International liability for injurious consequences arising out of acts not prohibited by international law: A tribute to the late Professor Robert Quentin Quentin-Baxter

Khalafalla El Rasheed Mohamed-Ahmed*

In 1978, the International Law Commission appointed Professor Robert Quentin Quentin-Baxter as Special Rapporteur of the topic concerning international liability for injurious consequences arising out of acts not prohibited by international law. In the present article, the author traces the progress made by the Working Group chaired by Professor Quentin-Baxter in his capacity of Special Rapporteur, and evaluates the latter's efforts in transforming a somewhat nebulous subject into one that commands much wider recognition and perspective today. The author concludes by considering the future development of the Commission's work on this important topic and expressing the desire that it should progress along the lines already delineated under Professor Quentin-Baxter's chairmanship.

I. INTRODUCTION

Great men are associated with great deeds. This is a truism; yet in the world of today, and particularly in the third world, great expectations are more often than not related to words. Thus, it needs to be emphasized by way of reminder that it is by deeds that men are measured. Professor Quentin-Baxter was a man of deeds. He possessed the rare quality of great learning modulated by a correct intuition and a singularly creative imagination. These are the qualities most needed for any contribution towards the development of international law.

Though action is the most important ingredient in the international arena, yet action without thought often leads nowhere. The writer respectfully agrees with Jenks that the "world of thought can greatly facilitate or gravely embarrass the task of the world of action."[1] Jenks links action with thought and does not absolve

* Member of the International Law Commission and former Sudanese Chief Justice. The author is indebted to Professor Stephen C. MaCaffery and Dr John De Saram for reading the proofs and making valuable suggestions, but remains responsible for any shortcomings.

1 Wilfred Jenks *A New World of Law?* (Longmans, London, 1969) 269.

legal scholars of responsibility for failure to achieve the necessary success. In his words:[2]

> The whole climate of the venture can be profoundly affected by the spirit in which creative scholarship envisages and discharges its responsibility. In a world which has become one there can be no ivory tower; scholarship must play an active part in building a new world of law or share in the responsibility for failure to achieve it.

This is a one-way street. Legal scholarship has no choice but to succeed. When Professor Quentin-Baxter was charged with the task of tackling this topic, he was faced with this one-way street. He could not afford to fail. In the following pages, we shall try to examine some aspects of the matter that Professor Quentin-Baxter was wrestling with in an attempt at an appraisal thereof.

II. HISTORICAL BACKGROUND

In 1977, the General Assembly invited the International Law Commission "at an appropriate time, and in the light of progress made on the draft articles on state responsibility for internationally wrongful acts and on other topics in its current programme of work, to commence work on the topic of international liability for injurious consequences arising out of acts not prohibited by International Law."[3] In 1978, The International Law Commission appointed Professor Quentin-Baxter Special Rapporteur[4] and created a Working Group chaired by the Special Rapporteur to consider whether the scope of the topic should be limited to matters arising from the use or management of the physical environment.[5] The Working Group noted that the topic had recently gained prominence and identified certain materials and subjects that may be relevant to the topic such as international co-operation in relation to peaceful uses of atomic energy, the regime of outer-space, the principles affirmed by the United Nations Conference on the Environment, transactions of a regional or local character in relation to shared resources of the world, and the Third United Nations Law of The Sea Conference deliberations concerning maritime pollution and the risks associated with the carriage of oil.[6] The Working Group detected at least three common characteristics in these subjects. First, each concerned the use or management of the physical environment. Second, each concerned the injurious consequences that such use or management entails and, third, such injurious consequences arose out of acts not prohibited by international law.[7]

The Working Group was inclined to limit the scope of the topic to dangerous consequences that arose out of activity in certain major fields. No uniform rule could be discerned, however, from the practice of states since the regulatory regimes in respect of such activities were, for the most part, on "a subject-by-

2 Idem.
3 Report of the I.L.C. on the Work of Its 32nd Session — Supp. No. 10 (A/35/10) 361.
4 Ibid. 362. The Working Group was composed of Mr Quentin-Baxter (Chairman), Mr Roberto Ago (now a judge of the International Court of Justice), Mr Jorge Castaneda and Mr Frank Njenga.
5 Idem.
6 [1980] II (2) Y.B. Int'l L. Comm'n (Annex) 150.
7 Ibid. 150-151.

subject basis" and the regimes varied accordingly. It was found, however, that the most constant feature of these regimes was the adoption of a rule of absolute liability.[8] The Working Group thought to find refuge in the common law principle of strict liability accompanied by a limitation of the extent of liability — "a liability that arises from the very fact that injurious consequences have occurred, without reference to the quality of action that led to the occurrences."[9]

Although this idea had attracted the attention of the Special Rapporteur, he adopted the notion of the duty of care as a relevant primary rule of obligation. He wrote that:[10]

> [the obligation] stated at the level of greatest generality, was reflected in the maxim *sic utere tuo ut alienum non laedas.* This rule — the duty to exercise one's own rights in ways that do not harm the interests of other subjects of law — is a necessary ingredient in any legal system — it was implicit in the aims and purposes of the U.N. Charter, and explicit in the principle of good-neighbourliness enunciated in the final communiqué of the Afro-Asian Conference held in Bandung in 1955. The rule had been expressed in various contexts, including the *Trail Smelter* Arbitral Award, the judgment of the International Court of Justice in the *Corfu Channel* case, Principle 21 of the Declaration of the U.N. Conference on the Human Environment held in Stockholm in June 1972, and Article 30 of the Charter of Economic Rights and Duties of States.

The Special Rapporteur was wary that a rule predicated on "strict" or "no fault" liability may not be generally acceptable. He realized that strict liability is not compatible with a duty of care. He seemed to forsake the strict liability theory and to emphasize the element of harm as a moral basis of the history he advanced. The Special Rapporteur held to the view that the main thrust of the topic should be to minimize the possibility of injurious consequences and to provide adequate redress in cases where injurious consequences do happen. The element of "harm" is used as a test by which the consequences of acts not prohibited could be measured. "Harm" was taken as a variable.

In the course of discussions, the Special Rapporteur stated that new legal relationships should result which would oblige a state whose activity gives or would possibly give rise to injurious consequences in another state "to attempt in good faith to arrive at an agreed conclusion as to the reality of the injury or danger and the measures of redress or abatement that are appropriate to the situation".[11] The Special Rapporteur had always been conscious of the fact that, according to orthodox international law, no state liability would be engaged without fault. Classical international law rules recognize responsibility[12] of states if the essential element of *dolus* is present. Therefore, "To make sure that the development of the present topic did not cut across the classical principles of international law, the Special Rapporteur had continued to use two guidelines, each of which had been generally supported during the Commission's discussion of the preliminary

8 Idem.
9 Idem.
10 Report of the I.L.C. on the Work of Its 32nd Session — Supp. No. 10 (A/35/10) 364.
11 Ibid. 367.
12 "Liability" and "responsibility" seem to be used rather loosely and sometimes as alternatives.

report."[13]

The first guideline related to the distinction between "primary" and "secondary" rules developed by the Commission in its study of the topic of state responsibility.[14] The second guideline was the test of care or due diligence. Basing himself on the decision of the International Court of Justice in the *Corfu Channel*[15] case, the Special Rapporteur developed the test of attribution which recognised "every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States".[16] He also took the *Trail Smelter*[17] arbitration award as a working model.[18]

In his third report, the Special Rapporteur introduced a schematic outline of the topic. He traced the relationship between the schematic outline and the principle that had been identified.[19] The schematic outline attempted to define the scope of the topic (section 1). Section 2 defined such terms as "acting or affected" states, the "activity", "loss or injury" and "territory or control". Section 6 enumerated seventeen factors which may be relevant to a balancing of interest. The following propositions were relied upon:[20]

(1) The topic did not in any way modify the rules of state responsibility for wrongfulness.

(2) In elaborating the draft articles, "pride of place would be given to avoid or minimize injury rather than to the substituted duty to provide reparation for injury caused"; and

(3) The topic owed its existence to the fact that "in modern conditions, it was neither possible to prohibit useful activities that might give rise to transboundary loss or injury, nor to allow such activities to proceed without regard to their effect upon condition of life in other countries."

In his fifth report, the Special Rapporteur introduced some changes in the schematic outline in response to the debate both in the Commission and the Sixth Committee. The scope of the topic was limited to physical activities giving rise to physical transboundary consequences. He noted that a consistent majority supported "the view that the topic should deal with prevention as well as reparation".[21]

III. THE DEVELOPMENT OF THE TOPIC

The topic was met at the outset by grave doubts as to its utility. Opinion was divided between flat rejection of the topic and reception with various misgivings. The wide differences of opinion stem from the nature and novelty of the topic. One line of thought posited that there was adequate state practice to warrant the reasonable deduction of a commonly accepted legal basis for the topic. Another

13 Report of the I.L.C. on the Work of Its 33rd Session — Supp. No. 10 (A/36/10) 339.
14 Ibid. 339-340.
15 [1949] I.C.J. Rep. 4.
16 Ibid. 22.
17 (1938-1941), R.I.A.A. iii. 1905.
18 Report of the I.L.C. on the Work of Its 33rd Session — Supp. No. 10 (A/36/10) 342.
19 Report of the I.L.C. on the Work of Its 34th Session — Supp. No. 10 (A/37/10) 178.
20 Ibid. 187.
21 Report of the I.L.C. on the Work of Its 35th Session — Supp. No. 10 (A/38/10) 195.

view maintained that there was no such basis at all for the topic and it was rather a waste of time to have it on the agenda of the Commission. While others doubted that state practice was such as to afford sufficient legal basis for the topic, they were, nonetheless, of the view that there were grounds on which a broadly acceptable mechanism such as a traité cadre could be devised.[22] The view was also advanced that some overlap did exist between this topic and the topics of state responsibility and the law of the non-navigational uses of international watercourses.

There is no doubt that the topic is novel, but novelty in itself is not a reason for neglecting it. On the contrary, when situations arise, the need for dealing with or otherwise regulating them and solving the consequences resulting from them does not depend on their novelty. It depends on their occurrence. In fact, if such situations were not novel, solutions would already have been developed based on the happening of defined situations which give rise to reasonably expected consequences. But what we are dealing with is in the factual context:[23]

> an increasingly intense use in many different forms of the resources of the planet for economic, industrial or scientific purposes. Because of economic and ecological interdependencies, activities occurring within or beyond the territorial control or jurisdiction of States may have injurious impacts on other States or their subjects.

In introducing his fifth report, the Special Rapporteur endeavoured to portray situations of user of natural resources or activities which may give rise to an obligation concerning the injurious consequences that inevitably result from such activities. Thus, he posed the question whether injurious consequences were a necessary ingredient of a wrongful act. Though he acknowledged the basic distinction between liability for wrongful and lawful acts, the Special Rapporteur strenuously tried to deduce a primary rule based on injurious consequences. He noted that in the view of many lawyers, injurious consequences were a necessary ingredient in both cases (i.e. liabilities for lawful as well as wrongful acts). He believed that wrongfulness is supplied by the element of injurious consequences, so that it was the primary rule, the rule of obligation, that must prescribe an element of injury. If a liability arose without wrongfulness, it could arise only because legal obligations attached such liability to the consequences of a particular act. "By that approach to the subject the Commission had discovered a key which the majority of writers had not yet found, and the subject of liability arising without wrongfulness tended to be thought of as an alternative system of liability."[24] The Special Rapporteur went on to argue in philosophical and engaging language that if the act was not permitted, then it was wrongful and the acting state would be accountable. On the other hand, if it was permitted, the argument could be made that there should be no accountability. He reasoned that this type of logic would tend to cheapen the concept of wrongfulness and disregard the notion that an obligation would exist even where there was no fault.[25]

22 [1980] II (2) Y.B. Int'l Law Comm'n 160-161.
23 "Survey of State Practice Relevant to International Liability For Injurious Consequences Arising Out of Acts Not Prohibited by International Law." A/CN. 4/384-16. X. 1984 p. 8.
24 [1980] I Y.B. Int'l L. Comm'n 242.
25 Idem.

The striking feature of this argument is that there is in fact no primary rule of obligation as there is in the field of state responsibility. But according to the line of argument adumbrated above, the primary rule arises a posteriori in the sense that because an injurious consequence arose, the act itself must be in breach of an obligation. This obligation which the Special Rapporteur resorted to as an alternative to the principle of strict liability was founded on a duty of care not to use one's own rights in such a way that it would harm the interests of others.[26]

The topic gained momentum following upon the introduction of the general provisions contained in five draft articles in the fifth report.[27] Draft Article 1 contained three elements:

1. An activity or situation, happening or obtaining in a State;
2. A physical consequence; and
3. The physical consequences necessarily having effect upon the subjects or territory of another State, thereby causing loss or injury.

The Special Rapporteur identified three limitations contained in the draft article. The first was the transboundary element. The second limitation was that the transboundary element must have arisen as a consequence of an activity or situation occurring wholly or in part within the territory or control of a state. Thirdly, such consequences must cause loss or injury to the affected state which cannot be prevented or repaired without "a measure of international co-operation".

The fifth report marked the clear departure by the Special Rapporteur from the concept of strict liability and the placing of emphasis on the duty of a state not to use its territory in such a way as to harm another state or its subjects. He then drew heavily on policy in relation to international co-operation and a duty to negotiate for the mutual interests of states. In his introduction the Special Rapporteur had stated "There were those who inevitably tended to part company with the traditionalists and saw in law no easy means of responding to the more complicated factual situation; they believed that reliance must be placed on voluntary efforts in the sphere of policy; and that only thereafter could the law guide and circumscribe the new development".[28]

IV. APPRAISAL OF THE EFFORTS OF THE SPECIAL RAPPORTEUR

The development of the topic bears witness to the indelible mark left by the Special Rapporteur. The impact of his ideas and forceful reasoning helped to give the topic its proper perspective.

Textbooks on international law are at one that only "dolus" or wrongfulness will engage State responsibility. According to Greig, "International Law is only concerned with the wrongful acts of one international person against another on the international plane. . . ."[29] This represents the generally accepted rule. The Special Rapporteur was fully cognizant of this fact, and that explained his agonising efforts

26 [1980] II (2) Y.B. Int'l L. Comm'n (Annex) 150.
27 A/CN. 4/383.
28 [1980] I Y.B. Int'l L. Comm'n 241.
29 D. W. Greig *International Law* (2 ed., Butterworths, London, 1976) 522.

to give the topic that was assigned to him the breath of life. He laboured hard and wide in order to identify the legal principles concerning the formation of policy and used the technique of his profession to come "to the practicabilities of human experience"[30] in putting the subject in its proper perspective. It must be remembered that while the topic was initially rejected outright either as having no value or as being of doubtful utility, it later on gained recognition. It was largely due to the singular qualities of the Special Rapporteur that the topic reached this stage of its development.

In commenting on Brierly's contribution, Sir Hersch Lauterpacht stated "Brierly's most significant — and perhaps most lasting — contribution to international law lies in the fact that during a period of transition and reassessment of values, he threw the weight of his writing and teaching in the scales of what may properly be regarded as a progressive conception of international law".[31] Brierly was guided by the ideas of a generation that had not lost faith in the inherent values of humanity. He opined that:[32]

> We are too often tempted to forget that the link between law and morals is much more fundamental than the differences between them and that the ultimate basis of the obligation to obey the law can only be a moral one. The problem of the binding nature of international law is only one aspect of the binding character of law in general, in the same way as the latter is no more than an aspect of the wider problem of obligation in general. And that is a problem of ethics.

Professor Quentin-Baxter was a believer in ideals and he just could not comprehend that injury caused by the act of a state should not entail that state's liability, especially if that injury could be avoided or at least minimized. In the face of strong criticism, he emerged with a set of articles that in the end gained approval as a basis for further work. He was much more confident and relaxed at the thirty-sixth session of the International Law Commission than at the previous sessions. The report of the Commission records his triumph in the following words: "There is, however, already general agreement that the topic is correctly centred in the need to avoid or minimize and, if necessary, repair transboundary loss or injury arising as a physical consequence of an activity within the territory or control of another State."[33] On the five articles he submitted, the final report reads as follows:[34]

> In final summary, subject to questions of drafting and subject also to the right to take longer and harder look when the project is more advanced, the Commission found no *major fault* in the five articles and agreed that on the basis of those articles, the elaboration of further articles should proceed.

After all, the traveller in the wilderness had come to habitation. But still the way was not fully paved. That was a success, though limited, but it was a major stride achieved with no small effort. The creative mind, the pragmatism and the

30 Jenks, op.cit. 21.
31 E. Lauterpacht (ed.) *International Law — Collected Papers of Hersch Lauterpacht* (Cambridge University Press, Cambridge, 1975) vol. 2 (Pt. 1), 431.
32 Ibid. 434.
33 [1984] Y.B. Int'l L. Comm'n 180.
34 Ibid. 191. Emphasis supplied.

perserverance of a dedicated scholar combined to make an otherwise uncertain and, at best, cloudy topic, clear and of ascertainable boundaries. In the apt words of Jenks:[35]

> The creative mind is not a refuge from reality, but a command of reality which rehabilitates the freedom of the human will; its office is to understand changing realities, to detect unsuspected relationships, to illuminate practice and precedent by principle, to perceive opportunities for decisive action while they can still be grasped, and to devise arrangements and procedures for giving practical expression to the values recognised by the law.

V. THE FUTURE OF THE TOPIC

During the last session of the International Law Commission, there was general agreement that the work on the topic should continue as delineated. It was emphasized that the topic hinged on the fact that man's increasing interference with the natural order of things through advancements in technology, may very well cause things to get out of hand. There was "complete agreement" that the needs of man to exploit natural resources and the resultant consequences could be met only by more measures of international co-operation.[36] Examples are not lacking. If we consider the various multilateral conventions or bilateral treaties establishing various regimes regulating transboundary injury or loss, we could detect a certain normative pattern of procedure which might be adopted in similar situations.

Rules of municipal law recognise a duty to prevent and, if necessary, to repair loss or injury that may arise from the exercise of a right. At the level of international relations, states are at least conscious of the fact that should injury ensue, efforts will not be spared to repair it or at least minimize it. It was agreed by the Commission that the regulation of the particular dangers that could have transboundary effect was the practical solution and that such line should be pursued while at the same time striking a proper balance between the freedom of action of the source state and the freedom of the affected state from transboundary loss or injury.[37]

At the previous session (i.e., the 35th), there was complete agreement in the Commission and in the Sixth Committee that the scope of the topic should be confined to the duty to avoid or otherwise minimize and repair physical transboundary harm resulting "from physical activities within the territory or control of the [source] State".[38]

Writing in 1983, Professor McCaffery concluded:[39]

> Thus while the future of this topic is not at all clear, it appears that its scope will have to be narrowed considerably if it is to result in a broadly acceptable product. The topic is a naturally controversial one, involving as it does the portent of liability

35 Jenks, op.cit. 271.
36 Report of the I.L.C. on the Work of Its 36th Session — Supp. No. 10 (A/39/10) 174.
37 Ibid. 186.
38 Idem.
39 S. McCaffery "The Thirty-Fourth Session of the International Law Commission" (1983) 77 A.J.I.L. 323, 336.

without fault and the appearance, at least, that the commission is engaging in "progressive development" to a greater extent than "codification" of international law.

Though the scope has been narrowed, it is not as yet possible to predict the future of the topic. It still remains contentious. Nevertheless, great steps were taken in the right direction in the opinion of many. Owing to the lamented death of the Special Rapporteur, the future progress of the topic on the lines outlined above is not certain, but one would hope that the work will progress on explored ground.


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