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

by

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I. PREVENTION

1. It will be recalled that, given the Commission's reluctance to accept the idea of prevention "ex post", which refers to measures adopted after an incident has occurred, the Special Rapporteur included in his tenth report 1/ a section explaining, as clearly as possible, his belief that that type of prevention existed in international practice. 2/ See paragraphs 7 to 18 of the tenth report. Paragraphs 19 to 21, which are essential in this regard, contain comments on two proposed texts, the first of which would be inserted as paragraph (e) of article 2 (Use of terms) and would define what are referred to therein as "response measures", which are nothing other than measures for prevention "ex post".

2. The text read as follows:

> (e) "Response measures" means any reasonable measures taken by any person in relation to a particular incident to prevent or minimize transboundary harm.
>
> (x) The harm referred to in subparagraph (y) includes the cost of preventive measures wherever taken, as well as any further harm that such measures may have caused.

(It was explained that the letters "x" and "y" represented the letters that would identify the relevant subparagraphs once article 2 had been finalized.)

3. We proceeded in this manner to avoid an impasse in case the Commission continued to oppose the use of the term "prevention" for "ex post" measures. However, we pointed out that calling them "response measures" would mean using a term that "differs from the term used in all the relevant conventions" 3/ - namely, "preventive measures" - and would pose serious problems.

4. We have the impression that the Commission was receptive to the arguments put forward and that it now accepts the idea of prevention "ex post". If this is the case, the Special Rapporteur suggests that the Commission consider that text at its current session and that it agree on a formulation that covers both

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1/ A/CN.4/459.

2/ It was argued that prevention always took place "prior" to the incident and that prevention "ex post" was a contradiction in terms. This type of prevention is intended to avoid incidents, but there is another type of prevention intended to keep the effects of an incident from reaching their maximum potential; in other words, measures to minimize the effects of an incident. Measures of this type have been unanimously considered to be preventive, both in theory and in all conventions dealing with liability for acts not prohibited by law.

3/ See para. 20, first sentence, of the above-mentioned report.

measures to prevent incidents (prevention "ex ante") and measures to prevent further harm once an incident has occurred (prevention "ex post"), such as:

> (e) "Preventive measures" means (i) measures to prevent or minimize the risk of incidents; (ii) measures taken in relation to an incident which has already occurred to prevent or minimize the transboundary harm it may cause.

Then, a subparagraph could be inserted under letter (g) of the same article, after the definition of harm, stating that:

> "The harm referred to in the preceding paragraph includes the cost of preventive measures under paragraph (a) (ii), as well as any further harm that such measures may have caused."

II. PRINCIPLES

5. At its preceding session, the Commission adopted the principles set forth in articles A to D (6 to 10 of the numbering to be proposed later in this report), but was unable to consider the principle of non-discrimination because the latter had not yet been examined by the Drafting Committee. It would be useful if the Committee would take a decision on that principle at the current session so that the relevant chapter may be provisionally completed.

III. LIABILITY

6. Two complete reports of the Special Rapporteur have yet to be considered: the tenth report, which concerns harm to the environment, and the eleventh, which proposes a liability regime for cases of transboundary harm. The Commission expressed preliminary views on both reports, but decided to use the time it would have spent considering them in the plenary session to enable the Drafting Committee to examine some of the articles on the subject appearing on its agenda; the Committee ultimately adopted those articles.

7. Thus, in the Special Rapporteur's view, it is time to deal with the crux of the matter; namely, liability. Although it is true that harm to the environment is an interesting item, it is also true that, basically, the Commission need only determine what this category comprises, since it has already agreed in principle that the concept of harm should include harm to the environment.

8. Having exhausted the issue of prevention, at least for the moment, the Commission should abide by its decision of 8 July 1992, to the effect that "the topic should be understood as comprising both issues of prevention and of remedial measures. However, prevention should 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. Remedial measures in this context

may include those designed for mitigation of harm, restoration of what was harmed and compensation for harm caused". 4/

9. The Commission cannot postpone this unavoidable task, at the risk of showing negligence with respect to the General Assembly's mandate, particularly since the Commission itself recognized, at its preceding session, that the vital task of identifying the activities to be included in the draft would "depend on the provisions on prevention which have been adopted by the Commission and the nature of the obligations on liability which the Commission will be developing". 5/

10. What the Commission must determine at its current session are the main features of the regime it wishes to apply to liability for acts not prohibited by law. Following is an explanation of the regime set forth in Mr. Quentin-Baxter's schematic outline and of the regimes proposed in the sixth 6/ and tenth reports of the current Special Rapporteur; these are the three options which have been proposed thus far and on which the Commission has yet to take a decision. What the Special Rapporteur suggests for this session is that the Commission simply look at the main points of these liability regimes; to this end, he has indicated, for each regime, the articles and paragraphs of the relevant reports which contain essential information. Colleagues of the Commission could also read the rest of the proposed articles in each report on liability to get an idea of how each of the regimes under consideration could operate.

11. We suggest, then, that the Commission focus on the following: (a) the annex to the fourth report 7/ of the Special Rapporteur, Mr. Quentin-Baxter (which could be supplemented, if desired, by a perusal of the entire report); (b) parts IV and V of the sixth report of the current Special Rapporteur, particularly articles 21, 23 and 28 to 31, which define the regime; and (c) the tenth report, and in particular the careful consideration of the whole of part III and of sections A, B and C of part IV, and of the articles included therein.

12. In the following analysis, we will discuss only basic concepts in the body of the text; clarifications and complementary concepts will be found in the footnotes. This explains the considerable number of footnotes included in this report.

4/ Yearbook ... 1992, vol. II (Part Two), para. 345.

5/ Official Records of the General Assembly, Fiftieth Session, Supplement No. 10 (A/50/10), para. 409.

6/ Yearbook ... 1990, vol. II (Part One), document A/CN.4/428 and Add.1.

7/ Yearbook ... 1983, vol. II (Part One), document A/CN.4/373.

A. The schematic outline

13. The regime set forth in the schematic outline is only a rough sketch, but the Commission will find in it the information it needs in order to take a decision and in order to develop it further, if it so desires. Some of the articles of the sixth report might also be helpful in order to have an idea of how this part of the schematic outline could be developed.

14. The regime applies to activities carried out in the territory under the control of one State which give or may give rise to loss or injury to persons or things within the territory or control of another State. In other words, the activities of our article 1 would be covered by the outline and its provisions would apply to them.

(a) Prevention

15. Breach of obligations regarding prevention does not entail any sanction according to section 2, paragraph 8. In other words, there is no liability for wrongful act in that draft.

(b) Liability

16. If transboundary harm arises and there is no prior agreement between the States concerned regarding their rights and obligations, these rights and obligations shall be determined in accordance with the schematic outline. There is an obligation to negotiate such rights and obligations in good faith.

17. Section 4 establishes in paragraph 2 that the acting State - that is to say the State of origin - shall make reparation to the affected State. 8/ The amount of the reparation due is determined by a number of factors. 9/

18. The general ideas of the outline are, therefore, as follows:

(a) Recommendations to States regarding the prevention of incidents due to activities "which give or may give rise to" transboundary harm. In

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8/ This obligation, however, is subject to a condition that did not find any support in the Commission: that the reparation for injury of that kind or character should be in accordance with the shared expectations of the States concerned. For the concept and effect of such expectations, see section 4, paras. 2, 3 and 4.

9/ These include the so-called "shared expectation", the principles spelled out in section 5 - inter alia, that in so far as may be consistent with these articles, an innocent victim should not be left to bear his loss or injury - the reasonableness of the conduct of the parties and the preventive measures of the State of origin. The factors outlined in section 6 (some of which were adopted in our article 20) also play a role as do the matters referred to in section 7, which remained open for consideration by the Commission; however, they are very vague, given the preliminary nature of the schematic outline.

particular, that they should draw up a legal regime between the States concerned which would apply to the activity.

(b) State liability for transboundary harm caused by dangerous activities. 10/

(i) Nature of the liability. Sine delicto, where the acts are not prohibited by international law. 11/

(ii) Attenuation of liability: although, in principle, the innocent victim should not bear the injury, the nature and amount of the reparation must be negotiated in good faith between the parties, taking into consideration a series of factors which may lessen the amount.

B. The regime of the sixth report

19. The draft articles proposed in the sixth report are almost complete.

(a) Prevention 12/

20. Article 18 strips the obligations regarding prevention of their "hard" nature, since it does not give the affected State the right to institute proceedings. 13/ Although more detailed, the draft articles set forth in the sixth report do not depart in any significant way from the schematic outline as far as prevention is concerned.

10/ Although the scheme leaves open (sect. 7.II.1) the possibility that by a decision of the parties to the negotiation there may be another decision as to where primary and residual liability should lie, and whether the liability of some actors should be channelled through others.

11/ Although the scheme leaves open (sect. 7.II.1) the possibility that by a decision of the parties to the negotiation there may be another decision as to where primary and residual liability should lie, and whether the liability of some actors should be channelled through others.

12/ The provisions regarding notification of affected States, the provision of information concerning the dangerous activity and consultations with them regarding a regime, further develop and refine the concepts set forth in the schematic outline.

13/ Unless, of course, such action is provided for in another agreement between the same parties. In any event, there would be a form of sanction for failure to comply. If, at some point subsequent to such failure to comply, there were to be appreciable transboundary harm, the sanction would be that in such a case, the State which did not comply could not invoke the provisions of article 23 which enable it to obtain favourable adjustments of the compensation.

(b) Liability

21. There is State liability sine delicto for transboundary harm which translates, here again, into a simple obligation to negotiate the determination of the legal consequences of the harm with the affected State or States. The States concerned must take into account that, in principle, the harm must be compensated in full, even though the State of origin may, in certain cases, seek a reduction of the compensation payable by it (art. 23). 14/

22. Thus far, the draft articles do not depart from the general lines of the schematic outline. The Special Rapporteur thought, however, that there seemed to be an undeniable trend in international practice towards introducing into specific activities civil liability for transboundary harm and that he should, therefore, present that possibility to the Commission. 15/

23. For that reason in addition to State liability which is exercised through the diplomatic channel, the draft provides for what is called the domestic channel, that is to say, remedy for victims through the domestic courts of

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14/ For example, if the State of origin took precautionary measures solely for the purpose of preventing transboundary harm, it could ask for a reduction of the compensation. In order to illustrate the above, take the example of an industry located on the border, upstream on a successive international river, which discharges waste into the water and, consequently, affects only the State downstream but not the course of the river as such (art. 23).

15/ In the international practice considered, such civil liability could coexist with State liability only in so far as the latter was residual, in other words when neither the operator nor his insurance could cover the full amount of the compensation fixed. In such cases, the State would intervene (nuclear conventions, see tenth report, paras. 24-29 inclusive). Subsequently, in draft articles such as the ones relating to the Basel Convention, the obligation of the State to complete the compensation was made contingent on the condition that the harm would not have been caused had the State not failed to comply (indirect causality).

law. 16/ The aim was merely to establish a minimum regulation of the domestic channel, as is explained in paragraphs 62 and 63. 17/

24. To summarize, the general thrust of the regime proposed in the sixth report is as follows:

1. Recommendations to States regarding the prevention of incidents and above all the drawing up of a legal regime between States to govern the activity.

2. State liability for transboundary harm caused by dangerous activities.

   2.1. Nature of the liability: sine delicto (strict, causal) where the acts giving rise to liability are not prohibited by international law.

   2.2. Attenuation of liability: although, in principle, an innocent victim should not have to bear the injury caused, the nature and amount of the reparation must be negotiated in good faith between the parties, taking into consideration a series of factors which may diminish the amount.

3. In addition to the diplomatic channel where one State deals with another State, provision is made for a domestic channel available to individuals or private entities and to the affected State.

   3.1. Once a channel has been selected for a specific claim, the other channel may not be used for the same claim.

16/ In order for the domestic channel to coexist with the diplomatic channel two provisions are needed: (a) one to permit the affected State to initiate the diplomatic claim without having to exhaust all internal remedies of the State of origin (art. 28 (a)), because otherwise the domestic channel would be compulsory and it would be appropriate to use the diplomatic channel only in the cases provided for under general international law, for example where there had been a denial of justice; and (b) one to prevent the State of origin from claiming immunity from jurisdiction (art. 28 (b)) because if it were to do so, the domestic channel would lead nowhere. A claim of immunity from jurisdiction may only be made in respect of enforcement of a judgement.

17/ For example, it did not establish that the liability had to be sine delicto (causal, strict) but referred, as far as the basic rules are concerned, to the applicable national law, that is to say, that of the court that ultimately had jurisdiction. It was suggested that States parties should, through their national legislation, give their courts jurisdiction to deal with claims of the type permitted under article 28 (b), that they should give affected States or individuals or legal entities access to their courts (art. 29 (a)) and that they should provide in their legal systems for remedies which permit prompt and adequate compensation (art. 29 (b)).

3.2. Character of the liability: to be established by the domestic legislation of the State of the court having jurisdiction.

25. As the preventive measures are not compulsory, failure to take such measures does not give rise to liability and therefore there is no State liability for a wrongful act. Consequently, there cannot be both liability for a wrongful act and at the same time liability sine delicto in respect of any single incident.

26. The Special Rapporteur points out two features of the system of his sixth report. The first is that if the affected State knows that its subjects may use the domestic channel it may be very reluctant to use the diplomatic channel. The second is that the determination of the type of liability is left to domestic law. This latter feature can easily be changed by including in the articles a provision for liability sine delicto of the person in charge.

C. The regime of the tenth report

27. It should be recalled that: (1) as we said before, the Commission categorically rejected the suggestion that the obligations concerning prevention should be "soft". Accordingly, violation of such obligations gives rise to State liability for a wrongful act; (2) this makes these articles extremely unusual and creates many difficulties, since State liability for violation of its obligations in respect of prevention must necessarily coexist with liability sine delicto for payment of compensation for injury caused.

28. If compensation for an injury caused followed only from a wrongful act, that is to say as a result of failure by the State to comply with its obligations concerning prevention, 18/ nothing in the draft articles would relate to the liability for acts not prohibited by international law. We would then compel innocent victims to bear the onus probandi and we would leave them without any remedy when the injury was caused by an act that was not prohibited as a consequence of a dangerous (but lawful) activity. We would not apply to compensation for injury caused by dangerous activities the liability regime which is becoming increasingly widespread in the world in respect of such activities: that of liability sine delicto. Thus the area which prompted the inclusion of the item on the Commission's agenda, namely, that of liability for

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18/ We say "almost" exclusively, because there would also be a regime of wrongfulness in the event of failure to comply with the obligation to compensate arising from liability "sine delicto", which obligation, as we all know, is a primary rule. However a regime concerning liability for wrongfulness of the State would only be appropriate in cases where the State had residual liability: either directly, if residual liability is established only in respect of the reparation for harm that would not have occurred had there not been a failure to comply with an obligation regarding prevention (indirect causality, regime of the draft protocol to the Basel Convention) or indirectly if the State must complete the amount that is still due because of a failure to pay by the operator or his insurance (regime of the Vienna and Paris nuclear conventions) and it does not fulfil that obligation.

injurious consequences arising out of acts not prohibited by international law, would be totally unprotected.

29. There is no doubt whatsoever that compensation for the transboundary harm arising out of acts not prohibited must be subjected to some form of liability sine delicto. In the schematic plan this type of liability is assigned to the State although it is considerably diminished because it is subject to negotiations between the States concerned and possible readjustments. The sixth report follows the same solution and also adds the possibility that the injured may resort to domestic channels. Chapter III, paragraphs 23 to 30 inclusive, of the tenth report should be read with particular care.

30. To summarize, the system proposed in the tenth report is as follows:

1. Obligations to prevent incidents are the responsibility of the State. There is State liability for failure to comply with these obligations.

2. Nature of State liability: for wrongful act, with the characteristics and consequences of international law (art. A).

3. Payment of compensation for transboundary harm caused is the responsibility of the operator. Nature of such liability: sine delicto. 19/

D. The Commission's options

31. (a) The decisions already taken by the Commission regarding prevention leave no other alternative than State liability for wrongful acts.

(b) As to some form (whether attenuated or not) of liability sine delicto, the Commission has no choice but to introduce it into the draft articles, unless it wishes to renounce the mandate given it by the General Assembly (international liability for the injurious consequences of acts not prohibited by international law). It can assign liability to the State (schematic outline), to the operator (tenth report) or, depending on what the actor chooses, to the State or operator (sixth report) with some possible changes of detail.

(c) The residual liability of the State can be resolved once the first two previous issues have been settled.

19/ Thus the State is responsible for all the consequences of the wrongful act (cessation, satisfaction, guarantee of non-repetition, see paras. 31 to 41), but not for compensation which is always the responsibility of private operators, even if they coexist with the failure of the State to comply with its obligations regarding prevention. The operator's liability is sine delicto, since it arises from acts not prohibited by international law and redresses the material harm caused by the dangerous activity under article 1.