

Chapter VII

INTERNATIONAL LIABILITY FOR INJURIOUS CONSEQUENCES ARISING OUT OF ACTS NOT PROHIBITED BY INTERNATIONAL LAW (INTERNATIONAL LIABILITY IN CASE OF LOSS FROM TRANSBOUNDARY HARM ARISING OUT OF HAZARDOUS ACTIVITIES)

A. Introduction

430. The Commission, at its thirtieth session, in 1978, included the topic “International liability for injurious consequences arising out of acts not prohibited by international law” in its programme of work and appointed Robert Q. Quentin-Baxter Special Rapporteur.³⁸⁴

431. The Commission, from its thirty-second session (1980) to its thirty-sixth session (1984), received and considered five reports from the Special Rapporteur.³⁸⁵ The reports sought to develop a conceptual basis and schematic outline for the topic and contained proposals for five draft articles. The schematic outline was set out in the Special Rapporteur’s third report to the thirty-fourth session of the Commission in 1982. The five draft articles were proposed in the Special Rapporteur’s fifth report to the thirty-sixth session of the Commission. They were considered by the Commission, but no decision was taken to refer them to the Drafting Committee.

432. The Commission, at its thirty-sixth session, also had before it the following materials: the replies to a questionnaire addressed in 1983 by the Legal Counsel of the United Nations to 16 selected international organizations to ascertain whether, among other matters, obligations which States owe to each other and discharge as members of international organizations may, to that extent, fulfil or replace some of the procedures referred to in the schematic outline,³⁸⁶ and a study prepared by the secretariat entitled “Survey of State practice relevant to international liability for injurious consequences arising out of acts not prohibited by international law”.³⁸⁷

³⁸⁴ At that session the Commission established a working group to consider, in a preliminary manner, the scope and nature of the topic. For the report of the Working Group, see *Yearbook ... 1978*, vol. II (Part Two), pp. 150–152.

³⁸⁵ For the five reports of the Special Rapporteur, see the following: (preliminary report) *Yearbook ... 1980*, vol. II (Part One), document A/CN.4/334 and Add.1 and 2, p. 247; (second report) *Yearbook ... 1981*, vol. II (Part One), document A/CN.4/346 and Add.1 and 2, p. 103; (third report) *Yearbook ... 1982*, vol. II (Part One), document A/CN.4/360, p. 51; (fourth report) *Yearbook ... 1983*, vol. II (Part One), document A/CN.4/373, p. 201; (fifth report) *Yearbook ... 1984*, vol. II (Part One), document A/CN.4/383 and Add.1, p. 155.

³⁸⁶ *Yearbook ... 1984*, vol. II (Part One), document A/CN.4/378.

³⁸⁷ *Yearbook ... 1985*, vol. II (Part One), Addendum, document A/CN.4/384. See also the survey prepared by the secretariat on liability regimes relevant to the topic “International liability for injurious consequences arising out of acts not prohibited by international law”, *Yearbook ... 1995*, vol. II (Part One), document A/CN.4/471, p. 61.

433. The Commission, at its thirty-seventh session, in 1985, appointed Mr. Julio Barboza Special Rapporteur for the topic. The Commission received 12 reports from the Special Rapporteur from its thirty-seventh session to its forty-eighth session (1996).³⁸⁸

434. At its forty-fourth session, in 1992, the Commission established a working group to consider some general issues relating to the scope, the approach to be taken and the possible direction of the future work on the topic.³⁸⁹ On the basis of the recommendation of the Working Group, the Commission at its 2282nd meeting, on 8 July 1992, decided to continue the work on this topic in stages—to first complete work on prevention of transboundary harm and then proceed with remedial measures.³⁹⁰ The Commission decided, in view of the ambiguity in the title of the topic, to continue with the working hypothesis that the topic dealt with “activities” and to defer any formal change of the title.

435. At its forty-eighth session, in 1996, the Commission re-established the Working Group in order to review the topic in all its aspects in the light of the reports of the Special Rapporteur and the discussions held, over the years, in the Commission, and to make recommendations to the Commission.

436. The Working Group submitted a report³⁹¹ which provided a comprehensive picture of the topic as it related to the principles of prevention and of liability for compen-

³⁸⁸ For the 12 reports of the Special Rapporteur, see the following: (preliminary report) *Yearbook ... 1985*, vol. II (Part One), document A/CN.4/394; (second report) *Yearbook ... 1986*, vol. II (Part One), document A/CN.4/402; (third report) *Yearbook ... 1987*, vol. II (Part One), document A/CN.4/405; (fourth report) *Yearbook ... 1988*, vol. II (Part One), document A/CN.4/413; (fifth report) *Yearbook ... 1989*, vol. II (Part One), document A/CN.4/423; (sixth report) *Yearbook ... 1990*, vol. II (Part One), document A/CN.4/428 and Add.1; (seventh report) *Yearbook ... 1991*, vol. II (Part One), document A/CN.4/437; (eighth report) *Yearbook ... 1992*, vol. II (Part One), document A/CN.4/443; (ninth report) *Yearbook ... 1993*, vol. II (Part One), document A/CN.4/450; (tenth report) *Yearbook ... 1994*, vol. II (Part One), document A/CN.4/459; (eleventh report) *Yearbook ... 1995*, vol. II (Part One), document A/CN.4/468; and (twelfth report) *Yearbook ... 1996*, vol. II (Part One), document A/CN.4/475 and Add.1.

³⁸⁹ See *Yearbook ... 1992*, vol. II (Part Two), document A/47/10, p. 51, paras. 341–343.

³⁹⁰ For the Commission’s detailed recommendation see *ibid.*, paras. 344–349.

³⁹¹ *Yearbook ... 1996*, vol. II (Part Two), annex I.

sation or other relief, presenting articles and commentaries thereto.

437. At its forty-ninth session, in 1997, the Commission again established a working group on international liability for injurious consequences arising out of acts not prohibited by international law to consider how the Commission should proceed with its work on this topic.³⁹² The Working Group reviewed the work of the Commission on the topic since 1978. It noted that the scope and the content of the topic remained unclear because of such factors as conceptual and theoretical difficulties, questions relating to the appropriateness of the title and the relation of the subject to State responsibility. The Working Group further noted that under the topic the Commission had dealt with two issues: “prevention” and “international liability”. In the view of the Working Group, these two issues were distinct from each other, though related. The Working Group therefore agreed that henceforth the issues of prevention and liability should be dealt with separately.

438. Accordingly the Commission decided to proceed with its work on the topic “International liability for injurious consequences arising out of acts not prohibited by international law”, dealing first with the issue of prevention under the subtitle “Prevention of transboundary damage from hazardous activities”.³⁹³ The General Assembly took note of this decision in paragraph 7 of its resolution 52/156. At the same session, the Commission appointed Mr. Pemmaraju Sreenivasa Rao Special Rapporteur for this part of the topic.³⁹⁴

439. At its fifty-third session, in 2001, the Commission adopted the final text of a draft preamble and a set of 19 draft articles on prevention of transboundary harm from hazardous activities,³⁹⁵ thus concluding its work on the first part of the topic. Furthermore, the Commission recommended to the General Assembly the drafting of a convention on the basis of the draft articles.³⁹⁶

440. The General Assembly, in paragraph 3 of its resolution 56/82, requested the Commission to resume its consideration of the liability aspects of the topic, bearing in mind the relationship between prevention and liability, and taking into account developments in international law and comments by Governments.

B. Consideration of the topic at the present session

441. At the present session, the Commission resumed its consideration of the second part of the topic. At its 2717th meeting, on 8 May 2002, the Commission established a working group on international liability for injurious consequences arising out of acts not prohibited by international law. At its 2743rd and 2744th meetings, on 8 and 9 August 2002, the Commission considered and adopted the report of the Working Group (A/CN.4/L.627),

³⁹² *Yearbook ... 1997*, vol. II (Part Two), p. 59, para. 162.

³⁹³ *Ibid.*, para. 168 (a).

³⁹⁴ *Ibid.*

³⁹⁵ *Yearbook ... 2001*, vol. II (Part Two), p. 146, para. 97.

³⁹⁶ *Ibid.*, p. 145, para. 94.

as amended by the Commission, which is reproduced in section C below. Furthermore, the Commission appointed Mr. Pemmaraju Sreenivasa Rao Special Rapporteur for the topic.

C. Report of the Working Group

INTRODUCTION

442. At the current session, the Commission established a working group,³⁹⁷ chaired by Mr. Pemmaraju Sreenivasa Rao, which held seven meetings, on 27 and 30 May, on 23, 24 and 29 July and on 1 August 2002.

443. As the Commission had completed the draft articles on prevention, the Working Group started consideration of the second part of the topic, in accordance with paragraph 3 of General Assembly resolution 56/82. It was also significant that the Commission had completed its work on State responsibility. It was understood that failure to perform duties of prevention addressed to the State in terms of the earlier draft articles on prevention entailed State responsibility.

444. The Working Group, recognizing that harm could occur despite faithful implementation of the duties of prevention, and for the purpose of the examination of the remainder of the topic, assumed that such duties had been fulfilled. Harm in such cases could occur for several reasons not involving State responsibility, such as situations where the preventive measures were followed but in the event proved inadequate, or where the particular risk that caused harm was not identified at the time and appropriate preventive measures were not taken.

445. If harm occurred despite compliance by the State with its duties, international liability would arise. Accordingly, it was important that the work of the Commission in addressing the remainder of the topic of significant transboundary harm arising out of hazardous activities focus on allocation of loss among different actors involved in the operations, such as, for instance, those authorizing, managing or benefiting from them. They could, for example, share the risk according to specific regimes or through insurance mechanisms.

446. It was generally recognized that States should be reasonably free to permit desired activities within their territory or under their jurisdiction or control despite the possibility that these might give rise to transboundary harm. However, it was equally recognized that they should ensure that some form of relief—for example, compensation—be made available if actual harm were to occur despite appropriate preventive measures. Otherwise, potentially affected States and the international community would be likely to insist that the State of origin prevent all harm caused by the activity in question, which might result in the activities themselves having to be prohibited.

³⁹⁷ For the membership of the Working Group see para. 10 (a) above.

1. SCOPE

447. The Working Group reviewed different possibilities for covering the scope of the topic. In this connection, it recognized that harm arising out of creeping pollution and pollution from multiple sources and harm done to the environment in areas beyond national jurisdiction had their own particular features. For that reason, the Working Group recommended continuing to limit the scope of the remainder of the topic to activities which were covered under the topic of prevention. Such an approach would also effectively link the present exercise to the previous one and complete the topic.

448. As regards the scope, it is understood that:

- (a) Activities covered are the same as those included within the scope of the topic of prevention of transboundary harm from hazardous activities;
- (b) A threshold would have to be determined to trigger the application of the regime on allocation of loss caused;³⁹⁸
- (c) Loss to persons; property, including elements of State patrimony and national heritage; and the environment within the national jurisdiction should be covered.

2. THE ROLES OF THE OPERATOR AND THE STATE IN THE ALLOCATION OF LOSS

449. The Working Group had a preliminary exchange of views on the different models and rationales that could be put forward to justify different ways to allocate loss among the relevant actors.

450. There was agreement on certain points. First, the innocent victim 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. Third, such a regime should widely cover the various relevant actors, in addition to States. These actors include private entities such as operators, insurance companies and pools of industry funds. In addition, States play an important role in devising and participating in loss-sharing schemes. Much of the topic would have to do with the detailed distribution of loss between such actors. In the debates, the following considerations were highlighted.

(a) *The role of the operator*

451. The operator, who has direct control over the operations, should bear the primary liability in any regime of allocation of loss. The operator's share of loss would involve costs that it needs to bear to contain the loss upon its occurrence, as well as the cost of restoration and compensation. In arriving at these costs, particularly the cost con-

³⁹⁸ There were different views in the Working Group on this issue. One view was that "significant harm" be retained as a trigger. The other view was that this threshold, while suitable for the prevention regime, was inappropriate, and therefore a higher threshold was necessary for the current endeavour.

cerning restoration and compensation, the considerations concerning compliance with the duties of prevention and proper management of the operation would be relevant. Other considerations, such as third-party involvement, *force majeure*, non-foreseeability of the harm, and non-traceability of the harm with full certainty to the source of the activity, would also need to be kept in view.

452. The Working Group also considered the usefulness of developing proper insurance schemes, mandating contributions to funding mechanisms by operators belonging to the same industry and having the State earmark funds to meet emergencies and contingencies arising from significant harm resulting from hazardous activities.

453. It was also recognized that the insurance industry did not always cover harm arising out of many hazardous activities, particularly those considered ultra-hazardous. In such cases, the practice of States providing national funding or incentives for such insurance to be available was to be noted. In this regard, some States had undertaken to promote suitable insurance schemes with appropriate incentives.

454. In any regime on allocation of loss, the operator's share could not be conceived to be full and exhaustive if the costs of restoration and compensation exceeded the limits of available insurance or the operator's own resources, which were necessary for survival as an operator. Accordingly, the operator's share of loss in case of major incidents could be limited. It was also noted that the operator's share would generally be limited where the latter's liability to pay was either strict or absolute. The remainder of the loss would have to be allocated to other sources.

(b) *The role of the State*

455. The Working Group discussed the role of the State in sharing the loss arising out of harm caused by hazardous activities. It was agreed that States played a crucial role in designing appropriate international and domestic liability schemes for the achievement of equitable loss allocation. In this connection, a view was expressed that these schemes should be devised to ensure that operators internalized all the costs of their operations, and, accordingly, that it should be unnecessary to use public funds to compensate for loss arising from such hazardous activities. In case the State itself acted as an operator, it too should be held liable under such schemes. However, it was also agreed that cases might arise where private liability might prove insufficient for attaining equitable allocation. Some members of the Working Group then opined that in such cases the remainder of the loss should be allocated to the State. Other members felt that, while that alternative could not be completely excluded, any residual State liability should arise only in exceptional circumstances. It was noted that in some cases, as in the case of damage caused by space objects, States had accepted primary liability.

456. The Working Group also discussed the problem that would arise if there were to be residual State liability for transboundary harm caused by hazardous activities. In such a case it was not self-evident which State should participate in loss-sharing. In some cases the State of

origin might be held liable. It was pointed out that the State authorizing and monitoring the operation, or receiving benefits from it, should also participate in bearing the loss. In other cases liability might fall on the State of nationality of the relevant operator. The degree of State control, as well as the role of the State as a beneficiary of the activities, might be taken into account when determining the State's role in loss allocation.

3. ADDITIONAL ISSUES

457. Matters for consideration in this area include inter-State and intra-State mechanisms for consolidation of claims; issues arising out of the international representation of the operator; the processes for assessment, quantification and settlement of claims; access to the relevant forums; and the nature of available remedies.

Chapter VIII

THE RESPONSIBILITY OF INTERNATIONAL ORGANIZATIONS

A. Introduction

458. At its fifty-second session, in 2000, the Commission decided to include the topic “The responsibility of international organizations” in its long-term programme of work.³⁹⁹

459. The General Assembly, in paragraph 8 of its resolution 55/152 of 12 December 2000, took note of the Commission’s decision with regard to the long-term programme of work, and of the syllabus on the new topic annexed to the Commission’s report to the Assembly on the work of its fifty-second session.

460. The General Assembly, in paragraph 8 of its resolution 56/82, requested the Commission to begin its work on the topic “The responsibility of international organizations”, having due regard to comments made by Governments.

B. Consideration of the topic at the present session

461. At the present session, the Commission decided, at its 2717th meeting, held on 8 May 2002, to include the topic in its programme of work.

462. At the same meeting, the Commission established a working group on the topic.⁴⁰⁰

463. The Commission further decided, at the same meeting, to appoint Mr. Giorgio Gaja Special Rapporteur for the topic.

464. At its 2740th meeting, held on 2 August 2002, the Commission considered and adopted the report of the Working Group (A/CN.4/L.622), which appears in section C below.

C. Report of the Working Group

1. THE SCOPE OF THE TOPIC

(a) *The concept of responsibility*

465. The Commission used the term “responsibility” in the articles on State responsibility for internationally wrongful acts⁴⁰¹ (hereinafter State responsibility) to refer to the consequences under international law of internationally wrongful acts. It is to be assumed that the mean-

ing of “responsibility” in the new topic at least comprises the same concept. Thus, the study should encompass responsibility which international organizations incur for their wrongful acts. The scope should reasonably also cover related matters which were left aside in the articles on State responsibility—for instance, as was mentioned in paragraph (4) of the commentary to article 57, “cases where the international organization is the actor and the State is said to be responsible by virtue of its involvement in the conduct of the organization or by virtue of its membership of the organization”.⁴⁰²

466. The articles on State responsibility aim to establish only rules of general international law and leave aside “conditions for the existence of an internationally wrongful act” and questions regarding “the content or implementation of the international responsibility of a State” that “are governed by special rules of international law” (art. 55). A similar approach appears to be justified with regard to international organizations. This choice would not exclude the possibility that some indications for establishing general rules may be taken from “special rules” and the respective implementing practice. Likewise, general rules of international law may be of relevance for construing “special rules” of the organization.

467. The responsibility of international organizations may arise *vis-à-vis* member and non-member States. In the case of non-universal international organizations, responsibility may be more likely to occur in relation to non-member States. With regard to member States, the great variety of relations existing between international organizations and their member States and the applicability to this issue of many special rules—mostly pertaining to the relevant “rules of the organization”—in case of non-compliance by an international organization with its obligations towards its member States or by the latter towards the organization will probably limit the significance of general rules in this respect. However, issues of responsibility for internationally wrongful acts should not be excluded from the study of the topic merely because they arise between an international organization and its member States.

468. Questions concerning the responsibility of international organizations are often coupled with those concerning their liability under international law, such as those concerning damage caused by space objects, for which international organizations may be liable according to article XXII, paragraph 3, of the Convention on International Liability for Damage Caused by Space Objects and possibly also according to a parallel rule of general inter-

³⁹⁹ *Yearbook ... 2000*, vol. II (Part Two), chap. IX, p. 131, para. 729.

⁴⁰⁰ For the membership of the Working Group see para. 10 (b) above.

⁴⁰¹ *Yearbook ... 2001*, vol. II (Part Two), p. 26, para. 76.

⁴⁰² *Ibid.*, p. 142.