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Report of the Working Group on international liability for injurious consequences arising out of acts not prohibited by international law

Topic:
International liability for injurious consequences arising out of acts not prohibited by international law

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174. At its twenty-eighth session, held in that year, the General Assembly again supported the position of the Commission and recommended that the Commission should undertake a study of the new topic "at an appropriate time". In each of the following two years, the Assembly repeated its recommendation that the Commission take up the topic "as soon as appropriate",⁶⁶⁹ and finally, in 1976, in resolution 31/97 of 15 December, it replaced that phrase by the words "at the earliest possible time".

175. Pursuant to those recommendations of the General Assembly, the Commission agreed, at its twenty-ninth session, in 1977, to place the topic "on the active programme of the Commission at the earliest possible time, having regard, in particular, to the progress made on the draft articles on State responsibility for internationally wrongful acts".⁶⁷⁰ The General Assembly, in its resolution 32/151 of 19 December 1977, endorsed the conclusion of the Commission and, in paragraph 7, "invited" the latter

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...

176. In past years, the new topic has been described in varying terms; for example, "responsibility for risk arising out of the performance of certain lawful activities, such as spatial and nuclear activities",⁶⁷¹ "this other form of responsibility, which is in reality a safeguard against the risks of certain lawful activities",⁶⁷² and "a study of that other form of responsibility, which is the protection against the hazards associated with certain activities that are not prohibited by international law".⁶⁷³ In the Sixth Committee similar expressions have been used, although during one discussion some representatives said they believed that there might be "a third category of acts ... which, because of their dangerous nature, fell half way between lawful and unlawful acts".⁶⁷⁴ The simple distinction between lawful and unlawful acts has prevailed however, and by 1974 the title of the new topic had assumed its present wording.

177. The Commission considered and took note of the report of the Working Group at its 1527th meeting, on 27 July 1978, and on the basis of the recommendations contained in paragraph 26 of the report, decided to:

- (a) appoint a Special Rapporteur for the topic;

⁶⁶⁹ See resolution 3315 (XXIX) of 14 December 1974, sect. I, para. 4 (a), and resolution 3495 (XXX) of 15 December 1975, para. 4 (b).

⁶⁷⁰ *Yearbook ... 1977*, vol. II (Part Two), p. 129, doc. A/32/10, para. 108.

⁶⁷¹ *Yearbook ... 1969*, vol. II, p. 233, doc. A/7610/Rev.1, para. 83.

⁶⁷² *Yearbook ... 1970*, vol. II, p. 308, doc. A/8010/Rev.1, para. 74.

⁶⁷³ *Yearbook ... 1973*, vol. II, p. 169, doc. A/9010/Rev.1, para. 39.

⁶⁷⁴ *Official Records of the General Assembly, Twenty-fifth Session, Annexes*, agenda item 84, doc. A/8147, para. 104.

(b) invite the Special Rapporteur for the topic to prepare a preliminary report at an early juncture for consideration by the Commission;

(c) request the Secretariat to make the necessary provision within the Codification Division of the Office of Legal Affairs to collect and survey materials on the topic on a continuing basis and as requested by the Commission or the Special Rapporteur appointed for the topic;

(d) include in this section of the Commission's report section II of the report of the Working Group.

178. At its 1525th meeting, held on 25 July 1978, the Commission appointed Mr. Robert Q. Quentin-Baxter Special Rapporteur on the topic "International liability for injurious consequences arising out of acts not prohibited by international law".

ANNEX

Report of the Working Group on international liability for injurious consequences arising out of acts not prohibited by international law.^a

...

II. GENERAL CONSIDERATION OF THE SCOPE AND NATURE OF THE TOPIC AND OF THE METHOD TO BE FOLLOWED IN THE STUDY OF THE TOPIC

9. The topic of international liability for injurious consequences arising out of acts not prohibited by international law has only recently gained prominence, and is not separately described in most standard works on international law. It therefore seems desirable briefly to consider the general nature of the obligations that States owe to each other, and to the international community, in relation to the use of territory, and then to indicate in a preliminary way the starting point for the present topic.

10. A revolution in technology, occurring mainly within the period since the United Nations was established, has extended dramatically man's power to control his environment, creating a corresponding need for the urgent development of legal norms. Because of its awareness of that need, the General Assembly has invited the Commission to take up the study of this new topic.

11. It is, of course, not the first time that such a task, depending so largely upon lessons to be learned from contemporary State practice, has been entrusted to the Commission. The question of the concept and régime of the continental shelf, taken up by the Commission more than a quarter of a century ago as part of its study of the law of the sea, also presented those features. There, however, the parallel between the two topics ends: the question of the continental shelf had one, bold outline; but the questions raised by the new topic are multiform.

12. It would not be appropriate in this report to try to survey the range of recent materials that are, or may be, relevant to the development of the new topic. They must include, for example, the measures of international co-operation undertaken in relation to the peaceful uses of atomic energy, and to the régime of outer space, the principles affirmed by the United Nations Conference on the Environment and transactions of a regional or local character in relation to shared resources, the work of the Third Law of the Sea Conference regarding maritime pollution, and international concern about the risks attendant upon the sea carriage of oil.

13. These subjects have at least three common characteristics. Each concerns the way in which States use, or manage the use of,

^a A/CN.4/L.284 and Corr 1.

their physical environment, either within their own territory or in areas not subject to the sovereignty of any State. Each concerns also the injurious consequences that such use or management may entail within the territory of other States, or in relation to the citizens and property of other States in areas beyond national jurisdiction. Finally, as the title of the new topic suggests, these injurious consequences, and the liability they generate, may arise out of acts not prohibited by international law.

14. The three characteristics are reflected succinctly in principle 21 of the United Nations Declaration on the Environment:^b

“States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.”

15. It may be noted that obligations of the kind now being considered are different from those that a State owes in respect of aliens who have chosen to place themselves or their property within that State's territory. In the situations that fall within the present topic, there is no presumption of willingness to accept risks or harmful consequences because they are tolerated within the territory or control of the State in which those risks or harmful consequences arise. There is also no requirement to seek an effective remedy offered by municipal law—unless, indeed, there is an applicable régime, accepted by the States concerned, that does impose such a requirement.

16. On the other hand, the community of States, like national and local communities, does not attach a legal liability to inconveniences that are thought to be minor, and incidental to normal or reasonable uses of territory. If States have provided themselves with no other measuring rod, tacit acquiescence in an established situation must be the best evidence that the law takes no account of the degree of discomfort which that situation entails.

17. Until the impact of the modern technological revolution began to be felt, the causes and occasions of dispute were relatively few. Industrial processes seldom had the capacity to cause devastation beyond national frontiers. In general, the high seas and the air could still be regarded as self-purifying and self-replenishing. Most of the modern manifestations of insidious or irreversible damage did not occur, and any that did were not perceived.

18. In those times, the concomitant obligations that States owe to each other by virtue of the use they make of their physical environment did not often assume a practical form, except in relation to the flow of fresh water across or along international frontiers, and the use of salt water as a means of navigation. The right of innocent passage through the territorial sea is an early and clear example of an obligation owed, by virtue of sovereignty over maritime territory, to the international community at large.

19. Questions such as those that may occur among riparian States have for many years given rise to doctrinal discussion about the essential nature of the underlying legal norms. The evaluation of conflicting interests has usually been found to import a test of reasonableness—that is, a balance between the purposes to be served by a given use of territory and the unwelcome consequences that such a use may entail for other States and their nationals. Therefore the essential obligation owed by a State in such a context has tended to be conceived as one of moderation, or of care or due diligence, in relation either to its own activities or to private activities within its jurisdiction or control.

20. Nevertheless, no criterion of this kind can of itself provide a means of regulating liability for the dangers inherent in certain major fields of activity made possible by modern technology. It is a feature of these activities that, however stringent the standard of care observed, and however excellent the general safety record, an accident—if it does occur—will probably be large in scale and in the extent of its injurious consequences. Moreover, in some fields the ascertainment and measurement of the harm caused must depend upon the application of accepted scientific standards.

21. It has become the practice of States to establish conventional régimes to regulate liability for these dangers, on a subject-by-subject basis. The régimes differ very widely in their content, which tends to be governed by the needs of the particular situation, rather than by any doctrinaire view about the nature of the responsibility of States. In some cases a liability is accepted by States themselves; in others liability is placed solely on the operator, and remedies are made available within the ambit of municipal law. There are intermediate solutions, including some that place primary liability on the operator, but envisage a recourse to the State as guarantor.

22. The most constant feature of these régimes is the adoption of a rule of absolute liability—that is, a liability that arises from the very fact that injurious consequences have occurred, without reference to the quality of the action that led to the occurrence. This rule, which was in large measure inspired by the common law rule of absolute liability for dangerous things, is often accompanied by a limitation of the extent of liability. Depending on the subject concerned, the imposition of an absolute—but limited—liability may, or may not, be intended to exclude a further and more extensive liability, based on the duty of care or due diligence.

23. The new topic has meeting points with several other topics that are, or will soon be, under consideration by the Commission. The law of the non-navigational uses of international water-courses is of extreme interest, because it is sharply focused on one aspect of the obligations that States may owe each other in respect of their use and management of territory. The topic of the jurisdictional immunities of States and their property is also of potential interest, because the extent of sovereign immunities may be a factor in the choice of a régime of liability for the injurious consequences of certain kinds of acts not prohibited by international law.

24. Nevertheless, the most fundamental connexions of the new topic are with that of State responsibility. It may, indeed, be necessary to reconsider the present title of the new topic when work has made some progress. Certainly, the use of the term “liability” rather than “responsibility” in the present title should not obscure the need to explore the relationship between the liabilities established by conventional régimes and the substratum of obligations owed by States under customary law. On the other hand, the use of the term “liability” does indicate that the topic should be approached largely in terms of the primary rules contained in conventional régimes, and should not attempt to parallel the extensive consideration that the Commission is giving to secondary rules in the course of its study of State responsibility.

25. The Working Group believes that the variety and volume of State practice in this fast-growing field of law warrants—and indeed demands—the systematic study for which the General Assembly has called. The topic is suitable for codification and progressive development in accordance with the Commission's usual working methods. This would have the added advantage of associating the Legal Committee of the General Assembly more closely with an important sector of United Nations activity which is of particular legal interest.

26. Finally, it should be noted that the range of materials on which the Commission and its Special Rapporteur will need to rely—especially in regard to multilateral practice under the auspices

^b *Report of the United Nations Conference on the Human Environment* (United Nations publication, Sales No. E.73.II.A.14), Part One, chap. I, p. 5.

of the United Nations and of other international organizations—will be extensive, and cannot be obtained quickly enough from secondary sources. It is therefore thought essential to the success of the project that provision be made within the Codification Division of the Office of Legal Affairs in the United Nations Secretariat to collect and survey such materials. An arrangement of this kind would seem to be in keeping with the general United Nations aim of co-ordinating activities related to the environment, and yet would preserve a necessary degree of detachment from areas directly concerned with the implementation of United Nations programmes.

D. Jurisdictional immunities of States and their property

179. As noted above,⁶⁷⁵ the Commission at its current session established a working group to consider the question of future work by the Commission on the topic "Jurisdictional immunities of States and their property" and to report thereon to the Commission. The Working Group was composed as follows: Mr. Sompong Sucharitkul (Chairman), Mr. Abdullah El-Erian, Mr. Laurel B. Francis and Mr. Willem Riphagen.

180. During the thirtieth session, the Working Group held three meetings and submitted to the Commission a report (A/CN.4/L.279/Rev.1) that dealt *inter alia* with general aspects of the topic and contained a number of recommendations.

181. In 1948, the Secretary-General had prepared for the first session of the Commission a memorandum entitled *Survey of International Law in Relation to the Work of Codification of the International Law Commission*.⁶⁷⁶ Included in that *Survey* was a separate section on "Jurisdiction over foreign States" in which it was stated that the subject covered "the entire field of jurisdictional immunities of States and their property, of their public vessels, of their sovereigns, and of their armed forces".⁶⁷⁷ It was noted that in 1928 the League of Nations Committee of Experts, notwithstanding the divergencies in detail, had been of the view that some aspects of the subject were ripe for codification and could be considered by an international conference convened for that purpose. It was further noted that, in reply to the questionnaire sent to governments by the Committee, 21 governments had expressed themselves in favour of the codification of this subject, while only three governments had answered in the negative.⁶⁷⁸ As to the contemporary suitability of codifying the topic, the 1948 *Survey* indicated the following:

There would appear to be little doubt that the question—in all its aspects—of jurisdictional immunities of foreign States is capable and in need of codification. It is a question which figures, more than any other aspect of international law, in the administration of justice before municipal courts. The increased economic activities of States in the foreign sphere and the assumption by the State in many countries of the responsibility for the management of the principal industries and of transport have added to

the urgency of a comprehensive regulation of the subject. While there exists a large measure of agreement on the general principle of immunity, the divergencies and uncertainties in its application are conspicuous not only as between various States but also in the internal jurisprudence of States.⁶⁷⁹

182. At its first session, in 1949, the Commission reviewed various topics of international law with a view to the selection of topics for codification, in accordance with article 18, paragraph 1, of its Statute, using as a basis for discussion the 1948 *Survey*. After due deliberation the Commission drew up a provisional list of 14 topics selected for codification, including one entitled "Jurisdictional immunities of States and their property".⁶⁸⁰

183. In its work on various topics, the Commission has touched upon certain aspects of the question of the jurisdictional immunities of States and their property. In its 1956 draft articles on the law of the sea,⁶⁸¹ the Commission referred to the immunities of State-owned ships and warships. The immunities of State property used in connexion with diplomatic missions were considered in the 1958 draft articles on diplomatic intercourse and immunities,⁶⁸² while those of such property used in connexion with consular posts were dealt with in the 1961 draft articles on consular relations.⁶⁸³ The 1967 draft articles on special missions⁶⁸⁴ also contained provisions on the immunity of State property, as did the 1971 draft articles on the representation of States in their relations with international organizations.⁶⁸⁵ International conventions have been elaborated on the basis of all the above-mentioned sets of draft articles.⁶⁸⁶

184. In 1970, when the Commission confirmed its intention of bringing its long-term programme up to date, taking into account the General Assembly's recommendations and the international community's current needs, it asked the Secretary-General to submit to it a new working paper as a basis for the selection of a list of topics that might be included in its long-term programme of

⁶⁷⁵ *Ibid.*, para. 52.

⁶⁸⁰ *Yearbook ... 1949*, p. 281, doc. A/925, para. 16.

⁶⁸¹ *Yearbook ... 1956*, vol. II, pp. 256 *et seq.*, doc. A/3159, chap. II, sect. II.

⁶⁸² *Yearbook ... 1958*, vol. II, pp. 89 *et seq.*, doc. A/3859, chap. III, sect. II.

⁶⁸³ *Yearbook ... 1961*, vol. II, pp. 92 *et seq.*, doc. A/4843, chap. II, sect. IV.

⁶⁸⁴ *Yearbook ... 1967*, vol. II, pp. 347 *et seq.*, doc. A/6709/Rev.1, chap. II, sect. D.

⁶⁸⁵ *Yearbook ... 1971*, vol. II (Part One), pp. 284 *et seq.*, doc. A/8410/Rev.1, chap. II, sect. D.

⁶⁸⁶ Convention on the Territorial Sea and the Contiguous Zone (1958) (United Nations, *Treaty Series*, vol. 516, p. 205); Convention on the High Seas (1958) (*ibid.*, vol. 450, p. 11); Vienna Convention on Diplomatic Relations (1961) (*ibid.*, vol. 500, p. 95); Vienna Convention on Consular Relations (1963) (*ibid.*, vol. 596, p. 261); Convention on Special Missions (1969) (General Assembly resolution 2530 (XXIV), annex); Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character (1975) (*Official Records of the United Nations Conference on the Representation of States in Their Relations with International Organizations*, vol. II, *Documents of the Conference* (United Nations publication, Sales No. E.75.V.12), p. 207).

⁶⁷⁵ Para. 10.

⁶⁷⁶ United Nations publication, Sales No. 1948.V.1(I).

⁶⁷⁷ *Ibid.*, para. 50.

⁶⁷⁸ *Ibid.*