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

## Text of draft Articles 1, 2 (paras. a, b and c), 11 to 14 bis [20 bis], 15 to 16 bis and 17 to 20 with commentaries thereto provisionally adopted by the Commission at its forty-sixth session

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Text of Articles 11 to 14 bis etc. will be issued in addenda to this document.

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## Text of draft Articles 1, 2 (paras. a, b and c), 11 to 14 bis [20 bis], 15 to 16 bis and 17 to 20 with commentaries thereto provisionally adopted by the Commission at its forty-sixth session

### General Commentary

(1) It is the Commission's view that the present science-based civilization is marked by the increasingly intensive use in many different forms of resources of the planet for economic, industrial or scientific purposes. Furthermore, the scarcity of natural resources, the need for the more efficient use of resources, the creation of substitute resources, and the ability to manipulate organisms and micro-organisms have led to innovative production methods, sometimes with unpredictable consequences. Because of economic and ecological interdependence, activities involving resource use occurring within the territory, jurisdiction or control of a State may have an injurious impact on other States or their nationals. This factual aspect of global interdependence has been demonstrated by events that have frequently resulted in injuries beyond the territorial jurisdiction or control of the State where the activity was conducted. The frequency with which activities permitted by international law, but having transboundary injurious consequences are undertaken, together with scientific advances and greater appreciation of the extent of their injuries and ecological implications dictate the need for some international regulation in this area.

(2) The Commission believes that the legal basis for establishing international regulation in respect of these activities has been articulated in State practice and judicial decisions, notably by the International Court of Justice in the Corfu Channel case in which the Court observed that there were "general and well-recognized principles" of international law concerning "every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States." 1/ The Trail Smelter Tribunal reached a similar conclusion when it stated that, "under the principles of international law, as well as of the law of the United States, no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is

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1/ Corfu Channel Case (Merits) (United Kingdom/Albania), ICJ Reports, p. 22, 1949.

established by clear and convincing evidence." 2/ Lauterpacht also supported that view stating that "[a] State is bound to prevent such use of its territory as, having regard to the circumstances, is unduly injurious to the inhabitants of the neighbouring State." 3/

(3) Principle 21 of the Stockholm Declaration on the Human Environment is also in support of the principle that States in the exercise of their sovereign right to exploit their own resources have the responsibility "to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the national jurisdiction." 4/ Principle 21 was reaffirmed in General Assembly resolutions: 2995 (XXVII) adopted on 15 December 1972 on Cooperation between States in the Field of Environment, 5/ 3129 (XXVIII) adopted on 13 December 1973 on Cooperation in the Field of the Environment concerning Natural Resources Shared by Two or More States, 6/ 3281 (XXIX) of 12 December 1974 adopting the Charter of Economic Rights and Duties of States, 7/ and by Principle 2 of Rio Declaration on Environment and Development. 8/ In addition operative paragraph 1 of General Assembly resolution 2995 further clarified Principle 21 of the Stockholm Declaration where it stated that "in the exploration, exploitation and development of their natural resources, States must not produce significant harmful effects

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2/ Trail Smelter Case, United Nations, Reports of International Arbitral Awards, vol. 3, p. 1965, (1949).

3/ Oppenheim, International Law, (8th ed. by H. Lauterpacht, 1955), vol. 1, p. 291.

4/ Document A/CONF.48/Rev.1.

5/ General Assembly Official Records: Twenty-seventh Session, Supp. No. 30 ( ), p. 42.

6/ General Assembly Official Records: Twenty-eighth Session, Supp. No. 30, (A/9030), p. 48.

7/ General Assembly Official Records: Twenty-ninth Session, Supp. No. 30, (A/9631), p. 50, see in particular arts. 2, 30 and 32 (2).

8/ Document A/CONF.151/26/Rev.1 (vol. I), p. 3.

in zones situated outside their national jurisdiction". 9/ Support of this principle is also found in UNEP Principles of the Conduct in the Field of the Environment for the Guidance of States in the Conservation and Harmonious Utilization of Natural Resources Shared Between Two or More States 10/ and in a number of OECD Council Recommendations. 11/

(4) The Commission believes the judicial pronouncements and doctrine and pronouncements by international and regional organizations together with non-judicial forms of State practice provide sufficient basis for the following articles which are intended to set a standard of behaviour in relation to the conduct and the effect of undertaking activities which are not prohibited by international law but could have transboundary injurious consequences. The following articles elaborate, in more detail, the specific obligations of States in that respect. States will be assisted if they know what steps should be taken, as a matter of international law, so that one's territory is not used in a manner that is detrimental to persons and property in or the environment of other States.

(5) As indicated in the introduction to this chapter of the report, the Commission decided in 1992 to approach the topic in stages. The first stage deals with issues of preventing transboundary harm of activities with a risk of such harm. The following articles are designed to deal only with that particular issue. The commentaries to the articles are also narrowly focused to deal with that specific issue.

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9/ See supra note 5.

10/ United Nations document UNEP/IG 12/2 (1978) reproduced in International Legal Materials, vol. 17, p. 1097.

11/ See 1974 OECD Council Recommendation c (74) 224 concerning Transfrontier Pollution (Annex title B), OECD, OECD and the Environment, 1986, p. 142; 1974 Recommendation c (74) 220 on the Control of Eutrophication of Waters, ibid., p. 44; and 1974 Recommendation c (74) 221 on Strategies for Specific Water Pollutants Control, ibid., p. 45.

[CHAPTER I. GENERAL PROVISIONS] *

Article 1

Scope of the present articles

The present articles apply to activities not prohibited by international law and carried out in the territory or otherwise under the jurisdiction or control of a State which involve a risk of causing significant transboundary harm through their physical consequences.

Commentary

(1) Article 1 defines the scope of the articles designed specifically to deal with measures to be taken in order to prevent transboundary harm of activities with a risk of such harm.

(2) Article 1 limits the scope of the articles to activities not prohibited by international law and carried out in the territory or otherwise under the jurisdiction or control of a State, and which involve a risk of causing significant transboundary harm through their physical consequences. This definition of scope introduces four criteria.

(3) The first criterion refers back to the title of the topic, namely that the articles apply to "activities not prohibited by international law". 12/ This element, though already indicated in the title of the topic, is incorporated in the scope article because of its critical role in delimiting the parameters of the articles. This criterion is also crucial in making the distinction between the scope of this topic and that of the topic of State responsibility which deals with "wrongful acts".

(4) The second criterion is that the activities to which preventive measures are applicable are "carried out in the territory or otherwise under the jurisdiction or control of a State". Three concepts are used in this criterion: "territory", "jurisdiction" and "control". Even though the expression "jurisdiction or control of a State" is a more commonly used

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* The designation of the chapter is provisional.

12/ The Commission has not yet changed in the title of the topic the word "acts" by "activities". The Commission's choice of the word "activities" in the articles is on the basis of the recommendation of the Working Group set up by the Commission in 1992 that "the Commission decided to continue with its working hypothesis that the topic deal with 'activities'". See Official Records of the General Assembly, Forty-seventh Session, Supp. No. 10, (A/47/10), para. 348.

formula in some instruments, 13/ the Commission finds it useful to mention also the concept of "territory" in order to emphasize the importance of the territorial link, when such a link exists, between activities under these articles and a State.

(5) For the purposes of these articles, "territory" refers to areas over which a State exercises its sovereign authority. The Commission draws from past State practice, whereby a State has been held responsible for activities, occurring within its territory, which have injurious extra-territorial effects. In the Island of Palmas, Max Huber, the sole arbitrator, stated that "sovereignty" consists not entirely of beneficial rights. A claim by a State to have exclusive jurisdiction over certain territory or events supplemented with a demand that all other States should recognize that exclusive jurisdiction has corollary. It signals to all other States that the sovereign State will take account of the reasonable interests of all other States regarding events within its jurisdiction by minimizing or preventing injuries to them and will accept responsibility if it fails to do so:

> "Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State. The development of the national organization of States during the last few centuries and, as the corollary, the development of international law, have established this principle of the exclusive competence of the State in regard to its own territory in such a way as to make it the point of departure in settling most questions that concern international relations." 14/

(6) Judge Huber then emphasized the obligation which accompanies the sovereign right of a State:

> "Territorial sovereignty, as has already been said, involves the exclusive right to display the activities of a State. This right has, as corollary, a duty: the obligation to protect within the territory the rights of other States, in particular their right to integrity and

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13/ See, for example, Principle 21 of the Stockholm Declaration, Report of the Stockholm Conference, United Nations document A/CONF.48/14; the 1982 United Nations Convention on the Law of the Sea, United Nations document A/CONF.62/122, art. 194, para. 2; Principle 2 of the Rio Declaration, United Nations document A/CONF.151/26 (vol. I) p. 3; and Principle 3 of the United Nations Convention on Biological Diversity of 5 June 1992, document DPI/1307.

14/ United Nations, Reports of International Arbitral Awards, vol. 2, p. 838.

> inviolability in peace and in war, together with the rights which each State may claim for its nationals in foreign territory. Without manifesting its territorial sovereignty in a manner corresponding to circumstances, the State cannot fulfil this duty. Territorial sovereignty cannot limit itself to its negative side, i.e., to excluding the activities of other States; for it serves to provide between nations the space upon which human activities are employed, in order to assure them at all points the minimum of protection of which international law is the guardian." 15/

(7) The Corfu Channel is another case in point. There, the International Court of Justice held Albania responsible, under international law, for the explosions which occurred in its waters and for the damage to property and human life which resulted from those explosions to British ships. The Court, in that case, relied on international law as opposed to any special agreement which might have held Albania liable. The Court said:

> "The obligations incumbent upon the Albanian authorities consisted in notifying, for the benefit of shipping in general, the existence of the minefield in Albanian territorial waters and in warning the approaching British warships of the imminent danger to which the minefield exposed them. Such obligations are based, not on The Hague Convention of 1907, No. VIII, which is applicable in time of war, but on certain general and well-recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war, the principle of the freedom of maritime communications, and every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States." 16/

(8) Although the Court did not specify how "knowingly" should be interpreted where a State is expected to exercise its jurisdiction, it drew certain conclusions from the exclusive display of territorial control by the State. The Court stated that it would be impossible for the injured party to establish that the State had knowledge of the activity or the event which would cause injuries to other States, because of exclusive display of control by the territorial State. The Court said:

> "On the other hand, the fact of this exclusive territorial control exercised by a State within its frontiers has its bearing upon the methods of proof available to establish the knowledge of that State as to such events. By reason of this exclusive control, the other State, the victim of a breach of international law, is often unable to furnish direct proof of facts giving rise to responsibility. Such a State

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15/ Ibid., p. 839.

16/ ICJ Reports, 1949, p. 22.

> should be allowed a more liberal recourse to inferences of facts and circumstantial evidence. This indirect evidence is admitted in all systems of law, and its use is recognized by international decisions. It must be regarded as of special weight when it is based on a series of facts linked together and leading logically to a single conclusion." 17/

(9) In the Trail Smelter, the Tribunal referred to the corollary duty accompanying territorial sovereignty. In that case, although the Tribunal was applying the obligations created by a treaty between the United States and the Dominion of Canada and had reviewed many of the United States cases, it made a general statement which the Tribunal believed to be compatible with the principles of international law. The Tribunal held: "under the principles of international law, as well as the law of the United States, no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons herein, when the case is of serious consequence and the injury is established by clear and convincing evidence." 18/ The Tribunal quoted Professor Eagleton to the effect that "A State owes at all times a duty to protect other States against injurious acts by individuals from within its jurisdiction," and noted that international decisions, from the Alabama onward, are based on the same general principle. 19/

(10) In the Lake Lanoux award, the Tribunal alluded to the principle prohibiting the upper riparian from altering waters of a river if it would cause serious injury to other riparian States:

> "Thus, while admittedly there is a rule prohibiting the upper riparian State from altering the waters of a river in circumstance calculated to do serious injury to the lower riparian State, such a principle has no application to the present case, since it was agreed by the Tribunal ... that the French project did not alter the waters of the Carol." 20/

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17/ Ibid., p. 18.

18/ UNRIAA, vol. 3, p. 1965.

19/ United Nations, International Arbitral Awards, vol. 3, p. 1963, C. Eagleton, Responsibility of States in International Law, 1928, p. 80.

20/ Lake Lanoux Arbitration (France-Spain), United Nations, Reports of International Arbitral Awards, vol. 12, p. 281.

(11) Other forms of State practice have also supported the principle upheld in the judicial decisions mentioned above. For example, in 1892 in a border incident between France and Switzerland, the French Government decided to halt the military target practice exercise near the Swiss border until steps had been taken to avoid accidental transboundary injury. 21/ Also following an exchange of notes, in 1961, between the United States and Mexico concerning two United States companies, Payton Packing and Casuco located on the Mexican border, whose activities were prejudicial to Mexico, the two companies took substantial measures to ensure that their operations ceased to inconvenience the Mexican border cities. 22/ Those measures included phasing out certain activities, changing working hours and establishing systems of disinfection. 23/ In 1972, Canada invoked the Trail Smelter principle against the United States when an oil spill at Cherry Point, Washington resulted in a contamination of beaches in British Columbia. 24/ There are a number of other examples of State practice along the same line. 25/

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21/ P. Guggenheim, "La pratique suisse (1956)", Annuaire suisse de droit international, 1957 (Zurich), vol. XIV, p. 168.

22/ M. M. Whiteman, ed., Digest of International Law (Washington D.C.), vol. 6, pp. 258-259.

23/ Ibid.

24/ See Canadian Yearbook of International Law, vol. 11, pp. 333-334, 1973. The Trail Smelter principle was applied also by the District Court of Rotterdam in the Netherlands in case against Mines Domaniales de Potasse d'Alsace. See J.G. Lammers, Pollution of International Watercourses, p. 198 (1984).

25/ In Dukovany, in former Czechoslovakia, two Soviet-designed 440 megawatt electrical power reactors were scheduled to be operating by 1980. The closeness of the location to the Austrian border led to a demand by the Austrian Ministry for Foreign Affairs for joint ranks with Czechoslovakia about the safety of the facility. This was accepted by the Czechoslovak Government. Osterreichische Zeitschrift fur Aussenpolitik, vol. 15, p. 1 cited in G. Handl, "Conduct of abnormally dangerous activities in frontier areas: The case of nuclear power plant siting", Ecology Law Quarterly, Berkeley Cal. vol. 7, 1978, p. 1. In 1973, the Belgian Government announced its intention to construct a refinery at Lanaye, near its frontier with the Netherlands. The Netherlands Government voiced its concern because the project threatened not only the nearby Netherlands national park but also other neighbouring countries. It stated that it was an established principle in Europe that, before the initiation of any activities that might cause

(12) Principle 21 of the Stockholm Declaration on the Human Environment 26/ and Principle 2 of the Rio Declaration on Environment and Development 27/ prescribe principles similar to Trail Smelter and Corfu Channel.

(13) Historically, the expression "territory", has been used together with the concept of "sovereignty" to limit physically the exercise of sovereign rights of States. If it was concluded that a particular territory belonged to a particular State, it was assumed that, under international law, that territory was subject to the sovereign rights of that State and not to any other. The more contemporary usage of sovereignty or sovereign rights expresses a more complex legal relationship. Sovereignty may be exercised in relation to certain types of resources in a territory and not to the whole territory. 28/ In other words, States may have title to certain resources

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injuries to neighbouring States, the acting State must negotiate with those States. The Netherlands Government appears to have been referring to an existing or expected regional standard of behaviour. Similar concern was expressed by the Belgian Parliament, which asked the Government how it intended to resolve the problem. The Government stated that the project had been postponed and that the matter was being negotiated with the Netherlands Government. The Belgian Government further assured Parliament that it respected the principles set out in the Benelux accords, to the effect that the parties should inform each other of those of their activities that might have harmful consequences for the other member States. Belgium Parliament, Questions et réponses bulletin, 19 July 1973.

26/ See Report of the United Nations Conference on the Human Environment, Stockholm, 5-16 June 1972, Doc.A/CONF.48/Rev. 1.

27/ See Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992, Doc. A/CONF.151/26 (Vol. I).

28/ A prime example of this case is article 56 of the United Nations Convention on the Law of the Sea. Under this article, a coastal State has "sovereign right" in its exclusive economic zone for the purposes of exploration and exploitation, and conserving and managing the natural resources, but has "jurisdiction" with regards to the establishment of artificial islands, marine scientific research, etc. Article 56 reads:

Article 56

Rights, jurisdiction and duties of the coastal State in the exclusive economic zone

1. In the exclusive economic zone, the coastal State has:

in a territory and not the whole of the territory. This usage of sovereignty has broken down the unity between sovereignty and territory. It is therefore with this caveat, that the Commission defines the term "territory".

(14) The use of the term "territory" in article 1 also stems from concerns about a possible uncertainty in contemporary international law as to the extent to which a State may exercise extraterritorial jurisdiction in respect of certain activities. It is the view of the Commission that, for the purposes of these articles, territorial jurisdiction is the dominant criterion. Consequently when an activity occurs within the territory of a State, that State must comply with the preventive measures obligations. "Territory" is, therefore, taken as conclusive evidence of jurisdiction. Consequently, in cases of competing jurisdictions over an activity covered by these articles, the territorially-based jurisdiction prevails. The words "or otherwise" after the word "territory" intend to signify the special relation of the concept "territory" to the concepts "jurisdiction or control". The Commission, however, is mindful of situations, where a State, under

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(a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds;

(b) jurisdiction as provided for in the relevant provisions of this Convention with regard to:

(i) the establishment and use of artificial islands, installations and structures;

(ii) marine scientific research;

(iii) the protection and preservation of the marine environment;

(c) other rights and duties provided for in this Convention.

2. In exercising its rights and performing its duties under this Convention in the exclusive economic zone, the coastal State shall have due regard to the rights of other States and shall act in a manner compatible with the provisions of this Convention.

3. The rights set out in this article with respect to the seabed and subsoil shall be exercised in accordance with Part VI.

See, A/CONF.62/122.

international law, has to yield jurisdiction within its territory to another State. The prime example of such a situation is innocent passage of a foreign ship through territorial sea or territorial waters. In such situations, if the activity leading to a significant transboundary harm emanates from the foreign ship, the flag State and not the territorial State must comply with the provisions of the present articles.

(15) The Commission is aware that the concept of "territory" for the purposes of these articles is somewhat narrow. There are situations where, under international law, a State exercises jurisdiction and control over places over which it has no territorial right, i.e., the rights of a belligerent occupant over occupied territories. Hence there are situations where a State is in de facto in control of a territory. To cover activities taking place under these circumstances, the concepts of "jurisdiction" and "control" are also used.

(16) The expression "jurisdiction" of a State is intended to cover, in addition to the activities being undertaken within the territory of a State, activities over which, under international law, a State is authorized to exercise its competence and authority. The Commission is aware that questions involving the determination of jurisdiction are complex and sometimes constitute the core of a dispute. This article certainly does not presume to resolve all the questions of conflicts of jurisdiction. In this article, the concept of jurisdiction is defined only to make it possible to reasonably determine the scope of this topic.

(17) There are several situations in which jurisdiction is not territorially based. Under international law, a State may exercise jurisdiction in a territory over which it has no sovereign right. This could arise in several types of relationships between States: 29/ (a) international dependency relationships, especially "suzerainty" and international protectorate; (b) relationships between a federal State and member States of the federation which have retained their own international personality; (c) relationships between an occupying State and an occupied State in cases of territorial occupation.

(18) A State may exercise jurisdiction over a non-self-governing territory or over a trust territory. The State entrusted with the duty of caretaker of a

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29/ See paras. 10 to 25 of Commentary to art. 28 of Part One on State Responsibility, Yearbook ... 1979, vol. II (Part Two), pp. 96-106.

non-self-governing territory or a trust territory has no territorial sovereignty over those territories, but it has been given, under international law, an extensive jurisdictional competence over such territories. The scope of such jurisdiction is determined by international law. It is the view of the Commission, that whenever a situation of "international" dependency is established between two States, but the "dependent" State still maintains its international personality, and the activities are taken place in the territory of the dependant State, the "dominant" State which has jurisdiction over the sphere of activities covered by these articles, is under an obligation to comply with these articles.

(19) In this regard, the Commission is instructed by the award in the Brown case, 30/ rendered on 23 November 1923 by the Arbitral Tribunal constituted by Great Britain and the United States of America under the Special Agreement of 18 August 1910. In that case, the question was raised as to the extent Great Britain, which was at the time exercising "suzerainty" in relation to foreign affairs of the South African Republic, should bear responsibility for the denial of justice suffered by an American citizen, Brown, in that country. The Tribunal agreed that there was a denial of justice to Brown, but held that Great Britain could not incur responsibility as the "suzerain" Power at the time when the denial of justice occurred. In the view of the Tribunal, although Great Britain had at that time a peculiar status and responsibility vis-à-vis the South African Republic, its "suzerainty" involved only rather loose control over the Republic's relations with foreign Powers and had not entailed any right of interference in nor control over internal activities legislative, executive or judicial. Accordingly, the conditions under which Great Britain could have been held responsible for an act such as a denial of justice, committed against a foreign national in the framework of such internal activities, were not fulfilled.

(20) The dependency relationship may also occur in the case of a federation in which the member States of the federation retain, from the standpoint of international law, a personality separate from that of the federal State. In the view of the Commission, the States members of a federal State are under an obligation to comply with the provisions of these articles. However, if the

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30/ United Nations, Reports of International Arbitral Awards, vol. 6, p. 120.

federal State exercises jurisdiction in respect of the activities covered by these articles, then it is the federal State that should comply with the obligations.

(21) International law may also recognize a State that is a belligerent occupant as having jurisdiction for certain matters over the territory of another State. Whether or not the occupation is complete or partial, it is the Commission's view that the occupying State is under an obligation to comply with the provisions of these articles, in so far as the occupying State has extended its jurisdiction over the conduct of activities covered by these articles.

(22) Sometimes due to the location of the activity, there is no territorial link between a State and the activity such as, for example, activities taking place in outer space or on the high seas. The most common example is the jurisdiction of the flag State over the ship. The Geneva Conventions on the Law of the Sea and the United Nations Convention on the Law of the Sea have covered many jurisdictional capacities of the flag State.

(23) Activities may also be undertaken in places where more than one State is authorized, under international law, to exercise particular jurisdictions that are not incompatible. The most common areas where there are functional mixed jurisdictions are the navigation and passage through the territorial sea, contiguous zone and exclusive economic zones. In such circumstance, the State which is authorized to exercise jurisdiction over the activity covered by this topic must, of course, comply with the provisions of these articles.

(24) In cases of concurrent jurisdiction by more than one State over the activities covered by these articles, States shall individually and, when appropriate, jointly comply with the provisions of these articles.

(25) The Commission takes note of the function of the concept of "control" in international law, which is to attach certain legal consequences to a State whose jurisdiction over certain activities or events is not recognized by international law; it covers situations in which a State is exercising de facto jurisdiction, even though it lacks jurisdiction de jure, such as in cases of intervention, occupation and unlawful annexation which have not been recognized in international law. The Commission relies, in this respect, on the advisory opinion by the International Court of Justice in Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council

Resolution 276 (1970). 31/ In that case, the Court after holding South Africa responsible for having created and maintained a situation which the Court declared illegal and finding South Africa under an obligation to withdraw its administration from Namibia, nevertheless attached certain legal consequences to the de facto control of South Africa over Namibia. The Court held:

> "The fact that South Africa no longer has any title to administer the Territory does not release it from its obligations and responsibilities under international law towards other States in respect of the exercise of its powers in relation to this Territory. Physical control of a territory, and not sovereignty or legitimacy of title, is the basis of State liability for acts affecting other States." 32/

(26) The concept of control may also be used in cases of intervention to attribute certain obligations to a State which exercises control as opposed to jurisdiction. Intervention here refers to a short-time effective control by a State over events or activities which are under jurisdiction of another State. It is the view of the Commission that in such cases, if the jurisdictional State demonstrates that it had been effectively ousted from the exercise of its jurisdiction over the activities covered by these articles, the controlling State would be held responsible to comply with the obligations imposed by these articles.

(27) The third criterion is that activities covered in these articles must involve a "risk of causing significant transboundary harm". The element of risk is intended to limit the scope of the topic, at this stage of the work, to activities with risk and, consequently exclude from the scope activities which, in fact, cause transboundary harm in their normal operation, such as, for example creeping pollution. The words "transboundary harm" are intended to exclude activities which cause harm only in the territory of the State within which the activity is undertaken or those activities which harm the so-called global commons per se but without any harm to any other State. The phrase "risk of causing significant transboundary harm" should be taken as a single term.

(28) The third criterion is intended to follow the well-established principle of sic utere tuo ut alienum non laedas (use your own property so as not to

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31/ ICJ Reports, 1971, p. 14.

32/ Ibid., para. 118.

injure the property of another) in international law. The Commission agrees with Lauterpacht when he stated that this maxim is applicable to relation of States not less than those of individuals; it is one of those general principles of law applicable under Article 38 (1) (c) of the Statute of the International Court of Justice. 33/ Accordingly, the third criterion recognizes the freedom of States in utilizing their resources within their own territories but in a way not to cause significant harm to other States.

(29) The fourth criterion is that the significant transboundary harm must have been caused by the "physical consequences" of such activities. It was agreed by the Commission that in order to bring this topic within a manageable scope, it should exclude transboundary harm which may be caused by State policies in monetary, socio-economic or similar fields. The Commission feels that the most effective way of limiting the scope of these articles is by requiring that these activities should have transboundary physical consequences which, in turn, result in significant harm.

(30) The physical link must connect the activity with its transboundary effects. This implies a connection of a very specific type - a consequence which does or may arise out of the very nature of the activity or situation in question, in response to a natural law. That implies that the activities covered in these articles must themselves have a physical quality, and the consequences must flow from that quality, not from an intervening policy decision. Thus, the stockpiling of weapons does not entail the consequence that the weapons stockpiled will be put to a belligerent use. Yet this stockpiling may be characterized as an activity which, because of the explosive or incendiary properties of the materials stored, entails an inherent risk of disastrous misadventure.

## Article 2

## Use of terms

For the purposes of the present articles:

(a) "risk of causing significant transboundary harm" encompasses a low probability of causing disastrous harm and a high probability of causing other significant harm;

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33/ Oppenheim, International Law (8th ed. by H. Lauterpacht, 1955), vol. 1, pp. 346-347.

(b) "transboundary harm" means harm caused in the territory of or in other places under the jurisdiction or control of a State other than the State of origin, whether or not the States concerned share a common border;

(c) "State of origin" means the State in the territory or otherwise under the jurisdiction or control of which the activities referred to in article 1 are carried out.

...

Commentary

(1) Paragraph (a) defines the concept of "risk of causing significant transboundary harm" as encompassing a low probability of causing disastrous harm and a high probability of causing other significant harm. The Commission feels that instead of defining separately the concept of "risk" and then "harm", it is more appropriate to define the expression "risk of causing significant transboundary harm" because of the interrelationship between "risk" and "harm" and the relationship between them and the adjective "significant".

(2) For the purposes of these articles, "risk of causing significant transboundary harm" refers to the combined effect of the probability of occurrence of an accident and the magnitude of its injurious impact. It is, therefore, the combined effect of "risk" and "harm" which sets the threshold. In this respect the Commission drew inspiration from the Code of Conduct on Accidental Pollution of Transboundary Inland Waters, 34/ adopted by the Economic Commission for Europe at its forty-fifth session in 1990. Under article 1, paragraph (f) of the Code of Conduct, "'risk' means the combined effect of the probability of occurrence of an undesirable event and its magnitude;". It is the view of the Commission that a definition based on the combined effect of "risk" and "harm" is more appropriate for these articles, and that combined effect should reach a level that is deemed significant. The prevailing view in the Commission is that the obligations of prevention imposed on States should be not only reasonable but also sufficiently limited so as not to impose such obligations in respect of virtually any activity, for the activities under discussion are not prohibited by international law. The purpose is to strike a balance between the interests of the States concerned.

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34/ Doc. E/ECE/1225 - ECE/ENVWA/16.

(3) The definition in the preceding paragraph allows for a spectrum of relationships between "risk" and "harm", all of which would reach the level of "significant". The definition identifies two poles within which the activities under these articles will fall. One pole is where there is a low probability of causing disastrous harm. This is normally the characteristic of ultrahazardous activities. The other pole is where there is a high probability of causing other significant harm. This includes activities which have a high probability of causing harm which while not disastrous, is still significant. But it would exclude activities where there is a very low probability of causing significant transboundary harm. The word "encompasses" in the second line is intended to highlight the intention that the definition is providing a spectrum within which the activities under these articles will fall.

(4) As regards the meaning of the word "significant", the Commission is aware that it is not without ambiguity and that a determination has to be made in each specific case. It involves more factual considerations than legal determination. It is to be understood that "significant" is something more than "detectable" but less than "serious" or "substantial". The harm must lead to a real detrimental effect on matters such as, for example, human health, industry, property, environment or agriculture in other States. Such detrimental effects must be susceptible of being measured by factual and objective standards.

(5) The Commission is mindful that the ecological unity of the Planet does not correspond to political boundaries. The Commission is aware that there are ongoing mutual impacts on States due to their lawful activities within their own territories. These mutual impacts, so long as they have not reached the level of "significant", are considered tolerable. Considering that the obligations imposed on States by these articles deal with activities that are not prohibited by international law, the Commission feels that the threshold of intolerance of harm cannot be placed below "significant".

(6) The threshold of "significant" seems to have considerable support in international law for the requirement of taking preventive measures or imposing liability. The Trail Smelter Tribunal imposed liability only in cases "of serious consequences". 35/ The Lake Lanoux Tribunal noted that

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35/ United Nations, Reports of International Arbitral Awards, vol. 3, p. 1,965.

the principle prohibiting the upstream State to alter the flow of water applied only where the downstream State has been (gravement) "seriously" injured. 36/ A number of conventions have also used "significant", "serious" or "substantial" as the threshold. 37/ "Significant" has also been used in other legal instruments and domestic laws. 38/

(7) The Commission is also of the view that the term "significant", while determined by factual and objective criteria, also involves a value determination which depends on the circumstances of a particular case and the period in which such determination is made. For instance, a particular deprivation, at a particular time might not be considered "significant" because at that specific time, scientific knowledge or human appreciation for

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36/ Ibid., vol. 12, p. 308.

37/ See, for example, Art. 4 (2) of the Convention on the Regulation of Antarctic Mineral Resource Activities adopted on 2 June 1988, International Legal Materials, vol. 28, p. 868; Art. 2 (1) and (2) of Convention on Environmental Impact Assessment in a Transboundary Context adopted on 25 February 1991 (E/ECE/1250), reprinted in International Legal Materials, vol. 30, p. 800; Art. I (b) of the Code of Conduct on Accidental Pollution of Transboundary Inland Waters adopted in 1990 (E/ECE/1225).

38/ See, for example, operative paras. 1 and 2 of General Assembly Resolution 2995 (XXVII) Concerning cooperation between States in the field of the Environment, General Assembly Official Records: Twenty-seventh Session, Supp. No. 30, p. 42 (1973); Recommendation of the Council of the Organization for Economic Co-operation and Development on Principles Concerning Transfrontier Pollution, 1974, para. 6, OECD, Non-Discrimination in Relations to Transfrontier Pollution: Leading OECD Documents, p. 35, (1978), reproduced also in International Legal Materials, vol. 14, p. 246, (1975); The Helsinki Rules on the Uses of the Waters of International Rivers, art. 10, International Law Association, Report of the 52nd Conference ( Helsinki, 1966), p. 496 (1967); and art. 5 of the draft Convention on industrial and agricultural use of international rivers and lakes, prepared by the Inter-American Juridical Committee in 1965, OAS, Rios y Lagos Internacionales, p. 132 (4th ed. 1971).

See also the 1980 Memorandum of Intent Concerning Transboundary Air Pollution between the United States and Canada, 32 U.S.T., p. 2,541, T.I.A.S. No. 9856; and the 1983 Mexico-United States Agreement to Cooperate in the Solution of Environmental Problems in the Border Area, Art. 7, in International Legal Materials, vol. 22, p. 1,025 (1983).

United States has also used the word "significant" in its domestic law dealing with environmental issues. See the American Law Institute, Restatement of the Law, Section 601, Reporter's Note 3, pp. 111-112.

a particular resource had not reached a point at which much value was ascribed to that particular resource. But some time later that view might change and the same harm might then be considered "significant".

(8) Paragraph (b) defines "Transboundary harm" as meaning harm caused in the territory of or in places under the jurisdiction or control of a State other than the State of origin, whether or not the States concerned share a common border. This definition includes, in addition to a typical scenario of an activity within a State with injurious effects on another State, activities conducted under the jurisdiction or control of a State, for example, on the high seas, with effects on the territory of another State or in places under its jurisdiction or control. It includes, for example, injurious impacts on ships or platforms of other States on the high seas as well. It will also include activities conducted in the territory of a State with injurious consequences on, for example, the ships or platforms of another State on the high seas. The Commission cannot forecast all the possible future forms of "transboundary harm". It, however, makes clear that the intention is to be able to draw a line and clearly distinguish a State to which an activity covered by these articles is attributable from a State which has suffered the injurious impact. Those separating boundaries are the territorial boundaries, jurisdictional boundaries and control boundaries. Therefore, the term "transboundary" in "transboundary harm" should be understood in the context of the expression "within its territory or otherwise under its jurisdiction or control" used in article 1.

(9) Paragraph c defines "State of origin" as the State in the territory or otherwise under the jurisdiction or control of which the activities referred to in article 1 are carried out. The definition is self-explanatory. In cases where there is more than one "State of origin", they shall individually and jointly, as appropriate, comply with the provisions of these articles.

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