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

[Agenda item 7]

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## Fourth 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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## I. Introduction

### A. List of activities within the scope of the topic

1. Some members of the International Law Commission and some representatives in the Sixth Committee of the General Assembly suggested that a list should be drawn up of activities which, because they are dangerous, are covered by the present topic. This would enable the present articles to deal with more specific concepts and would thereby facilitate their acceptance by States.

2. The main objection to this suggestion was that the provisions of such a list would soon become obsolete, in view of the acceleration of technological development and the constant appearance of new, dangerous activities, as has been seen recently. There are, however, other, very important activities that come to mind precisely when one attempts to carry out the suggestion. For example, there are many industrial activities which might be considered dangerous under the criteria proposed below, but it would be very difficult, and perhaps rather pointless, to enumerate each of the industries, for example according to the dangerous substances they handle that might have transboundary effects. This is especially true since, as will be seen clearly, the risks created are contingent on many circumstances. An industrial plant that produces emissions, such as the Trail Smelter, would be included in the list only if the emissions might cross the political boundaries

of a country. The same plant, if located in the interior and at a safe distance from the neighbouring country, might not be included. Nor would the same plant in the same place be included unless a set of simultaneous circumstances occurred, as in the *Trail Smelter* case,<sup>1</sup> where the winds blowing towards the State of Washington made the plant a centre of dangerous activity.

3. It seems clear from the above that practically no specific activity could be included in the absence of qualifications such as the one just noted or something similar. Moreover, to include various activities under the same heading in the list on the basis of some concept taken as a common denominator would give rise to the same charge as that made in connection with the objection to drawing up a list—that of generalizing.

4. However, there are far more important reasons for rejecting this idea, for the aim of the present articles is precisely to place us at a stage prior to the drafting of detailed agreements concerning specific activities. Such agreements would in fact constitute the next stage, arising out of the general obligations laid down by the articles.

<sup>1</sup> United Nations, *Reports of International Arbitral Awards*, vol. III (Sales No. 1949.V.2), p. 1905.

The present draft relates to the point where a State, having identified within its borders an activity involving risk, realizes that the continuation of the activity places it in a new situation, together with other States which may be affected.

5. It is essential to remain at that stage in order to meet the fairly modest objectives of the draft, namely, to encourage States to work out agreements regulating the activity, and, in the interim, to establish certain basic, general and minimally exigent duties. There appears to be no doubt—and international practice confirms this—that the State concerned must take precautions to limit the risks as far as possible. In accordance with established principles and practice it would also have a duty to notify and inform States that may be affected. If injury occurs before the establishment of any régime, can anyone deny that it would be just to make some kind of reparation if certain conditions, to be determined in the articles, are met?

6. The purpose of making a list would be to bring the convention which we are trying to draft into line, as far as possible, with those which regulate particular activities. Clearly, it is easier for States to accept responsibilities where they may be adapted to the specific features of well-known activities, as in the case of the conventions currently regulating certain activities. The present case is different, however, as are the proposed norms. In a specific activity, there are very precise, exacting obligations of prevention, and penalties may be applied if they are not met. Moreover, the full details of reparation are specified. Here, the only obligations are those governed by the general duty to co-operate, namely to notify, inform and prevent. If injury occurs, there is no precisely specified compensation; instead, there is an obligation to negotiate in good faith to make reparation for the injury caused, possibly taking into account various factors such as those set forth in sections 6 and 7 of the schematic outline.<sup>2</sup>

7. Under these circumstances the Special Rapporteur feels that rather than attempting the impossible, and perhaps undesirable, task of equating the situation to be dealt with in the articles with the regulation of specific activities (precisely the second stage towards which the articles are heading), it would be better to provide the most complete definition possible of the activities involving risk that comprise the subject-matter of the topic.

## B. Polluting activities

8. The subject of polluting activities was taken up preliminarily in the Special Rapporteur's second report,<sup>3</sup> to which the reader is referred. It was also taken up in the discussion at the Commission's thirty-ninth session, during which it was noted that polluting activities that produced their effects gradually, cumulatively and continually presented a problem as to their inclusion in the draft.

9. The first question is whether pollution that causes appreciable injury is prohibited by general international

law. If it were, it would not fall within the purview of the topic because we would be dealing with an unlawful act. Moreover, since it is known that certain activities normally produce a certain quantity of pollutants, where there is an increase in these activities in a State, that State is normally in a position to know that by allowing the expansion of the activities it would violate an international obligation.

10. There are undoubtedly various treaty régimes in which there are specific prohibitions of this type, and it seems clear that general international law is not indifferent to appreciable injury caused in this way. For the present, the principle *sic utere tuo* also serves as a guideline in this field. But is there a prohibition at an operative level against acts which give rise to appreciable injury through transboundary pollution? The Special Rapporteur does not think that the Commission would unanimously accept this idea. He therefore believes that it would be wrong to take for granted the aforementioned prohibition as a basis for excluding cases of continuous pollution from the topic.

11. Assuming that polluting activities which cause transboundary injury might not be expressly prohibited in general international law, such activities could be included in the present articles by virtue of the very wording of the title of the topic, which refers to acts "not prohibited".

12. Continuous pollution functions by accumulation. Pollutants that would not cause appreciable transboundary injury in small quantities over a limited period of time can accumulate after a certain period of uninterrupted flow and cause such injury. An activity resulting in substantial transboundary injury cannot be allowed to continue unpunished and without the establishment of some form of regulation. Such regulation would have to be worked out with the participation of the affected State; the State of origin would have to negotiate a régime with the affected State.

13. Another problem, which was barely touched on during the discussion at the last session, has to do with the difficulty of proving the facts in cases of continuous pollution from various sources, whether in the same State or in different States. In practice, the existence of a single polluting activity, as in the *Trail Smelter* case, is far from being the only conceivable situation. What normally happens is that various polluting activities contribute to producing the hazardous or injurious situation. Finally, the presence of a new industrial plant, an increase in production at an existing plant, or the use of certain fuels or new products may cause the level of pollution to rise substantially and exceed the threshold of tolerance. To which State, then, can the injury be attributed? And if there are several States, in what proportions? At times, as in the case of long-range pollution, there is no way of being sure which States are responsible for the undesirable situation.

14. However, upon closer examination, it seems that with this type of continuous pollution, reparation for injury is not the primary concern, especially where a régime such as that of the present articles does not allow the injury to go too far. It is clear that here, instead of obtaining reparation for injury it would be well for the affected State to have the situation examined so as to determine what remedy might be applied. For example, a general measure might be adopted in a certain region in order to reduce the level of transboundary pollution to acceptable proportions.

<sup>2</sup> Text submitted by the previous Special Rapporteur in his third report (*Yearbook* . . . 1982, vol. II (Part One), pp. 62-64, document A/CN.4/360, para. 53).

<sup>3</sup> *Yearbook* . . . 1986, vol. II (Part One), pp. 151-152, document A/CN.4/402, paras. 30-31 and footnotes 32-33.

Moreover, the problem of proving the facts should not justify abandoning the attempt to deal with the question of continuous pollution; it is better to have a régime of responsibility than to have no juridical structure or concepts to protect the affected State.

15. The question of reparation is, however, very important in the case of accidents, such as the many which have occurred recently and which will undoubtedly continue to occur. But here the problem of proving the facts generally does not exist, because the accident is obvious to all and occurs not only in connection with a specific activity but also in an easily identifiable place. In such cases, it is preferable to have certain guidelines also, to determine whether reparation is appropriate and, if so, what principles and factors might guide the parties in their negotiations to decide what form it should take.

### C. The proposed articles

16. The Special Rapporteur proposes that the Commission consider the ten articles presented below. The first five are based on the six presented in his third report<sup>4</sup> and take into account the observations and comments made both in the Commission and in the Sixth Committee of the General Assembly. The other five were, naturally, drafted on the basis of the guidelines emerging from the discussions in those two forums, particularly the significant discussions held in 1987.

17. The articles read as follows:

#### CHAPTER I

#### GENERAL PROVISIONS

##### *Article 1. Scope of the present articles*

The present articles shall apply with respect to activities carried on under the jurisdiction of a State as vested in it by international law, or, in the absence of such jurisdiction, under the effective control of the State, when such activities create an appreciable risk of causing transboundary injury.

##### *Article 2. Use of terms*

For the purposes of the present articles:

(a) (i) "Risk" means the risk occasioned by the use of things\* whose physical properties, considered either intrinsically or in relation to the place, environment or way in which they are used, make them highly likely to cause transboundary injury throughout the process;

(ii) "Appreciable risk" means the risk which may be identified through a simple examination of the activity and the things\* involved;

\* As modified subsequently by the Special Rapporteur at the 2075th meeting (para. 42) (see *Yearbook* . . . 1988, vol. I, p. 221).

<sup>4</sup> *Yearbook* . . . 1987, vol. II (Part One), p. 48, document A/CN.4/405, para. 6.

(b) "Activities involving risk" means the activities referred to in article 1;

(c) "Transboundary injury" means the effect which arises as a physical consequence of the activities referred to in article 1 and which, in spheres where another State exercises jurisdiction under international law, is appreciably detrimental to persons or objects, or to the use or enjoyment of areas, whether or not the States concerned have a common border;

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

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

#### *Article 3. Attribution*

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 an activity involving risk was being, or was about to be, carried on in areas under its jurisdiction or control.

#### *Article 4. Relationship between the present articles and other international agreements*

Where States Parties to the present articles are also parties to another international agreement concerning activities 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 5. Absence of effect upon other rules of international law*

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

#### CHAPTER II

#### PRINCIPLES

##### *Article 6. Freedom of action and the limits thereto*

States are free to carry on or permit in their territory any human activity considered appropriate. However, with regard to activities involving risk, that freedom must be compatible with the protection of the rights emanating from the sovereignty of other States.

##### *Article 7. Co-operation*

1. States shall co-operate in good faith in preventing or minimizing the risk of transboundary injury or, if injury has occurred, in minimizing its effects both in affected States and in States of origin.

2. In accordance with the above provision, the duty to co-operate applies to States of origin in relation to affected States, and vice versa.

#### Article 8. Participation

By virtue of their duty to co-operate, States of origin shall permit participation under the present articles by States likely to be affected, so that they might jointly consider the nature of the activity and its potential risks, and determine whether a régime needs to be jointly developed in this area.

#### Article 9. Prevention

States of origin shall take all reasonable preventive measures to prevent or minimize injury that may result from an activity which presumably involves risk and for which no régime has been established.

#### Article 10. Reparation

To the extent compatible with the provisions of the present articles, injury caused by an activity involving risk must not affect the innocent victim alone. In such cases, there must be reparation for the appreciable injury suffered, the question of reparation being settled by negotiation between the parties and in accordance with the criteria laid down in the present articles.

## II. Comments on articles 1 to 3 (Chapter I of the draft: General provisions)

### A. Article 1. Scope of activities

18. We have seen that, in the draft, the basis for attributing responsibility to a State is primarily territorial. In principle, therefore, activities involving risk which are undertaken in one territory and cause effects in another territory constitute the starting-point for our submission. The situation becomes complicated, however, if one seeks to situate such activities in all the spheres covered by contemporary international law.

19. There are regions where a State exercises *de facto* jurisdiction, even in violation of international law, as witness the situation of Namibia, where the jurisdiction exercised by South Africa is unlawful. Yet the occupier cannot be relieved of potential responsibility for such activities; hence the need to include in the definition the concept of effective State control. There are also activities which are conducted outside the territory of a State and which must come within the purview of our topic, for example activities carried out on vessels flying the flag of a State, in territories under hostile occupation, or in Mandated, Trust or Non-Self-Governing Territories. Here again, the concept of "territory" does not cover such situations.<sup>5</sup>

20. There are also regions where jurisdiction is exercised by more than one State, for example in the case of innocent passage through the territorial sea of a State, or navigation in its contiguous zone or its exclusive economic zone. Problems of joint jurisdiction may also arise in connection with the continental shelf or outer space.<sup>6</sup> In such cases, if the activity is carried out in the exercise of the jurisdiction enjoyed by a State under international law, it is equated with an activity carried out in the State's own territory.

<sup>5</sup> See the study prepared in February 1988 by the Codification Division of the Office of Legal Affairs of the United Nations Secretariat, "Concepts of 'jurisdiction' and 'control' as used in international law and as they may be relevant to the topic International liability for injurious consequences arising out of acts not prohibited by international law" (reproduced), p. 11.

<sup>6</sup> *Ibid.*, p. 16.

21. It is therefore essential to find a formula to cover all these possibilities. The term "territory" would not be adequate. Accordingly, it is proposed to refer to "jurisdiction", which is more comprehensive and includes the exercise of sovereign State rights that are relevant to the draft.<sup>7</sup> The term "control" will continue to be used in reference to territorial areas under the *de facto* and effective control of a State, and in reference to activities carried out by the State itself.

### B. Article 2

#### 1. SUBPARAGRAPH (a)

##### (a) *Dangerous things*

22. Activities involving risk would primarily be those entailing the use of things which are intrinsically dangerous, or potentially dangerous because of the place, environment or way in which they are used. Intrinsically dangerous things would include, for example, explosives, radioactive, toxic or flammable materials, or materials which cause damage to the human organism or the environment as a result of contact or proximity. Among the things that may be dangerous because of the place in which the activity is carried on are those used in border areas or in places where the wind would make transboundary effects likely. Among things that may be dangerous because of the environment in which the activity is carried on are those used in the atmosphere or in water, when those environments are conducive to the long-range transmission of effects. Among things that may be dangerous because of the way in which they are used are those used in space or aviation activities, those used in any way that makes it difficult to keep them stable and intact, and those used in large quantities. One example from the last category is crude oil: this substance, which might not be considered dangerous

<sup>7</sup> *Ibid.*, p. 4.

when transported in smaller quantities, comes to be considered dangerous when transported in the huge quantities that can be shipped by tankers.

23. Also covered are activities involving things which the word *peligrosa* (dangerous) does not seem to describe adequately, if one is to rely on the definition of *peligro* (danger) given in the *Diccionario de la Real Academia Española*: “*Riesgo o contingencia inminente de que suceda algún mal*” (Imminent risk or possibility that some harm might occur). The construction of a dam could hardly be considered a dangerous activity in the normal sense of the term; but it does create a situation, such as the inevitable formation of a crater or lake, which can indeed have adverse transboundary effects. For instance, it might cause excessive evaporation for some reason or other (size of the lake, special microclimate of the site or some other factor) which could change the pattern of rainfall in a neighbouring country. There is also the possibility that, despite precautions taken during construction, there might be an accident that causes flooding in the territory of other riparian States.

(b) *Risk and appreciable risk*

24. The basic characteristic, then, is the existence of some risk created by the activities. The risk must relate to the distinct possibility of transboundary injury. That possibility must be identifiable upon preliminary examination, by simply considering the specific properties of the materials in relation to the environment, place or way in which they are used. Of course, this does not exclude risks which are not easily seen but which, for one reason or another, are already known to exist; nor does it exclude from future consideration risks which are hidden and become evident at a later stage.

25. Moreover, as the Special Rapporteur pointed out in his third report,<sup>8</sup> the risk must be general. In other words, it need not relate to specific cases, since our point of reference is no longer the act but the activity. Thus there is no need for the risk to be related to a particular case, such as a specific voyage by a vessel carrying dangerous things, but to the general risk of the activity: transporting such things.

26. The perception of the risk must be objective; it cannot be the individual and fortuitous perception that may or may not develop in the mind of the operator handling the dangerous things, and therefore no consideration of negligence or fault is involved. The risk must be appreciable according to the normal criteria or standards for the use of the things which are the object or the product of the activity, or the result of the situations created.

27. That is why there is the “appreciable risk” requirement. If there is normally no appreciable risk, and injury occurs nevertheless, would that injury in particular and the activity in general come within the scope of the draft? Let us consider the various possibilities, for the result could have occurred under different circumstances. In the first scenario, injury has been caused by a hidden risk that was not perceptible at first sight, by the unexpected be-

haviour of a component of the things used, or through the effect of an unknown property of one of those components. In such a case, the injury would be outside the scope of the topic. However, from then on the activity in question would have to be reviewed and, if need be, the mechanisms provided for in the articles would have to be set in motion.

28. Another scenario might involve a supplementary cause: a cause which is not part of the normal chain of causation and which might relate to a fortuitous event or *force majeure*. Such a case may or may not be within the scope of the topic, depending on how strict the concept of liability for risk is to be. If liability is intended to be absolute, it would be possible not to regard such a case as exceptional, or it would be possible to accept only certain types of fortuitous event or *force majeure*, such as civil or international war, as is stipulated in certain conventions. Other exceptional cases might include the victim’s negligence or a third party’s intention to cause injury.

29. The purpose of including the adjective “appreciable” is to uphold a principle which is discussed later: the principle of protecting the freedom of the State of origin with regard to activities which it carries out or permits in its territory. If this qualification is not included, then virtually any new activity would have to be subjected to scrutiny by States which might be affected, and that would create an unacceptable situation.

30. What is introduced here is another “threshold” below which, as already noted, there would be no liability; introduced with it is a concept which, like the threshold of “non-appreciable” injury, is not very precise. The fact is that in this area, as in others, quantification is virtually impossible. Moreover, the use of a term of this kind is not without precedent in State practice, for it is to be found in several multilateral conventions on topics similar to that of the present articles.<sup>9</sup> In short, the risk referred to is one which involves a greater than normal likelihood of caus-

<sup>9</sup> For example, the Kuwait Regional Convention for Co-operation on the Protection of the Marine Environment from Pollution (United Nations, *Treaty Series*, vol. 1140, p. 133) contains the following provision:

“Article XI. *Environmental assessment*

“(a) Each Contracting State shall endeavour to include an assessment of the potential environmental effects in any planning activity entailing projects within its territory, particularly in the coastal areas, which may cause *significant risks\** of pollution in the Sea Area;”.

The Convention on Long-range Transboundary Air Pollution (E/ECE/1010) provides:

“Article 5

“Consultations shall be held, upon request, at an early stage between, on the one hand, Contracting Parties which are actually affected by or exposed to a *significant risk\** of long-range transboundary air pollution . . .”

There are also many precedents for using in multilateral agreements terms which leave some room for interpretation. The aforementioned Kuwait Regional Convention refers in article XI, paragraph (c), to the need to “minimize”, i.e. reduce to the minimum, the harmful impact of the contracting States’ development projects on the marine environment. One might well ask what the “minimum” is.

Similar terminology is also used in the aforementioned article 5 of the Convention on Long-range Transboundary Air Pollution, in the reference to contracting parties:

<sup>8</sup> *Yearbook* . . . 1987, vol. II (Part One), p. 50, document A/CN.4/405, para. 13.

ing transboundary injury during the entire course of an activity (this, in article 2, would be at the very heart of the concept of "risk" as used in the draft, the intention being to indicate that the draft is not concerned with any and every risk), but which is also visible on first examination. There are two distinct co-ordinates of the term "appreciable": a high risk and a perceptible risk.

31. For the rest, the arguments relating to this term are the same arguments as those presented in previous reports, particularly those relating to "appreciable injury" (see para. 42 below).

## 2. SUBPARAGRAPH (b)

32. Subparagraph (b) does not call for any comments in addition to those made in relation to article 1.

## 3. SUBPARAGRAPH (c)

### (a) General considerations regarding injury

33. In his third report<sup>10</sup> the Special Rapporteur considered certain characteristics of injury in the present context. It would be useful to reread those comments, be-

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"within which and subject to whose jurisdiction a *significant contribution*\* to long-range transboundary air pollution originates, or could originate, in connexion with activities carried on or contemplated therein".

In its survey of State practice relevant to the subject-matter of the draft articles, the Secretariat stated that the word "significant" had not been defined and that the States involved would presumably come to an agreement on the matter (*Yearbook* . . . 1985, vol. II (Part One)/Add.1, p. 221, document A/CN.4/384, para. 99). This seems to be the right approach and to be relevant to the present topic, for the "appreciable risk" serves only as an alarm signal and determines what obligations are to be laid down in the draft articles.

The same type of reference to risk is made in recommendation C(74)224 on "Principles concerning transfrontier pollution" adopted in 1974 by the Council of the Organisation for Economic Co-operation and Development. The "Principle of information and consultation" contained in the annex to that recommendation provides:

"6. Prior to the initiation in a country of works or undertakings which might create a *significant risk*\* of transfrontier pollution, this country should provide early information to other countries which are or may be affected . . .

"8. Countries should refrain from carrying out projects or activities which might create a *significant risk*\* of transfrontier pollution without first informing the countries which are or may be affected . . ." (OECD, *OECD and the Environment* (Paris, 1986), pp. 145-146.)

Similar language is used in the rules adopted by the International Law Association at its sixtieth Conference, held at Montreal in 1982:

#### "Article 5

"Basin States shall:

". . .

"(b) notify the other States concerned in due time of any activities envisaged in their own territories that may involve a *significant threat*\* of, or increase in, water pollution in the territories of those other States;

". . .".

(ILA, *Report of the Sixtieth Conference, Montreal, 1982* (London, 1983), p. 540.)

<sup>10</sup> *Yearbook* . . . 1987, vol. II (Part One), pp. 54-55, document A/CN.4/405, paras. 54-60.

cause a few important conclusions were drawn, although the analysis was rather brief. Perhaps the right time for a comprehensive study of injury will be during the consideration of certain factors which have not yet been discussed and which have a bearing on the determination of that concept. For now, however, the Special Rapporteur will be content with a few more observations which could contribute to a better understanding of the scope of the draft articles.

### (b) Terminology

34. The first observation to be made applies to all the chapters of the draft under consideration. In earlier discussions, there were quite a few comments regarding difficulties with respect to terminology stemming from the differences in scope which certain concepts, represented by different terms, usually have in different legal systems and, at times, in different languages. A special rapporteur has a single mother tongue and has been trained in a single system of domestic law. He can reply at length to questions about that language and that system, as well as questions about international law. On the other hand, no special rapporteur can answer questions about the words chosen by translators to render his thoughts in other languages. This holds true for all topics and all special rapporteurs.

35. The difficulty may, however, be overcome, perhaps by defining certain key characteristics of concepts which are important or have given rise to some difficulty during the discussions. What the Special Rapporteur cannot do is choose the words to be used in another language, as in the case of the word *daño* in the present chapter. Would his views be best reflected by the use of "injury", "damage" or "harm"? In any event, the Spanish term *daño* carries no connotation that it results from an act which is against the law; *daño* means anything that is prejudicial or detrimental to person or property. It is a neutral term. It is sometimes used in reference to the compensation paid for injury.

36. The Special Rapporteur hopes that he has thus given adequate guidelines to the members of the Commission who are experts in other languages and other legal systems, so that they themselves might suggest appropriate terms. It would not be useful, however, to overstate the problems of terminology, otherwise it would be necessary to start defining each word used. In the final analysis, the legal concepts in different systems or even different languages correspond, by and large, to similar situations and reflect similar solutions.

### (c) Injury and liability

37. During the discussions at the last session, the view was expressed that injury was the sole basis for liability in this area. For example, in connection with the requirement that the liability of the territorial State should be linked to knowledge of what was taking place in its territory, it was stated that injury, not knowledge, was the basis for that liability. Similarly, in connection with the need to perceive the nature of the risk being created, it was stated that for liability for injury to be incurred it was not enough to have recognized the risk, i.e. to have been in a position

to foresee the general possibility of injury. According to that school of thought, injury was apparently the sole basis for the obligation to compensate.

38. It should be pointed out, however, that not all injury is compensable under international law. In the *Barcelona Traction* case, the ICJ stated, in a section of its judgment dealing with damage caused to that company's Belgian shareholders:

... But, as the Court has indicated, evidence that damage was suffered does not *ipso facto* justify a diplomatic claim. Persons suffer damage or harm in most varied circumstances. This in itself does not involve the obligation to make reparation. Not a mere interest affected, but solely a right infringed involves responsibility . . .<sup>11</sup>

39. The Court was referring to responsibility for the violation of an international obligation, and we are dealing with a different issue: fulfilment of a condition (the occurrence of injury) that gives effect to a certain primary obligation to provide compensation. However, the reasoning also seems to apply to the issue before us: if injury is to be compensable, there must be a norm of international law (treaty law or customary law) to that effect. The Special Rapporteur does not believe that there is a norm of general international law which states that there must be compensation for every injury.

40. It is clear that if the present articles established such a norm, and if a number of States supported them in the form of a convention, the parties would be under an obligation to provide compensation for any type of injury. It is obvious, however, that this would lead to a form of absolute liability, corresponding to a degree of international solidarity which is not found in the present-day community of nations.

41. Obviously the basis for the obligation to make reparation in the matter under consideration is injury, because without injury the obligation would never move from the general and abstract to the particular and concrete; in other words, it would never become a reality. Yet nothing is ever absolute in practical life: the obligation to make reparation is subject, although this is not stated, to certain limitations. For the time being, the focus should be on appreciable injury, since we have already seen that there seems to be a universal consensus that, below this threshold, injury should be tolerated, for a number of reasons which have already been explained.

42. As to defining this threshold of appreciable injury, which is what is relevant to the present articles, enough has already been said, in particular in relation to the law of the non-navigational uses of international watercourses. It is the view of the Special Rapporteur that all commentaries relating to that topic apply to the injury he is discussing here. He has even adopted the term "appreciable injury" from among the various alternatives before him, not only because in his opinion it is appropriate but also because in this way the terminology is standardized with that used on the topic of watercourses. The reader is therefore referred to the commentary to article 4 of the draft

articles on that topic,<sup>12</sup> provisionally adopted by the Commission at its thirty-second session, in 1980.

43. Above all, in this respect, the guide should be the intended scope of the topic, that is, liability for dangerous activities. The goal here is not to differentiate liability from other matters on the basis of injury but rather to try to legislate on activities involving risk, since the injury caused by those activities is a source of great concern at present. As was wisely suggested in the debate at the last session of the Commission, progress should be in separate areas, bringing together the sectors that relate to the topic.

<sup>12</sup> *Yearbook* . . . 1980, vol. II (Part Two), pp. 118-120.

To illustrate his point, the Special Rapporteur also reproduces below a few paragraphs from Mr. Schwebel's third report on the law of the non-navigational uses of international watercourses (*Yearbook* . . . 1982, vol. II (Part One) and corrigendum, p. 65, document A/CN.4/348).

After drawing attention to a considerable number of agreements, both on watercourses and on the environment, in which the concept of threshold of injury is included in one way or another, Mr. Schwebel notes:

"'Substantial', 'significant', 'sensible' (in French and Spanish) and 'appreciable' (especially in French) are the adjectives most frequently employed to modify 'harm'". (*Ibid.*, para. 130.)

After other remarks which are important for our topic, Mr. Schwebel notes:

"Simply put, 'appreciable' stands for more in quantity than is denoted by 'perceptible', which could be construed to mean only barely detectable. 'Appreciable' means less in quantity than terms such as 'serious' or 'substantial'. With any such qualifying term out of ordinary language there is always the difficulty of determining, as in this case, just what quantity of harm satisfies 'appreciable'. As the Commission has reported in paragraph (10) of its commentary to the tentatively approved article 4, as set forth in chapter V of its 1980 report to the General Assembly:

"In the absence of any mathematical formula for fixing the extent to which use or enjoyment of system water should be affected in order to support participation in a negotiation, effect on a system State to an 'appreciable extent' is proposed as the criterion. This extent is one which can be established by objective evidence (provided that the evidence can be secured). There must be a real impairment of use." (*Ibid.*, para. 138.)

He goes on to state:

"It is perhaps worth noting again that the 'draft principles of conduct in the field of environment for the guidance of States in the conservation and harmonious utilization of natural resources shared by two or more States' employ 'significantly affect', which signifies, according to the single definition accompanying the draft principles, 'any appreciable effects on a shared natural resource and excludes *de minimis* effects'." (*Ibid.*, para. 139.)

The following observations are also relevant:

"In any event, measuring the quantity of such a qualifying term is not a new task for the law. Such descriptive terms denoting a certain standard are frequently unavoidable, and not only in customary law. The problem presented itself long ago with such verbal standards as 'reasonable care', 'probable cause', 'reasonable time', 'reasonable use', *rebus sic stantibus*, 'substantial capacity', 'substantial compliance' (or 'performance'), 'minimum standard of justice', *force majeure*, 'excessive force', and even *de minimis* itself.

"Since what is intended in this new article on responsibility for harm is the same quantity already expressed in articles 3 and 4, adopted at the Commission's thirty-second session, in 1980, it is imperative that the same term 'appreciable' be used. In its use of 'appreciable', the Commission desires to convey as clearly as possible that the effect or harm must have at least an impact of some consequence, for example on public health, industry, agriculture or environment in the affected system State, but not necessarily a momentous or grave effect, in order to constitute transgression of an interest protected by international law." (*Ibid.*, paras. 140 and 141.)

<sup>11</sup> *Barcelona Traction, Light and Power Company, Limited* (Second Phase), Judgment of 5 February 1970, *I.C.J. Reports* 1970, p. 36, para. 46.

The activities should be recognized as involving risk, and they should have the aforementioned characteristics, if the injury they cause is to be imputed to the State of origin.

(d) *Risk and injury*

44. It goes without saying that risk would not give rise to any obligation to provide compensation unless injury has occurred. Risk plays an important role in this context, however; so much so that it may be regarded as forming a continuum with injury. For everything here must be viewed in prospective terms, or, as it were, from the beginning: anyone who creates a risk in undertaking an activity must assume certain obligations, and it is precisely because of the risk created—which is greater than is normal in other human activities—that, *a priori*, he assumes the general obligation to provide compensation for any injury that occurs; therein lies the source of the concrete and specific obligation to make reparation once injury has occurred. Consequently, injury resulting from other causes is not relevant to the topic.

45. Dispensing with risk and considering only injury would therefore mean ignoring an essential aspect of the topic. It is no accident that one of the terms for the liability we are discussing is precisely “liability for risk”. In the present context, injury is not compensable merely because it has occurred but because it corresponds to a certain general prediction that it was going to occur, since the activity which eventually caused it creates a risk and is dangerous.

46. If this were not so, it would be necessary to change the approach and concentrate exclusively on injury, and the draft could very well be reduced to a single article stipulating that reparation must be made for all transboundary injury. The Special Rapporteur has opted for another approach because he found that it was dictated by technological developments, because the lack of legal regulation of such activities is one of the major shortcomings of the international legal order, and for all the reasons which have already been repeatedly stated.

47. That does not mean that injury resulting from other causes cannot be subject to reparation under some other régime or under general international law. If tomorrow a sufficiently large group of States decided to draw up a convention establishing the obligation to provide compensation for any injury that occurred, the régime contemplated here would not stand in the way. Nor would it stand in the way if a State which sustains injury as a result of an activity not considered to involve risk goes before an international court today and is awarded compensation based on general international law. It merely means that the only concern here is with liability for activities involving risk.

48. As to the other conditions relating to injury, it has already become clear that the injury must be due to a physical consequence of the activity involved; this limited the scope of the topic to the area of physical causality, thereby making it manageable. We have also seen that the injury must have an adverse effect on persons or objects, or on the enjoyment of areas under the jurisdiction of an affected State. It should be added now that although physical causality is the vehicle of injury, injury itself should

be reflected in social terms: a loss of certain advantages, replacement costs, a variety of inconveniences, deterioration of the health of certain persons, and other ill effects, which generally would have to be assessed and compensated for in economic terms.

(e) *Reparation and compensation*

49. It is not inconceivable that reparation might be partly in the form of some action by the State of origin to help eliminate or alleviate the consequences of the injury caused, for example if it possesses appropriate technology which the affected State does not have. For that reason, the Special Rapporteur has preferred to retain the word “reparation” here and not to use other words, such as “compensation”, which seem to refer exclusively to monetary payments. This explanation is also useful for terminological purposes. On the basis of the foregoing, he believes that it is enough to observe the characteristics of injury in the context of the topic. The study of this aspect might appropriately be completed at the time of considering the criteria to quantify injury or to determine its origin according to sections 6 and 7 of the schematic outline.<sup>13</sup>

(f) *Injury in subparagraph (c)*

50. It is clear that the injury with which we are concerned is transboundary injury. In subparagraph (c), an attempt is made to cover the various cases. The reference in article 1 to the scope of the activities involving risk implicitly addressed the transboundary element, for this element occurs between two poles: the place in which the activity is carried on and the place in which its consequences occur. This was considered at some length by the previous Special Rapporteur, R. Q. Quentin-Baxter, in his fifth report<sup>14</sup> and by the present Special Rapporteur in his third report.<sup>15</sup> The analysis made above regarding the concept of territory prompted the idea of replacing it with the concept of “jurisdiction”, which is better suited to the present topic. The transboundary element, therefore, occurs between different jurisdictions, i.e. between different sides of the “jurisdictional boundaries”.

51. Subparagraph (c) is concerned with the most common case. It was necessary to use very general terms, such as “in spheres where another State exercises jurisdiction under international law”, in an attempt to cover all cases. If the word “area” had been used, as in article 2, paragraph 5, of the text presented in the third report, this would not have included certain types of property, such as a State’s ships, aircraft and spacecraft when they are not in the territory of the affected State. The language chosen also obviates the need to specify the cases in which the transboundary effect occurs: the requirement is simply that it should occur in a jurisdiction other than that of the State of origin. Thus the injury may be sustained by a ship passing through the territorial sea or the contiguous zone of another State, as a result of an activity carried out on

<sup>13</sup> See footnote 2 above.

<sup>14</sup> *Yearbook . . . 1984*, vol. II (Part One), pp. 157-160, document A/CN.4/383 and Add.1, paras. 7-16.

<sup>15</sup> *Yearbook . . . 1987*, vol. II (Part One), pp. 53-54, document A/CN.4/405, paras. 47-53.

land or on a ship flying the flag of another State, and it may occur on the high seas between ships flying different flags, or between spacecraft in outer space, etc.

52. It was said in the debate at the last session of the Commission that article 3 as it appeared in the third report was unnecessary. Subparagraph (b) of that article referred to an activity involving risk which produced a certain effect in areas beyond national jurisdictions which in turn had an impact on areas within the jurisdiction of the affected State. Strictly speaking, one thing is clear: in order for the result to be attributed to the source activity, and with it possible liability, the sole requirement is that the chain of cause and effect should remain unbroken and that each link should be unquestionably connected to the previous link, so that the chain may be followed back to the source activity. This seems to be the rule that was established by the United States-German Mixed Claims Commission in relation to certain emergency war measures taken by Germany during the First World War. In its administrative decision No. II of 1 November 1923, that Commission stated in relation to the idea of "proximate cause":

. . . It matters not whether the loss be directly or indirectly sustained so long as there is a clear, unbroken connection between Germany's act and the loss complained of. It matters not how many links there may be in the chain of causation connecting Germany's act with the loss sustained, provided there is no break in the chain and the loss can be clearly, unmistakably, and definitely traced, link by link, to Germany's act. . . .<sup>16</sup>

Therefore, the concept in article 3 (b) discussed above can be deleted from article 2 (c) and the necessary clarification can be made in the commentary.

53. The Special Rapporteur believes, however, that the clarification "whether or not the States concerned have a common border", although strictly speaking not necessary either, helps to establish in the text of the subparagraph the concept of "jurisdictional boundaries", and that it is therefore preferable to retain it.

54. The expression "under international law", however, makes it unnecessary to include the concept of "control". On the one hand, it excludes territories under *de facto* control, since the claimant could not be the State exercising such control. On the other hand, the meaning sometimes given to the word "control", as in article 33 of the 1982 United Nations Convention on the Law of the Sea<sup>17</sup> relates to the jurisdictional competence of the coastal State.<sup>18</sup>

#### 4. SUBPARAGRAPHS (d) AND (e)

55. No commentary is required on these subparagraphs.

<sup>16</sup> United Nations, *Reports of International Arbitral Awards*, vol. VII (Sales No. 1956.V.5), pp. 29-30.

<sup>17</sup> *Official Records of the Third United Nations Conference on the Law of the Sea*, vol. XVII (United Nations publication, Sales No. E.84.V.3), p. 151, document A/CONF.62/122.

<sup>18</sup> See the study by the Codification Division (cited in footnote 5 above), pp. 18-20.

### C. Article 3

#### 1. ATTRIBUTION

56. In the context of the topic, attribution of liability to a State in respect of a certain activity will determine that the State, as regards that activity, has the obligations imposed by the present articles. In this topic, the word "liability" is not confined, therefore, as shown in the second report,<sup>19</sup> to the obligations which the State of origin incurs by causing injury (reparation, for example) but applies to obligations such as notification, information and consultation, with a view to the establishment of a régime between the parties. It also applies to the "purely preventive" obligation, i.e. the obligation to take all reasonable precautions, in the absence of a régime, to prevent or minimize the risk, or to minimize the transboundary injury itself (sect. 2, art. 8, and sect. 3, art. 4, of the schematic outline). Thus the word "liability" is taken in its two meanings, covering all its implications: the host of duties of a person in society in relation to certain conduct, and the obligation of reparation which arises as a consequence of injury.<sup>20</sup>

57. Attribution (to continue with the term used in part 1 of the draft articles on State responsibility for wrongful acts)<sup>21</sup> of liability is primarily on a territorial basis, as indicated in article 1. Within the sphere of this article, the activities undertaken by the State itself should, naturally, be considered as well as those carried on by individuals within the areas already mentioned. The definition in article 1, when it states "activities . . . under the effective control", aims to cover not only activities carried on in territories over which a State has *de facto* jurisdiction but also activities carried on by the State itself in any jurisdiction, its own or that of another State. The latter situation may not occur very frequently, but it seems possible, since the 1972 Convention on International Liability for Damage Caused by Space Objects<sup>22</sup> recognizes the liability of a State for a launching carried out in the jurisdiction of another State. It is possible that in such a launching the spaceship could be under the control of agents of one State but that jurisdiction would be exercised by another State, the State in whose territory the launching took place and in which the spaceship may be registered.

58. When the activity is carried on in a State's own jurisdiction, there is no difference regarding the basis of attribution of liability between an activity carried on by the State itself and one carried on by private persons. In both cases, liability is attributed by virtue of the mere fact

<sup>19</sup> *Yearbook . . . 1986*, vol. II (Part One), pp. 145-146, document A/CN.4/402, paras. 2-4.

<sup>20</sup> In this connection, the Special Rapporteur stated in his second report:

" . . . In short, the law considers that certain persons are responsible for specific obligations before the event that produces the injurious consequences. In that sense, responsibility refers to the host of obligations which the law imposes on persons because of the function they perform, which in the context of the present topic means the State, whose obligation to exert control derives from the exclusivity of the jurisdiction which it exercises in its territory. . . ." (*Ibid.*, para. 5.)

<sup>21</sup> See *Yearbook . . . 1980*, vol. II (Part Two), p. 30 *et seq.*

<sup>22</sup> United Nations, *Treaty Series*, vol. 961, p. 187.

that the activities are carried on in areas under the State's jurisdiction.

59. It is important, therefore, to resist the suggestion that the attribution of a certain act to a State when it is the State itself that carries on the activity in question must have the characteristics of an "act of the State" within the meaning of chapter II of part I of the draft articles on responsibility for wrongful acts. The attribution of an activity to a State is, as noted above, primarily on a territorial basis.

## 2. ATTRIBUTION AND LIABILITY

60. The attribution of an activity to a State automatically implies attribution of corresponding liability, or in other words imposition of the obligations established by the draft. Therefore, when the expression "attribution of an activity to a State" is used, it is in order to indicate that it would be the State which, in the manner indicated in the articles, would be responsible for the obligations laid down in the draft, even if, as we have seen, an act of the State is not involved.

## 3. KNOWLEDGE OR MEANS OF KNOWING

61. The primary basis of attribution is territorial, but in the present draft there is still another necessary condition, namely that the State should know or have means of knowing that the activity in question is being carried on within its territory or in areas under its control. It has been noted earlier that the liability attributed to a State for a risk created within its territory is the counterpart of the exclusive territorial jurisdiction it possesses and that the liability entails, as was established in the *Island of Palmas (Miangas)* case,<sup>23</sup> a general obligation to protect within its territory the rights of other States. Yet this reasoning seems perfectly applicable—if anything, *a fortiori*—to the rights of such other States and their nationals outside the territory of the State of origin, because those injured are even more innocent in the latter instance than in the former. In fact, it can be and has been said<sup>24</sup> that an alien residing in another country does so by voluntary integration in a national community that is not his own, and that he must assume any risks that he might incur; on the other hand, in the context of the present topic, those injured are living peacefully within the territory of their State of nationality or of one in which they have chosen to reside and which is other than the State of origin.

62. In this connection, the ruling by the ICJ in its judgment of 9 April 1949 in the *Corfu Channel* case (Merits)<sup>25</sup> is well known, since it has been repeatedly cited in reports and discussions on the present topic. Following a reasoning that is somewhat similar to the one in the *Island of Palmas* arbitral award, the Court gave the United Kingdom a certain procedural advantage in order to compensate for its inability to prove Albania's knowledge of

the minelaying in the Channel. The similarity in question lies in the fact that the disadvantage at which the United Kingdom found itself with respect to Albania stemmed precisely from the exclusivity of territorial jurisdiction, which had prevented it from gathering material evidence on the matter.

63. The Special Rapporteur does not believe that this *Corfu Channel* ruling encompasses the presumption that States know, or should know, of all the activities being carried on within their territory. In that particular case, the United Kingdom had argued that the minelaying, whoever its authors were, could not have been done without the Albanian Government's knowledge. The Court maintained:

It is clear that knowledge of the minelaying cannot be imputed to the Albanian Government by reason merely of the fact that a mine-field discovered in Albanian territorial waters . . . It is true, as international practice shows, that a State on whose territory or in whose waters an act contrary to international law has occurred, may be called upon to give an explanation. It is also true that that State cannot evade such a request by limiting itself to a reply that it is ignorant of the circumstances of the act and of its authors. . . . But it cannot be concluded from the mere fact of the control exercised by a State over its territory and waters that that State necessarily knew, or ought to have known, of any unlawful act perpetrated therein, nor yet that it necessarily knew, or should have known, the authors. This fact, by itself and apart from other circumstances, neither involves *prima facie* responsibility nor shifts the burden of proof.

On the other hand, the fact of this exclusive territorial control exercised by a State within its frontiers has a bearing upon the methods of proof available to establish the knowledge of that State as to such events. . . .<sup>26</sup>

64. Consequently, the Court allowed the admission of indirect evidence and found that two facts led to the conclusion that Albania had indeed had knowledge of minelaying in parts of the Channel. For one thing, the coastal State had, before and after the disaster of 22 October (the explosions), kept a close watch in the North Corfu Channel, and furthermore the facilities for observation of the mined area made it impossible for any minelaying operation to be carried out without its knowledge.

65. Thus, only real or presumed knowledge establishes the basis for liability. The Court, in fact, stated:

The obligations resulting for Albania from this knowledge are not disputed between the Parties. Counsel for the Albanian Government expressly recognized that [*translation*] "if Albania had been informed of the operation before the incidents of October 22nd, and in time to warn the British vessels and shipping in general of the existence of mines in the Corfu Channel, her responsibility would be involved. . . ."<sup>27</sup>

66. Knowledge, real or presumed, is the basis for attributing liability to a State, and it is clear that the presumption established by the Court did not go so far as to attribute to the Albanian Government a knowledge of everything taking place within its territory but simply authorized more liberal methods of proof to establish knowledge. On the basis of such methods of proof, it drew the conclusion that Albania had had knowledge of the minelaying.

67. In the light of the wording of the decision that "a State on whose territory . . . an act *contrary to international law*\* has occurred, may be called upon to give an

<sup>23</sup> United Nations, *Reports of International Arbitral Awards*, vol. II (Sales No. 1949.V.1), p. 829.

<sup>24</sup> Podesta Costa has spoken of a genuine "community of fortune" between the alien and the national community in which he settles. See L. A. Podesta Costa and J. M. Ruda, *Derecho Internacional Público* (Buenos Aires, Tipográfica Editora Argentina, 1984), vol. 2, p. 227.

<sup>25</sup> *I.C.J. Reports 1949*, p. 4.

<sup>26</sup> *Ibid.*, p. 18.

<sup>27</sup> *Ibid.*, p. 22.

explanation” and cannot claim ignorance, it could be argued, on the other hand, that the arguments above do not apply in the case of activities that are not prohibited. Such an objection would seem to be based on too literal a reading. The basic issues here are the duty of a State to protect the rights of other States against the injurious consequences of events occurring within its territory, and the difficulty an affected State experiences in proving that the State of origin actually had knowledge of an activity involving risk carried out within its territory.

68. The present draft therefore goes further in this respect than the *Corfu Channel* ruling: it is sufficient for a State to have “means of knowing” in order for the presumption of knowledge to arise. But this is justified because of the nature of causal responsibility, which requires that the mechanisms of the draft should be more easily operative. The responsibilities set forth in the draft could easily enough be attributed directly to the State of origin by simply tracing the causal chain of events to its territory. Why, then, erect a barrier such as the “means of knowing” requirement?

69. We have already seen in earlier discussions that its primary aim is to protect developing countries, which sometimes lack the means to be aware of everything that goes on within their territory, particularly when it is very extensive or when it takes in great maritime expanses with their corresponding airspace, requiring naval and air resources to monitor them that are usually not available at an adequate level.

70. The *Corfu Channel* ruling was correct. It is applicable to the present topic if it is adapted to the circumstances involving liability under the draft articles and if it is based, in turn, on a further presumption: that in principle a State has means of knowing, unless there is proof to the contrary.

#### 4. ATTRIBUTION OF CONDUCT AND OF RESULT

71. Thus far the Special Rapporteur has not put too much emphasis on the distinction between the attribution of an activity to a State and the attribution of liability for that activity, that is, the attribution of the obligations imposed by the articles as a corollary of the activity. It is clear that, in the context of the topic, the latter automatically follows the former, as if there were absolutely no break in continuity between them. However, a closer look shows that there is an important conceptual gap that is clearly discernible when injury occurs, because the process of ascribing injury to conduct follows the rules of causation. Thus the attribution of conduct to a State is on a territorial basis, and the attribution of a result to conduct is on a strictly causal basis. Yet actually, in this final stage, causation is as much the rule in the case of “causal” responsibility as it is in the area of responsibility for wrongfulness.<sup>28</sup>

<sup>28</sup> There is a point of comparison between the present topic and responsibility for wrongfulness in cases where so-called “obligations of result” are violated, the violation consisting either in not achieving a required result or else in not preventing a result deemed to be injurious. This is the only area of responsibility for wrongfulness which admits of comparison, since the sole requirement for the existence of a breach of an obligation of conduct is a discrepancy between actual conduct and conduct required by virtue of the obligation.

Strictly speaking, in respect of obligations to prevent a result, it

72. Where the two topics diverge radically is in the first stage, when certain conduct is attributed to a State. In the case of wrongfulness, as was seen, there are some important pre-conditions, whereas in the present case attribution in principle requires only a territorial basis.

73. What are those pre-conditions in the context of responsibility for wrongfulness? The act in question, as we have seen, must be an “act of the State”, namely an act committed by certain persons under certain circumstances previously stated. Beyond that, however, in order to characterize certain conduct as wrongful, there must be a whole process of legal interpretation regarding the meaning of the relevant norm and whether the meaning covers such conduct, before it can be determined if it is contrary to an international obligation. When one speaks, therefore, of attributing a result to a person in the context of wrongfulness, one is referring to a process in which causation is only one of the components. Rather than referring to the person causing a wrongful result, one should refer to the “author” of such a result, with all the implications of the concept of “authorship”.

74. On the other hand, the second step, the attribution of a result to conduct, brings us fully into the world of physical causation. The act attributed to the State has to have set in motion a causal chain of events at the other end of which is the result.

75. No more need be said to bring out the profound differences which, in this sphere, separate the present topic from that of State responsibility for wrongful acts. In the latter, for conduct to be attributed to a State it is of course not enough that the conduct should occur in areas within its territory or under its control. What is more, such attribution has in essence nothing to do with the territory or the place in which the act is performed; clearly, the conduct of persons operating outside the territory of a State may be attributed to the State. Basically, then, the act must have been performed by an organ of the State, by an entity empowered to exercise elements of the governmental authority, or by a person acting on behalf of the State.

76. None of these conditions is required in the topic under consideration, not even with respect to activities carried out by the State itself. If the reasoning followed is correct, the topic should also not include liability for omissions; omissions would seem to belong to the sector relating to responsibility for wrongfulness, since they involve

would not be correct to speak of a causal link between State conduct and the result that was not prevented. The question of State conduct that was inadequate to prevent a given event and the question of causation in respect of that event are in different categories. If the aim was to prevent, for example, an attempt on the life of a foreign head of State, and the attempt took place, the event would consist in some form of injury to the person of the head of State in question, injury caused by positive acts by the perpetrators—perhaps the placing of a bomb or the firing of shots—but in no way by the negligence of the territorial State. Although indeed there can be commission by omission, there is no causation by omission. Upon closer scrutiny, this is seen to be especially true since a State accused of not having fulfilled an obligation to prevent a result can exonerate itself from responsibility if it proves that it used all reasonable means to prevent it but none the less failed. Accordingly, this would seem to demonstrate that such an obligation is more an obligation of conduct than an obligation of result, although the result serves as a necessary—but not sufficient—pre-condition for there to be a breach.

some negligence on the part of those responsible. In principle, liability for an act which is part of an activity that is not prohibited does not depend upon the will of the State; if that were the case, an attempt to prevent the act would suffice to preclude liability.

77. The foregoing analysis confirms that one must view with suspicion the thesis that responsibility for wrongfulness is the norm and causal responsibility the exception. The two can best be seen as different species of a common order.

#### 5. ATTRIBUTION AND KNOWLEDGE

78. This is the time to deal with a possible objection suggested a short while ago: in the light of what has just been said, might one not be distorting the nature of causal responsibility if one admitted the requirement of prior knowledge, on the part of the State, that a certain activity is being carried on within its territory? Might one not be implicitly attributing to the State liability for an omission, given the fact that only if it knows what is happening can it act to prevent an injurious result, and consequently only when it has knowledge can the omissions required to engage its liability be imputed to it?

79. The Special Rapporteur does not believe that this is the case. Even causal responsibility requires a minimum of participation on the part of the natural or juridical person accountable for the activity. Such a minimum of participation consists in the person's knowledge that, in his name or on his behalf, an activity involving some risk is being carried on. While such knowledge need not extend to every act that makes up the activity, there must be a general knowledge of the existence and characteristics of that activity.

80. One might be tempted to counter this argument by citing an example of how the domestic law of many countries applies: in a case where the owner of a car entrusts it to a garage and the garage attendant uses it without his knowledge and causes injury, the owner is liable, whether or not he knew of the use made of his vehicle by the garage attendant.

81. However, anyone who buys a car already knows, first, that he bought it and, secondly, that he has certain responsibilities associated with it, because the car never ceases to be an instrument that involves certain risks when it is in use. This is why the owner is liable under domestic law. On the other hand, would any domestic legislation attribute liability to a person for whom a car was bought without his knowledge, if it is involved in an accident and the person knows nothing of the entire situation? To return to what the Special Rapporteur, with a certain biblical licence, has called the "original sin" of causal responsibility, it has been so termed because it lies at the root of the whole matter, and the term indicates that the minimum of subjective participation required for causal responsibility precedes any concrete act which brings it into play.

The knowledge involved is general, not specifically related to every act making up the activity, but without it causal responsibility is inconceivable.

#### 6. ATTRIBUTION AND APPRECIABLE RISK

82. "Appreciable risk" was defined as the risk that may be identified through a simple examination of the activity and the things used. It was then stated that what mattered for the régime under consideration was not that there should actually have been a perception of the risk but that the risk in question should be of the kind that was "objectively" appreciable, that is, appreciable by anyone who looked carefully at the activity concerned.

83. Accordingly, the question is whether, in order to attribute liability for a dangerous activity, it must be made a necessary pre-condition that the State have "means of knowing" the existence of the risk involved, in other words, the means needed to be able to perceive it. The wording of draft article 4 in the third report<sup>29</sup> might leave room for that interpretation, but a review of the matter suggests that it would be wise to reject it. If indeed that wording were used, we would appear to be speaking of two different things under the heading "appreciable risk". The concept of "appreciable" had been introduced in order to make States liable for activities constituting an easily perceptible danger of some magnitude. That had established a "threshold of freedom" below which a State was not obliged to give an account to anyone of what it was doing within its territory—in keeping with the acceptance of the first principle proposed by both the previous and the present Special Rapporteurs, which was a generalization of the first part of principle 21 of the Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration).<sup>30</sup>

84. The Special Rapporteur believes that it would be useful to accept the presumption that if a risk is appreciable by any normal person it could not have passed unnoticed by a State. Otherwise it would seem that a concept of risk different from that contained in article 1 was being introduced. We would thus be referring to two different concepts under the same heading: in article 1, a risk that is fairly easily appreciable, and in article 3 (formerly article 4), a risk whose perception requires certain special means not always at the disposal even of a State, regardless of its level of development. The Special Rapporteur therefore considered it preferable to delete the second proviso from the text of article 3. Naturally, the occurrence of injury would signal the risks attendant upon the activity in the future, and the activity would therefore have to be examined in the light of the duties established in the draft articles, so that its true nature might be determined.

<sup>29</sup> See footnote 4 above.

<sup>30</sup> *Report of the United Nations Conference on the Human Environment, Stockholm, 5-16 June 1972* (United Nations publication, Sales No. E.73.II.A.14), part one, chap. I.

### III. Comments on articles 6 to 10 (Chapter II of the draft: Principles)

#### A. General considerations

85. Following his summary of the topic at the last session, the Special Rapporteur proposed three principles for application in this field:

(a) Every State must have the maximum freedom of action within its territory compatible with respect for the sovereignty of other States;

(b) States must respect the sovereignty and equality of other States;

(c) An innocent victim of transboundary injurious effects should not be left to bear his loss.<sup>31</sup>

86. These three principles are stated only for preliminary guidance, and at this level of generality it is difficult to know even whether they apply to the present topic or to another, except perhaps in the case of the third principle. To be able to use these principles, we will have to descend to particulars. The Special Rapporteur had proposed in his second report<sup>32</sup> using principles that followed more closely those contained in section 5 of the schematic outline and subsequently summarized them as follows:

(a) The articles must ensure to each State as much freedom of choice within its territory as is compatible with the rights and interests of other States;

(b) The protection of such rights and interests requires the adoption of measures of prevention and, if injury nevertheless occurs, measures of reparation;

(c) In so far as may be consistent with those two principles, an innocent victim should not be left to bear his loss or injury.<sup>33</sup>

87. The schematic outline includes a fourth principle, referred to as a "procedural principle", which reads as follows in section 5, paragraph 4, of the outline:

"To the extent that . . . [a State of origin] has not made available to an affected State information that is more accessible to the . . . [State of origin] concerning the nature and effects of an activity, and the means of verifying and assessing that information, the affected State shall be allowed a liberal recourse to inferences of fact and circumstantial evidence in order to establish whether the activity does or may give rise to loss or injury." (In this quotation, the term "acting State" has been replaced by the term "State of origin", which is the more current term.)

Closer examination shows, however, that this is not a true principle but rather a way of compensating for a *de facto* advantage of the State of origin by virtue of the exclusivity of its territorial sovereignty. It is therefore better to introduce it into the draft as a regular provision in a later article.

88. As we have seen, the language used is very general. For example, where the first of the principles cited above (para. 85) refers to respect for sovereignty, it is understood that if there is no reparation for transboundary injury arising out of a dangerous activity, an interference

with the full use and enjoyment of the territory of the affected State will have occurred, with potential implications for a fundamental aspect of the concept of territorial integrity, which is an integral part of the concept of sovereignty over territory. Where the second principle refers to the sovereignty and equality of States and the need to respect them, it does so in reference to the fact that if the sovereignty of a State is infringed in the way described above, without any reparation to preserve the balance of the values in question, then one sovereignty will have predominated over another, in violation of the principle of the sovereign equality of States.

89. This group of principles is essential to the topic under consideration, and they will now be examined at greater length. The purpose of the analysis below is to propose that a core of principles should be adopted as a point of departure for the topic. The Special Rapporteur wishes to stress one basic point in order to avoid wasting time, namely that his concern here is not with establishing whether the principles in question reflect general international law. Many members of the Commission think that these principles indeed prevail in international law, while others take a different view. Whatever the individual beliefs on the subject, he feels that this debate is now closed.

90. These principles are simply proposed, if we may look at the matter this way, as part of the progressive development of international law. What is important for the work of the Commission—and the Special Rapporteur would be deeply grateful for any co-operation from his colleagues in this regard—is whether these principles are incompatible with the development of a topic such as the one under consideration, whether, on the contrary, they would be appropriate during the practical application of an eventual convention on the topic, whether they form a whole consistent with the general thrust of the topic, and other considerations of this type.

91. It might be well, when the articles are developed further, to include other principles in addition to the present ones. For the moment, these are the ones which the Special Rapporteur considers useful for the foreseeable development of the draft.

#### B. Proposed principles

##### 1. ARTICLE 6. FREEDOM OF ACTION AND THE LIMITS THERETO

92. The first principle proposed expresses both the freedom of initiative of a State in its territory and the limits thereto: freedom of initiative in carrying out or permitting activities which, though they involve risk, are useful on balance to the society of that country and, possibly, to that of other countries; but necessary limits to this freedom when it threatens the sovereignty of other States by not allowing them the full use and enjoyment of their territory and by infringing their territorial integrity. The model for this text was the well-known principle 21 of the Stockholm Declaration, adapted to the topic and not restricted exclusively to the environment.

<sup>31</sup> *Yearbook* . . . 1987, vol. II (Part Two), p. 49, para. 194 (d).

<sup>32</sup> *Yearbook* . . . 1986, vol. II (Part One), pp. 150-151, document A/CN.4/402, para. 27.

<sup>33</sup> See *Yearbook* . . . 1987, vol. I, p. 135, 2015th meeting, para. 4.

93. The Special Rapporteur has preferred to refer to the protection of the "rights" rather than of the "interests" of other States. The term "interests" could introduce an element of ambiguity which would be further complicated in the countries of the Anglo-Saxon legal tradition, where the term would appear to have a range of meanings which it does not have for the majority of countries of the continental European system, not to mention other legal systems which are not so familiar to the Special Rapporteur but which are well represented on the Commission.

94. For the Special Rapporteur, an "interest" is merely something which a State wants to protect because it may represent a gain or advantage for it, or because its elimination might cause a loss or disadvantage, but which does not have legal protection. At the point where it is dealt with by a legal norm intended to protect it in some way or to compensate in some way for its loss, it should be called a right rather than an interest—a right to something which may not be as intangible as the original interest, such as in the case where a norm establishes compensation if the interest is adversely affected, but ultimately a right to something specific. The original interest, i.e. to avoid injury to person or property or adverse effects on the enjoyment of areas of the territory of the affected State, changes as soon as injury has occurred. If the parties have agreed on a régime in that respect, and the régime contains norms concerning reparation, the affected State has a right to something specific, namely reparation. If there is no agreed régime and the situation is governed by the articles of a framework treaty such as the one we are trying to draft, then there is also a legal norm which grants a subjective right to the affected State. In brief, the Special Rapporteur believes that if there is a régime that provides for compensation or for obligations of prevention whose violation has some impact on the way compensation is provided, then one can speak of certain rights of the affected State, and not of its interests, because the use of the latter term could be ambiguous.

95. In the present case, the interests of the affected State are to some extent protected by the maintenance of the intangibility of its right to reparation for any injury, which derives from its territorial sovereignty. The Special Rapporteur has some reservations about the idea that has been expressed, in connection with the present topic and others, to the effect that a State should protect the interests of another State without those interests, automatically and by virtue of the aforementioned circumstance, becoming rights. In his opinion there would have to be a choice: either one is dealing with rights or one is not. In the former case, obligations are just that—obligations. In the latter, there will be moral constraints, or constraints derived from international courtesy or some other source but not from a right.

## 2. ARTICLE 7. CO-OPERATION

96. Article 7 states the principle that States should co-operate in good faith. This principle is included because, in implementing some of the provisions of the draft, States would indeed be engaging in a form of co-operation by avoiding or minimizing risk or by minimizing injury. This is exactly the purpose of the present articles and, *a fortiori*, will be the purpose of any régimes established by States within the framework of those articles.

97. Perhaps co-operation alone does not explain or form the basis of the obligations of the draft, since the attitude of someone who refrains from causing harm to another cannot be interpreted only as co-operation when the occurrence of the harm depends on him alone. A simplistic view of the problem would lead to a categorical denial that these obligations involve any form of co-operation. Can refraining from an offence be thought of as an act of co-operation towards the "victim" who was not a victim at all?

98. In the context of the present topic, however, things cannot be seen in terms of black and white. Faced with the development of modern technology and the appearance of certain activities which involve risk but are useful to society, individuals and societies feel trapped. It is well known everywhere, especially in the developed countries, that cars will kill and mutilate a considerable number of people every year. It is no secret that oil tankers will now and then damage the beaches, fauna and flora of regions of some countries, and that statistics suggest that every once in a while the chemical industry will produce an accident that will cause serious damage. These things happen in spite of all the precautions taken, because to some extent the new products and technologies cannot be fully controlled.

99. No one believes, however, that cars, the transport of large quantities of oil or the chemical industry can be eradicated from our way of life. In the face of modern technologies, individuals and societies find themselves forced to co-operate with one another, particularly since these activities at times escape human control, and the results do not always depend on those who manage the activities. It is perhaps for this reason also that the disasters that cause transboundary injury are considered in some sense a misfortune for all.

100. Thus, co-operation is also one of the foundations of the obligations of the draft, especially the obligations "towards" a régime and the "pure" obligation of prevention. If transboundary injury occurs, however, justice and equity demand reparation, although co-operation is often observed in the assistance offered to the State of origin in mitigating the effects of the disaster. In article 7 the wording "States shall co-operate in good faith" is used, even though it seems redundant since good faith is an ingredient in all international obligations, in order to accommodate the concern expressed during the discussion at the last session that States should avoid acts which are attempts to take advantage, because of international rivalries or for any other reason, of accidents such as those envisaged in the context of the present topic. It is not intended to imply that co-operation should be free in all cases, simply that a State that is in a better position than another to provide the necessary assistance should not avoid doing so.

## 3. ARTICLE 8. PARTICIPATION OF THE AFFECTED STATE

101. By virtue of the concept of co-operation established in article 7, States of origin should permit participation, as partners, by States exposed to a potential risk. They would thus be able to choose jointly the means for protecting the latter States from the threat. This principle would cover notification, information and the negotiation of a régime.

The purpose of notification is to let the affected State know that there is a risk and to request its participation in the common task of establishing a régime. The information on the nature and risks of the activity would provide the affected State with the facts it would need to function as a valid partner in this endeavour, and would enable it to take any appropriate precautions. In any case, depending on whether a particular injurious event occurs, these obligations would, as we shall see, have certain consequences, such as those which, according to the current draft of the schematic outline, arise out of non-compliance with the obligation to inform: the affected State would be authorized to have recourse to inferences of fact and circumstantial evidence to establish that the activity involves risk.

102. It goes without saying that, together with this consequence, which may be regarded as a procedural consequence, other formulae would be found to ensure that non-compliance has an impact on reparation for injury, for example by eliminating some forms of compensation which might be due to the State of origin in respect of cost-sharing or other factors referred to in section 6 of the schematic outline. The appropriate time to consider these concepts would perhaps be when we are dealing precisely with those factors described in section 6 and the questions referred to in section 7 and will have further criteria for clarifying the concept of "injury".

#### 4. ARTICLE 9. PREVENTION

103. In order to include prevention in the topic, as repeatedly called for in the Sixth Committee of the General Assembly and in the Commission, it would be useful to establish an underlying principle. Here, the Special Rapporteur and the Commission find themselves in a quandary, because the principle in question should define the role of prevention. Should prevention be linked exclusively to reparation? Should it be autonomous and should a separate set of sanctions be applied in case of non-compliance with the provisions? Or should the concept of prevention predominate in the instrument, to the exclusion of reparation? The implications of these three questions, which appear to correspond in a general way to three views expressed in the Commission, must be examined here.

104. If prevention is linked exclusively to reparation, it is the understanding of the Special Rapporteur that the preventive effect, under a régime of liability for risk, is achieved through the conditions imposed by the régime with respect to reparation; whoever is carrying out the activity knows that he will have to compensate for injury without there being, in principle, any legal defence whatsoever, as a purely statistical operation. Naturally, he will try to take the preventive measures necessary to avoid the damage and thereby alleviate the burden of such expenses on the management of his enterprise. This is undoubtedly one of the most important by-products of causal responsibility.

105. The second possibility, which could be regarded as giving equal weight to prevention and reparation—although some members of the Commission, believing that prevention predominates, do not so consider it—would undoubtedly accept the coexistence of obligations of reparation with "mixed" autonomous obligations, i.e. obligations whose violation would set in motion the sanctions pro-

vided under general international law. Such would be the case, specifically, of the obligations to notify, inform or negotiate a régime.

106. Lastly, an apparently isolated voice, which perhaps represents a trend of opinion, has expressed a decided preference for an instrument that would embody only norms of prevention.

107. The second of the three possibilities, i.e. the autonomy of the "mixed" obligations to notify, inform and negotiate, has already been analysed in previous reports. These obligations are considered autonomous precisely because they appear to have an established place in general international law.

108. It would be different with the "pure" obligation of prevention, i.e. that of the State of origin to take—in the absence of a régime—reasonable, unilateral precautions to avoid or minimize injury; this obligation appears to be not autonomous but directly linked to the injury. The Special Rapporteur feels that it would be useful to refer to paragraphs 64 to 67 of his second report<sup>34</sup> in order to understand the points being considered here. In brief, the effect of this obligation would arise only if injury occurred and might have an impact on the effects of compensation to the extent specified in the draft.

109. However, if this régime is also extended to "mixed" obligations, some of the objections that have been made would disappear. These objections were to the effect that such obligations would introduce into the topic an element of responsibility for wrongfulness, since the fact that they are obligations of conduct means that their violation would automatically entail wrongfulness and perhaps set in motion one of the sanctions laid down in part 2 of the draft articles on State responsibility for wrongful acts.

110. These objections, apart from their theoretical character, may reflect fears about superimposing a régime of wrongfulness on a régime of causal responsibility in the same instrument, because those who object feel that too much importance would thus be attached to prevention as compared to reparation, thereby unbalancing and even distorting the régime. Perhaps there are other important, practical reasons, including the fear that obligations of conduct in the initial phases of any activity place unacceptable limits on freedom of initiative in the territory of the State of origin, and that the territorial sovereignty of the affected State would thus take precedence over that of the State of origin, with the establishment of a virtual veto against the conduct of useful activities in its territory.

111. This position should be expressed in an article that would follow those presented here, so that the obligations referred to in the draft will be linked to the occurrence of injury. The Special Rapporteur feels that this would be an acceptable solution if the Commission agrees to it.

#### 5. ARTICLE 10. REPARATION

112. Another proposed principle would be one concerning reparation. This principle would prevail, naturally, if there were no agreed treaty régime between the State of

<sup>34</sup> *Yearbook* . . . 1986, vol. II (Part One), pp. 160-161, document A/CN.4/402.

origin and the affected State or States; in such a case, it is the present régime that would govern reparation. The innocent victim must not be left to bear "alone" the injury suffered as a result of an activity involving risk carried out in another State. By the word "alone", we mean the characteristic—peculiar to causal responsibility—that injury must be assessed not in its individual dimensions, i.e. not by the exact amount of specific damage caused by the accident in question, but by the amount of damage in relation to other factors; this means that the victim will have to bear the resulting injury to some extent.

113. After a preliminary examination of the reasons for this concept of injury, which is peculiar to causal responsibility and is certainly very different from injury resulting from wrongfulness, the Special Rapporteur found that this was another important difference between the two kinds of responsibility. He then noted that the activity in question was not prohibited and that it was presumably a useful activity, not only to the State in which it was being carried out—which, as noted in the discussion at the previous session, acted as a "pioneer" of technological progress—but also to the State which was accidentally affected by the damage. It also had to be taken into account that the measures of prevention adopted could impose a heavy financial burden on the State of origin, a factor to be cited at the time of reparation. In the main, activities based on modern technology and involving risk make perpetrators and victims of us all. Such activities are being carried on in nearly all countries, and today's affected State might be tomorrow's State of origin.

114. All this is true. It is also true, however, that where such developments are not taking place, as in the case of some developing countries in whose territory there are no activities of this kind, or where for some other reason these considerations do not apply, the injury should be assessed at the exact amount of individual damage, or the best approximation to it.

115. Whereas in the field of responsibility for wrongfulness, reparation takes a relatively large number of different forms, in the present field it will primarily take the form of monetary compensation. In considering the concerns about terminology that were expressed in the previous discussion, the Special Rapporteur had the idea that the concept might better be called compensation or indemnification.

116. On later reflection, he realized that the obligation of the State of origin after injury has occurred might not relate only to a sum of money, since there are various ways of making amends. It would be limiting the freedom of the parties to the negotiations to refer only to monetary compensation. In certain matters related to the accident itself, the State of origin might possess highly advanced technology which would be especially useful to the affected State. Amends might be made, in full or in part, through the supply of such technology, as agreed in the negotiations. The affected State might also prefer another type of assistance in another field, and that might also be acceptable to the State of origin. It would seem better, then, to retain the term "reparation" in preference to the others suggested.