

Document:-
A/CN.4/405 and Corr.1& 2

Third 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

Extract from the Yearbook of the International Law Commission:-
1987, vol. II(1)

*Downloaded from the web site of the International Law Commission
(<http://www.un.org/law/ilc/index.htm>)*

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

[Agenda item 7]

DOCUMENT A/CN.4/405*

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

[Original: Spanish]
[16 March 1987]

CONTENTS

	Paragraphs	Page
SCOPE AND RELATED PROVISIONS OF THE DRAFT ARTICLES	1-75	47
<i>Section</i>		
I. INTRODUCTION	1-6	47
A. Previous reports and debates	1-3	47
B. The proposed articles	4-6	48
II. ARTICLE 1	7-43	49
A. Activities	7-23	49
B. Situations	24-30	51
C. Conduct whose wrongfulness is precluded	31-36	51
D. The three limitations or criteria	37-43	52
III. ARTICLE 2	44-60	53
A. Territory and control	44-53	53
B. Injury	54-60	54
IV. ARTICLES 3 TO 6	61-75	55
A. Article 3	61-64	55
B. Article 4	65-70	55
C. Articles 5 and 6	71	56
D. International organizations	72-75	56

Scope and related provisions of the draft articles

I. INTRODUCTION

A. Previous reports and debates

1. The discussion by the International Law Commission at its previous session of the preliminary report¹ and the second report² of the Special Rapporteur was

* Incorporating documents A/CN.4/405/Corr.1 and 2.

¹ *Yearbook* . . . 1985, vol. II (Part One), p. 97, document A/CN.4/394.

² *Yearbook* . . . 1986, vol. II (Part One), p. 145, document A/CN.4/402.

obviously inadequate. Lack of time and the Commission's other priorities meant that these documents could not be dealt with in the normal way. During the few meetings allocated to consideration of the topic,³ it was impossible for all members of the Commission to take part in the debate, and some of them commented on the situation, expressing their disappointment. It should also not be forgotten that the Commission's new membership differs considerably from the previous

³ See *Yearbook* . . . 1986, vol. I, pp. 196 *et seq.*, 1972nd to 1976th meetings.

membership and the new members will surely wish to have an opportunity to make statements on the topic.

2. The present report contains the texts of six draft articles based largely on the five articles submitted by the previous Special Rapporteur, R. Q. Quentin-Baxter. These provisions deal with fundamental concepts relating to the subject under consideration, a number of which were considered both in the Commission and in the Sixth Committee of the General Assembly. Analysis of those debates shows that consideration of the draft articles was also by no means exhaustive, since both in the Commission and in the Sixth Committee attention was mostly devoted to a number of general issues that still had to be considered.

3. For all these reasons, the Special Rapporteur believes that, at its thirty-ninth session, the Commission should reopen the debate on the first two reports, in order to give members who wish to make statements on them an opportunity to do so, and that it should also deal with the present report containing the six draft articles now being submitted.

B. The proposed articles

4. On the basis of the five draft articles contained in the fifth report of the previous Special Rapporteur,⁴ but

⁴ For convenience and for a better understanding of the present report, the five draft articles submitted by Mr. Quentin-Baxter in his fifth report (*Yearbook . . . 1984*, vol. II (Part One), pp. 155-156, document A/CN.4/383 and Add.1, para.1) are reproduced below:

“CHAPTER I

“GENERAL PROVISIONS

“Article 1. *Scope of the present articles*

“The present articles apply with respect to activities and situations which are within the territory or control of a State, and which give rise or may give rise to a physical consequence affecting the use or enjoyment of areas within the territory or control of any other State.”

“Article 2. *Use of terms*

“In the present articles:

“1. ‘Territory or control’

“(a) in relation to a coastal State, extends to maritime areas in so far as the legal régime of any such area vests jurisdiction in that State in respect of any matter;

“(b) in relation to a State of registry, or flag-State, of any ship, aircraft or space object, extends to the ships, aircraft and space objects of that State while exercising a right of continuous passage or overflight through the maritime territory or airspace of any other State;

“(c) in relation to the use or enjoyment of any area beyond the limits of national jurisdiction, extends to any matter in respect of which a right is exercised or an interest is asserted;

“2. ‘Source State’ means a State within the territory or control of which an activity or situation occurs;

“3. ‘Affected State’ means a State within the territory or control of which the use or enjoyment of any area is or may be affected;

“4. ‘Transboundary effects’ means effects which arise as a physical consequence of an activity or situation within the territory or control of a source State, and which affect the use or enjoyment of any area within the territory or control of an affected State;

“5. ‘Transboundary loss or injury’ means transboundary effects constituting a loss or injury.”

“Article 3. *Relationship between the present articles and other international agreements*

“To the extent that activities or situations within the scope of the present articles are governed by any other international agreement,

with changes made in the light of the debates in the Commission and the Sixth Committee, the Special Rapporteur proposes the texts set out below. The texts submitted in his predecessor’s fifth report will be referred to as the “original text”, and those contained in the present report as the “revised text”.

5. In order to understand fully what follows, it is essential to have read the above-mentioned fifth report, as well as the summary records of the meetings at which the Commission considered the report at its thirty-sixth session,⁵ the Commission’s report on that session,⁶ and the topical summary, prepared by the Secretariat, of the discussion on the topic in the Sixth Committee during the thirty-ninth session of the General Assembly.⁷

6. The proposed articles are the following:

Article 1. Scope of the present articles

The present articles shall apply with respect to activities or situations which occur within the territory or control of a State, and which give rise or may give rise to a physical consequence adversely affecting persons or objects and the use or enjoyment of areas within the territory or control of another State.

Article 2. Use of terms

For the purposes of the present articles:

1. “Situation” means a situation arising as a consequence of a human activity which gives rise or may give rise to transboundary injury.

2. The expression “within the territory or control”:
(a) in relation to a coastal State, extends to maritime areas whose legal régime vests jurisdiction in that State in respect of any matter;

whether it entered into force before or after the entry into force of the present articles, the present articles shall, in relations between States parties to that other international agreement, apply subject to that other international agreement.”

“Article 4. *Absence of effect upon other rules of international law*

“The fact that the present articles do not specify circumstances in which the occurrence of transboundary loss or injury arises from a wrongful act or omission of the source State is without prejudice to the operation of any other rule of international law.”

“Article 5. *Cases not within the scope of the present articles*

“The fact that the present articles do not apply to the obligations and rights of international organizations, in respect to activities or situations which either are within their control or affect the use or enjoyment of areas within which they may exercise any right or assert any interest, shall not affect:

“(a) the application to international organizations of any of the rules which are set forth in the present articles in reference to source States or affected States, and to which international organizations are subject under international law independently of the present articles;

“(b) the application of the present articles to the relations of States as between themselves.”

⁵ *Yearbook . . . 1984*, vol. I, pp. 198 *et seq.*, 1848th to 1853rd meetings.

⁶ *Yearbook . . . 1984*, vol. II (Part Two), pp. 74 *et seq.*, paras. 221-257.

⁷ Document A/CN.4/L.382, sect. E.

(b) in relation to a flag-State, State of registry or State of registration of any ship, aircraft or space object, respectively, extends to the ships, aircraft and space objects of that State even when they exercise rights of passage or overflight through a maritime area or airspace constituting the territory of or within the control of any other State;

(c) applies beyond national jurisdictions, with the same effects as above, thus extending to any matter in respect of which a right is exercised or an interest is asserted.

3. "State of origin" means a State within the territory or control of which an activity or situation such as those specified in article 1 occurs.

4. "Affected State" means a State within the territory or control of which persons or objects or the use or enjoyment of areas are or may be affected.

5. "Transboundary effects" means effects which arise as a physical consequence of an activity or situation within the territory or control of a State of origin and which affect persons or objects or the use or enjoyment of areas within the territory or control of an affected State.

6. "Transboundary injury" means the effects defined in paragraph 5 which constitute such injury.

Article 3. Various cases of transboundary effects

The requirement laid down in article 1 shall be met even where:

(a) the State of origin and the affected State have no common borders;

(b) the activity carried on within the territory or control of the State of origin produces effects in areas beyond national jurisdictions, in so far as such effects are in turn detrimental to persons or objects or the use or enjoyment of areas within the territory or control of the affected State.

Article 4. Liability

The State of origin shall have the obligations imposed on it by the present articles provided that it knew or had means of knowing that the activity in question was carried on within its territory or in areas within its control and that it created an appreciable risk of causing transboundary injury.

Article 5. Relationship between the present articles and other international agreements

Where States Parties to the present articles are also parties to another international agreement concerning activities or situations within the scope of the present articles, in relations between such States the present articles shall apply subject to that other international agreement.

Article 6. Absence of effect upon other rules of international law

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

II. ARTICLE 1

A. Activities

7. In the light of article 1 as presented above, it is appropriate to re-examine the activities that would fall within the scope of the draft articles, and to consider whether the term "situation" is acceptable with the meaning proposed in the original text.

8. The activities characteristic of the topic are those referred to as "dangerous". This concept must be analysed more closely, because, as one member of the Commission commented: "Given that any human activity had some harmful consequences, section 1 [of the schematic outline] added nothing to the study of the topic, for its scope was too vast."⁸ If that meant that all human activities contain an element of danger, in the sense that no one can ever be absolutely certain that a routine activity will not, for some reason and at some point, cause injury to third parties, then the statement appears to be correct.

9. What is needed, then, is a characterization closer to the subject-matter. A preliminary observation in that direction is that, although what must be taken into account concerns both the injury that could be sustained inside a country and transboundary injury, for the latter type of injury to occur, there would have to be an effect even greater than for the former type. At issue is how to deal with the kind of occurrence which, in principle, would have an effect at somewhat greater distances.

10. Then again, it is also clear that the concept of danger is not absolute, but relative. It could vary, for example, according to the geographical location of the activity in question: location in the interior of a country with extensive territory is not the same as in a smaller country, or near a border, or on an international river, or in an area where there are steady or prevailing winds. The Special Rapporteur would recall, in this regard, the case mentioned in his second report of the refinery located in Belgian territory near the Netherlands border.⁹ It seems clear that, had it been located farther inside the country, it would not have given rise to any claim whatsoever.

11. In any case, on first examination it is generally not difficult to appreciate the risks created by certain new activities or certain variations on existing activities. What is at present impossible is to quantify the risk so that, by applying a simple standard, an activity can be classified as involving risk.

⁸ *Yearbook* . . . 1986, vol. I, p. 200, 1973rd meeting, para. 4 (Mr. Ushakov).

⁹ Document A/CN.4/402 (see footnote 2 above), footnote 40 (d).

12. One initial conclusion is that, for an activity to be considered as involving risk, that risk must be appreciable. Otherwise, vital preventive mechanisms could hardly come into play.

13. However, this predictability may be general in that cases may be predictable in a general rather than in a specific sense, such as when, because of the instruments or materials used, it would be appropriate to note that, even though they are handled with care, there is a statistical probability of accident. In the marine transport of oil, for example, experience has shown that, whatever precautions are taken, there are and will continue to be accidents resulting in huge oil spills, due to the use of enormous tankers offering other advantages. The risk thereby created is appreciable, even though there is no telling on which voyage, or on which tanker, an accident will actually occur.

14. Naturally, the present articles would apply even if the risk were not foreseeable in the general sense, provided that the full scope of that risk was known to the State of origin. When an activity does not appear dangerous on first examination, the risks it involves may become apparent *a posteriori*. Obviously, the State concerned would then become subject to the obligations and procedures set out in the present articles, as in the previously cited case of an agricultural pesticide which, after more or less prolonged application, proved to be detrimental to the use or enjoyment of transboundary areas.

15. The same arguments would also make general predictability of the risk a requirement for the reparation of injury sustained in the absence of an agreed régime. The fact is that, as was seen in the second report,¹⁰ there are solid reasons at the very basis of liability for risk: it is fair and logical that whoever derives the principal benefit from the dangerous undertaking or activity must assume the costs thereof, and not pass them on to third parties. To the extent that the injury upsets the balance of rights and interests that should exist among States, there would be unjust enrichment and, worse still, an international violation of the fundamental principle of equality of States before the law.

16. However, if an activity does not call for diagnosis of the risk involved and, for reasons that have nothing to do with it, it still causes isolated injury, the option available would be outside the scope of the present topic, namely to decide where responsibility for injury lies when both the victim and the agent are innocent in every respect even of the "original sin" of having created the general risk. To place this burden squarely on the State of origin would be to apply a concept of absolute liability difficult to accept at the present stage in the development of international law, and that would upset the balance from the other side: no new activity would be lawful until it had been monitored by an international agency which would declare that its lowest possible risks had been accepted by any States that might be affected.

¹⁰ *Ibid.*, paras. 51-54, and especially footnotes 56 to 58.

17. How can the existence of a risk of the type just described be officially determined? Obviously, if the States concerned are in agreement on the matter, the question does not arise. But if they are not, it becomes imperative to resort to machinery for fact-finding and the evaluation of consequences, as set forth in the schematic outline¹¹. It goes without saying that it is as important for this machinery to ascertain the facts relating to the activity as it is for it to estimate the risk created. All these factors provide the basis for the régime to be established.

18. For the purposes of the present study, the objective opinion of a third party is the only way out of the impasse to which attention has repeatedly been drawn in the discussions in the Commission and in the Sixth Committee, both on the present topic and on the water-courses topic. A set of factors are involved which are difficult to appraise quantitatively. One need only think of the very concept of injury, which, as will become more evident later, is very complex, or of the tolerable, and tolerated, consequences in the conduct of certain operations: the famous "threshold" below which there is no appreciable injury. Added to these is the characterization of the risk, which is under discussion here, with its never-ending subjective connotations, even when there is agreement on the facts underlying it.

19. If third-party involvement in ascertaining these facts is not accepted, no régime will be able to function. On the other hand, its acceptance would obviate the difficulties of making assessments in this area.

20. In the domestic legislation of States, the scope of concepts similar to these has been defined through lengthy legal process. It is also mainly by the courts of justice that new activities are being added to the list of "dangerous" ones and brought under the régime governing them. Clearly, international law will require a similar process of elaboration.

21. There are several possibilities for third-party participation in this field, as envisaged by the Special Rapporteur in his second report.¹² It is therefore enough to refer to that document, with the observation that to follow the approach of the schematic outline,¹³ and therefore fail to attach to non-compliance with obligations the natural consequences which would ensue under general international law, could very well place the affected State in an inferior position with respect to conditions prevailing in the international legal order.

22. This is, of course, different from establishing in the draft articles a penalty for non-compliance. In the Special Rapporteur's view, this point was not thoroughly clarified in the discussion at the previous session: it is not a matter of converting a "soft" obligation—whatever is actually meant by such contradictory terms—into a "hard" one, but simply of leaving it as it is in general international law. Anyone who thinks that

¹¹ Text submitted by the previous Special Rapporteur in his third report (*Yearbook . . . 1982*, vol. II (Part One), pp. 62-63, document A/CN.4/360, para. 53).

¹² See footnote 2 above.

¹³ See sect. 2, para. 8 (first sentence), and sect. 3, para. 4 (first sentence), of the schematic outline.

there the obligation in question is "soft" will have to accept that nothing has changed. And anyone who thinks that the obligation is "hard" should perhaps explain why it ought to be changed in the present field.

23. If the declared reason is to better prepare the ground for international co-operation, it would be well to ask whether the obligation to avoid causing injury to another State is actually based on international co-operation, or simply on justice and equity. For the Special Rapporteur, co-operation is the basis of the obligation when the aim is to spare that other State an injury caused by natural forces or by a third State, but it becomes harder to hold this view when the potential source of the injury is the very State which has an obligation to prevent it.

B. Situations

24. The original text of article 1 included "situations" in the proposed scope of the topic. A situation was defined as "a state of affairs, within the territory or control of the source State, which gives rise or may give rise to physical consequences with transboundary effects".¹⁴ The examples given were the approach of an oil slick, danger from floods or drifting ice, and risks arising from an outbreak of fire, or from pests or disease.

25. An initial review makes it possible to distinguish at least two different types of situation. First, there are those arising from a human activity, as in the construction of a dam with its resulting artificial lake, or the accumulation of highly toxic materials, etc. Secondly, there are those situations which arise naturally, in the absence of human activity, as in the case of spontaneous forest fires, pests, floods and the like.

26. The following reflections seem pertinent to the above line of thought:

(a) Situations of the first type would fit with no difficulty whatsoever within the régime envisaged, because they arise from activities involving risk. If a dam bursts or if its floodgates have to be opened to save it and that causes transboundary injury, the situation created by the existence of the dam and its artificial lake would obviously be a direct consequence of an activity arising from a particular use of the river in question. It would therefore be sufficient to include in article 1 a few words covering such situations.

(b) Situations which arise naturally without human intervention would be a different matter. In such situations, the responsibility incumbent upon the territorial State would derive from an act or omission on its part in respect of the situation. This would be the case if a State which had the ability to do something to prevent a pest or an epidemic in an area under its jurisdiction from spreading to a neighbouring country did nothing, or if an internal measure which was to the advantage of the territorial State became a major disadvantage for a neighbouring State.

27. Both types of situation have a single common denominator: the transboundary injury or risk of injury. The similarity ends there, however. In the one case, the State incurs some kind of responsibility by reason of human activities, and in the other by reason of purely natural occurrences.

28. The factors that engender responsibility in respect of human activities (whether carried out by the State or by private individuals in its territory) have already been noted: unjust enrichment, a disruption of the balance of rights and interests of States, and accordingly a violation of the principle of equality of States before the law.

29. This would not apply in the second category of situations. The territorial State derives no benefit from a forest fire or an epidemic. On the other hand, the State may be at fault, and that is a characteristic of responsibility for wrongfulness. (It should be recalled that, although fault, even *lato sensu*, does not figure overtly in the realm of State responsibility, it obviously plays a certain role in part 1 of the draft articles on that topic.¹⁵)

30. It also seems reasonable that, if transboundary injury does occur, the State may absolve itself from any liability by demonstrating that it has employed all the means at its command to prevent it (obligations to prevent a given event). This point is important and must be taken into account throughout the consideration of this topic. The Special Rapporteur would draw attention to the passages in his second report where a distinction is made between obligations of prevention in the case of liability for risk and obligations to prevent a given event.¹⁶ With regard to the former obligations, although like the latter they are unfulfilled only if injury occurs, the sole consequence is to aggravate the position of the State of origin in respect of the reparation due.

C. Conduct whose wrongfulness is precluded

31. In his second report,¹⁷ the Special Rapporteur has already touched on State acts whose wrongfulness is precluded by virtue of any of the grounds set forth in articles 29, 31, 32 and 33 of part 1 of the draft articles on State responsibility.¹⁸

32. Article 35 of those draft articles is, in fact, a reservation. It states:

Article 35. Reservation as to compensation for damage

Preclusion of the wrongfulness of an act of a State by virtue of the provisions of articles 29, 31, 32 or 33 does not prejudice any question that may arise in regard to compensation for damage caused by that act.

This reservation simply leaves open the possibility of applying other norms of international law that provide specifically for compensation.

33. Upon closer examination, it can be seen that this area does not include private activities, i.e. activities not

¹⁵ See footnote 18 below.

¹⁶ Document A/CN.4/402 (see footnote 2 above), paras. 64-66.

¹⁷ *Ibid.*, paras. 32-33.

¹⁸ See *Yearbook . . . 1980*, vol. II (Part Two), pp. 30 *et seq.*

¹⁴ See the previous Special Rapporteur's fifth report, document A/CN.4/383 and Add.1 (see footnote 4 above), para. 31.

carried out by the State either through any of its organs or through persons acting in its name or on its behalf, in accordance with the rules of attribution in part I of the draft. In short, the act whose wrongfulness is precluded must be an act of a State.

34. In the often-cited example of an aircraft which strays into foreign airspace because bad weather caused the pilot to lose his bearings, the norm in question would obviously not apply to an aircraft of a private airline, because the act would in no way constitute a State act whose wrongfulness could be precluded.

35. The rule would also not apply—if methodological purity in dealing with the topic is to be preserved—to a State entity which made a similar mistake in the course of a non-hazardous activity, for instance by mistakenly entering an area under another country's jurisdiction, in this case by land, or by causing some injury in that territory through an unforeseeable accident. Such a situation would not seem to be sufficient to set in motion the machinery of the present draft.

36. To be sure, such cases are rare, but for the same reasons of methodological purity, it must be pointed out that the preclusion of the wrongfulness of a given State act does not suffice to bring any injury it may have caused within the scope of the draft. This is not to deny that there may be an obligation to compensate for such injury; but if the obligation exists, it exists by virtue of other norms of international law.

D. The three limitations or criteria

37. In its report on its thirty-sixth session, the Commission stated:

239. It was pointed out that draft article I contains three distinct limitations or conditions, that is criteria which have to be fulfilled in order that any given circumstance may fall within the scope of the draft articles. There is, first, the transboundary element: effects felt within the territory or control of one State must have their origin in something which takes place within the territory or control of another State. Secondly, there is the element of a physical consequence: this implies a connection of a specific type, a consequence which arises or may arise out of the very nature of the activity or situation in question by reason of a natural law. These two limitations together create the possibility of the present topic: it arises because nature takes no account of political boundaries. . . .

240. The first two limitations are, however, only necessary pre-conditions. Before the principles or rules contained in the present topic are engaged, it must be shown also that the physical consequence, to use the words of the *Lake Lanoux* arbitral award, "change[s] a state of affairs organized for the working of the requirements of social life" in another State. . . .¹⁹

38. The Special Rapporteur is in general agreement with these criteria but considers it necessary to make certain changes in article 1.

39. The expression "physical consequence" is used in English, and had led some to argue that the English text better expresses the intention of the article. The idea which this article seeks to convey seems to be that a given hazardous activity gives rise to specific changes or alterations of a physical nature. These changes have an impact beyond the boundaries of one State (or the area

in which it exercises some form of jurisdiction or control) and produce in the territory of another State (or in an area in which the latter exercises some form of jurisdiction or control) an appreciable adverse effect in social terms or in terms of human needs. Presumably what is involved is a causal chain that originates in the State of origin through human intervention. Of course, a causal chain occurs only in a physical environment, and for that reason the Special Rapporteur believes that the appropriate term in Spanish would be *consecuencia física* and not *consecuencia material*.

40. This definition could be taken to cover product liability, because if a certain product is exported—or, rather, crosses a border—with defects that give rise in another State to a causal chain that results in damage to the health of certain persons, the matter would come within the scope of the definition given in article 1. This would run counter to the statement made by the previous Special Rapporteur in his summing-up of the discussion held at the thirty-sixth session.²⁰

41. The original text did not specify that the effects had to be "adverse". The Special Rapporteur understands that, as his predecessor said in the above-mentioned summing-up,²¹ each State must be the judge of how a given consequence affects it, so that even though the State of origin might not consider it adverse, the affected State nevertheless has the right to invoke (with what success, it would remain to be seen) the régime of the present articles. But the Special Rapporteur believes that the term "adverse" must be included, because if the régime of the present articles is in fact to be engaged, the effect unquestionably has to be an adverse one for the affected State. The qualification is necessary, because otherwise a State could argue that, although the effect is beneficial in every way, it is not to its liking and it would rather have an unchanged *status quo ante*. In a way, the inclusion of the term "adverse" would also be in keeping with the arbitral award in the *Lake Lanoux* case.²² Spain would not have been able to make any claim if, despite the work done by France, it had received the same volume and quality of water at the point where the river entered its territory, however much it resented the fact that France held the key, so to speak, to the volume of water downstream.

42. The original text of article 1 also stipulated that the effects in question must affect "the use or enjoyment of areas within the territory or control of any other State". During the discussion on this point at the thirty-sixth session, one member of the Commission referred to the case of harmful effects that damaged the health of populations, the question being whether such a situation would be covered by the concept of "use or enjoyment" of an area.²³

²⁰ *Yearbook* . . . 1984, vol. I, p. 229, 1852nd meeting, para. 49.

²¹ *Ibid.*, pp. 228-229, para. 48.

²² Original French text in United Nations, *Reports of International Arbitral Awards*, vol. XII (Sales No. 63.V.3), p. 281; partial translations in *International Law Reports, 1957* (London), vol. 24 (1961), p. 101; and *Yearbook* . . . 1974, vol. II (Part Two), pp. 194 *et seq.*, document A/5409, paras. 1055-1068.

²³ *Yearbook* . . . 1984, vol. I, p. 208, 1849th meeting, para. 26 (Sir Ian Sinclair).

¹⁹ *Yearbook* . . . 1984, vol. II (Part Two), pp. 77-78.

43. Admittedly, there is no guarantee that a hypothetical situation such as this one, which definitely falls within the scope of the draft, would be covered by the concept under discussion. It is a fact that the use or enjoyment of an area would in some way be diminished if an activity in another State had the effect of damaging the health of the area's inhabitants. It would, however, be odd to use the expression "use or enjoyment" as a way of referring to this circumstance. The Special Rapporteur has therefore preferred to add that the consequence may also adversely affect "persons or objects" situated in such areas.

III. ARTICLE 2

A. Territory and control

44. As in the original text, article 2 includes a list of the terms used so as to define their scope in the present articles.

45. Paragraph 1 explains the term "situation" and reflects what was said above.

46. Paragraph 2, with its three subparagraphs, corresponds to paragraph 1 of the original text.

47. As has already been seen, subparagraph (a) extends the concept of "territory" affected by the transboundary effect to certain maritime areas in which the State exercises some form of jurisdiction. It is taken for granted that the concept of State territory must include the territorial sea and the airspace above both the land and the maritime territory. They are therefore not expressly mentioned. This subparagraph does not refer necessarily or exclusively to the situation of a ship flying a foreign flag and passing, for example, through one of the areas described as territory of a State for the purposes of the present articles. It may also cover an activity on the high seas, in outer space, or possibly even in the territory of another State which has the aforesaid effects in those areas where the State exercises partial jurisdiction.

48. Subparagraph (b) envisages the situation of ships, aircraft or space objects, both when they are the source of the transboundary effect and when that effect is brought to bear on them, in which case the flag-State, State of registry or State of registration becomes the affected State. In such an event, there would be a transboundary effect, notwithstanding the fact that it came from a source which was temporarily located within the State's own territory. This paradox of a transboundary effect originating within a State's own boundaries called for an explanation such as that provided in subparagraph (b).

49. It is well known that both coastal States and flag-States have some jurisdiction over a ship engaged in innocent passage through the territorial sea of the coastal State: for certain purposes that ship is within the territorial jurisdiction of the coastal State, but for most purposes it is treated as remaining outside its civil and criminal jurisdiction.²⁴ It would appear, therefore, that

with regard to ships in such a situation, it would not suffice to refer to jurisdiction, let alone territory. The term "control", which is used here, is perhaps more appropriate, even though it must be pointed out that the concept covers situations such as that of a private ship over which the flag-State exercises only relative control, and that such control would certainly not be equivalent to the control which the State exercises over its own ships.

50. Subparagraph (b) in the original text envisaged the situation of ships exercising a right of "continuous passage" through the maritime territory of any State or of aircraft or space objects exercising a right of overflight through the airspace of any State. The expression "continuous passage" seems to have been chosen to refer to any form of passage recognized by the new law of the sea. But passage does not mean freedom of navigation, and therefore the expression would not apply to ships passing through the exclusive economic zone of another State. That would be inconsistent with subparagraph (a), which considers such areas to be the "territory" of the affected State, whatever the source of the transboundary effect that is brought to bear on them. Hence the text of subparagraph (b) proposed by the Special Rapporteur incorporates the concept of "navigation". Moreover, the revised text uses the expression "even when" instead of "while", because this is what makes the situation peculiar. If the ships in question were on the high seas, or if the aircraft or space objects were beyond the limits of national jurisdiction, there would be no need for this subparagraph, which is included in an attempt to explain the paradox of a transboundary effect originating within a State's own territory.

51. Subparagraph (c) refers to areas beyond national jurisdiction which are affected by an activity or situation also occurring beyond such jurisdiction: for example, two ships flying different flags, on the high seas, two aircraft having different States of registry, in airspace, or two space objects having different States of registration, in outer space or travelling through airspace. In such cases, any effect one craft might have on the other would be a transboundary effect. Of course, any effect originating in such areas and affecting the territory proper of a State would also have the same transboundary nature.

52. The situation envisaged in subparagraph (c) could have a far-reaching and interesting consequence, one that the Commission should be aware of: namely the establishment of a right for a State affected by an activity carried on anywhere—including in the territory of any State of origin—which creates a situation in areas beyond national jurisdiction that in turn has its own repercussions in the territory of the former State.

53. If this solution proves acceptable—and whether it is or not may depend on future developments relating to the limits of responsibility—it would address, if only partially, the concerns expressed on a number of occasions in debates on the injurious effects of activities on such areas. Every State would have a right—as soon as and as long as it was affected in its territory—to set in motion the machinery and procedures provided for in the present articles. Obviously, in many cases the

²⁴ See the Commission's report on its thirty-sixth session, *Yearbook* . . . 1984, vol. II (Part Two), p. 78, para. 243.

procedures will have to be different from bilateral procedures, and some intervention by international organizations might be necessary. It is somewhat similar to what may eventually be established for activities whose effects are felt very far away, causing problems already anticipated in the previous debate concerning notification or prevention in general.

B. Injury

54. Paragraphs 3, 4 and 5 of article 2 need no further explanation. Paragraph 6, on the other hand, introduces a very important concept in this field, that of injury. A first attempt at defining that concept must be made, for so far it has been dealt with only in piecemeal fashion.

55. What constitutes injury? What is its nature? Clearly, injury in the present context is not the same as in the context of responsibility for wrongful acts. In the latter case, the law attempts to restore, as far as possible, the situation which existed prior to the failure to fulfil the obligation in question, to erase in some way the consequences of the wrongful act. In the context of the present topic, on the other hand, it is necessary to bear in mind that the adverse effect which is the source of the injury occurs as a result of an activity which is lawful and which has been approved, notwithstanding the danger it involves, because a comparison of the various interests and factors at stake has shown that it is preferable to face the consequences which might arise rather than prohibit the activity outright. Likewise, if the activity has not been prohibited simply because the procedure for establishing a régime provided for in the present articles has not yet been completed, the injury would also occur in a context of legality, and the factors that come into play would therefore be similar to those outlined in the previous case.

56. The first conclusion that could be drawn would be that injury involves a disruption of the balance of factors and interests at stake and that this was taken into account when the activity was not prohibited. The magnitude of the injury will be directly proportionate to the resulting imbalance: the extent of the imbalance will determine the extent of the injury. Moreover, as the factors involved are complex, and sometimes not easy to quantify, the need for negotiation arises. Obviously, all things are open to negotiation, and, depending on the parties' skills at negotiating, the result may be of a different order of magnitude from the actual injury. This does not make it any less necessary to negotiate for the purposes mentioned above, but it does call to mind Gunther Handl's reference to a "negotiable duty".²⁵

57. What might those interacting factors be? Without prejudice to what may emerge when the question is studied in greater detail, the factors involved would seem at first glance to be those set out in section 6 of the schematic outline. To mention only two, it is necessary to determine whether a specific activity is also beneficial to the affected State (in the case of the transport of

petroleum, for example, whether the use of super-tankers reduces the cost and improves the supply); and it is necessary to consider whether the State of origin has had to incur great expense to satisfy the requirements of prevention or, conversely, to consider what expense the affected State itself has had to incur for that same purpose. Accordingly, at times the result of these operations is to set a ceiling on the compensation, which might be lower than would be the case if the injury were to be considered separately from the above context.

58. If the injury has occurred in the absence of any régime, it would be necessary to evaluate it bearing in mind the same factors which are sometimes involved in unilateral action by the parties. For example, if the State of origin has really taken serious and costly precautions, those costs may in some way affect the determination of the extent of the injury. The same is true if the activity actually benefits the affected State. If the State of origin does not meet its obligations to notify a State which may be affected, or to negotiate a régime, or, lastly, if it does not take into account its simple obligation of prevention (sect. 2, para. 8, and sect. 3, para. 4, of the schematic outline), its legal situation, as has already been seen, would be more serious, and therefore these circumstances might have an impact when the time came to set the amount of compensation.

59. Another approach to the concept of injury would be to distinguish between the various types that may occur, and to identify those which come within the purview of the present topic. At first glance, the following are to be noted:

(a) Injury which does not amount to anything significant, tangible or appreciable. It does not reach the threshold beyond which it begins to count as an injury, and is simply an unpleasantness which has to be endured because the enjoyment of modern technology implies some wear and tear, the discharge of certain wastes, etc. which we must all endure because we are all both victims and assailants;

(b) Accordingly, only injury which goes beyond this threshold is to be considered here.

60. There are at least three subtypes within this second type of injury:

(a) Appreciable injury caused by an activity involving a general risk, which is characteristic of the present topic;

(b) Injury caused by an activity that is not prohibited, through the fault or negligence of the State of origin or private persons operating in that State. Such injury would be characteristic of some polluting activities whose effects are not accidental, but a normal part of business. In the draft articles concerning water-courses, such injury is prohibited irrespective of the activities it stems from. This would be beyond the scope of the present topic, except in the case of an accident which was foreseeable only in a general sense. But in other areas, such prohibitions are not evident. In such cases, because of the lack of a specific norm, injury caused by activities which were not prohibited would not be compensatable on the grounds of wrongfulness. In his second report,²⁶ the Special Rapporteur agreed to examine

²⁵ See the Special Rapporteur's second report, document A/CN.4/402 (see footnote 2 above), para. 43.

²⁶ *Ibid.*, paras. 30-31.

such activities as part of the present topic, at least provisionally;

(c) Lastly, there is injury caused by an unforeseeable event during the course of an activity which is not appreciably dangerous, because of the existence of a contributory factor; in principle, this would not fall within the scope of the present topic. This does not mean that such injury is not compensatable, only that it is not compensatable under the present articles.

IV. ARTICLES 3 TO 6

A. Article 3

61. Article 3 deals with certain specific cases of transboundary effects.

62. Subparagraph (a) seeks to establish a concept which the Special Rapporteur explained during the debate at the previous session as follows:

. . . As regards the scope of the topic and the obligations to inform and to negotiate, it was found necessary to explain that, in the opinion of the Special Rapporteur, the term "transboundary" did not only refer to injury caused in neighbouring countries, but covered any injury caused beyond national frontiers, whether the source State and the affected State were contiguous or not.²⁷

63. This explanation, recorded in the Commission's report, could be considered sufficient, in which case the proposed text would be redundant. However, two considerations militate in favour of explicitness: one is that, when it comes to the scope of the topic, spelling out what is implied is usually a necessary precaution; the other is that, in the final analysis, the content of the debates and even the Commission's commentaries to the articles—which is where the above explanation belongs—merely constitute the *travaux préparatoires* and are consequently only of relative value. This, for the record, is the Special Rapporteur's position concerning the value of the clarifications which the Commission sometimes provides in commentaries.

64. Subparagraph (b) is a reaffirmation of what was stated earlier in connection with article 2, paragraph 2 (c) (see paras. 51-53 above), and whether it remains in the draft will depend on how the Commission reacts to what is stated there.

B. Article 4

65. Article 4 serves to introduce the rest of the text, but at the same time it sets out two very important conditions for engaging the responsibility which the draft imposes on States. These are that the State of origin has knowledge: (a) that the activity in question is taking place or is about to take place in its territory; and (b) that the activity creates an appreciable risk.

66. The two conditions are qualified substantially by the presumption contained in the phrase "or had means of knowing". The exclusivity of territorial jurisdiction makes this necessary, since the burden of proof of such knowledge cannot fall upon the affected State.

Although the first condition would be generally applicable, it would tend to apply especially to the situation of certain developing countries which have vast expanses of territory and can perhaps not automatically be presumed to be aware of everything that goes on within their territory. In particular, the question of liability for prevention or reparation of injury would be subject to special review in cases where the activity which is the source of the risk takes place in very extensive regions, such as the exclusive economic zone, where developing countries often lack the means to monitor activities. Such activities may be carried on by ships flying the flags of third States and have an effect in the territory of other States.

67. All this would be consistent with the principle embodied in the ICJ's judgment in the *Corfu Channel* case²⁸ and also—with respect to harmful smoke emissions—in the arbitral award in the *Trail Smelter* case.²⁹ It is true that, thus stated, this principle seems to establish an obligation the breach of which would give rise to wrongfulness, and would therefore fall outside the scope of the present topic. That is not the Special Rapporteur's view: both decisions urge respect for a very general principle of international law. The Special Rapporteur seriously doubts that this principle can be considered operative in general international law without a more specific norm, at a lower level of generality, which would make it operate.

68. There are two ways of making this principle apply in practice, depending on the goal pursued and the specific circumstances: either through norms relating to prohibition, the breach of which would naturally give rise to wrongfulness, or through norms relating to liability for risk or "strict liability". In the latter case, the State incurs causal liability and the event is fully attributable to it, for the simple reason that it occurred in its territory and it had knowledge of it. The State cannot escape liability by demonstrating that it used reasonable means that were available to it to prevent the injurious event, as it could in the case of obligations to prevent a given event. Strict liability is simply a technique of law to achieve certain goals.

69. The Special Rapporteur considers that knowledge on the part of the territorial State, or the presumption that it had such knowledge because it possessed the means of having it, constitutes the basis and justification for liability in this matter. He has used the term "original sin" to describe the creation of a risk of a certain magnitude by means of human activity engaged in by the State itself or by individuals in its territory. The creation of this risk is also the source of the disruption of the juridical balance or the balance of interests between that State and those which may be affected, as well as the source of the unjust enrichment and of the violation of the principle of the equality of States before the law. If one is convinced that somehow or other (and the Special Rapporteur does not wish to discuss exactly how at this point) the concept of "fault" *lato sensu* is central to all solutions in respect of liability, then one

²⁸ *I.C.J. Reports 1949*, p. 4.

²⁹ United Nations, *Reports of International Arbitral Awards*, vol. III (Sales No. 1949.V.2), p. 1905.

²⁷ *Yearbook . . . 1986*, vol. II (Part Two), p. 57, para. 206.

must seek as justification for liability for risk that kind of general fault which pre-dates the activity itself and lies in the creation of the risk.

70. It should also be noted that the expression "appreciable risk", which implies something really new in this field, is being introduced here. The adjective "appreciable" indicates that the risk involved must be of some magnitude and that it must be either clearly visible or easy to deduce from the properties of the things or materials used. This is the corollary of the requirement that the injury must be appreciable in order to be covered by the present articles. It is useful to include this adjective, bearing in mind that the description in article 1 ("which give rise or may give rise to a physical consequence") is too broad and covers any type of risk. Introducing a nuance by using the term "appreciable" does not, in the Special Rapporteur's view, mean introducing a new, unquantifiable dimension, but simply gives expression to what is implicit in the logic of the text.

C. Articles 5 and 6

71. Articles 5 and 6 need no further explanation. They reproduce articles 3 and 4, respectively, of the original text. Comments regarding these articles can be found in the previous Special Rapporteur's fifth report³⁰ and in the Commission's report on its thirty-sixth session.³¹ The discussion on the topic in the Commission at the same session³² should also be referred to. In the Special Rapporteur's view, the proper place for these articles is at the beginning of the draft, since clarification of the

³⁰ Document A/CN.4/383 and Add.1 (see footnote 4 above), paras. 39-43 (relationship with other rules of law) and paras. 44-48 (relationship with other agreements).

³¹ *Yearbook . . . 1984*, vol. II (Part Two), pp. 80-81, paras. 254-255.

³² See footnote 5 above.

relationship between any set of draft articles and other agreements or other rules of international law is generally made at the outset.

D. International organizations

72. Finally, the Special Rapporteur feels it necessary to explain why he has not submitted draft article 5 of the original text³³ for the Commission's consideration.

73. It is the Special Rapporteur's impression that everything that relates to the role which international organizations can play in this area constitutes a kind of *terra incognita* of no little magnitude. It seems clear that they may indeed have an important role to play, and during the previous debate there were statements concerning their possible role in procedures relating to the prevention (notification, negotiation) of activities which have such far-reaching consequences and which might affect so great a number of countries that they would overload the circuits designed for bilateral procedures.

74. Moreover, a questionnaire was sent to some organizations. It is undoubtedly useful to read it, together with the replies that were received.³⁴ At the last session, the Commission decided to consider sending a new questionnaire to selected international organizations.³⁵ Thus the Special Rapporteur and the Commission do not yet have sufficient data to enable them to tackle this question efficiently in relation to the draft articles.

75. The Special Rapporteur therefore prefers to postpone a decision on international organizations until the matter has been given further consideration.

³³ See footnote 4 above.

³⁴ See *Yearbook . . . 1984*, vol. II (Part One), p. 129, document A/CN.4/378.

³⁵ *Yearbook . . . 1986*, vol. II (Part Two), p. 58, para. 211.