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

by

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Addendum

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VI. The Roles of International Organizations

35. It is convenient to consider in reverse order the issues raised by articles 3, 4 and 5. The point covered in draft article 5, relating to matters not within the scope of the present articles, is a narrow one. Following the Commission's usual practice, the proposed scope article - draft article 1 - deals only with relations between States; and there is little warrant for departing from that practice in the case of the present topic. Nevertheless, some existing treaties do envisage that activities with transboundary effects may be conducted within the control either of States or of international organizations. The most notable of these are treaties which relate to activities in outer space or in the marine environment. In reference to such cases, draft article 5 would show that the relationships between States remain within the scope of the present articles, even though an international organization may also be involved. Furthermore, draft article 5 would negate any presumption that the relationships between States and international organizations are governed by rules in substance different from those applying in the relations between States. The draft article may be compared with similar articles included in the 1969 Vienna Convention on the law of treaties, 100/ and in the 1978 Vienna Convention on Succession of States in respect of treaties. 101/

36. It may be useful to detail the course of development in the treaties dealing with outer space and with the law of the sea, not so much as a vindication of the need for draft article 5, but in order to shed some light on the increasingly rich and varied role of international organizations in the practice connected with the present topic. The 1967 Treaty on the uses of outer space 102/ reveals, in its article XIII, a characteristic progression. It begins with the notion that States may conduct activities jointly, and may do so within the framework of an appropriate international organization; and this leads to the consequence that other parties may address themselves either to the organization or to the States which have conducted their activities within its framework. In the 1972 Convention on international liability for damage caused by space objects, 103/ eligible international organizations, which declare their acceptance of the convention, are installed as the potential partners of States in relation to the launching of space objects. The State or organization that launches, or procures the launching, of a space object shares liability for any damage caused by that space object with the State from whose territory or facility the space object was launched. 104/ The 1979 "Moon Treaty" contains comparable provisions. 105/ The 1972 Convention stipulates that States which are parties, and are also members of an international organization which has accepted the Convention, share jointly and severally any liability incurred by that organization. 106/

100/ Vienna, 23 May 1969, Article 3.

101/ Vienna, 23 August 1978, Article 3.

102/ Foot-note 15 supra.

103/ Foot-note 20 supra.

104/ Ibid., Article V and Article XII, paragraphs 1 and 2.

105/ Foot-note 95 supra, Article 16.

106/ Foot-note 20 supra, Article XXII, paragraph 3.

37. The 1958 Geneva Convention on the high seas, 107/ after stating the general legal position that ships have the right to fly the flag of their State of registration, and are required to sail under that flag only, leaves open the possibility "of ships employed on the official service of an international organization flying the flag of that organization". 108/ The United Nations Convention on the Law of the Sea 109/ retains this provision in slightly modified form. 110/ More importantly, however, the latter Convention includes a number of provisions comparable in structure with those of the 1972 Convention on international liability for damage caused by space objects, described in the preceding paragraph. Under these provisions, States are encouraged to work "through competent international organizations" - for example - to achieve the legislative and scientific goals of the convention in relation to marine scientific research, to the development and transfer of marine technology, and to the protection and preservation of the marine environment. 111/ As a consequence, article 263 of the Convention, dealing with "responsibility and liability" arising out of marine scientific research, applies equally to States and to international organizations; and it extends to such organizations the similar obligations which article 235 of the Convention places on States in respect of damage caused by pollution of the marine environment. 112/ As an entirely separate matter - not connected in any way with the earlier references in this paragraph to "competent international organizations" - it should be noted that the United Nations Convention on the Law of the Sea makes provision for signature of the Convention by an international organization "constituted by States to which its member States have transferred competence over matters governed by the Convention, including the competence to enter into treaties in respect of these matters". 113/

38. In short, the circumstances that draft article 5 is designed to cover have their own importance; but they are only byproducts of larger and more significant themes. The first replies to the questionnaire, prepared by the Special Rapporteur with the help of the Secretariat, and addressed to selected international organizations, 114/ will serve as an index of various ways in which States work "through competent international organizations" or "within the framework of an appropriate international organization". First - and here one harks back to the earliest themes of the present report - adverse transboundary effects can, by definition, only be resolved through international co-operation and whether a problem falls strictly within the scope of the present topic, or is one which

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107/ Geneva, 29 April 1958.

108/ Ibid., Article 7.

109/ Foot-note 15 supra.

110/ Ibid., Article 93.

111/ See, in particular, Articles 197, 199, 200, 203-206, 207(4), 208(5), 210(4), 211(1), (5), (6)(a) and (6)(b), 212(3), 217(1) and (7), 220(7), 239, 242(1), 243, 244, 251, 266, 271, 272, 273 and 278.

112/ The text of Article 235 is set out in foot-note 99 supra.

113/ Article 305(1)(f) and Annex IX.

114/ Document A/CN.4/378.

States choose to treat as if it fell within the scope of the topic - international organizations are essential catalysts. 115/ Secondly, they are also the main centres for data collection and dissemination. 116/ Thirdly, they provide the usual means for setting international standards, and monitoring compliance with those standards; 117/ and often norms thus established have as much influence upon the conduct of States as the most authoritative codification of a customary law rule. Fourthly, the technical assistance which international organizations can provide - especially in relation to impact assessment - is often the key to the avoidance or resolution of disputes, by reducing areas of disputed fact

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115/ See, for example, the work of the International Narcotics Control Board in furthering the aim of assuring and limiting the availability of drugs exclusively to legitimate uses, ibid.p.7; the work of the World Health Organization in seeking to ensure that international transport facilities do not pose risks to health, and in promoting the necessary co-ordination between neighbouring countries in efforts to eradicate insert-borne disease, ibid. pp. 13-15; and the work of the Organisation for Economic Co-operation and Development, acting through its Environment Committee, in relation to the problems of transboundary water and air pollution, ibid., pp. 23-27.

116/ See, for example, the mandate of the Food and Agriculture Organization of the United Nations to collect, analyse, interpret and disseminate information relating to nutrition, food and agriculture, ibid., p. 8; the work of the International Atomic Energy Agency in fostering the exchange of scientific information in nuclear science and technology, ibid., p. 18; and the work of the Organisation for Economic Co-operation and Development in providing mutually agreed technical and economic data and in recommending mutually agreed policy options and legal principles which were duly taken into account in the formulation and implementation of the Convention on long-range transboundary air pollution, foot-note 37 supra, Document A/CN.4/378, pp. 25-27.

117/ See, for example the measures which may be taken by the International Narcotics Control Board, pursuant to Article 14 of the Single Convention on Narcotic Drugs, 1961, as amended, to ensure the execution of the provisions of the Convention, ibid. pp. 7 and 46-7; the work of the International Atomic Energy Agency in developing various safety standards for nuclear activities or installations and, more specifically, an internationally recognized minimum value of radiation detriment, ibid., pp. 17-8; and the work of the Nuclear Energy Agency of OECD in encouraging the harmonization of the regulatory policies and practices of Governments in the nuclear field, with particular reference to the safety of nuclear installations, protection of man against ionizing radiation and preservation of the environment, radioactive waste management, and nuclear third party liability and insurance, ibid., p. 29.

and suggesting ways of reconciling uses. 118/ Fifthly, international organizations have often a statutory obligation to assess dangers and give warnings of them; and they may also give guidance as to remedial measures. 119/ Finally - and, within the context of the present topic, this is a feature of the greatest importance - international organizations are frequently the means through which States rise above a pre-occupation with immediate irritations, and work together for the common interest in protecting the oceans and airspace, and all of the other interests which cannot be reduced to a finite equation between a given activity and a quantified and localized transboundary effect. 120/

118/ See, for example, the work of the Food and Agriculture Organization of the United Nations in conducting research on the impact on the environment, within or outside the limits of national jurisdiction, of irrigation, of tropical forest exploitation, of pest management, of trypanosomiasis control, of pesticide use, of the pulp and paper industry, and of the hides, skins and leather industry, ibid., p.11; and the work of the International Atomic Energy Agency in providing assistance in data collection, studies and assessments at the request of a member State considering a project, ibid., p.19.

119/ See, for example, the role of the World Health Organization as the channel through which a warning is to be given to the international community of the outbreak of certain infectious diseases, ibid. pp. 13 and 16. See also the work of the International Atomic Energy Agency in facilitating co-operation among member States for preventing and limiting injurious effects in cases where a nuclear accident may have significant radiological impact in other States, ibid., p.17.

120/ See, for example, the work of the Food and Agriculture Organization of the United Nations in relation to research, data collection and the compilation of statistics on high seas and Antarctic fisheries, and on remote sensing technology, ibid., p.9; and the duty of the International Atomic Energy Agency, under the London Convention on the prevention of marine pollution by dumping of wastes and other matter, 29 December 1972, and the Barcelona Convention for the protection of the Mediterranean Sea against pollution, footnote 39 supra, to define high-level radioactive wastes and other such matter unsuitable for dumping at sea, and to make recommendations to be fully taken into account by the Contracting Parties in issuing permits for the dumping at sea of radioactive matter not prohibited under the relevant Convention, Document A/CN.4/378, p.18.

VII. The Relationship with other Rules of Law

39. Before leaving the treaties relating to outer space and to the marine environment, discussed under the previous heading, one should consider the frequent and consistent usage in these treaties of the terms "responsibility" 121/ and "liability" 122/ - which, in the United Nations Convention on the Law of the Sea, are even juxtaposed, as section and article headings. 123/ At first glance, it might be presumed that "responsibility" would have the same meaning as the expression "State responsibility" - that is, a responsibility arising from a wrongful act or omission of the State. The texts, however, make it clear that the term "responsibility" has in these treaties quite a different meaning. It refers to the content of a primary obligation, not to its breach:

> "States are responsible for the fulfilment of their international obligations concerning the protection and preservation of the marine environment. They shall be liable in accordance with international law." 124/

This provision may still leave a doubt about the relationship between "responsibility" and "liability"; but another, nearby article sheds some light upon the meaning of "liability":

> "States shall be liable for damage or loss attributable to them arising from measures taken pursuant to section 6" [which deals with enforcement of measures relating to the protection and preservation of the marine environment] "when such measures are unlawful or exceed those reasonably required in the light of available information." 125/

121/ Treaty on principles governing the activities of States in the exploration and use of outer space, including the moon and other celestial bodies, foot-note 15 supra, Article VI; Agreement governing the activities of States on the moon and other celestial bodies, foot-note 95 supra, Article 14(1); Convention on the marine environment of the Baltic Sea area, foot-note 97 supra, Article 17; United Nations Convention on the Law of the Sea, foot-note 15 supra, Articles 139(1), 235, 263, 304, Annex III, Articles 4(4) and 22, Annex IX, Article 6.

122/ Treaty on principles governing the activities of States in the exploration and use of outer space, including the moon and other celestial bodies, foot-note 15 supra, Article VII; Convention on international liability for damage caused by space objects, foot-note 20 supra, Title, Preamble and Article II; Agreement governing the activities of States on the moon and other celestial bodies, foot-note 95 supra, Article 14(2); Convention for the protection of the Mediterranean Sea against pollution, foot-note 39 supra, Article 12; Kuwait Regional Convention for co-operation on the protection of the marine environment from pollution, foot-note 83 supra, Article XIII; Convention on the protection of the marine environment of the Baltic Sea area, foot-note 97 supra, article 17; Convention for the protection and development of the marine environment of the wider Caribbean region, foot-note 97 supra, Article 14; United Nations Convention on the Law of the Sea, foot-note 15 supra, Articles 139(2), 232, 235, 263, 304, Annex III, Articles 4(4) and 22, Annex IV, Articles 2(3) and 3, Annex IX, Article 6.

123/ Ibid., Section 9 of Part XII and Article 235; Section 5 of Part XIII and Article 263. See also Articles 139 and 304. The full texts of Articles 235 and 304 are set out in foot-note 99 supra, and an excerpt from paragraph (1) of Article 139 appears in foot-note 15 supra.

124/ Ibid., Article 235(1).

125/ Ibid., Article 232.

It is therefore quite clear that "liability" may arise, whether or not there has been a breach of an international obligation. "Liability", no less than "responsibility", refers in this Convention to the content of a primary obligation; and that obligation is to regulate activities within the territory or control of the State, so as to avoid or repair transboundary loss or injury:

> "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." 126/

40. The phrase "responsibility and liability", as used in the United Nations Convention on the Law of the Sea, therefore corresponds closely to the twin themes of prevention and reparation, which form the basis of the present topic. To illustrate this, it is not necessary to resort to a close textual analysis of provisions that were hammered out on the anvil of consensus. In the earliest of these treaties - the 1967 Treaty on the uses of outer space 127/ - the usage is already crystal-clear:

> "States Parties to the Treaty shall bear international responsibility for national activities in outer space, including the Moon and other celestial bodies, whether such activities are carried on by governmental agencies or by non-governmental entities, and for assuring that national activities are carried out in conformity with the provisions set forth in the present Treaty ..." 128/

> "Each State Party to the Treaty that launches or procures the launching of an object into outer space, including the Moon and other celestial bodies, and each State from whose territory or facility an object is launched, is internationally liable for damage to another State Party to the Treaty or to its natural or juridical persons by such object ..." 129/

Equally, the Convention on the Law of the Sea - especially in the provisions dealing with research and with the protection and preservation of the marine environment - does not content itself with a statement of what is forbidden. Its emphasis, in article after article, is upon prescribing a course of conduct which, if followed in good faith, will ensure that transboundary loss or injury is avoided or repaired. 130/ In these provisions, the Convention reposes multiple discretions in States, but furnishes them with guidelines and enjoins their co-operation. Unless a State's whole course of action is refractory, the application of these provisions may not disclose a point of intersection of harm and wrong. 131/ If there is a modicum of co-operation, the duties of prevention and reparation can be discharged, without establishing the exact location of that much disputed point.

126/ Ibid., Article 235(2).

127/ Foot-note 15 supra.

128/ Ibid., Article VI.

129/ Ibid., Article VII.

130/ United Nations Convention on the Law of the Sea, foot-note 15 supra. See, in particular, Articles 194-7, 204, 206-12, 234, 240, 242, 246 and 249.

131/ Second Report, foot-note 38 supra. para. 59.

41. If the principles of the present topic could be reduced to a mathematical formula, "x" would always represent the unascertained point of intersection of harm and wrong. Sometimes the point can be precisely ascertained, because transboundary loss or injury has arisen from a wrongful act of the source State - for example, from a frontier transgression that constitutes a violation of sovereignty, or from the breach of a rule contained in a treaty regime made in pursuance of the present topic. Often, however, "x" remains at large, because it is the product of complex variables, and because the parties do not agree whether the conduct giving rise to transboundary loss or injury has passed the point of wrongfulness. It is then that the rules and guidelines of the present topic are set in motion, not to decide whether the loss or injury arose from a wrongful act of the source State, but to articulate the duties of prevention and reparation. Draft article 4 - as proposed by the Special Rapporteur - is therefore much more than a drafting precaution: it adverts to an essential relationship, which cannot be reduced to a fixed measurement, between the duty to prevent and repair transboundary loss or injury and the unresolved question whether the loss or injury arose from a wrongful act of the source State. Conversely, in making a regime or settling a claim pursuant to the present topic, States will give great weight to their own perceptions as to where the extreme limits of lawfulness may lie.

42. Some of the imponderables described in the preceding paragraph loom darkly in a 1954 Convention between Yugoslavia and Austria, relating to the waters of the river Drava. 132/ Both parties used their own sections of the river for the generation of electric power. The Austrian use resulted in a decreased minimum flow of water to Yugoslavia, while the Yugoslav damming of the river caused a back-up of water in Austrian territory. 133/ As is so often the case, the solution to the problem took into account interests other than those initially involved. Austria agreed, inter alia, to restrict the use of her power stations to ensure the maintenance of a minimum flow; to press no claims in respect of the existing back-up of water into her territory; and to purchase surplus summer power from Yugoslavia. The latter undertook not to increase the water back-up in Austrian territory, and to accept Austrian power-station equipment in payment for Austria's purchase of summer power.134/ There would be consultation before Yugoslavia took any step to add to power development on its section of the river, and before Austria acted upon any plan to divert more water from the Drava river basin. A Joint Drava Commission was established to ensure consultation and exchange of information. 135/ The parties also agreed that, as long as the conventional regime was being observed, they would not press their respective claims for interference with the flow of the river or the backing-up of water. 136/ The Convention gave no indication whether those claims, if revived, would allege wrongfulness, or would be formulated as claims to reparation within the rubric of the present topic.

132/ Convention (with annexes) concerning water economy questions relating to the Drava, Geneva, 25 May 1954.

133/ Ibid., Articles 1 and 3.

134/ Ibid., Articles 1, 2 and 3. There is perhaps an element of reparation in some of these provisions.

135/ Ibid., Articles 1(c), 4 and 5.

136/ Ibid., Article 3.

43. There is, of course, an extreme disparity between the tolerance that States are apt to demand of each other in relation to exposure to transboundary effects, and their meticulous respect in other contexts for the rights of territorial sovereignty. For example, in the Drava Convention, Austria and Yugoslavia avoided the need to characterize the conduct of the source State in matters as serious as the flooding of an area of national territory, and diversion of the flow of a much utilized river. By contrast, the building of Salzburg airport, on Austria's frontier with the Federal Republic of Germany, would not have been conceivable without the Federal Republic's full and prior agreement to establish the required safety zone in German territory, though at Austria's expense. 137/ One might, therefore, regard the latter case as barely falling within the present topic, because the true transboundary effects were limited to increased noise levels and other minor consequences of the positioning of the flight path. Yet it is appropriate to emphasize that the solutions to many problems involving prospective transboundary loss or injury entail changes in a boundary regime. Just as there is certainly no right to subject neighbouring territory to unlimited adverse transboundary effects, so there may be a duty to accept, on equitable terms, some encroachments upon the use or enjoyment of territory.

VIII. The Relationship with other Agreements

44. The ostensible contrast between rules made pursuant to the present topic, and those that "specify circumstances in which the occurrence of transboundary loss or injury arises from a wrongful act or omission", has been considered under the previous heading. It can be seen that the two kinds of rules are mutually supporting. If States have not settled for themselves the points at which harm and wrong intersect, and if no general rule of law has settled the matter for them, their usual and preferred course of action will be to develop a new context, in which the boundary line between what is permitted and what is forbidden can be drawn more or less to the satisfaction of all interests. The stimulus to agreement may be mutual advantage - in terms either of the particular subject-matter or of the more generalized benefits that flow from good neighbourliness; 138/ and there may be willingness to modify rights as a means of achieving a balance of interests. In the worst circumstance, when mutuality of interest and goodwill are lacking, the principles that underlie the

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137/ Agreement between the Federal Republic of Germany and the Republic of Austria concerning the effects on the territory of the Federal Republic of Germany of construction and operation of the Salsburg airport, foot-note 14 supra, Articles 1, 4 and 5.

138/ See, for example, some of the considerations which weighed with the parties to the Treaty of La Plata River and its maritime limits, foot-note 76 supra:

> "The Governments of the Republic of Argentina and the Republic of Uruguay, ... motivated by a common goal for the elimination of potential difficulties that may arise out of a legally undefined situation relevant to the exercise of equal rights in La Plata River, and out of the lack of any delimitation of a boundary between their respective maritime jurisdictions; ... have resolved to conclude a Treaty that will envisage a final solution to such problems, consistent with the special characteristics of the involved fluvial and maritime territories and the technical requirements for their over-all utilization and exploitation, all within a framework of respect for sovereignty and for the respective rights and interests of the two States."

present topic are still a spur to the taking of initiatives and the making of concessions in a search for agreement. Except as had been otherwise agreed, the onus must remain with the source State to show that it has taken every reasonable step to save others from exposure to adverse transboundary effects, and to provide for reparation should such effects occur.

45. There are two main ways in which rules and guidelines, developed in pursuance of the present topic, can help source States and affected States to reach agreements that strike a proper balance between freedom of activity and freedom from adverse transboundary effects. One way is by developing a pattern of procedures to facilitate fact-finding and negotiation - as indicated in sections 2, 3 and 4 of the schematic outline. The other way is by consolidating applicable principles and methods, as foreshadowed in sections 5, 6 and 7 of the schematic outline. In both of these respects, State practice can provide a revolving fund. Agreements made within the context of the present topic will furnish the parties to those agreements with more definite rules to regulate particular kinds of transboundary danger, or with more precise criteria for future decision-making in relation to such dangers. And, in so far as these new agreements reveal consistent patterns of State practice, they in turn will contribute to the development of customary law, and will augment the reservoir of applicable principles and factors. Therefore the proposed article 3, dealing with the relationship between the present draft articles and other international agreements, subordinates the present articles to all international agreements, present or future, to the extent that they deal with the same subject-matter. It remains to assess this rule of self-effacement, and its relationship to the proposed scope article.

46. The strength of the proposed articles lies, first, in their affirmation that a source State is never without a legal responsibility in relation to things done, within its territory or control, which do or may give rise to a physical consequence, affecting the use or enjoyment of areas beyond the limits of that State's jurisdiction. Secondly, subject to any customary law rules of prohibition - which lie outside the scope of the present articles - the normal method of discharging the source State's responsibility is by reaching agreement with affected States upon measures to prevent, or minimize and repair, the actual or prospective adverse transboundary effects. Failing the possibilities of such agreement, the source State remains accountable for the adequacy of its own efforts to take and implement measures which pay due regard to the interests of other States. Thirdly, these rules are supported by the whole range of treaty and claims practice examined in the Secretariat's extremely valuable analytical study. 139/ That practice also provides rich precedents on which the present draft articles would draw in elaborating the procedures for fact-finding and negotiation, and in assembling the principles and factors which are the building-blocks of treaty regimes. Finally, against the background of rules and precepts already mentioned, there is enormous strength in the theme of voluntarism. The compulsions to regulate dangers are provided by facts, not by law. If law seeks to assert a compulsion of its own, divorced from fact, the impetus to legal development is lost in empty disputation whether States act freely in their own domain, or are constrained by need for prior agreement.

47. A commitment to voluntarism cannot be half-hearted. The first requirement is to provide conditions that encourage communication between interested parties, leading them to pursue the promise of a fair solution, and not to fear entrapment.

139/ Document ST/LEG/15.

It is for this reason that the schematic outline attaches no dire legal consequence to a failure to engage in fact-finding, or to a refusal to establish a regime of prevention and reparation. The sanction is inherent in the circumstances of the source State: it must bear its own unliquidated liability, until there can be a fair distribution of costs and benefits, negotiated freely with affected States - who may themselves also be source States. It is for the same reason that the proposed scope article is widely drawn, speaking of "effects", not "adverse effects", and referring to "situations", as well as to "activities". An affected State is entitled to be the judge of its own interests, and its evaluation of effects upon use or enjoyment will not always coincide with that of the source State. Similarly, if these articles provide no formal sanction to compel the source State to provide information or to undertake negotiation, they must, as far as possible, place the affected State in an equally advantageous position: the affected State may take the initiative by requesting information, and by seeking an abatement, in relation to any actual or suspected source of transboundary damage, without a need to establish a connection with an activity. 140/ As the rules progress, their focus should narrow and deepen: "effects" will reduce to "adverse effects", and ultimately to "loss or injury"; and "activities and situations" will become "activities" alone. Moreover, the shades of qualification which are, and should be, absent from the draft scope article will begin to make their appearance in the following sections: for instance, in section 2, reasonable limits, supported by State practice, must be set for the duty to notify affected States of their actual or possible exposure to physical consequences with transboundary effects.

48. It would, finally, be a mistake to assume too readily that the proposed draft articles will be drained of content in relation to every activity and situation to which other international agreements apply. The multilateral treaties which contain the most copious indications of criteria and procedures for evaluating transboundary effects are also those which call for the development of international law - or which assert the absence of rules as to liability and, as it were, reserve a place for them. 141/ In bilateral negotiations, States make even more use of their right to tailor their agreements to immediate requirements, leaving it to the general law to fill in gaps. Articles developed in pursuance of the present topic cannot take the place of the more specific agreements which it is their main objective to promote. They can, however, offer a wealth of precedent to facilitate the conclusion of such agreements, and testimony that the duty to avoid and repair adverse transboundary effects is a principle of general application.

140/ See paras. 31 and 32 *supra*.

141/ See para. 34 and foot-note 99 *supra*. See also the Convention on long-range transboundary air pollution, foot-note 37 *supra*, Article 8 of which provides for the exchange of information among the Contracting Parties on, *inter alia*., "the extent of the damage which ... can be attributed to long-range transboundary air pollution" (Article 8(f)). A foot-note to the word "damage" records that: "The present Convention does not contain a rule on State liability as to damage."