Chapter VII

The Development in the International Law Commission: Consideration of the Topic since 1997

1. The 1997 Group

In its 1997 session, the International Law Commission, with largely renewed membership, decided to review, once again, all the work done on the subject. It appointed yet another Working Group which recommended separating the issues of “prevention” and “liability.” Mr. Penmaraju Sreenivassa Rao, from India, was appointed Special Rapporteur. The reason for dealing with “prevention” separately was explained:

The Working Group noted that the work of the Commission on ‘prevention’ was already at an advanced stage and that many of the articles in that area had been provisionally adopted by the Commission. In the view of the Working Group, the Commission is now well placed to proceed with the work and possibly the completion of the first reading of the draft articles on ‘prevention’ in the next few years. The Working Group also believes that any decision on the form and nature of the draft articles on prevention should be decided at a later stage. The Commission decided that “prevention” should be completed, under the subtitle “Prevention of transboundary damage from hazardous activities,” before examining “liability.” After consideration of Mr. Rao’s First Report, the Commission provisionally adopted a set of articles on first reading.

The Working Group decided that “liability” was fundamental to the topic and that the Commission should retain it as a subject. That was a wise decision: restricted to “prevention,” the topic became one of primary obligations, the breach of which originated responsibility for wrongful acts. The original General Assembly mandate—to progressively develop and codify the injurious

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1 “The Working Group further noted that the Commission had dealt with two issues under the topic: ‘prevention’ and ‘international liability.’ In the view of the Working Group these two issues are distinct from one another, though related. The Working Group therefore agreed that henceforth the issues of prevention and of liability should be dealt with separately.” Doc. A/CN.4/L.542, p. 2.
2 Ibid.
consequences of acts not prohibited by international law—would have been ignored. Moreover, compensation for damage caused by the hazardous activity would have lost all legal foundation had obligations of prevention been complied with by the State of origin in the case: These obligations only went as far as the minimization of risk of transboundary harm, if its avoidance was impossible (article 3). In what legal limbo would damages caused by the inherent risks of an activity be confined?

In this chapter, we shall compare the articles on prevention produced by the 1996 Group with those finally adopted by the Commission. In order to avoid repetitions, it must be remembered that the 1996 Group had adopted practically the same texts on prevention that had already been provisionally accepted by the Commission under the guidance of the second Special Rapporteur.

2. The Scope of the Topic

2.1. The 1996 Articles: Hazardous Activities

The 1997 Working Group and the Commission finally decided to delete paragraph (b) of article 1, so the definition of the activities falling within the scope of the articles remained exactly as in the 1996 draft.

2.2. The List of Activities

As explained in the Third Report of Mr. Rao, the 1996 Working Group:

“...recommended that there was no need to spell out the activities to which the draft articles could be applied. As science and technology is constantly evolving, activities coming within the scope of the draft articles could vary from time to time. In any case, what is excluded is reasonably clear. For example, outside the scope of the present draft articles would fall: activities which cause harm in their normal operation; harm caused by creeping pollution, that is, harm caused over a period of time, harm caused by a combination of effects from multiple sources,

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3 Doc. A/CN.4/L, p. 32.
4 After all, the Commission later expressed in the preamble to the 2006 Articles that they were aware “that incidents involving hazardous activities may occur despite compliance by the relevant State with its obligations concerning prevention of transboundary harm from hazardous activities.”
5 “The State of origin shall take all appropriate measures to prevent significant transboundary harm or in any event to minimize the risk thereof.”
6 The texts of the draft articles of the 1996 Group on prevention and those finally adopted by the Commission are transcribed in the Annexes.
7 That is, those which do not involve a risk but a certainty of harm.