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**Sixth 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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## Sixth 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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## Introduction

### A. The first 10 draft articles

1. The debates in the International Law Commission at its last session<sup>1</sup> and in the Sixth Committee at the forty-fourth session of the General Assembly<sup>2</sup> on international liability for injurious consequences arising out of acts not prohibited by international law deserve some comment. First of all, it should be pointed out that many of the suggestions made during those debates could be reflected in the final texts of the first articles that were submitted then. Furthermore, the rewording of articles 1 to 9 as proposed at the last session by some members of the Commission is, by and large, an improvement on the original texts. Those texts were the product of successive drafts incorporating ideas stemming from various quarters, and it is clear that the desire to remain true to these ideas has, at times, resulted in cumbersome or clumsy juxtapositions which must be remedied. The Drafting Committee will have available to it the "official" version of the first 10 draft articles<sup>3</sup> which were referred to it for consideration in 1988.<sup>4</sup> In addition, it will have before it the texts of the first nine draft articles which were

submitted by the Special Rapporteur in his fifth report, in 1989,<sup>5</sup> in which he attempted to incorporate the comments made during the debate on the original 10 draft articles.<sup>6</sup> It will also be able to take into account the many comments on those nine articles and the useful drafting suggestions made during the debate in 1989. In the annex to the present report, which contains the texts of the 33 draft articles submitted thus far, the Special Rapporteur has added, in footnotes to some of the first nine articles, texts for the Drafting Committee's use in which he has incorporated what he considers to be the comments most worthy of consideration, and even some of the drafting suggestions, made during the debate in 1989. Naturally, this does not prevent the Committee from also considering the other amendments proposed or even others which it may wish to suggest.

2. If the amendments now being submitted to the Commission for consideration are accepted, it will be necessary to change the original numbering of the articles, as proposed in the annex. If the introduction of the principle of "non-discrimination", which is the subject of draft article 10, proves acceptable, chapters I and II of the draft will again contain 10 articles. Two types of change will have to be made in article 2, concerning the use of

<sup>1</sup> See *Yearbook . . . 1989*, vol. II (Part Two), pp. 88 *et seq.*, paras. 335-376.

<sup>2</sup> See "Topical summary, prepared by the Secretariat, of the discussion in the Sixth Committee on the report of the Commission during the forty-fourth session of the General Assembly" (A/CN.4/L.443), paras. 175-200.

<sup>3</sup> See *Yearbook . . . 1988*, vol. II (Part Two), p. 9, para. 22.

<sup>4</sup> *Ibid.*, p. 21, para. 101.

<sup>5</sup> *Yearbook . . . 1989*, vol. II (Part One), p. 134, document A/CN.4/423, para. 16.

<sup>6</sup> These 10 articles are now reduced to nine, as a result of the deletion of article 8, on participation, considered by the Commission to be unnecessary (*Yearbook . . . 1988*, vol. II (Part Two), p. 20, para. 91).

terms: first, amendments needed to adapt the article to the new technique for defining dangerous activities (new subparagraphs (a) to (d)); secondly, amendments arising from the comments made during the latest debates and from further consideration of the topic (subparagraphs (f), (g) (last sentence), (h) and (k) to (n)).

### B. Activities involving risk and activities with harmful effects

3. The question whether activities involving risk and activities with harmful effects should be considered separately has already been dealt with. The conclusions drawn by the Special Rapporteur following further examination of the question are not very different from the preliminary conclusions outlined in his summary of the discussion on the topic in the Commission at the last session.<sup>7</sup> In his view, the two kinds of activity have more features in common than they have distinguishing features, so much so that one might consider the possibility of dealing with their consequences in a similar manner—that is to say, bringing them together under a single legal régime. The Council of Europe's draft rules on compensation for damage caused to the environment<sup>8</sup>—which in fact deal with liability for dangerous activities<sup>9</sup>—also cover activities which cause harm as a result of continuous pollution, without apparently differentiating between the legal treatment accorded to such activities and that accorded to activities which cause pollution accidentally.<sup>10</sup>

4. The other model which could be followed would be that of the legal principles and recommendations on environmental protection and sustainable development drawn up by the Experts Group on Environmental Law of the World Commission on Environment and Development.<sup>11</sup> This model distinguishes between activities that create a risk of "substantial" transboundary harm and those which *actually cause* "substantial" transboundary harm, and the two are accorded different legal treatment.

<sup>7</sup> *Yearbook* . . . 1989, vol. I, p. 189, 2121st meeting, para. 32.

<sup>8</sup> Draft prepared by the Committee of Experts on Compensation for Damage caused to the Environment for the attention of the European Committee on Legal Co-operation. See Council of Europe, Secretariat memorandum prepared by the Directorate of Legal Affairs (CDCJ (89) 60), Strasbourg, 8 September 1989.

<sup>9</sup> The draft rules were entitled "Rules on compensation for damage to the environment", but since they do not deal exclusively with that type of harm, the Committee of Experts wondered whether their most appropriate title should not be "Rules on compensation for damage resulting from dangerous activities" (*ibid.*, para. 17).

<sup>10</sup> During the debate on this question in the Committee of Experts:

"It was also wondered if the régime for civil liability proposed in the draft rules should apply only to damage resulting from accidents or other sudden incidents, or if it should apply also to damage resulting from continuous pollution. Advocates of the first approach, in a minority, maintained that except in the case of accidents, it would be very difficult to establish a causal link between damage and an incident attributable to an operator or a number of operators . . .

"Although the compensation for some types of damage arising from continuous or synergic pollution may not be obtained by virtue of the rules, unless it was possible to establish a sufficient link with the activities of one or several operators, it was decided in the end that this one circumstance did not justify excluding non-accidental damage." (*ibid.*, para. 15.)

<sup>11</sup> See *Environmental Protection and Sustainable Development: Legal Principles and Recommendations* (London, Graham & Trotman, 1987).

The former would, broadly speaking, correspond to the "activities involving risk" in the draft articles under consideration, the latter to what have been called, for want of a better term, "activities with harmful effects". In order that they may be considered an exception to the general rule set forth in article 10 of the above-mentioned principles,<sup>12</sup> which establishes simply the obligation of the State of origin to "prevent or abate any transboundary environmental interference or a significant risk thereof which causes substantial harm—i.e. harm which is not minor or insignificant" (that is to say, a rule prohibiting the causing of transboundary harm or the creation of a risk thereof), the cost of preventing or reducing the harm or risk, as the case may be, originating in such activities must outweigh the benefits which such prevention or abatement would entail.

5. Article 11 of the same principles, therefore, deals with activities involving risk and states:

1. If one or more activities create a *significant risk of substantial harm\** as a result of a transboundary environmental interference, and if the overall technical and socio-economic cost or loss of benefits involved in preventing or reducing such risk far exceeds in the long run the advantage which such prevention or reduction would entail, the State which carried out or permitted the activities shall ensure that compensation is provided should substantial harm occur in an area under national jurisdiction of another State or in an area beyond the limits of national jurisdiction.

2. A State shall ensure that compensation is provided for substantial harm caused by transboundary environmental interferences resulting from activities carried out or permitted by that State notwithstanding that the activities were not initially known to cause such interferences.<sup>13</sup>

This article envisages so-called "ultrahazardous activities" and imposes strict international liability on the State which authorized such activities.

6. The Experts Group finds the basis for such strict liability in a number of treaties, such as the 1972 Convention on International Liability for Damage Caused by Space Objects<sup>14</sup> and the 1973 Treaty between Argentina and Uruguay concerning the La Plata River and its maritime limits<sup>15</sup> (art. 51 on pollution of the waters). It points out, however, that the State of origin may fulfil its obligation by imposing strict liability upon the developer or operator, and in support of this solution it quotes numerous conventions which have already been cited several times in reports of the Special Rapporteur and in the debates of the Commission: the 1952 Rome Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface;<sup>16</sup> the conventions on liability for nuclear damage—the 1960 Paris Convention and its 1964 Additional Protocol,<sup>17</sup> the 1963 Brussels Convention supplementary to the 1960 Paris Convention,<sup>18</sup> and the 1963

<sup>12</sup> *Ibid.*, p. 75.

<sup>13</sup> *Ibid.*, p. 80.

<sup>14</sup> United Nations, *Treaty Series*, vol. 961, p. 187.

<sup>15</sup> INTAL, *Derecho de la Integración* (Buenos Aires), vol. II, No. 15, March 1974, p. 231; *International Legal Materials* (Washington, D.C.), vol. 13 (1974), p. 251.

<sup>16</sup> United Nations, *Treaty Series*, vol. 310, p. 181.

<sup>17</sup> Convention on Third Party Liability in the Field of Nuclear Energy (Paris, 1960) (*ibid.*, vol. 956, p. 251) and Additional Protocol (Paris, 1964) (*ibid.*, p. 325).

<sup>18</sup> IAEA, *International Conventions relating to Civil Liability for Nuclear Damage*, Legal Series, No. 4, rev. ed. (Vienna, 1976), p. 43.

Vienna Convention<sup>19</sup>—the 1962 Brussels Convention on the Liability of Operators of Nuclear Ships;<sup>20</sup> the 1969 International Convention on Civil Liability for Oil Pollution Damage;<sup>21</sup> and the 1976 London Convention on Civil Liability for Oil Pollution Damage resulting from Exploration for and Exploitation of Seabed Mineral Resources.<sup>22</sup> The Experts Group also stated that:

... It is typical for the treaties concerning the peaceful use of nuclear energy that they provide for a subsidiary and supplementary liability of the installation State or flag State—that is subsidiary and supplementary to the primary liability of the operator or owner of the installation or vessel—to guarantee the indemnification of nuclear damage up to the maximum limit of liability envisaged in the treaty. . . .<sup>23</sup>

That is to say—and this is an important precedent for the strict liability (*responsabilidad causal*) of the State at the international level—that the State puts itself exactly in the place of the private operator and assumes strict liability at the international level for certain amounts of money which the operator is unable to pay. The Experts Group also mentions a large number of countries which have incorporated the concept of strict liability into their domestic law and says that this is evidence of an emerging principle of national law recognized in the manner stated in article 38, paragraph 1(c), of the Statute of the ICJ. (All of these are arguments which have been advanced at the appropriate moment in developing the present topic.)

#### 7. Article 12 of the principles adopted by the Experts Group deals with another type of activity:

1. If a State is planning to carry out or permit an activity which will entail a transboundary environmental interference causing harm which is substantial but far less than the overall technical and socio-economic cost or loss of benefits involved in preventing or reducing such interference, such State shall enter into negotiations with the affected State on the equitable conditions, both technical and financial, under which the activity could be carried out.

2. In the event of a failure to reach a solution on the basis of equitable principles within a period of 18 months after the beginning of the negotiations or within any other period of time agreed upon by the States concerned, the dispute shall at the request of any of the States concerned, and under the conditions set forth in paragraphs 3 and 4 of article 22, be submitted to conciliation or thereafter to arbitration or judicial settlement in order to reach a solution on the basis of equitable principles.<sup>24</sup>

In its comments on article 12 the Experts Group states that:

The transboundary environmental interference envisaged in the present article may be an instance of pollution involving substantial harm which can only be avoided by the entire termination or forgoing of the, in itself, highly beneficial activity, which gives rise to the interference. . . .<sup>25</sup>

8. The different legal treatment accorded to the two types of activity seems to be based on the following: activities involving risk are considered legal, provided that all obligations have been met concerning *due diligence* in the prevention of an accident, and compensation

is paid for harm actually caused. In its comments on article 12 the Experts Group states further:

As noted, the type of risk involving activities dealt with in paragraph 1 of article 11 may be regarded lawful provided all possible precautionary measures have been taken in order to minimize the risk. As we have also seen, the State who carries out or permits the ultrahazardous activities must ensure that compensation is provided should substantial extraterritorial harm occur. This is, in fact, nothing else than the fair and equitable price which ought to be paid for the lawful continuation of an ultrahazardous activity which, on balance, must still be regarded as predominantly beneficial. . . .<sup>26</sup>

Here there would be no obligation for the interested parties to formulate a special régime, since provision for one has already been made in the proposed articles: if all precautions of due diligence are taken and damage results even so, then such damage will be compensated through strict liability. On the other hand, with regard to activities in which the damage results from normal operation, the Experts Group comments:

... Thus, in spite of the fact that the activity would cause substantial extraterritorial harm, it is not regarded either as clearly unlawful, or as clearly lawful. Instead a duty to negotiate on the equitable conditions under which the activity could take place has been provided for.<sup>27</sup>

There is not only a duty to negotiate but also a mechanism that, if followed, would be bound to lead to the creation of a régime between the parties to regulate the activity, and, according to what is implied in article 12, such a régime would have to establish compensation for the harm caused.

9. The articles referred to here seem to be based on the aforesaid philosophy, which can be briefly summarized as follows: there would seem to be sufficient basis in international practice for formulating a general régime regarding strict liability which would govern activities involving risk, without the States concerned having to formulate a régime for each individual activity. In the case of the other activities, sufficient basis would not appear to exist:

... the application of the principle of strict liability—and the idea of balancing of interests which it implies—to activities *definitely* causing substantial extraterritorial harm, is generally regarded as considerably more revolutionary than the application of that principle to activities which “merely” involve a significant risk of harm as envisaged in paragraph 1 of article 11.<sup>28</sup>

Accordingly, it is stated by the Experts Group in its comments that article 12 does not go as far as this and merely establishes the obligation for the parties to negotiate a régime and a corresponding mechanism—this notwithstanding the fact that it had earlier stated that there appeared to be convincing support for the application of the principle of strict liability in such situations, since it, too, could be considered a general principle of national law recognized by civilized nations within the meaning of article 38, paragraph 1(c) of the Statute of the ICJ.<sup>29</sup>

10. None the less, the above cannot be taken to mean that that set of norms looks more kindly upon activities with harmful effects than on activities involving risk simply because as a general rule it would not apply a

<sup>19</sup> Vienna Convention on Civil Liability for Nuclear Damage (Vienna, 1963) (United Nations, *Treaty Series*, vol. 1063, p. 265).

<sup>20</sup> IAEA, *op. cit.* (footnote 18 above), p. 34.

<sup>21</sup> United Nations, *Treaty Series*, vol. 973, p. 3.

<sup>22</sup> UNEP, *Selected Multilateral Treaties in the Field of the Environment*, Reference Series 3 (Nairobi, 1983), p. 474.

<sup>23</sup> *Environmental Protection . . .*, *op. cit.* (footnote 11 above), p. 82.

<sup>24</sup> *Ibid.*, pp. 85-86.

<sup>25</sup> *Ibid.*, p. 86.

<sup>26</sup> *Ibid.*

<sup>27</sup> *Ibid.*, p. 87.

<sup>28</sup> *Ibid.*

<sup>29</sup> *Ibid.*

régime of strict liability to the former. Quite the contrary: whereas activities involving risk are lawful in so far and so long as the measures dictated by *due diligence* are taken, activities with harmful effects are not legal until a consensual régime is in effect between the parties. Hence the need to find a mechanism to resolve any difference that may arise between the parties and to determine in a more or less automatic fashion the creation of a régime for such activity.

11. The Special Rapporteur is open to whatever preference the Commission may express. He finds, on the one hand, that it is difficult for States to agree to a binding dispute-settlement mechanism such as that proposed in the above-mentioned article 12—a veritable Procrustean bed—as a prerequisite for the lawfulness of activities under their jurisdiction or control. The reluctance of States to accept this type of conditions is an obstacle which arises so frequently in international relations that it is not worth dwelling on, and some members of the Commission were not in favour of burdening the State of origin with too many legal formalities at the start of possible activities referred to in article 1 of the present draft articles. On the other hand, as he indicated in his previous report, he would have some reservations about qualifying as “dangerous” an activity which is certain to cause harm, not as a result of an accident but in the course of normal operation, as the Council of Europe’s draft rules<sup>30</sup> seem to do, and he points out that those draft rules deal exclusively with liability, not with prevention, which is where the main differences between the two types of activity are to be found.

12. In fact, the main difference between the two types of activity is in the sphere of prevention. There are two types of preventive measures: (a) measures (or appropriate means) to prevent an incident from occurring, and (b) measures designed to contain or minimize the effects once an incident has occurred, as will be seen in greater detail below. In type (a) there is, as yet, no harm and no incident; in type (b) there is an accident (activities involving risk) or harmful effects have already been triggered (activities with harmful effects), but the harm is not yet quantifiable because measures can be taken to contain or reduce the effects, so that ultimately the harm may be less than it would have been if steps had not been taken to combat the original effects. In the two types of activity under consideration, the difference is in that first stage, for in the case of activities involving risk, pre-

<sup>30</sup> See footnote 8 above.

ventive measures are taken even though it is known that the accident may occur anyway. The harm occurs as a result of an accident: it escapes the operator’s control even though the operator takes due precautions. In the case of activities with harmful effects, if appropriate preventive measures are taken the effect does not occur, nor, consequently, does the harm, in principle.

13. This, in outline, is what happens with both activities in the first stage or aspect of prevention. In the second stage—that is to say, when the accident has occurred or the effects have been triggered—there would seem to be no difference between the two activities. One possibility, inspired to some extent by the Council of Europe’s draft rules, would be to differentiate between the two types of activity referred to in article 1 and to establish, in the case of activities with harmful effects, a genuine obligation to negotiate a régime setting forth the conditions on which the activity may be pursued, or, as stated earlier, “a duty to negotiate on the equitable conditions under which the activity could take place”.<sup>31</sup>

14. The other possibility would be to compare the two types of activity and their practical effects, given the great similarity between them, and to state that there is in both cases a need for notification, information and consultation between the States concerned, with or without the participation of international organizations depending on the case, but that the “hard” obligations arise only when the harm has occurred and can be imputed causally to the activity in question. This seems justifiable in the area of prevention because, although there are differences between the two types of activity, it is virtually unthinkable to require prior international approval for the conduct of an activity; likewise, it is virtually unthinkable to leave it in limbo in so far as its lawfulness is concerned. While awaiting better times, the solution might be to impose a simple obligation on the parties to consult one another in the event that an activity shows signs of having harmful effects, as is done in the present draft articles in the case of activities involving risk. In so far as liability as such is concerned, it seems that it should be the same as in the case of activities involving risk, for after all the draft articles do not automatically impose strict liability but merely the obligation to negotiate compensation for harm caused. That is the least one can ask for in the case of both forms of activity.

<sup>31</sup> Excerpt from the commentary of the Experts Group on Environmental Law, quoted in paragraph 8 above (see footnote 27).

## CHAPTER I

### Activities involving risk

#### A. List of activities

15. It will be remembered that some speakers, both in the Commission and in the Sixth Committee, were in favour of including a list of the activities covered by article 1. In view of certain objections, some expressed a

preference for a flexible list, which could be revised from time to time by a group of experts and any amendments to which would be submitted to Governments for approval. Others suggested drawing up a list for guidance purposes only. The incomparable advantage of a list is that it would define the scope of the draft precisely,

making it much more acceptable to States, which would know the limits of their future liability. The tenor of subsequent debates in which this concept was discussed shows that the idea of a list continues to come up and has many supporters in the Commission and the General Assembly. Arguments are still being raised against it, however. For instance, the draft rules on compensation for damage caused to the environment, prepared for the Council of Europe, which, as noted above (para. 3), are basically draft rules on civil liability for dangerous activities, recently discarded the possibility of drawing up a list of activities. On the other hand, they define these activities mainly in relation to the concept of dangerous substances,<sup>32</sup> a list of which is annexed to the rules, and what is done with them: handling, storage, production (including residual production), discharge and other similar operations. Also included are: activities using technologies which produce hazardous radiation; the release into the environment of dangerous genetically altered organisms or dangerous micro-organisms; and the operation of a waste disposal facility or site.<sup>33</sup> The draft rules then define dangerous substances as those which create a significant risk (it should be noted that, as in the draft articles under consideration, the expression *significant risk* denotes the acceptance of a threshold of risk) to persons or property or the environment, such as flammable and corrosive materials, explosives, oxidants, irritants, carcinogens, mutagens and toxic, ecotoxic and radiogenic substances as indicated in annex A to the rules under discussion. A number of other substances are listed in annex B. The draft rules also state that the designation of a substance as dangerous may be restricted to certain quantities or concentrations, certain risks or certain situations in which that substance may occur.<sup>34</sup> They then define both genetically altered organisms which present risk and dangerous micro-organisms.

16. This model is interesting, and perhaps better suited to a global convention than a list of activities such as that contained in the ECE draft framework agreement on environmental impact assessment in a transboundary context.<sup>35</sup> It offers greater flexibility and yet allows for considerable precision in the scope of the articles. It also

<sup>32</sup> The Council of Europe's draft is based on other instruments, particularly those in the field of carriage:

"As for other instruments, in particular in the field of carriage, the nucleus is made of operations on dangerous substances. These substances are here deemed dangerous on account of some properties (toxicity, . . .) defined in internationally accepted classifications. . . ." (CDCJ (89) 60 (see footnote 8 above), para. 12.)

<sup>33</sup> Both hazardous radiation and dangerous genetically altered organisms or dangerous micro-organisms, and doubtless also the waste handled in such facilities, could come under the broad category of substances, but it was deemed preferable to put them in a separate category. In short, the activities are dangerous because they involve handling either substances, micro-organisms, genetically altered organisms or waste.

<sup>34</sup> This idea is not unlike the one contained in article 2 (a) of the draft articles under consideration: things which engender risk, either because of their intrinsic properties or because of the place, medium or manner in which they are used. The concentration of 200,000 tons of petroleum in a ship is dangerous because of the way in which it is handled—in other words, in a vessel which can be shipwrecked or have an accident, with disastrous consequences for the sea and for the nearest coastline.

<sup>35</sup> ENVWA/AC.3/4 (26 May 1989), subsequently adopted as the Convention on Environmental Impact Assessment in a Transboundary Context, signed at Espoo, Finland, on 25 February 1991 (E/ECE/1250).

removes some ambiguities which are inevitable in the kind of convention on which the Commission has been working until now. For example, in the draft articles under consideration "appreciable" (or "significant") has two meanings in relation to "risk": it means either a risk that presents a higher than normal probability of causing transboundary harm or a risk that can be detected simply by examining the facts. In short, "appreciable" describes a risk which is not only higher than normal in a human activity but also easily perceptible, or foreseeable. With a list of substances, there would be no need to refer to the second meaning, because the mere fact that he is handling a dangerous substance serves to warn the operator—and hence the State of origin—that he may be subject to certain obligations, and makes it necessary to conduct an examination and an evaluation which hitherto were required only if the risk was "appreciable" on simple examination. With regard to the first meaning, things are made considerably easier by establishing the relationship between the concept and the dangerous substance handled in the activity to which the term "dangerous" applies, for the situation is such that the likelihood of transboundary harm is, in principle, greater than in other activities.

17. On the question of greater flexibility, it should be noted that the listing of dangerous substances is not exhaustive. On the one hand, if substances are included that cast suspicion on the activities in which they are used, it remains to be seen whether the risk of *transboundary* harm is real. On the other hand, there may be other substances which are not listed but which are also known to cause the same effects, in which case the activities in which they are used could be considered as falling under article 1.

#### B. Amendments to article 2 which the new formulation would entail

18. In order to visualize more clearly how the system of a list of dangerous substances would operate, the amendments that would be required if such a list were included in the general provisions of the draft articles under consideration are enumerated below. In the new article 2 (Use of terms), the first four subparagraphs incorporate the systems of defining "activities involving risk" as described above. Other subparagraphs are then adapted as explained above. It goes without saying that these texts are only provisional, since their final wording will have to be drafted in consultation with experts. However, they have an authoritative precedent in the Council of Europe's draft rules, which help us to make more practical use of the concepts.

19. There would be no problem in introducing certain amendments into the text of article 2 since in any case, according to opinions expressed in the Commission and not contradicted, the article is open to the introduction of new terms and the adaptation of existing ones to subsequent developments. The introduction of a list would have no effect on article 1. In general, the wording of the first four subparagraphs of article 2 follows that of the Council of Europe's draft rules, except that "the operation of a waste disposal installation or site" is not included in the concept of dangerous activity, since it seems to be already contained in the general idea of the

handling of dangerous substances, of which waste is obviously one. Moreover, this concept of "dangerous substances" was, of course, devised for the European region, whose predominant activities have their own particular characteristics. It would therefore be necessary to adapt this technique to the global level in consultation with experts. This could perhaps be done in two ways: by authorizing the Special Rapporteur to engage in the relevant consultations, or by leaving only the general concept in the text so that a future conference on codification could appoint a committee of experts for that purpose, as was done in the case of the law of the sea.

20. Subparagraph (a) of article 2 defines activities involving risk. Subparagraph (a) (i) relates them to dangerous substances such as those included in the list and is very general in nature: handling, storage, production, discharge or other similar operation. Carriage was excluded from the Council of Europe's draft rules because it was felt that it was already covered, in the case of Europe, by existing conventions and drafts. It could be included in the draft articles under consideration because article 4 would give precedence to specific conventions over general ones, without prejudice to the application, in such circumstances, of whatever principles of the framework convention were compatible with those of the specific instrument. With respect to subparagraphs (a) (ii) and (iii), although the term "substances" could be interpreted broadly as "anything used in the activity" or "anything with which the activity is chiefly concerned" and could therefore also encompass hazardous radiation or even genetically altered organisms and dangerous micro-organisms, it was deemed preferable to categorize such cases separately in the draft under consideration.

21. New subparagraph (b) defines "dangerous substances", new subparagraph (c) "dangerous genetically altered organisms" and new subparagraph (d) "dangerous micro-organisms". These four subparagraphs (a) to (d) will be necessary if the idea of defining the scope of the draft in a new way is accepted. The new subparagraph (e) is an amended version of the former subparagraph (a) (ii), in which the concept of risk was defined specifically in relation to the substances used in an activity, and that is redundant in view of the new definition of dangerous substances. In the new subparagraph (e) "appreciable" or "significant" risk is defined within the meaning used in the draft, i.e. as that presenting either a higher than normal probability of causing merely "appreciable" or "significant" transboundary harm, or a low or very low probability of causing very considerable or disastrous harm. This follows the ECE Code of Conduct on Accidental Pollution of Transboundary Inland Waters,<sup>36</sup> in which "risk" is defined as "the combined effect of the probability of occurrence of an undesirable event and its magnitude" (art. I(f))—corresponding, in short, to the former subparagraph (a) (ii), minus the concept of "appreciable [significant] risk" as being risk that is easily perceptible, as noted above. Now, the mere fact of handling a dangerous substance makes the risk appreciable, although, of course, one would have to use one's own judgment in determining whether a given risk could cause "transboundary" harm: not every

activity involving an explosive substance, for instance, will be liable to cause transboundary harm. An explosives factory situated far from the border, while it might be dangerous for persons living in the vicinity, would not appear to present an "appreciable [significant] risk" of causing transboundary harm. In subparagraph (f) activities with harmful effects can be defined as they were in the former subparagraph (b) but, in response to criticisms of the phrase "throughout the process", the latter could be changed to "in the course of their normal operation". These then are the amendments which would have to be made to article 2 to bring the draft articles into line with the approach of determining its scope through a definition of dangerous substances and a list.

### C. Other amendments to article 2 and other general provisions

22. The other provisions of article 2 proposed below are not related to the foregoing but are, rather, the result of further reflection on the topic and of suggestions made during the debate at the last session. First, an attempt has been made to give a more precise definition of the key concept of "transboundary harm" by including the cost of preventive measures taken *after* an accident has occurred in the case of activities involving risk, or *after* a harmful effect has arisen in the case of activities with harmful effects, while there is still time to contain or minimize the harm. It seems obvious that if such measures are taken by the affected State in order to protect its territory, or by a third party which is in a position to do so on its behalf, they should be treated as part of the harm and their cost compensated. This is the position taken in a number of recent conventions and drafts. The 1988 Convention on the Regulation of Antarctic Mineral Resource Activities<sup>37</sup> provides, in article 8, paragraph 2, that:

2. An Operator shall be strictly liable for:

...

(d) reimbursement of reasonable costs by whomsoever incurred relating to necessary response action, including prevention, containment, clean-up and removal measures . . .

Article 8, paragraph 1, states that an operator

... shall take necessary and timely response action, including prevention, containment, clean up and removal measures, if the activity results in or threatens to result in damage to the Antarctic environment or dependent or associated ecosystems. . . .<sup>38</sup>

The 1989 Convention on Civil Liability for Damage Caused during Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels (CRTD)<sup>39</sup> provides, in article 1, paragraph 10(d), that:

10. "Damage" means:

...

(d) the costs of preventive measures and further loss or damage caused by preventive measures.

<sup>37</sup> Signed at Wellington on 2 June 1988 (*International Legal Materials*, vol. XXVII (1988), p. 868), hereinafter "1988 Wellington Convention".

<sup>38</sup> "Prevention" as used in these instances means measures intended to limit the effects of an incident that has already occurred.

<sup>39</sup> Adopted on 10 October 1989 under the auspices of ECE. For the text, see *Convention on Civil Liability for Damage Caused during Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels (CRTD)* (United Nations publication, Sales No. E.90.II.E.39), hereinafter "1989 CRTD Convention".

<sup>36</sup> Adopted by ECE by its decision C (45) of 27 April 1990. For the text, see *Code of Conduct on Accidental Pollution of Transboundary Inland Waters* (United Nations publication, Sales No. E.90.II.E.28).

and, in article 1, paragraph 11, that:

11. "Preventive measures" means any reasonable measures taken by any person after an incident has occurred to prevent or minimize damage.

The IMO draft convention on liability and compensation in connection with the carriage of noxious and hazardous substances by sea (1984)<sup>40</sup> provides, in article 1, paragraph 6, that "Damage includes the costs of preventive measures and further loss or damage caused by preventive measures". Lastly, in the Council of Europe's draft rules it is stated, in rule 2, paragraph 10, that "preventive measures" means "Any reasonable measures taken by any person after an incident has occurred to prevent or minimize damage". Moreover, in rule 2, paragraph 8, the definition of "damage" includes "the costs of preventive measures and further loss or damage caused by preventive measures".

23. A separate category must also be established for harm to the environment, which essentially concerns the State, as opposed to harm caused directly to individuals or their property. Reparation for harm to the environment must be made by restoring the conditions that existed *prior to* the occurrence of the harm, and the cost of such operations must be borne by the State of origin if they were carried out by the affected State or, at its request, by a third party. If it is not possible to return to the *status quo ante*, the monetary value of the impairment suffered should somehow be estimated and the affected State should be compensated with an equivalent sum, or given such other compensation by the State of origin as may be negotiated between the parties concerned. It should be added that if the domestic channel is to be used, the only party entitled to bring proceedings is the affected State. On the other hand, the repercussions of harm to the environment may also be prejudicial to individuals: a hotel owner who loses his customers because the tourist area in which his establishment is located was harmed by a leak of radioactivity experiences a loss of income for which he must somehow be compensated, and he would be in a position to institute proceedings in the manner which will be described below. This solution is supported by recent practice. It is the solution adopted by the 1988 Wellington Convention, which, in article 8, paragraph 2(d), quoted above (para. 22), makes the operator liable for the "response action" mentioned and provides in that same paragraph 2 that:

2. An Operator shall be strictly liable for:

(a) damage to the Antarctic environment or dependent or associated ecosystems arising from its Antarctic mineral resource activities, including payment in the event that there has been no restoration to the *status quo ante*,

The 1989 CRTD Convention includes within the meaning of damage, defined in article 1, paragraph 10:

(c) loss or damage by contamination to the environment caused by the dangerous goods, provided that compensation for impairment of the environment other than for loss of profit from such impairment shall be limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken.

The Council of Europe's draft rules<sup>41</sup> give the following definition in paragraph 9 of rule 2:

9. *Measures of reinstatement* means:

Any appropriate and reasonable measures aiming to reinstate or restore damaged or destroyed natural resources or where appropriate or reasonable to introduce the equivalent of these resources into the environment.

and include the following within the concept of "damage" in paragraph 8 of the same rule:

...

loss or damage by contamination of the environment caused by the dangerous substances or waste, provided that compensation for impairment of the environment other than loss of profit shall be limited to costs of measures of reinstatement actually undertaken or to be undertaken.

In such cases, in which it is difficult to assess the harm and the corresponding compensation, the best compensatory measure would logically seem to be the cost of restoring the environment to its *status quo ante*, and only if this is not possible or not fully possible would monetary or other compensation by the State of origin, to be agreed on with the affected State, be used to restore the balance of interests between the parties which was upset by the harm to the environment.

24. In subparagraph (g) of article 2, the Special Rapporteur has added to the definition of transboundary harm the idea that it also includes the cost of *ex post facto* preventive measures, and in subparagraph (h) he has attempted to give a brief definition of "appreciable [significant] harm". That is no easy task, and the Special Rapporteur is open to suggestions in this regard. The Council of Europe's draft rules provide, in rule 3, paragraph 4(d), that :

4. No liability shall attach to the operator if he proves that:

...

(d) the damage was caused by pollution at tolerable levels to be anticipated under local [relevant] circumstances.

The Special Rapporteur has also attempted to define the concept of "incident" in a new subparagraph (k) of article 2. In this connection, the question arises first of all whether it is better to use the word "accident" or "incident". The *Diccionario de la Real Academia Española* defines the word *accidente*, in its second meaning, as a "fortuitous occurrence or action the involuntary result of which is harm to persons or things". In other words, it is a condition *sine qua non* for an accident that it be unintentional; indeed, in activities involving risk, the accident would have to be against the operator's will, since negligence could imply a violation of the general obligation of due diligence. In activities with harmful effects, while there may be no specific intent to cause harm, it seems clear that the operator is aware of such harm and none the less goes ahead with his activity and thus with the generation of its normal effects, which are by definition harmful. In some of the conventions and drafts that have been mentioned in this chapter, there appears to be a preference for the word "incident" in English. While it has something in common with the meaning of the Spanish word *accidente*, there are also differences, as is illustrated by the fact that one meaning of *accidente* is: "fortuitous occurrence which upsets the normal order of things", and this definition would not be appropriate for activities with harmful effects, in which harm occurs as a consequence of the normal operation of the activity. It might, however, be appropriate to use the term *incidente* (incident) in the draft under consideration

<sup>40</sup> IMO, document LEG/CONF.6/3 (13 January 1984).

<sup>41</sup> See footnote 8 above.

to refer both to an accident in the strict sense, when things are beyond the operator's control, and to a certain effect which "arises in the course of a matter or business and is somehow linked to it"—according to the definition of *incidente* given in the *Diccionario de la Real Academia Española*; this would enable us to avoid having to deal with the concept of "due diligence", as it is enough to know that the effect has arisen for there to be legal consequences. In any event, in the Council of Europe's draft rules the term "incident" is defined, in rule 2, paragraph 12, as follows:

12. *Incident* means:

Any sudden or continuous occurrence such as an explosion, fire, leak or emission or any series of occurrences having the same origin, which causes damage or creates a grave and imminent threat of causing damage.

and in the 1989 CRTD Convention "incident" is defined, in article 1, paragraph 12, as follows:

12. "Incident" means any occurrence or series of occurrences having the same origin, which causes damage or creates a grave and imminent threat of causing damage.

The latter might be the most appropriate definition for the draft articles under consideration.

25. The new subparagraph (1) of article 2 defines restorative measures and is consistent with the provisions of the conventions and drafts already considered; the new subparagraph (m) defines preventive measures, including *ex post facto* preventive measures. Lastly, the new subparagraph (n) provides that States of origin and affected States will be referred to as "States concerned". Articles 3, 4 and 5 remain unchanged.

## CHAPTER II

### Principles

26. The principles set forth in draft articles 6 to 10 would not be affected by the introduction of the concept of dangerous substances and a list of such substances. The additions proposed here have to do with the introduction of certain concepts which have been considered in connection with article 2 (paras. 22-25 above).

#### A. Article 8 (Prevention)

27. Article 8 should contain a provision incorporating the concept of *ex post facto* preventive measures—in other words, measures to contain and minimize the harmful transboundary effects of activities. The Special Rapporteur has chosen to speak of "harmful effects" rather than "harm" in relation to prevention, since a harmful effect may or may not ultimately translate into harm, depending on whether or not certain preventive measures are taken. If measures are taken to reduce or eliminate harm which has already occurred, for instance by attempting to restore the conditions that existed prior to the harm, it would no longer be a question of preventive measures but one of reparation.

#### B. Article 9 (Reparation)

28. Article 9 would not be affected, although a new text that takes into account comments made in the debate is provided for the benefit of the Drafting Committee.

#### C. Article 10 (Non-discrimination)

29. In order to sound out views in the Commission, an additional principle, that of non-discrimination, is being tentatively proposed and would be the subject of article 10. There are two aspects to this principle, and they are formulated separately by the Experts Group on Environmental Law in articles 13 and 20 of their "Principles specifically concerning transboundary natural resources and environmental interferences".<sup>42</sup> Article 13, on non-discrimination between domestic and transbound-

ary environmental interferences,<sup>43</sup> refers to the obligation of a State of origin to

... take into account the detrimental effects which are or may be caused by the environmental interference without discrimination as to whether the effects would occur inside or outside the area under their national jurisdiction.

In its comments on article 13 the Experts Group states:

According to this principle States are obliged *vis-à-vis* other States, when considering under their *domestic* policy or law the permissibility of environmental interferences or a significant risk thereof, to treat environmental interferences of which the detrimental effects are or may be mainly felt outside the area of their national jurisdiction in the same way as, or at least not less favourably than, those interferences of which the detrimental effects would be felt entirely inside the area under their national jurisdiction.<sup>44</sup>

The Experts Group considers this to be an "emerging principle" of international environmental law, and the texts it cites to support this thesis include article 30 of the 1962 Agreement concerning Co-operation between Denmark, Finland, Iceland, Norway and Sweden,<sup>45</sup> article 2 of the 1974 Convention on the Protection of the Environment between Denmark, Finland, Norway and Sweden ("Nordic Convention"),<sup>46</sup> the recommendations of inter-governmental organizations and other bodies, in particular OECD, and, above all, principle 13 of the UNEP principles of conduct in the field of the environment.<sup>47</sup> This principle of non-discrimination is without prejudice to the fact that a *minimum international standard* may be required of a State of origin which is higher than that established by its domestic legislation within its own jurisdiction. Referring to the OECD Council recommendation C(77)28 on implementation of a régime of equal

<sup>43</sup> *Ibid.*, p. 88.

<sup>44</sup> *Ibid.*

<sup>45</sup> United Nations, *Treaty Series*, vol. 434, p. 145.

<sup>46</sup> *Ibid.*, vol. 1092, p. 279.

<sup>47</sup> Principles of Conduct in the Field of the Environment for the Guidance of States in the Conservation and Harmonious Utilization of Natural Resources Shared by Two or More States (UNEP, *Environmental Law: Guidelines and Principles*, No. 2, *Shared Natural Resources* (Nairobi, 1978)).

<sup>42</sup> *Environmental Protection . . .*, *op. cit.* (footnote 11 above), pp. 72 *et seq.*

right of access and non-discrimination in relation to transfrontier pollution,<sup>48</sup> the Experts Group observed:

... Indeed, the principle of non-discrimination was intended to provide a *minimum* level of protection below which OECD Member States were not supposed to come. . . .<sup>49</sup>

30. The other aspect of the principle of non-discrimination, which is set forth in article 20 (Non-intergovernmental proceedings)<sup>50</sup> of the principles mentioned above (para. 29), applies to the relationship between States and private individuals. That article provides:

States shall provide remedies for persons who have been or may be detrimentally affected by a transboundary interference with their use of a transboundary natural resource or by a transboundary environmental interference. In particular, States of origin shall grant those persons equal access as well as due process and equal treatment in the same administrative and judicial proceedings as are available to persons within their own jurisdiction who have been or may be similarly affected.

<sup>48</sup> Adopted on 17 May 1977 by the OECD Council (*OECD and the Environment* (Paris, OECD, 1979), pp. 115 *et seq.*).

<sup>49</sup> *Environmental Protection . . .*, *op. cit.* (footnote 11 above), p. 90.

<sup>50</sup> *Ibid.*, pp. 119-120.

In its comments on article 20,<sup>51</sup> the Experts Group differentiates between the principle contained in article 13 and the one formulated in article 20. It points out that article 13 simply provides that a State of origin may not discriminate between the effects of what is referred to as an "environmental interference" that are felt mainly in its own territory and those felt mainly in another jurisdiction, and that it does not deal with the legal remedies available to affected or potentially affected aliens (individuals or non-governmental entities). Article 20, on the other hand, establishes that States must provide such remedies for persons who have been or may be detrimentally affected by a "transboundary environmental interference". This question will be considered in more detail, but the foregoing should suffice to justify the inclusion in the draft under consideration of a principle encompassing both of the aspects mentioned, the second of which seems to be a specific aspect of the first, which it supplements with an appeal to States parties to grant appropriate legal remedies in their legislation and to apply them without discrimination.

<sup>51</sup> *Ibid.*, pp. 120 *et seq.*

## CHAPTER III

### The revised procedure

#### A. Preliminary considerations

31. During its consideration of draft articles 10 to 17 at its last session, the Commission felt that the procedure put forward in relation to some aspects of co-operation and prevention needed to be simplified and made more flexible.<sup>52</sup> The Special Rapporteur has attempted to do so, in particular by eliminating the period for reply to notification (former articles 13 and 14), simplifying the procedure for protecting national security or industrial secrets (former article 11) and replacing the obligation to negotiate a régime (former article 16) by a simple obligation to hold consultations. It is also made clear in the new article 18 that failure to comply with the obligations contained in chapter III of the draft does not constitute grounds for the affected State to institute jurisdictional protective proceedings.

#### B. Comments on the proposed articles 11 to 20

##### 1. ARTICLE 11 (ASSESSMENT, NOTIFICATION AND INFORMATION)

###### (a) Paragraph 1

32. The Special Rapporteur believes that the general duty to assess, notify and inform in the case of certain activities which cause, or create the risk of causing, transboundary harm is reasonably well established in international practice, as he attempted to demonstrate in his fifth report.<sup>53</sup> The cases cited in support of that view

do not, however, appear to contain obligations proper, a breach of which would give rise to international penalties. The new article 11 provides that the State of origin must notify the State or States likely to be affected of any activity referred to in article 1 that is being, or is about to be, carried on under its jurisdiction or control. This obligation would be analogous to that in former article 10, but if the new definition of the activities referred to in article 1 is adopted (together with the list of dangerous substances in the corresponding annexes), the scope of the present article will become rather more restrictive and precise with respect to activities involving risk. The observation made at the last session to the effect that the obligations of the State of origin should not be too burdensome would then lose some of its weight. In any event, it must be borne in mind that the population of the State of origin is itself generally threatened by the risks or harm presented by activities referred to in article 1 and that the so-called "overburdening" of such States is thus nothing more than a duty which they must or should in any case fulfil for the protection of their own citizens, and that there are, besides, no penalties for non-compliance. As a result, if a State chooses to take responsibility for pursuing an activity which causes, or creates the risk of causing, transboundary harm, without assessing its effects or notifying or informing anyone, it may do so, but it will of course have to pay the corresponding compensation if harm occurs.

###### (b) Paragraph 2

33. Paragraph 2 of article 11 envisages situations in which the transboundary effect causing the harm may extend to more than one State, and it establishes the obligation to call in an international organization com-

<sup>52</sup> See *Yearbook . . . 1989*, vol. II (Part Two), pp. 93-94, paras. 377-381.

<sup>53</sup> Document A/CN.4/423 (see footnote 5 above), paras. 79-95. See also the ECE draft framework agreement on environmental impact assessment in a transboundary context (ENVWA/AC.3/4) (see footnote 35 above).

petent in the area. This plurality of States would create a situation in which the interest goes beyond the bilateral sphere or the sphere of a series of bilateral relations (State of origin with each of the affected States) and becomes, as it were, a public interest. This would also happen if there were more than one affected State and the State of origin had no way of identifying them. Of course, if the activity is governed by a specific convention which provides for an international organization to intervene even when there is only one affected State, the specific convention will prevail.

## 2. ARTICLE 12 (PARTICIPATION BY THE INTERNATIONAL ORGANIZATION)

34. Article 12 sets forth the functions of the international organization in the cases specified in paragraph 2 of article 11, when those functions are not specified in the organization's own statutes or rules. Any technical assistance which the organization may provide to developing countries which do not have the necessary technology to assess the transboundary effects of the activity will be very helpful.

## 3. ARTICLE 13 (INITIATIVE BY THE PRESUMED AFFECTED STATE)

35. If a State has serious reason to believe that an activity in another State is causing it transboundary harm, or creating a risk of causing it such harm, and it warns the alleged State of origin accordingly, the State of origin will have a duty to fulfil the requirements of paragraph 1 of article 11. If the activity in question is indeed one of those referred to in article 1, the State of origin will have to reimburse the costs incurred by the affected State. This seems fair since, by examining the activity in question and giving the State of origin the corresponding information, the affected State will have done most of that State's work for it.

## 4. ARTICLE 14 (CONSULTATIONS)

36. In the cases specified in earlier articles, the States concerned will consult among themselves with a view to finding a régime for the activity which reconciles their interests. They will have to do so in good faith and in a spirit of co-operation so as to resolve the matter satisfactorily. If there is more than one affected State, there may be multilateral meetings in addition to any bilateral meetings which may be held by the State of origin. This confers a degree of public status on the matters under discussion which would appear to be beneficial.

## 5. ARTICLE 15 (PROTECTION OF NATIONAL SECURITY OR INDUSTRIAL SECRETS)

37. As suggested at the last session, the Special Rapporteur proposes, in article 15, a simplified version of the former article 11, drafted along the lines of the principles concerning transfrontier pollution annexed to OECD Council recommendation C(74)224,<sup>54</sup> principle 6,

<sup>54</sup> Adopted on 14 November 1974 by the OECD Council (*OECD and the Environment* (Paris, OECD, 1986), p. 142).

paragraph 2, of the UNEP principles of conduct in the field of the environment<sup>55</sup> and article 20 of the draft articles on the law of the non-navigational uses of international watercourses (hereinafter referred to as the "draft articles concerning international watercourses").<sup>56</sup>

## 6. ARTICLE 16 (UNILATERAL PREVENTIVE MEASURES)

38. Regardless of the status of discussions—or the state of affairs if there are no discussions—if the State of origin is aware of the potential for transboundary harm of an activity under its jurisdiction or control it will have to take the precautionary measures indicated in article 8—unless, of course, it has reason to believe that the nature of the activity is not what some are claiming. In any case, if, in such circumstances, harm arises that can be attributed causally to the activity,<sup>57</sup> the articles relating to the liability of the State of origin will come into play. Unilateral preventive measures should include making the suspect activity subject to prior authorization by the State of origin and setting up some form of compulsory insurance, other financial safeguards or a public fund to cover liability towards possible affected States. In *ex post facto* prevention, it is also possible that the State may have to intervene through public institutions to halt some harmful effect which is spreading but can still be contained or diminished. It may sometimes be necessary to call in the fire brigade or even the army, to mobilize forest rangers or to do something else along those lines—and this is an obligation of the State, not the operator.

## 7. ARTICLE 17 (BALANCE OF INTERESTS)

39. The usefulness of providing some guidelines for the negotiation of a régime has been stressed on various occasions in the Commission and in the Sixth Committee. Those included in article 17 reflect most of the so-called factors described in section 6 of the schematic outline of the topic.<sup>58</sup> The Special Rapporteur must confess to a certain lack of enthusiasm for including such concepts in a body of norms, because they are only recommendations or guidelines for conduct and not genuine legal norms, and because the factors involved in this kind of negotiation are too varied to be forced into a narrow conceptual framework. However, it is not unusual to do so,<sup>59</sup> and their inclusion in the present articles, apart from lending some substance to the concept of "balance of

<sup>55</sup> See footnote 47 above.

<sup>56</sup> See *Yearbook* . . . 1988, vol. II (Part Two), p. 54.

<sup>57</sup> For the sake of argument, let us say that the harm is causally attributable to the activity. Strictly speaking, as the Special Rapporteur explained in his fifth report:

"... causality originates in specific acts, not activities. A certain result in the physical world which amounts to harm in the legal world can be traced back along the chain of causality to a specific human act which gave rise to it. It cannot, however, be attributed quite so strictly to an 'activity', which consists of a series of acts, one or more successive episodes of human conduct aimed in a certain direction." (Document A/CN.4/423 (see footnote 5 above), para. 13.)

<sup>58</sup> *Yearbook* . . . 1982, vol. II (Part Two), p. 83, para. 109.

<sup>59</sup> See article 7 of the draft articles concerning international watercourses, which contains a list of factors to be taken into account for the "equitable and reasonable" utilization of the waters of an international watercourse (*Yearbook* . . . 1987, vol. II (Part Two), p. 36).

interests",<sup>60</sup> which is, so to speak, behind a number of the proposed texts, and providing guidance to the States concerned, would be of some legal value for assessing the extent to which those States have acted in good faith in the negotiations. It may be useful in this connection to establish whether the State of origin could have conducted an equivalent activity in a less dangerous, if slightly more expensive, way or the extent to which the affected State protects its own nationals from the impact of that or a similar activity. The introductory paragraph of the article is permissive: the parties may take into account the factors indicated, since doing so would be a matter of free will which can yield only to compulsory norms of international law. Furthermore, so great is the variety of circumstances in each particular case that the States concerned could not be required to take into account the factors included in the article, for some other factor that is not listed may be more relevant in that particular instance. Concerning the list itself, the various subparagraphs are self-explanatory and there is no need for further comment.

#### 8. ARTICLE 18 (FAILURE TO COMPLY WITH THE FOREGOING OBLIGATIONS)

40. If the State of origin fails to comply with the obligations just discussed, the affected State will be entitled to institute proceedings only if harm arises. The mechanisms of liability are activated only if the harm can be causally attributed to the activity in question. This solution is in line with views expressed in both the Commission and the Sixth

<sup>60</sup> This expression is very difficult to define. In a general way, it may be found that certain paragraphs of international judgments come close to this idea. For example, in the *Lake Lanoux* case the arbitral tribunal stated:

"... The Tribunal is of the opinion that, according to the rules of good faith, the upstream State is under the obligation to take into consideration the various interests involved, to seek to give them every satisfaction compatible with the pursuit of its own interests, and to show that in this regard it is genuinely concerned to reconcile the interests of the other riparian State with its own." (*International Law Reports 1957*, vol. 24 (1961), p. 139.)

And in the case relating to the *Territorial Jurisdiction of the International Commission of the River Oder*, the PCIJ stated:

"... This community of interest in a navigable river becomes the basis of a common legal right, the essential features of which are the perfect equality of all riparian States in the use of the whole course of the river and the exclusion of any preferential privilege of any one riparian State in relation to the others." (Judgment No. 16 of 10 September 1929, *P.C.I.J.*, Series A, No. 23, p. 27.)

Committee, with which there was no disagreement. It is also in line with the international practice mentioned by the Special Rapporteur in his fifth report.<sup>61</sup> Of course, if any proceedings are envisaged in other conventions in force between the parties, those conventions will apply. In any event, if the State of origin fails to comply with the obligations mentioned, it will have no right to invoke the benefits of article 23.

#### 9. ARTICLE 19 (ABSENCE OF REPLY TO THE NOTIFICATION UNDER ARTICLE 11)

41. If the State of origin has given the notification required by article 11 and has also voluntarily provided information on the measures it plans to take to prevent harm or minimize risk, and if the State or one of the States likely to be affected has not replied, it will be assumed that the measures proposed are satisfactory to that State; if harm then occurs, it will not be able to allege that the State of origin had not taken sufficient precautions. If a State that has received a notification considers the period for replying to be insufficient or does not have the means to reply on time, it will be able to request an extension. If it is a developing country which needs some assistance in order to make a full assessment of the risks involved, such assistance could be forthcoming from international organizations or from the alleged State of origin itself if that State is able to give it. If a study reveals that the activity is indeed one of those referred to in article 1, the costs of that study will be borne by the State of origin, which is what would have happened if that State had complied with its obligations under article 11. Otherwise the costs will be borne by the affected State.

#### 10. ARTICLE 20 (PROHIBITION OF THE ACTIVITY)

42. Article 20 sets limits on the conduct of an activity. It is logical to ban an activity whose effects cause transboundary harm that cannot be avoided or adequately compensated, as would be the case with some kinds of harm to the environment which are irreversible. In order to be able to pursue the activity, the operator must find a way of converting it into a less harmful one or into one whose effects can be controlled, and the State of origin would have to propose this to the operator requesting the corresponding authorization.

<sup>61</sup> Document A/CN.4/423 (see footnote 5 above), paras. 79-95.

## CHAPTER IV

### Liability

#### A. General considerations

43. Chapter IV expands on the principle set forth in article 9 and deals with the liability of the State of origin, i.e. the *primary* obligations that arise from causing the harm. As noted above, liability may be incurred regardless of whether or not the harm is the result of a failure to comply with the obligation of prevention; the conse-

quences may be somewhat different, however, as will be explained below. In brief, when harm occurs that is causally attributable to an activity referred to in article 1, the State of origin is bound to negotiate the amount of compensation it must pay in order to restore, in so far as possible, the balance of interests that prevailed before the harm. If it does not fulfil this obligation to negotiate—in other words, if it refuses to sit down and talk, or if it

proceeds in such a way as to preclude genuine negotiation<sup>62</sup>—it will be violating an international obligation and thus incurring responsibility for a wrongful act. Only then, at the end of the entire process, would it incur this type of liability, which enters the realm of *secondary* rules. Needless to say, if the State of origin agrees, as a result of negotiations, to pay a given amount of compensation and then fails to do so, it also incurs the same liability.

### B. Reparation and balance of interests

44. The Special Rapporteur had felt that the chapter on liability, which sets forth the primary obligations of the State of origin when transboundary harm has been caused, might introduce a concept of reparation which, as opposed to the classical one involved in responsibility for wrongfulness, did not entail total restitution to eliminate all the consequences of the act which caused the harm. In brief, the idea would be that, using such total reparation as a unit of measurement, certain amounts would be deducted to represent those interests of the State of origin which, before the harm, were not matched by equivalent measures on the part of the affected State. For example, the State of origin may wish to recover amounts spent strictly for the benefit of the affected State, such as those aimed solely at preventing transboundary harm,<sup>63</sup> or it may want the affected State to help defray the cost of an activity from which the latter also benefits, if that can be demonstrated. Likewise, the State of origin may want the affected State to accept lower compensation in consideration of the fact that the same activity is also carried on under the jurisdiction or control of the affected State, in which case compensation would be paid in both directions. Of course, if the affected State does not obtain any benefit from the activity in question, or if the same activity or a similar one is not carried on under its jurisdiction or control, the situation would be different and one would have to think in terms of full compensation.

45. The Special Rapporteur still thinks that that would be the ideal situation, as it would allow for distributive justice in the economic aspects of an activity which benefits both States. Several examples may be found in domestic and international law to support this idea: when liability for occupational accidents is objective or strict, there is usually a ceiling which in most cases does not compensate for the harm caused but does allow for rapid payment and may even preserve the viability or economic soundness of the company which has to make payment. To explain briefly the *raison d'être* of this institution, it might be said that ideal justice is sacrificed for the sake of the social utility of, for example, manufacturing activities. In international law, some conventions authorize a ceiling on compensation, normally in cases where the harm is of considerable magnitude. This is due, in international law also, to the social utility of the activity and, consequently, to acceptance of the price that must be paid for not

interrupting technological progress, although perhaps the most practical reason might be that it is difficult to obtain insurance for the extremely high amounts that are at stake in such activities.

46. In trying to put this idea into practice, however, the Special Rapporteur has come up against some arguments for not adopting it in the framework of a convention as broad as the one at present under consideration, which envisages all the activities referred to in article 1. The first objection is that the most appropriate time to discuss such a solution would seem to be during negotiations concerning the régime for a specific activity. It is in the course of negotiations on the terms under which an activity may be pursued in the State of origin that such considerations can best be identified and quantified. This becomes more difficult after harm has occurred.

47. In addition, no matter how attractive such a concept might be, there is no example in international practice of deductions being made in the way suggested above (para. 44). In many cases, a ceiling is indeed placed on the amount to be paid by the operator; this was mainly due, at the outset, to the impossibility of obtaining the necessary insurance. This problem has, however, been gradually overcome as ceilings have been raised, firstly as a result of higher amounts of insurance being made available, and secondly as a result of the establishment of funds either by the operators themselves or by States. One clear example of this is the 1963 Brussels Convention supplementary to the 1960 Paris Convention on Third Party Liability in the Field of Nuclear Energy<sup>64</sup> which, in order to provide the greatest possible coverage for damage caused by nuclear activity, raises the ceiling for compensation through the use of public funds. Lastly, the 1972 Convention on International Liability for Damage Caused by Space Objects,<sup>65</sup> which establishes State liability, provides, in article XII, for full compensation:

... such reparation in respect of the damage as will restore the person, natural or juridical, State or international organization on whose behalf the claim is presented to the condition which would have existed if the damage had not occurred.

48. Another feature of the draft articles under consideration that must be remembered is that they are basically, *faute de mieux*, of a residual nature. They are aimed primarily at encouraging States to consult with each other in order to try to find a legal régime that covers the specific activity which has given rise to the problem, and to get them to accept the principles set forth therein as a guide for their negotiations. The idea is not to create a perfect system which would operate permanently, but rather to provide a kind of safety net, like those used by acrobats, which would be available if an activity referred to in article 1 were to cause harm without there being any specific legal régime to cover such a case. In these circumstances, it seems best to try to develop a system that works rather than one that guarantees perfect justice. For all these reasons, the Special Rapporteur has decided to suggest some deductions for the situations mentioned above (para. 44), to be made if the State of origin so requests and if they are reasonable in each case, leaving it up to the affected State to agree to them or not.

<sup>62</sup> On the obligation to negotiate, see the fifth report of the Special Rapporteur, document A/CN.4/423 (see footnote 5 above), paras. 126-147.

<sup>63</sup> Costs incurred to prevent harm to the population of the State of origin should, however, be deducted from accident-prevention costs, leaving only those additional costs, if any, which are incurred to prevent a transboundary effect; this considerably complicates the calculations.

<sup>64</sup> Brussels Convention of 31 January 1963 (see footnote 18 above) supplementary to the Paris Convention of 29 July 1960, amended by the Additional Protocol of 28 January 1964 (see footnote 17 above) and by the Protocol of 16 November 1982.

<sup>65</sup> See footnote 14 above.

### C. Comments on the proposed articles 21 to 27

#### 1. ARTICLE 21 (OBLIGATION TO NEGOTIATE)

49. The obligation to negotiate has already been discussed several times in connection with the Commission's work on the present topic. There is no point in elaborating on it, except for purposes of clarification in this particular context. The obligation of the States concerned consists, in the first place, of sitting down to negotiate; this applies to both States, not just to the State of origin. Both States are also required to conduct their negotiations in good faith, with a view to achieving a concrete result, which is to determine the amount to be paid by the State of origin in order to restore matters either to the situation that existed before the harm occurred (*status quo ante*) or to the situation which most probably would have existed had the harm never occurred (*Chorzów Factory* case<sup>66</sup>). Of course, put this way, there would not be much to negotiate, and that is why article 21 is worded somewhat more loosely: it provides that the legal consequences of the harm must be determined and that the harm must, *in principle*, be fully compensated. It is here that the considerations set forth in article 23 apply, so that, within reasonable limits, a compromise can be reached on (normally) an amount of money that satisfies the interests of both parties. The amount, therefore, would be determined through negotiations, the guidelines for which are given in articles 20 and 23.

#### 2. ARTICLE 22 (PLURALITY OF AFFECTED STATES)

50. If the harm occurs in a situation envisaged in article 11 (*b*), an international organization may intervene. If an international organization has already been called in as a result of the consultations envisaged in article 14, it may also intervene in this case, at the request of any of the States concerned. Its role will be to co-operate, and to facilitate co-operation on the part of the States concerned, in determining the amount to be paid by the State of origin. It will act with the same powers as those envisaged in article 12—that is to say, in keeping, generally, with the mandates of its own statutes or rules or using its good offices—in order that a consensus may be reached on the amount of compensation to be paid by the State of origin; in any event, it will provide to such States as may request it—presumably developing countries—such technical assistance as may be necessary in order better to ascertain the nature of the harm caused and the best way to make reparation for it. It did not seem necessary to include a final paragraph on the possibility of convening joint meetings; in such cases, when the interests under discussion could be of considerable magnitude and when an international organization is involved, no one is likely to question the right of any of the States concerned or of the international organization involved to call for joint meetings.

#### 3. ARTICLE 23 (REDUCTION OF COMPENSATION PAYABLE BY THE STATE OF ORIGIN)

51. Article 23 does not include precise definitions either of the harm or of the compensation due from the State of origin; rather, it gives guidelines for negotiations. It

would seem reasonable, as stated under section 5, paragraph 3, of the schematic outline,<sup>67</sup> to say that:

3. In so far as may be consistent with the preceding articles, an innocent victim should not be left to bear his loss or injury; the costs of adequate protection should be distributed with due regard to the distribution of the benefits of the activity. . .

Thus, if the State of origin can demonstrate that its prevention costs were increased in order to prevent transboundary harm, i.e. that prevention of transboundary harm represented a certain proportion of the costs above and beyond those necessary for internal prevention, it might seem reasonable that this increase in costs should be shared proportionately and equitably with the affected State or States. In cases where the State of origin could show, although without establishing any exact amounts, that the affected State benefited from the activity in question, for example from some of its generally beneficial aspects, it would be impossible to quantify *a priori*, or even *a posteriori*, the amounts or proportions involved. All this would be established as a result of negotiations, which then might or might not result in the establishment of a figure that would somehow permit a restoration of the balance of interests at stake. This holds true when a claim is made through the diplomatic channel. When a claim is made through the domestic channel, the applicable law would be the national law, in which considerations of this kind rarely prevail, although there may be other considerations, such as the limitation of liability to a maximum amount.

#### 4. ARTICLE 24 (HARM TO THE ENVIRONMENT AND RESULTING HARM TO PERSONS OR PROPERTY)

##### (a) Paragraph 1

52. Article 24 concerns specifically harm to the environment. International practice seems to point unequivocally to the solution proposed in paragraph 1 of the article. Various conventions and draft instruments provide that harm to the environment requires that the State of origin restore the *status quo ante* and therefore that the affected State, or anyone who carries out the necessary work to restore the environment on behalf of that State, is entitled to reimbursement, provided that the restoration operation is reasonable, in other words that it is within reason and its cost is not manifestly disproportionate to the harm done. If it is impossible to restore fully the environmental conditions existing prior to the harm, the parties must agree on compensation by the State of origin which is deemed equivalent to the deterioration actually suffered. Harm to the environment should be considered separately from harm to persons or private property, or from the State itself, since harm to the environment is more difficult to quantify: it involves harm to things such as air, water and space which cannot be appropriated, which are shared and used by everyone and do not belong to anyone in particular. Environmental harm may also be far more extensive than the other kinds of harm mentioned, however, and the priority is to attempt to restore the conditions that existed prior to the occurrence of the harm. One of the main reasons for the attempt being made within IAEA to amend the 1960 Paris Convention and the 1963 Vienna Convention concerning liability for

<sup>66</sup> P.C.I.J., Series A, No. 17, Judgment of 13 September 1928, p. 47.

<sup>67</sup> See footnote 58 above.

nuclear damage<sup>68</sup> is that they do not deal with harm to the environment over and above harm to persons or property.

(b) *Paragraph 2*

53. Paragraph 2, by contrast, covers precisely the other eventuality: that of harm to persons (including, of course, death or injury to the health or physical integrity of persons) or to property belonging to individuals or companies or to the State itself which is not caused directly (as in the case envisaged in article 21) but arises as a consequence of harm to the environment or of impairment of the use or enjoyment of areas under the jurisdiction of the affected State. A typical case would be that of a hotel owner who, as a result of environmental damage to the woodlands of the mountain area in which his hotel is located, is harmed by the loss of his customers. This is a case of *lucrum cessans* which must be compensated for.

(c) *Paragraph 3*

54. Paragraph 3 gives the affected State the possibility of agreeing to a reduction in its compensation on the grounds given in article 23. This happens when the diplomatic channel is used, but not when claims are brought by individuals through the domestic channel, in which case, as we have seen, the national law of the competent court will have to apply. In such circumstances, the compensation may be somewhat different from that which the same individual would have obtained had he resorted, through his State, to the diplomatic channel. The national law may set a limit on liability which affects the share due to each party or there may, in general, be another way of evaluating the harm, etc. This, however, arises from the diversity of national systems and it would be pointless to attempt to unify them under one convention, however multilateral. As will be noted a little further on, the draft articles under consideration impose certain rules on the national law: that it give the courts of the country concerned jurisdiction to hear the claims lodged by those persons, that it provide a remedy that gives prompt and satisfactory compensation in such cases, and that it not discriminate on grounds of nationality, domicile, residence or other basic concepts. It may not be appropriate, however, to impose any further rules on domestic law, as this may give rise to unforeseen complications.

5. ARTICLE 25 (PLURALITY OF STATES OF ORIGIN)

55. Article 25 covers cases in which there may be more than one State of origin responsible for transboundary harm, and two alternatives are offered. Under alternative A, a claim for the entire harm may be brought against any State of origin (joint and several liability) and this State of origin may of course claim from the other State of origin reimbursement of the proportionate share due from that State under article 23. This is the solution adopted by the 1972 Convention on International Liability for Damage Caused by Space Objects,<sup>69</sup> and it offers

advantages to the affected State, which can recover its losses from any of the States of origin. There are some drawbacks, however: the other State may invoke exceptions and, in general, the solution appears more suited to legal proceedings than to a claim through the diplomatic channel. The Special Rapporteur therefore also submits alternative B, bearing in mind that article 21 provides for a joint procedure under which each State of origin may put forward its procedural position.

6. ARTICLE 26 (EXCEPTIONS)

56. The existence of special cases in which there is no liability, or in which liability is not applicable to certain persons in certain circumstances, is common to most of the conventions on liability for harm resulting from specific activities, whether it is civil liability or State liability, even if the liability is objective or strict. Thus, the 1972 Convention on International Liability for Damage Caused by Space Objects,<sup>70</sup> which establishes the liability of the State for such damage, provides, in article VI, paragraph 1, that:

... exoneration from absolute liability shall be granted to the extent that a launching State establishes that the damage has resulted either wholly or partially from gross negligence or from an act or omission done with intent to cause damage on the part of a claimant State or of natural or juridical persons it represents.

These are the only grounds for exoneration from liability envisaged in that Convention.

57. The other conventions incorporate more grounds for exoneration. They are based on the "channelling" of strict liability towards the operator, who is made solely responsible for the harm. Before proceeding, it should be made clear that the operator's State is liable for any amounts over and above the capacity to pay of the operator or of his insurers and, in that case, fully replaces the operator and appears to be as much the subject of strict liability for those amounts as the operator himself. The 1963 Vienna Convention on Civil Liability for Nuclear Damage<sup>71</sup> provides, in article IV, paragraph 2, for an exception similar to the one referred to above in cases involving "gross negligence" or an "act or omission . . . done with intent to cause damage" on the part of the apparent victim but leaves it up to the court to grant this exception, provided that it is in keeping with the national law. On the other hand, the same Convention, under article IV, paragraph 3, allows an unrestricted exception in respect of nuclear damage caused by a nuclear incident directly due to (a) "an act of armed conflict, hostilities, civil war or insurrection" or (b) "a grave natural disaster of an exceptional character". The 1960 Paris Convention on Third Party Liability in the Field of Nuclear Energy<sup>72</sup> establishes, in article 9, an exception for damage caused by a nuclear incident due to:

... an act of armed conflict, hostilities, civil war, insurrection or, except in so far as the legislation of the Contracting Party in whose territory his nuclear installation is situated may provide to the contrary, a grave natural disaster of an exceptional character.

The 1988 Wellington Convention<sup>73</sup> provides, in article 8, paragraph 4, that:

<sup>70</sup> *Ibid.*

<sup>71</sup> See footnote 19 above.

<sup>72</sup> See footnote 17 above.

<sup>73</sup> See footnote 37 above.

<sup>68</sup> See footnotes 17 and 19 above.

<sup>69</sup> See footnote 14 above.

4. An Operator shall not be liable . . . if it proves that the damage has been caused directly by, and to the extent that it has been caused directly by:

(a) an event constituting in the circumstances of Antarctica a natural disaster of an exceptional character which could not reasonably have been foreseen; or

(b) armed conflict, should it occur notwithstanding the Antarctic Treaty, or an act of terrorism directed against the activities of the Operator, against which no reasonable precautionary measures could have been effective.

and in paragraph 6 of the same article provides that:

6. If an Operator proves that damage has been caused totally or in part by an intentional or grossly negligent act or omission of the party seeking redress, that Operator may be relieved totally or in part from its obligation to pay compensation in respect of the damage suffered by such party.

58. Several important drafts under consideration in various forums also make similar exceptions. Thus, in the Council of Europe's draft rules on compensation for damage caused to the environment,<sup>74</sup> rule 3, concerning the liability of the operator, provides in paragraph 4 that:

4. No liability shall attach to the Operator if he proves that:

(a) the damage resulted exclusively from an act of war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional, inevitable and irresistible character;

(b) the damage was exclusively caused by an act done with the intent to cause damage by a third party, despite safety measures appropriate to the type of dangerous activity in question;

(c) the damage was exclusively caused by an act performed in compliance with an express order or provision of a public authority;

...

59. The 1989 CRTD Convention<sup>75</sup> states, in article 5, paragraph 4:

4. No liability shall attach to the carrier if he proves that:

(a) the damage resulted from an act of war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional, inevitable and irresistible character; or

(b) the damage was wholly caused by an act or omission with the intent to cause damage by a third party;

...

and in article 5, paragraph 5:

<sup>74</sup> See footnote 8 above.

<sup>75</sup> See footnote 39 above.

5. If the carrier proves that the damage resulted wholly or partially either from an act or omission with the intent to cause damage by the person who suffered the damage or from the negligence of that person, the carrier may be exonerated wholly or partially from his liability to such person.

## 7. ARTICLE 27 (LIMITATION)

60. It is also common to set a time-limit after which proceedings in respect of liability lapse. The conventions cited as the basis for the preceding article may also be invoked here. The 1972 Convention on International Liability for Damage Caused by Space Objects<sup>76</sup> establishes time-limits in article X:

### Article X

1. A claim for compensation for damage may be presented to a launching State not later than one year following the date of the occurrence of the damage or the identification of the launching State which is liable.

2. If, however, a State does not know of the occurrence of the damage or has not been able to identify the launching State which is liable, it may present a claim within one year following the date on which it learned of the aforementioned facts; however, this period shall in no event exceed one year following the date on which the State could reasonably be expected to have learned of the facts through the exercise of due diligence.

...

61. The 1960 Paris Convention and the 1963 Vienna Convention concerning liability for nuclear damage<sup>77</sup> establish, in article 8 and article VI respectively, a time-limit of 10 years from the date of the nuclear incident which caused the damage. Rule 9 of the Council of Europe's draft rules<sup>78</sup> establishes a time-limit of three or five years (still to be decided) from the date on which the affected party knew or ought reasonably to have known of the damage and of the identity of the operator; in no case can proceedings be brought after 30 years from the date of the incident. Article 18 of the 1989 CRTD Convention sets a time-limit of three years from the date at which the person suffering the damage knew or ought reasonably to have known of the damage and of the identity of the carrier.

<sup>76</sup> See footnote 14 above.

<sup>77</sup> See footnotes 17 and 19 above.

<sup>78</sup> See footnote 8 above.

## CHAPTER V

### Civil liability

#### A. General considerations

62. Up to now, the liability envisaged in the present articles has been regarded as the exclusive responsibility of the State, for reasons which were given at the appropriate time<sup>79</sup> and which, briefly, were: (a) although private-law remedies are useful in giving various choices to the parties, they fail to guarantee prompt and effective compensation to innocent victims, who, after suffering

serious injury, have to take proceedings against foreign entities in the courts of other States; (b) private-law remedies by themselves will not encourage States to take more effective preventive measures in relation to activities conducted within their territory which give rise to injurious transboundary consequences. Without discarding these arguments, the Special Rapporteur feels that the possibility that the articles might make this local remedy more accessible and thus easier to choose for victims who, for whatever reason, prefer it to the protection of their

<sup>79</sup> See *Yearbook* . . . 1987, vol. I, p. 186, 2023rd meeting, para. 25.

own State should be considered. Of course there is nothing, as things are at present, to prevent an individual who has been the victim of transboundary harm from trying to go directly to the courts of the State of origin to obtain compensation for such injury without seeking protection from his own State, which, moreover, may or may not be forthcoming. The affected State itself might in some cases even find it useful to resort to this remedy in order to defend its own interests. The present articles therefore would simply attempt to ensure a minimum degree of uniformity in the treatment of these private individuals or the affected State by the courts and any applicable laws, as well as certain substantive guarantees and due process of law.

## B. Comments on the proposed articles 28 to 33

### 1. ARTICLE 28 (DOMESTIC CHANNEL)

63. Different degrees of international regulation of the domestic legal channel can be envisaged. As a minimum, the present articles could establish a system based in part on that of the 1972 Convention on International Liability for Damage Caused by Space Objects.<sup>80</sup> One initial provision for ensuring peaceful coexistence of the domestic channel with the international channel would be to establish, as does article XI, paragraph 1, of the 1972 Convention, that presentation of a diplomatic claim to the State of origin would not require the prior exhaustion of any local legal remedies that might be available to the claimant State or to natural or juridical persons it represents. At the same time, it would have to be established, as in paragraph 2 of the same article, that nothing in the convention would prevent a State, or a natural or juridical person it might represent, from pursuing a claim in the courts or agencies of the State of origin, or indeed in the courts or agencies of the affected State, as suggested in article 29 of the present draft. In that case, the affected State would not be able to use the diplomatic channel to present a claim in respect of harm for which compensation was being sought through the domestic channel. The system established by the 1972 Convention goes no further than this, but the Commission might prefer a greater degree of regulation, through an international convention, of access to the domestic channel and some other aspects. The solution provided by the 1972 Convention is understandable in an instrument of that kind, in the drafting of which strategic and security considerations prevailed over other considerations, especially economic considerations, in relation to an activity which at the time was seen as the exclusive responsibility of States.<sup>81</sup>

<sup>80</sup> See footnote 14 above.

<sup>81</sup> As stated in a recent study:

"When in 1966, based upon the primary agreement of the two superpowers, the Outer Space Treaty was adopted, it was agreed, within the political context of the legal régime on outer space, that there should be a tight régime based on international responsibility of the controlling state not only for activities on its own behalf but also for private activities carried out under its authority. The stipulation of the international liability of the controlling state corroborates its obligation continuously to supervise and control governmental, as well as private, space enterprises. It has to be seen in the framework of the space régime and not as a mere technical question of how to adjust the economic risk involved in space activities." (G. Doeker and T. Gehring, "Private or international liability for transnational environmental damage: The precedent of conventional liability régimes", *Journal of Environmental Law* (Oxford), vol. 2, No. 1 (1990), p. 13.)

### 2. ARTICLE 29 (JURISDICTION OF NATIONAL COURTS)

#### (a) Paragraph 1

64. A greater degree of regulation of civil liability could be achieved by imposing certain obligations on the parties, beginning with their obligation under paragraph 1 of article 29 to grant unrestricted access to their courts to victims of transboundary harm caused by activities under their jurisdiction or control. For this purpose the parties would have to adapt their domestic legislation so as to give their courts the necessary jurisdiction to deal with claims submitted by individuals or legal entities living or residing in another country. This is the solution advised in the ECE Code of Conduct on Accidental Pollution of Transboundary Inland Waters,<sup>82</sup> article VII, paragraph 3, of which reads:

3. Countries should endeavour, in accordance with their legal systems and, where appropriate, on the basis of mutual agreements, to provide physical and legal persons in other countries who have been or may be adversely affected by accidental pollution of transboundary inland waters with equivalent access to and treatment in the same administrative and judicial proceedings, and make available to them the same remedies as are available to persons within their own jurisdiction who have been or may be similarly affected.

A similar provision is to be found in article 19, paragraph 3, of the 1989 CRTD Convention.<sup>83</sup>

#### (b) Paragraph 2

65. Paragraph 2 of article 29 reflects a greater degree of regulation because, even if they had access to the courts of the State of origin, victims of transboundary harm would still be completely dependent on the solution provided by the national law of the competent court in all areas not regulated by the present articles. Domestic law may not grant any remedies even to nationals of the country in the event of such harm, or it may grant remedies which fall short of the "prompt and adequate compensation" referred to in paragraph 2. As the Special Rapporteur sees it, this does not mean that the liability of the party which caused the harm need necessarily be strict—although many international conventions and domestic legal systems envisage this kind of liability for the operator in the case of activities such as those referred to in article 1—and the formula is sufficiently flexible to permit the application of a domestic law which might reasonably satisfy the claimant. In a case where the applicable law does not recognize no-fault liability, the claimant will have to prove the existence of the conditions stipulated by the local law if his claim is to be admitted. A precedent for this solution is to be found in article 235, paragraph 2, of the 1982 United Nations Convention on the Law of the Sea:<sup>84</sup>

2. States shall ensure that recourse is available in accordance with their legal systems for prompt and adequate compensation or other relief in respect of damage caused by pollution of the marine environment by natural or juridical persons under their jurisdiction.

#### (c) Paragraph 3

66. Paragraph 3 of article 29, if acceptable, would give victims of transboundary harm an important option by

<sup>82</sup> See footnote 36 above.

<sup>83</sup> See footnote 39 above.

<sup>84</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.

enabling them to choose between the competent court of the State of origin and that of the affected State. It has been argued that the court of the State of origin is more appropriate since that is where the causal chain leading to the harm originated and, therefore, where evidence can more easily be gathered. That is true, but it must be remembered that one of the objections raised against the domestic channel was that the victim had to take proceedings in a foreign country, with all the attendant drawbacks: ignorance of substantive law and legal procedures, travel costs, possibly a different language, etc. Under paragraph 3, the claimant could, if he prefers, lodge a claim with a court in his own country. Evidence can be gathered by sending letters rogatory to the judge of the place where the incident which caused the harm occurred, but the important thing is that the claimant can institute proceedings in his own country. Such a solution is provided for in the 1968 Convention concerning Judicial Competence and the Execution of Decisions in Civil and Commercial Matters<sup>85</sup> and in the decision of the Court of Justice of the European Communities of 30 November 1976.<sup>86</sup> Similarly, the 1989 CRTD Convention,<sup>87</sup> in article 19, paragraph 1, establishes the jurisdiction of courts of contracting States:

- (a) where the damage was sustained as a result of the incident; or
- (b) where the incident occurred; or
- (c) where preventive measures were taken to prevent or minimize damage; or
- (d) where the carrier has his habitual residence.

If the affected State wished to go to court to pursue a claim for its own interests (for instance, for damage to its environment), it would have to do so in the courts of the State of origin, not in its own courts, in order to avoid any suspicion of partiality and because the State has means of litigation which are not available to individuals. In any case, this is a progressive provision and might not be acceptable in a global instrument such as the one now under consideration.

<sup>85</sup> United Nations, *Treaty Series*, vol. 1262, p. 153.

<sup>86</sup> *Handelskwekerij G. J. Bier BV v. Mines de Potasse d'Alsace S.A.* (case 21/76) (Court of Justice of the European Communities, *Reports of Cases before the Court, 1976-8* (Luxembourg), p. 1735).

<sup>87</sup> See footnote 39 above.

### 3. ARTICLE 30 (APPLICATION OF NATIONAL LAW)

67. Article 30 provides for application of the national law in all matters not specifically regulated by the present articles. Both the national law and these articles will have to be applied in such a way as to comply with the principle of non-discrimination provided for in draft article 10. The basis for this is to be found in articles 13 and 14 of the 1960 Paris Convention.<sup>88</sup>

### 4. ARTICLE 31 (IMMUNITY FROM JURISDICTION)

68. Article 31, which prevents a State against which proceedings have been instituted under the present articles from claiming immunity from jurisdiction, except in respect of enforcement measures, has precedents in article 13(e) of the 1960 Paris Convention<sup>89</sup> and article XIV of the 1963 Vienna Convention<sup>90</sup> and would appear necessary for the functioning of the system provided for in the present articles.

### 5. ARTICLE 32 (ENFORCEABILITY OF THE JUDGMENT)

69. Article 32 deals with the enforceability of the judgment and is based on article 13(d) of the 1960 Paris Convention,<sup>91</sup> article XII of the 1963 Vienna Convention<sup>92</sup> and article 20 of the 1989 CRTD Convention.<sup>93</sup> In any global framework convention such as the one under consideration, it is necessary to allow for the fact that different countries have different conceptions of public policy, as well as the other possibilities listed in the article.

### 6. ARTICLE 33 (REMITTANCES)

70. Article 33 is self-explanatory and is designed to facilitate the operation of the preceding provisions among the parties to the future convention.

<sup>88</sup> See footnote 17 above.

<sup>89</sup> *Ibid.*

<sup>90</sup> See footnote 19 above.

<sup>91</sup> See footnote 17 above.

<sup>92</sup> See footnote 19 above.

<sup>93</sup> See footnote 39 above.

## CHAPTER VI

### Liability for harm to the environment in areas beyond national jurisdictions (global commons)

#### A. Preliminary considerations

71. At the last session the Special Rapporteur undertook to explore the possibility of extending the present topic to harm caused to the so-called "global commons",<sup>94</sup> which might perhaps be rendered in Spanish by

<sup>94</sup> Whether the global commons were considered as a *res communis* to all States or as belonging to the eminent domain of the international community as a whole, i.e. as distinct from the sum of its members—in which case it would have to be given legal personality—there would apparently be no major differences in practice. In both cases States would have *common use*, which has been recognized in practice up to now.

*espacios públicos internacionales*, by analogy with areas in common use which, under domestic law, are said to be in the "public domain" of the State. It is necessary to clarify what is meant by "extending the topic" to cover harm to the global commons, for it is not a question of drafting an entire body of environmental law through the legal institution of liability, but rather of applying the concept of liability in all the areas in which it must be applied. With regard to the draft articles under consideration, the Special Rapporteur will examine three main issues in order to determine whether the draft can be extended to the global commons. These are: (a) the concept of harm; (b) the concept of affected State; and

(c) the applicability of responsibility for wrongfulness or strict liability.

72. A preliminary question which, in the Special Rapporteur's view, is crucial to his investigation is whether, under existing general international law, any State or individual can cause harm to the global commons, or to areas beyond national jurisdictions, without such harm having some kind of consequences for the State or individual that causes it. If the answer is in the affirmative, there is a second question that must be asked: is it conceivable that such a situation can continue, given the conditions in which the international community is now living? It should be borne in mind that the progressive development of international law is one of the tasks assigned to the International Law Commission.

### B. Harm

73. In order to answer these questions, the first distinction to bear in mind is whether the harm affects persons or property in areas beyond national jurisdictions (or causes injury to States within the meaning of article 2(g) and (h) of the draft articles under consideration) or whether it causes injury solely and exclusively to the environment. A study prepared by the Secretariat at the request of the Special Rapporteur<sup>95</sup> finds no conceptual difficulty with the first kind of harm and takes the view that it is covered by article 1 of the present draft. The Special Rapporteur agrees that the first hypothesis should present neither theoretical nor even practical difficulties with regard to the affected State, because there will be an affected State whenever its nationals, its property or the property of its nationals are harmed. With regard to the State of origin, there will be occasions when it will be easily identifiable (for example, in the event of an accident) and others when this may not be so easy. In any case, that would be a matter of proof and would not alter the principle itself.

74. The second hypothesis, that of harm caused solely to the environment of the global commons, presents very real difficulties. In principle, these difficulties would be as follows: (a) harm to the environment *per se* is a new element; (b) the threshold of harm to the global commons cannot easily be measured, in terms of its impact on persons or property, with sufficient precision to enable a liability régime to be established; and (c) it cannot be established with certainty that identifiable harm to the global commons would result in identifiable harm to human beings: all that can be established would be an overall correlation between the quality of the environment and the well-being and quality of life of human beings in the areas concerned.<sup>96</sup> Whatever the difficulties may be, however, the first and fundamental question posed above (para. 72) remains to be answered: are there legal consequences arising out of harm caused to the environment *per se* in areas beyond national jurisdictions? There are, of course, almost no precedents of liability for such harm, except perhaps the 1988 Wellington Convention.<sup>97</sup> Not even such well-worn principles as *sic utere tuo* are applicable to harm to the environment

that does not have an appreciable (significant) effect on States or their property, or on the nationals of States or their property.<sup>98</sup> This is of course because the problem is a recent one: until a short time ago, the effects of activities causing environmental pollution beyond national jurisdictions were dispersed over a seemingly infinite area, whose saturation and consequent degradation were not within the foreseeable future. How was anyone to think in terms of liability for the human activities that caused such harmful effects? One preliminary answer to the first of the two questions raised at the outset is that up to now general international law does not appear to have assigned any legal consequences to harm caused to the environment unless such harm affects States or their nationals.

75. However, we have now reached the point where cumulative effects, on the one hand, and major accidents, on the other, are causing harm to the environment which is having an appreciable (significant) impact on States, their nationals and their property. In this situation, there should be no doubt as to the consequent liability, or the need to establish such liability for the future whenever that is materially possible, since we would in fact be dealing with the case referred to in paragraph 73, namely harm to the environment which has an impact on persons or property. The question here, however, refers to harm which does not as yet have consequences for human beings. Before it reaches that stage it is harm which, although it may be significant for the environment, is not yet *significant* for human beings. For harm to the global commons to reach the point of affecting States either directly or through their nationals or the latter's property, the cumulative harmful effects must generally be tremendous. The areas involved are very vast, they are normally uninhabited or sparsely populated, and there is relatively little private or State property there. Moreover, the effects are not usually concentrated in one place: they are dispersed by water or air currents and disappear into the vastness of the seas or the atmosphere. The harm is intangible for now but potentially threatening, and no longer just for the environment but also for mankind itself. As an example one may cite the emission of certain gases produced as a result of human activities which enter the atmosphere and are said to cause the famous "greenhouse effect". It is difficult to know for sure whether the harm so far caused to the atmosphere is *significant* for man, since the global warming of the Earth observed in recent years could be due to another cause of climatic variation and be simply temporary or, perhaps, since the harm so far caused by this global warming, if it has caused any, cannot be measured. There are, however, strong and justified suspicions: if they are confirmed, the harm may prove immense and irreversible for the Earth's inhabitants. This is a different kind of harm from that generally dealt with in law: a potential harm, invisible for now but seen as a definite threat.<sup>99</sup> Somewhat similar situations are not, however, unknown in domestic law,

<sup>98</sup> The cases on which the Special Rapporteur based his reasoning with regard to transboundary harm, for instance the *Corfu Channel* and *Trail Smelter* cases, refer to harm caused directly or indirectly to specific States, not to property having the characteristics of global commons.

<sup>99</sup> It is also different from the potential harm that could be caused by an activity involving risk: there the harm is contingent, because it may or may not occur, while here harm will inevitably occur if the activities continue to go unregulated.

<sup>95</sup> "The doctrine of liability and harm to the 'global commons'", by Mrs. M. Arsanjani, January 1990 (mimeographed).

<sup>96</sup> *Ibid.*, pp. 16-17.

<sup>97</sup> See footnote 37 above.

where cumulative instances of minor harm, taken individually, seem insignificant but assume catastrophic proportions when viewed all together. Closed seasons for hunting, or quotas to protect certain species from extinction would be cases in point.<sup>100</sup> The interesting thing is that in domestic law such prohibitions are primarily penal or correctional in intent; the penalty is not necessarily proportional to the harm caused, and any compensation is of a purely incidental nature.

### C. Harm and liability

76. The presumable, or foreseeable, inevitability of harm to mankind now makes it necessary to think about regulating activities referred to in article 1 in some way *before* the threat they pose to the environment materializes and the resulting environmental degradation translates into appreciable or significant harm to people. The legal rules governing such activities will, of necessity, have to impose on States that cause harm either the obligation to provide some kind of safeguard or compensation to cover such harm or some other obligation the breach of which would have certain consequences.<sup>101</sup> In other words, States will have to be held liable or responsible in some way. There is no need to elaborate further on this point, because the truth of this statement appears to be self-evident and it is inconceivable that irresponsible, systematic assaults on the environment of the global commons should be allowed to continue. The answer to the second question, therefore, would be that if there is no current liability whatsoever under international law for this type of harm to the environment in areas beyond national jurisdictions, then there definitely ought to be. That being the case, what liability régime would be most appropriate? Before this important issue is dealt with, it may be noted that the Secretariat study referred to above suggests that the trend in international practice is towards applying responsibility for wrongfulness to activities with harmful effects, i.e. activities which cause harm through their normal operation, and strict liability to activities involving risk which cause harm through accidents.<sup>102</sup> In both

<sup>100</sup> This is also the object of some international conventions which attempt to protect common resources, such as certain animal species.

<sup>101</sup> To keep to the two kinds of liability we are familiar with: responsibility for wrongfulness and strict liability (*responsabilidad causal*).

<sup>102</sup> In the last part of the Secretariat study (see footnote 95 above) it is stated in regard to the question what legal régime could be applied to harm to the global commons:

“... there seemed to be a trend in identifying specific activities or items that cause harm to the global commons and making them subject to a legal régime restricting their conduct or banning their use. With all the deficiencies in the existing legal régime, a considerable number of regulatory measures and legal instruments imposing obligations on States not to harm the global commons continue to develop. . . .

“In terms of policy, when dealing with an activity which *continuously* and *repeatedly* causes harm to the global commons, it is preferable either to modify it or to ban it altogether. The trend indicates support for this policy and there seems to be a preference and consensus in the international community to *abate* activities that have proven to cause a *continuous* and *repeated significant* harm to the global environment. The trend does not support a policy for allowing the activity to continue and paying compensation for the harm caused. . . . This trend indicates a preference for dealing with those activities causing harm to the global commons on a continuous and repeated basis within the framework of State responsibility for wrongful acts.” (P. 48.)

cases, however, there are certain problems in using existing legal concepts to determine which of these forms of responsibility or liability applies to the global commons.

77. One problem has to do with the fact, mentioned earlier, that it is impossible to establish with certainty whether identifiable harm to the environment beyond national jurisdictions ultimately causes identifiable harm to human beings. As a result, if it is virtually impossible to measure harm to persons or property, it is equally difficult to assess the compensation or payment which the State of origin owes for having caused the harm, if indeed it is possible to identify the State of origin (consider the degradation caused by chlorofluorocarbons, carbon dioxide, methane and other substances which are emitted in vast amounts by millions of factories, electric-power plants, private homes, cars, etc.). If the harm cannot be assessed, if there is no identifiable affected State and if responsibility must nevertheless be assigned to the extent that the source of the harm can be traced—as noted in the answer to the first question—it would seem that further thought must be given to certain basic legal concepts of responsibility and liability.

### D. Harm and responsibility for wrongfulness

78. According to part 1 of the draft articles on State responsibility for internationally wrongful acts,<sup>103</sup> responsibility derives from the breach of an international obligation and not from harm done; in any case, the harm need be nothing more than the simple violation of a subjective right by a party bound by that obligation.<sup>104</sup> The problem is solved by environmental protection conventions, by general prohibitions against harming the environment—which, for the reasons given above, are very difficult to enforce—or by banning the emission of cer-

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This would apply, then, to the activities referred to as “activities with harmful effects”. As for activities involving risk, the study goes on to say:

“Leaving aside the main *corpus* of the régime dealing with activities that cause harm to the global environment within the framework of State responsibility, there is a narrower and more limited aspect of that subject which might be appropriate to be dealt with in the context of international liability. That is *accidental* harm to the global environment. Such accidents, for example, include the breaking down of an oil tanker or a tanker carrying other types of wastes on the high seas, etc.” (P. 49.)

<sup>103</sup> See *Yearbook . . . 1980*, vol. II (Part Two), pp. 30 *et seq.*

<sup>104</sup> In his third report on State responsibility, Mr. Ago stated:

“Most of the members of the Commission agreed with the Special Rapporteur regarding the preceding considerations; in particular, they recognized that the economic element of damage referred to by certain writers was not inherent in the definition of an internationally wrongful act as a source of responsibility, but might be part of the rule which lays upon States the obligation not to cause certain injuries to aliens. Furthermore, with regard to the determination of the conditions essential for the existence of an internationally wrongful act, the Commission also recognized that under international law an injury, material or moral, is necessarily inherent in every violation of an international subjective right of a State. Hence the notion of failure to fulfil an international legal obligation to another State seemed to the Commission fully sufficient to cover this aspect, without the addition of anything further. . . .” (*Yearbook . . . 1971*, vol. II (Part One), p. 223, document A/CN.4/246 and Add.1-3, para. 74.)

tain elements or their emission above certain levels.<sup>105</sup> In any event, this is one way of regulating certain activities in order to protect the atmosphere, climate or marine environment that the Special Rapporteur wholeheartedly supports. But given the difficulties that exist in measuring harm and the consequent compensation, what should responsibility for wrongfulness mean? Under part 1 of the draft articles on State responsibility, a wrongful act brings into play a dual form of legal relationship: the subjective right of an injured State to demand reparation (in the full sense of the term) from the author of the act, or the ability of that same State to impose a penalty on the author of the wrongful act.<sup>106</sup> Given what we have seen regarding the impossibility of making reparation for certain kinds of harm to the environment, in such cases the only option is to impose penalties. On the other hand, when the harm can be identified and somehow quantified, reparation is possible and can take various forms, one of the most practical being restoration of the *status quo ante*, as envisaged in article 24, paragraph 1, of the present draft (see para. 52 above).

#### E. The affected State

79. By definition, there would be no State that was *directly* injured through its territory, property, nationals or the property of its nationals. However, if the convention that may be concluded on this subject expressly stipulated as much, harm to the environment would affect a collective interest as defined in a multilateral treaty, under the terms of article 5, paragraph 2(f), of part 2 of the draft articles on State responsibility for internationally wrongful acts:<sup>107</sup>

2. In particular, "injured State" means:

...

(f) if the right infringed by the act of a State arises from a multilateral treaty, any other State party to the multilateral treaty, if it is established that the right has been expressly stipulated in that treaty for the protection of the collective interests of the States parties thereto.

<sup>105</sup> The Secretariat study (see footnote 95 above) refers in this connection to a number of conventions, including the 1954 International Convention for the Prevention of Pollution of the Sea by Oil (United Nations, *Treaty Series*, vol. 327, p. 3), the 1963 Agreement on the International Commission for the Protection of the Rhine against Pollution (*ibid.*, vol. 994, p. 3), the 1963 Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and under Water (*ibid.*, vol. 480, p. 45), the 1969 Agreement for Co-operation in Dealing with Pollution of the North Sea by Oil (*ibid.*, vol. 704, p. 3), the 1972 Convention on the Prevention of Marine Pollution by Dumping from Ships and Aircraft (*ibid.*, vol. 932, p. 3), the 1972 Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (*ibid.*, vol. 1046, p. 120), the 1973 International Convention for the Prevention of Pollution from Ships (United Nations, *Juridical Yearbook 1973* (Sales No. E.75.V.1), p. 81), the 1974 Convention between Denmark, Finland, Norway and Sweden on the Protection of the Environment (see footnote 46 above), the 1974 Convention on the Protection of the Marine Environment of the Baltic Sea Area (UNEP, *Selected Multilateral Treaties in the Field of the Environment*, Reference Series 3 (Nairobi, 1983), p. 3), the 1976 Convention for the Protection of the Mediterranean Sea against Pollution (to be published in United Nations, *Treaty Series*, as No. 16908), the 1979 Convention on Long-range Transboundary Air Pollution (*ibid.*, No. 21623), the 1985 Vienna Convention for the Protection of the Ozone Layer (UNEP, Nairobi, 1985) and the 1982 United Nations Convention on the Law of the Sea (see footnote 84 above).

<sup>106</sup> See Mr. Ago's third report on State responsibility, document A/CN.4/246 and Add.1-3 (footnote 104 above), para. 36.

<sup>107</sup> *Yearbook* . . . 1985, vol. II (Part Two), p. 25.

In this regard, it is stated in the commentary to article 5:

(23) Paragraph 2(f) deals with still another situation. Even if, as a matter of fact, subparagraph (e) (ii) [which represents an attempt to place the injured State in the context of a multilateral treaty or a breach of a rule of customary law] may not apply, the States parties to a multilateral treaty may agree to consider a breach of an obligation, imposed by such treaty, as infringing a collective interest of all the States parties to that multilateral treaty. Actually, and by way of example, the concept of a "common heritage of mankind", as recently accepted in respect of the mineral resources of the sea-bed and subsoil beyond national jurisdiction, expresses such a collective interest\*.

(24) Obviously, in the present stage of development of the international community of States as a whole, the recognition or establishment of a collective interest of States is still limited in application. Accordingly, subparagraph (f) is limited to multilateral treaties, and to express stipulations in those treaties.<sup>108</sup>

#### F. Applicable liability

80. As noted above, harm to the environment of the global commons often cannot be measured or assessed, in which case the consequence of the breach of an obligation is primarily punitive. This is true both in cases where maximum permitted levels for the introduction of certain substances into the environment are exceeded and in cases where general prohibitions are violated, maximum levels and general prohibitions being the two techniques so far used to protect the environment.<sup>109</sup> This explains the difficulties encountered in some conventions in finalizing a chapter on liability, an issue which in all instances has remained unresolved.<sup>110</sup> States normally refuse to accept liability for their conduct and the same difficulties can be expected to arise in the future.

81. In earlier debates we saw that it may be more practical to apply strict liability than responsibility for wrongfulness to regulate a given activity because, ironically, strict liability is less stringent and does not qualify the conduct that gives rise to the liability. We also know that, while they are based on the logic of strict liability, the present draft articles do not in fact apply it strictly because once the causal link between the act in the State of origin and the harm in the affected State has been established, the State of origin is simply under an obligation to *negotiate* with the affected State on compensation for the harm. There are also certain grounds in the draft for exoneration from liability (art. 26). It might therefore be useful to see if it would be possible to subject to the régime of the present draft articles activities which cause, or create an appreciable (significant) risk of causing, harm to the environment of the global commons.

82. First of all, banning the use of certain listed substances above certain levels would not seem to apply, because there would then be nothing to negotiate and the issue would be one of responsibility for wrongfulness. If that method cannot be used, the only possible way to

<sup>108</sup> *Ibid.*, p. 27.

<sup>109</sup> After mentioning a number of conventions which attempt to prevent certain types of harm to the global environment, the Secretariat study (see footnote 95 above) states that "these Conventions either specify the types of pollutants that should not be introduced into the global commons or provide general prohibitions for harming the environment by any type of pollutants" (p. 17).

<sup>110</sup> The 1988 Wellington Convention (see footnote 37 above), while it establishes the strict liability of the operator, and also the liability of the State for that portion of liability not satisfied by the operator or otherwise, promises a future protocol on liability (art. 8, para. 7).

apply the logic of the draft articles to activities with harmful effects is to transform the levels of prohibition into thresholds above which the mechanisms of the draft will come into play. Levels above the threshold would not be banned, but if it was found that a State had exceeded the threshold, any affected State would be able to request consultations with the alleged State or States of origin, possibly with the participation of an international organization. The purpose of such consultations would not be to agree on a régime applicable to the activity in question, since such a régime would already exist,<sup>111</sup> but to find ways of enforcing it, either through co-operation or through some kind of collective pressure such as publishing the request for consultations or some other method which does not amount to a penalty. In any event, if the harm caused can be identified and the environment in question can be restored to its *status quo ante*, this will give rise to strict liability on the part of the State or States of origin which might be covered by chapter V of the draft, dealing with liability *per se*.

83. What about the affected State? By definition, there is no such State because if there were one within the meaning of article 2(j) it would be covered by the terms of the present draft articles. The concept of affected State would have to be defined differently, perhaps by drawing on article 5, paragraph 2(f), of part 2 of the draft articles on State responsibility (see para. 79 above), not reproducing it word for word but simply saying that any State party to the convention automatically becomes an affected State if transboundary harm affects an expressly protected collective interest of the States parties, as the environment of the global commons would be.

84. If this reasoning is to work it might be necessary to redefine "harm" since, although responsibility for wrongfulness could conceivably arise without material harm actually occurring, as envisaged in part 1 of the draft articles on State responsibility for internationally wrongful acts, that is not so likely when it comes to strict liability (*responsabilidad causal*), which relates primarily to results. The problem seems to lie in the fact that the collective interest suffers harm, but this harm cannot as yet be perceived in people. Some way must therefore be found of distinguishing this type of harm from the tangible and visible harm that is covered by responsibility in general. The text should include a separate section on harm to the environment of the global commons, describing these characteristics<sup>112</sup> and defining the collective interest that is affected, so that harm can automatically be considered to have occurred whenever the quantities above certain stipulated levels are introduced into the environment of the global commons. This would be a

<sup>111</sup> It is assumed that, in the context of strict liability of the kind envisaged in the draft under consideration, a convention or specific protocol would exist that established the levels up to which certain elements can be used in specific activities. If there are certain substances which cannot be used at all, the level would be zero and above it there would be an obligation to consult or possibly to negotiate.

<sup>112</sup> In other words, differentiating it from harm caused to persons or property, or even to the environment of a given country, so that it fits the description given above.

somewhat different concept, something like the "threat of harm". The Special Rapporteur believes that harm to the environment must somehow be seen in relation to the people and States that are affected, because in the final analysis it, like any other harm, is of concern to the law only to the extent that it affects people (including their property). There is no harm, and hence no measurement of harm, other than that which is caused to human beings, either to their person or to their property,<sup>113</sup> whether directly or else indirectly through the property of their State. This is clearly the case when the environment of a State is affected, because the State personifies a human society. If the environment affected is that of the global commons, the collective interest of States is affected and, through them, the physical persons who make up their population.

85. More or less the same considerations apply to activities "involving risk", except that here the logic of liability for risk applies naturally, since responsibility for wrongfulness cannot be applied to accidents without creating the problems which, in domestic law, led to the adoption of the concept of strict liability.

86. For both types of activity, the principles governing harm caused to the global commons would be the same, *mutatis mutandis*, as those set forth in chapter II of the present draft articles. One major consideration would, however, have to be borne in mind in applying these principles to developing countries and making provision for their special situation. The developed countries have played a leading role, and the developing countries a far lesser one, in the process which has led to saturation of the atmosphere. Moreover, many developing countries would be totally innocent victims of any consequences of global warming and climatic change, having done little if anything to cause them. Restrictions will therefore have to be imposed mainly on the developed countries, which are the major contributors to the pollution of the environment of the global commons; in cases where limits on production or bans on certain elements inevitably affect the developing countries, the latter will have to be entitled to technical assistance and other types of compensation, while preserving their sovereignty in general and their sovereignty over their natural resources in particular.

87. Of course, the above is only a preliminary analysis of the most important points that will have to be borne in mind in exploring the possibility of extending the topic to the areas under consideration here. Many other changes will have to be made if it is found that this analysis offers at least some basis for pursuing the matter.

<sup>113</sup> In this regard, the judgment in the *Lake Lanoux* case seems to state a profound truth when it says that "the unity of a basin is sanctioned at the juridical level only to the extent that it corresponds to human realities" (*International Law Reports* 1957, vol. 24 (1961), p. 125). In the Secretariat survey of State practice relevant to the present topic, the relevant passage of the judgment is interpreted as follows: "Many variables have been taken into account to determine what constitutes harm. The most important, it seems, is that there must be some *value deprivation for human beings*" (*Yearbook* . . . 1985, vol. II (Part One)/Add.1, p. 37, document A/CN.4/384, para. 156).

## ANNEX

## Proposed articles

## CHAPTER I

## GENERAL PROVISIONS

*Article 1. Scope of the present articles<sup>a</sup>*

The present articles shall apply with respect to activities carried on in the territory of a State or in other places under its jurisdiction as recognized by international law or, in the absence of such jurisdiction, under its control, when the physical consequences of such activities cause, or create a risk of causing, transboundary harm throughout the process.

*Article 2. Use of terms*

For the purposes of the present articles:

(a) "Activities involving risk" means activities referred to in article 1, including those carried on directly by the State, which:

- (i) involve the handling, storage, production, carriage, discharge or other similar operation of one or more dangerous substances;
- (ii) use technologies that produce hazardous radiation; or
- (iii) introduce into the environment dangerous genetically altered organisms and dangerous micro-organisms;

(b) "Dangerous substances" means substances which present a[n appreciable] [significant] risk of harm to persons, property [, the use or enjoyment of areas] or the environment, for example flammable and corrosive materials, explosives, oxidants, irritants, carcinogens, mutagens and toxic, ecotoxic and radiogenic substances such as those indicated in annex . . . A substance may be considered dangerous only if it occurs in certain quantities or concentrations, or in relation to certain risks or situations in which it may occur, without prejudice to the provisions of subparagraph (a);

(c) "Dangerous genetically altered organisms" means organisms whose genetic material has been altered in a manner that does not occur naturally, by coupling or natural recombination, creating a risk to persons, property [, the use or enjoyment of areas] or the environment, such as those indicated in annex. . . .;

(d) "Dangerous micro-organisms" means micro-organisms which create a risk to persons, property [, the use or enjoyment of areas] or the environment, such as pathogens or organisms which produce toxins;

<sup>a</sup> This article has been subject to many drafting changes, as is evident from the debate at the last session of the Commission. One possible text for use by the Drafting Committee might be the following:

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

"The present articles shall apply with respect to activities carried on under the jurisdiction or [effective] control of a State and that cause, or create a risk of causing, transboundary harm."

There is no need to qualify the risk and the harm as "appreciable" or "significant" since, as article 2 makes clear wherever the terms "risk" and "harm" are used, they are understood to be "appreciable" or "significant".

(e) "[Appreciable] [Significant] risk" means risk which presents either the low probability of causing very considerable [disastrous] harm or the higher than normal probability of causing minor, though [appreciable] [significant], transboundary harm;<sup>b</sup>

(f) "Activities with harmful effects" means activities referred to in article 1 which cause transboundary harm in the course of their normal operation;

(g) "Transboundary harm" means the harm which arises as a physical consequence of the activities referred to in article 1 and which, in the territory or in [places] [areas] under the jurisdiction or control of another State, is [appreciably] [significantly] detrimental to persons, [objects] [property] [, the use or enjoyment of areas] or the environment. In the present articles, the expression always refers to [appreciable] [significant] harm. It includes the cost of preventive measures taken to contain or minimize the harmful transboundary effects of an activity referred to in article 1, as well as any further harm to which such measures may give rise;<sup>c</sup>

(h) "[Appreciable] [Significant] harm" means harm which is greater than the mere nuisance or insignificant harm which is normally tolerated;

(i) "State of origin" means the State which exercises jurisdiction or control over an activity referred to in article 1;

(j) "Affected State" means the State under whose jurisdiction or control the transboundary harm arises;

(k) "Incident" means any sudden event or continuous process, or series of events having the same origin, which causes, or creates the risk of causing, transboundary harm;

(l) "Restorative measures" means appropriate and reasonable measures to restore or replace the natural resources which have been damaged or destroyed;

(m) "Preventive measures" means the measures referred to in article 8 and includes both measures to prevent the occurrence of an incident or harm and measures intended to contain or minimize the harmful effects of an incident once it has occurred;

(n) "States concerned" means the State or States of origin and the affected State or States.

<sup>b</sup> Subparagraph (e) has been changed because activities involving risk are now defined in subparagraph (a) of the same article, as a result of the new way of defining the scope of the draft articles in respect of dangerous activities and activities involving risk. The definition of "activities with harmful effects" is now given separately, in subparagraph (f).

<sup>c</sup> The following might be an appropriate text for this subparagraph:

"(g) 'Transboundary harm' means the harm which arises in areas under the jurisdiction or control of a State as a physical consequence of an activity referred to in article 1. The expression always refers to [appreciable] [significant] harm caused to persons, [objects] [property] [, the use or enjoyment of areas] or the environment and includes the cost of preventive measures taken to contain or minimize the harmful transboundary effects of an activity referred to in article 1, as well as any further harm to which such measures may give rise."

*Article 3. Assignment of obligations<sup>d</sup>*

1. The State of origin shall have the obligations established by the present articles provided that it knew or had means of knowing that an activity referred to in article 1 was being, or was about to be, carried on in its territory or in other places under its jurisdiction or control.

2. Unless there is evidence to the contrary, it shall be presumed that the State of origin has the knowledge or the means of knowing referred to in paragraph 1.

*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 referred to in article 1, 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<sup>e</sup>*

The present articles are without prejudice to the operation of any other rule of international law establishing liability for transboundary harm resulting from a wrongful act.

CHAPTER II

PRINCIPLES

*Article 6. Freedom of action and the limits thereto<sup>f</sup>*

The sovereign freedom of States to carry on or permit human activities in their territory or in other places under their jurisdiction or control must be compatible with the protection of the rights emanating from the sovereignty of other States.

*Article 7. Co-operation<sup>g</sup>*

States shall co-operate in good faith among themselves, and request the assistance of any international organiza-

<sup>d</sup> The heading has given rise to objections. In Spanish it could be *responsabilidad*, because the obligations to which it refers arise as a consequence of *responsabilidad* in both meanings of the word: responsibility for seeing to it that an incident does not occur (prevention) and liability in the event that the incident does occur (compensation by the State of origin).

<sup>e</sup> Alternative B proposed for article 5 in the fifth report was chosen because it appeared more to the point.

<sup>f</sup> One possibility for article 6 might be the following:

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

*“The sovereign freedom of States to carry on or permit human activities [in their territory] or under their jurisdiction or control must be compatible with the rights emanating from the sovereignty of other States.”*

The expression “in their territory” could be deleted since all activities within the territory of a State are under its jurisdiction.

<sup>g</sup> One possibility for article 7 might be the following:

*“Article 7. Co-operation*

*“States shall co-operate in good faith among themselves, and request the assistance of any international organizations that might be able to help them, in trying to prevent any activities carried on*

*tions that might be able to help them, in trying to prevent any activities referred to in article 1 carried on in their territory or in other places under their jurisdiction or control from causing transboundary harm. If such harm occurs, the State of origin shall co-operate with the affected State in minimizing its effects. In the event of harm caused by an accident, the affected State shall, if possible, also co-operate with the State of origin with regard to any harmful effects which may have arisen in the territory of the State of origin or in other places [areas] under its jurisdiction or control.*

*Article 8. Prevention<sup>h</sup>*

States of origin shall take appropriate measures to prevent or minimize the risk of transboundary harm or, where necessary, to contain or minimize the harmful transboundary effects of the activities in question. To that end they shall, in so far as they are able, use the best practicable, available means with regard to activities referred to in article 1.

*Article 9. Reparation<sup>i</sup>*

To the extent compatible with the present articles, the State of origin shall make reparation for appreciable harm caused by an activity referred to in article 1. Such reparation shall be decided by negotiation between the State of origin and the affected State or States and shall be guided, in principle, by the criteria set forth in the present articles, bearing in mind in particular that reparation should seek to restore the balance of interests affected by the harm.

*Article 10. Non-discrimination<sup>j</sup>*

States Parties shall treat the effects of an activity arising in the territory or under the jurisdiction or control of another State in the same way as effects arising in their own territory. In particular, they shall apply the provisions of the present articles and of their national laws without discrimination on grounds of the nationality, domicile or residence of persons injured by activities referred to in article 1.

under their jurisdiction or control from causing transboundary harm. Where possible and reasonable, the affected State shall also co-operate with the State of origin with regard to any harmful effects which have arisen in areas under the jurisdiction or control of the State of origin.”

<sup>h</sup> A better alternative for article 8 might be the following:

*“Article 8. Prevention*

*“States of origin shall take all appropriate measures to ensure that activities under their jurisdiction or control do not cause transboundary harm, to minimize the risk of their causing such harm or, where appropriate, to contain and minimize the harmful transboundary effects of such activities.”*

<sup>i</sup> The Special Rapporteur suggests that the title and the text of article 9 might be as follows:

*“Article 9. Compensation by the State of origin*

*“To the extent compatible with the present articles, the State of origin shall ensure that [compensation] [reparation] is made for harm caused by an activity referred to in article 1. Such compensation shall be decided between the parties concerned by negotiations, which shall be guided, in principle, by the criteria set forth in the present articles.”*

<sup>j</sup> This article takes the place of the former article 8, on participation, which has been deleted.

CHAPTER III  
PREVENTION

*Article 11. Assessment, notification and information*

1. If a State has reason to believe that an activity referred to in article 1 is being, or is about to be, carried on under its jurisdiction or control, it shall review that activity to assess its potential transboundary effects and, if it finds that the activity may cause, or create the risk of causing, transboundary harm, it shall notify the State or States likely to be affected as soon as possible, providing them with available technical information in support of its finding. It may also inform them of the measures which it is attempting to take to prevent or minimize the risk of transboundary harm.

2. If the transboundary effect may extend to more than one State, or if the State of origin is unable to determine precisely which States will be affected as a result of the activity, an international organization with competence in that area shall also be notified, on the terms stated in paragraph 1.

*Article 12. Participation by the international organization*

Any international organization which intervenes shall participate in the manner stipulated in the relevant provisions of its statutes or rules, if the matter is regulated therein. If it is not, the organization shall use its good offices to foster co-operation between the parties, arrange joint or separate meetings with the State of origin and the affected States and respond to any requests which the parties may make of it to facilitate a solution of the issues that may arise. If it is in a position to do so, it shall provide technical assistance to any State which requests such assistance in relation to the matter which prompted its intervention.

*Article 13. Initiative by the presumed affected State*

If a State has serious reason to believe that an activity under the jurisdiction or control of another State is causing it harm within the meaning of article 2, subparagraph (g), or creating a[n appreciable] [significant] risk of causing it such harm, it may ask that State to comply with the provisions of article 11. The request shall be accompanied by a technical, documented explanation setting forth the reasons for such belief. If the activity is indeed found to be one of those referred to in article 1, the State of origin shall bear the costs incurred by the affected State.

*Article 14. Consultations*

The States concerned shall consult among themselves, in good faith and in a spirit of co-operation, in an attempt to establish a régime for the activity in question which takes into account the interests of all parties. At the initiative of any of those States, consultations may be held by means of joint meetings among all the States concerned.

*Article 15. Protection of national security or industrial secrets*

The State of origin shall not be bound by the provisions of article 11 to provide data and information which are vital

to its national security or to the protection of its industrial secrets. Nevertheless, the State of origin shall co-operate in good faith with the other States concerned in providing any information which it is able to provide, depending on the circumstances.

*Article 16. Unilateral preventive measures*

If the activity in question proves to be an activity referred to in article 1, and until such time as agreement is reached on a legal régime for that activity among the States concerned, the State of origin shall take appropriate preventive measures as indicated in article 8, in particular appropriate legislative and administrative measures, including requiring prior authorization for the conduct of the activity and encouraging the adoption of compulsory insurance or other financial safeguards to cover transboundary harm, as well as the application of the best available technology to ensure that the activity is conducted safely. If necessary, it shall take government action to counteract the effects of an incident which has already occurred and which presents an imminent and grave risk of causing transboundary harm.

*Article 17. Balance of interests*

In order to achieve an equitable balance of interests among the States concerned in relation to an activity referred to in article 1, those States may, in their consultations or negotiations, take into account the following factors:

(a) the degree of probability of transboundary harm and its possible gravity and extent, and the likely incidence of cumulative effects of the activity in the affected States;

(b) the existence of means of preventing such harm, taking into account the highest technical standards for engaging in the activity;

(c) the possibility of carrying on the activity in other places or by other means, or the availability of alternative activities;

(d) the importance of the activity for the State of origin, taking into account economic, social, safety, health and other similar factors;

(e) the economic viability of the activity in relation to possible means of prevention;

(f) the physical and technological possibilities of the State of origin in relation to its capacity to take preventive measures, to restore pre-existing environmental conditions, to compensate for the harm caused or to undertake alternative activities;

(g) the standards of protection which the affected State applies to the same or comparable activities, and the standards applied in regional or international practice;

(h) the benefits which the State of origin or the affected State derive from the activity;

(i) the extent to which the harmful effects stem from a natural resource or affect the use of a shared resource;

(j) the willingness of the affected State to contribute to the costs of prevention or reparation of the harm;

(k) the extent to which the interests of the State of origin and the affected States are compatible with the general interests of the community as a whole;

(l) the extent to which assistance from international organizations is available to the State of origin;

(m) the applicability of relevant principles and norms of international law.

*Article 18. Failure to comply with the foregoing obligations*

Failure on the part of the State of origin to comply with the foregoing obligations shall not constitute grounds for affected States to institute proceedings unless that is provided for in other international agreements in effect between the parties. If, in those circumstances, the activity causes [appreciable] [significant] transboundary harm which can be causally attributed to it, the State of origin may not invoke in its favour the provisions of article 23.

*Article 19. Absence of reply to the notification under article 11*

In the cases referred to in article 11, if the notifying State has provided information concerning the measures referred to therein, any State that does not reply to the notification within a period of six months shall be presumed to consider the measures satisfactory. This period may be extended, at the request of the State concerned, [for a reasonable period] [for a further six months]. States likely to be affected may ask for advice from any international organization that is able to give it.

*Article 20. Prohibition of the activity*

If an assessment of the activity shows that transboundary harm cannot be avoided or cannot be adequately compensated for, the State of origin shall refuse authorization for the activity unless the operator proposes less harmful alternatives.

CHAPTER IV

LIABILITY

*Article 21. Obligation to negotiate*

If transboundary harm arises as a consequence of an activity referred to in article 1, the State or States of origin shall be bound to negotiate with the affected State or States to determine the legal consequences of the harm, bearing in mind that the harm must, in principle, be fully compensated for.

*Article 22. Plurality of affected States*

Where more than one State is affected, an international organization with competence in the matter may intervene, if requested to do so by any of the States concerned, for the sole purpose of assisting the parties and fostering their co-operation. If the consultations referred to in article 14 have been held and if an international organization has participated in them, the same organization shall also participate in the present instance, if the harm occurs before agreement has been reached on a régime for the activity that caused the harm.

*Article 23. Reduction of compensation payable by the State of origin*

For claims made through the diplomatic channel, the affected State may agree, if that is reasonable, to a reduction in the payments for which the State of origin is liable if, owing to the nature of the activity and the circumstances of the case, it appears equitable to share certain costs among the States concerned [, for example if the State of origin has taken precautionary measures solely for the purpose of preventing transboundary harm and the activity is being carried on in both States, or if the State of origin can demonstrate that the affected State is benefiting without charge from the activity that caused the harm].

*Article 24. Harm to the environment and resulting harm to persons or property*

1. If the transboundary harm proves detrimental to the environment of the affected State, the State of origin shall bear the costs of any reasonable operation to restore, as far as possible, the conditions that existed prior to the occurrence of the harm. If it is impossible to restore those conditions in full, agreement may be reached on compensation, monetary or otherwise, by the State of origin for the deterioration suffered.

2. If, as a consequence of the harm to the environment referred to in paragraph 1, there is also harm to persons or property in the affected State, payments by the State of origin shall also include compensation for such harm.

3. In the cases referred to in paragraphs 1 and 2, the provisions of article 23 may apply, provided that the claim is made through the diplomatic channel. In the case of claims brought through the domestic channel, the national law shall apply.

*Article 25. Plurality of States of origin*

In the cases referred to in articles 23 and 24, if there is more than one State of origin,

ALTERNATIVE A

they shall be jointly and severally liable for the resulting harm, without prejudice to any claims which they may bring among themselves for their proportionate share of liability.

ALTERNATIVE B

they shall be liable *vis-à-vis* the affected State in proportion to the harm which each one of them caused.

*Article 26. Exceptions*

1. There shall be no liability on the part of the State of origin or the operator, as the case may be:

(a) if the harm was directly due to an act of war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional, inevitable and irresistible character; or

(b) if the harm was caused wholly by an act or omission of a third party done with intent to cause harm.

2. If the State of origin or the operator, as the case may be, prove that the harm resulted wholly or partially either from an act or omission done with intent to cause

harm by the person who suffered the harm or from the negligence of that person, they may be exonerated wholly or partially from their liability to such person.

*Article 27. Limitation*

Proceedings in respect of liability under the present articles shall lapse after a period of [three] [five] years from the date on which the affected party learned, or could reasonably be expected to have learned, of the harm and of the identity of the State of origin or the operator, as the case may be. In no event shall proceedings be instituted once thirty years have elapsed since the date of the accident that caused the harm. If the accident consisted of a series of occurrences, the thirty years shall start from the date of the last occurrence.

CHAPTER V

CIVIL LIABILITY

*Article 28. Domestic channel*

1. It is not necessary for all local legal remedies available to the affected State or to individuals or legal entities represented by that State to be exhausted prior to submitting a claim under the present articles to the State of origin for liability in the event of transboundary harm.

2. There is nothing in the present articles to prevent a State, or any individual or legal entity represented by that State that considers that it has been injured as a consequence of an activity referred to in article 1, from submitting a claim to the courts of the State of origin [and, in the case of article 29, paragraph 3, of the affected State]. In that case, however, the affected State may not use the diplomatic channel to claim for the same harm for which such claim has been made.

*Article 29. Jurisdiction of national courts*

1. States Parties to the present articles shall, through their national legislation, give their courts jurisdiction to deal with the claims referred to in article 28 and shall also give affected States or individuals or legal entities access to their courts.

2. States Parties shall make provision in their domestic legal systems for remedies which permit prompt and adequate compensation or other reparation for transboundary harm caused by activities referred to in article 1 carried on under their jurisdiction or control.

3. Except for the affected State, the other persons referred to in article 28 who consider that they have been

injured may elect to institute proceedings either in the courts of the affected State or in those of the State of origin.]

*Article 30. Application of national law*

The court shall apply its national law in all matters of substance or procedure not specifically regulated by the present articles. The present articles and also the national law and legislation shall be applied without any discrimination whatsoever based on nationality, domicile or residence.

*Article 31. Immunity from jurisdiction*

States may not claim immunity from jurisdiction under national legislation or international law in respect of proceedings instituted under the preceding articles, except in respect of enforcement measures.

*Article 32. Enforceability of the judgment*

1. When a final judgment made by the competent court is enforceable under the laws applied by that court, it shall be recognized in the territory of any other Contracting Party, unless:

(a) the judgment has been obtained fraudulently;

(b) the respondent has not been given reasonable advance notice and an opportunity to present his case in fair conditions;

(c) the judgment is contrary to the public policy of the State in which recognition is being sought, or is not in keeping with the basic norms of justice.

2. A judgment which is recognized to be in accordance with paragraph 1 shall be enforceable in any of the States Parties as soon as the formalities required by the Contracting Party in which enforcement is being sought have been met. No further review of the substance of the matter shall be permitted.

*Article 33. Remittances*

States Parties shall take the steps necessary to ensure that any monies due to the applicant in connection with proceedings in their courts arising from the preceding articles, and any monies he may receive in respect of insurance or reinsurance or other funds designed to cover the harm in question, may be freely remitted to him in the currency of the affected State or in that of the State of his habitual residence.