STATE RESPONSIBILITY AND INTERNATIONAL LIABILITY FOR INJURIOUS CONSEQUENCES OF ACTS NOT PROHIBITED BY INTERNATIONAL LAW: A NECESSARY DISTINCTION?

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I. INTRODUCTION

The topic "International Liability for the Injurious Consequences of Acts Not Prohibited by International Law" has been on the agenda of the International Law Commission since 1978. Despite adopting an ever narrower focus, it remains a difficult and controversial one. There are two major reasons for this.

First, at a theoretical level, it is not clear that the conceptual basis on which it is distinguished from State responsibility is either sound or necessary. Second, at a more practical level, it is questionable whether it represents a useful basis for codification and development of existing law and practice relating to environmental harm, the field in which the Commission has mainly located the topic.

From either perspective, it is liable to seem at best a questionable exercise in reconceptualising an existing body of law, or at worst, a dangerously retrograde step which may seriously weaken international efforts to secure agreement on effective principles of international environmental law. The purpose of this article is to explore the arguments for the new topic and to examine briefly the Commission's main proposals.

II. STATUS, ORIGINS AND SCOPE OF THE TOPIC

A. Present Status

The first special rapporteur presented his preliminary report to the Commission in 1980. Four more reports, a schematic outline and five

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draft articles\(^5\) followed. A new special rapporteur was appointed in 1985. He has delivered five reports\(^6\) and proposed revised draft articles, which make some significant changes in the original outline. It is clear that the Commission is still some distance from agreement on the content and form of its final conclusions, and some members of the United Nations Sixth Committee remain unconvinced of the topic's value or critical of certain aspects.\(^7\) Much work thus remains to be done.

B. The Topic's Origins

It began as an offshoot of the Commission's codification of the law of State responsibility. Discussions within the Commission in 1969 and 1973 indicated a belief that States might be responsible in international law not only for their wrongful acts—that is, for breaches of obligations owed to other States—but in certain cases also for the harmful consequences of their lawful activities.\(^8\) In the latter case it was thought that no breach of obligation, and therefore no wrongful act as defined by Article 3 of the draft articles on State responsibility\(^9\) would be attributable to the State. The first rapporteur, in his preliminary report, summarised the essence of the Commission's thinking on the matter: "The present title stems from the generic contrast between obligations that arise, respectively from wrongful acts and others from acts which international law does not prohibit ..."\(^10\)

Since these were not comparable situations, the Commission believed it was better to proceed with its codification of State responsibility by confining that topic to wrongful acts, and to leave responsibility for "lawful" activities aside for later consideration.\(^11\) It also decided to deal with the international criminal responsibility of States in a draft code of offences against the peace and security of mankind.\(^12\)

A threefold division within the generic concept of responsibility thus

\(^7\) See e.g. comments at the 6th Committee's 42nd Session (1987) by FRG (A/C6/42/SR.37); Canada (A/C6/42/SR.39); Bulgaria (A/C6/42/SR.41); GDR (A/C6/42/SR.43); and by the UK at the Committee's 43rd Session (2 Nov. 1988).
\(^8\) (1969) II Y.B.I.L.C. 229 et seq., paras.79 and 83; idem (1973) I 7–14.
\(^9\) Draft Articles on State Responsibility, Pt.1 (1980) II–2 Y.B.I.L.C. 30 et seq. Art.3 provides: "There is an internationally wrongful act of a State when: (a) conduct consisting of an action or omission is attributable to the State under International Law; and (b) that conduct constitutes a breach of an international obligation of the State."
emerges. What distinguishes criminal responsibility is that it alone deals with obligations owed not to States individually but to the international community as a whole. What distinguishes international liability from other forms of responsibility is that it does not presuppose wrongful conduct or breach of any obligation. The consequences ensuing from each of these forms of responsibility also differ significantly.

C. The Scope of the Topic

Responsibility for acts not in themselves wrongful was equated by some members of the Commission with "responsibility for risk", or "liability without fault". Activities in outer space, or involving nuclear energy or connected with the environment were given as examples which might support this form of responsibility. Professor Quentin-Baxter noted in his preliminary report that "the specific context in which the topic is discussed has always been that of environmental hazard", and there is no doubt that this is what Commission members had in mind initially.

When the matter reached its agenda as a separate item, however, the Commission avoided exclusive identification with environmental protection, and sought rules of a more general nature, which could also include forms of harm arising out of economic or monetary activities. This was reflected in the first draft of the rapporteur's schematic outline.

It quickly became apparent, however, that the precedents on which the Commission would have to rely came exclusively from the environmental field or dealt only with physical transboundary harm. They included the *Trail Smelter* and *Lac Lanoux Arbitrations*, the *Corfu...*
Channel Case,25 pollution liability treaties26 and the Law of the Sea Convention 1982. There was no comparable basis for establishing or codifying principles in the sphere of economic relations, and the rapporteur concluded that "there is no possibility of proceeding inductively from the evidence of State practice in the field of the physical uses of territory to the formulation of rules or guidelines in the economic field".27 With the agreement of the Commission and the Sixth Committee of the General Assembly, he therefore decided to confine future work to environmental matters,28 by concentrating on activities with physical transboundary consequences affecting the use or enjoyment of territory, or other areas within the control of States.29 The present rapporteur has made this environmental perspective explicit in his revised draft articles, presented to the Commission in 1988.30 Thus, in practice, the Commission's work on injurious consequences of acts not prohibited by international law has become an attempt to codify and develop aspects of international environmental law, overlapping in part with the law of State responsibility for breach of environmental obligations31 and in part with the Commission's simultaneous effort to codify the law relating to the non-navigational uses and environmental protection of international watercourses.32

III. AN OUTLINE OF THE SCHEME DEVELOPED BY THE SPECIAL RAPPORTEURS

A. The Schematic Outline

In his 1982 report, the first rapporteur summarised the elements of his proposed codification in a schematic outline.33 These subsequently formed the basis of his draft articles, after taking account of comments made by the Commission.34 The basis of this outline was the duty of the

29. (1984) II–2 Y.B.I.L.C. 77; draft Art.1 originally read: "The present articles apply with respect to activities and situations which are within the territory or control of a State and which give rise or may give rise to a physical consequence affecting the use or enjoyment of areas within the territory or control of any other State."
source State to avoid, minimise and repair, transboundary harm foreseeable as a risk associated with activities taking place in its territory or under its control.35

This obligation was described by the rapporteur as covering a “continuum of prevention and reparation”.36 Thus States were required to give information on activities which might foreseeably harm their neighbours and to indicate proposed remedies,37 to negotiate a regime acceptable to both parties, using fact-finding machinery where necessary,38 and to take or continue to take measures to protect the interests of other States.39 Failure to perform any of these obligations would not itself give rise to any right of action; in that sense non-performance would not be a wrongful act incurring State responsibility for breach of obligation.40 Where an activity caused injury, however, reparation would be due unless this was not in accordance with the “shared expectations of those states”,41 for example because the harm had long been tolerated.42

Emphasising the “lawful” character of the activities, neither the payment of compensation nor the prevention of harm was seen as an absolute obligation. Each was subject to a balancing process, in which numerous factors had to be accounted for, but especially the importance of the activity, its economic viability, the probability and seriousness of loss or injury.43 This balancing of each side’s interests was also to be the aim of any negotiations which took place to establish an acceptable regime. Thus the broad objective of the outline was to leave States as much freedom of choice as was compatible with adequate protection of others, to ensure that the innocent victim did not bear the whole of any loss, and that protective measures reflected regional and international standards, as well as the capability of the State in question.44

In sum, what the schematic outline sought was a world in which nothing was either prohibited or made obligatory and everything was negotiable.45 Underlying this was the perception that the sovereign

37. Schematic Outline, s.2.
38. Idem, ss.2 and 3.
39. Idem, s.3.
40. Idem, ss.2(8), 3(4). “The distinctive feature of the present topic is that no deviation from the rules it presents will engage the responsibility of the State for wrongfulness except ultimate failure, in case of loss or injury to make the reparation that may then be required” (1982) II—1 Y.B.I.L.C. 58, para.31.
41. Schematic Outline, s.4.
43. Schematic Outline, ss.3, 4 and 5.
44. Idem, s.5.
45. Handl (1985) Neths. Y.B.I.L. 49, 72, describes the outline as creating a “negotiable duty”.
equality of States precluded claims of absolute freedom of conduct and absolute freedom from harm, and that the burdens of socially desirable activities had to be shared equitably.\textsuperscript{46}

\section*{B. The Second Rapporteur's Approach and Draft Articles}

The second rapporteur has retained the topic's basic conceptual framework, and the original schematic outline,\textsuperscript{47} but his approach indicates significant changes in emphasis. The effect of these is:

1. to focus more clearly on strict liability for transboundary harm as a primary duty, stronger than a negotiable expectation;\textsuperscript{48} and
2. to acknowledge the co-existing responsibility of States for breach of obligations of notification, negotiation and prevention of harm.\textsuperscript{49}

Both changes further narrow the topic and its divergence from the regime of State responsibility for environmental obligations; they also make it easier to relate to State practice.\textsuperscript{50}

These points are reflected in the new draft articles, which are based on three guiding principles similar to those of the first rapporteur.\textsuperscript{51}

1. every State must have the maximum freedom of action within its territory compatible with respect for the sovereign equality of other States;
2. the protection of the rights and interests of other States requires the adoption of measures of prevention and reparation for injury;
3. the innocent victim should not be left to bear his own loss.

Thus the articles themselves continue to acknowledge the concept of sovereign equality, and they oblige States to take all reasonable measures to prevent or minimise transboundary injury and to co-oper-
ate with other States for this purpose. The 1989 draft introduces new articles dealing with assessment, notification, information and negotiation.

Where injury does occur, reparation must be negotiated according to criteria partly indicated in the commentary. Two points are clear. Liability will be strict, in the sense that it is founded on cause, not on lack of due diligence or breach of obligation. The source State will not be liable in full, so the victim will have to bear the resulting injury to some extent, a view consistent with existing strict liability conventions on oil pollution and nuclear risks.

The new draft articles also redefine their general scope by introducing thresholds of risk, which must be “appreciable”, and injury, which must be “appreciably detrimental”. Thus, some degree of probability and seriousness of harm is now implied, albeit imprecisely. On the one hand, the rapporteur has not confined himself to those activities which are “ultra-hazardous” in the sense that very serious harm on a large scale may occur; indeed his use of the term “appreciable injury” is drawn from the Commission’s work on international watercourses, where it was thought to mean merely harm that was more than perceptible but less than “serious” or “substantial”.

On the other hand, after initially confining the topic to risks involving only a greater than normal likelihood of injury, the rapporteur has now responded to criticism by including both “the low probability of very considerable (disastrous) transboundary injury and the high probability of minor appreciable injury” arising from “the use of things” whose physical properties, location or use make injury likely.

The implications of this redefinition of risk are important. The draft will now apply both to recurring discharges of moderate pollution, from a smelter, for example, where the risk may be high, and to large-scale but one-off accidents such as Chernobyl or Bhopal. In these cases the risk was probably not high, but the likelihood of serious harm if it did occur was very great. This looks like one sort of risk the rapporteur should be dealing with; it is certainly covered by existing oil pollution

57. See supra n.26.
60. UN Doc. idem, para.30.
and nuclear liability conventions,\textsuperscript{62} and its earlier apparent exclusion from the topic was remarkable.

One further limitation is introduced by the new draft articles. The source State will be liable only if it knew or had the means of knowing that an activity involving risk was being or would be carried on in its territory or under its protection or control.\textsuperscript{63} In itself this mirrors existing case law, notably the Corfu Channel Case.\textsuperscript{64} But it amplifies a point implicit in draft Articles 1 and 2, that substances or activities involving no foreseeable risk of harm carry no liability under these articles.\textsuperscript{65} This will absolve States from liability where, say, a chemical is used whose toxic properties are not at first appreciated and could not have been until the harm itself appeared, or where accidents occur in respect of a process not initially thought to be dangerous.\textsuperscript{66} Liability it seems might arise in such cases only once the risk is appreciated.\textsuperscript{67}

To summarise briefly, the present draft deals with a category of foreseeable environmental risks associated with activities which cause or may cause "appreciable" but not necessarily serious harm through the use of "things" whose properties or use make transboundary injury likely to occur, notwithstanding any precautions that have been taken. Compared with earlier drafts, this is now a prescription for dealing with a broader range of environmental injury; as we shall see, however, it remains open to question how far it represents an adequate basis for codification or development of new or existing law.

IV. THE TOPIC’S CONCEPTUAL VIABILITY: RELATIONS WITH STATE RESPONSIBILITY

Throughout the Commission’s work, references abound to the conceptual distinctions between State responsibility and international liability.\textsuperscript{68} It is worth summarising these, before considering the validity of separating the two topics.

A. "Responsibility" and "Liability"

Initially the Commission used these terms interchangeably, but it eventually adopted the view that "responsibility" was appropriate in cases

\textsuperscript{62} See supra n.26.
\textsuperscript{63} 1989 draft Arts.1, 3. The 1989 articles introduce a presumption of knowledge where there is no evidence to the contrary.
\textsuperscript{64} [1949] I.C.J. Rep. 3; see (1988) UN Doc. A/CN.4/413, paras.56 et seq.
\textsuperscript{65} UN Doc. idem, paras.24–27, 82–84.
\textsuperscript{66} Idem, para.27.
involving a breach of obligation, while "liability" should be used in connection with activities which are otherwise lawful or involve no wrongful acts. In this sense the terms have been used as convenient designations for the two topics. But this is possible only in English; French and Spanish terminology employs "responsabilité" and "responsabilidad" for both concepts. It is clear that there is little consensus on the Commission's choice of terminology or on its implications for the content of the topics under consideration.

In treaties and judicial practice, the terms are used in several senses. The most common use of "responsibility" is to refer to the obligations of States, and "liability" to refer to the consequences which ensue from a breach of those obligations. This interpretation is found in the Law of the Sea Convention, and it was adopted by the International Court in the Namibia Advisory Opinion. Dupuy summarises the point: "international liability is the obligation of a State guilty of an unlawful act which has caused damage to another State to make good such damage". This does not correspond to the Commission's usage but reflects instead the distinction drawn by the Commission in its work on State responsibility between primary and secondary obligations, considered below.

A second possible use of the term "liability" refers to obligations in private law, while "responsibility" distinguishes the obligations of States in public international law. This sense of "liability" can be found in liability treaties dealing with oil pollution and nuclear damage, which are concerned with ensuring that private operators, or States qua operators, are held strictly liable in national law for the damage they cause in other States. Once again, this is not how the Commission is now using these terms.

The Commission's present approach is to give extended parallel meanings to both terms. Thus Rapporteur Quentin-Baxter described "liability" in terms comparable to "responsibility": "It is not used to

71. See Goldie (1985) XVI Neths. Y.B.I.L. 175, 180. See also OECD, Legal Aspects of Transfrontier Pollution (1977), p.306, where the same author notes the use of these terms in common law systems.
72. Arts.139, 235, 263. See Goldie, ibid; but compare Pinto, idem, pp.28-31, and Quentin-Baxter (1984) II-1 Y.B.I.L.C. 170. Pinto notes the use of "liability" in this Convention as part of a "process of steering liability in the direction of the actor, and away from the state". Quentin-Baxter concludes that "liability, no less than 'responsibility', refers in this Convention to the content of a primary obligation". Given the context of these articles, this interpretation is hard to accept.
74. In Bothe, op. cit. supra n.31, at p.364.
75. See supra n.26. See also Pinto, loc. cit supra n.72.
mean only the consequences of an obligation, but rather to mean the obligation itself, which—like 'responsibility'—includes its consequences."77

Adopting this broad characterisation, Rapporteur Barboza has taken "liability" to cover not only the obligation of reparation, but also the whole range of obligations of notification, information, consultation and harm prevention with which the topic is concerned.78 Thus, he concludes, "the word 'liability' is taken in its two meanings, covering all its implications: the host of duties of a person in society in relation to certain conduct and the obligation of reparation which arises as a consequence of injury".79

One concludes from this survey that the adoption of "liability" to designate the present topic is redundant, for as now reinterpreted there must be real doubt whether the Commission could not equally well employ the term "responsibility" throughout.

B. Primary and Secondary Obligations

In State responsibility, the duty of reparation is often termed a secondary obligation, that is, it is consequential on breach of a primary obligation, for example to respect the rights of aliens.80 In its codification of State responsibility, the Commission is not concerned with the substantive primary obligations of States as such but with the much more modest task of defining what rights and remedies arise when these obligations are not performed, and when they may be invoked against a State.

In the Commission's liability topic, reparation is itself a primary obligation,81 consequential on the causation of harm, and not based on any theory of breach of obligation. Similarly, in the schematic outline, the requirements of notification, consultation and prevention of harm are also seen as primary obligations.82 The designation of obligations as either primary or secondary is not itself important, for it is merely a helpful way of expressing a distinction between the content of rules of law and the results of their breach referred to supra in section IV.A.

But this designation does reflect a real difference between the Com-

79. Ibid. See also (1989) UN Doc.A/CN.4/423, para.15: "The title of our topic then means: 'obligations with regard to the injurious consequences of activities not prohibited by international law'."
mission's two topics, in that "liability" is conceived in broader terms than the codification of State responsibility. The inclusion of obligations of notification, consultation and prevention of harm within the concept of "liability" makes this point apparent, for there is no comparable attempt to codify substantive obligations in the context of State responsibility, that having been abandoned when the Commission decided not to proceed with a codification of the law relating to the treatment of aliens.  

Codifying primary environmental obligations in this way raises the question whether their breach entails a "secondary" obligation of responsibility; whether in other words the Commission's liability topic does not inevitably lead straight into State responsibility. As we saw earlier, the two rapporteurs have differed on this point in respect of the obligations of notification, consultation and prevention.  

Rapporteur Quentin-Baxter's argument that such "primary" obligations may exist with no consequential responsibility for breach is certainly a novel one. It is difficult to reconcile with the case law relied on in this context, such as *Corfu Channel*, *Trail Smelter* or *Lac Lanoux*, in each of which responsibility for breach appears the more orthodox conclusion.

Rapporteur Barboza's departure from his predecessor's characterisation of primary obligations and his acknowledgement of orthodox responsibility for their breach, marks a welcome return to a more convincing thesis, and avoids implausible inflation of the significance of a global distinction between primary and secondary obligations. But this also makes the title of the topic even more misleading, and explains his efforts to create a procrustean definition of "liability", for we are now dealing with primary environmental obligations, well established in customary law, in terms wholly consistent with the Commission's conception of responsibility for wrongful acts. What is unsettling about this exercise, however, is the attempt to codify such a code of basic obligations only in terms appropriate to causal liability for harm. Even allowing for the rapporteur's expansion of the concept of risk, the result may be either unacceptably narrow in its formulation of primary environmental obligations, or unacceptably wide, in its imposition of causal liability in all cases.  

83. (1963) II Y.B.I.L.C. 227; idem (1969) II 125, 139. See also idem (1983) II-1 212, para.40, where the rapporteur notes the parallel between his schematic outline and the obligations relating to the treatment of aliens.

84. See supra nn.40 and 49.

85. See supra n.49.

C. "Acts not Prohibited by International Law"

This phraseology reveals further significant differences between the Commission's conception of the liability topic and State responsibility. Whereas the latter focuses on "wrongful acts" (including omissions)—that is, on the State's behaviour in breach of obligation—87 the former is concerned with "activities", 88 such as running a smelter, launching a spacecraft or operating a nuclear power plant. The present rapporteur accepts that the use of the word "acts" in the English title is for this reason inappropriate, and prefers the French title, which refers to "activités", 89 although his reports have continued to talk interchangeably of "acts" and "activities", while stressing that his concept of liability does not turn on the notion of an "act of the State". 90

The words "not prohibited by international law" were originally adopted to avoid having to decide questions of wrongfulness, and "to make it clear that the scope of this topic is not confined to lawful acts". 91 Thus, what is intended is a regime which overlaps with circumstances giving rise to wrongfulness, and for that reason the Commission chose not to talk simply of "lawful acts". 92

Nevertheless, it is clear that what fundamentally is thought to divide this topic from State responsibility is the belief that the latter, being concerned with wrongfulness, entails prohibition. What is never entirely clear, however, and a source of some confusion, is what it is the Commission believes would be prohibited. Thus Rapporteur Quentin-Baxter expresses one view: "If all transboundary harm were wrongful, there would be no need for this topic. Every activity that caused or threatened such harm would be prohibited, except with the consent of the States whose interest was affected." 93 Here it is the activity—the operation of the nuclear plant, or smelter, or oil tanker, which is forbidden. At other points however, he puts the matter differently: "No one doubts the essential message of the Trial Smelter and Corfu Channel cases and the Stockholm Declaration, that transboundary harm, even if unintended, can be wrongful and therefore prohibited." 94 Here it is the act of causing harm, rather than the activity producing the harm, which is prohibited.

Both interpretations see the regime of State responsibility as placing serious inhibitions on the conduct of socially beneficial activities,
because the consequences attributed to this regime are so extreme, particularly if it is the activity itself which is prohibited. In contrast, the "liability" topic is thought to avoid prohibition, and to "reconcile rather than inhibit, activities which are predominantly beneficial",\(^{95}\) because it assumes their conduct is not wrongful,\(^{96}\) and because it allows for a balancing of interests, as we saw earlier.\(^{97}\) This view of the outcome is reflected in the distinct character which the rapporteur attributes to reparation in the case of non-prohibited activities.\(^{98}\)

The cogency of the Commission's analysis on this distinction between wrongful and lawful activities has been doubted. Professor Brownlie describes it as "fundamentally misconceived",\(^{99}\) and observes that much of State responsibility—including the Trail Smelter and Corfu Channel cases on which the rapporteur relies—is concerned with categories of lawful activities which have caused harm. He notes that "it is the content of the relevant rules which is critical, and a global distinction between lawful and unlawful activities is useless", and unsupported by State practice or international jurisprudence.\(^{100}\) Akehurst makes a similar point, and says the Commission's thinking is based on a misunderstanding.\(^{101}\)

Neither rapporteur denied, however, that causing environmental harm could be a wrongful act incurring responsibility.\(^{102}\) What is at issue is the need for the Commission's alternative analysis. The weakness in its argument lies in assuming that prohibition is the inevitable result of responsibility for wrongful acts, and that a balancing of the benefits and burdens of socially useful activities is not possible in this context. It is not clear that this is correct; much will depend on the nature of reparation, its relationship to the content of the primary obligation which has been broken, and the availability of prohibitory remedies in international law to forestall anticipated or continuing breaches of obligation. On these questions, which are considered below in the context

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96. (1973) I Y.B.I.L.C. 7–10, II 169, paras.38–39. Rapporteur Quentin-Baxter also speaks of the topic being concerned with activities "on the way to being prohibited": idem (1983) II–1 206, para.20. This compounds the confusion.
97. Supra section III.A, nn.43 and 44; Schematic Outline, ss.4 and 5. Rapporteur Barboza (1986) II–1 Y.B.I.L.C. 152, para.31, takes the same view: "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".
98. See infra section IV.F.
99. Brownlie, loc. cit. supra n.86.
100. Ibid.
of reparation, the position may be more complex than the Commission allows.

But even if the Commission is correct in believing that wrongfulness entails prohibition, it cannot be correct that it is the activity of operating a smelter, a nuclear plant and so on which is prohibited. At most it is the harm these activities cause which is prohibited. This is the perspective from which the tribunal in Trail Smelter approached the issues: its final order required the smelter to refrain from causing damage through fumes, and to that end it prescribed a control regime; nowhere did it suggest that the operation of a smelter itself is prohibited or wrongfull. While there are undoubtedly “activities” prohibited by international law, or treaty—such as atmospheric nuclear testing, perhaps—that is not true of most of the environmentally harmful activities the Commission is concerned with.

Thus a major part of the Commission’s original reasoning in distinguishing this topic from State responsibility looks beset with conceptual and terminological confusion, and rests on dubious assumptions about prohibition as an inevitable consequence of wrongfulness.

D. Allocation of Costs and Burdens: Strict Liability

Where there is no breach of obligation, there is of course no State responsibility. This point is as fundamental as the last to the Commission’s conception of the need for an alternative regime. By focusing on breach of obligation, State responsibility, in its view, shifts the costs and burdens of beneficial but harmful activities too readily to innocent third parties. Where liability is instead imposed strictly, that is, on proof of cause alone, the cost of harm is more likely to remain with the polluter, an important advantage of the new regime.

The force of this point depends entirely on the unsettled question whether environmental obligations concerning harm are broken only if the State has failed to meet a standard of due care or diligent control of the activity in question: that it is in that sense at fault. Despite some scholarly support for the existence of a strict liability standard in inter-

103. Section IV.F.
104. Akhurst, loc. cit. supra n.101. Rapporteur Barboza (1986) II–1 Y.B.I.L.C. 161, para.68 acknowledges this point: “Around a given activity there are countless individual acts which are intimately related to the activity. Some of these acts may be wrongful, but that does not make the activity itself wrongful.”
national law,\textsuperscript{109} and its adoption in a few treaties,\textsuperscript{110} there is much force in Dupuy's conclusion that due diligence reflects the actual practice of States and the present state of customary law much more closely, at least in environmental matters, than any form of strict or absolute liability, however desirable.\textsuperscript{111}

If this is correct, the Commission is right to believe that there is room for considering the scope and extension of a strict liability principle for environmental harm.\textsuperscript{112} Founding international environmental responsibility on a due diligence standard does in practice shift much of the risk of major environmental accidents, such as Chernobyl, on to other States, particularly if that risk, although foreseeable, is not reasonably avoidable.\textsuperscript{113} But as Brownlie and others have pointed out, a stricter standard can be contained within the notion of objective responsibility, based on proof of a causal connection alone.\textsuperscript{114} Much will depend on whether the primary obligation of States to prevent harm is itself defined in absolute or qualified terms: is it an obligation of diligent conduct, or an absolute duty to prevent harm?

Whether one describes objective responsibility as liability without breach of obligation or as an obligation defined in terms which do not require fault, \textit{dolus} or \textit{culpa}, is immaterial. What matters is the possibility of achieving the Commission's objective of avoiding undue reliance on a due diligence standard for environmental obligations without embarking on a radical attempt to reconceptualise existing law.

Any such objective must of course identify carefully what situations it is intended to cover; as we saw earlier, the present rapporteur has


113. (1986) II-1 Y.B.I.L.C. 157, para.54. For the idea that risk creation amounts to an expropriation of rights, see Barboza, \textit{ibid}, and Goldie, \textit{op. cit. supra} n.110, at p.248.

expanded the topic to include the sort of serious accident for which the doctrines of objective responsibility or strict liability are particularly suited.\textsuperscript{115} This is a particularly significant development, for the successful articulation of criteria for adopting a general principle of strict liability in environmental cases would be an invaluable contribution to the subject, as uncertainty surrounding liability for the Chernobyl accident amply shows.\textsuperscript{116} The Commission’s view of strict liability is now that it should apply in all cases of appreciable environmental injury; in effect responsibility for a failure of due diligence and causal liability for the fact of harm would in many cases co-exist.\textsuperscript{117} If this is generally accepted by States it will radically alter Dupuy’s conclusion cited earlier, and it represents perhaps the most potentially valuable element in the Commission’s work.

\section*{E. The Importance of Harm or Injury}

In its codification of State responsibility, the Commission has taken the somewhat controversial view that harm or injury to another State is not a necessary element in the definition of a "wrongful act".\textsuperscript{118} Thus a wrongful act can, for example, consist of a breach of sovereignty\textsuperscript{119} or breach of treaty,\textsuperscript{120} where there is at most a violation of the legal rights of another State.

In contrast to cases of State responsibility, the Commission’s view of "liability" is that the primary obligation of reparation arises only where there is harm or injury, and that this is an essential feature of the distinction between the two topics.\textsuperscript{121} While this may be true in general terms, it misses the point, raised in the \textit{Nuclear Tests} cases,\textsuperscript{122} that there can be specific obligations whose content is defined in terms requiring harm or

injury; what is in issue is thus the particular obligation, and general propositions regarding the absence of harm or injury in the concept of State responsibility may therefore be unhelpful or misleading. This particularly applies in the case of environmental obligations: the Trail Smelter arbitration is, for example, more usually seen as a case of responsibility for breach of an obligation not to cause harm, in which proof of material damage is a precondition of responsibility.\footnote{Aroechaga, \textit{idem}, p.268; Handl, \textit{idem}, p.50. Both rapporteurs view this case as an example of responsibility for wrongfulness and also of liability for a lawful activity causing harm: (1981) II–1 Y.B.I.L.C. 117, para.58; \textit{idem} (1986) II–1 159, para.63.\footnote{(1987) UN Doc.A/CN.4/405, p.17, paras.55–57; (1983) II–1 Y.B.I.L.C. 212, paras.40–43.}}

\section*{F. The Scope of Reparation}


1. discontinue the act;
2. apply national legal remedies;
3. re-establish the situation existing before the act or, to the extent that this is impossible, pay corresponding compensation;
4. provide guarantees against repetition.

The special rapporteur summarises the effect of these requirements: "the law attempts to restore, as far as possible, the situation which existed prior to the failure to fulfil the obligation in question, to erase in some way the consequences of the wrongful act".\footnote{Gray, \textit{Judicial Remedies in International Law} (1987), p.223.} Additionally, the injured State may enjoy rights of reprisal and suspension of its legal obligations towards the offending State.\footnote{(1981) II–1 Y.B.I.L.C. 115, para.54; \textit{idem} (1983) II–1 212–213.} If the wrongful act is also an international crime other States will incur a duty of non-recognition.\footnote{\textit{Namibia Advisory Opinion} [1971] I.C.J. Rep. 16; Art.14, Draft Arts, \textit{idem}.} "Reparation", used in the context of international liability, has been given a more restricted meaning, seen by some commentators as "a marked departure from the traditional rules".\footnote{\textit{Namibia Advisory Opinion} [1971] I.C.J. Rep. 16; Art.14, Draft Arts, \textit{idem}.} Professor Quentin-Baxter viewed the matter as one of trying to ensure an acceptable balance of interests between competing sovereignties;\footnote{\textit{Chorzow Factory Case} (Merits) [1928] P.C.I.J. Rep. Sers.A, No.17, pp.47–48.} thus his schematic outline, as we saw earlier, envisaged only the negotiation of a
regime of control, and the payment of compensation if in accordance with the shared expectation of the parties. 131 There was no absolute obligation to discontinue the harmful activity, to restore the status quo ante or to compensate fully for the harm done.

Professor Barboza’s draft articles more clearly establish an obligation to take reasonable measures to prevent or minimise damage, and to make reparation for appreciable harm, 132 but he too believes that the balance of interests process will set a ceiling on compensation, and ensure that the consequences of a “lawful” activity are distinctly less extensive than those attaching to wrongful conduct. 133 Like Professor Quentin-Baxter, he does not envisage prohibition, but a negotiated solution taking account of factors referred to in the schematic outline.

As we have already seen, 134 it is not clear that the underlying assumption here, which sees prohibition as the outcome of State responsibility, is correct. Reparation in the law of State responsibility is not an inflexible concept: as Professor Brownlie points out, “the interaction of substantive law and issues of reparation should be stressed”. 135 There is no reason in principle why an international tribunal should not approach the question of responsibility for continuance of environmentally harmful activity by seeking to balance the interests of both States, using the remedies at its disposal to achieve this; it does not inevitably follow, as Professor Quentin-Baxter believed, that State responsibility is a system in which “the winner would take all”. 136 This was not the outcome of the Trail Smelter arbitration, 137 although as an arbitration on agreed terms the authority of that award on this point may be open to question, and in any case operation of the smelter without further harm was possible. Nevertheless, the essence of reparation in this case was the duty of Canada to exercise due diligence in the control and regulation of the future operation of the smelter, the acceptance of an obligation to compensate for future damage notwithstanding maintenance of that regime, and the payment of damages for harm arising from its failure to control a known risk in the past. The only certainty in the outcome of the case was the statement of principle that Canada had no right to cause serious injury to the United States but even then its right to operate the smelter

131. Supra section II.A; Schematic Outline, ss.5 and 6.
CN.4/423, para.50.
134. Supra section IV.C.
135. Brownlie, op. cit. supra n.86, at p.234; see also Combacau and Alland (1985) XVI
Neths. Y.B.I.L. 81, 108 who argue that “it is above all the consideration of ‘content’ of the
primary obligation in its widest meaning, which explains why a certain consequence is
attached specifically and ab initio to its breach”.
was maintained. Thus, despite admission on all sides of a breach of obligation, a balance of interests was achieved, and indeed formed the main object of the arbitration.  

A balance of interests can also come more radically by manipulating the threshold at which harm becomes wrongful, holding the State responsible not when the harm is serious or significant, but only when it constitutes an unreasonable and inequitable use of its territory or shared resource.  

Here the balance of interests ceases to be an aspect of any duty of reparation and instead takes on the characteristics of a primary obligation: in effect it turns environmental obligations into a duty not to abuse rights. This would leave even more of the cost of environmental injury to fall on innocent third parties than a due diligence standard of responsibility. In cases falling below the threshold of unreasonable use, a new theoretical basis for reparation might then be called for, if it was desired to shift the burden of loss back to the polluter.

There are two objections to this analysis of the balance of interests process, however. The first is that while this form of equitable balancing has typically been employed to determine questions concerning the use of international watercourses and other shared resources, including rights in common areas such as the high seas, it is questionable whether it can or should be applied in deciding the point at which serious pollution injury to other States constitutes a breach of obligation.  

Despite attempts to do so, it is unconvincing to interpret Trail Smelter in this way; the approach taken by the tribunal there was more consistent with treating serious injury, not inequitable use, as the

142. Handl, *op. cit. supra n.111* concludes that, for international watercourses "unreasonable use" has been the main test of State responsibility for harm to other States. At (1986) 26 N.R.J. 405 he notes the scarcity of State practice on the point and the evidence of international opposition. The "unreasonable use" approach was not followed in Art.9 of the ILC’s 1984 Draft Arts. on Non-Navigational Uses of International Watercourses, but the Special Rapporteur for that topic concluded in 1986 that this article "should be drafted in such a way as to bring it into conformity with the article or articles setting forth the principle of equitable utilisation" (1986) II-1 Y.B.I.L.C. 133, para.180. Some support for linking the obligation to prevent substantial injury to reasonable and equitable utilisation also comes from the 1982 ILA Montreal Rules on International Law Applicable to Transfrontier Pollution, Art.3.
threshold of responsibility. This Relevant United Nations declarations, and Article 194 of the Law of the Sea Convention consistently affirm that States must not cause significant harm or damage to others, without making this dependent on equitable factors.

The second objection is that once one constructs, or concedes the existence of an obligation to prevent appreciable harm falling below the threshold of inequitable use, which is the position taken by Article 8 of the Commission's draft articles in the present topic, and accepts also that failure to meet that obligation entails responsibility for resulting damage, the inequitable use test becomes redundant. In such a case it can no longer be, even hypothetically, the threshold of wrongfulness. While this does not defeat the application of the Commission's liability regime, it does mean that we are back where we started, viewing a balance of interests as part of the process of determining reparation for breach of obligation, not as part of the process of determining when breach of obligation occurs. Thus, we are left with the balance of interests as a major argument in favour of the present topic only in terms of its impact on reparation.

G. Attribution to the State

The Commission's draft articles on State responsibility make States responsible only for conduct which can be attributed to them in international law. This involves determining what constitutes an act of the State for this purpose, and excludes the conduct of persons not acting on its behalf.

In some cases, however, the conduct of private persons or groups, although not directly attributable, may indicate a failure by the State to

144. The Arbitral Tribunal held simply that no State had the right to cause serious injury to another. It was only in fashioning a regime of control for the future operation of the smelter that the Tribunal sought a balance of interests, i.e. at the remedial or reparation stage of the proceedings: see 3 A.J.I.L. 712-717. See also Handl, op. cit. supra n.142, at p.422. "the tribunal omitted any suggestion that an inequitable use of the shared resource established upon a balancing of interests was a prerequisite, additional to a finding of significant transboundary harm, before the state's international responsibility could be said to be engaged", and Read, op. cit. supra n.137.
146. Art.3, Draft Arts. on State Responsibility, Pt.1; Ago, op. cit. supra n.13, at pp.214-224.
perform adequately its own obligations of regulation, protection or control. Here responsibility arises because of the State’s own actions or omissions.\footnote{Brownlie, op. cit. supra n.86, at chap.8.} Examples of such cases are found in the Trail Smelter arbitration, where the smelter was privately owned, and in the Tehran Hostages case,\footnote{[1980]1.C.J. Rep. 3.} where the embassy was initially seized by students.

Draft Article 3 on international liability was initially headed “attribution”, but used that term in a very different sense from that employed in the articles on State responsibility. In its 1989 form it provides:

The State of origin shall have the obligations established by the present articles, provided that it knew or had means of knowing that an activity referred to in article 1 was being, or was about to be, carried out in its territory or in other places under its jurisdiction or control.

Neither this nor earlier versions have anything in common with the concept of “attribution” as it is usually understood in the law of State responsibility. But Article 3 does parallel exactly the role played by “control” and “knowledge” in cases involving responsibility arising from the use of territory.\footnote{Brownlie, op. cit. supra n.86, at chap.10.} Thus, in the Namibia Advisory Opinion the International Court observed that “physical control of a territory, and not sovereignty or legitimacy of title, is the basis of state liability for acts affecting other states”.\footnote{[1971]1.C.J. Rep. 16, para.118.} And in the Corfu Channel case the Court referred to “every state’s obligation not to allow knowingly its territory to be used for acts contrary to the rights of other states”.\footnote{[1959]1.C.J. Rep. 4, 22.} Knowledge of the minelaying and consequent danger to shipping was regarded by the Court as an essential element of Albania’s responsibility for the damage done to British warships in this case.

Use of the term “attribution” to describe these elements of the State’s primary obligations in the draft liability articles was unobjectionable so long as it was understood that this had nothing to do with “attribution” in State responsibility, where the Commission has carefully avoided the term in comparable situations. Such use did invite confusion, however, and in 1989 the Commission dropped the term “attribution” from the heading of Article 3 and used instead “assignment of obligations”. However, this does little more than give a new label to existing principles.

V. VIABILITY AND NECESSITY: CONCLUSIONS

The apparent distinctions which the Commission has drawn between State responsibility and international liability are in many cases implau-
sible. It is difficult to resist the conclusion that much of what the Com-
mmission is now proposing could be conceptually contained within a
regime of obligations whose breach entailed State responsibility. “Liabil-
ity”, like “responsibility”, is now used by the Commission to refer to
obligations and the consequences of their breach; the primary obli-
gations of notification, consultation and harm prevention are acknow-
ledged to exist in customary law and to carry responsibility for breach;
the notion that activities incurring responsibility for harm are unlawful
and prohibited can be seen as misconceived and oversimplified; and the
elements of harm, knowledge and control are all drawn directly from
comparable use in a State responsibility context. The only elements of
the topic which merit the Commission’s efforts to construct a separate
regime are the concept of strict liability for environmental harm and the
balance of interests sought by the rapporteurs. But even these could be
dealt with within the concept of State responsibility, provided it is clear
what the substantive environmental obligations of States are.

The rapporteurs have always accepted the co-existence of their pro-
posed regime with that of State responsibility; the more one examines
the elements which are supposed to differentiate them, however, the
weaker these become. If this is the case, it would have been wiser to
concentrate not on the topic as originally conceived, but to approach it
from the altogether more practical and less theoretically questionable
standpoint of codifying and developing a set of basic environmental
obligations for States. This is a task in which other organisations, such as
the United Nations Environment Programme or the International Mar-
time Organisation, or States themselves, have been engaged with much
greater success.

Treaties already define in many specific situations what the environ-
mental obligations of States are. In some cases the measures to be taken
are precisely stated, as for example in the 1973 International Maritime
Organisation’s Marine Pollution Convention, which sets detailed
standards for the control of pollution from ships. In other cases, a looser
standard is employed, requiring States only to “endeavour” to control a
particular problem or to take “all reasonable measures” or “all neces-

156. E.g. 1979 Geneva Convention on Long Range Transboundary Air Pollution; Law
of the Sea Convention 1982, Arts.207, 212.
standard by which to judge the responsibility of States for environmental harm. It has the added advantage that its definition in treaty practice can be related to the needs of each case, and offer clear evidence of the support of States. What is now needed is the elevation of this standard into general customary law: in effect a globalisation of environmental obligations comparable to what has been achieved for the marine environment by the Law of the Sea Convention and related treaties. This would provide both an adequate basis for responsibility and for the obligation of harm prevention sought by Rapporteurs Quentin-Baxter and Barboza. After some hesitation, the Commission's 1989 articles do appear to be heading in this direction. The rapporteur has noted the need to give "an equally important role to the concepts of harm and risk", and his draft articles on prevention, assessment, notification and negotiation reflect contemporary developments in international environmental law and practice. The only serious objection to this course is that it may still be premature for the Commission to undertake such an ambitious task of codification and development, and it may be the wrong forum for a matter of such political sensitivity. Nevertheless the Legal Principles and Recommendations of the World Commission on Environment and Development already exist as one possible model and it has its own work on international watercourses on which to draw.

There is still a case, however, for looking at the adoption of a stricter standard of responsibility for damage in some situations. A few treaties, such as the 1972 Convention on International Liability for Damage Caused by Space Objects, have already done this. But it is not yet a widely accepted standard. There remains doubt over whether it applies to all cases of a high risk of serious damage, unforeseeable accidents or harm, or only to those cases provided for by treaty. The Chernobyl accident has exposed the lack of agreement on these issues, and it is now necessary to address generally the question when it is appropriate and acceptable to expect States to make good losses inflicted without lack of due diligence. This is not a task which necessitates extended theoretical analysis; it is more a matter of deciding whether a general principle is possible, how it should be defined, and if generality is too ambitious, to what specific activities it should be applied.

Finally, while a balancing of interests in environmental disputes is probably a necessary and inevitable condition of progress in the regulation of the global environment, this is also not an issue which needs a new conceptual framework for the subject. It is better tackled in the

160. See supra nn.109 and 111.
context of developing appropriate remedies for the breach of environmental obligations, including those breaches which pose only a risk of possible harm. The role of injunctions and declarations in international law needs careful reconsideration for this purpose, for while there is no difficulty postulating an obligation of harm prevention based on standards of diligent conduct such as the MARPOL Convention, there remains great uncertainty, following the Nuclear Tests Cases, over the existence of adequate preventive or pre-emptive remedies to enforce such standards.

Thus, the Commission's present approach to the topic of international liability can best be summarised as a combination of two elements. On the one hand, it is busy elaborating a set of substantive and procedural primary obligations aimed at protecting the environment and other States from serious harm. These obligations draw largely on existing legal developments and precedents. On the other hand, the Commission's principle of causal liability provides a largely novel basis for reparation complementing State responsibility or operating in cases where responsibility does not arise. As such, it is only questionably supported by State practice and existing law.

The assumption that such a principle is desirable is not itself in question here. Rather, the main problems concerning the Commission are to identify its proper scope and its conceptual basis. There is some reason to believe that it has begun to answer the first of these questions satisfactorily, and to move away from earlier concentration on conceptual distinctions between the present topic and the principle of State responsibility. As we have seen here, that issue has largely been unproductive and frequently misconceived. The voluminous and often turgid character of much of the early work on this topic belies the essential modesty of what is now emerging: much less a counterpart to the principle of State responsibility than was originally conceived, it has become simply an attempt to codify and develop aspects of international environmental law.

APPENDIX: THE SPECIAL RAPPORTEUR’S DRAFT ARTICLES ON INTERNATIONAL LIABILITY FOR INJURIOUS CONSEQUENCES ARISING OUT OF ACTS NOT PROHIBITED BY INTERNATIONAL LAW, 1989

Chapter 1: General Provisions

Article 1 Scope of the present articles
The present articles shall apply with respect to activities carried out in the territory of a State or in other places under its jurisdiction as recognised by international law or, in the absence of such jurisdiction, under its control, when the

physical consequences of such activities cause, or create the risk of causing, transboundary injury throughout the process.

Article 2 Use of terms
For the purposes of the present articles:

(a) "Risk" means the risk occasioned by the use of things whose physical properties, considered either intrinsically or in relation to the place, environment or way in which they are used, make them likely to cause transboundary injury throughout the process, notwithstanding any precautions which might be taken in their regard.

"Appreciable risk" means the risk which may be identified through a simple examination of the activity and the substances involved, in relation to the place, environment or way in which they are used, and includes both the low probability of very considerable (disastrous) transboundary injury and the high probability of minor appreciable injury.

(b) "Activities involving risk" means the activities referred to in the preceding paragraph, in which injury is contingent, and "activities with harmful effects" means those causing appreciable transboundary injury throughout the process.

(c) "Transboundary injury" means the effect which arises as a physical consequence of the activities referred to in article 1 and which, in the territory or in places under the jurisdiction or control of another State, is appreciably detrimental to persons or objects, to the use or enjoyment of areas or to the environment, whether or not the States concerned have a common border. Under the régime of these articles, "transboundary injury" always refers to "appreciable injury".

(d) "State of origin" means the State of the territory which exercises the jurisdiction or the control referred to in article 1.

(e) "Affected State" means the State in whose territory or under whose jurisdiction persons or objects, the use or enjoyment of areas, or the environment, are or may be appreciably affected.

Article 3 Assignment of obligations
The State of origin shall have the obligations established by the present articles, provided that it knew or had means of knowing that an activity referred to in article 1 was being, or was about to be, carried out in its territory or in other places under its jurisdiction or control.

Unless there is evidence to the contrary, it shall be presumed that the State of origin has the knowledge or the means of knowing referred to in the preceding paragraph.

Article 4 Relationship between the present articles and other international agreements
Where States Parties to the present articles are also parties to another international agreement concerning activities referred to in article 1, in relations between such States the present articles shall apply, subject to that other international agreement.

Article 5 Absence of effect upon other rules of international law
The fact that the present articles do not specify circumstances in which the occurrence of transboundary injury arises from a wrongful act or omission of the
State of origin shall be without prejudice to the operation of any other rule of international law.

[The present articles are without prejudice to the operation of any other rule of international law establishing liability for transboundary injury resulting from a wrongful act.]

Chapter II: Principles

Article 6 Freedom of action and the limits thereto
The sovereign freedom of States to carry out or permit human activities in their territory or in other places under their jurisdiction or control must be compatible with the protection of the rights emanating from the sovereignty of other States.

Article 7 Co-operation
States shall co-operate in good faith among themselves, and request the assistance of any international organizations that might be able to help them, in trying to prevent any activities referred to in article 1 carried out in their territory or in other places under their jurisdiction or control from causing transboundary injury. If such injury occurs, the State of origin shall co-operate with the affected State in minimizing its effects. In the event of injury caused by an accident, the affected State shall, if possible, also co-operate with the State of origin with regard to any harmful effects which may have arisen in the territory of the State of origin or in other places under its jurisdiction or control.

Article 8 Prevention
States of origin shall take appropriate measures to prevent or, where necessary, minimize the risk of transboundary injury. To that end they shall, in so far as they are able, use the best practicable, available means with regard to activities referred to in article 1.

Article 9 Reparation
To the extent compatible with the present articles, the State of origin shall make reparation for appreciable injury caused by an activity referred to in article 1. Such reparation shall be decided by negotiation between the State of origin and the affected State or States and shall be guided, in principle, by the criteria set forth in these articles, bearing in mind in particular that reparation should seek to restore the balance of interests affected by the injury.