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

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

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

[Agenda item 8]

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

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### Updating of the topic

#### A. Status of the work done so far

1. In order to avoid any unnecessary waste of time now that the Sixth Committee of the General Assembly has shown an interest in the topic and some sense of urgency has been reflected in the statements made by Member States, and in particular by developing countries, at recent sessions of the General Assembly, the Special Rapporteur has followed the recommendation by the Enlarged Bureau of the International Law Commission that he should prepare a paper making an appraisal of the status of work on the topic to date and giving a preliminary indication of the direction future work will take.

2. A brief look at the work done by the Commission and the Sixth Committee shows, in the view of the present Special Rapporteur, that there have been two quite separate stages in the consideration of the topic. The first stage runs from the report submitted to the Commission at its thirtieth session, in 1978, by the Working Group it had established,<sup>1</sup> which was chaired by Robert Q. Quentin-Baxter—appointed Special Rapporteur at the same session—to the latter's third report

(containing a schematic outline), submitted to the Commission at its thirty-fourth session, in 1982. The second stage runs from the Sixth Committee's discussion of the topic in 1982 to the fifth and last report by the late R. Q. Quentin-Baxter, submitted to the Commission at its thirty-sixth session, in 1984.<sup>2</sup>

3. The first stage, which involved a rather lengthy and complicated general debate on a number of basic concepts, helped the members of the Commission to understand the most important problems with which the previous Special Rapporteur had to deal in his study of the topic and clarified the concepts on which he had begun to work.

4. In his preliminary report, the previous Special Rapporteur made strenuous efforts to draw as clear a distinction as possible between his topic and the topic of

<sup>1</sup> The previous Special Rapporteur submitted to the Commission, at its thirty-second to thirty-sixth sessions, the following reports:

Preliminary report: *Yearbook ... 1980*, vol. II (Part One), p. 247, document A/CN.4/334 and Add.1 and 2;

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

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

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

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

<sup>1</sup> A/CN.4/L.284 and Corr.1. Section II of the report of the Working Group is reproduced in *Yearbook ... 1978*, vol. II (Part Two), pp. 150-152.

State responsibility for wrongful acts. Those efforts were entirely necessary because the principles governing the two topics are very different and because his topic also required him to include obligations to prevent and minimize possible loss or injury arising out of acts which are not prohibited by international law, obligations which could in no way be admitted in the context of responsibility for wrongful acts.

The alternative to responsibility for wrongful conduct represented by strict liability was, however, not an appropriate basis for his work because it eliminated what was regarded as the most important component, namely the duty of care, and because quite a few risks would be involved in basing the entire draft on a type of responsibility on whose normative foundations in customary international law no consensus existed.

5. The previous Special Rapporteur therefore decided to base his work on a broader legal foundation whose fundamental principle was, in his view, "a necessary ingredient of any legal system", namely a primary rule stated at the level of greatest generality and reflected in the maxim *sic utere tuo ut alienum non laedas*.<sup>3</sup> A special process of adaptation was required if a rule of such generality was to apply to particular situations and, for the purposes of such a process, the pattern which appeared to emerge from State practice was to try to reach agreement on the procedures to be followed and the levels of protection to be ensured in respect of activities which might cause transboundary loss or damage.<sup>4</sup>

The main thrust of the new topic was thus to minimize the possibility of loss or damage and to provide means of redress if loss or damage did occur, without, if possible, prohibiting or hampering activities which were carried out in the territory or under the control of a State and which might be useful or beneficial. In the modern-day world,

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 conditions of life in other countries. The balance of interest test reflected in principle 21 of the United Nations Declaration on the Human Environment (Stockholm Declaration) was an expression of that situation. ...<sup>5</sup>

6. The previous Special Rapporteur used two main guidelines to draw a conceptual distinction between his

<sup>3</sup> "... That rule—the duty to exercise one's own rights in ways that did not harm the interests of other subjects of law—was a necessary ingredient of any legal system: it was implicit in the aims and purposes of the United Nations 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 United Nations Conference on the Human Environment held in Stockholm in June 1972, and article 30 of the Charter of Economic Rights and Duties of States." (*Yearbook ... 1980*, vol. II (Part Two), pp. 159-160, para. 135.)

<sup>4</sup> "... The pattern that had seemed to emerge was that, as States became aware of situations in which their activities—or activities within their jurisdiction or under their control—might give rise to injurious consequences in areas outside their territory, they took steps to reach agreement with the States to which the problem might extend about the procedures to be followed and the levels of protection to be covered. ..." (*Ibid.*, p. 160, para. 136.)

<sup>5</sup> *Yearbook ... 1982*, vol. II (Part Two), p. 86, para. 116.

topic and that of State responsibility. The first is based on the distinction between "primary" and "secondary" rules which has traditionally been made by the Commission.<sup>6</sup> The second emphasizes the duties of prevention and "due care" which linked the topic to the classical rules of international law and brought it closer to the field of strict liability.<sup>7</sup> It was, however, later made clear that the duty of care implied only the duty to take account of the interests of other States.<sup>8</sup>

With the schematic outline of the topic submitted in his third report the previous Special Rapporteur considered that he had found an appropriate legal framework for the draft and that that framework clearly distinguished his topic from the topic of responsibility for wrongful acts.

7. Some objections were raised at that first stage. Although a clear majority in the Commission and the Sixth Committee of the General Assembly was in basic agreement with the broad outline proposed by the previous Special Rapporteur and there was also firm support for continuing the consideration of the topic on the basis of the approach indicated, a few members of both bodies stated that, for various reasons, they were opposed to the idea that the Commission should continue to consider the topic. Some members of the Commission stated, in particular, that the Special Rapporteur was dealing with the topic in a way which did not fully correspond to the mandate assigned to the Commission by the General Assembly, since the concepts he had introduced included, *inter alia*, obligations of prevention which had nothing to do with responsibility.<sup>9</sup> Those members therefore expressed the view that the Commission should decide to inform the General Assembly of that problem and request it either to confirm or to reconsider the scope and content of the topic.<sup>10</sup>

8. It was in these circumstances that, at its thirty-fourth session, in 1982, the Commission had before it the schematic outline of the topic, contained in the third report of the previous Special Rapporteur.<sup>11</sup> In the present Special Rapporteur's view, the schematic

<sup>6</sup> "... According to this distinction, 'secondary' rules are those engaged by the occurrence of a wrongful act: therefore an act which is not prohibited can give rise to responsibility (or liability) only when a 'primary' rule of obligation so provides. The value of maintaining this technical distinction was simply that it kept a correct relationship between the present topic and that of State responsibility. The two topics are not on the same plane, and rules developed under the present topic may not purport to derogate from the universal rules of State responsibility." (*Yearbook ... 1981*, vol. II (Part Two), p. 147, para. 170.)

<sup>7</sup> "In any case, as some Commission members noted, the main purpose of the Special Rapporteur's emphasis on the duty of care was to strengthen the linkage between the present topic and the classical rules of international law, so that the issue of 'strict' liability could be conservatively assessed. ..." (*Ibid.*, p. 148, para. 174.)

<sup>8</sup> "... The description had, however, also caused misunderstanding because, in the context of the present topic, the duty of care did not imply an obligation to prohibit any conduct that might give rise to loss or injury to other States or their citizens: it implied only the duties, reviewed in the preceding paragraphs of this report, to take due account of the interests of other States." (*Yearbook ... 1982*, vol. II (Part Two), p. 87, para. 122.)

<sup>9</sup> See *Yearbook ... 1982*, vol. I, p. 284, 1743rd meeting, para. 40, and p. 289, 1744th meeting, para. 26.

<sup>10</sup> *Ibid.*, p. 290, 1744th meeting, paras. 32 and 35-36.

<sup>11</sup> *Yearbook ... 1982*, vol. II (Part One), p. 62, document A/CN.4/360, para. 53.

outline, which was given careful consideration by the Commission and the Sixth Committee, marked a turning-point in the discussions because, from then on, no further attempts were made to define the basis and scope of the topic: the aim now was to determine its content. In addition, the schematic outline described the scope and breadth of the topic in unambiguous terms. Although the ideas embodied in the schematic outline had been referred to in earlier reports, it was because of the novelty of the subject-matter and the seemingly unorthodox concepts introduced to explain it that the Commission had not fully grasped all the implications of the topic and exactly what the previous Special Rapporteur had had in mind. With the schematic outline, however, the Commission and the General Assembly had a clear idea of the Special Rapporteur's intentions with regard to the topic and the reaction to the outline was at least as favourable as the generally favourable consideration given to his earlier reports.<sup>12</sup>

9. In the present Special Rapporteur's opinion, this represented tacit approval on the part of the General Assembly—which had given the Commission its mandate—of the work done and was, as far as the Commission was concerned, an expression of its satisfaction with the fulfilment of its original mandate. There seemed to be a clear indication that higher approval had been given to the approach of considering transboundary loss or injury as a topic of discussion, to including prevention as an integral part of that topic, as well as to the other procedures and concepts referred to in the outline. The topic, for which a sound basis thus exists, is of concern to a large number of countries and will apparently have an interesting role to play in contemporary international law.

10. Another important development was the publication of the "Survey of State practice relevant to international liability for injurious consequences arising out of acts not prohibited by international law", prepared by the Secretariat.<sup>13</sup> This research on multilateral and bilateral agreements, State practice and judicial and arbitral decisions in the field under consideration reveals what the experts already knew, namely that there have been important normative developments in this area and that the way States react, as reflected in the practice they follow, is the result of a pressing need created by modern technology and the challenge it represents to the maintenance of international relations based on justice, tolerance and a spirit of co-operation. The valuable material contained in the survey holds out good prospects for the possibility of identifying positive rules of general international law governing the topic or, at any rate, good prospects for determining the lawfulness of State policy with regard to future conduct.<sup>14</sup>

<sup>12</sup> See *Yearbook ... 1984*, vol. II (Part Two), pp. 76-77, para. 235.

<sup>13</sup> Document A/CN.4/384.

<sup>14</sup> *Ibid.*, para. 10. See also "Topical summary, prepared by the Secretariat, of the discussion in the Sixth Committee on the report of the Commission during the thirty-ninth session of the General Assembly" (A/CN.4/L.382), para. 317:

"... [Many representatives] noted, in that connection, the law of outer space, the law of the sea and, in particular, marine pollution as a result of oil spillage, etc., which, they stated, provided firm foundation for the principle that States were under an obligation, first, to prevent damage and, secondly, to provide compensation where damage was caused. ..."

11. As a result of the two developments referred to in paragraphs 8 and 10 above, the topic gained momentum that would be difficult to check. Thus, in his fourth report, the Special Rapporteur indicated certain changes to the schematic outline<sup>15</sup> and then stated that the general debate had been concluded. In his fifth report, he submitted to the Commission the following five draft articles: article 1 (Scope of the present articles), article 2 (Use of terms), article 3 (Relationship between the present articles and other international agreements), article 4 (Absence of effect upon other rules of international law) and article 5 (Cases not within the scope of the present articles).<sup>16</sup>

The Commission's good progress on the topic and the start of its consideration of the articles on the basis of which the schematic outline would be developed were then interrupted by the Special Rapporteur's untimely death.

### B. The Special Rapporteur's proposals for future work

12. Given the special characteristics of the traditional institution of special rapporteurs' reports for the treatment of topics studied by the Commission, it is usual, when a special rapporteur takes over a subject on which work has already begun, to start with an assessment of all that has been done, after which he will give his work the particular stamp of his own perceptions and will finally give the whole topic unity of concept and style. But it is also easy to see that some ground has already been covered, since a number of concepts which are not part of a special rapporteur's subjective view have been established by their mere existence, proposed to the Commission and the General Assembly, considered by them and found to be useful working tools, so that they cannot now be ignored. A first comparison of the earlier reports already mentioned with the materials setting out the practice of States seems to indicate that certain trends and general lines exist independently of any personal conceptions, and that many of the courses proposed by the previous Special Rapporteur have already been marked out in State practice.

13. It will therefore be the task of the present Special Rapporteur to review carefully all that has been done, in order to confirm the proposals of his predecessor or propose the changes dictated by his own conception of the problems, but proceeding from a starting-point that permits the topic to be developed with proper continuity. Thus he does not intend to reopen the general discussion. Certain basic concepts arrived at in the first three reports are already accepted. This will not prevent the Special Rapporteur from re-examining all that has been done, and if, in his opinion, some theoretical construction is necessary which appears more appropriate in regard to specific aspects, he will propose it to the Commission. The foregoing is more in the nature of a reservation of rights than a formal announcement of changes, and it should be reiterated here that the Special

<sup>15</sup> *Yearbook ... 1983*, vol. II (Part One), p. 220, document A/CN.4/373, paras. 63 *et seq.*

<sup>16</sup> *Yearbook ... 1984*, vol. II (Part One), pp. 155-156, document A/CN.4/383 and Add.1, para. 1.

Rapporteur does not intend in any way to reopen the door to a general debate.

14. But what should undoubtedly be the most important raw material of his future work is the schematic outline, not because of any idea of revising it—since it was precisely the more general notions of the outline which motivated the above-mentioned tacit confirmation of what has been done—but simply because some aspects of the outline elicited differing opinions in the discussions which have taken place, and they may offer material for changes. In addition, the concepts forming it are the immediate source of the draft articles which, as can be seen from the five articles proposed (see para. 11 above), will provide the substance for the conceptual skeleton. At the same time, the execution of this work shows that it is appropriate or necessary to make additions or deletions. An example is provided by draft article 1, which with respect to section 1.1 of the schematic outline offers some important changes: the introduction of the expressions “situations”, “physical consequence” and “use or enjoyment” of certain “affected” areas (without including the notion “adversely”).<sup>17</sup>

15. As a method of carrying out this work it seems essential, at the first stage, to make a rigorous comparison between the rules and procedures contained in the schematic outline and the practice of States, for which purpose the Secretariat study already mentioned (para. 10 above) will be a valuable aid.

16. There are some points which met with objections in the discussions held or raised doubts in the mind of the present Special Rapporteur, and they will therefore be specially examined. Some, but not all of them, will be taken up and in any case they are the result of a first examination of the subject with a new approach. This means that there may be many other such points and that, on subsequent reflection, some of those mentioned will not be taken up again by the Special Rapporteur in his next report or in following reports.

(a) It would be useful to give some attention to the study of a matter not considered exhaustively in previous discussions, namely the point at which a State can be considered responsible for the consequences of activities carried out in its territory. This question was raised in the debate at the Commission's thirty-fourth session, in 1982, and taken up in its report on that session.<sup>18</sup> It appears to relate to the distinction usually made in the law of some countries between immediate or direct consequences and indirect consequences, which are more remote in the chain of cause and effect, or “accidental”, being produced by the intervention of other facts. In any case, this matter is usually connected with the foreseeability of certain effects.

(b) It would also be worth making a special examination of the criterion of “shared expectations” men-

tioned in section 4, paragraph 4, of the schematic outline, which is explained in the Commission's report on its thirty-fourth session.<sup>19</sup> The previous Special Rapporteur admitted that the reception given to that criterion in the Commission had not been entirely favourable, as was shown by the discussion.<sup>20</sup>

(c) The discussions in the Commission also showed that some members had doubts about the effectiveness or value of certain procedures set out in the schematic outline, such as those which in no way engaged the responsibility of the State if they were neglected by the State of origin or source State.<sup>21</sup>

(d) The duty to make reparation is somewhat lost among the procedures established in section 4 of the schematic outline; perhaps it should be given a better position to bring out its importance in the draft.<sup>22</sup>

(e) The role of international organizations within the framework of the concepts proposed will have to be analysed in all its aspects, since it is clear that the Commission did not examine this matter exhaustively, even though the previous Special Rapporteur's fifth report contains interesting considerations, particularly in connection with draft article 5 submitted therein.

As is known, the questionnaire prepared by the previous Special Rapporteur with the assistance of the Secretariat and sent to selected international organizations relates to sections 2, 3 and 4 of the schematic outline, since its underlying intention was to ascertain whether the mutual obligations of States as members of an international organization could, to some extent, take the place of the procedures indicated in those sections.<sup>23</sup>

(f) Until a more advanced study of the topic consolidates our knowledge, certain basic questions remain open, such as the definitive scope of the topic, which so far appears to have attracted a certain consensus as regards draft article 1 submitted in the fifth report, and the concept of “control”, etc. All this comes within the intention expressed above that the whole topic will be entirely reviewed, with a view not to making changes, but to seeking the certainty which alone gives inner conviction.

(g) As regards the five draft articles submitted in the fifth report, it need hardly be said that the Special Rapporteur intends to re-examine them and possibly re-submit them with the changes he may consider appropriate, having regard, among other elements, to the comments made in the discussions on them both in the Commission and in the Sixth Committee of the General Assembly.

<sup>19</sup> *Ibid.*, p. 87, para. 119.

<sup>20</sup> “The Special Rapporteur noted that the concept of ‘shared expectations’—contained in paragraph 4 of section 4 of the schematic outline ... had had a rather mixed reception in the Commission. Some saw it as a valuable concept, others as adding little to the schematic outline. ...” (*Ibid.*, p. 91, para. 145.)

<sup>21</sup> “... Some doubted the value of procedures which could be neglected without engaging the responsibility of the State for wrongfulness; ...” (*ibid.*, para. 148.)

<sup>22</sup> “... The duty to provide reparation, now rather lost in the procedural mass of section 4, was one candidate for certain elevation; ...” (*ibid.*, p. 92, para. 152.)

<sup>23</sup> The replies to that questionnaire, received in 1984, are reproduced in *Yearbook ... 1984*, vol. II (Part One), p. 129, document A/CN.4/378.

<sup>17</sup> *Ibid.*

<sup>18</sup> “... One Commission member noted with approval that the use of the phrase ‘give rise to’ in the scope clause, in paragraph 1 of section 1 of the schematic outline, established a broad connecting link between activities within the territory or control of a State and the loss or injury suffered outside that State's territory and control. Several members referred to the question of remoteness of consequences, and the need for further attention to this point was noted. ...” (*Yearbook ... 1982*, vol. II (Part Two), p. 90, para. 142.)

17. In developing the topic, the Special Rapporteur will give careful attention to the concern repeatedly expressed in those bodies about the interests of the developing countries, and to the degree of progressive

development of international law which may be required by the novelty of the topic and the demands of equity, provided that those demands secure the necessary consensus among States.