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**DRAFT REPORT OF THE INTERNATIONAL LAW COMMISSION  
ON THE WORK OF ITS FIFTY-EIGHTH SESSION**

**Rapporteur: Ms. Hanqin XUE**

**CHAPTER V**

**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)**

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## A. Introduction

1. The Commission, at its thirtieth session (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 Mr. Robert Q. Quentin-Baxter, Special Rapporteur.<sup>1</sup>
2. From the thirty-second (1980) to the thirty-sixth (1984) sessions, the Commission received and considered five reports from the Special Rapporteur. In the fifth report, five draft articles were proposed by the Special Rapporteur but no decision was made to refer them to the Drafting Committee.<sup>2</sup>
3. The Commission, at its thirty-seventh session (1985), appointed Mr. Julio Barboza, Special Rapporteur for the topic and from its thirty-seventh (1985) to the forty-eighth (1996)

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<sup>1</sup> 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.

<sup>2</sup> For the five reports of the Special Rapporteur, see *Yearbook ... 1980*, vol. II (Part One), p. 247, document A/CN.4/334 and Add.1 and 2 (First report); *Yearbook ... 1981*, vol. II (Part One), p. 103, document A/CN.4/346 and Add.1 and 2 (Second report); *Yearbook ... 1982*, vol. II (Part One), p. 51, document A/CN.4/360 (Third report); *Yearbook ... 1983*, vol. II (Part One), p. 201, document A/CN.4/373 (Fourth report); *Yearbook ... 1984*, vol. II (Part One), p. 155, document A/CN.4/383 and Add.1 (Fifth report). 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 (1982). In 1984, the Commission also had before it the replies to a questionnaire addressed in 1983 by the Legal Counsel of the United Nations to 16 selected international organizations to ascertain whether, amongst 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, *Yearbook ... 1984*, vol. II (Part One), p. 129, document A/CN.4/378 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”. *Yearbook ... 1985*, vol. II (Part One), Addendum, document A/CN.4/384. See also “Survey of liability regimes relevant to the topic of 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.

sessions it received and considered 12 reports from the Special Rapporteur.<sup>3</sup> During this period, the Commission also established two working groups, one in 1992 to consider general issues relating to the scope, the approach to be taken and the possible direction of the future work on the topic<sup>4</sup> and the other in 1996 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. The report of the latter Working Group provided a complete picture of the topic relating to the principle of prevention and that of liability for compensation or other relief, presenting articles and commentaries thereto.<sup>5</sup>

4. At its forty-ninth (1997) session, the Commission, on the basis of recommendations of a Working Group established to consider how the Commission should proceed with its work on this topic<sup>6</sup> decided to deal first with the issue of prevention under the subtitle

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<sup>3</sup> For the 12 reports of the Special Rapporteur, see: *Yearbook ... 1985*, vol. II (Part One), p. 97, document A/CN.4/394 (First report); *Yearbook ... 1986*, vol. II (Part One), p. 145, document A/CN.4/402 (Second report); *Yearbook ... 1987*, vol. II (Part One), p. 47, document A/CN.4/405 (Third report); *Yearbook ... 1988*, vol. II (Part One), p. 251, document A/CN.4/413 (Fourth report); *Yearbook ... 1989*, vol. II (Part One), p. 131, document A/CN.4/423 (Fifth report); *Yearbook ... 1990*, vol. II (Part One), p. 83, document A/CN.4/428 (Sixth report); *Yearbook ... 1991*, vol. II (Part One), p. 71, document A/CN.4/437 (Seventh report); *Yearbook ... 1992*, vol. II (Part One), p. 75, document A/CN.4/443 (Eighth report); *Yearbook ... 1993*, vol. II (Part One), document A/CN.4/450 (Ninth report) *Yearbook ... 1994*, vol. II (Part One), document A/CN.4/459 (Tenth report); document A/CN.4/468 (Eleventh report); and document A/CN.4/475 and Add.1 (Twelfth report).

<sup>4</sup> *Yearbook ... 1992*, vol. II (Part Two), para. 281. 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: first completing work on prevention of transboundary harm and subsequently proceeding with remedial measures. The Commission decided, in view of the ambiguity in the title of the topic, to continue with the working hypothesis that the topic deal with "activities" and to defer any formal change of the title, *ibid.*, paras. 341-349. For a detailed recommendation of the Commission see *ibid.*, ... 1995, chap. V.

<sup>5</sup> *Official Records of the General Assembly, Forty-eighth Session, Supplement No. 10 (A/51/10)*, Annex.

<sup>6</sup> *Ibid.*, *Fifty-second Session, Supplement No. 10 (A/52/10)*, paras. 162-165.

“Prevention of transboundary damage from hazardous activities” and appointed Mr. Pemmaraju Sreenivasa Rao Special Rapporteur for the topic.<sup>7</sup> From its fiftieth (1998) to its fifty-second (2000) sessions, the Commission received and considered three reports from the Special Rapporteur.<sup>8</sup>

5. At its fiftieth session (1998), the Commission adopted on first reading a set of 17 draft articles on prevention of transboundary harm from hazardous activities<sup>9</sup> and at its fifty-third session (2001), it adopted the final text of a draft preamble and a set of 19 draft articles on prevention of transboundary harm from hazardous activities,<sup>10</sup> thus concluding its work on the first part of the topic. Furthermore, the Commission recommended to the General Assembly the elaboration of a convention on the basis of the draft articles.

6. At its fifty-fourth session (2002), the Commission resumed its consideration of the second part of the topic and upon the recommendation of a Working Group established to consider the conceptual outline of the topic,<sup>11</sup> appointed

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<sup>7</sup> Ibid., para. 168. The General Assembly took note of this decision in paragraph 7 of its resolution 52/156.

<sup>8</sup> A/CN.4/487 and Add.1 (First report); A/CN.4/501 (Second report) and A/CN.4/510 (Third Report). The Commission also had before it comments and observations from Governments, A/CN.4/509 and A/CN.4/516, the latter being received in 2001.

<sup>9</sup> *Official Records of the General Assembly, Fifty-third Session, Supplement No. 10 (A/53/10)*, para. 52.

<sup>10</sup> Ibid., *Fifty-sixth Session, Supplement No. 10 (A/56/10)*, para. 97.

<sup>11</sup> The General Assembly, in operative paragraph 3 of resolution 56/82, requested the Commission to resume its consideration of the liability aspects of the topic, bearing in mind the interrelationship between prevention and liability, and taking into account the developments in international law and comments by Governments.

Mr. Pemmaraju Sreenivasa Rao Special Rapporteur for the topic under the subtitle “International liability in the case of loss from transboundary harm arising out of hazardous activities”.<sup>12</sup>

7. Between the fifty-fifth (2003) and the fifty-sixth (2004) sessions, the Commission received and considered two reports of the Special Rapporteur.<sup>13</sup> During this period, the Commission also established two working groups, one in 2003 to assist the Special Rapporteur in considering the future orientation of the topic in the light of his report and the debate in the Commission and the other in 2004 to examine the proposals submitted by the Special Rapporteur, taking into account the debate in the Commission, with a view to recommending draft principles ripe for referral to the Drafting Committee, while also continuing discussions on other issues, including the form that work on the topic should take. At its 2815th meeting, on 9 July 2004, the Commission received the oral report of the Chairman of the Working Group and decided to refer eight draft principles proposed by the Working Group to the Drafting Committee with a request to also prepare a text of a preamble.

8. At the same fifty-sixth session (2004), the Commission completed on first reading a set of eight draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities and decided, in accordance with articles 16 and 21 of its statute to transmit the draft principles, through the Secretary-General, to Governments for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 1 January 2006.

### **B. Consideration of the topic at the present session**

9. At the present session, the Commission had before it the third report of the Special Rapporteur (A/CN.4/566). The Commission also had before it comments and observations

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<sup>12</sup> Ibid., *Fifty-seventh Session, Supplement No. 10 (A/57/10)*, para. 441. The report of the Working Group set out some initial understandings on the topic “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)”, presented views on its scope and the approaches to be pursued.

<sup>13</sup> A/CN.4/531 (First report) and A/CN.4/540 (Second report).

received from Governments (A/CN.4/562 and Add.1). The Commission considered the report at its 2872nd to 2875th meetings, on 9, 10, 11 and 12 May 2006, and at the latter meeting decided to refer the draft principles adopted in 2004, on first reading, to the Drafting Committee for a second reading taking into account the views expressed in the Commission and comments and observations received from Governments.

10. At its 2882nd meeting, on 2 June 2006, the Commission received and considered the report of the Drafting Committee (A/CN.4/L.686) and adopted on second reading the text of the preamble and a set of eight draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities.

11. At its ... meeting, on ... the Commission adopted the commentaries to the aforementioned draft principles.

12. In accordance with its Statute, the Commission submits the draft preamble and the draft principles to the General Assembly, together with a recommendation set out below.

### **C. Recommendation of the Commission**

13. [to be inserted]

### **D. Tribute to the Special Rapporteur, Mr. Pemmaraju Sreenivasa Rao**

14. [to be inserted]

15. [to be inserted]

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