The Work of the International Law Commission Relating to the Environment

Stephen C. McCaffrey
Recent Developments

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It is now well recognized that pollution and other natural resource problems do not respect national boundaries. Authorities in both the public and private sectors have become increasingly aware that many domestic pollution problems have extraterritorial ramifications, as illustrated by the phenomenon of acid rain.1 Solutions to these problems can be approached on the private,2 governmental,3 or intergovernmental4 level, through application of principles of domestic private law,
treaty law, or general international law. The United Nations International Law Commission (ILC) concerns itself with a wide range of issues in international law. Several topics on which the Commission currently is working, however, pertain directly to transnational environmental problems. This note provides a brief overview of selected topics on the current agenda of the ILC. To place this discussion in proper context, however, it is best to review the background and methods of work of the ILC.

Article 13, paragraph 1 of the United Nations Charter requires the General Assembly to "initiate studies and make recommendations for the purpose of . . . encouraging the progressive development of international law and its codification." To carry out this provision, the General Assembly in 1947 established the ILC, a body of experts in international law. The ILC prepares draft articles on various topics of international law which are submitted to the General Assembly. The Commission held its first Session in 1949 and has since completed drafts on a number of topics which have formed the basis of multilateral conventions. The 1958 Geneva Conventions on the Law of the Sea, the Vienna Conventions on Diplomatic and Consular Relations, and the Vienna Convention on the Law of Treaties number among the treaties concluded on the basis of ILC work. The work of the Commission has no binding force, but because the Commission is involved, among other assignments, in the "codification" of general international law, its work is often viewed by states, tribunals, and commentators as an authoritative statement of the law on a given topic. Thus the Commission's work relating to the natural environment is of
interest not only because it may at some future date be embodied in a multilateral convention, but also because it carries authority as a statement of general international law.

The thirty-four members of the International Law Commission\(^\text{14}\) are elected for five year terms by the General Assembly\(^\text{15}\) on nomination of member states,\(^\text{16}\) and serve in individual capacities, not as representatives of governments.\(^\text{17}\)

Each of the seven topics on the Commission's agenda\(^\text{18}\) is entrusted to a different member, who is designated "Special Rapporteur" for that topic.\(^\text{19}\) Each year the Special Rapporteur presents to the full Commission a report which usually contains a group of draft articles concerning one aspect of the topic in question.\(^\text{20}\) The Commission discusses the report in plenary session, and the articles then usually are referred to the Drafting Committee for review in light of the plenary discussion.\(^\text{21}\) After the Drafting Committee conducts its review of the articles, it reports back to the full Commission which ordinarily adopts the articles as reported.\(^\text{22}\) This initial adoption of the articles is only provisional, however, and is termed accordingly "adoption on 'first reading.'"\(^\text{23}\) After the complete set of draft articles on a given topic is adopted on first reading, the Commission gives it a "second reading" which takes into account, among other considerations, the observations of governments and of the General Assembly on the draft articles approved on first reading.\(^\text{24}\) After completion of the second reading, the Commission submits the set of draft articles to the General Assembly.

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14. \(\text{Id.},\) art. 2, para. 1, at 1.
15. \(\text{Id.},\) art. 10, at 2.
16. \(\text{Id.},\) art. 4, at 1.
17. See generally \(\text{id.},\) art. 8, at 2, urging electors to bear in mind that members of the Commission should "individually possess the qualifications required," and that "in the Commission as a whole representation of the major forms of civilization and of the principal legal systems of the world should be assured."
22. See generally \(\text{id.}\).
23. \(\text{Id.}\).
24. \(\text{Id.}\).
along with a recommendation regarding further action.\textsuperscript{25} This action may take a number of forms.\textsuperscript{26} For example, the General Assembly may decide to make a completed set of draft articles on a particular topic the subject of a resolution,\textsuperscript{27} or it may decide to convene a conference of plenipotentiaries of member nations of the United Nations at which a multilateral convention would be formulated based on the Commission's draft.\textsuperscript{28}

The two topics on the Commission's current agenda bearing most directly upon the natural environment are The Law of the Non-Navigational Uses of International Watercourses and International Liability for Injurious Consequences Arising out of Acts Not Prohibited by International Law. A third topic, State Responsibility, is also relevant. The following sections review the important features of each topic.

I. INTERNATIONAL WATERCOURSES

The International Watercourses topic first was included in the Commission's general program of work in 1971.\textsuperscript{29} The topic primarily concerns the prevention and resolution of conflicts between states that arise from competing uses of a single watercourse system.\textsuperscript{30} For example, hydroelectric power generation may divert significant amounts of water from a watercourse at the expense of downstream users.\textsuperscript{31} Irrigation by an upper riparian state not only may consume large quantities of the water of an international river,\textsuperscript{32} but also may pollute the river with fertilizer and pesticide runoff, and the wasteproducts of livestock.\textsuperscript{33} In addition, through pollution and heavy consumption, industrial users may encroach upon water available for domestic and recreational use.\textsuperscript{34}

\textsuperscript{25} See Statute of the ILC, supra note 13, art. 23, at 6.
\textsuperscript{26} Article 23, paragraph 1 of the Statute of the International Law Commission provides:

1. The Commission may recommend to the General Assembly:
   (a) to take no action, the report having already been published;
   (b) to take notice of or adopt the report by resolution;
   (c) to recommend the draft to Members with a view to the conclusion of a convention;
   (d) to convene a conference to conclude a convention.

\textit{Id.}

\textsuperscript{27} \textit{Id.}, art. 23, para. 1(b), at 6.
\textsuperscript{28} \textit{Id.}, art. 23, para. 1(d), at 6.
\textsuperscript{29} UNITED NATIONS, THE WORK OF THE INTERNATIONAL LAW COMMISSION 91-94 (3d ed. 1980) gives an overview of the history of the Commission's work on this topic up to 1979, as well as references to compilations of relevant state practice.
\textsuperscript{30} First Report on Non-Navigational Uses, supra note 20, at 19.
\textsuperscript{31} \textit{Id.} at 20.
\textsuperscript{32} \textit{Id.}
\textsuperscript{33} \textit{Id.}
\textsuperscript{34} \textit{Id.}
There have been three Special Rapporteurs for the International Watercourses topic. The most recent Rapporteur, Minister Jens Evensen of Norway, submitted his first report in the Commission's 1983 session. Largely because of the progress that had been made under previous Special Rapporteurs, Minister Evensen was able to propose in his first report a complete set of draft articles, arranged in the form of a draft international agreement. The articles are divided into six chapters: Chapter I, Introductory articles; Chapter II, General principles: rights and duties of system States; Chapter III, Co-operation and management in regard to international watercourse systems; Chapter IV, Environmental protection, pollution, health hazards, natural hazards, regulation and safety, use preferences, national or regional sites; Chapter V, Settlement of disputes; and Chapter VI, Relationship to other Conventions and final provisions. A summary of the entire set of draft articles is beyond the scope of this note, but the basic approach of the draft may be gleaned from three foundational provisions: Articles 1, 6, and 9.

Article 1 defines an "international watercourse system," the conceptual foundation upon which the entire draft is built. Whether a state has riparian rights or obligations vis-a-vis another state under the draft articles depends on whether that other state is a “system state” — that is, whether it is within the same international watercourse system as the former state. Article 1 is entitled “Explanation (definition) of the term ‘international watercourse system’ as applied by the present draft Convention,” and provides:

1. An “international watercourse system” is a watercourse system ordinarily consisting of fresh water components, situated in two or more system States.

Watercourses which in whole or in part are apt to appear and disappear more or less regularly from seasonal or other natural causes such as precipitation, thawing, seasonal avulsion, drought or similar occurrences are governed by the provisions of these draft articles.

Deltas, rivermouths or other similar formations with brackish or

35. See id. at 7-8.
36. Id. at 19.
37. See generally id. at 7-18, discussing the work of previous Rapporteurs.
38. Id. at 23-25.
39. Article 1 as proposed by the Special Rapporteur is based on a "Note describing... tentative understanding of what is meant by the term ‘international watercourse system’" provisionally adopted by the Commission in 1980. Id. at 26. In that year, the Commission also provisionally adopted five articles (numbered 1 to 5) that had been proposed by the previous Special Rapporteur. Id. Article 6 as proposed by the present Special Rapporteur is based principally on the article 5 that was provisionally adopted by the Commission in 1980. Id. at 32. Article 9 also is based on a draft proposed by the previous Special Rapporteur, but this draft had not been acted upon by the Commission. See generally id. at 17.
40. Article 3 defines a "system State" as "a State in whose territory components/part of the waters of an international watercourse system exist[s]." Id. at 29.
salt water forming a natural part of an international watercourse system shall likewise be governed by the provisions of these draft articles.  

2. To the extent that a part or parts of a watercourse system situated in one system State are not affected by or do not affect uses of the watercourse system in another system State, such parts shall not be treated as part of the international watercourse system for the purpose of these articles.  

Thus, the term "watercourse system" includes not only rivers, lakes, and tributaries, but also such components as canals, streams, brooks, aquifers, ground water.

In formulating a definition of the term "international watercourse system," the Special Rapporteur recognized the paramount need for flexibility in any set of principles designed as a framework to govern the use of international watercourses. Because the issues surrounding competing uses of international watercourse systems are highly delicate, both legally and politically, and because each watercourse system is unique and presents its own peculiar problems, the principles formulated to govern such issues must be fairly general. At the same time, such principles cannot be so general as to render them ineffective.

A comparison between article 1 and a parallel definition in the 1966 Helsinki Rules on the Uses of the Waters of International Rivers illustrates an additional aspect of the flexibility afforded by the watercourse system definition of article 1 — its "relativity." The Helsinki Rules employed an "international drainage basin" concept, defined in article II of the Rules as a geographical area extending over two or more States determined by the watershed limits of the system of waters, including surface and underground waters, flowing into a common terminus.

Under the Helsinki Rules, any international drainage basin would be subject to the provisions of the Rules. In contrast, paragraph 2 of draft article 1 provides that waters that would otherwise fall within the definition of an international watercourse system will not be treated as such if such waters are not affected by or do not affect uses of waters

41. Id. at 26.
42. Id. at 27.
43. Id. at 9-10.
44. See id.
45. Id.
46. Id. at 8.
48. Id. at 484-85.
49. This writer and others in the Commission have pointed out the focus should be upon whether uses of waters have an effect on other water uses in the system.
in another system state.\textsuperscript{50} Article 1 in effect exempts certain waters from the provisions of the draft agreement where transnational effects arising from their use appear unlikely. Although this exemption lends the draft a degree of flexibility which perhaps enhances its political palatability, it is questionable whether it will be possible to implement, as a practical matter, such a provision. Moreover, because the entire set of draft articles is formulated very flexibly, paragraph 2 perhaps is unnecessary. Uses which do not cause appreciable harm\textsuperscript{51} generally are permitted regardless of whether they affect a system state or whether they take place within the watercourse system.

Besides affording greater flexibility than the Helsinki Rules, the ILC draft treaty's concept of a watercourse system encompasses a broader range of waters than the Helsinki Rules' concept of an international drainage basin. Although the Helsinki Rules require that the system of waters flow into a common terminus, draft article 1 does not.\textsuperscript{52} Thus, for example, it appears that interbasin transfers fall within the ambit of the ILC draft, but not that of the Helsinki Rules.\textsuperscript{53}

After defining the scope of the draft articles in draft Chapter I, the Special Rapporteur turns in Chapter II to general principles, the rights and duties of system states.\textsuperscript{54} Draft article 6 contains the central principle from which rights and duties of system states flow. This article is tentatively entitled "The international watercourse system — a shared natural resource. The use of such resource." It provides:

1. To the extent that the use of an international watercourse system and its waters in the territory of one system State affects the use of a watercourse system or its waters in the territory of another system State or other system States, the watercourse system and its waters are, for the purposes of this convention, a shared natural resource. Each system State is entitled to a reasonable and equitable participation (within its territory) in this shared resource.

2. An international watercourse system and its waters which constitute a shared natural resource shall be used by system States in accordance with the articles of this convention and other agreements or arrangements entered into in accordance with articles 4 and 5.\textsuperscript{55}

\textsuperscript{50} See infra text accompanying notes 87-95.
\textsuperscript{51} Id.
\textsuperscript{52} First Report on Non-Navigational Uses, supra note 20, at 26-27.
\textsuperscript{53} An example of such an interbasin transfer is the Garrison Diversion project in North Dakota. Plans for this highly controversial project call for water to be diverted from the Missouri River, across the Continental Divide, and into an area that eventually empties into the Hudson Bay Drainage Basin in Canada. See generally J. Carroll & R. Logan, The Garrison Diversion Unit (1980); and Goldberg, The Garrison Diversion Project: New Solutions for Transboundary Pollution Disputes, 11 Manitoba L.J. 177 (1981).
\textsuperscript{54} First Report on Non-Navigational Uses, supra note 20, at 31.
\textsuperscript{55} Id. Articles 4 and 5 provide for the right of every system state to participate in the negotiation of and to become a party to a "system agreement," an agreement that "applies and adjusts the provisions of the present articles to the characteristics and uses of a particu-
The principle embodied in this article — that an international watercourse system is a shared natural resource (SNR) — seems self-evident; yet it does not enjoy the unanimous support of the Commission. The questions that have been raised about the principle seem to stem from the fact that the legal implications of treating an international watercourse system as an SNR have not yet been fully defined. It is uncertain whether this article entails new obligations for upper riparian states, for example. This uncertainty, however, need not arise. For unless an upper riparian state were to take the untenable position that the Harmon Doctrine is a viable doctrine of international law, the SNR principle adds little, if anything, to the already existing obligations under international law.

56. The "Harmon Doctrine" stands for the proposition that an upper riparian state can do whatever it wishes with (that is, has absolute sovereignty over) an international watercourse and its waters while it is within the territory of that state, regardless of the consequences for lower riparian states. See generally McCaffrey, Trans-Boundary Pollution Injuries: Jurisdictional Considerations in Private Litigation between Canada and the United States, 3 CAL. W. INT'L L.J. 191, 205-209 (1973). The doctrine receives its name from an opinion delivered by Attorney General Judson Harmon in 1895, in response to a question posed by the Secretary of State: whether, under principles of international law, Mexico was entitled to indemnity for harm suffered from diversion of the waters of the Rio Grande in the United States. See generally 21 Op. Att'y Gen. 274 (1895). Attorney General Harmon relied principally upon language in Chief Justice Marshall's opinion in The Schooner Exchange v. McFadden, 11 U.S. 116, 7 Cranch 136 (1812), a sovereign immunity case. The principles governing the field of sovereign immunity appear to be inapplicable and irrelevant to questions relating to international watercourses, and hence Attorney General Harmon's reliance on the Schooner Exchange case as an expression of a doctrine of "absolute sovereignty" or "absolute immunity" probably was misplaced. See Statements of Sir Ian Sinclair and S. McCaffrey on the topic of the Jurisdictional Immunities of States and their Property, May 18, 1983, to be published in vol. 1 of the 1983 Yearbook of the International Law Commission.

Moreover, a 1958 Department of State memorandum recognized that the "truism that a state is sovereign in its territory does not lead to the conclusion that a state may legally make unlimited use of waters within its territory." DEPARTMENT OF STATE, LEGAL ASPECTS OF THE USE OF SYSTEMS OF INTERNATIONAL WATERS, S. Doc. No. 118, 85th Cong., 2d Sess., 60-61 (1958); see also id. at 62-63. It is generally recognized that the Harmon Doctrine is discredited, even if it ever represented the United States' view of international law on this point. The history of the doctrine is chronicled in Lipper, Equitable Utilization, in THE LAW OF INTERNATIONAL DRAINAGE BASINS 15, 20-40 (A. Garretson, R. Hayton and C. Olmstead eds. 1967). See also the statement of F. Clayton, counsel for the United States Section of the International Boundary Commission, to the Senate Foreign Relations Committee: "Attorney General Harmon's opinion has never been followed." Hearings before the Committee on Foreign Relations of the United States Senate on Treaty with Mexico Relating to Utilization of Waters of Certain Rivers, 79th Cong., 1st Sess., 97-98 (1945); and Third Report on the Law of the Non-Navigational Uses of International Watercourses 32-34, U.N. Doc. A/CN.4/348 (1981) [hereinafter cited as Third Report on Non-Navigational Uses].

The Commission recognizes that although there is nothing new about the fact that the water of an international watercourse system is an SNR, the use of the term as a source of obligations is a relatively recent development:

While the concept of shared natural resources may in some respects be as old as that of international co-operation, its articulation is relatively new and incomplete. It has not been accepted as such, and in terms, as a principle of international law, although the fact of shared natural resources has long been treated in State practice as giving rise to obligations to co-operate in the treatment of such resources.\(^6\)

As the commentary explains, paragraph 2 of draft article 6 envisages that subsequent provisions of the draft will furnish the content of the SNR principle:

It is assumed that, when the present articles are enlarged, they will include principles which will give concrete meaning to the parameters of this shared natural resource, and provide an indication as to how this shared natural resource shall be treated. As it stands, this article\(^5\) simply requires States to use the waters of an international watercourse system as a shared natural resource, with what that implies pursuant to principles such as the equitable use of those waters and of the axiom *sic utere tuo ut alienum non laedas*.\(^6\)

Thus it appears that although the SNR principle currently is at an embryonic stage of development, the Commission considers that the principle requires at minimum that the waters of international watercourses be used equitably and in such a manner as not to injure other system states.\(^6\) The commentary by the Commission to the predecessor of article 6 demonstrates that there is ample support for this proposition.\(^6\)

Among the authorities discussed by the Commentary is the Mar del Plata Action Plan,\(^6\) formulated at the 1977 United Nations Water Conference in Mar del Plata. Recommendation 91 of the Action Plan provides:

In relation to the use, management and development of shared water resources, national policies should take into consideration the right of each State sharing the resources to equitably utilize such resources as

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\(^5\) The commentary contains an exhaustive review of developments within the United Nations system, state practice and conventional law which support the shared natural resource principle. *Id.*

\(^6\) See also infra text accompanying note 60.

\(^5\) The quote refers to the predecessor of article 6 as proposed by the current Special Rapporteur, that is, article 5, provisionally adopted by the Commission in 1980. *Id.*, 35 U.N. GAOR Supp. (No. 10) at 246, reprinted in [1980] 2 Y.B. INT’L L. COMM’N at 108.


\(^6\) *Id.*

\(^6\) See supra note 57.

the means to promote bonds of solidarity and co-operation. Thus the Action Plan endorses the "right" of system states to equitable utilization of shared water resources.

The River Oder case, decided by the Permanent Court of International Justice in 1929, sheds further light on the consequences of treating an international watercourse as an SNR. In River Oder, the Court declared:

This community of interest in a navigable river becomes the basis of a common legal right, the essential features of which are the perfect equality of riparian States in the use of the whole course of the river and the exclusion of any preferential privilege of any one riparian State in relation to the others.

The ILC's commentary to the predecessor of article 6 recognizes that the River Oder case concerned navigation rights, but cites a number of authorities in support of the proposition that the quoted passage applies to other uses of international watercourses as well. The commentary concludes that the River Oder case "is notable in placing the weight of the Permanent Court of International Justice behind the principle of 'a community of interest of riparian States.' In speaking of a community of interest and of a 'common legal right' . . . the Court appears to assume that the international watercourse is a shared natural resource."

Thus the principle that an international watercourse system and its waters are a "shared natural resource" can be viewed as a shorthand method of referring to the rights and obligations of system states that antedated the advent of the term "shared natural resource" itself.

Whether the SNR principle conflicts with the doctrine of permanent sovereignty over natural resources or the principle that certain natural resources are the "common heritage of mankind" adds another source of uncertainty. These concerns appear misplaced. While a detailed discussion of the interrelationship of the three concepts is beyond the scope of this note, an attempt will be made to highlight the principle factors involved, which indicate that the doctrines should be treated as separate and distinct, yet compatible. This effort, however, is at best preliminary and tentative because the legal implications of

64. Id. at 53.
66. Id. at 27.
70. See infra notes 78-82 and accompanying text.
treat ing an international watercourse as a "shared natural resource" have yet to be fully defined.\textsuperscript{71}

Taking the principles of equitable use and \textit{sic utere tuo} as a legal reflection of treating the waters of an international watercourse as an SNR,\textsuperscript{72} it is clear that the SNR concept is wholly unrelated to the doctrine of permanent sovereignty over natural resources. The permanent sovereignty doctrine addresses circumstances entirely different from those involved in reconciling competing claims to the waters of international watercourse systems. But even if it were argued that the permanent sovereignty doctrine should be applied, in some tortured way, to international rivers (presumably in a misguided effort to substantiate Harmon Doctrine type claims), the language of the resolution of the General Assembly that enunciates the doctrine,\textsuperscript{73} as well as that of the Charter of Economic Rights and Duties of States, would blunt the force of such an argument.\textsuperscript{74} These instruments stress the importance of "the mutual respect of States,"\textsuperscript{75} "international cooperation in the field of economic development,"\textsuperscript{76} and prior notice and consultations with a view to avoiding harm to other states.\textsuperscript{77} Far from being inconsistent with the SNR concept, such principles in fact support the objectives that the concept is designed to achieve.

The "common heritage of mankind" (CHM) doctrine likewise appears wholly unrelated to the SNR principle, as it too is designed to meet entirely different needs. The CHM doctrine is identified principally with the resources of the deep seabed, and is embodied in the United Nations Convention on the Law of the Sea.\textsuperscript{78} Article 136 of the

\textsuperscript{71} See the quotation from the Commission's commentary to the predecessor of Minister Evensen's proposed article 6, that is, article 5, in \textit{supra} text accompanying note 58.

\textsuperscript{72} See \textit{supra} text accompanying note 61.

\textsuperscript{73} G.A. Res. 1803, \textit{supra} note 69. Both the preamble and the operative paragraphs of U.N. Resolution 1803 (Resolution on Permanent Sovereignty) concern principally the protection of natural resources of developing countries from improper foreign exploitation, and thus focus on the promotion of the "self-determination" and economic development of those countries. See \textit{generally id.}. This bears little, if any, discernable relation to the purposes served by the SNR concept, that is, assurance of equitable utilization and allocation of the waters of international watercourse systems among all system states.


\textit{In the exploitation of natural resources shared by two or more countries, each State must co-operate on the basis of a system of information and prior consultations in order to achieve optimum use of such resources without causing damage to the legitimate interest of others.}

\textit{Id.} at 52.

\textsuperscript{75} G.A. Res. 1803, \textit{supra} note 69, at 15.

\textsuperscript{76} \textit{Id.} (preamble).

\textsuperscript{77} G.A. Res. 3281, \textit{supra} note 74, at 52.

Convention provides that "[t]he Area and its resources are the common heritage of mankind." The "Area" is defined in article 1(1) to mean "the sea-bed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction." The CHM doctrine also has been applied to Antarctica and outer space. It has been described as implicating four basic propositions:

first, that the area to which it applies cannot be appropriated; second, that it requires a system of management in which all countries share; third, that it requires an active sharing of benefits from the exploration of the resources between all countries; and fourth, that it requires the dedication of the area to exclusively peaceful purposes.

It is apparent that these propositions are inapplicable to the waters of an international watercourse system. While it is true that they conceivably could be adapted for use in the context of international watercourse systems (for example, by confining the states having an "interest" in the resource to "system states"), such an adaptation would have to be performed with great care to ensure that the interests and legitimate expectations of both upper and lower riparian states were taken into account. It is questionable whether such an undertaking would be worthwhile, however, given the risks attendant to transplanting concepts and doctrines from one field to another.

Both the international watercourse system concept defined in article 1 and the shared natural resource principle laid down in article 6 are relative concepts. That is, obligations arising from the shared natural resource principle as a practical matter would come into play only where the use of waters within a system is affected by or affects uses of waters in another system state. If the shared natural resource principle is to be a source of rights and obligations, as probably is the case, the concerns adverted to relating to the practical ability to implement a relative concept may apply to article 6 as well as article 1.

The second sentence of article 6, paragraph 1 entitles each system state to "a reasonable and equitable participation" in the international watercourse system. Article IV of the Helsinki Rules contains a similar principle:

Each basin State is entitled, within its territory, to a reasonable and

79. Id., at art. 136, at 1293.
80. Id. at 1261.
82. Goedhuis, Some Recent Trends in the Interpretation and the Implementation of the Rules of International Space Law, 19 Colum. J. Transnat'l L. 213, 219 (1981); See also Larschan & Brennan, supra note 81, which concludes that "no opinio juris has emerged on the CHM. It could even be argued that, at this time, the CHM as a legal concept is dead." Id. at 336 (footnote omitted).
83. See supra notes 49-51 and accompanying text.
84. First Report on Non-Navigational Uses, supra note 20, at 37.
equitable share in the beneficial uses of the waters of an international drainage basin. The Special Rapporteur deemed “participation” preferable to the term “share” used in the Helsinki Rules, because the former expression encompasses not only the “right to use” but also the duty to contribute to the necessary management and conservation of a watercourse system for the optimal distribution in a reasonable and equitable manner of the benefits to be derived from the international watercourse system."

Article 9 as proposed by the Special Rapporteur is a key provision of the draft. It embodies the fundamental principle reflected in the Latin maxim, sic utere tuo ut alienum non laedas, and provides a standard for measuring that general obligation. Entitled “Prohibition against activities with regard to an international watercourse system causing appreciable harm to other system states,” draft article 9 provides as follows:

A system state shall refrain from and prevent (within its jurisdiction) uses or activities with regard to a watercourse system that may cause appreciable harm to the rights and interests of other system States unless otherwise provided for in a system agreement.

The previous Special Rapporteur devoted seven pages of his Third Report to a discussion of the meaning of the term “appreciable.” He concluded that “‘appreciable’ stands for more in quantity than is denoted by ‘perceptible’, which could be construed to mean only barely detectable. ‘Appreciable’ means less in quantity than terms such as ‘serious’ or ‘substantial’. An appreciable extent ‘is one which can be established by objective evidence (provided that the evidence can be secured). There must be a real impairment of use.’” Article X of the Helsinki Rules provides that states must prevent water pollution that would cause “substantial” injury or damage in the territory of a co-basin state. In his commentary on the term “appreciable”, the previous Special Rapporteur quotes from the International Law Association’s comments to article X:

‘Not every injury is substantial. Generally, an injury is considered “substantial” if it materially interferes with or prevents a reasonable use of the water.”

85. Helsinki Rules, supra note 47, at 486.
86. First Report on Non-Navigational Uses, supra note 20, at 32-33.
87. See Third Report on Non-Navigational Uses, supra note 56, at 76. The maxim translates: “use your own property in such a manner as not to injure another.” BLACK'S LAW DICTIONARY 1551 (Rev. 4th ed. 1968).
88. First Report on Non-Navigational Uses, supra note 20, at 37.
89. Third Report on Non-Navigational Uses, supra note 56, at 92-98.
90. Id. at 98.
91. Id. at 95, quoting Helsinki Rules, supra note 47, at 496-97.
92. Id.
Thus "appreciable harm" requires "a real impairment of use,"93 while an injury is "substantial" if it "materially interferes with . . . reasonable use."94 It is difficult to discern a practical (as opposed to semantic) distinction between a "real impairment" of, and a "material interference" with the use of the waters of an international watercourse. It therefore is questionable whether the "appreciable harm" standard of the ILC draft and the "substantial injury" criterion of the Helsinki Rules are different tests, notwithstanding the semantically correct statement that "'[a]ppreciable' means less in quantity than . . . 'substantial'."95 At bottom, both standards probably obligate a state not to interfere materially with the rights of other system (or co-basin) states to the equitable utilization of the waters of the system or basin in question. Yet given that the term "substantial" connotes a fairly high degree of harm or pollution, the use of the term "appreciable" seems well-advised, as "appreciable" does not sanction anything but substantial harm and may thus have a deterrent effect (however slight) upon uses of international watercourses which may cause harm to other states.

The criterion of "appreciable harm" is important not only because it measures the obligation laid down in article 9 but also because it triggers the notification procedure provided for in articles 11 to 14. Article 11 provides that a system state that is contemplating a project which may cause appreciable harm to another system state must provide advance notification to the latter state of the project.96 Article 12 sets out the time limits within which the notified state must reply to the notification,97 article 13 provides for the procedures to be followed in case of protest,98 and article 14 deals with the consequences of a failure of a system state to comply with articles 11 to 13.99

Paragraph 3 of article 12 provides that the notifying state may not initiate the project during the time period for reply without the consent of the notified state.100 Thus, by giving notice of a project it is considering, a state obligates itself to suspend implementation of its plans until the end of the period for reply. Article 13 provides that if the notified state informs the notifying state that the project in question may cause the former appreciable harm, the parties must enter into consultations and negotiations with a view to either eliminating the causes of any appreciable harm or otherwise giving the potentially af-

93. See supra text accompanying note 90.
94. See supra text accompanying note 92.
95. See supra text accompanying note 90.
96. First Report on Non-Navigational Uses, supra note 20, at 41.
97. Id. at 42-43.
98. Id. at 44.
99. Id. at 46.
100. Id. at 42-44.
fected state reasonable satisfaction. The article further provides that if the parties are unable to agree on a solution, they are to resort to the dispute settlement provisions of the draft articles (which are not compulsory), any system agreement, or any other relevant agreement. The notifying state may not proceed with the project during this dispute settlement process unless it "deems that the project or programme is of the utmost urgency and that a further delay may cause unnecessary damage or harm to the notifying State or other system States."

Article 14 provides that if the notified state fails to reply to the notification the notifying state may proceed with the project without incurring responsibility for any subsequent harm that results therefrom. It also provides that if a state proceeds with a project without complying with articles 11 to 13 it will be liable for any resultant harm to other system states.

One member of the Commission pointed out that the latter provision of Article 14 may amount to an incentive not to comply with the notification provisions, since the only penalty for such a failure is "liability." Thus, a state might choose in effect to appropriate a "servitude" in another state for which it need only pay compensation, much as a government condemns property of its citizens. The member also observed that articles 11 to 14 contain no obligation to resort to compulsory dispute settlement procedures, whether they take the form of conciliation, arbitration, or adjudication. These points doubtless will be considered when the Special Rapporteur submits this group of articles to the Commission for discussion in plenary, which will probably occur in the 1984 session of the Commission.

Before leaving the watercourses topic, brief mention should be made of chapter IV, entitled "Environmental protection, pollution, health hazards, natural hazards, regulation and safety, use preferences, 101. *Id.* at 44.
102. That the dispute settlement provisions contained in Chapter V of the Evensen draft are not "compulsory" means simply that states are not obligated to submit a dispute arising under the articles to conciliation, arbitration, judicial resolution, or other settlement procedure. For example, article 34, entitled "Conciliation", provides in part:

1. If a system agreement or other regional or international agreement or arrangement so provides, or if the Parties agree thereto with regard to a specific dispute concerning the interpretation or application of this Convention, the Parties shall submit such dispute to conciliation according to the provisions of this article or to the provisions of such system agreement or regional or international agreement or arrangement.

*Id.* at 76.
103. *Id.* at 44.
104. *Id.* at 44.
105. *Id.* at 46.
106. *Id.*
107. *Id.*
108. *See supra* note 102.
The chapter contains articles 20 to 30: articles 20 to 25 deal with environmental protection and the prevention of pollution, and article 30 concerns the establishment of protected national or regional sites. The remaining articles in the chapter deal with control and prevention of water related hazards (article 26), regulation of international watercourse systems (article 27), safety of international watercourse systems, installations and constructions (article 28), and use preferences (article 29).

Article 20, entitled "General provisions on the protection of the environment," is designed to protect the aquatic environment through measures protecting areas surrounding watercourse systems. As is perhaps inevitable in a general framework instrument of this kind, the "obligations" embodied in article 20 are rather flexible, being qualified by such terms as "to the extent possible," "unreasonable," "within reason," and "as far as possible." Although article 20 perhaps appears too flexible to be effective, it nonetheless is important that the draft include a provision on the protection of the environment of international watercourse systems that states will be able to accept. Without such a provision, it would be easy to lose sight of the importance of protecting not only a river, but also the entire ecosystem of which the river is a part. Article 20 recognizes this need and accordingly calls upon system states to take the necessary measures to protect the areas surrounding international watercourse systems and the sea.

110. Id. at 55-63.
111. Id. at 70.
112. Id. at 63-64.
113. Id. at 65.
114. Id. at 66.
115. Id. at 68.
116. Article 20 as proposed by the Special Rapporteur reads:
   1. System States — individually and in co-operation — shall to the extent possible take the necessary measures to protect the environment of a watercourse system from unreasonable impairment, degradation or destruction or serious danger of such impairment, degradation or destruction by reason of causes or activities under their control and jurisdiction or from natural causes that are abatable within reason.
   2. System States shall — individually and through co-ordinated efforts — adopt the necessary measures and regimes for the management and equitable utilization of a joint watercourse system and surrounding areas so as to protect the aquatic environment including the ecology of surrounding areas from changes or alterations that may cause appreciable harm to such environment or to related interests of system States.
   3. System States shall — individually and through co-ordinated efforts — take the necessary measures according to the provisions of this Convention and other relevant principles of international law including those derived from the United Nations Convention on the Law of the Sea of 10 December 1982 to protect the environment of the sea as far as possible from appreciable degradation or harm caused by means of the international watercourse system.

117. Id. at 55.
from degradation.\textsuperscript{118}

Article 21 sets forth the purposes of environmental protection\textsuperscript{119} and article 22 contains a definition of pollution.\textsuperscript{120} Article 23, entitled "Obligation to prevent pollution,"\textsuperscript{121} embodies a basic obligation to refrain from polluting the waters of an international watercourse system to an extent that would cause appreciable harm to the rights or interests of other system states.\textsuperscript{122} It appears that article 23 prohibits activities posing either actual or potential harm and the commentary makes clear that the prohibition applies to both existing and new pollution.\textsuperscript{123}

Article 24 deals with the cooperation of system states in protecting the international watercourse system against pollution.\textsuperscript{124} Article 25 prescribes the action to be taken in the event that "an emergency situation arises from pollution or from similar hazards to an international watercourse system or its environment."\textsuperscript{125} Article 26 requires system states to cooperate toward the prevention of water related hazards,\textsuperscript{126} and article 27 requires system states to cooperate in developing water system regulations.\textsuperscript{127} Article 28 deals with the protection of international watercourse systems, installations and constructions.\textsuperscript{128} Article

\begin{itemize}
\item \textsuperscript{118} \textit{Id.}
\item \textsuperscript{119} \textit{Id.}
\item \textsuperscript{120} \textit{Id.}
\item \textsuperscript{121} Article 23 as proposed by the Special Rapporteur reads:
\begin{enumerate}
\item No system State may pollute or permit the pollution of the waters of an international watercourse system which causes or may cause appreciable harm to the interests of other system States in regard to their equitable use of such shared water resources or to other harmful effects within their territories.
\item In cases where pollution emanating in a system State causes harm or inconveniences in other system States of a less serious nature than those dealt with in paragraph 1 of this article, the system State where such pollution originates shall take reasonable measures to abate or minimize the pollution. The system States concerned shall consult with a view to reaching agreement with regard to the necessary steps to be taken and to the defrayment of the reasonable costs for abatement or reduction of such pollution.
\item A system State shall be under no obligation to abate pollution emanating from another system State in order to prevent such pollution from causing appreciable harm to a third system State. System States shall — as far as possible — expeditiously draw attention of the pollutant [sic] State and of the States threatened by such pollution to the situation, its causes and effects.
\end{enumerate}
\textit{Id.} at 60.
\item \textsuperscript{122} \textit{Id.}
\item \textsuperscript{123} \textit{Id.} This approach is to be contrasted with that of the Helsinki Rules, which in article X require states to \textit{prevent} new forms, or any increase in existing water pollution, but only require them to "take all reasonable measures to abate" existing water pollution. Helsinki Rules, \textit{supra} note 47, at 496-97 (emphasis added). Other international agreements make the same distinction. See First Report on the Law of Non-Navigational Uses, \textit{supra} note 20, at 60-61.
\item \textsuperscript{124} \textit{Id.} at 62.
\item \textsuperscript{125} \textit{Id.} at 63.
\item \textsuperscript{126} \textit{Id.}
\item \textsuperscript{127} \textit{Id.} at 65.
\item \textsuperscript{128} \textit{Id.} at 66.
\end{itemize}
29 concerns use preferences. Finally, article 30 permits system states to "proclaim a watercourse system or part or parts thereof, a protected national or regional site." Article 30 calls upon other system states, as well as regional and international organizations, to cooperate with and assist other states establishing the site, and in preserving the site in its natural state.

II.
LIABILITY FOR ACTS NOT PROHIBITED BY INTERNATIONAL LAW

The topic of International Liability for Injurious Consequences Arising out of Acts Not Prohibited by International Law has been an enigma since it was first identified and taken up by the Commission. During the course of its work on the related topic of State Responsibility for internationally wrongful acts, the Commission decided in 1970 that there existed a related special category of issues which deserved separate and independent treatment. At that time, the Commission considered this category to include "questions relating to responsibility arising out of the performance of certain lawful activities - such as spatial and nuclear activities . . . [o]wing to the entirely different basis of the so-called responsibility for risk." Thus the ILC distinguished "responsibility" for internationally wrongful acts from "liability" for the injurious consequences of an activity which is itself lawful.

In 1978 the Commission set up a working group to develop a preliminary definition of the scope and nature of the "liability" topic. The working group concluded that the topic concerned "the way in which States use or manage the use of, their physical environment, either within their own territory or in areas not subject to the sovereignty of any State." Both the Commission's characterization of the

129. Paragraph 1 of article 29 as proposed by the Special Rapporteur provides that "no specific use or uses shall enjoy automatic preference over other equitable uses except as provided in [any applicable agreement] or other legal principles and customs applicable to the watercourse system in question." Id. at 68. In resolving conflicts between different uses, the objective is to obtain "the optimum utilization of shared watercourse resources and the reasonable and equitable distribution thereof between the system States." Id.
130. Id. at 70.
133. Id.
topic when it was originally identified in 1970 and the working group's definition indicate that the Commission originally conceived of the topic as including the liability of states for harm caused by lawful activities to or through the physical environment. Yet it has subsequently been argued, both in the Commission and in the Sixth (Legal) Committee of the General Assembly,\(^{136}\) that the scope of the topic should not be confined to liability for environmental harm, but should be expanded to include different problems such as those in the field of international economic law.

The Special Rapporteur for the liability topic, Professor Quentin-Baxter, endeavored initially to take these latter views into account by tentatively giving the scope of the topic a very broad definition. His Third Report,\(^{137}\) submitted in 1982, contained a "Schematic Outline" of the topic\(^{138}\) which defined the scope of the topic as follows:

Activities within the territory or control of a State which give rise or may give rise to loss or injury to persons or things within the territory or control of another State.\(^{139}\)

Paragraph 2 of Section 1 defines "activity" as "includ[ing] any human activity."\(^{140}\) The same paragraph contains the following definitions of "loss or injury" and "territory or control":

"Loss or injury" means any loss or injury, whether to the property of a State, or to any person or thing within the territory or control of a State.

"Territory or control" includes, in relation to places not within the territory of the Acting State, any activity which takes place within the substantial control of that State.\(^{141}\)

This rather open ended view of the scope of the topic gave rise to considerable concern in the Sixth Committee. For example, it was observed during the course of the discussion in the Sixth Committee of the Commission's 1982 report that the definition "loss or injury" could be construed to encompass such diverse injuries as defamation of a person in one state by a newspaper story published in another, "loss of profits by a company because a competitor in a foreign State had taken a perfectly legal action which had increased its sales at the expense of

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\(^{136}\) The Commission submits a report each year to the General Assembly on the work it has accomplished during that year's session. *See, e.g.*, Report of the ILC, Thirty-second Session, *supra* note 57. A general discussion of the Commission's report is held in the Sixth (Legal) Committee of the General Assembly each year during the Assembly's fall session. The Commission then takes into account the comments that are made by representatives to the Sixth Committee in its subsequent work on the topics on its agenda. *See generally*, UNITED NATIONS, THE WORK OF THE INTERNATIONAL LAW COMMISSION 12 (3d ed. 1980).


\(^{138}\) *Id.* at 24-30.

\(^{139}\) *Id.* at 24 (footnote omitted).

\(^{140}\) *Id.*

\(^{141}\) *Id.* (footnote omitted).
that company, or even losses caused by currency devaluation."142 The speaker concluded that "[w]ithout a drastic narrowing of the concept of 'loss or injury', virtually any individual or company would at some time or other be able to formulate a claim for reparation from, or a demand for regulation by, the State where the action had occurred."143 Indeed, Professor Quentin-Baxter himself had recognized, in his Third Report, the potential danger of expanding the scope of the topic beyond that which was originally envisioned:

What unexpected consequences might arise from a failure to restrict [the topic's] application to the areas in which practice is most developed [i.e., principally those involving uses of the environment]? In particular, might the topic become either a rogue elephant or a useful beast of burden in connection with international economic issues — especially those relating to the adumbration of the new international economic order?144

In the same report, he pointed out that he had twice suggested a two-part criterion for the limitation of the scope of the topic:

First, the topic could be limited to dangers arising out of the physical use of the environment. Secondly, it could be said . . . that the situations with which this topic deals do not arise unless there is, lurking in the background, some emerging or imperfectly formulated rule of obligation or one which cannot be invoked because its application is precluded.145

In his Fourth Report,146 submitted in 1983, Professor Quentin-Baxter noted that there was

strong and broadly based support [in the Sixth Committee] for the central aim of the topic — that is, to analyse the growing volume and variety of State practice relating to uses made of land, sea, air and outer space, and to identify rules and procedures which can safeguard national interests against losses or injuries arising from activities and situations that are in principle legitimate, but that may entail adverse transboundary effects.147

He therefore concluded that

[i]n accordance with the clear trend of majority opinion in 1982, both in the Commission and in the Sixth Committee, the description of the scope of the topic, contained in section 1 of the schematic outline, will be confined to physical activities, giving rise to physical transboundary

143. Id.
145. Id. at 21 (footnotes omitted).
147. Id. at 9-10.
harm.\textsuperscript{148} The Commission thus has returned to its original conception of the scope of its topic. This is a welcome development since the materials that the Special Rapporteur will draw upon in developing the topic relate almost exclusively to transboundary "environmental" harm.

The Special Rapporteur has not yet submitted draft articles on the liability topic, but the Schematic Outline of his third report indicates the general contours of the topic as he currently envisions them. A brief discussion of the salient features of the schematic outline is, therefore, in order at this time.

The Outline consists of eight sections.\textsuperscript{149} As noted above, Section 1 contains paragraphs on scope and definitions, with a third paragraph preserving any right or obligation arising independently of the articles to be elaborated on the topic.\textsuperscript{150} Section 2 provides that when an activity within the territory or control of one state (the "acting state") gives rise or may give rise to loss or injury to persons or things in another state (the "affected state"), the acting state has a duty to "provide the affected state with all relevant and available information, including a specific indication of the kinds and degrees of loss or injury that it considers to be foreseeable and the remedial measures it proposes."\textsuperscript{151} A state has a similar duty to provide such information if another state informs it that activities in the former are causing or may cause loss or injury in the latter. Section 2 goes on to provide that if the affected state proposes that fact finding be undertaken, the acting state has a duty to cooperate in good faith in determining the scope and method of the inquiry.\textsuperscript{152}

Both Sections 1 and 2 include a paragraph which provides that although failure to comply with their respective provisions does not in itself give rise to any right of action, the acting state has a continuing duty to monitor the activity in question, to take any "measures it considers necessary and feasible to safeguard the interests of the affected State," and to keep the affected state informed as to the action it is taking.\textsuperscript{153} The Special Rapporteur summarized the two phases of the process provided for in Sections 1 and 2 as follows:

There is a preliminary phase of consultation and fact finding, without substantive commitment by the States concerned. There is a second phase of negotiation among those States to establish a regime reconciling their conflicting interests; but the only sanctions for refusal to

\textsuperscript{148} \textit{Id.} at 48. Professor Quentin-Baxter stated that the reason for this narrowing of the topic's scope "is that State practice is at present insufficiently developed in other areas." \textit{Id.}

\textsuperscript{149} Third report on International Liability, \textit{supra} note 137, at 30.

\textsuperscript{150} \textit{Id.} at 24.

\textsuperscript{151} \textit{Id.} at 25.

\textsuperscript{152} \textit{Id.}

\textsuperscript{153} \textit{Id.} at 26.
negotiate, or failure to reach agreement, are a continuation of the conflict of interest, and the possibility that a State which has failed to cooperate may be at some disadvantage, if a loss or injury entailing questions of reparation subsequently occurs. 154

Section 3 provides that where the fact finding process does not, for whatever reason, resolve the problem, "the States concerned have a duty to enter into negotiations at the request of any one of them with a view to determining whether a regime is necessary and what form it should take." 155

Section 4 governs activities in one state that occasion loss or injury in another, and where the rights and obligations of the two states have not been agreed upon in advance. In this case, Section 4 provides that the acting state shall make reparation to the affected state, "unless it is established that the making of reparation for a loss or injury of that kind or character is not in accordance with the shared expectations of those States." 156 According to paragraph 4 of Section 4, "shared expectations" are those which:

(a) have been expressed in correspondence or other exchanges between the States concerned or, in so far as there are no such expressions,

(b) can be implied from common legislative or other standards or patterns of conduct normally observed by the States concerned, or in any regional or other grouping to which they both belong, or in the international community. 157

Section 5 sets forth the principles which are to guide the acting and affected states in reconciling their interests. Paragraph 2 of Section 5 provides that:

Adequate protection [of the affected state] requires measures of prevention that as far as possible avoid a risk of loss or injury and, in so far as that is not possible, measures of reparation; but the standards of adequate protection should be determined with due regard to the importance of the activity and its economic viability. 158

Paragraph 3 of Section 5 provides that "the means at the disposal of the acting State and the standards applied in the affected State and in regional and international practice" should also be taken into account in determining standards of protection. 159 The costs of the protective measures are to be "distributed with due regard to the distribution of the benefits of the activity." 160 Paragraph 4 of Section 5

154. Id. at 16.
155. Id. at 26.
156. Id. at 27 (footnote omitted).
157. Id.
158. Id. (footnotes omitted).
159. Id. at 28.
160. Id.
contains a sanction for any failure of the acting state to provide the affected state with information: "the affected State shall be allowed a liberal recourse to inferences of fact and circumstantial evidence in order to establish whether the activity does or may give rise to loss or injury." 161

Section 6 sets forth seventeen factors "which may be relevant to a balancing of interests." 162 The purpose of this balancing process "is to enable States to harmonize their aims and activities, so that the benefit one State chooses to pursue does not entail the loss or injury another has to suffer." 163 As Professor Quentin-Baxter states in his Third Report, "[p]erhaps the most important policy aim of the present topic is to promote agreements between States in order to reconcile, rather than inhibit, activities which are predominantly beneficial, despite some nasty side effects." 164 The factors enumerated in Section 6 include the importance of the activity to the acting state, the likelihood that loss or injury will occur, the seriousness of the loss or injury, the existence of means to prevent the loss or injury and the availability of alternatives to the activity in question, the physical and technical capacities of the acting state to avoid the harm or make reparation, and the extent to which the affected state shares in the benefits of the activity. 165

Section 7 sets forth three categories of factors that states may consider in their negotiations concerning prevention and reparation: fact finding and prevention, compensation as a means of reparation, and authorities competent to make decisions concerning fact finding, prevention and compensation. 166 Finally, Section 8 (which has not yet been developed) will deal with settlement of disputes. 167

The Commission will continue to discuss the Special Rapporteur’s Fourth Report during its 1984 session, and will probably have before it an additional report as well. It is hoped and anticipated that the Commission will make significant progress on the liability topic in 1984, especially since the scope of the topic is now within manageable limits.

III.
STATE RESPONSIBILITY

A review of the environmental work of the International Law Commission would be incomplete without brief mention of Article 19 of the Commission’s draft articles on the topic of State Responsibil-

161. Id.
162. Id. (footnote omitted).
163. Id. at 13.
164. Id. at 18.
165. Id. at 28-29.
166. Id. at 29-30.
167. Id. at 30.
Article 19 is the only article approved by the Commission to date that relates directly to the environment.

The Commission began work on this topic in 1955. The topic is divided into three parts: part one, which has been completed in first reading, deals with the origin of international responsibility; part two, on which the Commission is now working, deals with the content, forms and degrees of international responsibility — that is, with the consequences of an internationally wrongful act; and part three, on which work has not yet begun, will deal with the implementation of international responsibility and dispute settlement.

Article 19 of part one is entitled “international crimes and international delicts.” As this title suggests, the object of the article is to distinguish between the two basic kinds of internationally wrongful acts: those which are more serious and give rise to an aggravated degree of state responsibility (international “crimes”), and those which are less serious and give rise to more traditional legal consequences (international “delicts”). Paragraph 3 of article 19 contains a list of acts which may constitute international crimes. It states that an international crime “may result, inter alia, from” acts of aggression, the establishment or maintenance by force of colonial domination, a serious and widespread breach of an obligation for the safeguarding of the human being, such as obligations prohibiting slavery, genocide and apartheid, and finally, a 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.

Article 19 is noteworthy for several reasons. First, it applies only to the responsibility of states, not to that of individuals. Second, al-


171. Id.

172. Id.

173. Id.

though the Commission did not agree unanimously that the term "crimes" is an appropriate label for the acts in question, adoption of the draft indicates that the Commission members agree, however, that there are different categories or regimes of state responsibility, based upon the importance to the international community of the obligation in question and the seriousness of its breach. Third, some members have expressed concerns about the compatibility of draft article 19 with Chapter VII of the United Nations Charter (dealing with Security Council action with respect to threats to the peace, breaches of the peace and acts of aggression). For example, it remains unsettled whether Article 19 be taken to imply a right of third states (those not directly injured) to take punitive action outside the United Nations framework against the state that was the alleged author of the "crime." Finally, even if the General Assembly were to accept the term international "crime," it is uncertain whether a majority of the Assembly would agree that all of the acts listed in article 19, paragraph 3 constitute international "crimes." The commentary to article 19 states that to be considered an international "crime," an internationally wrongful act must be "subjectively" recognized as a "crime" by the international community as a whole. The commentary further explains that recognition by the "international community as a whole" means that "a given internationally wrongful act shall be recognized as an 'international crime,' not only by some particular group of States, even if it constitutes a majority, but by all the essential components of the international community." Given that in environmental cases, a wide variety of states — ranging from developed countries to oil-producing, developing countries — stand a very good chance of winding up as defendants, it is doubtful whether this test can be met.

The commentary to article 19 sheds further light on the considerations that led the Commission to cite gross environmental insults possibly constituting international "crimes." The commentary observes that although the advances in modern science are of great potential

175. See, e.g., the comments of Professor R. Quentin-Baxter, Summary Records of the 1375th Meeting, [1976] Y.B. INT'L L. COMM'N at 78, 79, U.N. Doc. A/CN.4/SER.A/1976 (1976) (summary of statement of Mr. Quentin-Baxter) and the summary of the reply of the Special Rapporteur, Professor R. Ago (now a judge of the International Court of Justice), to the effect that the difficulty was due in large part to the fact that "legal language was inadequate." Summary Records of the 1376th Meeting, Id. at 84, 89 (statement of Mr. Ago).


178. Id. (emphasis added).
benefit to humanity, they also have "the capacity to inflict kinds of damage which would be fearfully destructive not only of man's potential for economic and social development but also of his health and of the very possibility of survival for the present and future generations."\(^{179}\) The commentary concludes that it seems undeniable that the existing rules of general international law on the subject and those which will of necessity be added to them in the future are bound to be regarded to a great extent as "peremptory" rules. It seems equally undeniable that the obligations flowing from these rules are intended to safeguard interests so vital to the international community that a serious breach of those obligations cannot fail to be seen by all members of the community as an internationally wrongful act of a particularly serious character, as an "international crime."\(^{180}\)

**CONCLUSION**

Since its establishment by the United Nations General Assembly in 1947, the International Law Commission has contributed significantly to the codification and progressive development of international law. While most of the topics with which it has been concerned are not directly related to the natural environment, the Commission has developed the drafts that formed the basis of the 1958 Geneva Conventions on the Law of the Sea.\(^{181}\) Work on two topics on the Commission's current agenda also promises to provide valuable and much needed clarification of the rights and duties of states in regard to international watercourses and transboundary environmental harm. This note provides only a cursory overview of the Commission's work, but the author hopes that it has left the reader with a general understanding of the status and direction of the Commission's efforts as they bear on the natural environment.


\(^{181}\) See supra note 9.