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 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.

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.

INTERNATIONAL LIABILITY IN CASE OF LOSS FROM TRANSBOUNDARY HARM ARISING OUT OF HAZARDOUS ACTIVITIES

The General Assembly, in resolution 53/102 of 8 December 1998, 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.

In his second report (A/CN.4/501), Special Rapporteur Rao, dealt, apart from the issues related to the first part of the topic (prevention), with the treatment of the concept of international liability in the Commission since the topic was placed on its agenda; negotiations on liability issues in other international fora; and options with respect to the future course of action on the question of liability. The Commission considered the report at its fifty-first session, in 1999, and decided to defer the consideration of the question of international liability, pending completion of the second reading of the draft articles on the prevention of transboundary damage from hazardous activities.
The General Assembly, in resolutions 54/111 of 9 December 1999 and 55/152 of 12 December 2000, requested the Commission to resume the consideration of the liability aspects of the topic as soon as the second reading of the draft articles on prevention was finalized. The General Assembly, by resolution 56/82 of 12 December 2001, requested the Commission to resume, during its fifty-fourth session, its consideration of the liability aspects of the topic, bearing in mind the interrelationship between prevention and liability, and taking into account the developments in international law and comments by Governments.

At its fifty-fourth session, in 2002, the Commission decided to include the topic “International liability for injurious consequences arising out of acts not prohibited by international law” on its programme of work and to begin consideration of the second part of the topic “International liability in case of loss from transboundary harm arising out of hazardous activities”. The Commission established a Working Group, chaired by Pemmaraju Sreenivasa Rao, to consider the conceptual outline of the topic. The Working Group recommended continuing to limit the scope of the remainder of the topic concerning liability to the same activities that were covered under the first part of the topic concerning prevention, which would effectively link the work on the two parts of the topic. The Working Group also set out the following initial understandings on the topic: (a) a threshold would have to be determined to trigger the application of the regime on allocation of loss caused; and (b) the loss to be covered should include loss to (i) persons, (ii) property, including elements of State patrimony and national heritage, and (iii) environment within national jurisdiction. The Working Group also considered the approach to be taken regarding the role of the operator and the State in the allocation of loss. The Commission adopted the report of the Working Group, as amended by the Commission. The Commission also appointed Mr. Rao as Special Rapporteur for the topic (A/57/10).

The General Assembly, in resolution 57/21 of 19 November 2002, took note of the Commission’s decision to proceed with its work on the topic, as requested by the Assembly in resolution 56/82.

At its fifty-fifth session, in 2003, the Commission had before it the Special Rapporteur’s first report (A/CN.4/531) on the legal regime for allocation of loss in case of transboundary harm arising out of hazardous activities. The report reviewed the work of the Commission in previous years, analysed the liability regimes of various instruments and offered conclusions for the consideration of the Commission. After considering the report, the Commission decided to establish a Working Group, under the chairmanship of the Special Rapporteur, to assist the Special Rapporteur in considering the future orientation of the topic in the light of his report and the debate in the Commission (A/58/10).

At its fifty-sixth session, in 2004, the Commission had before it the second report (A/CN.4/540) of the Special Rapporteur on the legal regime for the allocation of loss in case of transboundary harm arising out of hazardous activities. The Commission also had the Survey of Liability Regimes relevant to the topic, updated by the Secretariat (A/CN.4/543). The Commission established a working group under the chairmanship of Mr. Pemmaraju Sreenivasa Rao to examine the proposals submitted by the Special Rapporteur, taking into account the debate in the Commission, with view to recommending draft principles ripe for referral to the Drafting Committee, while also continuing discussions on other issues, including the form that work on the topic should take. In its work the Working Group reviewed and revised the 12 draft principles submitted by the Special Rapporteur and it recommended that the 8 draft principles contained in its report (A/CN.4/L.661) be referred to the Drafting Committee. The Commission received the oral report of the Chairman of the Working Group and decided to refer the eight draft principles...
to the Drafting Committee. The Commission also requested the Drafting Committee to prepare a text of a preamble. The Commission subsequently considered the report of the Drafting Committee (A/CN.4/L.662) and adopted on first reading a set of eight draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities (A/59/10). The Commission also decided, in accordance with articles 16 and 21 of its Statute to transmit the draft principles through the Secretary-General, to Governments for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 1 January 2006 (A/59/10).

The General Assembly, in resolution 59/41 of 2 December 2004, expressed its appreciation to the International Law Commission for the completion of the first reading of the draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, and drew the attention of Governments to the importance for the International Law Commission of having their views on the draft principles.

The General Assembly, in resolution 61/34 of 4 December 2006, expressed its appreciation to the International Law Commission for the completion of the second reading of the draft principles.

At its fifty-eighth session, the Commission adopted on second reading the text of the preamble and a set of eight draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, with commentaries. The Commission recalled that at its forty-ninth session (1997) it decided to consider the topic in two parts; at its fifty-third session (2001) it completed the first part and recommended to the General Assembly the elaboration of a convention on the basis of the draft articles on Prevention of transboundary harm from hazardous activities. The Commission’s recommendation was based on its view that, taking into account the existing State practice, the first part of the topic lent itself to codification and progressive development through a convention. The adoption by the Commission of the draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities completed the second part, thus concluding work on the topic “International liability for injurious consequences arising out of acts not prohibited by international law”. In accordance with article 23 of its Statute the Commission recommended, for the second part, that the Assembly endorse the draft principles by a resolution and urge States to take national and international action to implement them.

On 4 December 2006, the General Assembly adopted resolution 61/36, in which it decided to include 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, in resolution 65/28 of 10 December 2010, commended once again the principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, the text of which was annexed to General Assembly resolution 61/36, to the attention of Governments, without prejudice to any future action, as recommended by the Commission regarding the principles. It invited Governments to submit further 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 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 included 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”. 