

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

From the outset of its work on the topic of State responsibility, the International Law Commission agreed that that topic should deal only with the consequences of internationally wrongful acts, and that, in defining the general rule concerning the principle of responsibility for internationally wrongful acts, it was necessary to adopt a formula which did not prejudge the existence of responsibility for lawful acts. That conclusion met with broad acceptance in the discussion of the Sixth Committee of the General Assembly at its twenty-fifth session, in 1970.

At its twenty-fifth session, in 1973, when the Commission started to work on the first set of draft articles on State responsibility, it referred to the matter in more definite terms: "... if it is thought desirable—and views to this effect have already been expressed in the past both in the International Law Commission and in the Sixth Committee of the General Assembly—the International Law Commission can undertake the study of the so-called responsibility for risk after its study on responsibility for wrongful acts has been completed, or it can do so simultaneously but separately" (Yearbook of the International Law Commission, 1973, vol. II, document A/9010/Rev.1, para. 39).

The General Assembly, in resolution 3071 (XXVIII) of 30 November 1973, supported the position of the Commission and recommended that the Commission should undertake a study of the new topic "at an appropriate time". The Assembly, in resolutions 3315 (XXIX) of 14 December 1974 and 3495 (XXX) of 15 December 1975, repeated its recommendation that the Commission take up the topic "as soon as appropriate", replacing the latter phrase by the words "at the earliest possible time" in resolution 31/97 of 15 December 1976.

Pursuant to those recommendations of the General Assembly, the Commission agreed, at its twenty-ninth session, in 1977, to undertake the study on the topic at the earliest possible time, having regard, in particular, to the progress made on the draft articles on State responsibility for internationally wrongful acts.

The General Assembly, in resolution 32/151 of 19 December 1977, endorsed the conclusion of the Commission and invited it, at an appropriate time and in the light of progress made on the draft articles on State responsibility for internationally wrongful acts and on other topics in its current programme of work, to commence work on the topic of international liability for injurious consequences arising out of acts not prohibited by international law.

At its thirtieth session, in 1978, the Commission established a working group to consider, in a preliminary manner, the scope and nature of the topic. Having considered the recommendations made by the Working Group (A/CN.4/L.284 and Corr.1), the Commission appointed Robert Q. Quentin-Baxter as Special Rapporteur for the topic and invited him to prepare a preliminary report at an early juncture. It also requested the Secretariat to collect and survey materials on the topic on a continuous basis.

At its thirty-fifth session, in 1983, the Commission agreed that the Special Rapporteur should, with the help of the Secretariat, prepare a questionnaire to be addressed to selected international organizations with a view to ascertaining whether obligations which States owed to each other, and discharged, as members of international organizations might, to that extent, fulfil or replace some of the procedures indicated in the Special Rapporteur's schematic outline contained in his third report (A/CN.4/360 and Corr.1). In compliance with this decision, a questionnaire (A/CN.4/378) was prepared and

addressed to sixteen international organizations, selected on the basis of activities which might bear on the subject matter of the inquiry.

At the Commission's thirty-seventh session, in 1985, Julio Barbosa succeeded Robert Q. Quentin-Baxter as Special Rapporteur for the topic. In connection with its work on the topic, the Commission had before it the reports of the Special Rapporteurs (A/CN.4/334 and Add. 1. and Add. 1/Corr. 1 and Add 2; A/CN.4/346 and Add.1 and Add. 2; A/CN.4/360 and Corr.1; A/CN.4/373 and Corr. 1 and 2; A/CN.4/383 and Add.1; A/CN.4/394), information provided by Governments and international organizations (A/CN.4/378), as well as documents prepared by the Secretariat (A/CN.4/384).

At its fortieth session, in 1988, the Commission began the first reading of the draft articles on the topic which were contained in the Special Rapporteur's fourth report (A/CN.4/413 and Corr.1 & 2).

At its forty-fourth session, in 1992, the Commission established a Working Group to consider some of the general issues relating to the scope, the approach to be taken and the possible direction of the future work on the topic. On the basis of the recommendation of the Working Group (A/CN.4/L.470), the Commission decided, with regard to the scope of the topic, that, pending a final decision, the topic should be understood as comprising both issues of prevention and of remedial measures. Prevention should, however, be considered first; only after having completed its work on that first part of the topic would the Commission proceed to the question of remedial measures. Thus, the draft articles should deal first with preventive measures in respect of activities creating a risk of causing transboundary harm and secondly with articles on the remedial measures when such activities had caused transboundary harm. The Commission deferred, however, its decision on the question of the approach to be taken with regard to the nature of the articles or of the instrument to be drafted, until after the completion of the work on the topic. The Commission also deferred its decision on the title of the topic until after the completion of the draft articles. (Yearbook of the International Law Commission, 1992, vol. II (Part Two), paras. 344-348.)

At its forty-sixth and forty-seventh sessions, in 1994 and 1995, the Commission provisionally adopted draft articles 1 (Scope of the present articles), 2 (Use of terms), 11 (Prior authorisation), 12 (Risk assessment), 13 (Pre-existing activities), 14 (Measures to prevent or minimize the risk), 14 *bis* (Non-transference of risk), 15 (Notification and information), 16 (Exchange of information), 16 *bis* (Information to the public), 17 (National security and industrial secrets), 18 (Consultations on preventive measures), 19 (Rights of the State likely to be affected), 20 (Factors involved in an equitable balance of interests, (A) (Freedom of action and the limits thereto), (B) (Prevention), (C) (Liability and compensation) and (D) (Cooperation), with commentaries thereto (A/CN.4/L.494 and Corr. 1; A/CN.4/L.508).

At its forty-seventh session, in 1995, the Commission established a Working Group to identify activities within the scope of the topic. In the light of the Working Group's report (A/CN.4/L.510), the Commission agreed that it must, in its future work on the topic, have a clear view of the kind of activities to which the draft articles on the topic apply. It took the view that it could work on the basis that the types of activities listed in various conventions dealing with issues of transboundary harm came within the scope of the topic, but that eventually, more specificity might be required in the draft articles.

At its forty-eighth session, in 1996, the Commission established a Working Group to review the topic in all its aspects in the light of the reports of the Special Rapporteur (in addition to those previously mentioned: A/CN.4/394; A/CN.4/402 and Corr.1, Corr.2 (S only) to 4; A/CN.4/405 and Corr.1& 2; A/CN.4/423 and Corr.1 & 2; A/CN.4/428 & Corr.1-4 and Add.1; A/CN.4/437 and Corr.1; A/CN.4/443 and Corr.1 and 3; A/CN.4/450;

A/CN.4/459; A/CN.4/468; A/CN.4/475, Corr.1, Add. 1 and Add.1/Corr.1) and the discussions on the topic held over the years. In its report to the Commission, the Working Group submitted a single consolidated text of draft articles and commentaries thereto which were limited in terms of the scope of the topic and residual in character (A/CN.4/L.533 and Add.1). The Commission was unable to examine the draft articles at that session. It, however, decided to transmit them to the General Assembly and to Governments for comments. (Yearbook of the International Law Commission, 1996, vol. II (Part Two), para. 97-101.)

At its forty-ninth session, in 1997, the Commission, pursuant to General Assembly resolution 51/160 of 16 December 1996, established a Working Group to consider the question of how to proceed with the topic. The Working Group reviewed the work of the Commission on the topic since 1978 (A/CN.4/L.536). It noted that the scope and content of the topic remained unclear due to such factors as conceptual and theoretical difficulties, appropriateness of the title and the relation of the subject to the topic "State responsibility." It further noted that the Commission had dealt with two distinct, though related, issues under the topic: "prevention" and "international liability". The Working Group agreed that those issues henceforth should be dealt with separately. Noting that the work on prevention was already at an advanced stage, the Working Group believed that the Commission should proceed with its work on this aspect of the topic with a possible completion of the first reading in the near future. With respect to the second aspect, liability, the Working Group was of the view that, while retaining it, the Commission should await further comments from Governments before making any decision on the issue. (Yearbook of the International Law Commission, 1997, vol. II (Part Two), paras. 165-167.)

At the same session, the Commission considered and adopted the Working Group's report. On the basis of the recommendation of the Working Group, the Commission decided, *inter alia*, to proceed with its work on the topic, undertaking first prevention under the subtitle "Prevention of transboundary damage from hazardous activities".

The General Assembly, in resolution 52/156 of 15 December 1997, took note of the Commission's decision.

PREVENTION OF TRANSBOUNDARY DAMAGE FROM HAZARDOUS ACTIVITIES

At its forty-ninth session, in 1997, the Commission, after considering the report of the Working Group on the topic, decided to proceed first with the work under the subtitle "prevention of transboundary damage from hazardous activities". The Commission appointed Pemmaraju Sreenivasa Rao as Special Rapporteur for that part of the topic, and requested him to submit a report thereon.

The Commission proceeded with its work on this part of the topic, on the basis of the reports of the Special Rapporteur (A/CN.4/487 and Add.1; A/CN.4/501; and A/CN.4/510) and information provided by Governments (A/CN.4/509 and A/CN.4/516), from its fiftieth to fifty-third sessions, from 1998 to 2001, respectively.

At its fiftieth session, in 1998, the Commission decided to refer to the Drafting Committee draft articles 1 (a) (Activities to which the present articles apply) and 2 (Use of terms), recommended by the Working Group in 1996. The Commission also reestablished the Working Group to review draft articles 3 to 22 recommended in 1996 in light of the Commission's decision to focus first on the question of prevention. On the basis of the

Working Group's discussions, the Special Rapporteur proposed at the same session a revised text of the draft articles (A/CN.4/L.556), which the Commission referred to the Drafting Committee. The Commission considered the report of the Drafting Committee and adopted on first reading a set of seventeen draft articles on prevention of transboundary damage from hazardous activities. In accordance with articles 16 and 21 of the Statute, they were transmitted to Governments for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 1 January 2000.

The General Assembly, in resolution 53/102 of 8 December 1998, expressed its appreciation to the Commission for the completion of the first reading of the draft articles on the prevention part of the topic and invited Governments to submit comments and observations in writing on the draft articles. It welcomed the valuable work done by the International Law Commission on the topic "International liability for injurious consequences arising out of acts not prohibited by international law", and requested the Commission, while continuing its work on prevention, to examine other issues arising out of the topic, taking into account comments made by Governments, either in writing or in the Sixth Committee, and to submit its recommendations on the future work to be done on these issues to the Sixth Committee.

At its fifty-second session, in 2000, the Commission established a Working Group to examine the comments and observations made by States on the draft articles. On the basis of the discussion in the Working Group, the Special Rapporteur presented his third report (A/CN.4/510) containing a draft preamble and a revised set of draft articles on prevention, along with the recommendation that they be adopted as a framework convention. Furthermore, the third report addressed questions such as the scope of the topic, its relationship with liability, the relationship between an equitable balance of interests among States concerned and the duty of prevention, as well as duality of the regimes of liability and State responsibility. The Commission considered the report and decided to refer the draft preamble and draft articles contained therein to the Drafting Committee.

At its fifty-third session, in 2001, the Commission adopted and submitted to the General Assembly the final text of draft articles on prevention of transboundary harm from hazardous activities, consisting of a preamble and nineteen articles, with commentaries thereto (A/56/10). In transmitting the final draft to the General Assembly, the Commission recommended that the General Assembly elaborate a convention on the basis of the draft articles.

The General Assembly, by resolution 56/82 of 12 December 2001, expressed its appreciation for the valuable work done by the Commission on the issue of prevention on the topic of international liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary harm from hazardous activities). It requested the Commission, taking into consideration its decision at its forty-ninth session to proceed with its work on the topic of "International liability for injurious consequences arising out of acts not prohibited by international law", undertaking, as a first step, the issue of prevention, to resume, during its fifty-fourth session, its consideration of the liability aspects of the topic, bearing in mind the interrelationship between the prevention and liability aspects of the topic and taking into account developments in international law and comments by Governments.

On 4 December 2006, the General Assembly adopted resolution 61/36, in which it took note of the principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, presented by the Commission, the text of which was annexed to the resolution, and commended them to the attention of Governments. It also

included in the provisional agenda of its sixty-second session an item entitled “Consideration of prevention of transboundary harm from hazardous activities and allocation of loss in the case of such harm”.

On 7 December 2007, the General Assembly adopted resolution 62/68, in which it welcomed the conclusion of the work of the International Law Commission on prevention of transboundary harm from hazardous activities and allocation of loss in the case of such harm and its adoption of the respective draft articles and draft principles and commentaries on the subjects. It commended the articles on prevention of transboundary harm from hazardous activities, presented by the Commission, the text of which was annexed to the resolution, to the attention of Governments, without prejudice to any future action, as recommended by the Commission regarding the articles. It invited Governments to submit comments on any future action, in particular on the form of the respective articles and principles, bearing in mind the recommendations made by the Commission in that regard, including in relation to the elaboration of a convention on the basis of the draft articles, as well as on any practice in relation to the application of the articles and principles. It decided to include in the provisional agenda of its sixty-fifth session the item entitled “Consideration of prevention of transboundary harm from hazardous activities and allocation of loss in the case of such harm”.

The General Assembly, by resolution 65/28 of 6 December 2010, commended once again the articles on prevention of transboundary harm from hazardous activities to the attention of Governments. And it invited once again Governments to submit further comments on any future action. It requested the Secretary-General to submit a compilation of decisions of international courts, tribunals and other bodies referring to the articles and the principles. It decided to include in the provisional agenda of its sixty-eighth (2013) session the item entitled “Consideration of prevention of transboundary harm from hazardous activities and allocation of loss in the case of such harm”.