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DRAFT REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FIFTIETH SESSION

Rapporteur: Mr. Christopher John Robert Dugard

CHAPTER VI

INTERNATIONAL LIABILITY FOR INJURIOUS CONSEQUENCES ARISING OUT OF ACTS NOT PROHIBITED BY INTERNATIONAL LAW (PREVENTION OF TRANSBOUNDARY DAMAGE FROM HAZARDOUS ACTIVITIES)

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A. Introduction

1. At its forty-ninth session, in 1997, 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".[1] The General Assembly took note of this decision in paragraph 7 of resolution 52/156 of 15 December 1997.

2. The Commission appointed at the same session Mr. Pemmaraju Sreenivasa Rao Special Rapporteur for this part of the topic.[2]

B. Consideration of the topic at the present session

3. At the present session, the Commission had before it the Special Rapporteur's first report (A/CN.4/487 and Add.1), which it considered at its 2527th to 2531st meetings, held between 8 and 15 May 1998. A summary of the Commission's debate is to be found below.

4. At its 2531st meeting, on 15 May 1998, the Commission decided to refer to the Drafting Committee draft articles 1(a) (Activities to which the present articles apply)

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[1] *Official Records of the General Assembly, Fifty-second session, Supplement No. 10* (A/52/10), para. 168.

[2] Ibid.

and 2 (Use of terms) recommended by the Commission's Working Group in 1996.[3]

5. At the same meeting, the Commission established a Working Group[4] to review draft articles 3 to 22 recommended in 1996 in light of the Commission's decision to focus first on the question of prevention. The purpose of such review was to

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[3] Ibid, *Fifty-first Session, Supplement No. 10* (A/51/10), annex I, p. 238. These articles read as follows:

Article 1
Activities to which the present articles apply

The present articles apply to:

(a) activities not prohibited by international law which involve a risk of causing significant transboundary harm [...]

through their physical consequences.

Article 2

Use of terms

For the purposes of the present articles:

(a) "risk of causing significant transboundary harm" encompasses a low probability of causing disastrous harm and a high probability of causing other significant harm;

(b) "transboundary harm" means harm caused in the territory of or in other places under the jurisdiction or control of a State other than the State of origin, whether or not the States concerned share a common border;

(c) "State of origin" means the State in the territory or otherwise under the jurisdiction or control of which the activities referred to in article 1 are carried out;

(d) "affected State" means the State in the territory of which the significant transboundary harm has occurred or which has jurisdiction or control over any other place where such harm has occurred.

[4] For the composition of the Working Group, see para.... above.

ascertain whether the principles of procedure and content of the duty of prevention were appropriately reflected in the text.

1. Presentation of the first report of the Special Rapporteur

6. The Special Rapporteur felt that, as a first step, it was necessary to address the questions of the scope and the content of the topic, which, as noted by the Commission's Working Group in 1997, remained unclear.[5] In this respect, he had thought it useful to review the work already accomplished with the aim of identifying various elements of the concept of prevention so far developed by the Commission which had also received support in the Sixth Committee.

7. The Special Rapporteur was of the view that the concept of prevention should be considered within the broader context of sustainable development, where it had found its most significant expression. He drew attention in this regard to Principle 2 of the Rio Declaration of 1992 embodying the obligation of States to ensure that activities within their jurisdiction of control do not cause damage to the environment of other States or of areas beyond natural jurisdiction, which, as confirmed by the International Court of Justice in its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons,*[6] was now part of the corpus of international law relating to the environment.

8. Prevention, the Special Rapporteur stated, was a preferred policy as compensation in case of harm could often not restore the *status quo ante.* The enhanced ability to trace the chain of causation, i.e. the physical link between the cause (activity) and the effect (harm), made it further imperative for operators of hazardous activities to take all necessary steps to prevent harm. The principle of

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[5] *Official Records of the General Assembly, Fifty-second session, Supplement No. 10* (A/52/10), para. 165.

[6] *I.C.J. Reports 1996,* p, 15, para. 29.

prevention had consequently been underscored in international jurisprudence and incorporated in numerous international instruments referred to in the report.

9. The Special Rapporteur recalled that, in the course of the Commission's consideration of the topic of international liability, reference had been made repeatedly to the duty of prevention as an obligation of conduct. Obligations of reparation were not considered as obviating the need for obligations of prevention. In fact, Professor Quentin-Baxter had dealt with the concepts of prevention and reparation as a continuum and as a compound obligation rather than as two mutually exclusive options and the Commission had endorsed his view that the topic of international liability lay within the field of "primary rules". Quentin-Baxter's primary contribution had been the presentation of a schematic outline, which, in relation to prevention, provided for the duty to provide information and to cooperate in good faith to reach an agreement, if necessary, upon the establishment of a non-binding fact-finding procedure. Moreover, it set out various factors which States could take into consideration in order to achieve mutual accommodation and balancing of interests. While there was strong support for this schematic outline in the Sixth Committee, some felt, however, that it should be reinforced to give better guarantees that the duties of prevention would be discharged. A few also expressed some skepticism as regards the viability of the topic.

10. Barboza had retained the basic approach developed by Quentin-Baxter. However, he had recommended a slight modification of the schematic outline in order to emphasize that failure to fulfil the obligations of prevention would entail certain adverse procedural consequences for the acting State. Barboza had also stressed the fact that, while States had an obligation to notify, consult and negotiate a mutually accepted regime governing activities involving a risk of transboundary harm, prior consent of the States likely to be affected by such activities was not required. He had identified the following six elements as regard the concept of prevention: prior authorization; risk assessment; information and notification; consultation; unilateral preventive measures; and a standard of due diligence

proportional to the degree of risk of transboundary harm in a particular case.

11. Turning to the draft articles provisionally adopted by the Commission in 1994 and the draft articles recommended by the Working Group in 1996, the Special Rapporteur noted that both had answered in the affirmative the controversial question whether prevention *ex post* - i.e. contingency measures to contain and minimize the effects of harm resulting from an accident - should be regarded as part of the duty of prevention. He further observed that draft articles 4 and 6 recommended by the Working Group provided the basic foundation for the concept of prevention, as they set forth the obligations to take all appropriate measures to prevent or minimize the risk of significant transboundary harm and to minimize its effects as well as to cooperate to that end.

12. Following an overview of the discussion that had taken place over the years on the *scope of the topic*, the Special Rapporteur highlighted the Working Group's conclusion that, at the current stage, the Commission could proceed without any specific identification of the activities falling within such scope, bearing in mind the types of activities listed in various conventions dealing with the issue of transboundary harm. His review of the debates both in the Commission and the Sixth Committee led the Special Rapporteur to the conclusion that draft articles 1 (a) regarding the activities within the scope of the draft articles and 2 on the use of terms proposed by the Working Group in 1996[7] could be endorsed by the Commission without any further amendment. He noted in this connection that harm to the global commons as such would be excluded from the scope of the topic. He recommended, however, the deletion of draft article 1 (b) proposed by the Working Group dealing with activities which did not involve a risk of causing significant transboundary harm but caused such harm none the less.

13. With respect to the *concept of prevention*, the Special Rapporteur had identified in his report a number of principles of both procedure and substance.

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[7] See footnote 3 above.

14. As regards *principles of procedure*, the Special Rapporteur observed that, in accordance with the principle of *prior authorization,* which had been embodied in draft article 9 recommended by the Working Group in 1996, authorization for an activity which included a risk of causing significant transboundary harm was granted subject to the fulfilment of certain conditions aimed at ensuring that such risk was properly assessed, managed and contained. In addition, States were required to put in place an appropriate monitoring machinery to ensure that the risk-bearing activity was conducted within the limits and conditions prescribed.

15. In assessing whether a particular activity had the potential of causing significant harm, States increasingly relied on an *environmental impact assessment* (EIA). Where such risk was identified, the State of origin had the obligation to notify States likely to be affected and to provide them with all available information, including the results of any EIA. The Special Rapporteur observed that certain criteria, such as location and size of an activity, the nature of its impact, public interest and environmental values, could be relied upon for developing a list of activities which should be subject to an EIA. Moreover, the use of substances listed in some conventions as dangerous or as hazardous could also provide an indication that an activity might cause significant transboundary harm and hence require an EIA. Be that as it may, the Special Rapporteur noted that an analysis of State practice with respect to EIA led to the conclusion that until now no uniform approach to transboundary information exchange has been followed.

16. Concerning the *principle of cooperation,* the Special Rapporteur observed that it was embodied in numerous international instruments. At the procedural level, cooperation included a *duty to notify* the potentially affected State, *to exchange information,* and to engage in *consultations.* The aim of such consultations was to reconcile conflicting interests and to arrive at mutually beneficial or satisfactory solutions. However, it was well-established that the obligation *to negotiate in good faith*, where it arose, did not imply an obligation to reach an agreement.

17. The Special Rapporteur suggested that the *principle of prevention or avoidance of disputes* was also one of the components of the concept of prevention. States were thus urged to develop methods, procedures and mechanisms promoting informed decision-making, mutual understanding and confidence-building. Resort to fact-finding commissions, good offices, mediation, and conciliation as well as to national reporting was particularly encouraged.

18. *The principle of non-discrimination,* within the context of prevention, consisted in making available to potential victims of transfrontier pollution residing outside the State of origin the same administrative or legal procedures open to residents of that State. The Special Rapporteur observed that problems could arise in the application of this principle when there were drastic differences between the substantive remedies provided in different States.

19. Regarding the second category of principles identified in the report, namely *principles of content,* the Special Rapporteur observed that, in accordance with the *principle of precaution,* lack of full scientific evidence did not justify the postponement of measures to prevent environmental degradation. He made the point that, while it was reflected in several international instruments, this principle had been not been interpreted in a uniform manner. In fact, it could be described as an evolving principle", the application of which depended on the particular circumstances of each case.

20. The *polluter-pays principle* was considered to be the most efficient means of allocating the costs of pollution prevention and control measures so as to encourage the rational use of scarce resources. The Special Rapporteur pointed out that it had been introduced in numerous international agreements as a guiding principle rather than a legal principle. Even where it had been included as a binding principle, it was couched in very general terms, which raised difficulties in its application.

21. The Special Rapporteur remarked that during the negotiations leading to the

adoption of the Rio Declaration, due consideration was given to the special situation and interests of developing countries. In this context, reference had been made to the *principles of equity, capacity-building and good-governance.* The Special Rapporteur pointed out that the principle of intra-generational equity recognized that economic development was a priority for developing countries and that environmental rules should not put an undue burden on such development. As for the principle of inter-generational equity, it provided that the environment and natural resources should be conserved and used for the benefit of both present and future generations. The Special Rapporteur further stated that a spirit of global partnership should prevail in order to enable developing countries and countries in transition to discharge the duties involved in prevention of transfrontier harm in their own self-interest as well as in the common interest. Such a global partnership could entail offering financial support through the development of common funds, facilitating the transfer of appropriate technology on fair and equitable terms and providing necessary training and technical assistance. In the view of the Special Rapporteur, many of the requirements for enhancing the capacity of States to meet their duties of prevention culminated in the need for the maintenance of good governance, which included the taking of necessary legislative, administrative or other action to implement such duty, as envisaged in draft article 7 recommended by the Working Group in 1996.

22. In *conclusion*, the Special Rapporteur emphasized again that the Commission had so far approached the obligation of prevention as an obligation of conduct. States had the obligation to identify activities likely to cause significant transboundary harm and notify States concerned accordingly, as well as to consult and negotiate. In the absence of agreement between the State of origin and the States likely to be affected, the former had to undertake unilateral measures of prevention. The standard of due diligence to be observed could vary from State to State, region to region, and from one point in time to another, which did not mean that there should exist double standards, but only that it was necessary to take into account the differing requirements of standards for activities generating different

levels of risk. Similarly, States could, by common agreement in a given region, adopt standards of due diligence commensurate with the prevailing levels of economic development and the availability of appropriate technology and financial means to discharge the duty of prevention.

23. The Special Rapporteur observed that, under the scheme developed so far, failure to perform a duty of prevention would not give rise to any legal consequences in the absence of harm. However, the Commission's decision to separate the issues of prevention and liability provided it with an opportunity to take a fresh look at the question of the legal consequences to be attached to the failure to comply with obligations of prevention. For this purpose, it would be necessary to distinguish between relevant duties of States and of operators of risk-bearing activities. As regards the former, failure to comply with the duty of prevention could be dealt with either at the level of State responsibility or as a matter of liability without attaching a taint of wrongfulness to or prohibiting the activity itself. The Commission had so far adopted the second approach. As for the consequences of the failure of operators, they should be addressed in national legislation.

24. The Special Rapporteur made the point that State practice as regards implementation of the procedural and substantive principles of prevention identified in his report was both evolving and flexible. He emphasized the importance of international cooperation in this respect, including the need to take into account the special circumstances and needs of developing countries.

25. He noted that the draft articles recommended by the Working Group in 1996 addressed many of the above principles of prevention. The Special Rapporteur therefore suggested that, once agreement was reached on the general orientation of the topic, the Commission review these draft articles and decide on their possible inclusion in the new draft to be elaborated on the question of prevention.

2. Summary of the Commission's debate

(a) General observations

26. The members of the Commission commended the Special Rapporteur for his report on such a complex topic.

27. It was observed that the work of the Commission on the issue of prevention pertained to progressive development rather than codification. It was emphasized again that obligations of prevention belonged to the realm of primary rules.

28. The Commission, it was said, had to respond to the pressing need of the international community for clear and concrete rules on prevention. It was pointed out in this respect that the fundamental obligation of prevention of environmental harm confirmed by the International Court of Justice in its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons* was very general and required further elaboration. It was observed, on the other hand, that certain concepts, such as "due diligence" or "significant harm", were useful because of their flexibility and that an attempt to codify them might be counterproductive. The Commission was similarly cautioned not to elaborate rules on prevention which were below the standards which States were already required to respect under existing law. Attention was drawn in this connection to the self-contained regimes developed in certain areas, such as nuclear energy or non-navigational uses of watercourses.

29. There was widespread agreement with the Special Rapporteur's recommendation that the Commission should undertake a review of the articles adopted by the Working Group in 1996. In so doing, it should take into account a number of relevant international instruments, in particular the 1997 Convention on the Law of the Non-navigational Uses of International Watercourses.

30. There was also a view that the Commission's decision to focus on the issue of prevention was tantamount to a complete reorientation of the topic.

(b) Scope of the topic

31. There was broad support for the Special Rapporteur's recommendation that draft articles 1(a) and 2 proposed by the Working Group in 1996 be referred to the Drafting Committee.

32. A view was expressed that the Commission should not exclude from the scope of its work on prevention the question of harm to the global commons. The point was made, however, that this would prove difficult where no causal link to such harm could be established.

33. Some members expressed concern that too much emphasis was placed on the environmental protection aspect of the topic. But others pointed out that, even though it was not the primary goal of its activity, the Commission inevitably had to deal with the question of the environment, as transboundary damage could take at least three forms, namely: damage to persons, damage to property, and damage to the environment. It as also observed that it was difficult in practice to distinguish between various forms of damage, since environmental damage also involved damage to life, health and property. It was thus felt that the term "environment" should be defined in the context of this topic in a broader sense, as in the expression "environmental impact assessment", which encompassed questions such as prevention of loss of life.

34. Reservations were expressed with regard to the use of the term "prevention *ex post*", although it was recognized that the underlying concept was within the scope of the present topic.

(c) <u>The concept of due diligence</u>

35. The point was made that, although due diligence standards were more flexible than obligations of result and it was therefore reasonable to take into account factors such as the facilities available to the State concerned, that should not result in a system of double standards, or rather, in an absence of standards. It was also observed that, according to a recent resolution of the Institute of International Law,

due diligence should be measured by objective standards.[8] The view was expressed that it was difficult - and even dangerous - to attempt to define such standards in the abstract. It was recalled that the phrase "taking all appropriate measures" had been included in article 7 of the 1997 Convention on the Law of the Non-navigational Uses of International Watercourses instead of "due diligence", proposed by the Commission.

(d) The concept of harm in the context of the present topic

36. The point was made that the concept of harm should be defined for the purposes of the topic of prevention.

37. Several members agreed with the Special Rapporteur that the Commission should recognize a threshold of tolerance for harm as a necessary condition for engaging States in a legal relationship. Reference was made in this regard to the debate both in the Commission and in the Working Group of the Sixth Committee on the law of the non-navigational uses of international watercourses, which had shown that the concept of "significant" harm was that which currently commanded the widest acceptance in the international community. The point was made that, while the determination of the level of harm depended on each particular case, there was also one objective standard, i.e. whether the damage was reparable. Other members felt that no threshold of harm should be established in relation to the duty of prevention. It was argued in this respect that environmental protection should take precedence over industrial development.

(e) Principles of prevention

38. The principles of procedure discussed in the report were considered generally acceptable, as was the principle of precaution. In fact, the question was raised whether they had not reached the status of customary law. While some felt that the polluter-pays principle should rather be considered in the context of the question of

[8] Article 3 of the resolution on "Responsibility and Liability under International Law for Environmental Damage" adopted on 4 September 1997.

liability, others believed that, since a number of instruments envisaged that the potential polluter should bear the costs of prevention, it was justified to discuss the principle under the topic of prevention.

39. Some members expressed the view that it would unduly complicate the Commission's task to take into account the principles of equity, capacity-building and good governance identified in the report as they had highly political, social and economic aspects. But support was also expressed for their inclusion in the draft to be elaborated. It was further said that such principles had a role to play in the context of the effective implementation of the duty of prevention, even if they were not to be considered as an essential component of the concept of prevention as such. Another view was that the inclusion of said principles depended on the final form of the draft, as it was doubtful whether they would be acceptable in the framework of a binding instrument.

40. There was a view that the draft should expressly provide for a general obligation to cooperate, along the lines of article 8 of the 1997 Convention on the Law of the Non-navigational Uses of International Watercourses. It was also felt, however, that the principle of cooperation should not be interpreted too broadly, as this might impose an undue burden on the affected State; the latter should merely be required to act in good faith. The importance of the principle of good-neighbourliness was also underlined in this connection.

41. It was felt that the Commission should also address the question whether the State of origin adopting preventive measures ought to do so in accordance with its own standards or with those of the potentially affected State and that it should recommend to States a procedure for resolving this problem. It was pointed out, however, that the aim of the present exercise was to encourage States to agree on common standards rather than to rely on the standards of either the State of origin or the affected State.

(f) The legal consequences of non-compliance with the duty of prevention

42. Rejecting the notion that obligations of prevention should only be treated as obligations of conduct without any legal consequences in case of failure to comply, several members stressed that any such violation, whether or not harm had occurred, would entail State responsibility. This should be recognized, it was said, notwithstanding the fact that responsibility for violations of various procedural obligations of prevention, such as the obligation to notify, would not lead to drastic consequences.

43. The Special Rapporteur observed that the Commission would have to decide at an appropriate stage whether it would deal with the question of non-compliance with the duties of prevention in the context of the present topic or of its work on State responsibility.

44. It was agreed that the situation where damage occurred in spite of compliance with obligations of prevention was outside the scope of the present exercise, but views differed on whether the Commission should subsequently address the question of liability.

45. The point was made that the issue of the legal consequences of violations of the obligations under consideration led to the question of the status of the draft to be elaborated by the Commission. A declaration approved by the General Assembly was suggested as a possible option.

(g) Dispute settlement

46. The view was expressed that, where there was a risk of transboundary damage and the parties had not reached agreement as a result of consultations and negotiations, the draft articles should envisage compulsory resort to impartial fact-finding in the same manner as article 33 of the 1997 Convention on the Law of the Non-navigational Uses of International Watercourses. Doubts were raised as to the advisability of the inclusion of dispute settlement provisions in the draft in light of the

controversy surrounding the subject in the context of the topic of State responsibility.