A Special Rapporteur in search of his topic: Professor Quentin-Baxter's work on "International liability for injurious consequences arising out of acts not prohibited by international law"

Alison Quentin-Baxter*

In 1978, Professor R. Q. Quentin-Baxter was appointed by the United Nations International Law Commission as its first Special Rapporteur for the topic entitled "International liability for injurious consequences arising out of acts not prohibited by international law". Over the following six years, his wife, Alison, assisted him with his research. In this article, based on speech notes which she prepared for the use of the New Zealand Representative in the Sixth (Legal) Committee of the United Nations General Assembly at its thirty-ninth session in 1984, Alison Quentin-Baxter looks back over the whole course of the development of the topic under her husband's guidance.

I. INTRODUCTION

The topic entitled "International liability for injurious consequences arising out of acts not prohibited by international law" was an offshoot of the International Law Commission's work on the topic of "State responsibility". In examining the consequences of any breach of an international obligation, the Commission had found indications in state practice that an obligation to make reparation might subsist, even when circumstances precluded the wrongfulness of a particular act or omission of the state. There was also widespread concern in the international community that activities which were useful, and in principle legitimate, might nevertheless give rise to serious transboundary harm.

In 1978, Professor Quentin-Baxter was appointed as the Commission's first Special Rapporteur for the new topic. The value of his work in that capacity will have to be assessed, now and in years to come, by reading and rereading the pages of the five reports which he presented to the Commission in the years

* Barrister and Solicitor of the High Court of New Zealand.

1980 to 1984,[1] the relevant chapters of the Commission's reports in each of those years,[2] and the debates on the topic in the International Law Commission[3] and the Sixth Committee.[4] No summary can achieve anything like a full traverse of all the issues raised during those five years of painstaking effort. There is some danger, in a selective commentary, of overlooking or blurring essential elements in the chain of reasoning by which the topic has attained its present degree of delineation. It is possible, however, by selecting the main themes, to convey some idea of the place which is likely to be assigned to the product of that individual and collective effort, as a lasting contribution to the codification and progressive development of international law.

Although the Special Rapporteur had barely begun to elaborate draft articles in pursuance of his topic,[5] conceptually, his structure was complete. Every aspect had been assigned a place that could be reconciled with traditional principles of international law, and, at the same time, reflected his own acute sense of the course of its future development. His reports and statements exemplified his belief that international lawyers should be ready to join with others who shape the world's responses to human needs, and should not be content merely to chronicle developments after they have occurred. Yet, for all the innovative character that his work is sometimes felt to have, the special gift he brought to it was the ability to look in a new way at received ideas about legal principle and the significance of state practice, and to see hitherto unperceived pathways by which doctrine might be united with the ways in which states actually behave. In his five years of intensive work on the topic, Professor Quentin-Baxter's initial conceptions were refined and developed. He was always receptive to the ideas of others. But it is a striking feature that, through all his reports and oral interventions, there runs a consistent pattern of principled thinking, in which many strands are woven together to form an integrated whole.

1 Preliminary Report, *Yearbook of the International Law Commission 1980,* vol. II (Part One), p. 247, document A/CN. 4/334 and Add. 1-2; Second Report, *Yearbook ... 1981,* vol. II (Part One), p.103, document A/CN. 3/346 and Add. 1 and 2; Third Report, *Yearbook ... 1982,* vol. II (Part One), p. 51, document A/CN. 4/360; Fourth Report, document A/CN. 4/373 and Corr. 1 (English only) and Corr 2 (English only); Fifth Report, document A/CN. 4/383 and Corr. 1 (French only) and Add. 1.

2 *Yearbook ... 1980,* vol. II (Part Two), pp. 158 et seq., paras. 123-144; *Yearbook ... 1981,* vol. II (Part Two, pp. 146 et. seq., paras. 162-199; *Yearbook ... 1982,* vol. II (Part Two), pp. 83 et seq., paras. 104-156; *Yearbook ... 1983,* vol. II (Part Two), pp. 82 et seq., paras. 278-302; *Yearbook ... 1984,* vol. II (Part Two), pp. 73 et seq., paras. 215-257.

3 *Yearbook ... 1980,* vol. 1, pp. 241-259; *Yearbook ... 1981,* vol. 1, pp. 217-230; ibid. 250-255; *Yearbook ... 1982,* vol. 1, pp. 224-230; ibid. 242-250; ibid. 273-292; *Yearbook ... 1983,* vol. 1, pp. 260-271; *Yearbook ... 1984,* vol. 1, pp. 198-209; ibid. 211-229.

4 A/C 6/36/SR. 25, 33, 37, 43-60 and 72 (1980); A/C. 6/36/SR. 36, 38-54, 62 and 64-5 (1981); A/C. 6/37/SR. 37-52 and 63 (1982); A/C. 6/38/SR. 34, 36-50, 54, 66-8 and 70 (1983); A/C. 6/38/SR. 33-47 and 65 (1984).

5 Fifth Report, supra n.1, para. 1.

II. THE CONCEPT OF THE TOPIC

At the outset, the Special Rapporteur refused to equate the topic simply with a study of strict or absolute liability as an autonomous principle of international law. There were two reasons for this refusal. On the doctrinal plane, he had been greatly stimulated by the work of the International Law Commission in elaborating, over the decade of the nineteen seventies, under the guidance of the then Professor Ago, rules on state responsibility for a wrongful act. This work, in his view, had scarcely begun to be appreciated in the larger legal community for its value in helping international lawyers to clarify their thoughts about new problems. For him, the analytical device of distinguishing between the "primary" rules imposing obligations on states and the "secondary" rules setting out the consequences of a breach of an obligation revealed the essential unity of the international legal system. He readily acknowledged the distinction to be an abstraction, which did not always yield a result on which all could agree. But, in his view, it provided a key to the place in international law of the strict liability principle which had not up to that time, he felt, been found by the majority of writers in the field.

Modern scientific and technological developments had allowed mankind to undertake activities that carried with them the risk, or even the certainty, that they would give rise to some transboundary harm. In some cases, the risks would be unacceptable, and the states concerned would have a duty to prohibit the activities in question, or at least ensure that they were carried on in ways which reduced the risks to an acceptable level. Assuming, however, compliance with this duty, loss or injury resulting from the materialisation of a risk could not be characterised as the consequence of a wrongful act or omission on the part of the source state. Where, then, could an alternative basis of obligation lie, linking the source state to the occurrence of the loss or injury, and requiring it to ensure that proper reparation was made?

The Special Rapporteur could not conceive that such a system of obligation, governed by the principle of causality or strict liability, could exist on the same plane as, and as an alternative to, the rules of state responsibility for a wrongful act which the Commission was so painfully distilling. As the Special Rapporteur pointed out:[6]

> It would have meant that the traditional secondary rules of responsibility [would] have somehow to be stretched and distorted, that all the limitations normally involved in the attribution of responsibility to States [would] have to be set aside and different principles followed.

That doctrinal difficulty could be left behind by adhering to the Commission's distinction between primary and secondary rules. The Special Rapporteur postulated that a liability arising without wrongfulness must arise from a primary obligation attaching such a liability to the source state. Only if the primary obligation was not fulfilled, would the source state have committed a wrongful act, and the

6 The quotation is from the transcript of the Special Rapporteur's statement introducing his Preliminary Report to the International Law Commission.

secondary rules of traditional state responsibility would then apply. In that way, the principle of strict or no-fault liability could be accommodated within the structure of international law without threatening its unity. That perception alone stands as a significant contribution to legal thinking.

III. THE DUTY TO PREVENT, AS WELL AS TO REPAIR, TRANSBOUNDARY LOSS OR INJURY

From the beginning, Professor Quentin-Baxter also argued that the strict liability principle on its own could scarcely account for the richness and variety of state practice establishing the conditions upon which particular activities might be conducted without engaging the responsibility of the source state for wrongfulness, even if the conduct of the activity might give rise to transboundary loss or injury. He saw the allocation of losses resulting from human failure as peripheral to the mainstream of international endeavour. Draft articles in pursuance of the topic must have the primary aim of promoting:[7]

> the construction of regimes to regulate, without recourse to prohibition, the conduct of any particular activity which is perceived to entail actual or potential dangers of a substantial nature, and to have transnational effects. It is a secondary consideration, though still an important one, that the draft articles should help to establish the incidence of liability in cases in which there is no applicable special regime and injurious consequences have occurred.

For some, the insistence that the topic was concerned with the prevention of transboundary harm, as well as its reparation, gave rise to conceptual difficulties. The Special Rapporteur effectively demonstrated, by reference to state practice, that the payment of compensation was often volunteered as a cheaper alternative to the forbearance or the preventive measures which might otherwise be required. States affected by the actual occurrence of transboundary loss or injury were often more concerned about preventing future recurrences than obtaining compensation for losses already suffered. Prevention and reparation were a continuum, and source states had a duty to make adequate provision concerning both aspects if they wished to avoid any allegation that they had acted wrongfully in permitting the conduct of an activity. In the words of the Special Rapporteur:[8]

> From a formal standpoint, the subject matter of the present topic must be conceived as a compound 'primary' obligation that covers the whole field of preventing, minimising and providing reparation for, the occurrence of physical transboundary harm.

IV. THE ROLE OF THE STRICT LIABILITY PRINCIPLE

In this setting, limits could be set to the application of the strict liability principle in keeping with its present value and future significance. It need no longer be seen as:[9]

7 Preliminary Report, supra n.1, para. 9.
8 Fourth Report, supra n.1, para. 40.
9 Ibid. para. 6.

> a stark and exceptional departure from the classical system of State responsibility for wrongful acts and omissions, but an ultimate development of broader tendencies, well grounded in existing State practice. Strict liability — whether assumed by the State itself or imposed upon others involved in the conduct of an activity — is a frequent ingredient in a recipe with endless permutations, all designed to prevent, minimise and provide reparation for harm that was foreseeable, not always in its actual occurrence, but at least as a substantial possibility.

The Special Rapporteur stressed that his proposals did not entail any automatic commitment to construct regimes of strict liability. Nevertheless, the topic recognised the principle of causality in the sense that duties of reparation flowed not from the "act" (or omission) of the state, but from "activities" within the territory or control of the state, giving rise to transboundary loss or injury. This meant that "[a]t the very end of the day, when all the opportunities of regime-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."[10] Moreover:[11]

> This solution leaves open in all cases the possibility of apportionment, if there are factors which diminish the source State's liability. It also leaves open the possibility that the parties will, in effect, agree to construct retrospectively a civil liability regime, using municipal institutions to assess the liability, but maintaining the source State's obligation to ensure that appropriate reparation is made.

V. THE REGULATORY DUTIES OF THE SOURCE STATE

For the Special Rapporteur, the range of obligations just described was logically consistent with the premise that the source state's involvement arose from its regulatory capacity, and not as a direct actor. As in other branches of international law, the spate of recent state practice stood as a recognition of the exclusive authority that states enjoy in respect of national territory, and the correlative duty they owe to other members of the international community. Thus, the duties that a state owes, as a territorial or controlling authority, in respect of aliens within its borders, could be compared with the duties it owes in a similar capacity to avoid and repair transboundary harm.[12]

VI. THE SOURCE OF THE DUTY TO AVOID AND REPAIR TRANSBOUNDARY HARM

The Special Rapporteur saw the obligations of states under rules developed in pursuance of his topic as founded on the elemental principle that, in a universe of law, the freedom of each of its subjects is bounded by equal respect for the freedoms of other subjects. This norm, expressed in the maxim *sic utere tuo ut alienum non laedas,* had found recognition in the *Trail Smelter*[13] and *Corfu Channel*[14] cases, and had subsequently been restated in Principle 21 of the

10 Third Report, supra n.1, para. 41.
11 Fourth Report, supra n.1, para. 73.
12 Fourth Report, supra n.1, para. 7 and 8.
13 *Reports of International Arbitral Awards,* vol. III, p. 1905.
14 [1949] I.C.J. Rep. 4.

Declaration of the United Nations Conference on the Human Environment.[15] The equality of rights and obligations implied there, and in every other formulation of the maxim, required the freedom of action of one sovereign state to be reconciled with the freedom from harm of another.

VII. THE RELATIONSHIP WITH WRONGFULNESS

For the reason just referred to, it was seldom possible in any given fact situation to fix with any degree of certainty or inevitability what the Special Rapporteur referred to as "the point of intersection of harm and wrong".[16] In reality, what states usually did was to settle the conditions upon which certain activities could be undertaken. No doubt they had their own broad, and perhaps differing, perceptions of the point at which exposure to harm or the risk of harm would become wrongful. In practice, they usually found it advantageous to substitute a network of smaller obligations for its prevention, minimisation and, if necessary, its reparation.

Consequently, in the Special Rapporteur's view, the topic was not to be seen merely as a residual one, reaching only into areas where harm suffered could not be attributed to a wrongful act or omission on the part of the source state. Drawing on the authority of the *North Sea Continental Shelf*[17] and *Fisheries Jurisdiction*[18] cases, he saw it as enunciating a duty to negotiate within a framework of principle. This was the only way of applying to a particular set of circumstances a broadly formulated rule which required the wrongfulness of allowing harm to be caused to others to be determined by reference to a balance between the competing interests involved. The attainment of this balance might involve some prohibitions, some positive safeguards and possibly a guarantee for the indemnification of loss or injury which could not be avoided by reasonable preventive measures. This, the Special Rapporteur demonstrated, was the true rationale of the principle enunciated by the Arbitral Tribunal in the *Trail Smelter*[19] case. Further, as the Commission's report on the work of its 35th Session had noted,[20] references in many treaty regimes to "appreciable" or "significant" or "substantial" transboundary harm were more than a threshold test requiring the application of the de minimis rule. They were, in reality, disguised or incompletely articulated appeals to a balance of interests test which would have to be applied in order to give the provision a concrete application. This, the

15 Report of the United Nations Conference on the Human Environment, Stockholm, 5-16 June 1972, Part One, chap. 1. The text of Principle 21 reads as follows:

> States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

16 Second Report, supra n.1, para. 59.
17 [1969] I.C.J. Rep. 3.
18 [1974] I.C.J. Rep. 3; Ibid. 175 (Merits).
19 Supra n.13.
20 *Yearbook ... 1983,* vol. II (Part Two), supra n.2, para 291.

authors had acknowledged, was equally true of the duty not to cause "substantial injury" by pollution in the territory of another state, set out in Article 3(1) of the Montreal Rules adopted by the International Law Association in 1982.[21]

Professor Quentin-Baxter believed that this fundamental point should be borne in mind in carrying forward the International Law Commission's work on the law of the non-navigational uses of international watercourses. The connection between the two topics was adverted to in the Commission's report on the work of its 35th Session (1983),[22] and again in its report on the work of its 36th Session (1984).[23] In his view, the liability topic had a contribution to make, particularly in relation to the sharing principle enunciated in draft Article 6 of the Special Rapporteur's second report on the watercourses topic,[24] and the duty to avoid appreciable harm enunciated in draft Article 9.[25] As the Commission's 1984 report warns, the essential problems with which the liability topic deals cannot be avoided merely by formulating a rule entailing a balance of interest test as an obligation, the breach of which will entail the responsibility of the state for a wrongful act.[26] The reason for this warning was spelled out more fully in the Special Rapporteur's Fourth Report:[27]

> . . . [t]he rules of State responsibility for wrongful acts or omissions . . . form the backbone of any legal system. Nevertheless, as international life grows more complex and is more elaborately organised, attempts to interpret international law solely in terms of breaches of imprecise or disputed rules, engaging State responsibility for a wrongful act or omission, are bound to be inadequate. This is the more true because adjudication, or any other principled determination of a legal dispute, is in this area of international law a rarity.

In short, the duties in the course of formulation under the liability topic are the means of filling certain gaps in the texture of international law as traditionally conceived. Such a gap may be seen as occurring when, under the "secondary" rules of state responsibility, transboundary loss or injury cannot be attributed to a wrongful act or omission on the part of the source state. Alternatively, the gap may be perceived as arising because the "primary" rule concerning the source state's duty to avoid, minimize and repair transboundary harm is cast in such general terms that its application in particular circumstances depends on a process of negotiation — or perhaps self-regulation — enabling its parameters to be discerned. These bases of obligation are not mutually exclusive. They simply represent an analysis proceeding from different starting points. Accordingly, both logic and common sense forbid any prior requirement to establish that the loss or injury occurred without wrongfulness on the part of the source state. Even when wrongfulness has not been formally precluded, its shadow provides the motivating factor.

21 International Law Association, Montreal Conference (1982), Report of the Committee on Legal Aspects of the Conservation of the Environment, Comment on Article 3, para. 8. See Fourth Report, supra n.1, para. 27.

22 Supra n.2, paras. 248 and 292.

23 Supra n.2, paras. 230 and 341.

24 Document A/CN. 4/381, reproduced in *Yearbook of the International Law Commission 1984*, vol. II (Part One).

25 Ibid.

26 Supra n.23, para 230.

27 Supra n.1, para. 60.

A negotiation is likely to focus, not on the point at which the conduct of a particular activity would give rise to wrongfulness, but on the conditions for conducting it without wrongfulness. The procedures of fact-finding and negotiation, envisaged in sections 2, 3 and 4 of the Special Rapporteur's schematic outline,[28] are not to be seen as part of a "dispute settlement" process. They are, rather, a means of giving substantive content to the duty to avoid, minimize and repair transboundary harm. Only if loss or injury has occurred, and the parties cannot agree about the scope of the duty of reparation, will the question of dispute settlement arise.

VIII. THE INNER CONTENT OF THE TOPIC

This backward look at some of the policy and doctrinal questions dealt with by the first Special Rapporteur is not intended as an invitation to the International Law Commission or the Sixth Committee of the United Nations General Assembly to refight old battles as they continue the work on the topic.[29] It has, rather, the object of recording progress and of consolidating ground already won. At its 36th session in 1984, the Commission's discussions ranged over both the Fourth Report[30] of the Special Rapporteur, dealing with questions concerning the nature of the topic and its future treatment by the Commission, and his Fifth Report,[31] proposing five draft articles. The outcome of these discussions was recorded in paragraphs 223 and 225 respectively of the Commission's 1984 report:[32]

> Though significant differences of opinion and emphasis remain, there was almost unanimous agreement that the Commission's work on the topic, as now delineated, should continue. . . . There is, in any case, no disagreement that the topic, as now delineated, hinges upon the elements of a physical consequence, producing transboundary effects.

In his Third Report,[33] the Special Rapporteur had turned his attention to the inner content of the topic and provided a schematic outline, reproduced in the Commission's 1982 report to the General Assembly.[34] The development of this outline into draft articles offered a way of making progress on the substance of the topic without first having to resolve every doctrinal difficulty. The first dividend from the schematic outline was the decision which emerged from the ensuing debates in the Commission and in the Sixth Committee to limit the scope of

28 Third Report, supra n.1, para. 53.
29 In 1985, the Commission appointed Mr Julio Barboza as the new Special Rapporteur on the topic, and noted with appreciation his preliminary report (A/CN. 4/394) indicating the status of the work done so far on the topic and the lines on which he intended to proceed. The Commission expressed the hope that the Special Rapporteur might wish to present a further report which, along with his preliminary report, would be discussed by the Commission at its 38th session in 1986. See *Official Records of the General Assembly, Fortieth Session, Supplement No. 10* (A/40/10), paras. 291-2.
30 Supra n.1.
31 Idem.
32 Supra n.2.
33 Supra n.1.
34 Supra n.2.

the topic to physical activities giving rise to physical transboundary effects.[35] This meant that the topic would no longer have the general field of application conveyed by its present title — an outcome according fully with the initial approach of the Special Rapporteur but not one which the Commission as a whole wished to adopt until the inner content of the topic had been established. At that point, there was, as the Special Rapporteur noted in his Fourth Report:[36]

> . . . strong and broadly based support for the central aim of the topic — that is, to analyse the growing volume and variety of State practice relating to uses made of land, sea, air and outer space, and to identify rules and procedures which can safeguard national interests against losses or injuries arising from activities and situations that are in principle legitimate, but that may entail adverse transboundary effects. Yet the course of debate had made it clearer than before that unity of purpose would collapse if either of two boundary lines were crossed. One such boundary line . . . forbade the abrupt adoption of a new system of obligation, based upon the principle of causality or strict liability, and developed in municipal legal systems to meet situations of inherent danger. The outer boundary line forbids the wholesale transfer of pioneering experience in the field of the physical uses of territory to the even less developed field of economic regulation.

The Special Rapporteur believed, however, that the successful application in one area of techniques for promoting painstaking individual adjustments of competing interests, might well be productive of solutions in other areas.[37] These might include not only the economic area, but also the treatment of aliens. The Commission's sad experience with the latter topic had shown the resistance of states to proposals which asked too large a sacrifice of their sovereign discretions in relation to matters arising within their territory or control.[38] On the other hand, states sometimes recognised the practical limits on their ability to deal with problems arising within their own territory. By agreement, they allotted responsibilities to the states which were in a position to exercise effective control over a relevant aspect of the activity, as though it gave rise to a physical consequence with transboundary effects. Those cases, referred to in paragraph 250 of the Commission's report on the work of its 36th session (1984),[39] were also within the topic's sphere of influence.

More generally, the Special Rapporteur saw the regimes or other settlements constructed by states pursuant to the liability topic as a revolving fund, providing material for the emergence of customary law rules, including rules of prohibition. These rules would, in turn, influence the construction of future regimes. The strength of the five draft articles dealing with scope and related provisions lay, first of all, in their affirmation that a source state is never without a legal responsibility in relation to things done within its territory or control which do or may give rise to a physical consequence affecting the use or enjoyment of areas beyond the limits of that state's jurisdiction. Except as had been otherwise agreed,

35 Fourth Report, supra n.1, para 63; Commission's report on the work of its 35th Session (1983), supra n.2, para. 294.
36 Supra n.1, para. 12.
37 Fourth Report, supra n.1, paras. 13-15.
38 Ibid. para. 65.
39 Supra n.2.

the onus would remain with the source state to show that it had taken every reasonable step to save others from adverse transboundary effects, and to provide for reparation should such effects occur.[40] The Special Rapporteur had already drawn a parallel between that responsibility and the provisions of the United Nations Convention on the Law of the Sea[41] which reposed multiple discretions in states, but furnished them with guidelines for accommodating the rights and interests of others.[42] This had been the theme of an article by another legal scholar,[43] earlier invoked by the Special Rapporteur to demonstrate that the treatment of the liability topic accorded with the most recent and compelling tendencies in international law.[44]

IX. ISSUES FOR FURTHER RESOLUTION

Chapter V of the International Law Commission's Report on the work of its 36th session (1984),[45] dealing with the liability topic, is a careful appraisal of progress made and consolidated, of remaining differences of opinion or of emphasis, and a checklist of issues to be re-examined as the work goes forward. The Special Rapporteur had been invited to continue to prepare draft articles on the basis of the five submitted in 1984, but not then sent to the Drafting Committee. In doing so, he should refer to the full range of treaty and other materials, restricted only by the decision to limit the scope of the topic to activities and situations entailing a physical consequence with transboundary effects.[46] The further policy issues raised during the Commission's debate should be looked at again when the project was further advanced in several years' time.[47] As a contribution to future work on the topic, the following comments are offered on some of the matters raised in the Commission's discussions during its 1984 session.

In draft Article 1, on scope,[48] the distinction between the physical consequence of an activity and its effect on the use or enjoyment of an area within the territory or control of another state is fully supported by state practice. The requirement of a physical consequence affords the means of restricting the topic to those cases in which the consequences of an activity may, by the operation of a law of nature, disregard political boundaries. In itself, however, a physical consequence is simply a neutral, unevaluated fact, actual or prospective. The requirement that its effects should be weighed by reference to the use or enjoyment of an area within the

40 Fifth Report, supra n. 1, paras. 45 and 46.
41 Montego Bay, 10 December 1982, UN Doc.A/CONF.62/122(1982), reprinted in 21 I.L.M. (1982) 1261.
42 Fifth Report, supra n.1, para. 40.
43 Philip Allott "Power sharing in the law of the sea" (1983) 77 A.J.I.L. 1, 26-7.
44 Fourth Report, supra n.1, para. 74.
45 Supra n.2.
46 Para. 236.
47 Para. 257.
48 Fifth Report, supra n.1, para. 1. The text of the draft art. reads as follows:
> These draft articles apply with respect to activities and situations which are within the territory or control of a State, and which do or may give rise to a physical consequence affecting the use or enjoyment of areas within the territory or control of another State.

territory or control of another state is an essential additional element, enabling every facet of human needs or interests to be taken into account in assessing the impact of an activity or situation. This important reason for distinguishing between a physical consequence and its effects on use or enjoyment should not be lost sight of, in the course of finding exact equivalences in the Commission's other working languages for the English expression "physical consequence", a problem referred to in paragraph 247 of the Commission's 1984 report.[49]

It should also be stressed that the range of effects on use or enjoyment is not limited to those which states can identify or quantify within their own territory or in areas beyond national jurisdiction in which they are actively exercising rights or asserting interests. As paragraphs 233 and 234 of the 1984 report[50] make clear, draft articles in pursuance of the topic must be seen also as an encouragement to multilateral initiatives, often under the auspices of international organisations, to promote — and to share the costs of — measures to protect the regional or global environment, whenever its capacity to sustain or contribute to human well-being may seem to be threatened by human activity.

Whether a particular problem is being tackled on a bilateral or a multilateral basis, a key question will be the levels of supervision and other involvement required of the source state in various circumstances. These include, but are not limited to, the conduct of activities by private persons. Paragraphs 227 and 228 of the Commission's 1984 report[51] carefully outline many of the relevant considerations. These would allow for multi-faceted solutions to the problems involved, without necessarily further limiting the scope of the topic. In keeping with his starting point that the topic was situated in the realm of "primary" rules, the Special Rapporteur saw these problems as relating to the extent of the source state's obligations, and not as involving any departure from the rules concerning attribution set out in Articles 5 to 15 of the draft articles on State Responsibility, Part 1, provisionally adopted on first reading by the International Law Commission.[52] These draft articles include the following provision, in paragraph 1 of draft Article 11:

> The conduct of a person or group of persons not acting on behalf of the State shall not be considered as an act of the State under international law.

In an exhaustive commentary on Article 11, the Commission set out the basis of that rule, including the conclusion stated in paragraph 35 of the commentary:[53]

> Although the international responsibility of the State is sometimes held to exist in connection with acts of private persons, its sole basis is the internationally wrongful conduct of organs of the State in relation to the acts of the private persons concerned.

In other words, the organs of the state must have acted — or failed to act — in breach of an international obligation of the state imposing duties in relation to the conduct of private persons.

49 Supra n.2.
50 Supra n.2.
51 Supra n.2.
52 *Yearbook of the International Law Commission 1980,* vol. II (Part Two), pp. 26-62.
53 *Yearbook of the International Law Commission 1975,* vol. II, p.82.

In the context of the liability topic, the question is, therefore, the content of the "primary" obligation of the state to exercise its regulatory function in respect of private and other activities and situations within its territory or control which do or may give rise to transboundary effects. The policy issues involved can be squarely faced, free of any risk of interfering with the rules of attribution constituting the subjective element in state responsibility, or the drawing of a false analogy with those rules. It seems likely that a further analysis of state practice will reveal that the source state has different levels of obligation in different contexts. For example, duties in respect of activities within the territory of a state may differ in intensity from those in respect of the activities of nationals, or ships, or aircraft or space objects of a state in areas beyond national jurisdiction. The rights and duties relating to the provision of information about the likely impact of activities will be accessible by means of a lower threshold than that relating to duties of reparation; but it must still protect source states from unreasonable demands. Drawing on a point established in the discussion of the watercourses topic during the Commission's session in 1983 — notably, the absence of any universal yardstick for measuring "substantial" or "significant" or "appreciable" harm — the Commission's 1983 report on the liability topic recognized that, as far as possible, the initial question of threshold should be distinguished from the subsequent question of balancing the competing interests involved.[54]

One of the issues going to the heart of future work on the topic is the proper weighting of those interests in order to establish the principles which are to guide the actions of source states and affected states.[55] Those principles are to apply whenever states are negotiating a regime for the avoidance or minimization of future transboundary loss or injury, and, if necessary, for its reparation. The principles are also to be applied unilaterally by the source state if, in the absence of a regime, it permits the conduct of an activity which does or may give rise to a physical consequence affecting the use or enjoyment of areas within the territory or control of any other state. In the last resort, the relevant principles will also apply if, again in the absence of a regime, actual loss or injury occurs and the states concerned are carrying out their duty to construct, in effect, a regime for reparation in retrospect. The principles to be enunciated must include and develop the little understood concept of "shared expectations", which qualifies the duty of reparation in section 4 of the schematic outline.[56] This was the gateway by which the Special Rapporteur sought to let in, whenever relevant, such important considerations as the principle of sharing, and the margin of tolerance to be allowed to an existing activity, without, however, absolving the states concerned from any duty they might have to establish better standards of prevention for the future. As always, Professor Quentin-Baxter's starting point was the perfect equality of rights of source states and affected states. He was at pains to emphasize that there is no need for states to think of themselves as acting predominantly in one or other capacity. Often, interests are mutual or reciprocal. Sometimes an individual

54 Supra n.2, para. 292.
55 Report of the International Law Commission on the work of its thirty-sixth session (1984), supra n.2, para. 226.
56 Third Report, supra n.1, para. 53.

state may be both a source state and an affected state in relation to the same activity, as is the case, for example, when a coastal state is itself dependent on the sea carriage of oil.

This equality of rights prompted the Special Rapporteur to include in draft Article I a reference to "situations" as well as to "activities". A source state's duties in relation to an activity arise only when there has been a voluntary initiative to undertake that activity within the territory or control of the source state. This was the case in the dispute which arose between Spain and France, when the French Government made plans to divert some of the waters of Lake Lanoux and replace them with water from a different watershed. Guarantees concerning the availability and control of the water supply were offered to Spain only because an "activity" was being undertaken in France. As the Arbitral Tribunal observed in its award:[57]

> On her side, Spain cannot invoke a right to insist on the development of Lake Lanoux based on the needs of Spanish agriculture. In effect, if France were to renounce all of the works envisaged on her territory, Spain could not demand that other works in conformity with her wishes should be carried out.

The Special Rapporteur considered, however, that, even when the source state planned no new activity, a neighbouring state should be entitled to take up with the source state questions arising from the affected state's dependence upon, or its concern about, a situation in the source state, whether that situation arose from a past activity or resulted solely from natural causes. One measure of the extent of the source state's duty to co-operate in maintaining a beneficial situation or remedying a harmful one must, of course, be a factor referred to by the *Lake Lanoux* tribunal — that is, the price which the affected state is ready to pay to have its interests safeguarded.[58] It goes without saying that the source state's duties in respect of "situations" will not be the same as its duties in respect of "activities". In particular, the Special Rapporteur did not envisage that there would be a duty of reparation in respect of transboundary loss or injury arising from a situation.

Whatever differentiations may be necessary in formulating the circumstances governing the application of the various procedural guidelines and substantive obligations of which the topic consists, it seems worthwhile to strive, at least for the present, to maintain the unity of its treatment. Now that the question of scope appears to be settled — whatever the difficulties still to be overcome in drafting a scope clause — there is good reason to follow the Commission's suggestion in its 1984 report and change the title of the topic to one corresponding more closely with its essential focus — that is, the duty to avoid — or to minimize and, if necessary, repair — transboundary loss or injury.[59] The Special Rapporteur continued to believe that states invoking or responding to that duty would seldom be concerned to fix in any general way the point at which transboundary loss or injury could be said to result from a wrongful act or omission on the part of the source state. For that reason, the topic would remain faithful to that part of its present title which refers to "injurious consequences arising out of acts not prohibited by international law".

57 *Lake Lanoux Arbitration (France* v. *Spain)* 24 Int. L.R. (1957) 101, 140.
58 Ibid. 141.
59 Supra n.2, para. 235.

Nevertheless, now that the topic has achieved its present degree of definition, the writer foresees a further conceptual development. As a matter both of logic and of practical need, draft articles formulated in pursuance of the topic should cover all the rights and duties of states in relation to transboundary loss or injury arising as a physical consequence of an activity or situation within the territory or control of another state. The applicable principles would then afford guidance as to the circumstances in which states have a duty not to permit a particular activity, as well as those in which they are free to permit it, upon conditions which give reasonable protection to the rights and interests of other states. In this way the topic would reflect the continuing concern of a number of the Commission's members with the moving frontier between the lawfulness and unlawfulness of subjecting another state or its citizens to a risk of serious transboundary loss or injury.[60] Remaining in the realm of "primary" rules, the topic will always be concerned with the content of the obligations of states, not with the consequences of a breach of those obligations. Therefore, even if developed in the way just suggested, the topic will not trespass on the topic of "State responsibility". There is no doctrinal reason for making an artificial distinction between the circumstances in which a state may permit an activity, subject to the necessary safeguards, and those in which it must ensure that the activity is not undertaken. Both aspects were in the minds of Commission members when they first began to think of studying the problem of transboundary loss or injury as a separate topic.[61]

X. CONCLUSION

In carrying forward the work on the wide-ranging basis suggested above, all members of the Commission and other students of the topic will be able to draw extensively, as the first Special Rapporteur had himself done, on the Secretariat's comprehensive survey of relevant practice.[62] Other international organisations with responsibilities in fields falling within the scope of the topic also have an important role in relation to the operation of almost all its aspects, as well as in its further development. They must be encouraged to play their full part in both contexts.

To conclude, there are many leads into further productive work on the topic by the International Law Commission, and there is every indication that the momentum will be maintained. But the measure of the contribution made by the first Special Rapporteur will not lie solely in progress with the formulation of draft articles nor in their ultimate reception by the international community. There are indications that, already, his reports are being looked to by the legal advisers of Governments, and others who help to shape the actions of states. In the period since the recent disastrous accident at the Chernobyl nuclear power plant, the responses of the source state, of affected states and of international organisations have provided a new fund of state practice which appears to confirm the validity of Professor Quentin-Baxter's widely focussed perceptions about the content of his topic. The power of his ideas will live on. There could be no better memorial.

60 Fourth Report, supra n.1, paras. 19-21, but cf. para. 22.
61 Ibid. para. 20, n.47.
62 ST/LEG/15.

THE CASE FOR ANZ BANK.

For over 140 years, the ANZ Bank has been an integral part of the New Zealand financial scene.

140 years experience that has resulted in a well deserved reputation for its expertise in financial management.

Much of this financial expertise is available in the form of a package of services for the legal profession and its clients.

Services that range from nominee and portfolio management, short term investments through the ANZ Money Market department and ADIS. Arguably the most advanced deposit information reporting service currently available.

In short, no one is better suited to assisting the legal profession with its financial enquiries.

Just call your local ANZ Branch Manager and ask for the evidence.

ANZP1060A

Partner-in-law

In these modern times, practising law may generate a lawyer's income. But running the law practice may have an even greater bearing on its success.
Now with special software designed to bring efficiency to the business of practising law, the IBM Personal Computer becomes a lawyer's tool for modern times.
How do you justify the investment? Just how does it pay its way?
It lets you concentrate on your income-generating skills by helping you get everyday time-consuming calculating, accounting or word processing tasks out of the way quickly, efficiently.
Your Personal Computer can find information, compare it, compute it, change it faster and more accurately than doing the jobs by hand.
Which makes trust accounting a breeze — not a chore.
This tailored programming package means your IBM Personal Computer can prepare timely customer statements, pinpoint overdue accounts and help you identify outstanding balances and improve your cash flow.
You can also use your Personal Computer to help control the cash your business pays out; let it help you automate key payables functions; take maximum advantage of discounts and update ledger accounts.
The IBM Personal Computer. Use it anywhere you want to cut costs, reduce paperwork and improve productivity in your business. While you get on with the business of practising law.
From Authorised IBM Dealers.

IBM Personal Computer