PRINCIPLES ON THE ALLOCATION OF LOSS IN THE CASE OF TRANSBOUNDARY HARM ARISING OUT OF HAZARDOUS ACTIVITIES

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Historical background

After completing its work on the prevention of transboundary harm in 2001, the International Law Commission (hereinafter "ILC" or "the Commission"), pursuant to a decision of the United Nations General Assembly[1] (hereinafter "UNGA"), reverted to the remainder of the work concerning remedial measures. It may be recalled in this connection that the 1996 Working Group of the Commission had concluded that, it could not envisage a regime of liability that would be generally considered suitable and acceptable to address issues of reparation and compensation arising or likely to arise from the operation of hazardous or dangerous activities. The commentary to article 5 of the draft articles adopted by that Working Group noted that: "[t]he principle of liability is without prejudice to the question of: (a) the entity that is liable and must make reparation; (b) the forms and the extent of reparation; (c) the harm that is subject to reparation; and (d) the basis of liability"[2]. In other words, reviewing the work that it had done for over a decade, the Working Group concluded that, prospects for achieving a widely acceptable international regime of liability lay in avoiding an exclusive or even primary focus on the State, even though its earlier work had proceeded on that basis for some good reasons[3].

Accordingly, a Working Group of the ILC, established in 2002, examined possible ways to deal with the subject matter left for consideration. The Working Group first noted that significant transboundary harm could occur under two different circumstances: first, harm associated with non-compliance with the duty of prevention and the duty of due diligence that it entails; and second, harm arising despite observance of such duties either because prevention measures adopted proved inadequate, or where the risk of harm was not foreseeable to provide for adequate measures to prevent the same[4]. It is well understood, thanks to the earlier discussion within the Commission, that non-compliance with the duty of due diligence would amount to a wrongful act giving rise to State responsibility[5]. The Working Group concluded accordingly that what was left for its consideration was transboundary harm that could occur despite compliance by the State with all its duties of prevention, that is, despite its best efforts, knowledge and means available to it.

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[1] See para. 3 of the General Assembly resolution 56/82 of 18 January 2002.
[2] The commentary to draft article 5, para. (6), see "Report of the International Law Commission, Forty-eighth session (6 May - 26 July 1996)", *Official Records of the General Assembly, Fifty-first session, Supplement No.10* (A/51/10), annex I. For the views expressed by some States on State liability, see "Second Report on international liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities), by Mr. Pemmaraju Sreenivasa Rao, Special Rapporteur" (A/CN.4/501), paras. 57-58, in *Yearbook of the International Law Commission 1999*, vol. II, Part One. For an analysis of different forms of liability including State liability covered under different treaty regimes, see *ibid.*, paras. 60-66.
[3] For factors that influenced the ILC to focus on State liability, see "First report on the legal regime for allocation of loss in case of transboundary harm arising out of hazardous activities, by Mr. Pemmaraju Sreenivasa Rao, Special Rapporteur" (A/CN.4/531), para. 16, in *Yearbook of the International Law Commission 2003*, vol. II, Part One.
[4] For an account of the report of the Working Group, see "Report of the International Law Commission, Fifty-fourth session (29 April-7 June and 22 July-16 August 2002)", *Official Records of the General Assembly, Fifty-seventh session, Supplement No.10* (A/57/10), paras. 442-457.
[5] The separation of liability of States for harmful consequences of lawful—in the sense of not prohibited—activities from State responsibility for wrongful activities was criticized as flawed, misleading and confusing. See "Third report on international liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities), by Mr. Pemmaraju Sreenivasa Rao, Special Rapporteur" (A/CN.4/510), paras. 27-30, in *Yearbook of the International Law Commission 2000*, vol. II, Part One.

As regards the scope of the regime governing international liability, it recommended that it should be the same as the one that was agreed upon in the case of the draft articles on prevention, with respect to (a) activities to be covered, (b) threshold governing damage, and (c) loss to persons, property (including elements of State patrimony and national heritage), and the environment within the national jurisdiction[6].

As a basis for the work ahead, the Working Group also suggested certain policy guidelines: first, it reiterated the basic policy that underlined the topic from its inception that "the innocent victim[7] should not, in principle, be left to bear the loss"; second, "any regime for allocation of loss must ensure that there are effective incentives for all involved in a hazardous activity to follow best practice in prevention and response"; and third, such a regime should focus on operators, insurance companies, and pools of industry funds, in addition to States, which could "play an important role in devising and participating in loss-sharing schemes"[8].

While generally endorsing the guidelines suggested by the 2002 Working Group, the Commission understood that "full and complete compensation might not be possible in every case"[9]. Factors militating against that possibility, as identified by the Commission, were: "problems with the definition of 'damage', difficulties of proof of loss, problems of the applicable law, limitations on the operator's liability as well as limitations within which contributory and supplementary funding mechanisms operated"[10].

Reliance on the concept of "allocation of loss" replacing terms like "liability for harm or damage" was criticized by some members, preferring the use of more familiar terms like "damage" or "compensation" or "allocation of damages"[11]. While similar views were also expressed by some delegations to the UNGA Sixth Committee during the debate on the report of the ILC, others welcomed the new emphasis on "allocation of loss" primarily to the operator and linking to the supplementary contributions from others, including the State, noting that it "has made it possible to overcome the conceptual difficulties in delineating the contours of the topic, including separating it from State responsibility"[12]. Others considered that "given that the objective of the exercise is to address the loss to innocent victims, the difference between the two concepts—liability and allocation of loss—was … not so very important"[13].

In pursuance of this new orientation, as noted above, the Commission reviewed several relevant sectoral and regional treaties and other instruments, some of which were well established and others not yet in force but instructive as models for allocation of loss in case of transboundary harm[14].

The Special Rapporteur's first report in 2003 sufficiently brought home the point that States differed in their preferences and practice on the models they adopted for the allocation of loss. The Second report in 2004 noted the different elements of civil liability and private international law that were involved in the many choices States made: the definition of compensable damage, the designation of entities for the purpose of attaching the primary and secondary or subsidiary liability for compensation, the selection of standard of liability, the choice of exceptions to liability, the construction of the causal connection and the associated issue of who should discharge what standard of burden of proof, the appropriate national judicial forums for submission and settlement of claims of compensation and other issues of private law on choice of applicable law and the recognition and enforcement of foreign awards[15]. As

[6] See "Report of the International Law Commission" (A/57/10, see footnote 4), para. 448.
[7] The term "innocent victim" was understood to refer to persons who are not responsible for transboundary harm. see "Report of the International Law Commission, Fifty-fifth session (5 May-6 June and 7 July-8 August 2003)", *Official Records of the General Assembly, Fifty-eighth session, Supplement No.10* (A/58/10), fn. 180.
[8] See "Report of the International Law Commission" (A/57/10, see footnote 4), para. 450.
[9] "Report of the International Law Commission" (A/58/10, see footnote 7), para. 171.
[10] *Ibid.*
[11] See *ibid*., para. 187.
[12] "Second report on the legal regime for the allocation of loss in case of transboundary harm arising out of hazardous activities, by Mr. Pemmaraju Sreenivasa Rao, Special Rapporteur" (A/CN.4/540), para. 4, in *Yearbook of the International Law Commission* 2004, vol. II, Part One. For suggestions made on loss-sharing schemes, see *ibid*., paras. 25-29.
[13] *Ibid.*
[14] See "First report by Mr. Pemmaraju Sreenivasa Rao, Special Rapporteur" (A/CN.4/531, see footnote 3), paras. 47–113.
[15] See "Second report by Mr. Pemmaraju Sreenivasa Rao, Special Rapporteur" (A/CN.4/540, see footnote 12), para. 36(10).

such it was pointed out that any exercise to develop a full convention or even a protocol on liability would involve the harmonization of these elements, being a task beyond the scope of the present exercise[16].

Based on the views expressed first by members of the Commission and later by States during the debate on the report of the Commission at the UNGA Sixth Committee in 2003, the Special Rapporteur drew the following conclusions: i). In developing any legal regime, emphasis should be placed on the need for States to have sufficient flexibility to develop national or regional schemes of liability to address their needs and those of victims of harm. ii). States had an obligation to ensure that some arrangement existed in national laws to guarantee the equitable allocation of loss, so that, to the extent feasible, the innocent victim should not be left to bear loss unsupported. iii). A model of allocation of loss that would be general and residual in character is preferred based on State practice which relied on civil liability regimes that were both sectoral and sensitive to the nature of the activity involved. iv). The legal regime to be considered by the Commission should be without prejudice to State responsibility under international law and civil liability under national law or rules of private international law. v). The scope of the topic should be the same as that governed by the draft articles on prevention. vi). The definition of "damage" should include any loss to persons and property, including elements of State patrimony and natural heritage as well as the environment within national jurisdiction, vii) excluding damage to the global commons. viii). The person most in command or control of the activity should bear the primary duty of redressing any harm caused. ix). The task of harmonization of principles of civil liability or private international law was best left to appropriate national or competent international forums as it was outside the scope of the mandate of the ILC. [17]

Approving the conclusions noted thus, the Commission finalized in 2004 a set of draft guidelines on the allocation of loss. These were finalized in 2006 based on the comments received from States in 2005 which were reviewed in the third report of the Special Rapporteur. The Commission forwarded a set of eight draft principles along with commentaries to the UNGA to endorse the same and commend them to "States to take national and international action to implement them"[18].

Analysis of the 2006 draft principles

The main objective of the 2006 draft principles governing the allocation of loss in case of transboundary harm[19](hereinafter "the draft principles") is to contribute to the progressive development of law in this field, by providing "appropriate guidance to States in respect of hazardous activities not covered by specific agreements and by indicating the matters that should be dealt with in such arrangements"[20]. The preamble sets out the general context that governed the development of the draft principles and the basic policies and understanding that shaped its content: concern for the protection of the environment, liability to be distinguished from State responsibility, the duty of prevention and remedial measures in case harm occurs despite compliance with due diligence obligations.

Principle 1 deals with the scope of the principles covering significant transboundary damage arising from activities not prohibited by international law. Determination of "damage" as significant involves, as in the case of 2001 draft articles on prevention of transboundary harm from hazardous activities[21], both factual and objective criteria, as well as value determination that would evolve along with growing scientific knowledge and increasing demands on good governance. Most importantly, the scope of the draft principles is confined to dealing with "physical consequences" of damage relatable to an activity through a chain of causation. Some examples of activities covered

[16] See *ibid*., para. 36(10).
[17] See *ibid*., paras. 5, 6, 10, 11, 13, 14, and 36(8).
[18] "Report of the International Law Commission, Fifty-eighth session (1 May-9 June and 3 July-11 August 2006)", *Official Records of the General Assembly*, S*ixty-First session, Supplement No. 10* (A/61/10), para. 63.
[19] The text of the draft principles, see *ibid*., para. 66.
[20] *Ibid*., para. 67, general commentary to the draft principles, subpara. (5).
[21] The text of the draft articles, see "Report of the International Law Commission, Fifty-third session (23 April–1 June and 2 July–10 August 2001)", *Official Records of the General Assembly*, S*ixty-First session, Supplement No. 10* (A/56/10 + Corr.1), para. 97.

by existing international liability regimes were noted in the commentary[22]. The threshold is also designed to discourage "frivolous and vexatious" claims[23].

The definition of "damage" noted in Principle 2 includes, in addition to the loss of life, personal injury, loss or damage to property, in sub-paragraphs. (iii)-(v), damage to the environment *per se*: "loss or damage by impairment of the environment"; "the costs of reasonable measures of reinstatement of the property or environment, including natural resources"; and "the costs of reasonable response measures"[24]. The different elements noted in this connection are drawn from trends in decision dealing with compensation for damage affecting the environment. They could also pave the way for further developments of the law for the protection of the environment *per se*[25].

Damage by impairment of the environment would allow claims concerning the loss of income directly deriving from an economic interest in any use of the environment, incurred because of modification, alteration, destruction, or loss of the environment[26]. The standing to sue in such cases is open only to public authorities in the name of the State, which may be considered to have held such property in the trust. Public interest groups also have the standing to sue and pursue claims in this regard as the environment is an asset of common concern[27].

It may be noted that the references to "costs of reasonable measures of reinstatement" in subparagraph (iv) and reasonable costs of clean-up associated with the "costs of reasonable response measures" in subparagraph (v) are relatively recent concepts. The reference to "reasonable" is intended to indicate that the costs of such measures should not be excessively disproportionate to the basic objective of the reinstatement, that is, to re-establish the situation ante that existed or would have existed but for the harm at issue. It is pointed out that the aim of these measures should be "not to restore or return the environment to its original state but to enable it to maintain its permanent functions"; and where that is not possible, "it is reasonable to introduce the equivalent of those components into the environment"[28]. Recent trends allow compensation for the loss of "non-use value" of the environment[29]. The Commission has opted to include in the definition of "environment" both the natural resources, such as air, soil, water, flora and fauna, and their interaction but also encompassing non-service values, such as aesthetic aspects of the landscape. This includes the enjoyment of nature because of its natural beauty and recreational attributes, and associated opportunities. This broader approach is justified, according to the Commission, because of the general and residual character of the draft principles[30].

Paragraph (*g*) of Principle 2 defines "operator". The channeling of liability onto one single entity, whether owner or operator, is the hallmark of strict liability regimes. "Operator" is defined in functional terms, based on "a factual determination as to who has use, control and direction of the object at the relevant time"[31]. The commentary however makes it clear that "the term 'operator' would not include employees who work or are in control of the activity at the relevant time". The term "control" denotes "power or authority to manage, direct, regulate, administer or oversee". The expression "control" thus could cover "the person to whom decisive power over the technical functioning of an activity has been delegated, including the holder of a permit or authorization for such an activity or the person registering or notifying such an activity"[32].

Principle 3 identifies the purposes served by the present draft principles: prompt and adequate compensation to the victim of transboundary damage; and to preserve and protect the environment and its restoration or

[22] See "Report of the International Law Commission" (A/61/10, see footnote 18), fn. 312.
[23] See *ibid*., para. 67, the commentary to draft principle 2, subpara. (1).
[24] *Ibid*., para. 66, draft principle 2(a).
[25] See *ibid*., para. 67, the commentary to draft principle 2, subpara. (11).
[26] See *ibid.*, para. 67, the commentary to draft principle 2, subpara. (13).
[27] See *ibid*., para. 67, the commentary to draft principle 2, subpara. (14).
[28] *Ibid*., para. 67, the commentary to draft principle 2, subpara. (15).
[29] See *ibid*., para. 67, the commentary to draft principle 2, subpara. (18).
[30] See *ibid.*, para. 67, the commentary to draft principle 2, subpara. (20).
[31] *Ibid*., para. 67, the commentary to draft principle 2, subpara. (32).
[32] *Ibid*., para. 67, the commentary to draft principle 2, subpara. (33).

reinstatement. These two aspects are linked to Principle 4 (prompt and adequate compensation) and Principle 5 (response measures).

The Trail Smelter arbitration[33], the Corfu Channel case[34], Principle 22 of the Stockholm Declaration[35], and Principle 13 of the Rio Declaration[36] underpin the aspirations and preferences of the international community in advancing the principle of prompt and adequate compensation. In addition to serving the stated purposes, the draft principles directly or indirectly serve several other objectives, such as principles of precaution and "polluter pays" principles or "cost internalization"[37], resolving disputes among States in a peaceful manner, promoting the viability of economic activities that are important for the welfare of States and peoples, and providing compensation in a manner that is predictable, equitable, expeditious, and cost-effective.

Commentary to Principle 3 notes some general principles concerning payment of compensation, evolved over a period of time, and endorsed by the International Court of Justice (hereinafter "ICJ" or "the Court") and other international tribunals. The basic principle was noted by the Permanent Court of International Justice in the Chorzow Factory case: "that reparation must, so far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed"[38]. Where restitution in kind is not possible, compensation must be paid to cover the loss. Two basic principles guided the award of compensation. Damages awarded should not have a punitive function. The victim can only be compensated for the loss suffered and cannot be rewarded with financial gain for the harm caused to him[39].

Generally, as noted above, principle 2 makes it clear that claims concerning "costs incurred by way of reasonable preventive, restoration or reinstatement measures" are allowed. In addition, compensation would be available in respect of "financially assessable damage, that is quantifiable in monetary terms". Overall, "the particular circumstances of the case, the content of the obligation breached, the assessment of the reasonableness of measures undertaken by parties in respect of the damage caused, and finally, considerations of equity and mutual accommodation" would determine what is compensable and how much would it be[40].

Principle 4 calls on the State of origin of the hazardous activity that causes transboundary harm to take all necessary measures to ensure prompt and adequate compensation to victims (para. 1). These measures include the imposition of liability without proof of fault on the part of the operator, or in appropriate cases, other person or entity (para. 2); requiring the operator to maintain financial security such as insurance, bonds, or other financial guarantees to cover claims for compensation (para. 3)[41]; and where appropriate, the requirement for the establishment of industry-wide funds at the national level (para. 4). Principle 4 also emphasized that in the event the measures thus noted proved

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[33] Trail smelter case (United States, Canada), see United Nations, *Reports of International Arbitral Awards*, vol. III, pp. 1905-1982.
[34] International Court of Justice, *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania)*, see the website of the Court: https://www.icj-cij.org/en/case/1.
[35] Declaration of the United Nations Conference on the Human Environment, in *Report of the United Nations Conference on the Human Environment, 5-16 June 1972* (A/CONF.48/14/Rev.1).
[36] Rio Declaration on Environment and Development, in *Report of the United Nations Conference on Environment and Development, 3-14 June 1992* (A/CONF.151/26 (Vol. I)).
[37] On the limitations of the "polluter pays" principle in practice, see the commentary to draft principle 3, subpara. (14), "Report of the International Law Commission" (A/61/10, see footnote 18), para. 67.
[38] Permanent Court of International Justice, *Factory at Chorzów, Merits, Judgment No. 13*, September 13, 1928, P.C.I.J., Series A, No. 17, p. 47. Cited at the commentary to draft principle 3, subpara. (16), "Report of the International Law Commission" (A/61/10, see footnote 18), para. 67.
[39] See the commentary to draft principle 3, subparas. (17)-(18), "Report of the International Law Commission" (A/61/10, see footnote 18), para. 67. See also *ibid*., commentary to draft principle 2, subpara. (2), and the commentary to draft principle 3, subpara. (8). A recent case brought to the ICJ in this regard is *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, see the website of the ICJ: https://www.icj-cij.org/en/case/116.
[40] See the commentary to draft principle 3, subpara. (18), "Report of the International Law Commission" (A/61/10, see footnote 18), para. 67.
[41] For an analysis of issues concerning insurance coverage, see the commentary to draft principle 4, subparas. (28)-(34), "Report of the International Law Commission" (A/61/10, see footnote 18), para. 67.

insufficient to provide adequate compensation, "the State of origin should also ensure that the additional financial resources are made available" (para. 5)[42].

Some important observations arising out of Principle 4 are: the draft principles are organized on the assumption "that the State of origin would have performed fully all the obligations concerning prevention" of transboundary harm[43]. The notion of "promptness" refers to expeditious access to justice and procedures aimed at eliminating costly and protracted litigation[44]. Compensation should be adequate but not necessarily full or sufficient, a consequence that flows directly from the imposition of strict but limited liability on the operator[45]. The imposition of strict liability on the operator is aimed at helping the victim to secure prompt and adequate compensation. It enables the claimant to seek compensation without having to "shoulder a heavy burden of proof of fault or negligence in respect of highly complex technological activities whose risks and operation the concerned industry closely guards as a secret"[46]. Second, it might help, at the international level, the application of a less rigorous standard of proof of proximity or causal connection of the damage to the source of the activity[47].

Principle 5 deals with response measures after the occurrence of transboundary damage has become imminent or real. The duties of notification, consultation, and cooperation involved are similar to the duties the State of origin owes in respect of the prevention of transboundary harm. The difference lies in the fact that these duties are that much more urgent and compelling, first to prevent the occurrence of transboundary damage or mitigate its effects where it is only imminent, and second, to reduce the range of its effects in case it is real.

The duty of prompt notification (para. a) imposed on the State of origin is a duty under general international law and is endorsed as such by the ICJ in the Corfu Channel case and the Nicaragua case. The Convention on the Early Notification of a Nuclear Accident, adopted by the International Atomic Energy Agency in 1986, confirmed the importance of this duty under customary law. The notification addressed to all States affected or likely to be affected should contain all available and practical information about the nature of the damage and remedial action that could and should be taken.

The State of origin, with the appropriate involvement of the operator, should in addition take all necessary response measures based on the "best available scientific data and technology" (para. b). The duty to take response measures involves the duty on the part of the State of origin to put in place necessary contingency preparedness and to employ the best means at its disposal to prevent or, at any rate, mitigate the transboundary damage, once the emergency arises. It may also seek, where necessary, possible assistance from other States and competent international organizations.

The requirement concerning response measures is closely related to the principle of a precautionary approach. Accordingly, the State of origin is expected to perform this duty "keeping in view all social and economic costs"[48]. Further, the duty imposed on the State of origin in this respect is secondary and residuary to the responsibility of the operator, which is primary. Accordingly, the State would have the option of securing reimbursement of costs of reasonable response measures from the operator[49].

The duties of consultation and cooperation noted as part of Principle 5 (c and d) entail duties on the part of the State of origin and States likely to be affected. Once notified, the States likely to be affected are under a duty to take all appropriate and reasonable measures to mitigate the damage to which they are exposed. Such a response action

[42] On the question of ensuring supplementary funds, referred to in paragraphs 4 and 5 of draft principle 4, see *ibid*., para. 67, the commentary to draft principle 4, subparas. (35)-(39).
[43] See *ibid*., para. 67, the commentary to draft principle 4, subpara. (2).
[44] See *ibid*., para. 67, the commentary to draft principle 4, subpara. (7).
[45] See *ibid*., para. 67, the commentary to draft principle 4, subparas. (8), (19)-(27).
[46] *Ibid*., para. 67, the commentary to draft principle 4, subpara. (13).
[47] See *ibid.*, para. 67, the commentary to draft principle 4, subpara. (16).
[48] *Ibid.*, para. 67, the commentary to draft principle 5, subpara. (6).
[49] See *ibid*., para. 67, the commentary to draft principle 5, subparas. (6) and (8).

is essential not only in its public interest but also "to enable the appropriate authorities and courts to treat the subsequent claims for compensation and reimbursement of costs incurred for response measures taken as reasonable"[50].

Principle 5 (e) deals with cooperation sought by the State concerned from or offered by the competent international organizations in undertaking necessary response measures. These are expected to be organized on mutually agreed terms and conditions. While different factors govern these arrangements, it is important to note that any such arrangements "should not be based on purely commercial terms and be consistent with the elementary considerations of humanity" with the primary objective of "rendering humanitarian assistance to the victims in distress"[51].

Principle 6 deals with procedural minimum standards. Principle 4 along with Principle 6 constitute the substantive and procedural principles governing the basic purpose of the draft principles of ensuring prompt and adequate compensation to victims in respect of transboundary damage suffered on account of hazardous activities. Principle 6 provides for the establishment of jurisdiction to deal with claims concerning compensation, equal and non-discriminatory access to justice irrespective of the nationality or place of residence of the victims, availability of effective legal remedies, recognition, and enforcement of foreign judicial and arbitral decisions, recourse to international procedures for the settlement of compensation claims, and access to information.

The commentary to Principle 6 notes in para. 1 that access to administrative, quasi-judicial, and judicial bodies at the national level could be provided by States, as already mentioned in the commentary to Principle 4, in accordance with due process, or by negotiation between States concerned. Para. 2 emphasizes that the State of origin should ensure no less prompt, adequate and effective remedies to victims than those available for its nationals for similar damage. This might require, incidentally attention to matters both of procedure[52] and substance. The latter involves more difficult issues relating to incorporating the minimum substantive standards provided for in international instruments dealing with human rights and other matters such as choice of law or choice of forum[53]. Paragraph 3 refers in this connection to the need for harmonization of laws and agreement among the States concerned.

Principle 6, paragraph 4 focuses on "international claims settlement procedures" based on the practice which differs from case to case[54]: payments made *ex gratia* or settled through negotiations, contributions made by the State of origin to the States affected to disburse compensation through national claims procedure established by the latter, lump sum compensation paid either as a result of a trial or out-of-court settlement, or payment of some reasonable compensation paid on a provisional basis, pending settlement through more formal procedures. The work of the Iran-US Claims Tribunal[55] and the UN Compensation Commission[56] offer useful models of their own.

Given the fact that some, if not most, of the compensation claim procedures were subject to remedies sought in civil law "requiring victims to pursue their claims in foreign national and judicial and other forums", the overall

[50] *Ibid*., para. 67, the commentary to draft principle 5, subpara. (10). In the Gabcikova-Nagymoros Project case, the ICJ endorsed the principle that "an injured State which has failed to take necessary measures to limit the damage sustained would not be entitled to claim compensation for that damage which could have been avoided". See *ibid*., fn. 460.
[51] *Ibid*., para. 67, the commentary to draft principle 5, subpara. (11).
[52] These matters may relate to waiving security costs required of foreign claimants, providing legal aid and admissibility of claims of damage relating to the loss of property or assets situated outside the territorial jurisdiction. See *ibid*., fn. 468.
[53] On issues concerning choice of forum, see *ibid*., fns. 471-472. On issues concerning the choice of law, see *ibid*. fn. 475.
[54] For different methods by which compensation was paid to victims of nuclear or other accidents affecting persons, property or environment, see *ibid*., fns. 475, 476 and 477.
[55] See H. Mafi, A Review of the Iran-United States Claims Tribunal, *Revista Misión Jurídica*, vol. 13, no. 19, 2020, pp. 98 -119. See also R. Khan, *The Iran-United States Claims Tribunal, Controversies, Cases and Contribution*, Dordrecht: Springer Netherlands, 1990.
[56] See "Report of the International Law Commission" (A/61/10, see footnote 18), fn. 479. See also T. J. Feighery, C. S. Gibson, T. M. Raja (eds.), *Gulf War Reparations and The UN Compensation: Designing Compensation After Conflict*, Oxford: Oxford University Press, 2011; and C. R. Pyane and P. H. Sand, *Gulf War Reparations and the UN Compensation Commission: Environmental Liability*, Oxford: Oxford University Press, 2011.

impression gathered by the Commission was that it leaves much to be desired. In this context, it is recommended that "both States and concerned entities representing the victims must get involved to settle claims out of court or the victims must be given equal or non-discriminatory right of access to civil law remedies"[57].

Paragraph 5 gains importance, in the light of the above, as it provides for access to information, "without which the principle of equal access noted in paragraphs 1, 2, and 3 for victims of transboundary damage cannot be realized expeditiously or without much expense"[58]. It is an evolving principle and one that is included in national law and some international instruments. Ensuring the implementation of this principle in all its varied dimensions as a "legally enforceable right is taking its time"[59].

Principle 6 (5) is designed to give necessary room to States to deny access to information in appropriate cases, for example, where consideration of national security requires it.

Principle 7 reiterated the general and residual character of the draft principles. It urges States to adopt bilateral, regional, or international agreements on particular categories of hazardous activities. In that sense, it emphasizes the basic philosophy or policy originally articulated by Quentin-Baxter in his schematic outline and reiterated by Barbosa during his long tenure as the Special Rapporteur, that is, the development of international liability regimes based on negotiations between and among States based on the shared expectations and selecting from among the boundless choices available to them.

Principle 8 makes an otherwise obvious point encouraging States to adopt necessary legislative, regulatory, and administrative measures to implement the draft principles. In so doing, States are under a duty to ensure that such measures do not amount to any discrimination on any ground prohibited by international law, including those based on nationality, domicile, or residence. Other grounds equally prohibited, as noted by the commentary, are "race, gender, religion or belief"[60].

The ILC thus was able to conclude its work on international liability, originally inscribed on its agenda as an item in 1978, in 2006, that is, nearly after 28 years. The main focus of the work during this period was protecting the environment and identifying sources of funds for restoring the environment as well as ensuring suitable compensation for innocent victims of transboundary harm. The liability regime, drafted in the form of principles, in contradistinction to the draft articles on prevention, as conceived very early in the exercise, is both general and residuary in character. It encourages States to conclude bilateral, regional and international regimes regulating hazardous activities, considering their special characteristics and types of risks they embody, based on their shared expectations and selecting from among the boundless choices available to them. The principles thus identified could serve as a useful guide in dealing with compensation claims even in contexts other than strict transboundary contexts.

This Introductory Note was finalized in February 2023.

Related Materials

A. Legal Instruments

Declaration of the United Nations Conference on the Human Environment, in *Report of the United Nations Conference on the Human Environment, 5-16 June 1972* (A/CONF.48/14/Rev.1).

[57] The commentary to draft principle 6, subpara. (12), "Report of the International Law Commission" (A/61/10, see footnote 18), para. 67.
[58] *Ibid*., para. 67, the commentary to draft principle 6, subpara. (13).
[59] *Ibid*., para. 67, the commentary to draft principle 6, subpara. (14).
[60] *Ibid*., para. 67, the commentary to draft principle 8, subpara. (2).

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