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### Consideration of prevention of transboundary harm from hazardous activities and allocation of loss in the case of such harm

## Consideration of prevention of transboundary harm from hazardous activities and allocation of loss in the case of such harm

Compilation of decisions of international courts, tribunals and other bodies

### Report of the Secretary-General

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\* [A/74/50](#).



## I. Introduction

1. This report has been prepared pursuant to General Assembly resolution [71/143](#), in which the Assembly requested the Secretary-General to submit a compilation of decisions of international courts, tribunals and other bodies referring to the articles on prevention of transboundary harm from hazardous activities (annexed to resolution [62/68](#)) and the principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities (annexed to resolution [61/36](#)) adopted by the International Law Commission.

2. The Commission, in 2001, under the subtitle “Prevention of transboundary damage from hazardous activities” of the topic “International liability for injurious consequences arising out of acts not prohibited by international law”, which was first included in its programme of work in 1978, completed and adopted a set of 19 draft articles on prevention and recommended to the General Assembly the drafting of a convention on the basis of the draft articles. In resolution [56/82](#), the Assembly expressed its appreciation for the valuable work done on the issue of prevention. Pursuant to a request contained in the same resolution, in 2002 the Commission resumed work on the liability aspects, under the subtitle “International liability in case of loss from transboundary harm arising out of hazardous activities”. In 2006, the Commission completed and adopted a set of eight draft principles on the allocation of loss and recommended to the Assembly that it endorse the draft principles by a resolution and urge States to take national and international action to implement them.

3. In its resolution [61/36](#), the General Assembly took note of the principles and commended them to the attention of Governments. In resolution [62/68](#), the Assembly commended the articles to the attention of Governments, without prejudice to any future action, as recommended by the Commission. It also commended the principles once more to the attention of Governments. Moreover, Governments were invited to submit comments on any future action, in particular on the form of the respective articles and principles, bearing in mind the recommendations made by the Commission in that regard, including in relation to the elaboration of a convention on the basis of the draft articles, as well as on any practice in relation to the application of the articles and principles. Following its consideration, at its sixty-fifth session, of the comments received from Governments,<sup>1</sup> the Assembly invited Governments to submit further comments in its resolution [65/28](#). In the same resolution, it also requested the Secretary-General to submit a compilation of decisions of international courts, tribunals and other bodies referring to the articles and the principles. At its sixty-eighth session, the Assembly considered the comments received from Governments and the compilation submitted by the Secretariat.<sup>2</sup> It issued another invitation for comments and a request for a compilation in resolution [68/114](#),<sup>3</sup> and again in resolution [71/143](#).

4. In notes verbales dated 13 January 2017 and 25 January 2019, the Secretary-General drew the attention of Governments to resolution [71/143](#) and invited them to submit, by 31 May 2019, any information (including copies of decisions) regarding instances in which they had pleaded or relied upon the articles or principles before international courts, tribunals or other bodies. None of the submissions received provided information on the invocation of the articles or principles before international courts, tribunals or other bodies. However, two submissions were

<sup>1</sup> [A/65/184](#) and [A/65/184/Add.1](#).

<sup>2</sup> [A/68/170](#) and [A/68/94](#), respectively.

<sup>3</sup> [A/71/98](#), [A/71/136](#) and [A/71/136/Add.1](#).

received from Lebanon and the Netherlands, in which reference was made to the use of the articles or principles before national courts.<sup>4</sup>

5. This compilation, which covers the period between June 2016 and June 2019, should be read in the light of the Commission's recommendation that the General Assembly elaborate a convention on the basis of the articles.<sup>5</sup> In contrast, the Commission cast the principles, which it considered to be of a general and residual character, as a non-binding declaration, as it felt that the goal of widespread acceptance of the substantive provisions was more likely to be met if the outcome was in that form. The Commission focused on the formulation of the substance of the draft principles as a coherent set of standards of conduct and practice. Unlike its practice with the articles, it did not attempt to identify the current status of the various aspects of the principles in customary international law. The way in which the draft principles were formulated was not intended to affect that question.<sup>6</sup>

6. The Secretariat has identified one case in the designated time period in which a relevant body or its individual members addressed issues relating to the articles and the principles: the advisory opinion of the Inter-American Court on Human Rights on the environment and human rights.<sup>7</sup> In the advisory opinion, the Court referred directly to the draft articles and principles and cited their content in support of its conclusions, shedding light on the interpretation and application of the articles and principles together with regional human rights instruments of the inter-American human rights system. In section II, elements of the advisory opinion relating to issues addressed in the articles and principles are summarized.

## **II. Decisions referring to the articles on prevention of transboundary harm from hazardous activities (annexed to resolution 62/68) and the principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities (annexed to resolution 61/36)**

7. The advisory opinion came in response to a request made on 14 March 2016 by Colombia to the Court that it determine, inter alia, how to interpret the Pact of San José where there is a risk that the construction and use of new large-scale infrastructure may seriously affect the marine environment of the wider Caribbean region and, consequently, the human habitat that is vital for the full enjoyment and exercise of their rights by the residents of coastal areas and islands in a State party to the Pact, in the light of environmental norms enshrined in treaties and customary international law applicable in the States concerned.<sup>8</sup>

8. In order to respond to the request for an advisory opinion, the Court deemed it necessary to determine first whether, for the purposes of article 1, paragraph 1, of the American Convention on Human Rights,<sup>9</sup> a person, although not present in the territory of a State party, may be considered subject to the jurisdiction of that State in

<sup>4</sup> See A/74/131.

<sup>5</sup> *Yearbook of the International Law Commission*, 2001, vol. II (Part Two), p. 145, para. 94.

<sup>6</sup> See *Yearbook of the International Law Commission*, 2006, vol. II (Part Two), pp. 59–61.

<sup>7</sup> Inter-American Court of Human Rights, The environment and human rights (State obligations in relation to the environment in the context of the protection and guarantee of the rights to life and personal integrity – interpretation and scope of articles 4.1 and 5.1, in relation to articles 1.1 and 2, of the American Convention on Human Rights), advisory opinion OC-23/17 of 15 November 2017, Series A, No. 23.

<sup>8</sup> *Ibid.*, para. 1.

<sup>9</sup> Inter-American Court of Human Rights, The environment and human rights, para. 82.

terms of compliance with environmental obligations.<sup>10</sup> The Court noted that, for the purposes of the Convention, the jurisdiction of a State is not limited to its territorial area<sup>11</sup> but rather encompasses any situation in which a State has authority or exercises effective control over a person or persons in or outside its territory.<sup>12</sup> The Court underlined that the exercise of jurisdiction under article 1, paragraph 1, of the Convention outside the territory of a State is an exceptional situation that must be closely examined on a case-by-case basis.<sup>13</sup> However, the Court also found that the obligation to prevent transboundary harm to the environment constitutes an obligation under international environmental law and that States therefore may be liable for the significant harm done to persons beyond their borders by activities originating in their territory or under their authority or effective control.<sup>14</sup> Referring to the articles, the Court ruled that the obligation obtains regardless of the lawful or unlawful nature of the conduct that causes the harm.<sup>15</sup>

9. The Court was also asked to identify the specific obligations of States arising from the duty to respect and guarantee the rights to life and personal integrity in the context of environmental protection.<sup>16</sup> The Court found that States must comply with: (a) the obligation of prevention;<sup>17</sup> (b) the precautionary principle;<sup>18</sup> (c) the obligation to cooperate;<sup>19</sup> and (d) procedural obligations, in particular with regard to: (i) access to information; (ii) public participation; and (iii) access to justice, all in relation to the State's environmental protection obligations.<sup>20</sup>

10. With a view to specifying the obligations of prevention, the Court referred expressly to the articles to determine the type of harm that must be prevented, noting that they cover only activities that may cause significant harm.<sup>21</sup> The Court also noted that, in line with the Commission's commentaries to the draft articles, the State of origin is not responsible for preventing unforeseeable risks.<sup>22</sup>

11. With regard to the obligation of prevention, the Court also referred to the articles in maintaining that the State of origin should develop contingency plans for responding to environmental emergencies or disasters, and that such plans should be drawn up in cooperation with other States likely to be affected and competent international organizations.<sup>23</sup> The Court also referred to the articles and the principles, and the Commission's commentaries thereto, in defining the obligation to mitigate, should the environment suffer significant harm, in the following terms:

The State must mitigate significant harm to the environment. Even where the incident occurs in spite of all the required preventive measures having been taken, the State of origin should ensure that appropriate action is taken to

<sup>10</sup> "The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, colour, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition." American Convention on Human Rights: "Pact of San José, Costa Rica" (San José, 22 November 1969), United Nations, *Treaty Series*, vol. 1144, No. 17955, p. 144.

<sup>11</sup> *Ibid.*, para. 104 (c).

<sup>12</sup> *Ibid.*, para. 104 (e).

<sup>13</sup> *Ibid.*, para. 104 (d).

<sup>14</sup> *Ibid.*, para. 103.

<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid.*, para. 105.

<sup>17</sup> *Ibid.*, paras. 127–129 and 174.

<sup>18</sup> *Ibid.*, paras. 175–180.

<sup>19</sup> *Ibid.*, paras. 181–186 and 210.

<sup>20</sup> *Ibid.*, paras. 211, 212 and 241.

<sup>21</sup> *Ibid.*, para. 136.

<sup>22</sup> *Ibid.*

<sup>23</sup> *Ibid.*, para. 171.

mitigate the harm and, to that end, use the best available technology and science. Such measures must be taken immediately, even where the source of the pollution is unknown. Measures that States should take include: (i) clean-up and restoration work within the jurisdiction of the State of origin; (ii) the containment of the geographical spread of the harm and, where possible, preventing it from affecting other States; (iii) the gathering of all necessary information regarding the incident and potential risk of harm; (iv) in emergency situations relating to an activity that may cause significant harm to the environment of another State, the State of origin must, without delay and as quickly as feasible, notify the State likely to be affected by such harm [...]; (v) once notified, the States affected, or likely to be affected, should take all possible measures to mitigate and, if possible, eliminate, the impact of the harm and; (vi) in emergencies, inform persons likely to be affected.<sup>24</sup>

12. With regard to the obligation to consult and negotiate with potentially affected States, the Court noted that in the [articles] it is established that States should consult one another with a view to arriving at acceptable solutions regarding measures to be adopted to prevent significant transboundary harm or, at least, to minimize the risk thereof.<sup>25</sup>

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<sup>24</sup> Ibid., para. 172.

<sup>25</sup> Ibid., para. 200.