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# THE WORK OF THE INTERNATIONAL LAW COMMISSION IN THE FIELD OF INTERNATIONAL ENVIRONMENTAL LAW

LUIS BARRIONUEVO ARÉVALO\*

**Abstract:** Established in 1947 by the United Nations General Assembly, the International Law Commission (ILC) has played an instrumental role in the codification and progressive development of international law over the last five decades. Despite an initially weak legal basis for environmental action, the ILC managed to meet the demands for international measures in this domain, producing a number of draft articles, some of which gave birth to major environmental treaties. After briefly describing the ILC's organization, functions, and procedures, this Article analyses its work on some environmental issues, grouped under three categories: law of the sea, international watercourses and natural shared resources, and accountability for transboundary environmental damage. Although not counted among today's main law-making bodies in the environmental field, the ILC has positively responded to the need to protect the environment and made a valuable contribution to the process of codification and progressive development of international environmental law.

## INTRODUCTION

The International Law Commission (ILC or Commission) was established in 1947 by the United Nations (U.N.) General Assembly<sup>1</sup> to implement article 13, paragraph 1, of the U.N. Charter, which provides that the Assembly "shall initiate studies and make recommendations for the purpose of . . . encouraging the progressive development of international law and its codification."<sup>2</sup> Indeed, both progressive development and codification are among the most significant aspects in the evolution of international law since WWII.<sup>3</sup> In this respect, the

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<sup>1</sup> G.A. Res. 174 (II), U.N. GAOR, 2d Sess., at 105, U.N. Doc. A/519 (1948).

<sup>2</sup> U.N. CHARTER art. 13, para. 1.

<sup>3</sup> See *Introduction to INTERNATIONAL LAW ON THE EVE OF THE TWENTY-FIRST CENTURY*, at 1, U.N. Sales No. E/F 97.V.4 (1997).

ILC has been instrumental by producing more than twenty sets of draft articles, many of which “have, in turn, been transformed into major global treaties.”<sup>4</sup> Some of these draft articles and treaties deal with the environment, even though the ILC, like the international organization to which it belongs,<sup>5</sup> is in fact a pre-environmental institution, in that it predates the dawn of the environmental era.<sup>6</sup> However, despite an initially weak legal basis for environmental action, the U.N. system positively responded to the demands for international measures in this domain as soon as an environmental consciousness started to emerge. On the international level, these growing demands played a decisive part in the convening of the Stockholm Conference on the Human Environment in 1972, generally regarded as the starting point for the development of international environmental law as a separate branch of international law.<sup>7</sup> As far as the ILC is concerned,

<sup>4</sup> See *id.* at 1–2.

<sup>5</sup> The U.N. Charter includes only indirect links to environmental issues, such as article 55, “which addresses ‘the creation of conditions of stability and well-being’ and according to which the United Nations shall promote ‘conditions of economic and social progress and development’ as well as ‘solutions of international economic, social, health, and related problems.’” Winfried Lang, *The United Nations and International Environmental Law*, 9 INT’L GENEVA Y.B. 47, 47 (1995); see U.N. CHARTER art. 55.

<sup>6</sup> Concepts about nature started to experience a fundamental change near the end of the 1960s as a result of a growing awareness that our planet is “endangered by the continued multiplication of human population, by increasingly invasive technology, and by the disordered activities of humanity.” See ALEXANDRE KISS & DINAH SHELTON, *INTERNATIONAL ENVIRONMENTAL LAW* 1 (3d ed. 2003).

<sup>7</sup> PETER MALANCZUK, *AKEHURST’S MODERN INTRODUCTION TO INTERNATIONAL LAW* 241 (7th rev. ed. 1997). As for the definition of this new branch of international law and the concept of environment that underlies it, the task remains complex and controversial. Professors Kiss and Shelton consider international environmental law a category of international law aiming “at the protection of the biosphere from major deterioration which could endanger its present or future functioning.” KISS & SHELTON, *supra* note 6, at 9. They then draw on a UNESCO (United Nations Educational, Scientific, and Cultural Organization) definition of the biosphere as “the totality of our environment, that part of the universe in which, as far as we know, all life is concentrated.” *Id.* Using Philippe Sands’s definition of international environmental law (“those substantive, procedural and institutional rules of international law which have as their primary objective the protection of the environment”) as a departure point, Professors Hafner and Pearson suggest that environment is a very broad concept that includes “human life, health, and social well-being; flora, fauna, and all other components of ecosystems; landscape and cultural heritage; and natural resources.” See Gerhard Hafner & Holly L. Pearson, *Environmental Issues in the Work of the International Law Commission*, 11 Y.B. OF INT’L ENVTL. L. 3, 5–6 (2000) (quoting PHILIPPE SANDS, *FRAMEWORKS, STANDARDS AND IMPLEMENTATION* 17 (1995)). For their part, Professors Birnie and Boyle define international environmental law “to encompass the entire corpus of international law, public and private, relevant to environmental issues or problems.” P.W. BIRNIE & A.E. BOYLE, *INTERNATIONAL LAW AND THE ENVIRONMENT* 1–2 (2d ed. 2002). They note, however, that many conventions avoid dealing with the concept of envi-

although some of its early work on the law of the sea certainly had an environmental impact, it was not until the 1970s that it explicitly started to address environmental issues.<sup>8</sup> Since then, however, the environment and its protection have come to occupy an increasingly important place on the Commission's agenda.

The ILC has dealt with environmental issues in different ways. Sometimes, it has done so in a straightforward, explicit way, addressing conduct that results in environmental damage (under the topics of international liability and prevention of transboundary damage from hazardous activities, for example) or providing for the rational management and conservation of natural resources and protection from pollution (under the topics of international watercourses and shared natural resources).<sup>9</sup> On other occasions, aspects of international environmental law have been addressed only indirectly (for instance, under the issue of state responsibility, which deals with the legal consequences of the breach of international obligations, including environmental ones) or incidentally (as shown by the inclusion of certain crimes against the environment in the Draft Code of Crimes against the Peace and Security of Mankind).<sup>10</sup> After a brief description of the Commission's organization, functions, and methods of work, this Article will analyse its work on some of those topics, grouped under three broad categories: law of the sea, international watercourses and natural shared resources, and accountability for transboundary environmental damage. Finally, some concluding observations will be made regarding the work of the ILC in the field of environmental law.

## I. THE INTERNATIONAL LAW COMMISSION: ORGANIZATION, FUNCTIONS, AND PROCEDURES

As mentioned before, the ILC is a U.N. body devoted to the progressive development of international law and its codification.<sup>11</sup> It is

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ronment because, "as Caldwell remarks[,] 'it is a term that everyone understands and no one is able to define.'" *Id.* at 4.

<sup>8</sup> See VED P. NANDA, INTERNATIONAL ENVIRONMENTAL LAW & POLICY 133 (1995).

<sup>9</sup> See *infra* Part I.A–B.

<sup>10</sup> See *infra* Part I.C.

<sup>11</sup> Article 15 of the ILC statute makes a distinction "for convenience" between progressive development, which means "the preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of the States," and codification, which means "the more precise formulation and systematization of rules of international law in fields where there already has been extensive State practice, precedent and doctrine." See STAT-

composed of thirty-four experts in international law<sup>12</sup> representing the world's principal legal systems;<sup>13</sup> they are elected for terms of five years by the General Assembly to serve in their personal capacities rather than as representatives of governments.<sup>14</sup>

The most important function of the Commission is the drafting of articles and other documents on various aspects of international law either upon request of the General Assembly, other U.N. organs, the Member States, or on its own initiative.<sup>15</sup> According to its usual method of work, after a topic has been selected, the ILC appoints a special rapporteur and establishes an appropriate plan of work.<sup>16</sup> Governments may be required to provide relevant information on such matters as laws, judicial decisions, treaties, and diplomatic practices.<sup>17</sup> The special rapporteur then submits reports to the ILC that form the basis of a provisional draft of articles and their commentaries, which eventually become final.<sup>18</sup> Upon completion of its work on a topic, the ILC refers the final draft back to the General Assembly for it to take action as deemed appropriate, normally including its recommendations as to what measures should be adopted.<sup>19</sup>

UTE OF THE INTERNATIONAL LAW COMMISSION at 3, U.N. Doc A/CN.4/4/Rev.2, U.N. Sales No. E.82.V.8 (1982) [hereinafter ILC STATUTE], *available at* <http://www.un.org/law/ilc/texts/statufra.htm>. In practice, however, the distinction between codification and progressive development is often blurred. *See* MALANCZUK, *supra* note 7, at 61.

<sup>12</sup> ILC STATUTE, *supra* note 11, art. 2, para. 1.

<sup>13</sup> *Id.* art. 8.

<sup>14</sup> *See id.* art. 10. Even though the members of the ILC do not represent governments, the Commission reports on its work every year to the General Assembly. The reports of the Commission are thoroughly discussed in the Sixth (Legal) Committee of the General Assembly, and records of these discussions are transmitted to the ILC, which takes them into account in future deliberations. Therefore, as Professor McCaffrey points out, "despite the independence of the members, it would not be accurate to suggest that the Commission functions in an 'ivory tower,' aloof from such pragmatic considerations as whether its work would be acceptable to governments." *See* Stephen C. McCaffrey, *An Update on the Contributions of the International Law Commission to International Environmental Law*, 15 ENVTL. L. 667, 668 n.4 (1985).

<sup>15</sup> ILC STATUTE, *supra* note 11, arts. 16–18.

<sup>16</sup> *See id.* art. 16.

<sup>17</sup> *See id.*

<sup>18</sup> *See id.* Upon adoption by the ILC, the draft's first version is submitted to the General Assembly and to governments for comment. *See id.* Bearing in mind the replies received, the special rapporteur prepares additional reports with recommendations until a final report with draft articles and their commentaries is approved. *See id.*

<sup>19</sup> *See id.* The Commission's options for recommendation to the General Assembly are:

- (a) To take no action, the report having already been published;
- (b) To take note of or adopt the report by resolution;
- (c) To recommend the draft to Members with a view to the conclusion of a convention;

Although the Commission's functions cannot be characterised as legislative, its work is often regarded as an authoritative source of international law on a given subject. Therefore, its work on environmental issues is of interest not only because it has formed the basis of a number of draft articles and multilateral conventions, but also because it reflects the views of a large and diverse group of experts on international law. To this work we now turn.

## II. THE INTERNATIONAL LAW COMMISSION AND THE ENVIRONMENT

### A. *Law of the Sea*

The ILC discussed environmental issues for the first time under two of the topics of its initial programme of work,<sup>20</sup> namely, the regime of the high seas and the regime of territorial waters. In this respect, two main environmental questions arose relatively soon: water pollution and the conservation of marine resources. Water pollution was dealt with under the framework of the high seas regime, restricted to certain types of pollution, particularly that caused by fuel oil. After subsequent discussions on the issue, the ILC adopted a provision<sup>21</sup> calling on all states to draft regulations to prevent water pollution from fuel oil discharged from ships. This draft article formed the basis for article 24 of the Convention on Fishing and Conservation of the Living Resources of the High Seas, which also includes a provision on radioactive waste (article 25), added as a result of the negotiations that took place in the first U.N. Conference on the Law of the Sea (UNCLOS I).<sup>22</sup>

As for conservation of marine resources, a question also discussed in connection with the regime of the high seas, the negotiations within the ILC led to the drafting of several articles later to be

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(d) To convoke a conference to conclude a convention.

*See id.* art. 23, para. 1.

<sup>20</sup> The ILC drew its first list of topics selected for codification—also known as the Commission's long-term programme of work—in 1949. *See UNITED NATIONS, THE WORK OF THE INTERNATIONAL LAW COMMISSION* 30, U.N. Sales No. E.04.V.6, Vol. I (6th ed. 2004).

<sup>21</sup> The provision was draft article 23. *See Report of the International Law Commission on the Work of Its Seventh Session*, U.N. GAOR, 10th Sess., Supp. No. 9, at 2, 9, U.N. Doc A/2934 (1955) [hereinafter *ILC Seventh Session Report*].

<sup>22</sup> *See id.* Held in Geneva from February 24 to April 27, 1958, UNCLOS I adopted four conventions on the law of the sea (the Convention on the Territorial Sea and the Contiguous Zone, the Convention on the High Seas, the Convention on the Continental Shelf as well as the Convention on Fishing and Conservation of the Living Resources of the High Seas). *See UNITED NATIONS, supra* note 20, at 118–20.

included in two of the conventions adopted at UNCLOS I.<sup>23</sup> Discussions on these issues within the ILC revolved around the definition of the countries that were entitled to impose restrictions on fishing on the high seas and on exploiting the natural resources of the continental shelf in order to protect the resources of the sea. However, to a large extent, the yardstick by which conservation was measured was the need to preserve the food supply for human consumption.<sup>24</sup>

Professors Hafner and Pearson have aptly criticized the ILC for addressing the conservation of living resources in a largely anthropocentric and exploitation-oriented way and for dealing with only certain types of water pollution while excluding others.<sup>25</sup> However, bearing in mind the time and circumstances in which the ILC carried out its work, the draft articles on water pollution and conservation of marine resources are worthy of praise, for they represent an important contribution to international environmental law in its early stages; moreover, they had a profound influence on the subsequent efforts of codification and progressive development of the law of the sea.<sup>26</sup>

### B. *International Watercourses and Natural Shared Resources*

The topic of the non-navigational uses of international watercourses, referred to the Commission by the General Assembly in 1971, is a prime example of the ILC's contribution to both the codification and the progressive development of international environmental law.<sup>27</sup>

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<sup>23</sup> See Convention on Fishing and Conservation of the Living Resources of the High Seas, Apr. 29, 1958, art. 5, para. 1, 17 U.S.T. 138, 141, 599 U.N.T.S. 285, 289-90, available at <http://www.un.org/law/ilc/texts/fish.htm>; Convention on the Continental Shelf, Apr. 29, 1958, art. 5, para. 1, 15 U.S.T. 471, 473, 499 U.N.T.S. 311, 314, available at <http://www.un.org/law/ilc/texts/contsh.htm>.

<sup>24</sup> According to the ILC, "the primary objective of conservation of the living resources of the sea is to obtain the optimum sustainable yield so as to obtain a maximum supply of food and other marine products in a form useful to mankind." See *ILC Seventh Session Report*, *supra* note 21, at 14.

<sup>25</sup> Hafner & Pearson, *supra* note 7, at 9-10.

<sup>26</sup> Even though the ILC was not involved in the negotiations (held within the frame of UNCLOS III from 1973 to 1982) that led to the adoption of the 1982 U.N. Convention on the Law of the Sea, a number of its articles are based on those of the 1958 conventions. See UNITED NATIONS, *supra* note 20, at 122.

<sup>27</sup> The final draft of articles on this topic was adopted by the ILC in 1994. See *Report of the International Law Commission on the Work of Its Forty-Sixth Session*, U.N. GAOR, 49th Sess., Supp. No. 10, U.N. Doc. A/49/10 (1994). This draft formed the basis for the Convention on the Law of the Non-Navigational Uses of International Watercourses (Watercourses Convention), adopted by the General Assembly on May 21, 1997. *Convention on the Law of the Non-Navigational Uses of International Watercourses*, G.A. Res. 51/229, Annex, U.N. GAOR

As far as codification is concerned, the draft articles formulate and systematize a number of principles governing non-navigational uses of watercourses<sup>28</sup> drawn from the practice of watercourse states. Worth mentioning are the principle of “equitable and reasonable” utilization of international watercourses and participation in their use, development, and protection (articles 5 and 6), the “obligation not to cause significant harm” (article 7), the “obligation to cooperate” (article 8), and the directive to exchange data and information (article 9).<sup>29</sup> The final draft also included a set of provisions on the notification of planned measures that might affect an international watercourse (articles 11–19), which envisaged a procedure of notification and information exchange followed by a waiting period during which the potentially affected state could reply to the notification.<sup>30</sup>

Together with the codification of these customary rules in the Watercourses Convention,<sup>31</sup> the ILC has also contributed to the progressive development of the law of international watercourses by including a number of provisions dealing with the protection, preservation, and management of the ecosystems of international watercourses. Draft article 21, for example, imposes on states the duty to “prevent, reduce and control the pollution of an international watercourse that may cause significant harm to other watercourse States or to their environment, including harm to human health or safety, to the use of the waters for any beneficial purpose or to the living resources of the watercourse.”<sup>32</sup> In addition to this provision, the final draft includes others dealing with issues such as introduction of alien species (article 22), protection and preservation of marine ecosystems (article 23), joint management mechanisms for watercourses (article 24), measures to regulate the flow of waters (article 25), prevention and mitigation of harmful conditions (article 27), and management of emergency situations (article 28).<sup>33</sup>

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51st Sess., U.N. Doc. A/RES/51/229 (1997) [hereinafter *Watercourses Convention*]. Its text is available at <http://www.un.org/law/ilc/texts/nonnav.htm>.

<sup>28</sup> According to Professor McCaffrey (fourth ILC Special Rapporteur on the topic) the non-navigational uses of international watercourses “vary widely, including such activities as fishing, irrigation, power generation, domestic consumption, and . . . waste disposal.” McCaffrey, *supra* note 14, at 674. As for “watercourses,” McCaffrey contends that “[t]he term may be taken to include not only rivers, but also lakes, canals, glaciers, aquifers, and reservoirs.” *Id.*

<sup>29</sup> *Watercourses Convention*, *supra* note 27, at 5–7.

<sup>30</sup> *Id.* at 7–9.

<sup>31</sup> See *Watercourses Convention*, *supra* note 27.

<sup>32</sup> *Id.* at 10.

<sup>33</sup> *Id.* at 10–12.

The Watercourses Convention has only been signed by sixteen states and ratified by twelve.<sup>34</sup> Despite this low level of acceptance, it has received considerable attention from scholars,<sup>35</sup> legal practitioners, and international courts,<sup>36</sup> some of which consider it “a clear statement on several important environmental principles” and, up to now, “the ILC’s most significant contribution to international environmental law.”<sup>37</sup> Moreover, the principles contained in the Watercourses Convention have been applied to other topics, such as the regime of shared natural resources.<sup>38</sup>

Indeed, the ILC first addressed this issue during the codification of the law of the non-navigational uses of international watercourses. At the time, the Commission decided to exclude confined groundwaters unrelated to surface waters from the topic, acknowledging, nonetheless, that the singular nature and importance of such waters in many parts of the world warranted a separate study of the subject.<sup>39</sup> In 2002, the ILC decided to include the topic “Shared natural resources” in its programme of work,<sup>40</sup> appointing a special rapporteur who submitted his first report on the issue in 2003.<sup>41</sup> In this report, it was suggested that priority should be given to confined transboundary waters and, at

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<sup>34</sup> For convention status, see United Nations, *Convention on the Law of the Non-Navigational Uses of International Watercourses*, May 21, 1997, at <http://untreaty.un.org/ENGLISH/bible/englishinternbible/part1/chapterXXVII/treaty41.asp>. In accordance with article 36(1), the entry into force of the Convention requires its ratification, acceptance, approval, or accession by at least 35 states. See *Watercourses Convention*, *supra* note 27, at 15.

<sup>35</sup> A recent study conducted under the auspices of the British Institute of International and Comparative Law acknowledges that “[t]he careful and thorough preparatory work of successive rapporteurs undoubtedly gives the new Convention an authority which is likely to endure . . . almost regardless of however many States become parties.” See THE INTERNATIONAL LAW COMMISSION AND THE FUTURE OF INTERNATIONAL LAW 14 (M.R. Anderson et al. eds., 1998) [hereinafter THE INTERNATIONAL LAW COMMISSION].

<sup>36</sup> Although not yet in force, the Convention has already been relied upon by the International Court of Justice. See *generally* Concerning the Gabčíkovo-Nagymaros Project (Hung. v. Slov.), 1997 I.C.J. 7 (Sept. 25).

<sup>37</sup> Hafner & Pearson, *supra* note 7, at 15.

<sup>38</sup> See *Shared Natural Resources: First Report on Outlines*, U.N. GAOR, 58th Sess., at 3–6, U.N. Doc. A/CN.4/533 (2003).

<sup>39</sup> See *id.* at 6.

<sup>40</sup> See *Report of the International Law Commission on the Work of Its Fifty-Fourth Session*, U.N. GAOR, 57th Sess., Supp. No. 10, at 243, U.N. Doc. A/57/10 (2002).

<sup>41</sup> *Shared Natural Resources: First Report on Outlines*, U.N. GAOR, 58th Sess., U.N. Docs. A/CN.4/533 and A/CN.4/533/Add.1 (2003).

a later date, to oil and gas,<sup>42</sup> whereas other natural resources like minerals and migratory species (that is, birds) should be excluded.<sup>43</sup>

Even though the topic is still in a preliminary stage of development, some conclusions can be drawn from the above-mentioned report and the subsequent commentaries of the ILC and the Sixth Committee of the General Assembly. First, the relevance of the principle of sovereignty has been unanimously emphasized. In this context, it has been observed that “any intimation that the term ‘shared resources’ referred to a shared heritage of mankind or to notions of shared ownership would be misleading”<sup>44</sup> and that, in its work, the ILC will have to bear in mind the principles governing the permanent sovereignty of states over natural resources enshrined in General Assembly resolution 1803 (XVII) of 14 December 1962.<sup>45</sup> Second, although most of the principles contained in the Watercourses Convention are deemed applicable to the management of shared natural resources, account must be taken of the uniqueness of groundwaters as vulnerable, non-renewable, and finite resources and their significance for the fresh water supply.<sup>46</sup> Finally, these features also seem to justify heightened standards of due diligence and pollution prevention as compared to the ones applied to surface waters and stricter thresholds in relation to transboundary harm.<sup>47</sup>

### C. *Accountability for Transboundary Environmental Damage*

Under this heading, we will discuss three interrelated issues (state responsibility, international liability, and prevention of transboundary damage from hazardous activities) that are particularly pertinent to en-

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<sup>42</sup> However, within the General Assembly’s Sixth Committee, “[c]aution was voiced concerning the drawing of close parallels with oil or gas since that would overlook the essential role of groundwaters for, inter alia, broader ecosystems, biodiversity and human health.” *Report of the International Law Commission on the Work of Its Fifty-Fifth Session: Topical Summary of the Discussion Held in the Sixth Committee of the General Assembly During Its Fifty-Eighth Session*, U.N. GAOR, 58th Sess., at 47, U.N. Doc. A/CN.4/537 (2004) [hereinafter *ILC Fifty-Fifth Session Report: Topical Summary*].

<sup>43</sup> See *id.* at 46.

<sup>44</sup> *Id.*

<sup>45</sup> See *Report of the International Law Commission on the Work of Its Fifty-Fifth Session*, U.N. GAOR, 58th Sess., Supp. No. 10, at 265, U.N. Doc. A/58/10 (2003).

<sup>46</sup> In this connection, it has been suggested that, given the special characteristics of these resources, article 5 of the Watercourses Convention (which deals with the principle of equitable and reasonable utilization), and article 7 (regarding the measures to prevent significant harm to other states) will have to be adapted, modified, or reinforced. *Id.* at 265.

<sup>47</sup> *Id.* at 265, 266.

vironmental law and how it deals with the consequences of transboundary damage. As for the first, state responsibility was among the topics included in the ILC's long-term programme of work.<sup>48</sup> The Commission's intention was to codify the secondary rules which allocate responsibility and determine the legal consequences of the breach of any primary rule of international law. This proved to be a "marathon task" that required the ILC "to expend in the preparation of the draft Articles a vast amount of time and energy, unparalleled in its other work."<sup>49</sup>

One of the most controversial issues addressed by the ILC under this topic was the distinction, based on the severity of the breach, between international crimes and international delicts,<sup>50</sup> and the inclusion among the former of any "serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment, such as those prohibiting massive pollution of the atmosphere or of the seas."<sup>51</sup> This provision, drafted in the early 1980s, clearly illustrates the growing pervasiveness of environmental issues in the work of the ILC. Even though the article in question faced strong criticism from governments and ILC members<sup>52</sup> and was finally suppressed, some of the concepts underlying it can still be found in the final draft.<sup>53</sup> Moreover, its discussion paved the road for the inclusion of similar provisions in other sets of articles drafted by the ILC, such as the Draft Code of Crimes Against the Peace and Security of Mankind.<sup>54</sup>

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<sup>48</sup> See UNITED NATIONS, *supra* note 20, at 194.

<sup>49</sup> THE INTERNATIONAL LAW COMMISSION, *supra* note 35, at 13. The final draft was adopted by the ILC in 2001, 46 years after it began considering the topic. See *Report of the International Law Commission on the Work of Its Fifty-Third Session*, U.N. GAOR, 56th Sess., Supp. No. 10, at 43, U.N. Doc. A/56/10 (2001) [hereinafter *ILC Fifty-Third Session Report*].

<sup>50</sup> According to draft article 19(2) (adopted in first reading in 1980), international crime is any "internationally wrongful act which results from the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole," whereas an international delict is "[a]ny internationally wrongful act which is not an international crime." See *Report of the International Law Commission on the Work of Its Thirty-Second Session*, U.N. GAOR, 35th Sess., Supp. No. 10, at 64, U.N. Doc. A/35/10 (1980).

<sup>51</sup> *Id.*

<sup>52</sup> See Hafner & Pearson, *supra* note 7, at 17.

<sup>53</sup> One such example is part II, chapter III, entitled "Serious breaches of obligations under peremptory norms of general international law." See *ILC Fifty-Third Session Report*, *supra* note 49, at 53.

<sup>54</sup> Article 20(g) of the draft code provides that "using methods or means of warfare not justified by military necessity with the intent to cause widespread, long-term and severe damage to the natural environment" constitutes not only a war crime but also "a crime

The scope of the topic of state responsibility—"the totality of legal rules and consequences linked to the breach of any international obligation of the State"<sup>55</sup>—goes far beyond the domain of international environmental law and permeates the very foundations of international law as a whole. We shall merely observe that some of the articles drafted by the ILC on the issue, such as those governing the attribution of internationally wrongful acts to the state<sup>56</sup> and those relating to the reparation of injuries arising from such acts,<sup>57</sup> are of particular interest for international environmental law, since they may enable states to demand "*ex post* compensation" and other relief for harm caused to them by other states.<sup>58</sup>

Halfway through its work on state responsibility, the ILC came to the conclusion that legal consequences resulting from damage through lawful activities should be treated differently from responsibility for consequences of wrongful acts.<sup>59</sup> It therefore decided to divide the original topic into "two segments: one dealing with responsibility for harms resulting from violations of international law; and the other with the prevention of and international liability for" damage not involving breaches of international law.<sup>60</sup> In undertaking the codification of international liability for otherwise lawful acts, the ILC had two objectives in mind: "to provide compensation to injured states (liability) and, as well as to deter or prevent" potentially liable

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against the peace and security of mankind when committed in a systematic manner or on a large scale." See *Report of the International Law Commission on the Work of Its Forty-Eighth Session*, U.N. GAOR, 51st Sess., Supp. No. 10, at 110, 112, U.N. Doc. A/51/10 (1996) [hereinafter *ILC Forty-Eighth Session Report*]. In any case, the consideration of the draft code, the final version of which was submitted to the General Assembly in 1996, "was superseded by the negotiations leading to the Rome Statute of the International Criminal Court," adopted on July 17, 1998. See Hafner & Pearson, *supra* note 7, at 30.

<sup>55</sup> See *Introduction to UNITED NATIONS CODIFICATION OF STATE RESPONSIBILITY*, at VII (Marina Spinedi & Bruno Simma eds., 1987).

<sup>56</sup> This is a prerequisite for state responsibility to arise, according to article 2(a) and (b). See *ILC Fifty-Third Session Report*, *supra* note 49, at 43.

<sup>57</sup> The remedies available to secure compliance with international obligations and obtain reparation for injuries caused by an internationally wrongful act are restitution, compensation, and satisfaction (article 34). See *id.* at 235.

<sup>58</sup> See LAKSHMAN D. GURUSWAMY, *INTERNATIONAL ENVIRONMENTAL LAW IN A NUTSHELL* 66 (2d ed. 2003). For a general analysis of judicial remedies as instruments to compel compliance with international environmental law, see *id.* at 65–93.

<sup>59</sup> See UNITED NATIONS, *supra* note 20, at 204–05.

<sup>60</sup> GURUSWAMY, *supra* note 58, at 71 (parenthetical omitted). The new topic, termed "[i]nternational liability for injurious consequences arising out of acts not prohibited by international law," was included in the ILC programme of work in 1997, and the Commission started to work on it one year later. See UNITED NATIONS, *supra* note 20, at 204–05; see also GURUSWAMY, *supra* note 58, at 71.

states from performing such injurious acts or, at least, take appropriate measures to “minimize the risk of potential harms (prevention).”<sup>61</sup> In the following years, the ILC increasingly focused on the prevention objective,<sup>62</sup> which led to a further division of international liability into two subtopics: prevention and liability.

Leaving aside the controversy on the breakdown of the original topic into two and then three subtopics,<sup>63</sup> international liability is one area of the ILC’s work that has been “consistently interpreted as pertaining to environmental law.”<sup>64</sup> Originally, this topic was supposed to deal with liability “for ‘ultrahazardous’ but socially desirable activities affecting the physical environment—such as nuclear reactors and space objects”—which, despite their legal character, create a risk of harm to states and individuals having no control over them.<sup>65</sup> This means that, although the act causing the damage may not be prohib-

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<sup>61</sup> See GURUSWAMY, *supra* note 58, at 82.

<sup>62</sup> Already in 1982, the ILC considered that priority should “be given to the duty to avoid or minimize injury, rather than to the substituted duty to provide reparation for injury caused.” See *Report of the International Law Commission on the Work of Its Thirty-Fourth Session*, U.N. GAOR, 37th Sess., Supp. No. 10, at 186, U.N. Doc. A/37/10 (1982).

<sup>63</sup> For example, as far as the distinction between international liability and state responsibility is concerned, Professor Boyle considers that, theoretically, it has a weak conceptual basis and, practically, represents an uncertain basis for the codification and development of existing law and practice in the field of environmental harm. See Alan E. Boyle, *State Responsibility and International Liability for Injurious Consequences of Acts Not Prohibited by International Law: A Necessary Distinction?*, 39 INT’L & COMP. L.Q. 1, 1 (1990). In his view, such distinction “is liable to seem at best a questionable exercise in reconceptualising an existing body of law, or at worst, a dangerously retrograde step which may seriously weaken international efforts to secure agreement on effective principles of international environmental law.” See *id.*

Professor Guruswamy suggests that, in practice, the creation of the new topic “international liability,” as distinct from state responsibility, has not caused significant new difficulties because the real challenge is to “define the non-wrongful acts (or one not prohibited by international law) to which international liability attaches.” GURUSWAMY, *supra* note 58, at 82. This question remains problematic regardless of the heading under which it is found. Moreover, in Guruswamy’s opinion, the separate treatment of wrongful and non-wrongful acts may also have the positive effect of affirming “the ‘legal’ character of international law by emphasizing the difference between acts that violate international law and those that do not.” *Id.*

<sup>64</sup> See NANDA, *supra* note 8, at 153.

<sup>65</sup> See Stephen C. McCaffrey, *International Environmental Law and the Work of the International Law Commission*, 77 AM. SOC’Y INT’L L. PROC. 414 (1983). However, the scope of the topic was subsequently enlarged to include “activities not prohibited by international law which involve a risk of causing significant transboundary harm . . . through their physical consequences” as well as other “legal” activities that cause that harm even if they do not involve such risk (article 1 of the 1996 draft articles on international liability for injurious consequences arising out of acts not prohibited by international law). See *ILC Forty-Eighth Session Report*, *supra* note 54, at 238.

ited, the individuals who suffer the harmful consequences must be compensated. The essential feature of this regime is a standard of strict liability for environmental injury, according to which states may be held accountable, even if they have not breached their obligations of due diligence.<sup>66</sup> However, the issue remains controversial, and there are doubts as to whether there is support among states for the development of a general international legal regime on liability.<sup>67</sup>

As already mentioned, in 1997 the ILC set aside liability and proceeded with the subtopic of prevention. This move, welcomed by some as the beginning of the “transformation of [international environmental law] from an *ex post* to an *ex ante law*,”<sup>68</sup> led to the approval in 2001 of a set of draft articles specifically devoted to prevention of transboundary damage from hazardous activities.<sup>69</sup> These draft articles envisage several obligations for states, including: the duty to take all appropriate measures to prevent, or minimize the risk of, significant transboundary harm (article 3); to obtain prior authorization for activities within the scope of the draft articles, with decisions on authorization to be based on environmental impact assessments (article 7); to provide information to the public (article 13); to notify states that are likely to be affected (article 8); and to cooperate, consult, and exchange information (articles 4, 9, and 12, respectively).<sup>70</sup>

On the other hand, after the adoption of the final draft on prevention, the ILC resumed consideration of the liability aspects of the topic. In this evaluation, the special rapporteur on the issue submitted a report in 2003 on the legal regime for allocation of loss in the case of a transboundary harm arising out of hazardous activities.<sup>71</sup> Consistent with the “polluter pays” principle, the report recognized that the operator should bear primary liability for redressing any harm caused and that the innocent victim should not be left to bear loss.<sup>72</sup> The special

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<sup>66</sup> See BIRNIE & BOYLE, *supra* note 7, at 189.

<sup>67</sup> See ILC *Fifty-Fifth Session Report: Topical Summary*, *supra* note 42, at 31.

<sup>68</sup> GURUSWAMY, *supra* note 58, at 92. In the same vein, Professors Birnie and Boyle consider it an example of a change of perspective within environmental international law: “Having started as a system of rules limited largely to liability for transboundary damage, resource allocation, and the resolution of conflicting uses of common spaces, international law now accommodates a preventive, and in this sense precautionary, approach to the protection of the environment on a global level.” BIRNIE & BOYLE, *supra* note 7, at 753.

<sup>69</sup> See ILC *Fifty-Third Session Report*, *supra* note 49, at 370.

<sup>70</sup> *Id.* at 370–75.

<sup>71</sup> See generally *First Report on the Legal Regime for Allocation of Loss in Case of Transboundary Harm Arising out of Hazardous Activities*, U.N. GAOR, 58th Sess., U.N. Doc. A/CN.4/531 (2003).

<sup>72</sup> *Id.* at 19.

rapporteur also favoured linking the strict liability of the operator with some residual compensation regime involving the state,<sup>73</sup> which itself should enact legislation designed to prevent uncovered losses, exercising due diligence to ensure effective enforcement. Also worthy of mention is the idea that any future regime should guarantee compensation for harm caused, not only to individuals, but also to the environment, and that the definition of harm should therefore include any damage to the environment or natural resources within the national jurisdiction, including elements of state patrimony and natural heritage on the same footing as any loss to persons and property.<sup>74</sup>

### CONCLUSION

Over the last three decades, the protection of the environment has come to occupy a significant place on the international agenda. Parallel to the increasingly obvious need to protect the environment, a new branch of international law has developed to address environmental deterioration in a way that earlier laws were unable to do.<sup>75</sup> As this Article has sought to demonstrate, the ILC's contribution to this endeavour has been remarkable. In pursuance of its mandate to codify and progressively develop international law, the ILC has drafted several sets of articles that have often formed the foundation for significant international environmental conventions. Even when this has not been the case, its discussions have been found extremely useful because they have provided evidence of what international environmental law is and how it could be reasonably transformed in ways that are acceptable to the international community at large.

In general, the ILC has placed a greater emphasis on establishing procedural regulations (such as the draft articles on state responsibility and many provisions in the Watercourses Convention) than on drawing up substantive rules imposing obligations on states. In the opinion of some commentators, this responds to a clear need for the codification of "general rules and principles which support the substantive provisions of international environmental law."<sup>76</sup> On the other hand, the ILC has refrained from including in its programme

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<sup>73</sup> *Id.* at 10.

<sup>74</sup> *Id.* at 18.

<sup>75</sup> See GURUSWAMY, *supra* note 58, at iv.

<sup>76</sup> See THE INTERNATIONAL LAW COMMISSION, *supra* note 35, at 44. Under this view, the need is particularly evident in fields such as "risk prevention, environmental impact assessment, liability for environmental damage, transboundary cooperation, and sustainable utilization" of resources. *Id.*

issues perceived to be too general (“environmental protection,” for instance) or topics in which state practice is sparse, vague, or inconsistent, such as rules for the avoidance of environmental conflicts, or some principles of environmental law, including the precautionary principle and the polluter pays principle.<sup>77</sup>

Admittedly, the ILC is far from being the only (or even the most important) law-making body in the environmental arena.<sup>78</sup> However, as its work over half a century indicates, it has been increasingly responsive to the environmental demands of the international community, making a highly valuable contribution to the process of codification and progressive development of international environmental law.

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<sup>77</sup> See Hafner & Pearson, *supra* note 7, at 49.

<sup>78</sup> In general terms, Professor Anderson considers that the ILC shares its codifying role with “an eclectic range of competing or complementary institutions and processes within and outside the UN system.” THE INTERNATIONAL LAW COMMISSION, *supra* note 35, at 17.

