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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**

### *Summary*

The present report is prepared pursuant to General Assembly resolution [74/189](#), 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.

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\* [A/77/150](#).



## I. Introduction

1. The present report has been prepared pursuant to General Assembly resolution [74/189](#), 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. At its sixty-fifth session, following its consideration 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, seventy-first and seventy-fourth sessions, 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 [74/189](#).

4. In notes verbales dated 8 January 2020 and 13 January 2022, the Secretary-General drew the attention of Governments to resolution [74/189](#) and invited them to submit, by 31 May 2022, 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. A submission was received from Argentina indicating that it had relied on the articles to support its position in the rejoinder for the case relating to the *Pulp Mills on the River Uruguay (Argentina v. Uruguay)* before the International Court of Justice.<sup>3</sup>

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

<sup>2</sup> [A/68/170](#), [A/68/94](#), [A/71/98](#), [A/71/136](#), [A/71/136/Add.1](#), [A/74/131](#), [A/74/131/Add.1](#) and [A/74/132](#).

<sup>3</sup> Previously reported in document [A/71/98](#).

5. This compilation, which covers the period between June 2019 and June 2022,<sup>4</sup> 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 *Case of the Workers of the Fireworks Factory in Santo Antônio de Jesus and their Families v. Brazil*, before the Inter-American Court of Human Rights.<sup>7</sup> In the separate opinion of Judge Eduardo Ferrer Mac-Gregor Poisot appended to the judgment, reference is made to an advisory opinion of the Court on the environment and human rights,<sup>8</sup> discussing the draft articles, in order to clarify the concept of "significant risk". In section II, the use of the articles by Judge Ferrer Mac-Gregor Poisot are discussed.

## 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. While the *Case of the Workers of the Fireworks Factory in Santo Antônio de Jesus and their Families v. Brazil* deals with matters related to occupational safety, the Court found that there is an obligation for States parties to the Pact of San José<sup>9</sup> to regulate, supervise and monitor the implementation of dangerous activities that entail significant risks for the life and integrity of the persons subject to their jurisdiction.<sup>10</sup>

8. To further develop the concept of "significant risk", Judge Ferrer Mac-Gregor Poisot, in his separate opinion, quoted paragraph 136 of the aforementioned advisory opinion on the environment and human rights.<sup>11</sup> In that paragraph, the Court pointed out that the International Law Commission's articles refer only to those activities that may involve significant transboundary harm susceptible of being measured by factual

<sup>4</sup> Previous reports containing compilations of decisions are found in documents [A/68/94](#), [A/71/98](#) and [A/74/132](#).

<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, *Case of the Workers of the Fireworks Factory in Santo Antônio de Jesus and their Families v. Brazil*, Judgment of 15 July 2020 (preliminary objections, merits, reparations and costs).

<sup>8</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 to 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, 15 November 2017, Series A, No. 23.

<sup>9</sup> 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>10</sup> Inter-American Court of Human Rights, *Case of the Workers of the Fireworks Factory in Santo Antônio de Jesus and their Families v. Brazil*, para. 118.

<sup>11</sup> *Ibid.*, separate opinion of Judge Eduardo Ferrer Mac-Gregor Poisot, fn. 39.

and objective standards. In the quoted paragraphs, it was also noted that the International Law Commission had indicated that a State of origin was not responsible for preventing risks that were not foreseeable, but that States had the continuing obligation to identify activities that involved significant risk.<sup>12</sup>

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<sup>12</sup> Inter-American Court of Human Rights, “The environment and human rights”, para. 136.