Chapter VI

INTERNATIONAL LIABILITY FOR INJURIOUS CONSEQUENCES ARISING OUT OF ACTS NOT PROHIBITED BY INTERNATIONAL LAW (INTERNATIONAL LIABILITY IN CASE OF LOSS FROM TRANSBOUNDARY HARM ARISING OUT OF HAZARDOUS ACTIVITIES)

A. Introduction

154. The Commission, at its thirtieth session, in 1978, included the topic "International liability for injurious consequences arising out of acts not prohibited by international law" in its programme of work and appointed Mr. Robert Q. Quentin-Baxter Special Rapporteur.[160]

155. The Commission, from its thirty-second (1980) to its thirty-sixth sessions (1984), received and considered five reports from the Special Rapporteur.[161] The reports sought to develop a conceptual basis and schematic outline for the topic and contained proposals for five draft articles. The schematic outline was set out in the Special Rapporteur's third report to the thirty-fourth session of the Commission (1982). The five draft articles were proposed in the Special Rapporteur's fifth report to the thirty-sixth session of the Commission. They were considered by the Commission, but no decision was taken to refer them to the Drafting Committee.

156. The Commission, at the same thirty-sixth session, also had before it the replies to a questionnaire addressed in 1983 by the Legal Counsel of the United Nations to 16 selected international organizations to ascertain whether, amongst other matters, obligations which States owe to each other and discharge as members of international organizations may, to that extent, fulfil or replace some of the procedures referred to in the schematic outline[162] and a survey prepared by the Secretariat on State practice relevant to international liability for injurious consequences arising out of acts not prohibited by international law.[163]

157. The Commission, at its thirty-seventh session, in 1985, appointed Mr. Julio Barboza Special Rapporteur for the topic. The Commission received 12 reports from the Special Rapporteur from its thirty-seventh to its forty-eighth session in 1996.[164]

158. At its forty-fourth session, in 1992, the Commission established a working group to consider some of the general issues relating to the scope, the approach to be taken and the possible direction of the future work on the topic.[165] On the basis of the recommendation of the Working Group, the Commission decided to continue the work on this topic in stages. It would first complete work on prevention of transboundary harm and subsequently proceed with remedial measures. The Commission decided, in view of the ambiguity in the title of the topic, to continue with the working hypothesis that the topic dealt with "activities" and to defer any formal change of the title.[166]

159. At its forty-eighth session, in 1996, the Commission re-established the Working Group in order to review the topic in all its aspects in the light of the reports of the Special Rapporteur and the discussions held, over the years, in the Commission and make recommendations

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[160] At that session the Commission established a working group to consider, in a preliminary manner, the scope and nature of the topic. For the report of the Working Group, see *Yearbook ... 1978*, vol. II (Part Two), pp. 150–152.

[161] The five reports of the Special Rapporteur are reproduced as follows:

Preliminary report: *Yearbook ... 1980*, vol. II (Part One), p. 247, document A/CN.4/334 and Add.1 and 2;

Second report: *Yearbook ... 1981*, vol. II (Part One), p. 103, document A/CN.4/346 and Add.1 and 2;

Third report: *Yearbook ... 1982*, vol. II (Part One), p. 51, document A/CN.4/360;

Fourth report: *Yearbook ... 1983*, vol. II (Part One), p. 201, document A/CN.4/373;

Fifth report: *Yearbook ... 1984*, vol. II (Part One), p. 155, document A/CN.4/383 and Add.1.

[162] *Yearbook ... 1984*, vol. II (Part One), p. 129, document A/CN.4/378.

[163] *Yearbook ... 1985*, vol. II (Part One) (Addendum), p. 1, document A/CN.4/384. See also the survey prepared by the Secretariat of liability regimes relevant to the topic "International liability for injurious consequences arising out of acts not prohibited by international law", *Yearbook ... 1995*, vol. II (Part One), p. 61, document A/CN.4/471.

[164] The 12 reports of the Special Rapporteur are reproduced as follows:

Preliminary report: *Yearbook ... 1985*, vol. II (Part One), p. 97, document A/CN.4/394;

Second report: *Yearbook ... 1986*, vol. II (Part One), p. 145, document A/CN.4/402;

Third report: *Yearbook ... 1987*, vol. II (Part One), p. 47, document A/CN.4/405;

Fourth report: *Yearbook ... 1988*, vol. II (Part One), p. 251, document A/CN.4/413;

Fifth report: *Yearbook ... 1989*, vol. II (Part One), p. 131, document A/CN.4/423;

Sixth report: *Yearbook ... 1990*, vol. II (Part One), p. 83, document A/CN.4/428 and Add.1;

Seventh report: *Yearbook ... 1991*, vol. II (Part One), p. 71, document A/CN.4/437;

Eighth report: *Yearbook ... 1992*, vol. II (Part One), p. 59, document A/CN.4/443;

Ninth report: *Yearbook ... 1993*, vol. II (Part One), p. 187, document A/CN.4/450;

Tenth report: *Yearbook ... 1994*, vol. II (Part One), p. 129, document A/CN.4/459;

Eleventh report: *Yearbook ... 1995*, vol. II (Part One), p. 51, document A/CN.4/468;

Twelth report: *Yearbook ... 1996*, vol. II (Part One), p. 29, document A/CN.4/475 and Add.1.

[165] *Yearbook ... 1992*, vol. II (Part Two), p. 51, paras. 341–343.

[166] *Ibid.*, paras. 344–349, for a detailed recommendation of the Commission.

to the Commission. The Working Group submitted a report,[167] which provided a complete picture of the topic relating to the principle of prevention and that of liability for compensation or other relief, presenting articles and commentaries thereto.

160. At its forty-ninth session, in 1997, the Commission established a working group on international liability for injurious consequences arising out of activities not prohibited by international law to consider how the Commission should proceed with its work on this topic.[168] The Working Group reviewed the work of the Commission on the topic since 1978. It noted that the scope and the content of the topic remained unclear due to such factors as conceptual and theoretical difficulties, appropriateness of the title and the relation of the subject to "State responsibility". The Working Group further noted that the two issues dealt with under the topic, namely "prevention" and "international liability" were distinct from one another, though related. The Working Group therefore agreed that henceforth these issues should be dealt with separately.

161. Accordingly, the Commission decided to proceed with its work on the topic, dealing first with the issue of prevention under the subtitle "Prevention of transboundary damage from hazardous activities".[169] The General Assembly took note of this decision in paragraph 7 of its resolution 52/156. At the same session, the Commission appointed Mr. Pemmaraju Sreenivasa Rao Special Rapporteur for this part of the topic.[170] The Commission, from its fiftieth (1998) to its fifty-second session (2000), received three reports from the Special Rapporteur.[171]

162. At its fiftieth session, in 1998, the Commission adopted on first reading a set of 17 draft articles on prevention of transboundary harm from hazardous activities.[172] At the fifty-third session, in 2001, it adopted the final text of a draft preamble and a set of 19 draft articles on prevention of transboundary harm from hazardous activities,[173] thus concluding its work on the first part of the topic. Furthermore, the Commission recommended to the General Assembly the elaboration of a convention on the basis of the draft articles.[174]

163. The General Assembly, in paragraph 3 of its resolution 56/82, requested the Commission to resume its consideration of the liability aspects of the topic, bearing in mind the interrelationship between prevention and liability, and taking into account the developments in international law and comments by Governments.

164. At its fifty-fourth session, in 2002, the Commission resumed its consideration of the second part of the topic and established a working group on international liability for injurious consequences arising out of acts not prohibited by international law to consider the conceptual outline of the topic.[175] The report of the Working Group[176] set out some initial understandings on the topic "International liability for injurious consequences arising out of acts not prohibited by international law (international liability in case of loss from transboundary harm arising out of hazardous activities)", presented views on its scope and the approaches to be pursued. The Commission adopted the report of the Working Group and appointed Mr. Pemmaraju Sreenivasa Rao Special Rapporteur for the topic.[177]

B. Consideration of the topic at the present session

165. At the present session, the Commission had before it the first report of the Special Rapporteur on the legal regime for the allocation of loss in case of transboundary harm arising out of hazardous activities (A/CN.4/531). It considered the report at its 2762nd to 2769th meetings, on 23, 27, 28, 30 May and 3 to 6 June 2003.

166. At its 2769th meeting, the Commission established an open-ended working group under the chairmanship of Mr. Pemmaraju Sreenivasa Rao to assist the Special Rapporteur in considering the future orientation of the topic in the light of his report and the debate in the Commission. The Working Group held three meetings.

1. Introduction of the first report by the Special Rapporteur

167. The Special Rapporteur noted that his report was in three parts, part one of which reviewed the work of the Commission on the topic, beginning with an analysis of the approaches of Mr. Quentin-Baxter (paras. 6–9) and Mr. Barboza (paras. 10–14). It also analysed relevant issues which had given rise to differences in the Commission's earlier work, as well as the extent to which such issues had been resolved or remained outstanding.[178]

168. The Special Rapporteur recalled the endorsement by the Commission of the 2002 Working Group's

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[167] *Yearbook ... 1996*, vol. II (Part Two), annex I, p. 100.

[168] *Yearbook ... 1997*, vol. II (Part Two), p. 59, para. 162.

[169] *Ibid.*, para. 168 (a).

[170] *Ibid.*

[171] The three reports of the Special Rapporteur are reproduced as follows:

First report: *Yearbook ... 1998*, vol. II (Part One), p. 175, document A/CN.4/487 and Add.1;

Second report: *Yearbook ... 1999*, vol. II (Part One), p. 111, document A/CN.4/501; and

Third report: *Yearbook ... 2000*, vol. II (Part One), document A/CN.4/510.

The Commission also had before it comments and observations from Governments:

Yearbook ... 2000, vol. II (Part One), document A/CN.4/509; and

Yearbook ... 2001, vol. II (Part One), document A/CN.4/516 (received in 2001).

[172] *Yearbook ... 1998*, vol. II (Part Two), pp. 20–21, para. 52.

[173] *Yearbook ... 2001*, vol. II (Part Two), p. 146, para. 97.

[174] *Ibid.*, p. 145, para. 94.

[175] *Yearbook ... 2002*, vol. II (Part Two), para. 441.

[176] *Ibid.*, paras. 442–457.

[177] *Ibid.*, para. 441.

[178] The strong linkage established between prevention and liability in the approaches adopted by Mr. Quentin-Baxter and Mr. Barboza which was considered problematic, was resolved by a decision of the Commission to split the topic to deal first with prevention and subsequently with liability. Other issues on which agreement was elusive were (a) State liability, and the role of strict liability as the basis for creating an international regime; (b) scope of activities and the criteria for delimiting "transboundary damage"; and (c) threshold of damage to be brought within the scope of the topic.

recommendations[179] that the Commission: (*a*) limit the scope of the topic to the same activities which were covered by the draft articles on the prevention, namely activities not prohibited by international law which involved a risk of causing significant transboundary harm through their physical consequences; (*b*) concentrate on harm caused for a variety of reasons but not necessarily involving State responsibility; (*c*) deal with the topic as an issue of allocation of loss among different actors involved in the operations of the hazardous activities; and (*d*) cover within the scope of the topic loss to persons, property, including the elements of State patrimony and natural heritage, and the environment within national jurisdiction.

169. The Special Rapporteur noted in his report that part one also raised broad policy considerations relevant to the topic (paras. 43–46), which in the main had formed the basis of the work of the Commission on the topic: (*a*) that each State must have as much freedom of choice within its territory as was compatible with the rights and interests of other States; (*b*) that the protection of such rights and interests required the adoption of measures of prevention and, if injury nevertheless occurred, measures of reparation; and (*c*) that insofar as may be consistent with the two preceding principles, the innocent victim[180] should not be left to bear his or her loss or injury.

170. While the draft articles on prevention of transboundary harm from hazardous activities[181] had addressed the first objective and, partially, the second objective, the challenge for the Commission was to address the remaining elements of the policy. In particular, States must be encouraged to conclude international agreements and adopt suitable legislation and implement mechanisms for prompt and effective remedial measures including compensation for activities involving a risk of causing significant transboundary harm.

171. The Special Rapporteur also observed that although there was general support for the proposition that any regime of liability and compensation should aim at ensuring that the innocent victim was not, as far as possible, left to bear the loss resulting from transboundary harm arising from hazardous activity, full and complete compensation might not be possible in every case. Factors which militated against obtaining full and complete compensation included the following: problems with the definition of damage, difficulties of proof of loss, problems of the applicable law, limitations on the operator's liability as well as limitations within which contributory and supplementary funding mechanisms operated.

172. Part two of the report reviewed sectoral and regional treaties and other instruments (paras. 47–113), some of which were well established and others not yet in force but instructive as models for allocation of loss in case of transboundary harm.[182] The Special Rapporteur noted that the liability regime governing space activities was the only one which provided for State liability.

173. On the basis of the review, the Special Rapporteur noted that the picture was a mixed one. Some instruments were either not yet in force or had not been widely ratified and yet there continued to be a discernible trend to explore aspects of liability further. The Special Rapporteur also drew attention to common features of the various regimes and raised fundamental issues concerning civil liability, noting in particular that the legal issues involved in a civil liability system were complex and could be resolved only in the context of the merits of a specific case. Such solutions also depended on the jurisdiction in which the case was instituted and the applicable law. Although it was possible to negotiate specific treaty arrangements to settle the legal regime applicable for the operation of an activity, he had refrained from drawing any general conclusions on the system of civil liability, as it might lead the Commission to enter a different field of study altogether.

174. The Special Rapporteur noted that part three of the report contained submissions for consideration by the Commission:

(*a*) While the schemes of liability reviewed had common elements, each scheme was tailor-made for a particular context. Certainly the review did not suggest that the duty to compensate would best be discharged by negotiating a particular form of liability convention. The duty could equally be discharged, if considered appropriate, by forum shopping and allowing the plaintiff to sue in the most favourable jurisdiction, or by negotiating an *ad hoc* settlement;

(*b*) States should have sufficient flexibility to develop schemes of liability to suit their particular needs. Accordingly, the model of allocation of loss to be endorsed by the Commission should be general and residuary in character;

(*c*) In developing such a model, and taking into consideration some of the earlier work of the Commission on the topic, the Special Rapporteur proposed that the Commission could take the following into consideration:

(1) Any regime should be without prejudice to claims under civil liability as defined by national law and remedies available at the domestic level or under private international law. For the purposes of the present scheme, the model of allocation of loss in case of transboundary harm need not be based on any system of liability, such as strict or fault liability;

(2) Any such regime should be without prejudice to claims under international law, in particular the law of State responsibility;

(3) The scope of the topic for the purpose of the present scheme of allocation should be the

[179] See footnote 176 above.

[180] "Innocent victim" is a convenient term used to refer to persons who are not responsible for the transboundary harm.

[181] See footnote 173 above.

[182] For example, in the Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment, not yet in force, and the Basel Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and their Disposal, different actors share or bear liability for loss at different stages in the movement of hazardous wastes. See also the Convention on Civil Liability for Damage caused during Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels.

same as the one adopted for the draft articles on prevention;

(4) The same threshold of significant harm as defined and agreed in the context of the draft articles on prevention should be applied. The survey of the various schemes of liability and compensation showed that they all endorsed some threshold or the other as a basis for the application of a regime;

(5) State liability was an exception and was accepted only in the case of outer space activities;

(6) Liability and the obligation to compensate should first be placed at the doorstep of the person most in command and control of the hazardous activity at the time the accident or incident occurred. This might not always be the operator of an installation or a risk-bearing activity;

(7) Liability of the person in command and control of the hazardous activity could ensue once the harm caused could reasonably be traced to the activity in question. The test of reasonableness and not strict proof of causal connection should be sufficient to give rise to liability. This was necessary because hazardous operations involved complicated scientific and technological elements. Moreover, the issues involved harm which was transboundary in character;

(8) The test of reasonableness, however, could be overridden, for example, on the ground that the harm was the result of more than one source; or that there were other intervening causes, beyond the control of the person bearing liability but for which harm could not have occurred;

(9) Where the harm was caused by more than one activity and could be reasonably traced to each one of them, but could not be separated with any degree of certainty, liability could either be joint and several or could be equitably apportioned. Alternatively, States could decide in accordance with their national law and practice;

(10) Limited liability should be supplemented by additional funding mechanisms. Such funds might be developed out of contributions from the principal beneficiaries of the activity, from the same class of operators or from earmarked State funds;

(11) The State, in addition to the obligation earmarking national funds, should also be responsible for designing suitable schemes specific to addressing problems concerning transboundary harm. Such schemes could address protection of citizens against possible risk of transboundary harm; prevention of such harm from spilling over or spreading to other States on account of activities within its territory; institution of contingency and other measures of preparedness; and putting in place necessary measures of response, once such harm occurred;

(12) The State should also ensure that recourse was available within its legal system, in accordance with evolving international standards, for equitable and expeditious compensation and relief to victims of transboundary harm;

(13) The definition of damage eligible for compensation was not a well-settled matter. Damage to persons and property was generally compensable. Damage to environment or natural resources within the jurisdiction or in areas under the control of a State was also well accepted. However, compensation in such cases was limited to costs actually incurred on account of prevention or response measures as well as measures of restoration. Such measures must be reasonable or authorized by the State or provided for under its laws or regulations or adjudged as such by a court of law. Costs could be regarded as reasonable if they were proportional to the results achieved or achievable in the light of available scientific knowledge and technological means. Where actual restoration of damaged environment or natural resources was not possible, costs incurred to introduce equivalent elements could be reimbursed;

(14) Damage to the environment *per se*, not resulting in any direct loss to proprietary or possessory interests of individuals or the State should not be considered compensable, for the purposes of the present topic. Similarly, loss of profits and tourism on account of environmental damage need not be included in the definition of compensable damage. However, it could be left to national courts to decide such claims on their merits in each case.

175. The Special Rapporteur noted that the above recommendations, if found generally acceptable, could constitute a basis for drafting more precise formulations. The Commission was also requested to comment on the nature of instrument that would be suitable and the manner of ultimately disposing of the mandate. On a preliminary basis, one possibility he suggested was to draft a few articles for adoption as a protocol to a draft framework convention on the regime of prevention.

2. Summary of the debate

(a) *General comments*

176. The Special Rapporteur was commended for a comprehensive report. Comments and observations focused on the viability of the topic as a whole as well as its conceptual and structural affinities in relation to other areas of international law, such as State responsibility.

177. Members of the Commission continued to express different views on the viability of the topic. Some members suggested that the viability of the topic as a whole should not be an issue again. The 2002 Working Group had discussed the matter extensively and the Commission had endorsed its recommendations. Moreover, the Sixth Committee was favourably disposed towards the

consideration of the topic, viewing it as a logical follow-up to the draft articles on prevention as well as to the topic on State responsibility. It was further noted that since the General Assembly, in paragraph 3 of its resolution 56/82, had requested the Commission to resume the consideration of the liability aspects of the topic and article 18, paragraph 3, of the statute of the Commission required that priority be given to requests of the Assembly, a discussion on the viability of the project was misplaced.

178. The view was nevertheless maintained that the topic was inappropriate for, and did not easily lend itself to, codification and progressive development. According to that view, a global approach was unlikely to yield constructive results. In this context, reference was made to paragraphs 46 and 150 of the report of the Special Rapporteur which noted that the treaties analysed revealed that there could not be a single pattern of allocation of loss and that the legal issues involved were complex and could be resolved only in the context of the merits of a specific case. It was also noted that the Commission at its forty-eighth session (1996) and its forty-ninth session (1997), had already acknowledged that the trends for requiring compensation were not grounded in a consistent concept of liability[183] and considered the scope and content of the topic to be nebulous.[184] In addition, the following difficulties were noted: (*a*) that the topic under consideration was not a topic at all since the issues contemplated already formed the corpus of the law of State responsibility; (*b*) that the activities concerned were difficult to regulate since the various regimes provided for diverse particularities to the extent that it would be difficult to deal with the topic in general terms; (*c*) that the nature of the topic did not concern public international law; (*d*) that the topic was not for the Commission to consider but for negotiating or other bodies dealing with harmonization; and (*e*) that the topic was not part of the Commission's mandate. Further, there existed no agreement on the matter in doctrine, jurisprudence or practice.

179. On the other hand, some members were of the opinion that the topic, particularly as it concerned the allocation of loss, was not appropriate for codification and progressive development. They expressed the view that the subject was important theoretically and in practice, with a greater incidence of highly probable cases in the future. They also noted that some of the various criticisms against the topic needed to be taken into account in the Commission's work, but they did not debar the Commission from achieving a realizable objective. The Commission could elaborate general rules of a residual character that would apply to all situations of transboundary harm that occurred despite best practice prevention measures.

180. With regard to the conceptual framework of the topic, some members stated that the topic was filling a gap. It was addressing situations where, in spite of the fulfilment of the duties of prevention to minimize risk, significant harm was caused by hazardous activities. In most cases, such activities were conducted by private operators, giving rise to questions of liability of the operator and of the State that authorized the activity. Such activities were not unlawful and were essential for advancement of the welfare of the international community and the system of allocation of loss served well to balance the various interests.

181. It was also stressed that there was a link between prevention and allocation of loss arising from hazardous activities and it was that link which underpinned the question of compensation. Consequently, the work of the Commission would remain superficial if elements of such a relationship were not fleshed out, including ascertaining whether or not strict liability constituted the basis of liability of a State for activities involving risk. It was also noted that it would be interesting to conduct a study to determine the extent to which recent environmental disasters were a result of a violation of the duty of prevention.

182. Recognizing that the Commission's effort on the topic was still fraught with structural problems, the view was expressed that the Commission would have to grapple with two major policy questions. The first was to define fully the contours of the topic and deal with those situations in which there was no responsibility according to general principles of international law of State responsibility but which caused damage to innocent victims; and secondly, to deal with different social costs, which, from an analysis of the various regimes, varied from sector to sector.

183. In dealing with the first question, the view was expressed that vague references to points of principle alone, namely that rules of State responsibility would or should not be prejudiced, might not be enough to address the real questions of overlap. In operational terms, it was suggested that State responsibility, to a great extent, dealt with the subject matter of the present topic. State responsibility had more relevance and resilience in achieving recovery than was acknowledged. On the basis of the *Corfu Channel* case, States were responsible in certain circumstances for controlling sources of harm in their territory.[185] Each State was under the obligation not to allow its territory to be used for acts of which it had knowledge or means of knowledge contrary to the rights of other States. Such obligation would apply to the environment as well. Moreover, it was noted that the view that State responsibility obligations were based on fault was wholly exceptional: the general approach of tribunals in applying principles of State responsibility, was to apply the principle of "objective responsibility" which was in reality very close to the concept of "strict liability", at least as understood in common law. In contrast, principles of State liability did not exist in general international law.

184. On the second question concerning social costs, it was stressed that it was necessary for the Commission to take into account the effect of a general compensation regime on encouraging or discouraging certain beneficial activities. One model, which was more nuanced to the specific needs of a particular sector, proceeded on a sector-by-sector basis. It was suggested that solutions modelled on fishery conservation or similar regimes,

[183] See *Yearbook ... 1996*, vol. II (Part Two), annex I, p. 116, para. (32) of the commentary to article 5.

[184] See *Yearbook ... 1997*, vol. II (Part Two), p. 59, para. 165.

[185] *I.C.J. Reports 1949* (see footnote 123 above), p. 22.

including possibilities of negotiated or institutionally monitored waivers could be explored.

185. Comments were also made on the terminology used and the various issues raised by the Special Rapporteur in his report.

186. Commenting on the terminology in the report, some members noted that the title of the report "Legal regime for allocation of loss in case of transboundary harm arising out of hazardous activities" was misleading. However, the view was expressed that the use of "models" or "legal regime" could be a reflection of the Commission's own uncertainties about the nature of the final result and the use of such terms should be perceived as possible alternatives to a draft convention. Some members commented also on the appropriateness of the expression "innocent victim", particularly in relation to the case concerning damage to the environment. Another view objected, in principle, to the use of the expression "innocent victim".

187. It was averred that the term "allocation of loss" or "loss" was inconvenient. Instead, the more familiar terms such as "damage" and "compensation" could be reverted to. Further, it was suggested that the regime for "allocation of loss" might be more accurately referred to as "allocation of damages". The use of "civil liability" was also cautioned against by some members who noted that in some jurisdictions which drew a distinction between civil and administrative law, liability had been extensively developed not only in the context of "civil liability" but also in relation to "administrative liability" on the basis of the principle that a public burden should be shared equally by all citizens.

188. With regard to the general scope of the topic, support was reiterated for the recommendations of the 2002 Working Group. Some members considered the inclusion of the "global commons" tantamount to changing the orientation of the topic and constituting a deviation from the approved scope of the topic. Other members viewed it as an area worth studying, with some suggesting that protection of the global commons be included in the Commission's long-term programme. The inclusion of State patrimony and national heritage within the scope of coverage of loss to persons and property was also viewed positively.

189. Concerning the threshold of liability there was broad support for maintaining the same threshold of "significant harm" as in the draft articles on prevention. However, some members expressed a preference, for the purposes of compensation, for a lower threshold such as "appreciable harm".

190. While issues concerning damage by transnational corporations in the territory of a host country and their liability were critical, some members viewed any consideration of such issues within the context of the topic, or at any rate by the Commission, with reticence. Moreover, it was noted that questions concerning civil liability such as those on proper jurisdiction, in particular the consideration of cases such as *Ok Tedi*[186] and the 1984 Bhopal disaster litigation[187] went beyond the general scope of the topic.

191. The view was however expressed that the Special Rapporteur should have analysed further the various cases cited in order to illustrate the full nature of the problems involved. It was stressed that any emphasis on traditional civil liability approaches should not be considered as an excuse for not dealing with questions concerning damage to the environment.

192. With regard to the various regimes analysed by the Special Rapporteur in his report, some members of the Commission observed that the spread of national legislation, regional and other instruments covered could have been wider and a separate compilation of all instruments and exploration of other instruments would be relevant.[188] Mention was made of recently concluded instruments such as the Protocol on Civil Liability and Compensation for Damage Caused by Transboundary Effects of Industrial Accidents on Transboundary Waters. [189]

(b) *Comments on the summation and submissions of the Special Rapporteur*

193. Members also commented on the specific submissions of the Special Rapporteur in his report (see paragraph 174 above). There was wide support for a regime that would be general and residual in character. The view was expressed that any rules for allocation of loss should not replace existing regimes, discourage the development of new ones, or attempt to provide new detailed comprehensive regimes with wide scope to cover all conceivable circumstances.

194. On the other hand, it was considered reasonable to envision a comprehensive regime that covered all aspects of allocation of loss. On this account, allocation of loss should be studied in a comprehensive manner to take into consideration domestic law systems.

195. Some members offered tentative comments. It was pointed out that, given the divisions on the feasibility of the topic, it was premature to make definitive submissions. It was also noted that it was difficult to comment without knowing whether the end product envisaged would be a model for allocation of loss for a treaty regime, national legislation or merely a set of recommendations or guidelines. Moreover, the point was made that there was a gap between the description of the existing regimes in part two of the Special Rapporteur's report and the submissions in part three indicating a failure to offer a perspective from which the Commission should consider the matter. The viewpoint was also expressed that some of

[186] *Dagi, Rex and Ors* v. *BHP Ltd. and OK Tedi Mining Ltd.*, Supreme Court of Victoria, judgment of 22 September 1995.

[187] *Union Carbide Corporation Gas Plant Disaster at Bhopal, India in December, 1984*, opinion and order of 12 May 1986, United States District Court, New York (ILM, vol. 25 (1986), p. 771).

[188] Reference was made to the civil aviation liability regime established under the "Warsaw System".

[189] It is a Protocol to the Convention on the Protection and Use of Transboundary Watercourses and International Lakes and to the Convention on the Transboundary Effects of Industrial Accidents. See also the Protocol of 2003 to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992, which establishes an additional "third tier" supplementary fund.

the submissions (para. 174 (*c*) (10)–(14) above) only confirmed that the topic was not appropriate for codification.

196. Some other members expressed support for the general thrust of the submissions, which were realistic and constituted a directory of problems and questions to be considered. It was noted that some submissions (in particular points (7)–(12) of paragraph 174 (*c*) above) were condensed and some aspects thereof needed further discussion in the context of a working group.

(1) *Application of regime to be without prejudice to other civil liability schemes (para. 174 (*c*) (1))*

197. Several members expressed support for this submission. With the financial limits imposed by the various regimes, it was reasonable not to foreclose the possibility of receiving better relief and the continued application of the polluter-pays principle under national law.

198. It was suggested that the exhaustion of domestic mechanisms first would not be necessary before recourse to international mechanisms. In addition, a role could be envisaged for multiple national jurisdictions and mechanisms, especially in the State of origin and the State of injury. In this connection, support was expressed for the principle laid down in the *Handelskwekerij G. J. Bier BV* v. *Mines de Potasse d'Alsace S. A.* case.[190] The Protocol on Civil Liability and Compensation for Damage caused by Transboundary Effects of Industrial Accidents on Transboundary Waters was also cited as providing opportunity for forum shopping.

199. Concerning the Special Rapporteur's submission that a model of loss need not be based on any system of liability, such as strict or fault liability, preference was expressed for strict liability. It was also noted that the suggestion did not make the consideration of the topic any easier. Generally, liability was limited in cases of strict liability. Accordingly, even if the question of strict or fault liability was to be set aside, the basis of residual State liability would arise as would the question whether or not compensation would in such cases be full or limited.

(2) *Application of regime to be without prejudice to claims under international law (para. 174 (*c*) (2))*

200. The Commission expressed support for this submission. It was stressed that there should be special care not to prejudice the work on State responsibility. A statement to that effect would not be sufficient for that purpose. It was not clear whether or not the local remedies rule would apply if a State responsibility claim was made: whether the civil liability claims system in domestic courts would replace the local remedies rule or reinforce its ambit. It was not apparent whether the existence of civil liability remedies within a municipal system would qualify as "another available means of settlement" within the meaning of such phrases in the acceptance of the compulsory jurisdiction of ICJ.

(3) *Scope of topic similar to the draft articles on prevention (para. 174 (*c*) (3))*

201. Support was expressed for this submission. It gave flexibility to the Commission when it finally decided on the form of the final product. Some members regretted the exclusion from the scope of the topic of harm to the environment in areas beyond national jurisdictions. It was also reiterated that the Commission should not deal with the global commons, at least at the current stage, since it had its own peculiarities.

202. It was observed that in certain situations, harm caused within the territory of the State of origin would be no less significant than harm in a transboundary context. In a comprehensive regime, on the basis of the principle of equality of treatment of persons, such harm should not be ignored. Article XI of the Convention on Supplementary Compensation for Nuclear Damage, which sought to protect those who suffer nuclear damage in and outside the State of the installation, was cited as an example.

(4) *"Significant harm": same threshold as in the draft articles on prevention of transboundary harm (para. 174 (*c*) (4))*

203. There was broad support for maintaining the same threshold of "significant harm" as in the draft articles on prevention. However, some members expressed a preference, for the purposes of compensation, for a lower threshold such as "appreciable harm". The suggestion was made that, in the context of liability, the term "significant harm" could be changed to "significant damage". The importance of reaching agreement on the meaning of "significant harm" that would be understood in all legal systems was emphasized.

(5) *State liability exception as a basis for a model of liability (para. 174 (*c*) (5))*

204. Support was expressed for this submission. However, it was noted that in models of liability and compensatory schemes, the State had a prominent role, either directly when it would bear loss not covered by the operator or indirectly through the establishment of arrangements for allocation of loss. It was also noted that residual liability for States was also supported in the Sixth Committee and was contained in several instruments, including the Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment, the Convention on Third Party Liability in the Field of Nuclear Energy (as amended by its Protocols in 1964 and 1982) as well as the proposal for a Directive of the European Parliament and of the Council on environmental liability with regard to the prevention and remedying of environmental damage.[191] Moreover, it was suggested that it

[190] Case 21/76, judgement of 30 November 1976, Court of Justice of the European Communities, *Reports of Cases before the Court, 1976–8*, p. 1735. The Court of Justice of the European Communities construed the phrase "in the courts for the place where the harmful event occurred" in the Convention concerning judicial competence and the execution of decisions in civil and commercial matters (art. 5, para. 3) as meaning the choice of forum between the State in which the harm occurred and the State in which the harmful activity was situated; and the choice of forum belonged to the plaintiff whom the Convention sought to protect.

[191] *Official Journal of the European Communities*, No. C 151 E (25 June 2002), p. 132.

was worth analysing whether, and the extent to which, the approaches under the space liability regime could affect other models of liability or conversely the extent to which the regime could be modified in future by following other models considering the involvement of non-State actors in space activities.

(6) *Liability for person in command and control (para. 174 (*c*) (6))*

205. It was noted that the term "operator" was not a term of art. In the Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment the term was used to characterize the person who exercised the control of the activity (art. 2, para. 5) and in the proposal for a Directive of the European Parliament and of the Council on environmental liability with regard to the prevention and remedying of environmental damage the term applied to any person who directed the operation of an activity, including a holder of a permit or authorization for such activity and/or the person registering or notifying such activity.[192] It was suggested that the term "operator" could be used to describe the person in "command and control". It was further suggested that the operator of the activity should be primarily liable since the operator was the person who carried out an activity and was practically responsible all the way. It was pointed out that "command and control" could give rise to different interpretations.

206. Further, it was observed that this proposition should be reviewed from the perspective of the need to secure assets in the event of loss. It was essentially for that reason that shipowners rather than the charterers are held liable in pertinent conventions for harm caused by ships. Those who owned assets such as ships could insure such assets against risk and could easily pass on the costs to others if necessary.

(7) *Test of reasonableness as basis for establishing causal link (para. 174(*c*) (7))*

207. The test of reasonableness was supported since it was difficult to establish a causal link in activities containing an element of risk. However, some members doubted whether there was a real distinction between "causality" and "reasonableness". According to this view, "causality" is the criterion for reasonableness. Other members expressed preference for "proximate cause". It was also pointed out that the test of reasonableness did not obviate the need to consider and determine the standard of proof for establishing the causal link.

(8) *Exceptions to limited liability (para. 174 (*c*) (8))*

208. It was suggested that the situation where the harm was caused by more than one source could constitute an exception to limited liability. It was also pointed out that it was also necessary to provide safeguard clauses for damage arising from armed conflict, *force majeure,* or through fault of the injured or third party.

[192] *Ibid.*, p. 135.

(9) *Joint and several liability (para. 174 (c) (9))*

209. Several members agreed to the need for liability to be joint or several where harm was caused by more than one activity. It was doubted however that "equitable apportionment" constituted a good basis for liability in situations where it was difficult to trace harm to one particular activity and whether it could in practice be objectively determined. Instead, States should be allowed to negotiate in accordance with their national law and practice. On the other hand, it was proposed that the principle of equitable apportionment could be provided for in a general manner, leaving States or parties concerned to agree on measures of implementation. It was also suggested that the reference to "in accordance with national law and practice" be deleted to allow States other possibilities, such as negotiation, arbitration or other means of settlement.

(10) *Limited liability to be complemented by supplementary funding mechanisms (para. 174 (*c*) (10))*

210. Some members stressed that in addition to minimum limits, maximum ceilings should be set for insurance and additional funding mechanisms.

211. The view was expressed that loss be allocated among the different actors, including the operator as well as those who authorized, managed or benefited from the activity. A State acting as an operator should also be liable in that capacity. In the exceptional case where the operator could not be identified, was unable to pay in full or was insolvent, it was suggested that the State of origin could assume residual liability. Consequently, the State concerned should make insurance mandatory or have the right to be notified of the risk and demand that such activity be insured. It was also suggested that a State should be held liable only if it was responsible for monitoring the activity. It was also suggested that it was necessary to enjoin States irrespective of their involvement in an activity and article IV of the Convention on Supplementary Compensation for Nuclear Damage was perceived as establishing a useful precedent.

212. Since the amount for which the operator would be liable was likely to be inadequate, the point was made that liability, whether limited or not, should always be supplemented by additional funding mechanisms. Article 11 of the Protocol on Civil Liability and Compensation for Damage Caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters was considered an example.

213. However, the view was expressed that the presumption that limited liability was inadequate for compensation in all cases was not always correct. Much depended on the type of activity and the targeted economies.

214. The recommendation that the State should take the responsibility for the design of suitable schemes was supported, noting that it was consistent with principle 21 of the Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration)[193] as well

[193] *Report of the United Nations Conference on the Human Environment, Stockholm, 5-16 June 1972* (United Nations publication, Sales No. E.73.II.A.14 and corrigendum, part one, chap. I).

as principle 13 of the Rio Declaration on Environment and Development (Rio Declaration),[194] which was confirmed in the Plan of Implementation of the World Summit on Sustainable Development.[195]

215. It was contended that the role of the State in this matter was underpinned by its obligation to conduct activities within its jurisdiction or control in a manner so as not to cause transboundary environmental harm. The principle of prevention was highlighted in the *Trail Smelter* arbitration case, [196] reiterated in principle 2 of the Rio Declaration and confirmed in the advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*.[197] It was also pointed out that such rationale was embedded in the principle of collective solidarity. It was also suggested that the duty of States to take preventive measures could also contribute to compliance with the draft articles on prevention.

(11) *Other obligations for States, including availability of recourse procedures (para. 174 (*c*) (11)–(12))*

216. The point was made that the dispute settlement mechanisms such as arbitration, including questions concerning the applicable law, should not be excluded from the overall scope of the topic. In this connection, reference was made to article 14 of the Protocol on Civil Liability and Compensation for Damage Caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters which provided for arbitration in accordance with the Permanent Court of Arbitration Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment[198] for disputes between persons claiming damage and persons liable under the Protocol.

217. It was proposed that the Special Rapporteur in developing the recommendations further should take into account articles 21 (Nature and extent of compensation or other relief) and 22 (Factors for negotiations) adopted by the 1996 Working Group.[199]

218. Support was also expressed for the proposition that the State should ensure the availability of recourse procedures within the legal system and it was pointed out that such a right should be guaranteed.

(12) *Damage to the environment, environment per se and loss of profits and tourism (para. 174 (*c*) (13)–(14))*

219. The submission that damage to the environment *per se* should not be considered compensable for the purposes of the topic received some support. In that regard it was noted that there was a distinction between damage to the environment which could be quantified, and damage to the environment which was not possible to quantify in monetary terms. It was pointed out that in some liability regimes, such as the Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment[200] and the proposal for a Directive of the European Parliament and of the Council on environmental liability, damage to the environment[201] or natural resources would be directly compensable. The work of UNCC was also considered helpful in this area.[202] A separate issue was whether, in view of global interconnectedness, the inclusion of damage to the environment beyond national jurisdiction should be considered.

220. Concerning loss of tourism as such or loss of profits, it was noted that while there might not be a clear causal link to proprietary or possessory interest, in certain instances harm would be catastrophic to economies of States. Some members made reference to article 2, paragraph 2 (*d*) (iii), of the Protocol on Civil Liability and Compensation for Damage Caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters which defined "damage" as covering also income deriving from the impairment of a legally protected interest in any use of the transboundary waters for economic purposes, incurred as a result of the impairment of the transboundary waters, taking into account savings and costs.

221. It was noted that the report did not offer any well-founded basis for the conclusion reached that loss of profits and tourism on account of environmental damage are not likely to be compensated and should be excluded from the topic. It was also questioned whether such loss was directly connected to damage to the environment *per se.*

(13) *Form of instrument*

222. Support was expressed for the Special Rapporteur's suggestion that the Commission's work on liability take the form of a draft protocol. Some members favoured a convention, with inter-State dispute settlement clauses. Some other members argued that the liability aspects be treated on an equal footing with the draft articles on prevention of transboundary harm from hazardous activities. Thus, a convention, rather than a protocol, with one part on prevention and another enunciating general principles of liability was preferred.

223. Some members favoured recommendations, guidelines or general rules on liability. Further, a declaration of principles, focusing on the duty of States to protect innocent victims, was also viewed as a possible outcome. The

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

[195] *Report of the World Summit on Sustainable Development, Johannesburg, South Africa, 26 August-4 September 2002* (United Nations publication, Sales No. E.03.II.A.1), chap. I, resolution 2.

[196] See footnote 151 above.

[197] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, at pp. 240–241, para. 29.

[198] These Rules can be consulted on www.pca-cpa.org.

[199] See footnote 167 above.

[200] Compensation for impairment in such a case, other than for loss of profit from such impairment, is limited to the costs of measures of reinstatement actually undertaken or to be undertaken.

[201] See footnote 191 above. Under the proposal for a Directive, environmental damage is to be defined in the context of the proposal by reference to biodiversity protected at Community and national levels, waters covered by the Water Framework Directive and human health when the source of the threat to human health is land contamination.

[202] See Security Council resolutions 687 (1991) and 692 (1991). See also the report of the Secretary-General pursuant to paragraph 19 of Security Council resolution 687 (1991) (S/22559 of 2 May 1991).

possibility of preparing model clauses, with alternative formulations, as appropriate, was also offered.

224. Other members observed that it would be premature to decide on the nature of the instrument. Such a decision would have to emerge from the continuing work of the Commission, noting that it may well be that "soft law" approaches would eventually be advisable.

3. The Special Rapporteur's concluding remarks

225. In response to some of the comments and observations, the Special Rapporteur recounted the earlier efforts by the Commission to address the conceptual issues, particularly delineating the topic to distinguish it from other topics concerning State responsibility and the law of non-navigational uses of watercourses, the impact that international environmental law had on the discussions and how eventually a pragmatic step-by-step approach was considered most feasible. He also noted that the question of the global commons had been discussed and was left out to make the consideration of the topic manageable[203] and the issue could be revisited once the Commission had finalized the model of allocation of loss.

226. He recalled the discussions in the 2002 Working Group and the direction given to him to develop a model on allocation of loss without linking it to any particular legal basis and to have such a model elaborated following a review of the various existing models. The report therefore concentrated on the outcomes or results and avoided emphasis on the process of negotiations of such instruments or on the attitude of States towards the regimes concerned either during the process of the negotiation or after their conclusion.

227. The terminology used in his report[204] was a product of an effort to conceptualize the topic within manageable confines and to overcome any imputation of linkages with other topics. International "liability" contrasted with State "responsibility"; the term "allocation of loss" was intended to overcome the legal connotations associated with "reparation" in relation to State responsibility or "compensation" in relation to civil liability.

228. Concerning the question of the operator's liability, the Special Rapporteur noted that the legal basis on which such liability would have to lie was not self-evident. Although strict liability was well recognized in national legal systems, it could not be stated that it was well accepted or understood as a desirable policy in the context of transboundary harm and should be cautiously approached. Further, it was difficult to establish a comprehensive legal regime, which reconciled different elements of a civil liability regime. Such an exercise would be time-consuming and involve many jurisdictions and different legal systems.

229. He conceded that pertinent questions had been raised on the relationship between the claims concerning civil liability of the operator and possible claims against the State. However, such questions would only be relevant if the purpose of the exercise was to address a share of loss to the State as a consequence of its liability for the harm caused; and not if the allocation of the loss to the State resulted in an obligation of the State to earmark funds at national level as a matter of social duty to make good a portion of the loss suffered by the innocent victim which was otherwise not assumed in the liability of the operator.

230. A multiple-tier approach for compensation was a well-established pattern in the various regimes and it was considered appropriate by the 2002 Working Group.[205] He pointed out that the social justification and equity for involving the State in a subsidiary tier could not be overemphasized in any scheme of allocation of loss, particularly where the operator's liability was limited or when the operator could not be traced or identified. While the mandate of the Commission was to deal with transboundary harm, it would be anticipated that any model to be proposed could be useful in providing similar relief to innocent victims even within the jurisdiction of the State of origin. The modalities for doing so could be a matter for further reflection.

231. He noted that there was need for further work and reflection on the various issues raised and, if possible, to produce as part of the next report concrete formulations.

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[203] See, for example, *Yearbook ... 2002*, vol. II (Part Two), paras. 443–448.

[204] *Ibid.*, paras. 442–457.

[205] *Ibid.*, paras. 449–456.

Chapter VII

UNILATERAL ACTS OF STATES

A. Introduction

232. In its report on the work of its forty-eighth session, in 1996, the Commission had proposed to the General Assembly that the law of unilateral acts of States should be included as a topic appropriate for the codification and progressive development of international law.[206]

233. The General Assembly, in paragraph 13 of resolution 51/160, *inter alia*, invited the Commission to further examine the topic "Unilateral acts of States" and to indicate its scope and content.

234. At its forty-ninth session, in 1997, the Commission established a working group on this topic which reported to the Commission on the admissibility and facility of a study on the topic, its possible scope and content and an outline for a study on the topic. At the same session, the Commission considered and endorsed the report of the Working Group.[207]

235. Also at its forty-ninth session, the Commission appointed Mr. Víctor Rodríguez Cedeño as Special Rapporteur on the topic.[208]

236. The General Assembly, in paragraph 8 of its resolution 52/156, endorsed the Commission's decision to include the topic in its work programme.

237. At its fiftieth session, in 1998, the Commission had before it and considered the Special Rapporteur's first report on the topic.[209] As a result of its discussion, the Commission decided to reconvene the Working Group on unilateral acts of States.

238. The Working Group reported to the Commission on issues related to the scope of the topic, its approach, the definition of a unilateral act and the future work of the Special Rapporteur. At the same session, the Commission considered and endorsed the report of the Working Group.[210]

239. At its fifty-first session, in 1999, the Commission had before it and considered the Special Rapporteur's second report on the topic.[211] As a result of its discussion, the Commission decided to reconvene the Working Group on unilateral acts of States.

240. The Working Group reported to the Commission on issues related to: (*a*) the basic elements of a workable definition of unilateral acts as a starting point for further work on the topic as well as for gathering relevant State practice; (*b*) the setting of general guidelines according to which the practice of States should be gathered; and (*c*) the direction that the work of the Special Rapporteur should take in the future. In connection with point (*b*) above, the Working Group set the guidelines for a questionnaire to be sent to States by the Secretariat in consultation with the Special Rapporteur, requesting materials and inquiring about their practice in the area of unilateral acts as well as their position on certain aspects of the Commission's study of the topic.

241. At its fifty-second session, in 2000, the Commission considered the third report of the Special Rapporteur on the topic,[212] along with the text of the replies received from States[213] to the questionnaire on the topic circulated on 30 September 1999. The Commission decided to refer revised draft articles 1 to 4 to the Drafting Committee and revised draft article 5 to the Working Group on the topic.

242. At its fifty-third session, in 2001, the Commission considered the fourth report of the Special Rapporteur[214] and established an open-ended working group. At the recommendation of the Working Group, the Commission requested that a questionnaire be circulated to Governments inviting them to provide further information regarding their practice of formulating and interpreting unilateral acts.[215]

243. At its fifty-fourth session, in 2002, the Commission considered the fifth report of the Special Rapporteur,[216] as well as the text of the replies[217] received from States to the questionnaire on the topic circulated on 31 August 2001.[218] The Commission also established an open-ended working group.

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[206] *Yearbook ... 1996*, vol. II (Part Two), pp. 97–98, para. 248, and annex II, p. 133, para. 2 (e) (iii).

[207] *Yearbook ... 1997*, vol. II (Part Two), pp. 64–65, paras. 194 and 196–210.

[208] *Ibid.*, p. 66, para. 212, and p. 71, para. 234.

[209] *Yearbook ... 1998*, vol. II (Part One), p. 319, document A/CN.4/486.

[210] *Ibid.*, vol. II (Part Two), pp. 58–59, paras. 192–201.

[211] *Yearbook ... 1999*, vol. II (Part One), p. 195, document A/CN.4/500 and Add.1.

[212] *Yearbook ... 2000*, vol. II (Part One), p. 247, document A/CN.4/505.

[213] *Ibid.*, p. 265, A/CN.4/511.

[214] *Yearbook ... 2001*, vol. II (Part One), p. 115, document A/CN.4/519.

[215] *Ibid.*, vol. II (Part Two), p. 19, para. 29, and p. 205, para. 254. The text of the questionnaire can be consulted on http://untreaty.un.org/ilc/sessions/53/53sess.htm.

[216] *Yearbook ... 2002*, vol. II (Part One), p. 95, document A/CN.4/525 and Add.1–2.

[217] *Ibid.*, p. 90, A/CN.4/524.

[218] See footnote 215 above.