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

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Report of the Secretary-General

Summary

The present report, prepared pursuant to General Assembly resolution 71/143, contains comments and observations of Governments on the consideration of prevention of transboundary harm from hazardous activities and allocation of loss in the case of such harm.

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I. Introduction

1. The present report has been prepared pursuant to paragraph 3 of General Assembly resolution 71/143, in which the Assembly invited Governments to submit further comments on any future action, in particular on the form of the articles on prevention of transboundary harm from hazardous activities[1] and the principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities,[2] bearing in mind the recommendations made by the International Law Commission in that regard, including in relation to the elaboration of a convention on the basis of the articles,[3] as well as on any practice in relation to the application of the articles and principles.

2. The Secretary-General, in a circular note dated 13 January 2017, drew the attention of Governments to resolution 71/143, and a reminder was sent out on 25 January 2019. The present report should be read together with the previous reports of the Secretary General on this item (A/65/184, A/65/184/Add.1, A/68/170 and A/71/136).

II. Comments and observations received from Governments

Austria

3. Austria reiterated its position (see A/65/184, paras. 3–4) that it would be preferable to defer a decision on future action and the ultimate form of both the articles and the principles. Austria was of the view such an approach would permit the monitoring of whether the articles and principles would be able to stand the test of time and whether States accepted them in their practice. Austria also noted that its authorities were not aware of any judicial decision of Austrian courts referring to the articles or principles.

El Salvador

4. El Salvador reiterated its position (see A/68/170, paras. 10–14; and A/71/136, paras. 5–7) that it considered it of great importance to elaborate a convention on the basis of the articles and principles, especially in view of the need to prevent the harm to health, agriculture, water resources and ecosystems that could be caused by environmentally harmful transboundary activities. El Salvador expressed the view that the elaboration of a convention on the topic would undoubtedly represent the progressive adaptation of contemporary international law in respect of environmental issues with an international dimension, especially taking into account that environmental issues could not be resolved exclusively by individual actions of States. El Salvador stated that it was increasingly necessary to build intergovernmental cooperation mechanisms to settle disputes between a polluting State and a State affected by environmental harm.

5. El Salvador noted that the instrument should take into account the principles set out in the Charter of the United Nations, the Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration)[4] and the Rio

[1] General Assembly resolution 62/68, annex.
[2] General Assembly resolution 61/36, annex.
[3] *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* and corrigendum (A/56/10 and A/56/10/Corr.1), para. 94.
[4] See *Report of the United Nations Conference on the Human Environment, Stockholm, 5–16 June 1972* (A/CONF.48/14/Rev.1), part one, chap. I.

Declaration on Environment and Development.[5] El Salvador emphasized the importance of the sovereign right of States to exploit their own resources pursuant to their own environmental and development policies, and highlighted the obligation of States to ensure that activities within their jurisdiction or control would not cause damage to the environment and areas that were outside the limits of their national jurisdiction.

6. In respect of the articles, El Salvador made specific observations in relation to the text of the draft articles. El Salvador noted that article 1 was not clear in what was meant by "physical consequences", considering that the hazardous activities that might cause transboundary harm could be associated with situations that involved radiological, biological, chemical and physical risks, representing threats to health and the environment.

7. El Salvador also noted that the expression "significant transboundary harm", as used in articles 2, 3, 4, 8, 9, 10, 11, 12 and 15, would exclude the high probability of causing catastrophic harm that could arise, for example, when a toxic waste mining dyke broke. In the view of El Salvador, the scope of what was to be understood as "significant transboundary harm" had not been determined. Moreover, El Salvador suggested that article 3 should be amended to read as follows: "The State of origin shall take all appropriate measures to avoid, prevent or reduce significant transboundary harm".

8. It was also noted that article 6 did not mention specific activities covered by the articles, and therefore El Salvador suggested that it was advisable to include priority activities and a mechanism for the incorporation and updating of new activities.

9. With regard to article 7, El Salvador recommended that a standard methodology for the assessment of risks and harm should be established. It was also recommended that consideration be given to extending response times in article 8, taking into account the complexity and size of an activity, work or a project, provided that there were justifications for such extension. In regard to the procedures in the absence of notification in article 11, El Salvador suggested that specific periods or a mechanism was to be set up for the establishment of a reasonable period for suspending the activity in question.

10. Concerning article 14, El Salvador recommended the addition of the following provision: "For the purposes of this convention, information on health and human and environmental safety shall not be considered confidential". El Salvador considered such information essential to protect human and environmental rights, especially when those might have been affected immediately or over the long term.

11. El Salvador proposed to refer to "the State or States that may be affected" in articles 16 and 17, since in some cases more than one State might have been affected.

12. Considering the possible adoption of an international convention on the topic, El Salvador expressed the opinion that it was necessary to include aspects of responsibility for environmental harm, particularly in relation to adequate compensation and reparation for transboundary harm caused by activities that were carried out inside a jurisdiction, and the determination of appropriate measures for the prevention of such harm and its related risks.

[5] *Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3–14 June 1992, vol. I, Resolutions Adopted by the Conference* (United Nations publication, Sales No. E.93.I.8 and corrigendum), resolution 1, annex I.

Iraq

13. Iraq commented that a fault-based approach was perhaps not suitable for addressing all environmental harm, because some risks were the result of activities that were hazardous by nature and not covered by international law. In the view of Iraq, the State of origin should take "take all necessary measures" to prevent significant transboundary harm, rather than taking "all appropriate measures", as the term "appropriate" would be understood as relating to the capacity of the State of origin to prevent harm.

14. Iraq also noted that cooperation to prevent harm should be compulsory rather than optional and that, in order to avoid discretionary interpretations, it should not be contingent on good faith.

15. The view was also expressed that the term "hazardous activities" should include the issue of disaster management (floods, surges and natural disasters). While noting that such disasters were unintentional, Iraq commented that their management was subject to human assessment and was one instance of actions not covered by international law.

16. In regard to the allocation of loss, Iraq highlighted the need to ensure that both the State of origin and the affected State would take the necessary measures. It also expressed the view that the allocation should take place on a basis that ensured cooperation among States and the establishment of funds to address the harm done.

Lebanon

17. Lebanon provided a compilation of decisions by the inquisition judge before the Military Court of Lebanon, dated 2014 to 2017, related to the request by the General Assembly in its resolution 71/143.[6]

Morocco

18. With regard to the draft articles, Morocco made specific observations in relation to the text, noting that the third paragraph of the preamble should be amended to read "bearing in mind also that the freedom of … or control must pose no threat to persons or their property, historical or cultural heritage, or to the environment in general". Morocco considered that the use of the adjective "significant" in articles 1, 2, 3, 4, 8, 9, 10, 11, 12 and 15 raised terminological questions, as it seemed inadequate for quantifying or assessing transboundary harm, and as it was difficult to see how the distinction might be made between significant and insignificant harm. In that regard, Morocco suggested that thought should be given to devising a technical approach for establishing such a distinction.

19. In respect of article 3, Morocco was of the view that the kind of appropriate measures that the State of origin should take to prevent significant transboundary harm and minimize the risk thereof would depend greatly on the resources available to it. Morocco also suggested that consideration should be given to specifying which national body or bodies should be entrusted with the processing of authorization requests and the issuance and termination of the different types of authorization referred to in article 6.

20. As to the draft principles, Morocco noted that provisions should be included in the text to address the following: technical and financial assistance to implement its provisions; mechanisms for allocating loss in the cases covered by the principles; an environmental restoration, rehabilitation and reclamation fund and a compensation

[6] For previous comments, see A/71/136, paras. 8–13. The text of the compilation, as submitted in Arabic, is on file with the secretariat of the Sixth Committee and is available for consultation.

fund for victims of loss in the cases covered by the principles; and the promotion of scientific research on, and techniques for, preventing transboundary harm arising out of hazardous activities, in particular for the scientific monitoring, assessment and analysis of such harm.

21. Morocco also made specific observations in relation to the text of the principles, noting that other principles of the Rio Declaration on Environment and Development,[5] in addition to principles 13 and 16, could be mentioned in the preamble, including principles 17 (on the environmental impact assessment of activities that are likely to have a significant adverse impact on the environment), 18 (on States notifying one another about any natural disasters or other emergencies that are likely to produce harmful effects on the environment), 19 (on the prior notification of States potentially affected by activities that may have an adverse transboundary environmental effect and the necessary consultations in that regard), 20 (on the vital role of women in environmental management and sustainable development), 26 (on the peaceful resolution of environmental disputes between States by appropriate means in accordance with the Charter of the United Nations) and 27 (on cooperation between States and people in a spirit of partnership in the fulfilment of the principles embodied in the Rio Declaration and in the further development of international law in the field of sustainable development).

22. Additionally, Morocco stated that mention should be made of the principle of compensation for the various forms of environmental harm in the fifth preambular paragraph of the principles. Morocco recalled that, according to that principle, States were liable to provide prompt and adequate compensation to natural or legal persons that incurred losses as a result of transboundary harm arising out of hazardous activities.

23. Morocco suggested that paragraphs 2 and 3 of principle 4 could be made clearer by specifying the persons or entities referred to therein and that, in paragraph 5, provision for an international compensation fund for harm done, to which all States concerned would contribute, could be included in place of the provision under which the State of origin alone had to provide such compensation.

Netherlands[7]

24. The Netherlands provided information in relation to the application of the draft articles by the Attorney-General of the Supreme Court of the Netherlands, in an opinion in the case of the appeal of the State of the Netherlands against victims of the war in Bosnia and Herzegovina. In the opinion, the Attorney-General referred to article 3 and the commentary thereto to explain the nature and extent of due diligence obligations in international law, in relation to the determination of the obligation of a State to prevent genocide under the Convention on the Prevention and Punishment of the Crime of Genocide.[8]

Qatar[9]

25. Qatar expressed the belief that the questions of transboundary harm from hazardous activities and allocation of loss in the case of such harm were of paramount importance for international relations. Such matters undergirded the rights of States affected by harmful actions, namely practices engaged in by a given State that caused them harm, or the practices of neighbouring States, when the source of harm traversed the border from the State of origin. Qatar also stated that the principle of the allocation

[7] For previous comments, see A/65/184, paras. 16–18; and A/68/170, para. 15.
[8] General Assembly resolution 260 A (III), annex.
[9] For previous comments, see A/68/170, paras. 28–29.

of harm among affected States entailed a form of equity, as States would share the costs resulting from such harm.

26. Qatar suggested adding provisions to the effect that the State of origin would be obliged to put an end to activities that were likely to result in the occurrence of transboundary harm, and that the location of activities that were likely to result in the occurrence of transboundary harm would be specified and would not be adjacent to the borders of other States or close to territorial waters.

Serbia

27. Serbia stated that it considered that the elaboration of a global convention on the prevention of transboundary harm from hazardous activities was very important. To that end, Serbia noted that it was a party to the Convention on the Transboundary Effects of Industrial Accidents,[10] which had been adopted by member States of the Economic Commission for Europe (ECE), and recalled the adoption of the Protocol on Civil Liability and Compensation for Damage Caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes and to the 1992 Convention on the Transboundary Effects of Industrial Accidents,[11] also in the context of ECE.

28. In the context of the elaboration of a new convention, Serbia drew attention to the Convention on the Transboundary Effects of Industrial Accidents, which was aimed at improving industrial safety and protecting human beings and the environment throughout the ECE region. Serbia noted that, in view of the complexities involved, the implementation of the aforementioned Convention called for participation by a large number of competent agencies, vertical coordination among local and regional agencies, engagement by the industrial sector and the public, and bilateral transboundary cooperation among neighbouring countries.

29. Serbia also highlighted that the definition of hazardous activities in the Convention on the Transboundary Effects of Industrial Accidents,[12] when compared to the proposed definition in the principles,[13] was indicative of a possible broader meaning in the latter. Serbia also noted that it was possible to conclude that the notion of damage and of transboundary damage caused by hazardous activities was more precisely defined in the principles.

30. In regard to the articles, Serbia found it important to note that they addressed issues already regulated by the Convention on the Transboundary Effects of Industrial Accidents, but exclusively in matters within its scope of application, such as prevention, cooperation, assessment of risk, notification and information, consultations, exchange of information, provision of information to the public, emergency preparedness, development of contingency plans for responding to emergencies and notification regarding an emergency.

31. Serbia also pointed out that the question of opening the Convention on the Transboundary Effects of Industrial Accidents to States Members of the United Nations that were not members of ECE had been considered at the 8th and 9th[14] meetings of the Conference of the Parties to the Convention on the Transboundary

[10] United Nations, *Treaty Series*, vol. 2105, No. 36605.

[11] Not in force, available at https://www.unece.org/fileadmin/DAM/env/civil-liability/documents/protocol_e.pdf.

[12] Art. 1 (b).

[13] General Assembly resolution 61/36, annex, principle 2 (c).

[14] At the time of the submission of the contribution by Serbia, the 10th meeting of the Conference of the Parties had not yet taken place.

Effects of Industrial Accidents, but that the Conference had been unable to adopt a decision on proposed amendments to the Convention, including on the accession by States Members of the United Nations and regional economic integration organizations constituted by sovereign States Members of the United Nations.

32. Serbia expressed the view that, in the elaboration of a new Convention, there was a need to take into account the provisions of the Convention on the Transboundary Effects of Industrial Accidents, and that possible overlaps should be avoided.