]

[43] Document A/CN.4/373 (see footnote 2 above), para. 54.

[44] Handl, *loc. cit.* (footnote 33 above), p. 72.

[45] See paragraph 6 and footnote 14 above.

[46] Document A/CN.4/360 (see footnote 2 above), para. 41.

[47] Goldie writes:

". . . While it is true that in some older writings these qualifiers [strict and absolute] were used interchangeably to describe such liability, usage was effectively changed after the publication of Sir Percy Winfield's influential article, 'The Myth of Absolute Liability' almost sixty years ago.

"Professor Winfield argued with a cogency which still influences the profession that the exculpatory rules which the courts have developed to mitigate the rigour of the defendant's liability under *Rylands* v. *Fletcher* (and those which have been evolved in jurisdictions recognizing the alternative doctrine of ultra-hazardous ac-

(Continued on next page.)

49. With regard to international law, Goldie draws attention to the differences along the lines mentioned to be found in conventions, such as those concerning nuclear power, which have incorporated the innovative concept of "channelling". This involves "[tracing] liability back to the nuclear operator, no matter how long the chain of causation, nor how novel the intervening factors (other than a very limited number of exculpatory ones)".[48] There are very few exceptions to liability in this area, as may be seen in article 9 of the 1960 Paris Convention on Third Party Liability in the Field of Nuclear Energy, as amended by its 1964 Additional Protocol,[49] under which the only grounds for exonerating the nuclear operator are:

> . . . disturbances of an international character such as acts of armed conflict and invasion, of a political nature such as civil war and insurrection, or grave natural disasters of an exceptional character, which are catastrophic and completely unforeseeable, on the grounds that all such matters are the responsibility of the nation as a whole. . . .[50]

Thus some of the traditional grounds for exoneration, such as many cases of *force majeure*, fraudulent acts, acts of God or acts committed by third persons, would not be taken into account. Even negligence on the part of the plaintiff is not enough to exonerate the nuclear operator completely.[51]

50. Other treaties which establish forms of absolute liability are cited by Goldie in the same article, to which members of the Commission are referred for further examples.[52] For instance, there is the 1972 Convention on International Liability for Damage Caused by Space Objects[53] (where liability is less strict, since "channelling" would not occur and the plaintiff State would have to prove the causal connection). In the field of marine pollution, too, there are varying degrees of strictness of liability. It has become stricter over the years. The International Convention on Civil Liability for Oil Pollution Damage, adopted at Brussels in 1969,[54] marked a departure from the view of the International Maritime Committee, whose draft convention was based on the concept of fault and on a reversal of the *onus probandi*. Thus the régime established at Brussels, under article III of the Convention, could be termed one of "absolute liability". It was completed with the establishment in 1971 of a compensation fund to provide additional compensation, with even more limited grounds for exemption (see para. 59 below). Lastly, the International Conference on Liability and Compensation for Damage in Connection with the Carriage of Certain Substances by Sea, held in London in 1984 under the auspices of IMO, adopted two Protocols—one amending the 1969 Brussels Convention, and the other the 1971 Convention establishing the international compensation fund—which increased the amounts to be paid.[55]

51. Liability for risk, or strict liability, is nothing more than a technique applied in law to obtain a result. In other words, State responsibility and international responsibility differ only in degree of prohibition, as mentioned earlier. To attain the goal of preventing certain acts, or of compensation for them should they occur, there can be various types of mechanisms leading to régimes of varying strictness, depending on the international community's general assessment of the situation. It is obvious that, in the examples given in the preceding paragraph, the international community, and the States participating in those treaty régimes, had strong feelings about the risks created, and the result was a form of liability that Goldie prefers to call "absolute" rather than "strict". However, what seems certain is that there is no clear-cut division between the two types of liability, but rather many shades of strictness, ranging from "channelling" and the almost total lack of exceptions, to more benign forms, such as the simple reversal of the burden of proof or recourse to inferences which would work in favour of the plaintiff.[56] It goes

(*Footnote 47 continued.*)

> tivities) render the adjective 'absolute' something of a misnomer; hence the phrase 'strict liability' has come to be preferred in the usages of the common law. On the other hand, in this article the term 'absolute liability' has been revived, not in order to ignore Professor Winfield's important point as to accuracy in nomenclature, but to indicate that a more rigorous form of liability than that usually labelled "strict' is now before us, especially in the international arena."

("Concepts of strict and absolute liability . . .", *loc. cit.* (footnote 10 above), p. 194.)

[48] *Ibid.*, p. 196.

[49] United Nations, *Treaty Series*, vol. 956, p. 251, at p. 341.

[50] See *European Yearbook* (The Hague), vol. VIII (1961), p. 249, "Explanatory memorandum", para. 48; cited by Goldie, *loc. cit.* (footnote 10 above), p. 196.

[51] Goldie, *loc. cit.*, p. 197.

[52] *Ibid.*, pp. 193-204.

[53] United Nations, *Treaty Series*, vol. 961, p. 187.

[54] *Ibid.*, vol. 973, p. 3.

[55] Goldie, *loc. cit.*, pp. 202-204. The London Conference also had before it a draft Convention on Liability and Compensation in Connection with the Carriage of Noxious and Hazardous Substances by Sea, which, even more significantly, extended liability to other dangerous substances. See Final Act of the Conference with texts of instruments and resolutions adopted (IMO publication, Sales No. 456 85.15.E). The draft convention, issued by IMO as document LEG/CONF.6/3, is published in *International Legal Materials* (Washington, D.C.), vol. XXIII, No. 1 (January 1984), p. 150.

[56] For example, the Argentine Civil Code provides for several degrees of liability. Concerning liability for subordinates, in which risk is considered the key factor:

> ". . . if it can be proved that the accident was solely the fault of the victim, there shall be no grounds for compensation; if concurrent fault can be proved, compensation shall be partial. These solutions are not incompatible with the theory of created risk, because if it can be proved that it was the victim's fault, then it has been proved that the dangerous activity was not the sole cause of the accident; and if there was more than one cause, damage should be proportional in the light of those circumstances." (G. A. Borda, *Manual de obligaciones*, 4th ed. (Buenos Aires, Perrot, 1970), p. 484.)

In contrast, the liability of proprietors of hotels, inns and similar establishments, and that of captains of vessels and shipping agents for damage caused to the property of occupants of such establishments or to property being shipped, as well as liability for damage caused by objects thrown from a house, are subject to a stricter régime. Under article 1118 of the Civil Code, those in charge are not exonerated "even if they can prove that it was impossible for them to prevent the damage".

There are varying degrees of liability for damage caused by animals. Here, too, liability is considered to relate to the created risk even though, according to the traditional theory, it should be based on fault *in vigilando*, since it is often impossible to attribute any fault to the person held responsible (Borda, *op. cit.*, p. 500). The grounds for exoneration are: (*a*) if the animal was provoked by a third party (art. 1125); (*b*) if the animal broke loose or lost its way through no fault of its keeper (art. 1127), meaning that a third party was solely at fault; (*c*) *force majeure* or the victim's fault (art. 1128). In the case of a ferocious animal (art. 1129), on the other hand, neither *force*

without saying that these forms of absolute liability, which are so strict in attributing the consequences to the source State, would be appropriate only in conventions on specific and very dangerous activities, and not in a general régime such as the one under consideration here. Naturally, if, under the present articles, States conclude specific conventions on certain activities, they will choose the form of liability they deem most appropriate for the risk in question or the nature of that risk. But in the case of prevention of or reparation for damage when a régime is not already in place—the situation under consideration here—liability should be of the least strict form, or should be conditional. This seems to be the intent of the schematic outline, which establishes a régime in which liability is not very strict and is subject to the above-mentioned conditions, which seem appropriate provided a few amendments are made.

52. As already indicated, the concept of liability for risk, or strict liability, has aroused some strong opposition in the Commission and in the Sixth Committee of the General Assembly, for it has been said, perhaps rightly so, that it is not based on any norm of general international law. That, of course, is possible if one is thinking of a very basic general norm which can be applied to a specific case. But we have all the elements that are needed to present such liability almost as a consequence which derives from premises that can be borne out by pure logic. Those premises are at the cornerstone of the international legal order. There is actually no need to prove that that foundation also includes the concept of sovereignty, a concept to which we should refer if we wish to indicate what is the basis for the undeniable right of every State to refuse to tolerate any disruption of the use and enjoyment of its territory. From the theoretical point of view, a State has no obligation whatsoever to tolerate the slightest disruption of such use and enjoyment arising from the action of another State, or of persons in the territory of that other State. That is the principle in its purest form.

53. The other side of the coin, also stemming from the same principle of territorial sovereignty, is the so-called right of a State to conduct or authorize any action within its territory without giving any thought to the consequences for the territory of other States. Both premises are based on the idea of sovereignty, and neither is valid if formulated in that manner. It is common knowledge that sovereignty is, like the god Janus, two-faced. This is so because of an inherent contradiction: there is no true sovereignty when there is coexistence with other, equal entities. The idea of sovereignty is incompatible with the idea of multiplicity, since sovereignty refers to an entity on its own, not one among a whole set of equals. Sovereignty in absolute terms would exist in a universal empire, not in a community of nations such as ours. Both concepts are incompatible with international law and with mere factitious coexistence among equals. Thus the concept of absolute freedom of action of a State in its own territory, based on the premise that any activity authorized by the source State is valid, and that if it causes damage, that damage cannot be compensated for under international law, is as far removed from reality as the opposite assumption, namely that, since it is forbidden to cause damage because it would interfere with another State's use and enjoyment of its territory, any activity likely to create a risk is in principle prohibited and cannot be undertaken without the prior approval of the other States. Finally, if there is to be compensation for injury to aliens in the territory of a State, what can be said of injury inflicted upon persons living in their own country? The conclusion is clear. At the very root of the international legal order is sovereignty, conceived in the only way it can be, given the fact of international coexistence, namely in the context of interdependence. In turn, such coexistence is inconceivable unless the coexisting States are equal before the law. To disregard a State's right to undisturbed use and enjoyment of its territory (and therefore to refuse to be a party to a régime which regulates the rights and obligations of every State with respect to an activity), or to refuse to make reparation for damage caused, only upsets the balance, destroys the equality between States. The principle of equality before the law is very general, and if it is to be implemented, there must be more specific rules, which would be either primary or secondary depending on the nature of the topic. Therefore, proposing rules to implement it amounts to nothing more than the inevitable application of a legal technique to the situation.

54. A legal norm, then, cannot be based on an international "reality" which does not exist, since absolute independence, or absolute sovereignty, does not exist. In contrast, interdependence has always existed and is becoming more and more prevalent; it is also the basis in international law for liability for risk. As reflected in the schematic outline, there have been commendable efforts to base the obligation of reparation as well on the obligation of prevention. This is acceptable because prevention and reparation obviously form a "continuum", since both have similar purposes, i.e. to ensure that, in the conduct of an activity, the impact of the damage it causes—in other words, its negative aspect—is as minor as possible: in the first case, through preventive measures; in the second, through compensation which offsets the consequences as much as possible. As we have seen (chap. I, sect. B), the subjects of damage, its prevention and elimination are central to the present topic. It is therefore fair for an activity which is socially useful, but which creates a risk, to be subject to examination for the various interests in question to be considered, and for it to be allowed when the interests are balanced, so as to guard against any violation of the sovereign equality of States. The legal conceptualization of the matter may well be novel. Cowan, for example, sees the creation of risk by a dangerous activity as an expropriation of certain rights.[57] The fact is

majeure nor blamelessness of the keeper is an exonerating factor. There may be grounds for exoneration when it is the victim's own fault.

In the case of damage caused by objects, and further to the amendment to article 1113 and related articles of the Civil Code by Act No. 17.711 of 1968, a distinction is made according to whether or not the object itself was defective or dangerous. If it was not, the person who owns or has the object can be exonerated by proving he was not at fault; if it was, he has to prove that it was the fault of the victim or of a third party not accountable to him (*ibid.*, p. 505).

[57] Recalling Cowan's view, Goldie writes:

"Perhaps a principle may be seen as emerging whereby an enterprise which in the course of its (ultra-hazardous) business engenders

(*Continued on next page*)

that, if no remedy is provided for the damage they cause, these activities actually transfer the cost from the agent to the victim. Through the damage done to them, third parties would be paying the cost that should be charged to the enterprise. At the international level, other States would be paying for an activity beneficial to one particular State. It could justifiably be argued that reparation constitutes a veritable "internalization" of costs: costs which appear to be unjustly dissociated from an enterprise or activity are absorbed by it, become internalized.[58]

55. We have already seen that the requirement of shared expectations in the schematic outline is a moderating force, and that they might also serve to reinforce the obligation of reparation. Despite these positive aspects, further thought should be given to this concept. In the first place, expectations are something less than a right: they are a hope grounded in logic and in prior experience that something will happen, in this case that compensation will be made. Expectations undeniably play some role in law, and there have been instances in which courts have granted some form of compensation or satisfaction to those who had expectations with good reason.

56. The survey of State practice relevant to the present topic prepared by the Secretariat contains some concepts that are of interest here. For example, it states:

> This study has not ignored the difficulties of evaluating a particular instance as "evidence" of State practice. Different policies may motivate the conclusion of treaties or decisions. Some may be compromises or accommodations for extraneous reasons. But repeated instances of State practice, when they follow and promote similar policies, may create expectations about the authoritativeness of those policies in future behaviour. Even though some of the policies may not have been explicitly stated in connection with the relevant events, or may purposely and explicitly have been left undecided, continuous similar behaviour may lead to the creation of a customary norm. Whether or not the materials examined here are established as customary law, they demonstrate a trend in expectations and may contribute to the clarification of policies concerning some detailed principles of the international liability topic. Practice also demonstrates ways in which competing principles, such as "State sovereignty" and "domestic jurisdiction", are to be reconciled with the new norms.[59]

The appreciable quantity of practice examined, then, while it does not yet justify declaring the existence of customary norms in this area, does appear to have made it possible to find well-founded expectations, or at least a trend in those expectations.

57. The use of such cautious language demonstrates the difficulty of the present topic. If the conclusion of such a comprehensive survey is that it shows certain trends in the creation of expectations, it seems unreasonable to demand fulfilment of such a legally cumbersome requirement as proof of shared expectations. Cases may occur in which such expectations do arise easily, as when they are reflected in the record of negotiations between the parties. There may be other cases in which a shared regional expectation may be admitted by the judge or by another party to the negotiations, as appears to have happened in the examples referred to earlier concerning the installation of nuclear power plants and a refinery near the borders between various European countries.[60] But, in general, such evidence would be difficult to find. Perhaps we could take something from what was defined in the schematic outline as shared expectations, without necessarily accepting the entire concept. One aspect, referred to in section 4, paragraph 4 (*b*), seems to be important and should not fail to be taken into account: the existence of common legislative or other standards. Perhaps the key here lies in the standards of domestic law, whether embodied in legislation or in court decisions. Indeed, it seems very unfair for a State in whose territory or under whose control the activity in question takes place to provide for compensation if an accident occurs in its territory and yet refuse to make reparation for injury in the territory of another State. Nor does it appear very logical that an affected State which does not provide under its domestic law for compensation for such occurrences should be allowed to claim it when the injury originates in a neighbouring State. Specific norms would not be called for in this case because that would entail involvement in the complexities of interpreting the domestic law of States; it would be sufficient for there to be standards requiring compensation. This may provide the draft with sufficiently broad application,

(*Footnote 57 continued.*)

> the possibility of injuries to the members of the public who consume its wares or come into contact with its operations is liable for damage arising from the risk it creates. To [impose on] an enterprise [mere fault liability] would have the effect of enabling it to conduct its operations at the expense of others and to throw a valid operating cost onto the shoulders of its neighbours, or onto those of the ultimate consumers of its products or services. Professor Cowan has aptly called the emerging judicial policy which gives recovery under these conditions 'the policy of [viewing a] deliberately created risk as [an] expropriation'." (*Loc. cit.* (footnote 10 above), p. 185.)

[58] According to Fleming:

> "On its most prosaic level the problem may be illustrated by an oil-drilling incident in which the operator decided to 'blow out' a well and proceeded to do so in accordance with established procedures. These, however, were in no way proof against unknown and harmful substances being belched from the bowels of the earth, including the arsenic that was spewed over neighbouring pastures. Here the operator had resolved the invidious choice facing him by subordinating the interests of others to his own. The chances of something deleterious coming up might have been comparatively small though clearly recognized, and the more perplexing because they were irreducible by anything short of not proceeding with the blow-out. Yet the latter was necessary and accustomed procedure in oil-drilling—an industry of paramount economic importance which it would not be justifiable to impede for less than absolutely compelling reasons. To say that the operator's choice was negligent would imply that for him to proceed would be unlawful and could be enjoined by injunction. It is precisely to resolve this dilemma that the law may say to him: 'What you propose to do is not prohibited and we therefore cannot stop you. Yet if you proceed, you must be prepared to foot the bill should anything go wrong, as you hope it will not though well aware that it might.' " (J. G. Fleming, *An Introduction of the Law of Torts* (Oxford, Clarendon Press, 1967), pp. 158-159; cited by Goldie, *loc. cit.*, p. 187.)

On this basis, Goldie concludes that damage caused by certain activities, such as the ones considered here, should be regarded as having been caused without fault. But it should also be regarded as having entailed a compensatable expropriation of certain rights—which he calls "amenities", such as the right of each individual to pure water and clean air—and a breach of personal security, when harm occurs as a consequence of a lawful activity (*loc. cit.*, p. 189). Failure to compensate for this expropriation would be tantamount to unjust enrichment. In national law, these "amenities" should be viewed as both a personal and a property right. "In international law, analogies with both of these categories should be received and developed in terms of the territorial integrity of States . . . and their sovereign right to enjoy their natural resources." (*Ibid.*, p. 193.)

[59] *Yearbook . . . 1985*, vol. II (Part One)/Add.1, document A/CN.4/384, para. 10.

[60] See footnote 40 (*d*) above.

since the majority of States in the international community include such standards in their domestic law.[61]

58. Nevertheless, it would not be consistent with the nature of the damage-compensation system to put the burden of proof of the existence of such standards on the affected State. The following would be conceivable, then, as an exception: the source State might be exempted from compensation if it demonstrated that the relevant standards did not exist either in its domestic law or in that of the affected State. Another admissible exception might be the existence of a regional practice on the basis of which compensation would not be provided in such cases, or the practice of the affected State of not providing compensation in similar situations. It is important to emphasize the regional or individual nature of this type of negative expectation, since the exception must be specific. This would not be possible in the context of a general situation.

59. Some conventions provide for exceptions in specific cases of *force majeure* or fortuitous event (not all cases of *force majeure* and not all fortuitous events). As we have seen (para. 49 above), the exceptions in the 1960 Paris Convention on Third Party Liability in the Field of Nuclear Energy, as amended by its 1964 Additional Protocol, are very limited. The same criteria for exemption are recognized in article III, paragraph 2 (*a*), of the 1969 International Convention on Civil Liability for Oil Pollution Damage,[62] namely that the pollution damage "resulted from an act of war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional, inevitable and irresistible character". Under article 4, paragraph 2 (*a*), of the 1971 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage,[63] the Fund is allowed a similar exemption, which is limited, however, to acts of war, hostilities, civil war or insurrection. Article 3, paragraph 2 (*a*), of the draft Convention on Liability and Compensation in Connection with the Carriage of Noxious and Hazardous Substances by Sea[64] includes such criteria as "an act of war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional, inevitable and irresistible character".

60. Other conceivable exceptions, as stipulated in various international conventions[65] and in the domestic law of many countries, are negligence on the part of the victim and the action of third parties with intent to harm.

61. These exceptions, which mitigate the application of strict liability, might not be appropriate if the source State behaved in a way that was incompatible with its obligations to provide information and to negotiate, in so far as, in respect of the first obligation, it knew or should have known of the dangerous nature of the activity in question. In that regard, a liberal approach should be taken to the assessment of the evidence, as mentioned earlier in connection with the *Corfu Channel* case (see para. 36). This would be a way of encouraging States to comply with the obligations referred to, and it would seem fair, moreover, that any State which displays flagrant disregard for the rights and interests of neighbouring countries should not be allowed later to take shelter in exceptions.

62. As was seen earlier, the subject of prevention has been a focal point in the debates on the present topic, which have shown, in particular, that the majority is in favour of keeping the concern for prevention as an essential part of the draft.[66] With prevention, as with all aspects of the topic, the balance of interests comes into play as an important standard for measuring obligations. In cases where countries enter into ultimately successful negotiations aimed at establishing a régime for a hazardous activity, the role of the draft as set out in the schematic outline can be none other than to provide general guidelines for any treaty eventually signed. This is not the problem which requires our attention, then, except in relation to hazardous activities on which the parties have not yet come to an agreement.

63. The obligation contained in the final part of paragraph 8 of section 2, and of paragraph 4 of section 3, of the schematic outline is a duty of due diligence based, in the event of injury, on criteria relating to the state of technology in terms of the possibility of avoiding the injury in question, and the proportionality between the precautions to be required and the danger created by the activity, always bearing in mind that, if the potential injury actually occurs, reparation must be made as provided for in the outline. To obtain the desired result of avoiding the injury or eradicating its consequences as far as possible, it would theoretically be possible to combine a régime of responsibility for wrongful acts with a régime of liability for risk, as seems to be the case of the régime established by the arbitral tribunal in the *Trail Smelter* case.[67] That régime laid down a series of procedures to be followed by the industry in question in order to reduce pollution to the lowest possible acceptable level, as compatible with the profitability of the enterprise, given the current state of technology. Presumably, if the expected standard level of pollution exceeded the established limits, there would have to be an investigation; and if the latter revealed that the procedures had not been followed, the Canadian State might have engaged in wrongful conduct by, for example, neglecting its duties in respect of control over the smelter's activity. It seems that, in this example,

[61] Of interest in this regard is a study by M. H. Arsanjani entitled "No-fault liability from the perspective of the general principles of law" (to be published). It demonstrates that the principles of liability for risk, in its various categories and forms, have been accepted by a large number of countries, so much so that the author feels that the necessary conditions exist for considering it a general principle of law in the sense of Article 38 of the Statute of the ICJ:

> "Strict liability as a legal concept has now been accepted by most legal systems, especially those of technologically developed countries with more complex tort laws. . . . But it is evident that strict liability is a principle common to a sizeable number of countries belonging to different legal systems, that have particularly been confronted by activities relevant to the use of this principle. While States may differ as to the particular application of this principle, their understanding and formulation is substantially alike."

[62] See footnote 54 above.

[63] United Nations, *Treaty Series*, vol. 1110, p. 57.

[64] See footnote 55 above.

[65] See the Secretariat's survey of State practice, document A/CN.4/384 (see footnote 40 (*d*), *in fine* above), paras. 484-507.

[66] See footnote 13 above.

[67] See footnote 34 above.

even when substantial injury does not occur, it could be a question of the Canadian Government's obligations of conduct, as such obligations are defined in article 20 of part 1 of the draft articles on State responsibility:

Article 20. Breach of an international obligation requiring the adoption of a particular course of conduct

There is a breach by a State of an international obligation requiring it to adopt a particular course of conduct when the conduct of that State is not in conformity with that required of it by that obligation.[68]

Coexisting with this régime of State responsibility is a régime of liability for risk, for even if all the indicated procedures have been followed, when injury occurs as a result of what might be considered to be an accident, reparation must still be made.

64. The duty of due diligence appears to be of a different nature here: it is contingent upon the occurrence of injury. Only if injury occurs do the consequences of the breach come into play, and they do so within the régime of liability for risk, becoming a new obligation of compensation whose scope is modified (increased) by the incidence of the unfulfilled obligations. They would not be autonomous obligations, such as those of conduct, where mere non-compliance is already a source of unlawfulness, but obligations subsumed in the régime of liability for risk which depend for their functioning on the same condition: the occurrence of injury. A comparison might be made with the obligation to prevent a given event defined in article 23 of part 1 of the draft articles on State responsibility:

Article 23. Breach of an international obligation to prevent a given event

When the result required of a State by an international obligation is the prevention, by means of its own choice, of the occurrence of a given event, there is a breach of that obligation only if, by the conduct adopted, the State does not achieve that result.[69]

The procedures and precautions adopted are the exclusive concern of the State which is under the obligation, and only if the event to be prevented occurs does the comparison begin to be made between the preventive methods followed and those which should have been followed according to the rules of the game.

65. One major difference between prevention in the case of the obligation to prevent a given event and prevention in a régime of liability for risk is that the former may entail exemption from adverse consequences for the State which used reasonable means to prevent the result,[70] whereas, under the régime of liability for risk, compensation is always due, although the amount depends on all the factors mentioned above, including the exceptions. Thus it may be said that, in such a régime, obligations are not autonomous, but are subject to the same condition as reparation (i.e. the occurrence of injury), and that their effect, in any event, is to aggravate the legal and, at times, the material position of the source State. For between the obligation to prevent a given event and the obligation of reparation under a régime of liability for risk—even though it is not an entirely pure régime in the case of the schematic outline—there is the same difference as between secondary and primary obligations. In the case of secondary obligations, the occurrence of the event which was to be prevented gives rise to the possibility of wrongful conduct on the part of the State (that is to say, if the means taken to prevent the event were not reasonable or were predictably inadequate), whereas the other case involves not wrongfulness, but the fulfilment of an obligation which provided for reparation in its very formulation.

66. We therefore come to the conclusion that the obligation laid down at the end of section 2, paragraph 8, and of section 3, paragraph 4, forms part of a régime of prevention whose primary effects, which come into play only after injury has occurred, are to aggravate the legal and material position of the source State. But what happens with regard to the obligation to inform (sect. 2, paras. 1 and 2), and to negotiate on a régime (sect. 3, para. 1)? Is that a true obligation of prevention? It appears that to some extent it may be. Warning a State that may be affected, and informing it of the activity to be undertaken, its nature and its possible injurious effects, will help to prevent or minimize injury because of the unilateral precautions which the affected State may take. But the immediate purpose of this obligation is to prompt the parties to formulate a régime which establishes their rights and obligations in respect of the activity, a régime which takes into consideration the balancing of interests, the unilateral obligation of prevention, and the parties' obligation to co-ordinate their activities with regard to prevention and reparation. Although prevention, in this case, may be a prime concern in such régimes, it is not the only concern. This appears to be the main difference between prevention in this instance and prevention as discussed earlier, which consisted of unilateral measures to be taken by the source State to control the activity and to take into account the interests of those who might be affected.

67. Would this feature make the obligations under consideration autonomous? In other words, is it necessary to wait until injury has occurred for these

[68] *Yearbook . . . 1980*, vol. II (Part Two), p. 32.

[69] *Ibid.*

[70] In paragraph (6) of the commentary to article 23 of part 1 of the draft articles on State responsibility, the Commission stated:

". . . the occurrence of the event [the injury, in the present case] is not the only condition specifically stipulated for the existence of a breach of an international obligation requiring the State to achieve the result of preventing the occurrence of that event. In assuming obligations of this kind, States are not underwriting some kind of insurance to cover co-contracting States against the occurrence, whatever the conditions, of events of the kind contemplated, i.e. against the occurrence of the event even regardless of any material possibility of the State's preventing it from occurring in a given case. The State can obviously be required only to act in such a way that the possibility of the event is obstructed, i.e. to frustrate the occurrence of the event as far as lies within its power. Only when the event has occurred because the State has failed to prevent it by its conduct, and when the State is shown to have been capable of preventing it by different conduct, can the result required by the obligation be said not to have been achieved. . . . It is hardly necessary to add that the objective of each obligation and the more or less essential character of the prevention of this or that type of event must also be taken into account, once the event to be prevented has occurred, in comparing the conduct actually adopted by the State and the conduct that it might reasonably have been expected to adopt the prevent the event from occurring." (*Yearbook . . . 1978*, vol. II (Part Two), pp. 82-83.)

obligations to come into play, as in the preceding case? This question is very important, for obviously if the answer is in the affirmative, any conduct that is incompatible with such obligations would be wrongful, and it would be worth discussing whether or not they should be included in the topic. In the opinion of the Special Rapporteur, the obligations to inform and to negotiate are sufficiently well established in international law, and any breach of these obligations thus gives rise to wrongfulness. However, all things considered, that does not mean that they cannot be included in the draft.

68. At the beginning of this report (chap. I, sect. A), we examined the scope of the term "responsibility" in reference to the duties incumbent upon certain persons. It is clear that the duties to inform and to negotiate come within the framework of international liability for activities that are not prohibited. So we return to the complexities of the title of the topic and to the distinction between "acts" and "activities". The Special Rapporteur believes, as stated earlier (para. 29), that the French version is the right one and that it gives the topic its real scope. According to the terms of reference given it by the General Assembly, the Commission must deal with injurious consequences arising out of activities not prohibited by international law. Activities are shaped by complex and varied components which are so interrelated that they are almost indistinguishable from one another. Around a given activity there are countless individual acts which are intimately related to the activity. Some of these acts may well be wrongful, but that does not make the activity itself wrongful. Thus there is nothing to prevent the Commission, when it considers establishing a régime of liability for injurious consequences arising out of activities not prohibited by international law, from also considering acts—since they are inseparable from activities—which are wrongful because they are incompatible with established obligations (in the present case, the obligation to inform and negotiate). That, then, is the scope of the Commission's terms of reference and it will remain within them if it also includes in the treaty régime obligations concerning the establishment of a régime the breach of which gives rise to wrongfulness.

69. The critical analysis of the schematic outline shows that it appears to have been based on certain principles: those that are fundamental and necessary to the topic are correctly stated in general terms in section 5. However, some doubts persist regarding more specific aspects, which will become clearer as the topic develops and an attempt is made to express in articles the concepts contained in that section. In this task, which comes next, the Special Rapporteur hopes to be guided by the general thrust of those texts, and also to test them against the criterion of how they function within the resulting body of law, with State practice constantly in the background. The Special Rapporteur believes that this is the best way of arriving at a final formulation of the principles permeating the topic.