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YEARBOOK OF THE INTERNATIONAL LAW COMMISSION

2004

Volume II
Part One

Documents of the fifty-sixth session

UNITED NATIONS

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NOTE

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Volume I: summary records of the meetings of the session;

Volume II (Part One): reports of special rapporteurs and other documents considered during the session;

Volume II (Part Two): report of the Commission to the General Assembly.

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ABBREVIATIONS

ACP	African, Caribbean and Pacific Group
CARICOM	Caribbean Community
EC	European Community (formerly EEC)
ECE	United Nations Economic Commission for Europe
ECOWAS	Economic Community of West African States
ECSC	European Coal and Steel Community
EEC	European Economic Community
EU	European Union
FAO	Food and Agriculture Organization of the United Nations
GATT	General Agreement on Tariffs and Trade
GNP	gross national product
IAEA	International Atomic Energy Agency
IAH	International Association of Hydrogeologists
ICAO	International Civil Aviation Organization
ICJ	International Court of Justice
IMF	International Monetary Fund
IMCO	Inter-Governmental Maritime Consultative Organization (now IMO)
IMO	International Maritime Organization
ILO	International Labour Organization
IOPC	International Oil Pollution Compensation
ITLOS	International Tribunal for the Law of the Sea
MFO	Multinational Force and Observers
NATO	North Atlantic Treaty Organization
NGO	non-governmental organization
OAS	Organization of American States
OECD	Organization for Economic Cooperation and Development
OPCW	Organisation for the Prohibition of Chemical Weapons
PAHO	Pan American Health Organization
PCIJ	Permanent Court of International Justice
PLO	Palestine Liberation Organization
SFOR	Stabilization Force [Bosnia and Herzegovina]
UNCC	United Nations Compensation Commission
UNDP	United Nations Development Programme
UNECE	United Nations Economic Commission for Europe
UNEP	United Nations Environment Programme
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNIFIL	United Nations Interim Force in Lebanon
UNFICYP	United Nations Peacekeeping Force in Cyprus
UNOSOM	United Nations Operation in Somalia
UNRWA	United Nations Relief and Works Agency for Palestine Refugees in the Near East
WEU	Western European Union
WFP	World Food Programme
WHO	World Health Organization
WTO	World Trade Organization

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AJIL	*American Journal of International Law* (Washington, D.C.)
I.C.J. Pleadings	ICJ, *Pleadings, Oral Arguments, Documents*
I.C.J. Reports	ICJ, *Reports of Judgments, Advisory Opinions and Orders*
ILM	*International Legal Materials* (Washington, D.C.)
ILR	*International Law Reports* (London)
LGDJ	Librairie générale de droit et de jurisprudence (Paris)
P.C.I.J., Series A	PCIJ, *Collection of Judgments* (Nos. 1–24: up to and including 1930)
P.C.I.J., Series A/B	PCIJ, *Judgments, Orders and Advisory Opinions* (Nos. 40–80: beginning in 1931)
P.C.I.J., Series C	PCIJ, *Pleadings, Oral Arguments, Documents* (Nos. 52–88: beginning in 1931)
REDI	*Revista Española de Derecho Internacional* (Madrid)
RGDIP	*Revue générale de droit international public* (Paris)
UNRIAA	United Nations, *Reports of International Arbitral Awards*

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NOTE CONCERNING QUOTATIONS

In quotations, words or passages in italics followed by an asterisk were not italicized in the original text.

Unless otherwise indicated, quotations from works in languages other than English have been translated by the Secretariat.

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The Internet address of the International Law Commission is **www.un.org/law/ilc/index.htm.**

RESPONSIBILITY OF INTERNATIONAL ORGANIZATIONS

[Agenda item 2]

DOCUMENT A/CN.4/541

Second report on responsibility of international organizations, by Mr. Giorgio Gaja, Special Rapporteur

[*Original: English*]
[*2 April 2004*]

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Multilateral instruments cited in the present report

	Source
Agreement between the World Health Organization and the Pan American Sanitary Organization (Washington, D.C., 24 May 1949)	United Nations, *Treaty Series*, vol. 32, No. 178, p. 387.
Treaty establishing the European Atomic Energy Community (EURATOM) (Rome, 25 March 1957)	*Ibid.*, vol. 298, No. 4301, p. 167.
Exchange of letters between the United Nations and Belgium constituting an agreement relating to the settlement of claims filed against the United Nations in the Congo by Belgian nationals (New York, 20 February 1965)	*Ibid.*, vol. 535, No. 7780, p. 197.
Exchange of letters between the United Nations and Switzerland constituting an agreement relating to the settlement of claims filed against the United Nations in the Congo by Swiss nationals (New York, 3 June 1966)	*Ibid.*, vol. 564, No. 621, p. 193.
Exchange of letters between the United Nations and Greece constituting an agreement relating to the settlement of claims filed against the United Nations in the Congo by Greek nationals (New York, 20 June 1966)	*Ibid.*, vol. 565, No. 8230, p. 3.
Exchange of letters between the United Nations and Luxembourg constituting an agreement relating to the settlement of claims filed against the United Nations in the Congo by Luxembourg nationals (New York, 20 December 1966)	*Ibid.*, vol. 585, No. 8487, p. 147.

Exchange of letters between the United Nations and Italy constituting an agreement relating to the settlement of claims filed against the United Nations in the Congo by Italian nationals (New York, 18 January 1967)	*Ibid.*, vol. 588, No. 8525, p. 197.
Convention on International Trade in Endangered Species of Wild Fauna and Flora (Washington, D.C., 3 March 1973)	*Ibid*., vol. 993, No. 14537, p. 243.
Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character (Vienna, 14 March 1975)	A/CONF.67/16.
United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982)	United Nations, *Treaty Series*, vol. 1833, No. 31363, p. 3.
Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (Vienna, 21 March 1986)	A/CONF.129/15.
Fourth ACP-EEC Convention (Lomé, 15 December 1989)	United Nations, *Treaty Series*, vol. 1924, No. 32847, p. 3.

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Introduction*

1. The International Law Commission adopted in 2003 the first three draft articles on the topic "Responsibility of international organizations".[1] Several comments were made on those articles in the Sixth Committee of the General Assembly during the examination of the Commission's report.[2] The wording of the definition of international organizations in draft article 2 was the main object

* The Special Rapporteur gratefully acknowledges the assistance given for the preparation of this report by Messrs José Caicedo (Ph.D. candidate, University of Paris I), Stefano Dorigo (Ph.D. candidate, University of Pisa), Paolo Palchetti (researcher, University of Florence) and Ms. Ashika Singh (S.J.D. candidate, New York University).

[1] *Yearbook … 2003*, vol. II (Part Two), p. 18, para. 53.

[2] Especially in the meetings held between 27 October and 4 November 2003 (*Official Records of the General Assembly, Fifty-eighth Session, Sixth Committee*, 14th–21st meetings). Only comments that relate to questions of attribution of conduct will be analysed in the present report.

of that exchange of views. In my opinion, all those comments should be considered by the Commission before the end of the first reading. The Commission may then decide whether to revise the draft articles as they were provisionally adopted or to postpone their revision to the second reading.

2. On the basis of a recommendation made by the Commission during its 2002 session,[3] the Legal Counsel of the United Nations requested a number of international organizations to provide comments and "materials, especially on questions of attribution [of conduct to international organizations] and of responsibility of member States for conduct that is attributed to an international organization". With a few noteworthy exceptions, the replies hereto given by international organizations have added little to already published materials. It is the Special Rapporteur's hope that the continuing discussion in the Commission will prompt international organizations to send further contributions, so that the Commission's study may more adequately relate to practice and thus become more useful.

3. In that context it is to be noted that the General Assembly, in paragraph 5 of its resolution 58/77 of 9 December 2003, requested:

> the Secretary-General to invite States and international organizations to submit information concerning their practice relevant to the topic "Responsibility of international organizations", including cases in which States members of an international organization may be regarded as responsible for acts of the organization.

4. Under the heading "General principles" draft article 3 on responsibility of international organizations stated:

> 2. There is an internationally wrongful act of an international organization when conduct consisting of an action or omission:
>
> (*a*) Is attributable to the international organization under international law.[4]

The present report will discuss issues relating to attribution of conduct to international organizations.

[3] *Yearbook … 2002*, vol. II (Part Two), p. 93, paras. 464 and 488. The following quotation comes from the latter paragraph.

[4] *Yearbook … 2003* (see footnote 1 above).

Chapter I

Relations between attribution of conduct to an international organization and attribution of conduct to a State

5. The articles adopted by the Commission on responsibility of States for internationally wrongful acts contain a number of provisions on attribution of conduct to a State (arts. 4–11).[5] While these articles are not immediately relevant to international organizations, they have to be fully taken into account when discussing issues relating to attribution to international organizations that are parallel to those concerning States. The need for coherency in the Commission's work requires that a change, in respect of international organizations, in the approach and even the wording of what has been said with regard to States needs, be justified by differences in the relevant practice or in objective distinctions in nature.

6. Should one assume that conduct cannot be simultaneously attributed to a State and an international organization, the positive criteria for attributing conduct to a State would imply corresponding negative criteria with regard to attribution of the same conduct to an international organization. In many cases the question will in practice be whether a certain conduct should be attributed to one or, alternatively, to another subject of international law. However, conduct does not necessarily have to be attributed exclusively to one subject only. Thus, for instance, two States may establish a joint organ, whose conduct will generally have to be attributed to both States. Similarly, cases can be envisaged in which conduct should be simultaneously attributed to an international organization and one or more of its members.

[5] *Yearbook … 2001*, vol. II (Part Two), p. 26, para. 76.

7. A paradigmatic example is offered by the bombing in 1999 of the territory of the Federal Republic of Yugoslavia. That military action gave rise to much discussion on the point whether conduct had to be attributed to an international organization or to some or all of its members. In relation to the bombing, several members of NATO were sued before ICJ in the cases on *Legality of Use of Force*[6] and before the European Court of Human Rights in the *Banković* case.[7] In both venues some of the respondent States argued that conduct was to be attributed to NATO and not to themselves, as the claimants contended.[8] While

[6] While by two orders of 2 June 1999 ICJ removed two cases (*Legality of Use of Force (Yugoslavia* v. *Spain), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999*, p. 761, and *ibid. (Yugoslavia* v. *United States of America)*, p. 916) from the Court's list, the other eight cases are still pending (*ibid. (Yugoslavia* v. *Belgium)*, p. 124; *ibid. (Yugoslavia* v. *Canada)*, p. 259; *ibid. (Yugoslavia* v. *France)*, p. 363; *ibid. (Yugoslavia* v. *Germany)*, p. 422; *ibid. (Yugoslavia* v. *Italy)*, p. 481; *ibid. (Yugoslavia* v. *Netherlands)*, p. 542; *ibid. (Yugoslavia* v. *Portugal)*, p. 656; *ibid. (Yugoslavia* v. *United Kingdom)*, p. 826. The Court is due to examine shortly the objections to its jurisdiction raised by the defendant States.

[7] *Banković and Others* v. *Belgium and Others*, European Court of Human Rights, Grand Chamber, 2001, Application No. 52207/99. This application was declared inadmissible by the Grand Chamber by a decision of 12 December 2001. The text of the decision is reproduced in *Rivista di diritto internazionale*, vol. 85 (2002), p. 193.

[8] Reference may be made, for instance, to the oral pleading of the agent for the Government of Canada, Mr. Kirsch, on 12 May 1999 (*Legality of Use of Force (Yugoslavia* v. *Canada*) (see footnote 6 above); the relevant passage was reproduced by Higgins, "The responsibility of States members for the defaults of international organizations: continuing the dialogue", p. 447), and to the memorial of the French Government in the *Banković* case (see the passage quoted by Weckel, "Chronique de jurisprudence internationale", p. 446, with a critical comment). The view that conduct of NATO forces could be attributed only to NATO was held by Pellet, "L'imputabilité d'éventuels

a discussion of this question would not be appropriate here, one may argue that attribution of conduct to an international organization does not necessarily exclude attribution of the same conduct to a State, nor does, vice versa, attribution to a State rule out attribution to an international organization.[9] Thus, one envisageable solution would be for the relevant conduct to be attributed both to NATO and to one or more of its member States, for instance because those States contributed to planning the military action or to carrying it out.[10]

8. Dual attribution of conduct normally leads to joint, or joint and several, responsibility. However, joint, or joint and several, responsibility does not necessarily depend on dual attribution. One can take as an example the so-called mixed agreements, to which both the European Community (EC) and its member States are parties. In case of an infringement of a mixed agreement that does not distinguish between the respective obligations of the EC and its member States—either directly, or by referring to their respective competencies—responsibility would be joint towards the non-member State party to the agreement. As the European Court of Justice said in case C–316/91, *European Parliament* v. *Council of the European Union*, with regard to the Fourth ACP-EEC Convention:

> [I]n the absence of derogations expressly laid down in the Convention, the Community and its Member States as partners of the ACP States [States of Africa, the Caribbean and the Pacific] are jointly liable to those latter States for the fulfilment of every obligation arising from the commitments undertaken.[11]

In this case attribution of conduct to the EC or a member State does not appear to be relevant when deciding who is responsible. Even if it was ascertained that conduct was attributable only to one of the actors, they would all be jointly responsible.

9. The type of situation examined in the preceding paragraph is not the only one in which responsibility could arise for an international organization for conduct taken by another subject of international law, for instance a State. This may occur under circumstances similar to those considered in part one, chapter IV, of the articles on responsibility of States for internationally wrongful acts.[12] In that chapter, articles 16–18 refer to cases in which a State is responsible because it "aids or assists" or "directs and controls another State in the commission of an internationally wrongful act", or else "coerces another State to commit an act [that] would, but for the coercion, be an internationally wrongful act of the coerced State".[13] It seems reasonable to envisage that, if an international organization aids or assists, or directs or controls, a State in the commission of a wrongful act, or coerces a State to commit it, the organization should be held responsible under conditions similar to those applying with regard to States. These cases will have to be examined in a chapter corresponding to part one, chapter IV, of the articles on responsibility of States for internationally wrongful acts.

10. What is more relevant in the discussion of questions of attribution is a different case, which was not mentioned in the articles on responsibility of States for internationally wrongful acts and in the respective commentary, possibly because it was held to be marginal. This case deserves consideration with regard to international organizations because of its greater practical importance in that context. Let us assume that certain powers have been transferred to an international organization, which may then conclude an agreement with a non-member State with regard to the use of those powers. As an example, one could take the case of an agreement concluded by the EC in an area in which the EC is exclusively competent, such as common commercial policy. If the implementation of a trade agreement that was concluded by the EC is left, at least in part, to State organs (for instance, customs officials, who are not placed under the organization's control), the organization would have to be responsible in case of an infringement of its obligations under the agreement, but would it be so for its own conduct?

11. Considering this question, the Director-General of the Legal Service of the European Commission explained in the following way the attitude taken by the EC with regard to trade disputes that were brought by the United States of America before a WTO panel against two EC member States:

> [Given] the "vertical" structure of the EC system as far as it concerns the authorities of the Member States (customs administration) acting as implementing authorities of EC law in a field of exclusive community competence … [t]he EC took the view that the actions of these authorities should be attributed to the EC itself and emphasised its readiness to assume responsibility for all measures within the particular field of

actes illicites: responsabilité de l'OTAN ou des États membres", p. 199. Stein, "Kosovo and the international community—the attribution of possible internationally wrongful acts: responsibility of NATO or of its member States?", pp. 189–190, accepted attribution of conduct of NATO forces to NATO, but excluded NATO responsibility because it was "as such … not recognized by the possible claimant (Yugoslavia)" (*ibid*., p. 192). Verhoeven, *Droit international public*, p. 613, denied the legal personality of NATO. Cohen-Jonathan, "Cour européenne des droits de l'homme et droit international général (2000)", p. 632, stressed the autonomy of NATO member States when they act within the NATO system.

[9] This point had already been made, albeit with reference to damage (*dommage*), by Ritter, "La protection diplomatique à l'égard d'une organisation internationale", pp. 444–445. The Committee on Accountability of International Organisations of the International Law Association suggested stating that "[t]he responsibility of an IO [international organization] does not preclude any separate or concurrent responsibility of a State or of another IO which participated in the performance of the wrongful act" (International Law Association, *Report of the Seventieth Conference held in New Delhi, 2–6 April 2002*, p. 797).

[10] As was said by the Minister for Foreign Affairs of the Netherlands with regard to the military operations in question:

> "[T]he Netherlands was fully involved in the decision-making process regarding all aspects of the aerial operation: the formulation of the political objectives of the aerial campaign, the establishment of the operational plan on which the campaign was based, the decision concerning the beginning and the end of the operation and the decision concerning the beginning of the various stages."

(Declaration made on 18 May 2000 in a debate in the Lower House, reproduced in Tange, "Netherlands State practice for the parliamentary year 1999–2000", p. 196)

Most member States were also involved in the implementation of decisions. It is noteworthy in this context that the claim of the Government of China in relation to the bombing of China's embassy in Belgrade on 7 May 1999 was settled through a bilateral agreement between China and the United States of America (United States Department of State, Digest of United States Practice in International Law 2000 (Washington, D.C., International Law Institute) (http://www.state.gov).

[11] Judgement of 2 March 1994, *Reports of Cases before the Court of Justice and the Court of First Instance* (1994–3), pp. I-661–662 (recital 29).

[12] *Yearbook … 2001* (see footnote 5 above), p. 27.

[13] *Ibid*.

tariff concessions, be they taken at EC level or at that of the Member States.[14]

This approach implies that conduct that would have to be attributed to a State according to the articles on responsibility of States for internationally wrongful acts would be instead attributed to the international organization because of its exclusive competence. It cannot be ruled out that special developments may occur with regard to organizations providing for integration. However, there is no need to devise special rules on attribution in order to assert the organization's responsibility in this type of case. Responsibility of an organization does not necessarily have to rest on attribution of conduct to that organization.[15] It may well be that an organization undertakes an obligation in circumstances in which compliance depends on the conduct of its member States. Should member States fail to conduct themselves in the expected manner, the obligation would be infringed and the organization would be responsible. However, attribution of conduct need not be implied. Although generally the organization's responsibility depends on attribution of conduct, a point which is reflected in draft article 3 (see paragraph 4 above), this does not necessarily occur in all circumstances.

12. Annex IX to the United Nations Convention on the Law of the Sea provides an example of an approach which is focused on attribution of responsibility rather than on attribution of conduct. According to article 5, international organizations and their member States are required to declare their respective competence with regard to matters covered by the Convention. Article 6, paragraph 1, states:

> Parties which have competence under article 5 of this Annex shall have responsibility for failure to comply with obligations or for any other violation of this Convention.[16]

No reference is here made to attribution of conduct. This is confirmed by practice. For instance, one cannot find a reference to attribution of conduct in the special agreement between Chile and the European Community which established a special chamber of the International Tribunal for the Law of the Sea (ITLOS) in order to ascertain *inter alia*:

> whether the European Community has complied with its obligations under the Convention, especially articles 116 to 119 thereof, to ensure conservation of swordfish, in the fishing activities undertaken by vessels flying the flag of any of its member States in the high seas adjacent to Chile's exclusive economic zone.[17]

The alleged omissions include measures that would have had to be taken by the national States of the ships concerned.

13. The fact that a member State may be bound towards an international organization to conduct itself in a certain manner does not imply that under international law conduct should be attributed to the organization and not to the State. This point was clearly made by the European Commission of Human Rights in *M. & Co.* v. *the Federal Republic of Germany*, a case relating to enforcement by German authorities of a judgement given by the European Court of Justice against a German firm:

> The Commission first recalls that it is in fact not competent *ratione personae* to examine proceedings before or decisions of organs of the European Communities ... This does not mean, however, that by granting executory power to a judgement of the European Court of Justice the competent German authorities acted *quasi* as Community organs and are to that extent beyond the scope of control exercised by the Convention organs.[18]

Likewise, with regard to a claim for damage incurred because of the fruitless search for weapons of a ship in Djibouti, a memorandum of the Office of Legal Affairs of the United Nations stated:

> The responsibility for carrying out embargoes imposed by the Security Council rests with Member States, which are accordingly, responsible for meeting the costs of any particular action they deem necessary for ensuring compliance with the embargo.[19]

While conduct of State authorities has to be attributed to the State in this set of circumstances, an organization's responsibility could be engaged for the reasons considered above.

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[14] Information note of 7 March 2003, attached to a letter from the Director-General of the Legal Service of the European Commission, Mr. Michel Petite, addressed to the United Nations Legal Counsel, Mr. Hans Corell, p. 2. This view reflects the opinion expressed by Groux and Manin, *The European Communities in the International Order*, p. 144.

[15] In the oral pleadings to the WTO panel in the *European Communities—Customs Classification of Certain Computer Equipment* case, the EC no doubt asserted that responsibility for infringements, if any, was entirely its own and not of the two member States involved. However, this view was not based, at least explicitly, on the argument that conduct of State customs authorities had to be attributed to the EC.

[16] Heliskoski, *Mixed Agreements as a Technique for Organizing the International Relations of the European Community and its Member States*, p. 165, wrote: "Articles 5 and 6 of Annex IX essentially create a *procedural framework* within which doubts as to the question of attribution can be addressed". This should be understood as referring to attribution of responsibility, not of conduct.

[17] *Conservation and Sustainable Exploitation of Swordfish Stocks (Chile/European Community), Order of 20 December 2000, ITLOS Reports 2000*, pp. 149–150.

[18] Application No. 13258/87, decision of 9 February 1990, *Decisions and Reports*, vol. 64, p. 144. It should be noted that, with regard to non-contractual liability of the EC, the Court of Justice of the European Communities did not express a different view on attribution in *Krohn & Co.* v. *Commission of the European Communities*, case 175/84, *Reports of Cases before the Court of Justice and the Court of First Instance* (1986–2), p. 768, when it stated that "the unlawful conduct alleged by the applicant in order to establish its claim for compensation is to be attributed not to the Bundesanstalt, which was bound to comply with the Commission's instructions, but to the Commission itself". While the EC was held liable, this was not because the German Bundesanstalt was considered an organ of the EC. The view that State authorities do not act as EC organs was recently reasserted by Scobbie, "International organizations and international relations", p. 892; Cohen-Jonathan, *loc. cit*., p. 623; and Weckel, *loc. cit*., p. 447. The question was also discussed by Klein, *La responsabilité des organisations internationales dans les ordres juridiques internes et en droit des gens*, pp. 385–386, and Klabbers, *An Introduction to International Institutional Law*, pp. 307–308.

[19] Memorandum of 21 April 1995 to the Assistant Secretary-General, Department of Peacekeeping Operations, *United Nations Juridical Yearbook, 1995* (United Nations publication, Sales No. E.01.V.1), p. 465. The Assistant Secretary-General for Legal Affairs, Mr. Ralph Zacklin, reiterated in a letter of 4 May 1998 relating to the same case that the responsibility for implementing and enforcing mandatory sanctions imposed by the Security Council of the United Nations rested with States.

Chapter II

The general rule on attribution of conduct to an international organization

14. According to draft article 4 on responsibility of States for internationally wrongful acts,[20] attribution of conduct to a State is basically premised on the characterization as "State organ" of the acting person or entity. Attribution could hardly depend on the use of a particular terminology in the internal law of the State concerned. Thus, what is decisive is not whether an entity is formally defined as an "organ". As the Commission observed in its commentary:

> Where the law of a State characterizes an entity as an organ, no difficulty will arise. On the other hand, it is not sufficient to refer to internal law for the status of State organs. In some systems the status and functions of various entities are determined not only by law but also by practice, and reference exclusively to internal law would be misleading. The internal law of a State may not classify, exhaustively or at all, which entities have the status of "organs". In such cases, while the powers of an entity and its relation to other bodies under internal law will be relevant to its classification as an "organ", internal law will not itself perform the task of classification.[21]

A similar reasoning could be made with regard to the corresponding system of law relating to international organizations.

15. It is noteworthy that, while some provisions of the Charter of the United Nations use the term "organs",[22] ICJ, when considering the status of persons acting for the United Nations, gave relevance only to the fact that a person had been conferred functions by an organ of the United Nations. The Court used the term "agents" and did not give relevance to the fact that a person had or did not have an official status. In its advisory opinion on the *Reparation for Injuries* case, the Court noted that the question addressed by the General Assembly concerned the capacity of the United Nations to bring a claim in case of injury caused to one of its agents and said:

> The Court understands the word "agent" in the most liberal sense, that is to say, any person who, whether a paid official or not, and whether permanently employed or not, has been charged by an organ of the Organization with carrying out, or helping to carry out, one of its functions—in short, any person through whom it acts.[23]

In the later advisory opinion on the *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations*, the Court noted that:

> In practice, according to the information supplied by the Secretary-General, the United Nations has had occasion to entrust missions—increasingly varied in nature—to persons not having the status of United Nations officials.[24]

With regard to privileges and immunities, the Court also said in the same opinion:

> The essence of the matter lies not in their administrative position but in the nature of their mission.[25]

16. More recently, in its advisory opinion on *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, ICJ pointed out that

> the question of immunity from legal process is distinct from the issue of compensation for any damages incurred as a result of acts performed by the United Nations or by its agents acting in their official capacity.[26]

In the same opinion the Court also briefly addressed the question of attribution of conduct, noting that in case of

> damages incurred as a result of acts performed by the United Nations or by its agents acting in their official capacity … [t]he United Nations may be required to bear responsibility for the damage arising from such acts.[27]

Thus, according to the Court, conduct of the United Nations includes, apart from that of its principal and subsidiary organs, acts or omissions of its "agents". This term is intended to refer not only to officials but also to other persons acting for the United Nations on the basis of functions conferred by an organ of the organization.

17. The same view was endorsed by several scholars, who premised attribution of conduct on the existence of a functional link between the agent and the organization, generally through one of its organs, which are established, directly or indirectly, on the basis of the constituent instrument of the organization.[28]

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[20] See footnote 5 above.

[21] *Yearbook … 2001*, vol. II (Part Two), p. 42, para. (11) of the commentary to article 4.

[22] Article 7 of the Charter refers to "principal organs" and to "subsidiary organs". This latter term also appears in articles 22 and 29.

[23] *Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports 1949*, p. 177.

[24] *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations, Advisory Opinion, I.C.J. Reports 1989*, p. 194, para. 48.

[25] *Ibid*., para. 47.

[26] *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, I.C.J. Reports 1999*, p. 88, para. 66.

[27] *Ibid*., pp. 88–89, para. 66.

[28] Eagleton, "International organization and the law of responsibility", p. 387, held that "the United Nations may be expected to assume responsibility for acts of [its] agents injurious to others". Butkiewicz, "The premises of international responsibility of inter-governmental organizations", p. 123, considered "behaviour of persons remaining with [the organization] in a functional relationship (the organs of the organization, the persons employed by it)". According to Tomuschat, "The international responsibility of the European Union", p. 180, "conduct shown by a given individual must be capable of being attributed to the IO [international organization] inasmuch as that individual is authorized to act on behalf of the IO". Several authors refer to the condition that "control" is exercised over a person entrusted with a function by an organ of the organization. See, for instance, Ritter, *loc. cit*., p. 441; Pérez González, "Les organisations internationales et le droit de la responsabilité", p. 88; Amerasinghe, *Principles of the Institutional Law of International Organizations*, p. 241; and Sands and Klein, *Bowett's Law of International Institutions*, p. 520. The existence of control may be taken as implied in the establishment of a formal link, such as the conferral of a mission to a person by an organ of the organization. Klein, *op. cit*., p. 378, goes a step further by postulating control on the part of the organization as the main criterion for attribution. This view approaches that of Arangio-Ruiz, "State fault and the forms and degrees of international responsibility: questions of attribution and relevance",

(*Continued on next page*.)

18. What was stated by ICJ with regard to the United Nations applies more generally to international organizations, most of which act through their organs (whether so defined or not) and a variety of agents to which the organization's functions are entrusted. As was stated in a decision of the Swiss Federal Council of 30 October 1996:

> As a rule, one may attribute to an international organization acts and omissions of its organs of all rank and nature and of its agents in the exercise of their competencies.[29]

19. In order to establish the existence of a link between an organ or an agent and an international organization, it would be inappropriate to refer to the organization's "internal law" in attempting to model the reference to the one expressed in draft article 4 on responsibility of States for internationally wrongful acts (see paragraph 14 above). As was noted by the Commission on a previous occasion:

> There would [have been] problems in referring to the "internal law" of an organization, for while it has an internal aspect, this law also has in other respects an international aspect.[30]

20. The term that is generally used with regard to international organizations is "rules of the organization". In article 2, paragraph 1 (*j*), of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (hereinafter the 1986 Vienna Convention), which is the most recent codification convention that includes a definition of the term, the following text may be found:

> "[R]ules of the organization" means, in particular, the constituent instruments, decisions and resolutions adopted in accordance with them, and established practice of the organization.[31]

21. In reply to a question addressed by the Commission in its 2003 report[32] several State representatives in the Sixth Committee expressed the view that the draft articles should use the above definition when stating a general rule on attribution of conduct to international organizations.[33] However, a few representatives dissented,[34] while some of the representatives who in general favoured retention of the definition also said that the same definition should be further elaborated.[35] The Legal Counsel of WHO wrote that the definition would be adequate, at least as a point of departure for a definition more suitable to the specific purpose of the draft articles.[36]

22. One important feature of the above definition of "rules of the organization" is that it gives considerable weight to practice. The definition appears to provide a balance between the rules enshrined in the constituent instrument and formally accepted by members, on the one hand, and the needs for the organization to develop as an institution.[37] As ICJ said in its advisory opinion on the *Reparation for Injuries* case:

> Whereas a State possesses the totality of international rights and duties recognized by international law, the rights and duties of an entity such as the Organization must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice.[38]

23. Practice is one of the key elements to be taken into consideration when interpreting the constituent

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(*Footnote 28 continued.*)

p. 33, who considered that only "factual standards or criteria" were relevant in order to establish a link between an individual and a State. The latter author, while denying the existence of rules on attribution under international law, did not exclude the usefulness of "a few presumptions" like those appearing in articles 4–11 on responsibility of States for internationally wrongful acts (see Arangio-Ruiz, "Dualism revisited: international law and interindividual law", p. 985).

[29] This is a translation from the original French, which reads as follows: "En règle générale, sont imputables à une organisation internationale les actes ou omissions de ses organes de tout rang et de toute nature et de ses agents dans l'exercice de leurs compétences." (VPB 61.75, published on the Swiss Federal Council's website)

[30] *Yearbook ... 1982*, vol. II (Part Two), p. 21, para. (25).

[31] A partly different definition may be found in article 1, paragraph 1 (34), of the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character, which reads:

> "'[R]ules of the Organization' means, in particular, the constituent instruments, relevant decisions and resolutions, and established practice of the Organization."

The same wording had been proposed by the Commission in draft article 2, paragraph 1 (*j*) , on the question of treaties concluded between one or more States and one or more international organizations, and treaties between international organizations (*Yearbook ... 1982*, vol. II (Part Two), p. 18, para. 63). In article 2 (*c*) of its resolution on the legal consequences for member States of the non-fulfilment by international organizations of their obligations towards third parties, adopted at its Lisbon session in 1995, the Institute of International Law gave the following definition:

> "'Rules of the organization' means the constituent instruments of the organization and any amendments thereto, regulations adopted thereunder, binding decisions and resolutions adopted in accordance with such instruments and the established practice of the organization."

(Institute of International Law, *Yearbook*, p. 447)

[32] *Yearbook … 2003*, vol. II (Part Two), p. 14, para. 27.

[33] Statements by Denmark, also on behalf of Finland, Iceland, Norway and Sweden, *Official Records of the General Assembly, Fifty-eighth Session, Sixth Committee*, 14th meeting (A/C.6/58/SR.14), para. 25; Austria (*ibid*., para. 33); Japan (*ibid*., para. 37); Italy (*ibid*., para. 45); France (*ibid*., para. 58); Canada, *ibid*., 15th meeting (A/C.6/58/SR.15), paras. 1–2); Greece (*ibid*., para. 12); Israel (*ibid*., para. 20); Portugal (*ibid*., para. 27); Russian Federation (*ibid*., para. 30); Spain (*ibid*., para. 40); Belarus (*ibid*., para. 42); Egypt, *ibid*., 16th meeting (A/C.6/58/SR.16), para. 1; Romania, *ibid*., 19th meeting (A/C.6/58/SR.19), para. 53; Venezuela, *ibid*., 21st meeting (A/C.6/58/SR.21), para. 21; Sierra Leone (*ibid*., para. 25); and Mexico (*ibid*., para. 47).

[34] The definition was viewed as "not satisfactory" in the statement of Gabon, *ibid*., 15th meeting (A/C.6/58/SR.15), para. 4, "since in matters involving responsibility it was desirable to have the widest possible sphere of application". The statement of Argentina (*ibid*., para. 24) considered that "prima facie it would not be advisable to refer to the definition of the 'rules of the organization' contained in the Vienna Convention".

[35] Statements of Japan, *ibid*., 14th meeting (A/C.6/58/SR.14), para. 37; Italy (*ibid*., para. 45); France (*ibid*., para. 58); and Portugal, *ibid*., 15th meeting (A/C.6/58/SR.15), para. 27. The latter statement suggested that "other components of the rules of the organization might be considered with a view to formulating a more exhaustive definition".

[36] Letter from the Legal Counsel of WHO, Mr. Thomas S. R. Topping, addressed on 19 December 2003 to the United Nations Legal Counsel, Mr. Hans Corell. The letter added that what mattered most in that case was the retention of a reference to the established practice of the organization as one category of "rules" of that organization.

[37] This point was clearly expressed by Charles de Visscher, "L'interprétation judiciaire des traités d'organisation internationale", p. 187.

[38] *I.C.J. Reports 1949* (see footnote 23 above), p. 180. This passage was approvingly quoted in the partial award of 22 November 2002 of the Permanent Court of Arbitration in *Horst Reineccius, et al.* v. *Bank for International Settlements*. The Court added: "The fact that the Bank has, on a number of occasions, amended its Statutes by the introduction of a new article appears to be probative of the authoritative interpretation of the Statutes in this regard". (UNRIAA, vol. XXIII (Sales No. E/F.04.V.15), p. 224; see also International Council for Commercial Arbitration, *Yearbook: Commercial Arbitration*, vol. XXVIII, 2003, p. 120, para. 43.)

instrument of an international organization. Thus, in its opinion on the *Namibia* case, ICJ interpreted Article 27, paragraph 3, of the Charter of the United Nations in the light of practice:

> [T]he proceedings of the Security Council extending over a long period supply abundant evidence that presidential rulings and the positions taken by members of the Council, in particular its permanent members, have consistently and uniformly interpreted the practice of voluntary abstention by a permanent member as not constituting a bar to the adoption of resolutions ... This procedure followed by the Security Council, which has continued unchanged after the amendment in 1965 of Article 27 of the Charter, has been generally accepted by Members of the United Nations and evidences a general practice of that Organization.[39]

More recently, in its advisory opinion on the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, the Court stated:

> [T]he constituent instruments of international organizations are also treaties of a particular type; their object is to create new subjects of law endowed with a certain autonomy, to which the parties entrust the task of realizing common goals. Such treaties can raise specific problems of interpretation owing, *inter alia*, to their character which is conventional and at the same time institutional; the very nature of the organization created, the objectives which have been assigned to it by its founders, the imperatives associated with the effective performance of its functions, as well as its own practice, are all elements which may deserve special attention when the time comes to interpret these constituent treaties.[40]

24. The relevance of practice was discussed by ICJ in the passages quoted above first in relation to a provision concerning the Security Council's decision-making process and then the competence of WHO. The definition of the "rules of the organization" quoted above (para. 20) is taken from the 1986 Vienna Convention, in which the term is used with regard to an organization's capacity and competence to conclude a treaty.[41] The question may be raised whether, for the purpose of attribution of conduct in view of international responsibility, practice should not be given a wider significance than when the organization's capacity or competence is discussed. It may be held that, when practice develops in a way that is not consistent with the constituent instrument, the organization should not necessarily be exempt from responsibility in case of conduct that stretches beyond the organization's competence. However, the possibility of attribution of conduct in this case may be taken into account when considering *ultra vires* acts of the organization and need not affect the general rule on attribution.

25. The above definition of "rules of the organization" (para. 20) seems capable of improvement in two ways. First, the reference to "decisions and resolutions" is imprecise, because the terms used vary (for instance, resolutions may include decisions) and also because the legal significance of the various acts of an organization are different. Clearly, the definition is intended to give a broad description of what may be relevant. However, it could be framed in a theoretically more appropriate way, which would be both more accurate and more comprehensive. What seems to matter is that the functions are conferred on the organ, official or other person by an act of the organization which is taken in accordance with the constituent instrument. A second possible improvement concerns the term "established practice". This wording puts the stress on the element of time, which is not necessarily relevant, while it expresses less clearly the role of general acceptance, which appears to be more significant.[42] Thus, it seems preferable to consider alternatives to these two aspects of the current definition. Both the wording of that definition and some possible alternatives are set in brackets in the draft article below (para. 28).

26. A further question would be whether the definition to be given of "rules of the organization" should be included in draft article 4 or placed in draft article 2, which contains the definition of international organizations. The decision may be postponed to the time when it will become clearer whether the term "rules of the organization" appears only in the context of the general rule on attribution of conduct or whether the same term will also be used in other provisions. In the latter case it would be preferable to move to draft article 2 what is currently suggested as draft article 4, paragraph 3.

27. According to draft article 4, paragraph 1, on responsibility of States for internationally wrongful acts, attribution to a State of conduct of an organ takes place "whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State".[43] The latter specification could hardly apply to an international organization. The other elements may be retained, but they could be covered by simpler wording. In particular, there is no need to specify the type of function exercised by the organization, also in view of the fact that, while all States may be held to exert all the functions mentioned, organizations also vary significantly from one another in this regard.

28. On the basis of the foregoing remarks, draft article 4 should be placed at the beginning of a chapter called "Attribution of conduct to an international organization". The following wording is suggested:

"*Article 4. General rule on attribution of conduct to an international organization*

"1. The conduct of an organ of an international organization, of one of its officials or another person entrusted with part of the organization's functions shall be

[39] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 22, para. 22.

[40] *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, I.C.J. Reports 1996*, p. 75, para. 19. The Court reiterated that the constituent instrument had to be interpreted "in the light of ... the practice followed by the Organization" (p. 76, para. 21).

[41] The term "rules of the organization" is used in the Convention in a preambular paragraph, in article 6 (Capacity of international organizations to conclude treaties), in article 46 (Provisions of internal law of a State and rules of an international organization regarding competence to conclude treaties), and, with regard to assent on the part of an international organization, in articles 35 (Treaties providing for obligations for third States or third organizations) and 36 (Treaties providing for rights for third States or third organizations).

[42] The role of "general acceptance" was underlined by ICJ in the first passage quoted above (para. 23). According to Amerasinghe, "Interpretation of texts in open international organizations", p. 200, one should "base the use of subsequent practice in the interpretation of constitutions on agreement or consent". However, he appeared to refer only to acceptance "at the time [a State] became a party to the constitutive treaty" (*ibid.*).

[43] See footnote 5 above.

considered as an act of that organization under international law, whatever position the organ, official or person holds in the structure of the organization.

"2. Organs, officials and persons referred to in the preceding paragraph are those so characterized under the rules of the organization.

"3. For the purpose of this article, "rules of the organization" means, in particular, the constituent instruments, [decisions and resolutions] [acts of the organization] adopted in accordance with them, and [established] [generally accepted] practice of the organization."

Chapter III

Conduct of organs placed at the disposal of an international organization by a State or another international organization

29. Given the limited resources that international organizations possess for pursuing their objectives, they often have to rely on State organs for assistance. One way in which States assist organizations is by putting some of their own organs at the organizations' disposal. The case of a State placing one of its organs at an organization's disposal is certainly more frequent than the reciprocal phenomenon: an organization putting one of its organs at a State's disposal.

30. The draft articles on State responsibility that were adopted on first reading included in article 9 a reference to the case in which an organ had "been placed at the disposal of a State by ... an international organization". The same rule was regarded as applicable to this case as the one applying to the case in which an organ was put by a State at another State's disposal.[44] The reference to international organizations was removed during the second reading,[45] together with all similar references that had been included at first reading in the chapter on attribution of conduct. In the second-reading text, article 57 simply contains a without-prejudice clause,[46] which is designed to leave issues relating to international organizations open for further study. However, the commentary on article 57 briefly considered the converse case of a State placing one of its organs at an organization's disposal, and said:

> [I]f a State seconds officials to an international organization so that they act as organs or officials of the organization, their conduct will be attributable to the organization, not the sending State.[47]

31. When an organ is placed by a State or an international organization at the disposal of another State or another organization, the issue relating to attribution will generally not be whether conduct of that organ is at all attributable to a State or an organization. The question will rather be to which State or organization conduct is attributable: whether to the lending State or organization or to the borrowing State or organization. Moreover, dual attribution of the same conduct cannot be excluded (see paragraphs 6–7 above).

32. Questions concerning attribution of conduct to the United Nations or a State have sometimes been raised in relation to conduct taken by military forces in the course of interventions recommended or authorized by the Security Council. In this type of case, responsibility of the United Nations, if any, could not be premised on attribution of conduct. It could not be said that authorized forces are placed at the disposal of the United Nations. This is confirmed by practice. During the Korean war, United States forces mistakenly bombed targets on the territory of China and the Soviet Union. With regard to China, the United States Government finally accepted

> to assume responsibility for and pay compensation through the United Nations, for damages which an impartial, on-the-spot investigation might show to have been caused by United States planes.[48]

The United States Government also expressed "its regret that American forces under the United Nations Command should have been involved" in the violation of Soviet sovereignty, and declared that it was "prepared to supply funds for payment of any damages determined by a United Nations Commission or other appropriate procedure to have been inflicted upon Soviet property".[49]

33. When forces operate outside the United Nations chain of command, the United Nations constantly held that conduct had to be attributed to the respective national State. For instance, the Director of the Field Administration and Logistics Division of the Department of Peacekeeping Operations of the United Nations wrote to the Permanent Representative of Belgium to the United Nations about a claim resulting from a car accident in Somalia, saying that Belgian troops in Somalia at the time of the accident, 13 April 1993, had formed part of the Unified Task Force (UNITAF) established by the Security Council in its resolution 794 (1992) and not of the United Nations Operation in Somalia (UNOSOM). He went on to say that in fact, the only Belgian nationals to have formed part of UNOSOM were headquarters staff officers, and that the individual involved in that accident had stated in his interview that he worked as a cook as part of Operation Restore Hope; he could not therefore have

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[44] Article 9 adopted on first reading read as follows:

"The conduct of an organ which has been placed at the disposal of a State by another State or by an international organization shall be considered as an act of the former State under international law, if that organ was acting in the exercise of elements of the governmental authority of the State at whose disposal it has been placed."

(*Yearbook ... 1974*, vol. I, 1278th meeting, p. 154, para. 39)

[45] *Yearbook ... 1998*, vol. II (Part Two), p. 85, paras. 422–424.

[46] *Yearbook ... 2001*, vol. II (Part Two), p. 30, para. 76.

[47] *Ibid.*, p. 142, para. (3) of the commentary to article 57.

[48] Letter dated 26 September 1950 from the Deputy Representative of the United States to the Secretary-General concerning the bombing by air forces of the territory of China (S/1813). The representative of the United States had denied responsibility with regard to an earlier and similar claim (S/1722), arguing that conduct had to be attributed to "the United Nations in Korea" (S/1727).

[49] Note of 19 October 1950 from the representative of the United States addressed to the Secretary-General (S/1856).

been considered to have been part of the United Nations operation. He added that UNITAF troops were not under the command of the United Nations and the Organization had consistently declined liability for any claims made in respect of incidents involving those troops.[50] This approach appears to have been generally accepted by States whose forces were involved in operations authorized by the Security Council.[51]

34. Most of the practice concerning attribution of conduct in case of a State organ placed at an organization's disposal relates to peacekeeping forces.[52] This is the apparent reason why in its 2003 report the Commission expressed the wish to receive the views of Governments on practice relating to the "extent to which the conduct of peacekeeping forces is attributable to the contributing State and the extent to which it is attributable to the United Nations".[53] The Commission did not suggest that these replies would help it to draft a specific rule on attribution of conduct of peacekeeping forces. Not only would such an endeavour be at odds with the pattern of the articles on State responsibility that the Commission had declared it intended to follow, stating a specific rule would also be difficult in view of the variety of meanings that is often attributed to the term "peacekeeping force".

35. Peacekeeping forces are regarded as subsidiary organs of the United Nations. However, they are made up of State organs, and therefore the question of attribution of conduct is not clear-cut. The first instance in which the United Nations acknowledged its responsibility for the conduct of national contingents occurred when the Secretary-General settled claims with Belgium and a few other States in relation to damages suffered by their respective nationals in the Congo as the result of harmful acts of United Nations Operations in the Congo (ONUC) personnel. The agreements included the following sentence:

> It [the United Nations] has stated that it would not evade responsibility where it was established that United Nations agents had in fact caused unjustifiable damage to innocent parties.[54]

This attitude of the United Nations was reasserted on several occasions. For instance, a memorandum of the Office of Legal Affairs stated with regard to an accident that occurred to a British helicopter which had been put in Cyprus at the disposal of the United Nations Peacekeeping Force in Cyprus (UNFICYP):

> The crew members of the helicopters are members of the British contingent of UNFICYP and the helicopter flights take place in the context of the operations of UNFICYP. Through the chain of command, the operations in which the helicopters are involved take place under the ultimate authority of the UNFICYP Force Commander and are the responsibility of the United Nations. The circumstances under which the British-owned helicopters are put at the disposal of UNFICYP thus lead to the conclusion that these helicopters should be considered as United Nations aircraft.
>
> As the carrier, it is the United Nations that could and normally would be held liable by third parties in case of accidents involving UNFICYP helicopters and causing damage or injuries to these parties; therefore third-party claims should normally be expected to be addressed to the United Nations.[55]

36. The Secretary-General summed up as follows the current position concerning responsibility of the United Nations for the conduct of peacekeeping forces:

> In recognition of its international responsibility for the activities of its forces, the United Nations has, since the inception of peacekeeping operations, assumed its liability for damage caused by members of its forces in the performance of their duties ...
>
> The undertaking to settle disputes of a private law nature submitted against it and the practice of actual settlement of such third-party claims ... evidence the recognition on the part of the United Nations that liability for damage caused by members of United Nations forces is attributable to the Organization.[56]

While reference is made here and in other instances to private law claims, it is implied that the same principle concerning attribution of conduct would apply in relation to responsibility under international law. This transition was clearly made in the following passage of a recent statement of the United Nations Legal Counsel:

> As a subsidiary organ of the United Nations, an act of a peacekeeping force is, in principle, imputable to the Organization, and if committed in violation of an international obligation entails the international responsibility of the Organization and its liability in compensation. The fact that any such act may have been performed by members of a national military contingent forming part of the peacekeeping operation does not affect the international responsibility of the United Nations vis-à-vis third States or individuals.[57]

37. The question of attribution of conduct of a member of a national contingent was similarly solved by the Superior Provincial Court (Oberlandesgericht) of Vienna in a judgement of 26 February 1979 (*N. K.* v. *Austria*). The claim had been brought against the Austrian State because the member of an Austrian contingent in the United Nations Disengagement Observer Force had caused damage to property in the barracks. The Court found:

> [W]hat is decisive is not whose organ (from the organizational standpoint) the person alleged to have caused the damage actually was, but rather in whose name and for whom (from the functional standpoint) that person was acting at the moment when the act occurred. What is decisive is therefore the sphere in which the organ in question was acting at the relevant time.[58]

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[50] Unpublished letter dated 25 June 1998.

[51] For instance, the Government of Canada paid compensation for the killing of a Somali youth by some members of the Canadian contingent in UNITAF (see Young and Molina, "IHL and peace operations: sharing Canada's lessons learned from Somalia", p. 366).

[52] As the United Nations Legal Counsel, Mr. Hans Corell, wrote on 3 February 2004 in a memorandum to the Director of the Codification Division, Mr. Václav Mikulka, it is "in connection with peacekeeping operations where principles of international responsibility … have for the most part been developed in a fifty-year practice of the Organization" (para. 4).

[53] *Yearbook … 2003*, vol. II (Part Two), p. 14, para. 27 (*c*) .

[54] Exchange of letters constituting an agreement relating to the settlement of claims filed against the United Nations in the Congo by Belgian nationals, p. 199. Similar agreements were concluded with Greece, Italy, Luxembourg and Switzerland. Reference to an agreement with Zambia was made in the *United Nations Juridical Yearbook, 1975* (United Nations publication, Sales No. E.77.V.3), p. 155. As was noted by Paul De Visscher, "Les conditions d'application des lois de la guerre aux opérations militaires des Nations Unies", pp. 54–55, no suggestion was made that the national State of the forces involved would have to be held responsible.

[55] *United Nations Juridical Yearbook, 1980* (United Nations publication, Sales No. E.83.V.1), pp. 184–185.

[56] Report of the Secretary-General on financing of United Nations peacekeeping operations (A/51/389), p. 4, paras. 7–8.

[57] Memorandum (see footnote 52 above), para. 7.

[58] This passage is taken from the English translation reproduced in *International Law Reports*, vol. 77, p. 472. The original text of the judgement may be read in *Österreichische Zeitschrift für öffentliches Recht und Völkerrecht*, vol. 31, Nos. 3–4 (1980), p. 310.

38. However, attribution of conduct of national contingents should also take into account the fact that the respective State retains control over disciplinary matters and has exclusive jurisdiction in criminal affairs.[59] This is generally specified in the agreements that the United Nations concludes with the contributing States.[60] Thus the national contingent is not fully placed at the disposal of the United Nations and this may have consequences with regard to attribution of conduct. For instance, the Office of Legal Affairs of the United Nations took the following line:

> Since the Convention [on International Trade in Endangered Species of Wild Fauna and Flora] places the responsibility for enforcing its provisions on the States parties and since the troop-contributing States retain jurisdiction over the criminal acts of their military personnel, the responsibility for enforcing the provisions of the Convention rests with those troop-contributing States which are parties to the Convention.[61]

39. Although not directly relevant in the case, the retention of disciplinary power and criminal jurisdiction on the part of the contributing State was an important element that led the House of Lords to find in *Attorney General* v. *Nissan* that the Government of the United Kingdom had to pay compensation for the temporary occupation of a building by British forces which were part of UNFICYP.[62] This was particularly clear in the opinion of Lord Morris of Borth-y-Gest:

> [T]hough national contingents were under the authority of the United Nations and subject to the instructions of the commander, the troops as members of the force remained in their national service. The British forces continued, therefore, to be soldiers of Her Majesty. Members of the United Nations force were subject to the exclusive jurisdiction of their respective national states in respect of any criminal offences committed by them in Cyprus.[63]

40. It would be going too far to consider that the existence of disciplinary power and criminal jurisdiction on the part of the contributing State totally excludes forces being considered to be placed at the disposal of the United Nations. As has been held by several scholars,[64] the decisive question in relation to attribution of a given conduct appears to be who had effective control over the conduct in question. For instance, it would be difficult to attribute to the United Nations conduct of forces in circumstances such as those described in the report of the Commission of Inquiry which was established in order to investigate armed attacks on UNOSOM II personnel:

> The Force Commander of UNOSOM II was not in effective control of several national contingents which, in varying degrees, persisted in seeking orders from their home authorities before executing orders of the Forces Command.
>
> Many major operations undertaken under the United Nations flag and in the context of UNOSOM's mandate were totally outside the command and control of the United Nations, even though the repercussions impacted crucially on the mission of UNOSOM and the safety of its personnel.[65]

41. The Secretary-General held that the criterion of the "degree of effective control" was decisive with regard to joint operations:

> The international responsibility of the United Nations for combat-related activities of United Nations forces is premised on the assumption that the operation in question is under the exclusive command and control of the United Nations ...
>
> In joint operations, international responsibility for the conduct of the troops lies where operational command and control is vested according to the arrangements establishing the modalities of cooperation between the State or States providing the troops and the United Nations. In the absence of formal arrangements between the United Nations and the State or States providing troops, responsibility would be determined in each and every case according to the degree of effective control exercised by either party in the conduct of the operation.[66]

What has been held with regard to joint operations, such as those involving UNOSOM II and the Quick Reaction Force in Somalia, should also apply to peacekeeping operations, insofar as it is possible to distinguish in their regard areas of effective control respectively pertaining to the United Nations and the contributing State. While it is understandable that, for the sake of efficiency of military operations, the United Nations insists on claiming exclusive command and control over peacekeeping forces, attribution of conduct should also in this regard be based on a factual criterion.

42. With regard to infringements of international humanitarian law, the United Nations Secretary-General referred to "concurrent responsibility"[67] of the United Nations and the contributing State, without clarifying the basis of

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[59] As was stated in a memorandum of the Legal Bureau of the Department of Foreign Affairs of Canada:

> "[U]ltimately any prosecution for acts contrary to the ROE [rules of engagement] (or contrary to international or domestic law) will be done by the national authorities of the troop-contributing states. This is a standard practice of all armed forces involved in peacekeeping activities."

(Kirsch, "Canadian practice in international law", p. 388)

[60] See, for example, with reference to "disciplinary authority" and to "jurisdiction with respect to any crime or offence", the agreements concerning service with UNFICYP, *United Nations Juridical Yearbook, 1966* (United Nations publication, Sales No. E.68.V.6), pp. 42–43. More generally on these clauses, see the report of the Secretary-General on command and control of United Nations peacekeeping operations (A/49/681), para. 6.

[61] *United Nations Juridical Yearbook, 1994* (United Nations publication, Sales No. E.00.V.8), p. 450.

[62] *The All England Law Reports* (1969), vol. 1, p. 639. The House of Lords reversed the decision of the Court of Appeal, *ibid*. (1967), vol. 2, in which Lord Denning had held that the British troops that were part of UNFICYP "were acting as agents of the United Nations" (p. 1244).

[63] *Ibid.* (1969), vol. 1, p. 646.

[64] Ritter, *loc. cit*., p. 442; Simmonds, *Legal Problems Arising from the United Nations Military Operations in the Congo*, p. 229; Amrallah, "The international responsibility of the United Nations for activities carried out by U.N. peace-keeping forces", pp. 62–63 and 73–79; Butkiewicz, *loc. cit*., pp. 123–125 and 134–135; Pérez González, *loc. cit*., p. 83; Hirsch, *The Responsibility of International Organizations toward Third Parties: Some Basic Principles*, pp. 64–67; Amerasinghe, *op. cit*., pp. 241–243; Klein, *op. cit*., pp. 379–380; Scobbie, *loc. cit*., p. 891; Pitschas, *Die völkerrechtliche Verantwortlichkeit der Europäischen Gemeinschaft und ihrer Mitgliedstaaten*, p. 52; Sorel, "La responsabilité des Nations Unies dans les opérations de maintien de la paix", p. 129. Some authors refer to "effective control", some others to "operational control". The latter concept was also used by Bothe, *Streitkräfte internationaler Organisationen*, p. 87. Difficulties in drawing a line between operational and organizational control were underlined by Condorelli, "Le statut des forces de l'ONU et le droit international humanitaire", pp. 887–888. The draft suggested by the Committee on Accountability of International Organisations of the International Law Association referred to a criterion of "effective control (operational command and control)" (International Law Association, *op. cit*., p. 797).

[65] Note by the Secretary-General (S/1994/653), p. 45, paras. 243–244.

[66] Report of the Secretary-General (A/51/389), p. 6, paras. 17–18.

[67] *Ibid*., p. 11, para. 44. The Secretary-General's Bulletin on observance by United Nations forces of international humanitarian law (ST/SGB/1999/13), p. 1, does not address the question.

responsibility. This would depend on the circumstances of the infringement. One may have to conclude for joint attribution of the same conduct; however, one could also consider that the infringing acts are attributed to either the State or the United Nations, while omission, if any, of the required preventive measures is attributed to the other subject.[68] Similar conclusions may be reached with regard to infringements by members of peacekeeping forces that affect other areas of the protection of human rights.[69]

43. Arrangements that are concluded between the United Nations and the contributing State only concern the parties and do not affect the question of attribution of conduct under general international law. In any case, the model contribution agreement asserts the liability of the United Nations towards third parties and only provides for a right of recovery of the United Nations under circumstances such as "loss, damage, death or injury [arising] from gross negligence or wilful misconduct of the personnel provided by the Government".[70]

44. In reply to a question put by the Commission in its 2003 report,[71] several State delegates held in the Sixth Committee of the General Assembly that conduct of peacekeeping forces had to be generally attributed to the United Nations.[72] However, some delegates also found that in certain cases attribution had to be made concurrently,[73] or even exclusively,[74] to the contributing State. Some statements stressed the importance of the criterion of control in order to determine to whom conduct had to be attributed.[75]

45. The principles applicable to peacekeeping forces may be extended to other State organs put at the disposal of the United Nations, such as disaster relief units, about which the Secretary-General wrote:

> If the disaster relief unit is itself established by the United Nations, the unit would be a subsidiary organ of the United Nations. A disaster relief unit of this kind would be similar in legal status to, for example, the United Nations Force in Cyprus (UNFICYP).[76]

46. Similar conclusions would have to be reached in the rarer case in which an international organization would place one of its organs at the disposal of another international organization. An example is provided by the Pan American Sanitary Conference, which, as a result of an agreement between WHO and the Pan American Sanitary Organization (now the Pan American Health Organization (PAHO)), serves "respectively as the Regional Committee and the Regional Office of the World Health Organization for the Western Hemisphere, within the provisions of the Constitution of the World Health Organization".[77] The Legal Counsel of WHO noted that on the basis of that arrangement, acts of PAHO and of its staff could engage the responsibility of WHO.[78]

47. Draft article 6 on the responsibility of States for internationally wrongful acts considers that the decisive criterion for attribution to a State of conduct of an organ placed at its disposal by another State is the fact that "the organ is acting in the exercise of elements of the governmental authority of the State at whose disposal it is placed".[79] Reference to governmental authority would not be appropriate with regard to international organizations, which only rarely exercise that type of authority. Reference should be made more generally to the exercise of an organization's functions.

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[68] Condorelli, "Le azioni dell'ONU e l'applicazione del diritto internazionale umanitario: il 'bollettino' del Segretario generale del 6 agosto 1999", p. 1053, and Benvenuti, "Le respect du droit international humanitaire par les forces des Nations Unies: la circulaire du Secrétaire général", p. 370, held that the United Nations are under an obligation to ensure that the contributing State exercises criminal jurisdiction in case of infringements of international humanitarian law.

[69] This prompted the United Nations Office of Internal Oversight Services to conduct investigations on charges of sexual exploitation in various countries. See United States House of Representatives, *The U.N. and the Sex Slave Trade in Bosnia: Isolated Case or Larger Problem in the U.N. System*? *Hearing before the Subcommittee on International Operations and Human Rights of the Committee on International Relations*. For a critical survey, see Murray, "Who will police the peace-builders? The failure to establish accountability for the participation of United Nations civilian police in the trafficking of women in post-conflict Bosnia and Herzegovina", especially pp. 518 et seq.

[70] Contribution Agreement between the United Nations and participating States contributing resources to United Nations peace-keeping operations (A/50/995, annex, art. 9, p. 5); and Model Memorandum of Understanding between the United Nations and participating States contributing resources to United Nations peacekeeping operations (A/51/967, annex, art. 9, pp. 6–7). While the text says that "the Government will be liable for such claims", a right of recourse appears to be intended. A later report by the Secretary-General (A/51/389, pp. 10–11, para. 43) referred to this text under the heading "Recovery from States contributing contingents: concurrent responsibility". A similar text is contained in the memorandum of agreement used by the United Nations to obtain gratis personnel (ST/AI/1999/6, annex).

[71] See paragraph 34 of the present report.

[72] Statements by Denmark, also on behalf of Finland, Iceland, Norway and Sweden, *Official Records of the General Assembly, Fifty-eighth Session, Sixth Committee*, 14th meeting (A/C.6/58/SR.14), para. 27; Austria (*ibid*., para. 33); Italy (*ibid*., para. 46); Canada, *ibid*., 15th meeting (A/C.6/58/SR.15), para. 3; Gabon (*ibid*., para. 5); Greece (*ibid*., para. 13); Israel (*ibid*., para. 21); Russian Federation (*ibid*., para. 31); Spain (*ibid*., para. 41); Belarus (*ibid*., para. 43); Egypt, *ibid*., 16th meeting (A/C.6/58/SR.16), para. 2; and Mexico, *ibid*., 21st meeting (A/C.6/58/SR.21), para. 48.

[73] Statements by Denmark, also on behalf of Finland, Iceland, Norway and Sweden, *ibid*., 14th meeting (A/C.6/58/SR.14), para. 28; Greece, *ibid*., 15th meeting (A/C.6/58/SR.15), para. 13; and Israel (*ibid*., para. 21).

[74] Statements by Austria, *ibid*., 14th meeting (A/C.6/58/SR.14), para. 33; Italy (*ibid*., para. 46); Canada, *ibid*., 15th meeting (A/C.6/58/SR.15), para. 3; Gabon (*ibid*., para. 5); Israel (*ibid*., para. 21); Russian Federation (*ibid*., para. 31); Belarus (*ibid*., para. 43);and Egypt, *ibid*., 16th meeting (A/C.6/58/SR.16), para. 2.

[75] Statements by Italy, *ibid*., 14th meeting (A/C.6/58/SR.14), para. 46; Canada, *ibid*., 15th meeting (A/C.6/58/SR.15), para. 3; Israel (*ibid*., para. 21); Russian Federation (*ibid*., para. 31); Spain (*ibid*., para. 41); Belarus (*ibid*., para. 43); and Mexico, *ibid*., 21st meeting (A/C.6/58/SR.21), para. 48. The statement by Greece, *ibid*., 15th meeting (A/C.6/58/SR.15), para. 13, referred to "authority and command" as the criterion for attributing conduct of peacekeeping forces to the United Nations.

[76] *United Nations Juridical Yearbook, 1971* (United Nations publication, Sales No. E.73.V.1), p. 187.

[77] Art. 2 of the Agreement concerning the integration of the Pan American Sanitary Organization with the World Health Organization.

[78] Letter from the Legal Counsel of WHO, Mr. Thomas S. R. Topping, addressed on 19 December 2003 to the United Nations Legal Counsel, Mr. Hans Corell.

[79] See footnote 5 above.

48. Draft article 6 on the responsibility of States for internationally wrongful acts does not provide any elements in order to identify when a certain organ is placed at the "disposal" of another State. However, some kind of control on the part of the beneficiary State is implied. The relevant commentary specifies that:

> [I]n performing the functions entrusted to it by the beneficiary State, the organ must also act in conjunction with the machinery of that State and under its exclusive direction and control, rather than on instructions from the sending State.[80]

This point could be made more explicitly in the text, in order to provide guidance in relation to questions of attribution arising when national contingents are placed at an organization's disposal and in similar cases. It should also be indicated that what matters is not exclusiveness of control, which for instance the United Nations never has over national contingents, but the extent of effective control. This would also leave the way open for dual attribution of certain conducts.

[80] *Yearbook ... 2001*, vol. II (Part Two), p. 44, para. (2) of the commentary to article 6.

49. With regard to attribution of conduct to international organizations, draft article 4 (see paragraph 28 above) distinguishes between organs, officials and other persons entrusted with part of the organization's functions. It does not seem necessary to repeat these specifications, which would render the text cumbersome, if it is understood that what applies to organs of an international organization is also applicable to officials and other persons referred to in draft article 4.

50. The following wording is suggested:

"Article 5. Conduct of organs placed at the disposal of an international organization by a State or another international organization

"The conduct of an organ of a State or an international organization that is placed at the disposal of another international organization for the exercise of one of that organization's functions shall be considered under international law an act of the latter organization to the extent that the organization exercises effective control over the conduct of the organ."

Chapter IV

The question of the attribution of *ultra vires* conduct

51. *Ultra vires* conduct of an international organization could be either conduct beyond the powers conferred on the organization or conduct exceeding the powers of a specific organ. In its advisory opinion on *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, ICJ stated that

> international organizations ... do not, unlike States, possess a general competence. International organizations are governed by the "principle of speciality", that is to say, they are invested by the States which create them with powers, the limits of which are a function of the common interests whose promotion those States entrust to them.[81]

This statement does not imply that conduct which exceeds an international organization's function could never be attributed to that organization.

52. Clearly, an act which is *ultra vires* for an organization is also *ultra vires* for any of its organs. An organ may also exceed its powers because it impinges on those that are exclusively given to another organ or because it uses powers that have not been given to any organ. The possibility of attributing to an international organization acts that an organ takes *ultra vires* has been admitted by ICJ in its advisory opinion on *Certain Expenses of the United Nations*, in which the Court said:

> If it is agreed that the action in question is within the scope of the functions of the Organization but it is alleged that it has been initiated or carried out in a manner not in conformity with the division of functions among the several organs which the Charter prescribes, one moves to the internal plane, to the internal structure of the Organization. If the action was taken by the wrong organ, it was irregular as a matter of that internal structure, but this would not necessarily mean that the expense incurred was not an expense of the Organization. Both national and international law contemplate cases in which the body corporate or politic may be bound, as to third parties, by an *ultra vires* act of an agent.[82]

53. The fact that ICJ considered that the United Nations may have to bear expenses deriving from *ultra vires* acts of an organ reflects policy considerations that appear even stronger in relation to wrongful conduct, because denying attribution of conduct may deprive third parties of all redress, unless conduct could be attributed to a State or another organization.[83] The need to protect third parties requires an extension of attribution of conduct for the same reason that underpins the validity of treaties concluded by an international organization, notwithstanding minor infringements of rules concerning competence to conclude treaties.[84] While in that context it may be argued that protection of third parties should be limited to those that relied in good faith on the organ's or official's conduct,[85] the same rationale does not apply in most cases of responsibility for unlawful conduct.

[81] *I.C.J. Reports 1996* (see footnote 40 above), p. 78, para. 25.

[82] *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962*, p. 168.

[83] Dorigo, "Attribution and international responsibility for conduct of UN peacekeeping forces", pp. 933–935, held that if a national contingent acts *ultra vires* because of pressure by the contributing State, conduct should be attributed only to that State.

[84] Reference is made here to article 46 of the 1986 Vienna Convention.

[85] For that concern, see Arsanjani, "Claims against international organizations: *quis custodiet ipsos custodes*", p. 153; and Aramburu, "Responsabilidad de los organismos internacionales y jurisprudencia argentina", p. 4. Reinisch, *International Organizations before National Courts*, pp. 80–81, appears to link responsibility to the validity of the *ultra vires* act.

54. A distinction between the conduct of organs and officials, on the one hand, and that of persons entrusted with part of the organization's functions, on the other hand, would find little justification in view of the limited significance that the distinction carries in the practice of international organizations.[86] ICJ appears to have also asserted the organization's responsibility for *ultra vires* acts of persons other than officials. In its advisory opinion on *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, the Court stated:

> [I]t need hardly be said that all agents of the United Nations, in whatever official capacity they act, must take care not to exceed the scope of their functions, and should so comport themselves as to avoid claims against the United Nations.[87]

The obvious reason why an agent—in the case in hand, an expert on mission—should care not to exceed the scope of his or her functions in order to avoid that claims be preferred against the organization is also that the organization could well be held responsible for the agent's conduct.

55. As with State organs, for responsibility to arise there needs to be some connection between the entity's or person's official duties and the conduct in question. This appears to underlie the position taken by the Office of Legal Affairs of the United Nations in a memorandum concerning claims involving off-duty acts of members of peacekeeping forces:

> United Nations policy in regard to off-duty acts of the members of peace-keeping forces is that the Organization has no legal or financial liability for death, injury or damage resulting from such acts. ...
>
> We consider the primary factor in determining an "off-duty" situation to be whether the member of a peace-keeping mission was acting in a non-official/non-operational capacity when the incident occurred and not whether he/she was in military or civilian attire at the time of the incident or whether the incident occurred inside or outside the area of operations.
>
> ... [W]ith regard to United Nations legal and financial liability, a member of the Force on a state of alert may none the less assume an off-duty status if he/she independently acts in an individual capacity, not attributable to the performance of official duties, during that designated "state-of-alert" period.
>
> ...[W]e wish to note that the factual circumstances of each case vary and, hence, a determination of whether the status of a member of a peace-keeping mission is on duty or off duty may depend in part on the particular factors of the case, taking into consideration the opinion of the Force Commander or Chief of Staff.[88]

While the "off-duty" conduct of a member of a national contingent would not be attributed to the organization,[89] the "on-duty" conduct may be so attributed, although one would have to consider how any *ultra vires* conduct relates to the functions entrusted to the person concerned.

56. The General Counsel of IMF wrote:

> Attribution may apply even though the official exceeds the authority given to him, he failed to follow rules or he was negligent. However, acts of an official that were not performed in his official capacity would not be attributable to the organization.[90]

A similar concept, although differently worded, may be found in the judgement given by the Court of Justice of the European Communities in *Sayag* v. *Leduc*:

> By referring at one and the same time to damage caused by the institutions and to that caused by the servants of the Community, article 188 [of the Treaty establishing the European Atomic Energy Community] indicates that the Community is only liable for those acts of its servants which, by virtue of an internal and direct relationship, are the necessary extension of the tasks entrusted to the institutions.[91]

57. Draft article 7 on responsibility of States for internationally wrongful acts reads as follows:

> The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions.[92]

The key wording "in that capacity" refers to a relation that must exist between the *ultra vires* conduct and the functions entrusted to the organ, entity, person or official. The commentary makes this clearer by stating:

> Cases where officials acted in their capacity as such, albeit unlawfully or contrary to instructions, must be distinguished from cases where the conduct is so removed from the scope of their official functions that it should be assimilated to that of private individuals, not attributable to the State.[93]

Although the wording "in that capacity" is rather cryptic and vague,[94] it seems preferable to keep it. This would show that there is no need to elaborate for international organizations, under this respect, a different rule from that applying to a State.[95]

58. Some minor changes in the wording used in draft article 7 on responsibility of States for internationally

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[86] The Committee on Accountability of International Organisations of the International Law Association suggested the following rule:

> "The conduct of organs of an IO [international organization] or of officials or agents of an Organisation shall be considered an act of that Organisation under international law if the organs or official or agent were acting in their official capacity, even if that conduct exceeds the authority granted or contravenes instructions given (*ultra vires*)."

(International Law Association, *op. cit.*, p. 797)

[87] *I.C.J. Reports 1999* (see footnote 26 above), p. 89, para. 66.

[88] *United Nations Juridical Yearbook, 1986* (United Nations publication, Sales No. E.94.V.2), p. 300.

[89] A clear case of an "off-duty" act of a member of UNIFIL, who had engaged in moving explosives to the territory of Israel, was considered by the District Court of Haifa in a judgement of 10 May 1979, *United Nations Juridical Yearbook, 1979* (United Nations publication, Sales No. E.82.V.1), p. 205.

[90] Letter from the General Counsel of IMF, Mr. François Gianviti, dated 7 February 2003 addressed to the Secretary of the Commission.

[91] Judgement of 10 July 1969, case 9/69, *European Court Reports*, vol. XV (1969–1), p. 336 (recital 7). The Court noted that "[a] servant's use of his private car for transport during the performance of his duties does not satisfy the conditions set out above" (*ibid*., recital 9).

[92] See footnote 5 above.

[93] *Yearbook ... 2001*, vol. II (Part Two), p. 46, para. (7) of the commentary to article 7.

[94] Brownlie, *System of the Law of Nations: State Responsibility*, p. 147, noted that "the Commission formulates a principle in tautologous terms. Whilst wishing to avoid a basis for avoidance of responsibility, refuge is taken in imprecision". For examples of the variety of interpretations of the term "in that capacity" in this context, see Condorelli, "L'imputation à l'Etat d'un fait internationalement illicite: solutions classiques et nouvelles tendances", p. 94, and Fischer, *La responsabilité internationale de l'État pour les comportements* ultra vires *de ses organes*, pp. 234–235.

[95] Identity of solutions for States and international organizations was advocated by Klein, *op. cit*., p. 390; Pitschas, *op. cit*., pp. 56 and 60; and Daillier and Pellet, *Droit international public*, p. 782.

wrongful acts are, however, required. First of all, the term "elements of the governmental authority" is appropriate for States, but applies only in very limited cases to international organizations. The reference to organs, persons or entities could be aligned on the language used in draft article 4. The possessive "its" in the last line of draft article 7 is ambiguous and may be dropped.

59. The following wording is suggested:

"Article 6. Excess of authority or contravention of instructions

"The conduct of an organ, an official or another person entrusted with part of the organization's functions shall be considered an act of the organization under international law if the organ, official or person acts in that capacity, even though the conduct exceeds authority or contravenes instructions."

Chapter V

Conduct acknowledged and adopted by an international organization as its own

60. The relevance of acknowledgement and adoption of conduct after it has taken place may be viewed as reflecting a "principle ... of agency or ratification".[96] It could also be viewed as the result of a procedural rule, relating to evidence. Whatever view is taken, it would seem unreasonable for the Commission to take a different approach from the one that led it to adopt article 11 on responsibility of States for internationally wrongful acts.[97] Nor is there any reason for establishing for international organizations a different rule from the one which has been adopted with regard to States.

61. Moreover, there are a few recent examples of practice relating to acknowledgement or adoption on the part of international organizations. One is to some extent doubtful because it relates to adoption of responsibility rather than specifically to attribution of conduct.[98] In the oral pleadings before a WTO panel in the *European Communities—Customs Classification of Certain Computer Equipment* case, confronted with claims brought by the United States against Ireland and the United Kingdom, the European Community declared that it was ready to assume the entire international responsibility for all measures in the area of tariff concessions, whether the measure complained about had been taken at the EC level or at the level of member States.[99]

62. A clearer case is given by a decision of Trial Chamber II of the International Tribunal for the Former Yugoslavia, which in *Prosecutor* v. *Dragan Nikolić* considered the question of the attribution to the Stabilization Force (SFOR) of the accused's arrest. The Chamber first noted that the Commission's draft articles on responsibility of States for internationally wrongful acts were "not binding on States".[100] It then referred to draft article 57 and observed that the articles were "primarily directed at the responsibilities of States and not at those of international organisations or entities".[101] However, the Chamber found that, "[p]urely as *general* legal guidance", it would "use the principles laid down in the Draft Articles insofar as they may be helpful for determining the issue at hand".[102] This led the Chamber to quote extensively draft article 11 and the related commentary.[103] The Chamber then added:

> The Trial Chamber observes that both Parties use the same and similar criteria of "acknowledgement", "adoption", "recognition", "approval" and "ratification", as used by the ILC [International Law Commission]. The question is therefore whether on the basis of the assumed facts SFOR can be considered to have "acknowledged *and* adopted" the conduct undertaken by the individuals "as its own".[104]

The Chamber concluded that the conduct of SFOR did not "amount to an 'adoption' or 'acknowledgement' of the illegal conduct 'as their own'".[105]

63. The text to be suggested may be perfectly parallel to draft article 11 on responsibility of States for internationally wrongful acts. It would read as follows:

"*Article 7. Conduct acknowledged and adopted by an international organization as its own*

"Conduct which is not attributable to an international organization under the preceding articles shall nevertheless be considered an act of that international organization under international law if and to the extent that the organization acknowledges and adopts the conduct in question as its own."

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[96] Brownlie, *op. cit*., p. 158.

[97] See footnote 5 above.

[98] See footnote 15 above.

[99] *Ibid.*

[100] "Decision on defence motion challenging the exercise of jurisdiction by the Tribunal", case No. IT-94-2-PT, para. 60.

[101] *Ibid.*

[102] *Ibid*., para. 61.

[103] *Ibid*., paras. 62–63.

[104] *Ibid*., para. 64.

[105] *Ibid*., para. 66. The appeal was rejected on a different basis. On the point here at issue the Appeals Chamber only noted that "the exercise of jurisdiction should not be declined in cases of abductions carried out by private individuals whose actions, unless instigated, acknowledged or condoned by a State, or an international organisation, or other entity, do not necessarily in themselves violate State sovereignty" ("Decision on interlocutory appeal concerning legality of arrest", case No. IT-94-2-AR73 (5 June 2003), para. 26.

Chapter VI

Other cases of attribution of conduct to an international organization

64. The chapter on attribution of conduct to a State in the draft articles on responsibility of States for internationally wrongful acts[106] contains four other provisions which seem to be of limited interest with regard to international organizations. This suggests that one should refrain from writing parallel texts and leave open the possibility of an application by analogy of the rules established for States in the rare cases in which a problem of attribution that is covered by one of these articles may arise.

65. Draft article 5 on responsibility of States for internationally wrongful acts concerns "Conduct of persons or entities exercising elements of governmental authority". As already noted, the term "governmental authority" cannot be appropriately used with regard to international organizations. Moreover, the definition suggested in draft article 4 as a general rule on attribution covers all cases in which a person is entrusted with part of the organization's functions. Insofar as entities are concerned, the General Counsel of IMF stated:

> [S]tate responsibility rules on attribution that deal with acts of external entities are of limited, if any, relevance to international organizations. We know of no case in which the act of an external entity has been attributed to the IMF and, in our view, no act of an entity external to the IMF could be attributable to the IMF unless an appropriate organ of the IMF ratified or expressly assumed responsibility for that act.[107]

While this statement mainly relates to IMF, entities that are entrusted with some of the organizations' functions tend to be located inside the structure of the organization.

66. The wide definition in draft article 4 on responsibility of States for internationally wrongful acts gives little scope for an additional rule modelled on draft article 8 (Conduct directed or controlled by a State). This is all the more so as the reference to practice in draft article 4 allows one to take into account situations of factual control, which characterize draft article 8 and may be harder to comprise in draft article 4.

67. Draft article 9 (Conduct carried out in the absence or default of the official authorities") and draft article 10 (Conduct of an insurrectional or other movement) on responsibility of States for internationally wrongful acts presuppose control of territory. Despite a few recent developments, this is a rare event for an international organization. A parallel case to that envisaged for a State in draft article 10—which would involve an insurrectional movement becoming a "new Government" (art. 10, para. 1)—would be particularly unlikely.

[106] See footnote 5 above.

[107] See footnote 90 above.

RESPONSIBILITY OF INTERNATIONAL ORGANIZATIONS

[Agenda item 2]

DOCUMENT A/CN.4/545

Comments and observations received from international organizations

[*Original: English*]
[*25 June 2004*]

CONTENTS

Multilateral instruments cited in the present report

	Source
Convention on International Civil Aviation (Chicago, 7 December 1944)	United Nations, *Treaty Series*, vol. 15, No. 102, p. 295.
Convention on the Privileges and Immunities of the United Nations (New York, 13 February 1946)	*Ibid.*, vol. 1, p. 15.
Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) (Rome, 4 November 1950)	*Ibid.*, vol. 213, No. 2889, p. 221.
Treaty establishing the European Coal and Steel Community (Paris, 18 April 1951)	*Ibid.*, vol. 261, No. 3729, p. 141.
Agreement on the International Commission for the protection of the Rhine against pollution (Berne Convention) (Bern, 29 April 1963)	*Ibid.*, vol. 994, No. 14538, p. 3.
Treaty on the Non-Proliferation of Nuclear Weapons (London, Moscow and Washington, D.C., 1 July 1968)	*Ibid.*, vol. 729, No. 10485, p. 161.
United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982)	*Ibid.*, vol. 1833, No. 31363, p. 3.
Agreement relating to the implementation of Part XI of the Convention on the Law of the Sea (New York, 28 July 1994)	*Ibid*., vol. 1836, No. 31364, p. 3.
Agreement for the implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (New York, 4 August 1995)	*Ibid.*, vol. 2167, No. 37924, p. 3.
Vienna Convention for the Protection of the Ozone Layer (Vienna, 22 March 1985)	*Ibid.*, vol. 1513, No. 26164, p. 293.
Montreal Protocol on Substances that Deplete the Ozone Layer (Montreal, 16 September 1987)	*Ibid.*, vol. 1522, No. 26369, p. 3.
Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (Vienna, 21 March 1986)	A/CONF.129/15.
Convention on temporary admission (Istanbul, 26 June 1990)	United Nations, *Treaty Series*, vol. 1762, No. 30667, p. 121.
Treaty on European Union (Maastricht Treaty) (Maastricht, 7 February 1992)	*Ibid.*, vol. 1757, No. 30615, p. 3.
Convention on the Protection and Use of Transboundary Watercourses and International Lakes (Helsinki, 17 March 1992)	*Ibid.*, vol. 1936, No. 33207, p. 269.
Convention on Transboundary Effects of Industrial Accidents (Helsinki, 17 March 1992)	*Ibid.*, vol. 2105, No. 36605, p. 457.
United Nations Framework Convention on Climate Change (New York, 9 May 1992)	*Ibid.*, vol. 1771, No. 30822, p. 107.
Kyoto Protocol to the United Nations Framework Convention on Climate Change (Kyoto, 11 December 1997)	*Ibid.*, vol. 2303, No. 30822, p. 162.

Convention on Biological Diversity (Rio de Janeiro, 5 June 1992)	*Ibid.*, vol. 1760, No. 30619, p. 79.
Cartagena Protocol on Biosafety to the Convention on Biological Diversity (Montreal, 29 January 2000)	*Ibid.*, vol. 2226, No. A-30619, p. 208.
Convention on nuclear safety (Vienna, 20 September 1994)	*Ibid.*, vol.1963, No. 33545, p. 293.
United Nations Convention to combat desertification in those countries experiencing serious drought and/or desertification, particularly in Africa (Paris, 14 October 1994)	*Ibid.*, vol. 1954, No. 33480, p. 3.
The Energy Charter Treaty (Lisbon, 17 December 1994)	*Ibid.*, vol. 2080, No. 36116, p. 95.
Energy Charter Protocol on energy efficiency and related environmental aspects (Lisbon, 17 December 1994)	*Ibid.*, vol. 2081, No. 36117, p. 3.

Introduction

1. In its 2002 report, the International Law Commission recommended that the Secretariat "approach international organizations with a view to collecting relevant materials, especially on questions of attribution and of responsibility of member States for conduct that is attributed to an international organization".*

Accordingly, by letter dated 23 September 2002, selected international organizations were invited to inform the Commission of their relevant practice and submit primary source materials relevant to its study on responsibility of international organizations. In its 2003 report, the Commission, bearing in mind the close relationship between this topic and the work of international organizations, requested the Secretariat to circulate, on an annual basis, the chapter of the report of the Commission to the General Assembly on this topic to the United Nations, its specialized agencies and some other international organizations for their comments.** By letters dated 23 September 2002 and 1 October 2003, the above requests were relayed to selected international organizations by the Secretariat.

2. Subsequently, on 9 December 2003, the General Assembly adopted resolution 58/77, entitled "Report of the International Law Commission on the work of its fifty-fifth session". In paragraph 5 of that resolution, the Assembly requested the Secretary-General to invite States and international organizations to submit information concerning their practice relevant to the topic "Responsibility of international organizations", including cases in which States members of an international organization may be regarded as responsible for acts of the organization. This invitation was transmitted to selected international organizations by the Secretariat by letter dated 18 December 2003.

3. As of 20 April 2004, replies had been received from the following international organizations (dates of submission in parentheses): European Commission (7 March 2003 and March 2004), IAEA (14 November 2002 and 29 March 2004), IMF (7 February 2003, 29 January 2004 and 25 February 2004), International Seabed Authority (28 April 2003), Multinational Force and Observers (24 March 2003), OAS (8 January 2003), OPCW (31 October 2002), UNDP (15 December 2002), United Nations Secretariat (3 February 2004), WHO (19 December 2003), WTO (received 6 November 2002). These replies are reproduced below, in a topic-by-topic manner. In addition, attachments to the submissions of international organizations are reproduced in the annex to this document.

* *Yearbook … 2002*, vol. II (Part Two), p. 96, para. 488.
** *Yearbook … 2003*, vol. II (Part Two), p. 18, para. 52.

Comments and observations received from international organizations

A. General remarks

1. European Commission

1. The general view on the work of the International Law Commission in 2003 was expressed in the European Union (EU) statement to the Sixth Committee of the General Assembly on 27 October 2003.[1]

2. Given its role as an actor and participant in the international system, the European Community (EC) naturally takes a great interest in the topic of the responsibility of organizations and recognizes that it may have particular relevance to its own activities.

3. The EC is often described as differing from the "classical" model of an international organization in a number of ways. Firstly, the EC is not only a forum for its member States to settle or organize their mutual relations, but it is also an actor in its own right on the international scene. The EC is a party to many international agreements with third parties within its areas of competence. Quite often the EC concludes such agreements together with its member States, each in accordance with its own competencies. In that case the specificity of the EC lies in the fact that the EC and the member States each assume international responsibility with respect to their own competencies. The EC is also involved in international litigation, in particular in the context of WTO.

4. Secondly, the EC is regulated by a legal order of its own, establishing a common market and organizing the

[1] See *Official Records of the General Assembly, Fifty-eighth Session, Sixth Committee*, 14th meeting (A/C.6/58/SR.14), paras. 13–14.

legal relations between its members, their enterprises and individuals. Legislation enacted under the Treaty on European Union forms part of the national law of the member States and thus is implemented by member States' authorities and courts. In that sense, the EC goes well beyond the normal parameters of classical international organizations as they are known. It is important that the draft articles of the International Law Commission should fully reflect the institutional and legal diversity of structures that the community of States has already established.

5. In that respect, the EC submits that established notions such as "regional economic integration organization" reflected in modern treaty practice may require special consideration when dealing with substantive questions in the subsequent draft articles of the International Law Commission.

6. While the EC is in many ways *sui generis*, it is clear that all international actors, be they States or organizations, need to recognize their international responsibility in the event of any wrongful acts. This does not exclude the possibility of taking differences into account in the course of the future work of the International Law Commission concerning the responsibility of international organizations. Above all, common sense practical solutions are needed in order to cover a wide variety of situations and to cover the activities of organizational structures in a range of fields.

2. International Monetary Fund

1. IMF appreciates being invited to comment on this topic. Furthermore, it is interested in being involved in future discussions on it as it has a number of concerns with respect to the development of a body of law on the responsibility of international organizations, including the complex issue of attribution and how IMF activities might be affected.

2. IMF appreciates being invited to comment on the proposed draft articles and assures the Commission of its continued interest in this important project.

3. IMF would like to take this opportunity to express particular concerns about two aspects of this project. As a general matter, IMF does not necessarily agree that rules on State responsibility should be applied to international organizations. The differences between the legal status of States and that of international organizations are significant, as are the differences among international organizations. Furthermore, it seems to IMF that any analysis of the responsibility of international organizations must take into account the provisions of the international agreements by which individual organizations were created. Also, more particularly, State responsibility rules on attribution that deal with acts of external entities are of limited, if any, relevance to international organizations. IMF knows of no case in which the act of an external entity has been attributed to it and, in the IMF view, no act of an entity external to IMF could be attributable to it unless an appropriate IMF organ ratified or expressly assumed responsibility for that act.

4. As expressed in previous correspondence on this issue, IMF has reservations about the degree to which provisions from the Commission's draft articles on State responsibility should be applied to or relied on with regard to international organizations.

5. First, certain key concepts have been borrowed from the draft articles on State responsibility without being defined with reference to international organizations. IMF notes that the draft articles on international organizations use terms such as the "responsibility" or "international obligations" of international organizations without any explanation or definition in relation to international organizations. These undefined references imply that there is an established body of international law that determines what the terms "responsibility" or "international obligations" mean with regard to an international organization. In fact, paragraph (6) of the commentary to draft article 3 recognizes that the meaning of the term "international responsibility" is not defined. In the IMF view, a body of law explaining the meaning of these critical terms with respect to international organizations does not exist. Therefore, it is premature for the draft articles on international organizations to use these basic terms and seek comment on provisions that turn on the use of these basic terms without providing guidance as to their intended substantive meaning. Such guidance must satisfy the basic requirements of providing notice of what precise criteria would be used to determine whether or not an international organization could be held liable and required to provide compensation for the consequences of its actions. Unless clear definitions and precise criteria are set forth in the articles, the international organizations would confront such an uncertain and potentially destructive legal environment that, out of concern that their activities could subject them to endless claims and litigation, they could become substantially inhibited in carrying out their mandates. Therefore, IMF anticipates that it will need to supplement its comments on the present draft articles, as well as the responses to the specific questions asked, once it has been given the opportunity to review the anticipated provisions that define these (and other) key concepts.

6. In this connection, IMF is particularly concerned that the draft articles do not identify the entities that would be competent to apply, interpret or enforce the draft articles. It is important to know whether the intention is for the articles to be applied by national courts according to their own views of the obligations of international organizations or by an international agency that would be expected to have general competence over all international organizations. If the intention is for national courts of member States to have competence to apply the articles, the courts of each State would need to ensure that they apply the draft articles in a manner that is consistent with that State's obligations under the charter of the relevant international organization. Furthermore, either approach could be inconsistent with the charters of some international organizations that have provisions for dispute resolution and interpretation of their constituent documents.

7. Secondly, States and international organizations are fundamentally different. Therefore, before any principle of State responsibility can be applied to international

organizations, the principle must be tested against these fundamental differences. As recognized by ICJ in its opinion on the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, international organizations are "unlike States" in that they "do not … possess a general competence".[1] International organizations are established by the agreement of their member States for the specific purposes set out in their constituent agreement and the powers and responsibilities of international organizations must, therefore, be assessed primarily against the provisions of their respective constituent instruments.

8. Thirdly, while States are functionally and organizationally very similar to each other, there are significant differences among international organizations. The draft articles provided make insufficient reference to the law or practice of international organizations but rely, rather, on the fact that the principles contained in these three draft articles were accepted with reference to States. For instance, the fundamental question of attribution must, for each international organization, be determined with reference to the treaty that established the organization, the decisions of its governing bodies and the established practice of the organization. Therefore, in discussing questions of attribution, particular attention will need to be paid to the differences in the treaty-based laws and practices of the various international organizations. As mentioned in earlier correspondence, IMF considers that only acts of officials performed in their official capacity would be attributable to IMF and generally a determination as to whether or not an official was acting in his official capacity would rely on the findings or decisions of competent organs of the Fund.

3. International Seabed Authority

As the International Seabed Authority is sure the Commission is aware, the United Nations Convention on the Law of the Sea and the Agreement relating to the implementation of Part XI of that Convention contain a number of unique provisions relating to the responsibility and liability of the Authority. In the coming years, the Authority will need to consider how to implement these provisions and, for that reason, considers the work of the Commission to be of great value and importance.

4. World Health Organization

1. Concerning the report of the Commission, WHO would like to register its appreciation for the work conducted so far, and in particular for the adoption of three articles on first reading at the 2003 session. WHO supports the general thrust of the articles and considers the choice of the Commission to rely in principle on the approach followed in the articles on responsibility of States for internationally wrongful acts to be logical. WHO does not have specific comments on the articles in question at this stage.

2. While WHO regrets not having more materials or cases to contribute at this time, WHO research would probably be facilitated if the Commission or the Special Rapporteur were to formulate specific questions or issues on the subject of attribution or other relevant aspects of the topic at hand.

[1] *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, I.C.J. Reports 1996*, p. 78, para. 25.

B. Draft article 1: Scope of the draft articles

Draft article 1, as provisionally adopted by the Commission at its fifty-fifth session, in 2003, reads as follows:

Article 1. Scope of the present draft articles

1. The present draft articles apply to the international responsibility of an international organization for an act that is wrongful under international law.

2. The present draft articles also apply to the international responsibility of a State for the internationally wrongful act of an international organization.*****

***** *Yearbook … 2003*, vol. II (Part Two), p. 18, para. 53.

1. International Atomic Energy Agency

With respect to the Commission's commentary to draft article 1:[1]

(a) *Paragraphs (1)–(3):* No comment.

(b) *Paragraph (4):* The last sentence of this paragraph suggests that one case in which an international organization may be held responsible is that of an internationally wrongful act committed by another international organization of which the first organization is a member. This potential case seems to be to a large extent parallel to that of a State that is a member of the international organization that committed the internationally wrongful act. *Prima facie*, any potential responsibility of a State member of an international organization and of an international organization that is a member of another international organization should be treated similarly.

(c) *Paragraph (5):* No comment.

(d) *Paragraph (6):* Given the Agency's comment on paragraph (4), it seems that the potential responsibility of an international organization for the internationally wrongful acts of an international organization of which the first organization is a member needs to be considered in parallel with the potential responsibility of a State that is a member of the organization committing the internationally wrongful act, as well as a State member of the first international organization. *Prima facie*, the same considerations would apply in all cases.

(e) *Paragraph (7):* Reference is made to the fact that responsibility of States for internationally wrongful acts only refers to the cases in which a State aids, assists, directs, controls or coerces another State and it is suggested that, if the question of similar conduct by a State with regard to an international organization were not regarded as covered, at least by analogy, in the articles on State responsibility, the present draft articles could fill the resulting gap. Given that, normally, an international organization acts on the basis of decisions etc., taken by

[1] *Yearbook … 2003*, vol. II (Part Two), p. 18, para. 54.

its policymaking organs, it would seem that the States that participated in the decision (whether *ultra vires* or not) that "authorized" the internationally wrongful act by the organization could be jointly and severally responsible. In this connection the situation in the International Tin Council in the early 1980s would appear to be relevant. However, the means by which the policymaking organ(s) took the decision may be relevant. For example, if the decision were taken by consensus, all States participating in the decision could be regarded as jointly and severally liable. If the decision were taken by vote, should States that voted against the decision or abstained be regarded as jointly, but not severally, liable? If a State induced the secretariat of an organization to carry out an unauthorized or *ultra vires* act, it would seem to be easier to regard that State as responsible.

(f) *Paragraphs (8) and (9):* No comment.

2. International Monetary Fund

1. The reference to "acts wrongful under international law" needs to be defined and explained. In particular, the relationship between the draft articles and the constituent instrument of an organization requires explanation. Since there is no existing body of international law on the matter of what constitutes a wrongful act of an international organization and the evolution of such a body of law would largely rely on general principles of law, the overriding legal effects of the provisions of the charters of the international organizations, which have been expressly agreed upon and are primary sources of international law, must be made clear. Also, it should be clear in the draft articles that when an international organization acts pursuant to its charter, it would not be subject to liability for doing so under general international principles (that are implicitly referred to but not set forth in substance in the draft articles), but its liability would be determined under its own charter.[1] Furthermore, to the extent that organizations would be expected to conform to international norms that are incorporated into the proposed articles which would supplement the provisions of their charters, they must have actual notice of the substance of those norms. Otherwise, they should not be bound because this would violate the most fundamental principles regarding the requirement of notice as the foundation for accountability.

2. *Draft article 1, paragraph 2.* The responsibility of a member State to other member States for an act committed by an international organization must be subject to the rules of that organization. There is no principle of international law that limits States' ability to set up international organizations to act collectively and on behalf of the membership and to provide, explicitly or by implication, that when doing so, neither the organization nor its member States would be held responsible or liable by fellow member States, or their subjects, for breaches of international obligations or internationally wrongful acts that were consequences of the organizations' activities.

3. It may be that the international law of States' responsibility should explicitly provide that individuals or States would have recourse, under rules of international law concerning States' responsibility, against member States of an international organization for actions that were taken by an international organization. This would be particularly appropriate when the international organization was acting as the agent of the member State in discharging an obligation of the State. However, such legal doctrine should also clearly recognize that in the case of an international financial institution created to achieve legitimate collective goals, and not created as a means of shielding member States from responsibility in the discharge of pre-existing obligations, the exposure to liability of a member State (whose relationship to the organization is comparable to a shareholder in a corporation) for the acts or omissions of the organization should be limited to the amount of the financial contributions or guarantees of that member.

C. Draft article 2: Use of terms

Draft article 2, as provisionally adopted by the Commission at its fifty-fifth session, in 2003, reads as follows:

Article 2. Use of terms

For the purposes of the present draft articles, the term "international organization" refers to an organization established by a treaty or other instrument governed by international law and possessing its own international legal personality. International organizations may include as members, in addition to States, other entities.*****

***** *Yearbook … 2003*, vol. II (Part Two), p. 18, para. 53.

1. International Atomic Energy Agency

With respect to the Commission's commentary to draft article 2:[1]

(a) *Paragraph (1)*: No comment.

(b) *Paragraph (2)*: If an international organization does not possess one or more of the characteristics outlined in the draft articles, the draft articles would not apply to such an organization. Therefore, if certain of the principles and rules stated in the draft articles do apply to such an organization, those principles and rules would, presumably, apply to the organization on a basis other than the draft articles.

(c) *Paragraphs (3)–(14)*: No comment.

[1] International organizations are entities generally created by countries for specific purposes and to perform certain functions. The attributes of each organization, such as legal personality, privileges and immunities, powers and scope of responsibilities are or could be set forth in the agreement under which the organizations are established. So long as, and to the extent that, an organization is performing its functions and acting, itself or through its officials, within the scope of its authorized activities, it cannot be made subject to responsibilities or liabilities that are not provided for in its constituent documents. The management of an organization would be in violation of its official duties if it were to make payments to claimants for claims that were not recognized as legitimate expenses under the charter and regulations of the organization.

[1] *Yearbook … 2003*, vol. II (Part Two), p. 18, para. 54.

2. International Monetary Fund

IMF refers to its general comments set out above on the differences between international organizations *inter se* and has no further comments on this article.

D. Draft article 3: General principles

Draft article 3, as provisionally adopted by the Commission at its fifty-fifth session, in 2003, reads as follows:

Article 3. General principles

1. Every internationally wrongful act of an international organization entails the international responsibility of the international organization.

2. There is an internationally wrongful act of an international organization when conduct consisting of an action or omission:

(a) Is attributable to the international organization under international law; and

(*b*) Constitutes a breach of an international obligation of that international organization.*****

***** *Yearbook … 2003*, vol. II (Part Two), p. 18, para. 53.

1. International Atomic Energy Agency

With respect to the Commission's commentary to draft article 3:[1]

(*a*) *Paragraphs (1)–(4):* No comment.

(*b*) *Paragraph (5):* The principle that "[w]hen an international organization commits an internationally wrongful act, its international responsibility is entailed" is well established; however, it would be useful to refer to a less obtuse judicial statement of that principle than the one quoted.

(*c*) *Paragraphs (6)–(9):* No comment.

(*d*) *Paragraph (10):* It is difficult to see how Article 103 of the Charter of the United Nations might provide a justification for an organization's conduct in breach of an obligation under a treaty with a non-member State of the organization, particularly for an organization, like the Agency, which has no provision in its statute that is equivalent to Article 103. The precise effect of Article 103 is also not free from doubt (including with respect to non-member States of the United Nations).[2]

2. International Monetary Fund

1. As mentioned above, this article refers to concepts concerning "internationally wrongful acts" and the "responsibility" of international organizations that have not been developed and, accordingly, are neither generally understood nor broadly accepted in relation to international organizations. The draft articles should provide guidance on what constitutes or determines "internationally wrongful acts". Furthermore, the draft article must provide a clear definition of what is meant by "responsibility". Does the concept of responsibility mean any one or more of the following:

(*a*) Acknowledging publicly that the action or omission was wrongful?

(*b*) Payment for actual damages suffered by victims of the wrongful act?

(*c*) Payment of indirect losses resulting from the wrongful act?

(*d*) Payment of punitive damages for the wrongful act?

2. In considering what is intended by "responsibility", one issue to be addressed is how would an international organization be held responsible for a finding by a national court or international tribunal that it had failed to fulfil the mandate for which it was established (which the court considered a breach of obligation and an internationally wrongful act of the organization)? Could the court order the organization to cease conducting its business? Could the court award damages that would financially bankrupt the organization? Could the failure of an organization to achieve its stated goals result in court orders that would cause its member States to lose the capital that they contributed or guaranteed—if so, to whom? If so, the court's decision could, in effect, override the will of the organizations' member States.

3. Furthermore, while the immunities of an organization are conceptually distinct from the responsibility of the organization, the immunities of the organizations, which vary with different organizations, must be reconciled with the proposed articles on responsibility. An organization's immunities may protect the assets of the organization from being used for any reason or by any means other than what is specifically authorized by the treaty that created it. Any judicial decision to the contrary would violate a fundamental protection that enables the organization to conduct its international responsibilities, as provided in the treaty that created it. For some international organizations the immunities provided for in their charters are essential to the ongoing viability of the organization because the immunities protect them from vexatious claims and potential financial destruction by courts of many different countries that would have differing or conflicting views about the organization's international obligations. The draft articles and commentary seem to suggest, by implication, that the draft articles would override the immunities provided to the organizations in their charters, but this approach would render the provisions of those charters virtually meaningless and such an approach cannot be reconciled with the specific terms of the agreements entered into by the member countries.

4. The inclusion of "omissions" along with "actions" that would trigger the organization's responsibility may also lead to some problems that were not necessarily applicable when dealing with responsibility of States. Such omissions may result from the application of the organization's decision-making process under its constitutive

[1] *Yearbook … 2003*, vol. II (Part Two), p. 18, para. 54.

[2] See Bruno Simma, ed., *The Charter of the United Nations: a Commentary*, 2nd ed., vol. II (Munich, Beck, 2002), p. 1298.

instrument. Would an organization be responsible for not taking action, if this non-action is the result of the lawful exercise of their powers by its member States? Again, the draft articles must recognize and provide that the charters of international organizations are the primary sources of law that determine the obligations of the organizations and that, while general principles of international law that are consistent with an organization's charter may supplement or complement the laws and regulations applicable to the organization, inconsistent customary or general principles of international law (whether or not reflected in the proposed articles on the responsibility of international organizations) would neither override the provisions of an organization's charter nor govern actions taken pursuant to the provisions of the organization's charter.

E. Reference to the "rules of the organization"*

1. European Commission

1. With respect to question (*a*), the European Commission affirms that a possible general rule of attribution of conduct to international organizations should indeed contain a reference to the "rules of the organization". These rules define the powers and their scope of the "organs" or "institutions" of the international organization and of its officials or persons acting on its behalf. They are, therefore, of great importance for ensuring that the international organization as a subject of international law shall be held responsible for the conduct of all the organs, instrumentalities and officials which form part of the organization and act in that capacity. There can be no doubt that the "rules of the organization" are important for *attribution* of a specific conduct to the international organization.

2. They are, however, equally important for the second limb of paragraph 2 of draft article 3, namely the question whether the obligation of which a breach is alleged is an obligation of the international organization in question. This is the question, as one of the great experts in the field, Klein, has put it, of the "*articulation de la responsabilité entre l'organisation internationale et les États membres*",[1] of the apportionment of the obligation as between the organization and its members. This apportionment is entirely determined by the rules of the organization, since these rules define the tasks and powers of the organization which possesses its own international legal personality, *vis-à-vis* those of the member States.

3. This question of apportionment of obligations and responsibilities should in principle be clearly distinguished from the question of attribution of conduct. The latter question can only arise once the first one has been answered in the affirmative. It is clear that there can be no attribution to the international organization, if the organization cannot, in the first place, be apportioned exercise of the obligation which it is alleged to have breached. On the other hand, once responsibility must be apportioned to the organization and cannot be apportioned to the member States, it must be very doubtful if conduct (even by member State organs) can still be attributed to the member States, since according to the internal rules of the organization they are no longer bearers of the obligation under international law.

4. The following example from European Community practice illustrates the problem. Member State customs authorities follow a policy of tariff classification which is alleged to be contrary to the trade provisions of an agreement that has been concluded by the EC and its member States together. The question of apportionment of the obligation and of responsibility would have to be decided in favour of the EC, since trade policy is an exclusive competence of the EC which has been wholly transferred by the member States to it. It would seem to be impossible in such a situation to say that the action by member States' customs authorities should nonetheless lead to the attribution of the conduct to the member States, since they are not the carriers of the obligation any longer.

5. The draft, therefore, should probably make room for the internal rules of the organization as an element that is important not only for the question of the attribution of conduct, but also—and perhaps foremost—for the question of the apportionment of responsibility. As a corollary of that, it might be made clear that apportionment is really the primary question and attribution the secondary one. Finally, thought should be given to the question whether the rules on attribution should accommodate the situation in which the organs of member States act in reality as organs of the international organization.

2. International Atomic Energy Agency

Prima facie, it seems that it would be useful and appropriate for such a general rule to contain a reference to the "rules of the organization" as such rules are, in the Agency's view, an important parameter that is relevant to a consideration of the attribution of conduct to an international organization.

3. International Monetary Fund

With respect to the questions raised by the Commission,[1] IMF would concur with the Commission that the general rule on attribution of conduct to international organizations should contain a reference to the "rules of the organization".

[1] *Yearbook … 2003*, vol. II (Part Two), p. 14, para. 27.

4. United Nations Secretariat

A general rule on attribution of conduct to an international organization should contain a reference to the "rules of the organization"—the equivalent of "the internal law of the State" under article 4, paragraph 2, of the draft articles on responsibility of States for internationally wrongful acts.[1] It is indeed by reference to the rules of the organization that an organ, a person or entity of the

[1] *Yearbook ... 2001*, vol. II (Part Two), p. 26, para. 76.

***** The Commission, requested the views of Governments on the following question:

"Whether a general rule on attribution of conduct to international organizations should contain a reference to the 'rules of the organization'."

(*Yearbook … 2003*, vol. II (Part Two), para. 27 (a))

[1] Pierre Klein, *La responsabilité des organisations internationales dans les ordres juridiques internes et en droit des gens* (Brussels, Bruylant, 1998), p. 426.

organization whose conduct engages the responsibility of the organization is defined.

5. World Health Organization

Concerning the questions posed by the Commission to member States and reproduced in chapter III of the Commission's report,[1] WHO is of the view that a general rule on attribution of conduct to international organizations should indeed contain a reference to the rules of the organizations, and that the definition given in article 2, paragraph 1 (*j*), of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (hereinafter the 1986 Vienna Convention) would be adequate, at least as a point of departure for a definition more suitable to the specific purpose of the draft articles.

[1] *Yearbook … 2003*, vol. II (Part Two), p. 14, para. 27.

F. Definition of "rules of the organization"*

1. European Commission

1. As regards question (*b*), the European Community takes the view that the definition of "rules of the organization" as it appears in article 2, paragraph 1 (*j*) of the 1986 Vienna Convention may serve as a starting point. However, this definition might need further refinement if it is intended to cover the case of the EC by it as well.

2. First, it is important for the EC that the definition of the internal rules of the organization should encompass next to "the constituent instruments, decisions and resolutions adopted in accordance with them" other sources as well. As the International Law Commission is aware, sources of Community law would include, e.g. general principles of law.

3. Secondly, the case law of the European Court of Justice and the Court of First Instance is of particular importance. It offers important guidelines about the apportionment of responsibility as between the Community and its member States. Accordingly, it should be emphasized that the notion "established practice of the organization" must be understood broadly as encompassing the case law of the courts of an organization. The European Commission would therefore recommend making this point clear either in the text by referring to "established practice of the organization, including case law by its courts" or by explaining this point in the commentary to the draft definition.

2. International Atomic Energy Agency

Again, *prima facie*, it seems that the definition is adequate. However, such rules are only one relevant parameter. Another parameter relevant to the attribution of conduct to an international organization would seem to be treaties concluded by the organization.

3. International Monetary Fund

IMF agrees with the Commission that the proposed definition of the "rules of the organization", as it appears in article 2, paragraph 1 (*j*), of the 1986 Vienna Convention, is adequate and complete for the present purpose. IMF believes this provision is consistent with the requirement that attribution, in the case of an international organization, can only be determined with reference to the treaty that established the organization, the decisions of its governing bodies and the established practice of the organization.

4. United Nations Secretariat

The definition of the "rules of the organization" contained in article 2, paragraph 1 (*j*), of the 1986 Vienna Convention is, for the purpose of this study, adequate. It is particularly so in connection with peacekeeping operations where principles of international responsibility for the conduct of the force have for the most part been developed in the 50-year practice of the Organization.

5. World Health Organization

Concerning the questions posed by the Commission to Member States and reproduced in chapter III of the Commission's report,[1] WHO is of the view that a general rule on attribution of conduct to international organizations should indeed contain a reference to the rules of the organizations, and that the definition given in article 2, paragraph 1 (*j*), of the 1986 Vienna Convention would be adequate, at least as a point of departure for a definition more suitable to the specific purpose of the draft articles. What matters most in this case is the retention of a reference to the established practice of the organization as one category of "rules" of that organization. It is evident in the view of WHO that, when considering the attribution of conduct by an agent, organ or other person or entity to the organization, the role of the practice of that organization in the delimitation or specification of such attribution cannot be ignored and should be given formal status through its inclusion in the concept of "rules of the organization".

[1] *Yearbook … 2003*, vol. II (Part Two), p. 14, para. 27.

G. Attribution of the conduct of peacekeeping forces to the United Nations or to contributing States*

1. European Commission

The European Community does not take a position on question (*c*) as it does not relate to Community law.

2. International Atomic Energy Agency

This is a question that should best be answered by the United Nations Legal Counsel.

* The Commission requested the views of Governments on the following question:

"If the answer to [the question raised in paragraph 27 (*a*) of whether a general rule on attribution of conduct to international organizations should contain a reference to the 'rules of the organization'] is in the affirmative, whether the definition of 'rules of the organization', as it appears in article 2, paragraph 1 (*j*) , of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations … is adequate."

(*Yearbook … 2003*, vol. II (Part Two), para. 27 (*b*))

3. International Monetary Fund

The issue of attribution of the conduct of peacekeeping forces to the United Nations is specific to that organization and, in the absence of particular proposals on this issue, IMF does not have any comments. It has reservations, however, about including such a specific issue, which applies to a limited number of organizations, in draft articles that aim at setting forth the principles of responsibility of all international organizations. If any principles or rules applicable to peacekeeping operations are included, the scope of such principles and rules should be explicitly limited to peacekeeping activities and organizations that conduct such activities.

4. United Nations Secretariat

1. The question of attribution of the conduct of a peacekeeping force to the United Nations or to contributing States is determined by the legal status of the force, the agreements between the United Nations and contributing States and their opposability to third States.

2. A United Nations peacekeeping force established by the Security Council or the General Assembly is a subsidiary organ of the United Nations. Members of the military personnel placed by Member States under United Nations command, although remaining in their national service, are, for the duration of their assignment to the force, considered international personnel under the authority of the United Nations and subject to the instructions of the force commander. The functions of the force are exclusively international and members of the force are bound to discharge their functions with the sole interest of the United Nations in view. The peacekeeping operation as a whole is subject to the executive direction and control of the Secretary-General, under the overall direction of the Council or the Assembly, as the case may be.

3. As a subsidiary organ of the United Nations, an act of a peacekeeping force is, in principle, imputable to the Organization, and, if committed in violation of an international obligation, entails the international responsibility of the Organization and its liability in compensation. The fact that any such act may have been performed by members of a national military contingent forming part of the peacekeeping operation does not affect the international responsibility of the United Nations *vis-à-vis* third States or individuals.

4. Agreements concluded between the United Nations and States contributing troops to the Organization contain a standard clause on third-party liability delineating the respective responsibilities of the Organization and contributing States for loss, damage, injury or death caused by the personnel or equipment of the contributing State. Article 9 of the Model Memorandum of Understanding between the United Nations and [participating State] contributing resources to [the United Nations Peacekeeping Operation] provides in this regard:

> The United Nations will be responsible for dealing with any claims by third parties where the loss of or damage to their property, or death or personal injury, was caused by the personnel or equipment provided by the Government in the performance of services or any other activity or operation under this Memorandum. However, if the loss, damage, death or injury arose from gross negligence or wilful misconduct of the personnel provided by the Government, the Government will be liable for such claims.[1]

5. While the agreements between the United Nations and contributing States divide the responsibility in the relationship between them, they are not opposable to third States. *Vis-à-vis* third States and individuals, therefore, where the international responsibility of the Organization is engaged, liability in compensation is, in the first place, entailed for the United Nations, which may then revert to the contributing State concerned and seek recovery on the basis of the agreement between them.

6. The principle of attribution of the conduct of a peacekeeping force to the United Nations is premised on the assumption that the operation in question is conducted under United Nations command and control, and thus has the legal status of a United Nations subsidiary organ. In Chapter VII-authorized operations conducted under national command and control, the conduct of the operation is imputable to the State or States conducting the operation. In joint operations, namely, those conducted by a United Nations peacekeeping operation and an operation conducted under national or regional command and control, international responsibility lies where *effective* command and control is vested and practically exercised.[2]

H. Rules for attribution of conduct

1. European Commission

1. The particular structure and "supranational" nature of the European Community should be borne in mind when analysing its international responsibility as an international organization. Unlike classical intergovernmental organizations, the EC constitutes a legal order of its own, with comprehensive legislative and treaty-making powers, deriving from transfer of competence from the member States to the Community level. Moreover, the Community's decision-making procedures have particular features of their own, including qualified majority voting at the level of its Council. It may also be noted that concepts such as "regional economic integration organization" have emerged in the drafting of multilateral treaties, which seem to reflect some of these special features. While a number of areas of international activities fall

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[1] Reform of the procedures for determining reimbursement to Member States for contingent-owned equipment: note by the Secretary-General (see annex to the present report, attachment No. 84). A similar provision is contained in article 6 of the Memorandum of agreement used by the Organization to obtain gratis personnel (ST/AI/1999/6), annex. It reads:

> "The United Nations shall be responsible for dealing with claims by third parties where the loss of or damage to their property, or death or personal injury, was caused by the actions or omissions of the ... personnel in the performance of services to the United Nations under the agreement with the Government. However, if the loss, damage, death or injury arose from gross negligence or wilful misconduct of the ... personnel provided by the donor, the Government shall be liable to the United Nations for all amounts paid by the United Nations to the claimants and all costs incurred by the United Nations in settling such claims."

[2] See the report of the Secretary-General on financing United Nations peacekeeping operations (A/51/389), paras. 17–18. See also the annex to the present report, attachment No. 80.

within the shared competences of the EC and the member States (e.g. the environment), in other areas (e.g. most but not all trade-related issues) the Community alone is competent to legislate and enter into international agreements.

2. One distinctive feature of Community law, including international obligations adopted by the Community, is that it is automatically applicable in the member States without separate ratification acts being necessary. Another feature of Community law is that, for the most part, its practical implementation is carried out by the authorities of the member States instead of the EC institutions themselves. There is no Community administration throughout the Community territory comparable to the federal Government in federal States. Typically, even in areas of exclusive Community competence, like customs tariffs, implementation is ensured by the national customs administrations of the member States rather than a separate Community customs service.

3. The characteristics outlined above raise two strands of questions concerning the international responsibility of the EC and/or its member States. First, the "vertical" dimension of the relationship between the Community and its member States raises one set of issues. The fact that the implementation of Community law, even in areas of its exclusive competence, is normally carried out by the member States and their authorities, poses the question as to whether or when the EC as such is responsible not only for acts committed by its organs, but also for actions of the member States and their authorities. Secondly, there is a "horizontal" dimension between the Community and its member States, raising another set of issues for the purposes of international responsibility. International agreements in fields of shared competence between the member States and the Community frequently result in so-called "mixed agreements", to which both the EC and the member States are Contracting Parties. Such a situation calls for delineation of their respective responsibilities *vis-à-vis* third parties to an agreement. The two aspects described above are reflected in the materials annexed to the present report.

4. As a general observation, it should be noted that, in practice, the Community's international responsibility has arisen only in the context of international obligations *ex contractu* with third parties rather than in a non-treaty context. In the framework of international treaty law, the *pacta sunt servanda* principle not only carries the idea that treaties are binding, but also that they are binding, under international law, only on those who are formally the parties to a treaty (concept of privity). This formal aspect of international treaty law is perhaps worth emphasizing, given that even in the case of pure Community agreements their implementation is in large part carried out by the member States (and their authorities) which are not formally Contracting Parties to a treaty. In the case of mixed agreements, to which both the Community and the member States are parties, responsibility under public international law may also be affected by other considerations related to the division of competence between the Community and the member States.

(a) *Vertical dimension of the relationship between the EC and its member States: some examples*

5. Issues related to the vertical dimension between the Community and the member States are not confined to pure Community agreements, but may also arise in the framework of mixed agreements, e.g. the WTO Agreement. The EC position as regards the attribution of acts of the member States to the EC itself, for the purposes of its international responsibility, is reflected in the materials related to WTO litigation.[3] The statements in the LAN case (customs classification of certain computer equipment)[4] explain the "vertical" structure of the EC system as far as it concerns the authorities of the member States (customs administration) acting as implementing authorities of EC law in a field of exclusive Community competence. The EC took the view that the actions of these authorities should be attributed to the EC itself and emphasized its readiness to assume responsibility for all measures within the particular field of tariff concessions, be they taken at EC level or at that of the member States.[5] These views are also reflected in the final panel report,[6] recognizing the EC customs union and related EC measures which were at issue in the LAN case.

6. Another example of attributing acts by bodies within the member States to the EC is reflected in some earlier GATT cases.[7] These cases further highlight the above-mentioned characteristics concerning the implementation of Community obligations by administrative authorities and organizations within the member States. It may be noted that even measures taken by private producers' organizations in the member States, acting within the Community's agricultural intervention system, are regarded as "governmental measures" taken by the Community .[8] Also in these cases, the responsibility resulting out of these actions was entirely assumed by the Community *vis-à-vis* the other GATT parties.

7. In the area of intellectual property rights under the TRIPS Agreement[9] (largely subject to member State competence), some variation in the dispute settlement practice over time may be noticeable. First, requests for consultations were addressed solely to the member State concerned and the solution was reached between the claimant and that State,[10] whereas in some subsequent similar cases, the Community participated in the settlement negotiations (cases brought against Sweden and Denmark).[11] More recently, consultations as well as the establishment of a panel were requested against both the member State concerned and the EC separately, while the settlement

[3] See the annex to the present report, attachments Nos. 1–7.

[4] *Ibid*., attachments Nos. 1–4.

[5] *Ibid*., attachment No. 1, para. 6; No. 2, reply to question 1; and No. 3, paras. 4 and 11.

[6] *Ibid*., attachment No. 4.

[7] *Ibid*., attachments Nos. 5–7.

[8] *Ibid*., attachment No. 5, para. 4.13; No. 6, para. 4.6; and No. 7, paras. 2.11–2.12.

[9] Marrakesh Agreement establishing the World Trade Organization, Agreement on Trade-Related Aspects of Intellectual Property Rights, annex 1C.

[10] See the annex to the present report, attachment No. 8.

[11] *Ibid*., Nos. 9–10.

was negotiated among the claimant, the member State concerned and the EC.[12]

(b) *Responsibility of the member States for acts of Community organs: the case of treaties to which the Community is not a party*

8. A very different dimension of the vertical relationship between the Community and its member States has arisen in cases where the member States, but not the EC, are parties to an international agreement, in particular in the human rights context. In these cases, the issue of vertical relationship is put in reverse terms: the possible responsibility of the member States for acts of the Community.

9. This line of inquiry has been explored in some decisions by the European Commission of Human Rights (Application No. 13258/87[13] and Application No. 8030/77[14]). The former case related to execution of a judgement by the Court of Justice of the European Communities in the area of competition law. While not excluding the possibility that a member State could be held responsible under the European Convention on Human Rights, the Commission nevertheless concluded that the application was inadmissible (*ratione materiae*) in this case, where the act of the member States consisted of issuing a writ of execution for a judgement of the European Court of Justice. The Commission considered *inter alia* that it would be contrary to the very idea of transferring power to an international organization to hold the member State responsible for examining whether article 6 of the Convention had been respected in the underlying proceedings. Also in the second (earlier) decision, the Commission found the application inadmissible (*ratione personae*), considering that the member States, by taking part in the decision of the Council of the European Communities, had not in the circumstances of that case exercised "jurisdiction"[15] in the sense of article 1 of the Convention. The underlying issue concerned the applicant's (trade union) right to be appointed to the Consultative Committee set up by the Treaty establishing the European Coal and Steel Community and to be heard in that context, which raised issues related to articles 11, 13 and 14 of the Convention. In that case, there was no effective remedy at the domestic level nor access to the European Court of Justice.

10. More recently, also in the area of competition law—and still pending before the European Court of Human Rights (Application No. 56672/00[16])—an applicant has claimed the responsibility of the 15 EU member States for a judgement of the European Court of Justice rejecting its demand for the suspension of an obligation to pay a fine that had been imposed on it by the European Commission. In this case, the issue at stake concerns the procedures applied by the Court of First Instance and the European Court of Justice, involving alleged violation of the applicant's right to judicial appeal in accordance with article 6 of the European Convention on Human Rights. The member States, emphasizing *inter alia* the separate legal personality of the EC and the independence of the Commission and its decisions from the member States, have argued in favour of inadmissibility *ratione personae*. The Commission was also permitted to intervene, associating itself with the submissions by the member States and the arguments put forward by them.[17]

11. Another example of the possible responsibility of the member States for measures taken by EC institutions has arisen in the context of the Convention on International Civil Aviation. In this case, too, only the 15 member States are parties to the Convention, while the Community is not. The subject matter of a dispute brought before the ICAO Council concerned an EC regulation enacted by the EC Council of Ministers (regulation No. 925/1999, the so-called "Hushkits Regulation"),[18] imposing certain noise-related constraints on the operation and registration of certain aircraft in the Community. In this case, unlike in the human rights cases referred to above, there was no preliminary objection to the jurisdiction of the ICAO Council, even though it related to a Community regulation alleged to infringe upon certain provisions of the Convention. It may be pointed out that the 15 EC member States presented a joint defence and appointed the Director General of the European Commission's Legal Service as their agent ("*à titre personnel*"). The case is formally pending even though the Hushkits Regulation has been repealed.

(c) *Horizontal dimension of the relationship between the EC and its member States: some examples*

12. The horizontal dimension of the relationship between the EC and the member States arises in the context of mixed agreements, where both the member States and the EC act as Contracting Parties to international agreements.

13. It may be noted that this question has come up *en passant* in the context of article 47, paragraph 1, of the draft articles on responsibility of States for internationally wrongful acts,[19] dealing with the situation concerning the issue of plurality of responsible States. It seems to adopt a neutral position, providing as follows:

> Where several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act.

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[12] *Ibid*., Nos. 11–16.

[13] *Ibid*., No. 20. See also *M & Co*. v. *Federal Republic of Germany*, decision of 9 February 1990, *Decisions and Reports*, vol. 164, p. 138.

[14] *Confédération Française Démocratique du Travail* v. *European Communities*, decision of 10 July 1978, *Yearbook of the European Convention on Human Rights*, vol. 21 (1978), p. 530.

[15] *Ibid*., p. 538.

[16] *Senator Lines GmbH* v. *Fifteen member States of the European Union*, decision of 10 March 2004, European Court of Human Rights, *Reports of Judgments and Decisions, 2004–IV*, p. 331. See also the annex to the present report, attachment No. 17.

[17] See annex to the present report, attachment No. 19.

[18] Council regulation (EC) No. 925/1999 of 29 April 1999 on the registration and operation within the Community of certain types of civil subsonic jet aeroplanes which have been modified and recertificated as meeting the standards of volume I, Part II, Chapter 3 of Annex 16 to the Convention on International Civil Aviation, third edition (July 1993), *Official Journal of the European Communities*, No. L 115 (4 May 1999).

[19] *Yearbook ... 2001*, vol. II (Part Two), p. 29, para. 76.

14. The corresponding commentary by the International Law Commission, while taking notice *inter alia* of the EU practice related to mixed agreements, states as follows:

> Paragraph 1 neither recognizes a general rule of joint and several responsibility, nor does it exclude the possibility that two or more States will be responsible for the same internationally wrongful act. Whether this is so will depend on the circumstances and on the international obligations of each of the States concerned.[20]

15. The European Community, as an international organization with limited legal powers, is only capable of concluding international treaties to the extent that it has been granted the necessary competence.[21] However, as many international agreements cover a wide range of aspects, they often result in mixed agreements concluded by both the EC and its member States.

16. This has led to a situation where more and more frequently special "declarations of competence" are envisaged when a regional economic integration organization such as the European Community enters into multilateral international agreements. The EC declarations, made pursuant to specific treaty requirements, describe the competencies in the fields relevant to the agreement concerned.[22] Some of the declarations specify that the Community is (only) responsible for the performance of the obligations covered by Community law in force or falling in its respective sphere of competence (Declaration in accordance with article 34 (3) of the Convention on Biological Diversity;[23] Declaration pursuant to article 29 (4) of the Convention on the Transboundary Effects of Industrial Accidents, concerning competence;[24] see also article 6, paragraph 1, of annex IX of the United Nations Convention on the Law of the Sea). Such declarations reflect a separate responsibility of the Community and its member States, in accordance with their respective competencies, and make this evident to third parties.

17. The issue of responsibility in accordance with the respective competencies declared to third parties is highlighted in the recent case brought against the European Community before the International Tribunal for the Law of the Sea.[25] While both the Community and the member States are parties to the United Nations Convention on the Law of the Sea, the particular issue at stake (acts by vessels flying the flags of member States in the framework of conservation measures regarding living resources of the high seas) falls within the Community competence, as stated in its respective declaration. The claimant accordingly invoked solely the responsibility of the EC for breach of the obligations resulting from, in particular, articles 64 and 116–119 of the Convention. The case is currently pending before the Tribunal.

18. Some agreements contain provisions establishing special regimes of responsibility for certain obligations, like article 6, paragraph 2, of annex IX of the United Nations Convention on the Law of the Sea and article 4, paragraph 5, of the Kyoto Protocol.[26] In the latter case, the EC negotiated a special clause providing for a global commitment for the economic integration organization as a whole, while permitting differentiated allocation of commitments among its members. In that case, the organization is responsible for achieving the global target, whereas its individual member States are responsible only in respect of commitments as internally agreed and notified accordingly. While these provisions refer to the material question of responsibility, some agreements provide for solutions as far as the procedural implementation of responsibility is concerned.[27]

19. The Energy Charter Treaty illustrates another example that could be cited in this context. The European Communities made a statement pursuant to article 26 (3) (b) (ii) of that Treaty with regard to the investor-State arbitration procedures. The statement declares *inter alia* as follows:

> The European Communities are a regional economic integration organisation within the meaning of the Energy Charter Treaty. The Communities exercise the competences conferred on them by their Member States through autonomous decision-making and judicial institutions. The European Communities and their Member States have both concluded the Energy Charter Treaty and are thus internationally responsible for the fulfilment of the obligations contained therein, in accordance with their respective competences. The Communities and the Member States will, if necessary, determine among them who is the respondent party to arbitration proceedings initiated by an Investor of another Contracting Party. In such case, upon the request of the Investor, the Communities and the Member States concerned will make such determination within a period of 30 days.*
>
> * This is without prejudice to the right of the investor to initiate proceedings against both the Communities and their Member States.[28]

20. It may be noted that, in situations where no specific declaration of competence has been made, the issue of possible joint responsibility of the European Community and its member States can be subject to somewhat different views. This is also reflected, for instance, in the opinions of the Advocates General of the European Court of Justice. While Advocate General Tesauro (in case C–53/96, *Hermès International* v. *FHT Marketing Choice BV*[29] as well as Advocate General Jacobs (in case C–316/91, *European Parliament* v. *Council of the European Union*)[30] appear to suggest that joint responsibility should be recognized, in case C–13/00, *Commission of the European Communities* v. *Ireland*,[31] Advocate General Mischo seems to take an opposite view. He pointed out *inter alia* that the very fact that the EC and its member States had recourse to the formula of a mixed agreement announces to non-member States that the agreement does not fall wholly within the competence of the EC and that the EC is *a priori* only assuming responsibility for those parts which fall within its competence.

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[20] *Ibid*., p. 125, para. (6).

[21] See, for example, the preamble to the 1986 Vienna Convention.

[22] See the annex to the present report, attachments Nos. 22–34.

[23] *Ibid*., No. 22, annex B, p. 65.

[24] *Ibid*., No. 23, annex II.

[25] *Ibid*., No. 35.

[26] *Ibid*., No. 25.

[27] See the Agreement on the International Commission for the protection of the Rhine, annex B, para. 8.

[28] *Official Journal of the European Commission*, No. L 69, p. 115. See also the annex to the present report, attachment No. 37.

[29] *European Court Reports 1998*, pp. I-3614–3615, para. 14.

[30] *Ibid., 1994*, para. 69.

[31] *Ibid., 2002*, paras. 29–30.

21. At all events, it needs to be noted that in practice, the claim for international responsibility has never failed for the reason that it has been brought against a "wrong party" in the context of mixed agreements.

22. As far as mixed agreements of a bilateral nature are concerned, the European Court of Justice seems to regard the EC and the member States as jointly responsible *vis-à-vis* the other party for the implementation of all obligations resulting from the agreement. This conclusion seems to follow from the usual wording used in such agreements, providing that the agreement was concluded "of the one part" by the Community and the member States and the African, Caribbean and Pacific States, "of the other part" (case C–316/91, *European Parliament* v. *Council of the European Union*).[32]

(d) *Internal EC law framework relating to compliance with international obligations*

23. There are a number of means under European Community law which may be relevant to the enforcement of obligations resulting from international agreements. In particular, article 300, paragraph 7, of the Treaty establishing the European Community, should be mentioned here. It provides as follows:

> Agreements concluded under the conditions set out in this Article shall be binding on the institutions of the Community and on Member States.

24. This provision makes international treaties binding under European Community law with regard to the member States and the institutions: they are obliged to take all measures necessary for the effective implementation of international agreements concluded by the Community and to abstain from acts which could hinder the proper implementation of agreements. Thereby it also enables the Community to fulfil its international responsibilities. Formally, it is a *res inter alios acta*, constituting a Community law obligation, which cannot be invoked by a third party under international law (case 104/81, *Hauptzollamt Mainz* v. *C. A. Kupferberg & Cie. KG a.A*;[33] case 12/86, *Meryem Demirel* v. *Stadt Schwäbisch Gmünd*;[34] case C–53/96, paras. 18–20;[35] judgement of the Court in case C–13/00, para. 15[36]). In reality, however, the provision provides an additional assurance to third States that the Community will honour its obligations.

25. Article 10 of the Treaty establishing the European Community could also be mentioned in this context. It provides as follows:

> Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks. They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty.

26. It should also be pointed out that, in its opinion 1/94, the European Court of Justice has confirmed that there exists a duty of cooperation in a situation involving shared competencies between the Community and the member States. It stated *inter alia* that:

> [I]t is essential to ensure close cooperation between the Member States and the Community institutions, both in the process of negotiation and conclusion and in the fulfilment of the commitments entered into. That obligation to cooperate flows from the requirement of unity in the international representation of the Community.[37]

27. While it is not the intention to review here the various judicial actions such as infringement procedures that can be used to bring cases to the attention of the European Court of Justice, separate mention could perhaps be made of the EC system of non-contractual liability of its institutions. It is in this particular context that questions of attribution arise under Community law and it could be relevant in view of the type of issues that the International Law Commission is likely to address in its codification work regarding the responsibility of international organizations. Article 288, paragraph 2, of the Treaty establishing the European Community sets out the relevant Community legal framework on this issue, which has been the subject of a rich jurisprudence by the Court. It provides as follows:

> In the case of non-contractual liability, the Community shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused its institutions or by its servants in the performance of their duties.

28. The European Court of Justice has interpreted the various elements of this provision on frequent occasions; such as those requiring specification of an act as an act of a Community "institution"[38] or of its "servant" ,[39] in the "performance of its duties" .[40] This jurisprudence also elucidates the circumstances under which acts by a member State's administrative authority can give rise to Community liability or where the member States should be liable for a damage caused in the implementation of Community law (case 175/84;[41] case C–282/90[42]). The main criterion for the determination of a member State's liability is the margin of discretion left to it in implementing Community law obligations. Only in cases where the member State is bound, by a Community decision, to act in a certain way can the Community be held liable for the resulting damage. These rules are of course only applicable under Community law, even though the issues at stake may relate to the implementation of international obligations, as in the case of the implementation of United Nations sanctions (case T–184/95).[43]

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[32] *Ibid*., *1994*, para. 29.

[33] *Ibid*., *1982*, para. 13.

[34] *Ibid*., *1987*, paras. 9–11.

[35] See footnote 29 above.

[36] *European Court Reports 2002* (see paragraph 20 above).

[37] Opinion pursuant to Article 228(6) of the EC Treaty (Competence of the Community to conclude international agreements concerning services and the protection of intellectual property: Article 228(6) of the EC Treaty), *ibid*., *1994*, p. I-5420, para. 108.

[38] Case C–370/89, *Société Générale d'Entreprises Électro-Mécaniques (SGEEM) and Roland Etroy* v. *European Investment Bank, ibid., 1992*, p. I-6238, para. 15.

[39] Case 18/60, *Louis Worms* v. *High Authority of the European Coal and Steel Community* (12 July 1962), *European Court Reports*, p. 204.

[40] Case 9/69, *Claude Sayag and S.A. Zurich* v. *Jean-Pierre Leduc, Denise Thonnon and S.A. La Concorde*, *ibid*., *1969*, p. 336, para. 11.

[41] *Krohn & Co. Import-Export (GmbH & Co. KG)* v. *Commission of the European Communities*, *ibid*., *1986*, paras. 18–23.

[42] *Industrie- en Handelsonderneming Vreugdenhil BV* v. *Commission of the European Communities*, *ibid*., *1992*, para. 15.

[43] *Dorsch Consult Ingenieurgesellschaft mbH* v. *Council of the European Union and Commission of the European Communities*, *ibid*., *1998*, paras. 74–88.

2. International Atomic Energy Agency

1. IAEA responsibility for acts committed by the wrongful conduct of its officials, agents or other persons acting on its behalf, as far as IAEA is aware, has been considered only in the context of the development of the structure and content of the comprehensive safeguards agreements in connection with the Treaty on the Non-Proliferation of Nuclear Weapons. This includes a paragraph 17, which states:

> The Agreement should provide that any claim by one party thereto against the other in respect of any damage, other than damage arising out of a nuclear incident, resulting from the implementation of safeguards under the Agreement, shall be settled in accordance with international law.[1]

2. At the time, a note by the Director General was prepared, entitled "The international responsibility of the Agency in relation to safeguards" (GOV/COM.22/27 of 24 June 1970), taking substantive account of the then available reports on State responsibility by the Special Rapporteur(s) of the Commission.

3. The subject of the note was the international responsibility of the Agency in the context of responsibility for damage arising out of the application of safeguards under the Treaty on the Non-Proliferation of Nuclear Weapons. The note outlines:

(*a*) The Agency's safeguards activities from which damage might arise;

(*b*) Some of the legal considerations which appear to be relevant to a discussion of the Agency's responsibility; and

(*c*) A number of clauses relating to responsibility, proposed for insertion into safeguards agreements.

[1] IAEA, *The Structure and Content of Agreements between the Agency and States required in connection with the Treaty on the Non-Proliferation of Nuclear Weapons* (INFCIRC/153 of June 1972).

3. International Monetary Fund

1. State responsibility rules on attribution that deal with acts of external entities are of limited, if any, relevance to international organizations. IMF knows of no case in which the act of an external entity has been attributed to IMF and, in its view, no act of an entity external to IMF could be attributable to IMF unless an appropriate IMF organ ratified or expressly assumed responsibility for that act.

2. The second specific question relates to the rules of attribution by which IMF might be held responsible for the wrongful acts of officials, agents or other persons acting on its behalf. In one case IMF has taken the position that it will defend its officials and assert immunities when an official is sued in his official capacity for actions performed by him or other officials in an official capacity. The case of *Kissi* v. *de Larosière*[1] was a civil law suit initiated in 1982 before the United States District Court for the District of Columbia. The plaintiff (who had never been employed by IMF) sued the IMF Managing Director, claiming that he had been wrongfully denied a position at IMF and was discouraged from reapplying. The Court dismissed the suit for lack of jurisdiction because of IMF immunity and the immunity of the Managing Director as an official of IMF acting in his official capacity, therefore without IMF having to take a position on the substance of the matter.

3. The IMF view is that the criteria used for determining whether or not the acts of an IMF official would be attributable to IMF should be consistent with the criteria used to determine whether or not the conduct of IMF officials constituted acts performed by them in their official capacity to which the IMF immunities would apply (art. IX, sect. 8 of the IMF Articles of Agreement). The Policy statement on immunity of Fund officials, dated 28 June 2002,[2] indicates how IMF would ensure that the immunity of IMF officials is respected; the principle which underlies the statement is that IMF will assert immunities in respect of acts performed by an official in an official capacity. Accordingly, IMF considers that only acts of officials performed in their official capacity would be attributable to IMF.

4. Note, also, in this regard that for the purposes of the statement it is the IMF Managing Director who would determine whether the arrest or detention of an IMF official was made for acts performed in an official capacity and, accordingly, whether the IMF immunities would be involved. IMF notes furthermore, first, that IMF would take steps pursuant to its own rules against any member which did not respect immunities or comply with obligations ancillary to those immunities and, secondly, that article XXIX of the IMF Articles of Agreement arising between any member of IMF and IMF itself, or between members of IMF; any such issue must be determined by the IMF internal organs. (A disagreement between IMF and a member which has withdrawn, or between IMF and any member of IMF during IMF liquidation, would be submitted to arbitration.)

5. Concerning the subsidiary issue of what is covered by acts performed by officials in their official capacity, so long as an official was found to be acting in his official capacity, his acts would be attributable to the organization. Attribution may apply even though the official exceeds the authority given to him, he failed to follow rules or he was negligent. However, acts of an official that were not performed in his official capacity would not be attributable to the organization. IMF has not dealt with a situation in which a third party claimed that he believed that an official was acting in his official capacity when he was not, but that the third party was misled to the belief by misrepresentations of the official.

6. To the best of the Fund's knowledge, IMF has not had a case in which there was a claim that a member State was legally responsible for the acts of the organization.

7. Please note that IMF does not understand this question as including situations in which allegations have

[1] No. 82–1267 (D.D.C.).

[2] See the annex to the present report, attachment No. 71.

been made that one or more States have influenced decisions or actions taken by IMF and, thus, were responsible for influencing, but were not legally responsible for, the organization's actions.

4. World Health Organization

1. Concerning the rules of attribution of wrongful conduct, WHO does not have explicit rules specifically concerning the attribution to the organization of conduct by statutory or other organs, or by officials or experts acting on behalf of the organization. The constitutional provisions concerning the authority and competence of the various organs, the Staff Regulations and Staff Rules, as well as the arrangements whereby experts on mission are appointed, guide on a general basis the determination of which conduct is attributable to WHO.

2. WHO would like, however, to draw the attention of the Commission to a particular arrangement which leads to the attribution to WHO of the conduct of another international organization. The case in question is that of the Pan American Health Organization (PAHO), previously the Pan American Sanitary Organization, the health organization of the inter-American system. PAHO, like other regional sanitary bureaux, predates the establishment of WHO, which raised during the 1946 International Health Conference the issue of the relationship between the two organizations. Whereas other regional structures were absorbed into the new organization, an unusual arrangement was agreed upon concerning PAHO. Article 54 of the WHO Constitution provides in relevant part that "The Pan American Sanitary Organization represented by the Pan American Sanitary Bureau and the Pan American Sanitary Conferences ... shall in due course be integrated with the Organization". As a step towards integration, WHO and PAHO concluded an agreement in 1949 whereby the Pan American Sanitary Conference, through the Directing Council, and the Pan American Sanitary Bureau, would serve respectively as the Regional Committee and the Regional Office of the World Health Organization for the Americas. PAHO thus acts at the same time as a component of both the United Nations and the inter-American systems. On the basis of that arrangement, acts of PAHO and of its staff could engage the responsibility of WHO.

3. As a result of the foregoing, it may be stated that WHO has, on a contractual basis, accepted that the conduct of a separate organization such as PAHO be considered as conduct of WHO. Even though PAHO formally remains a separate organization and may thus act in that capacity rather than as a regional organization of WHO, the fact that its decisions and activities do not normally introduce that distinction leads to a generalized attribution of its conduct to WHO.[1]

[1] See the annex to the present report, attachment No. 90.

5. World Trade Organization

WTO does not have in place any rules of attribution under which WTO may be held responsible for the wrongful conduct of its officials, agents or other persons acting on its behalf, regardless of the source of the violated rule.

I. Practice regarding claims filed against an international organization for violations of international law

1. International Atomic Energy Agency

No claims have been made against the Agency alleging violations of international law.

2. International Monetary Fund

1. IMF has never had to take a position in court in response to an alleged violation by it of international law. However, in 1998, the Korean Federation of Bank and Financial Labor Unions (KFBFLU) brought a complaint against IMF before the Seoul District Court claiming that it had suffered damages due to the policies implemented by the Government of the Republic of Korea pursuant to the arrangement between it and IMF. IMF asserted its immunities and the Court dismissed the complaint on that basis.[1] KFBFLU unsuccessfully appealed that decision to the Seoul High Court, which rejected the appeal.[2]

2. In addition, IMF has received reports that it was named as a defendant in a lawsuit commenced by a trade union organization in Romania which complained that IMF imposed economic policies that impoverished Romanians.[3] In this matter IMF was neither served nor presented with court documents. IMF understands that the Romanian court objected, on its own motion, to taking jurisdiction.

3. Please note that, in preparing its response to the Commission's enquiry, IMF has disregarded employment cases that are subject to IMF grievance processes and the jurisdiction of the IMF Administrative Tribunal, as well as the few contentious matters that have involved allegations of a breach of IMF internal administrative law, or contractual disputes, between IMF and personnel or vendors. IMF has done so because none of these matters would be responsive to the Commission's enquiry. IMF has also disregarded the occasional correspondence it has received in which an individual or company, for itself or purportedly for the benefit of others, seeks payments for various types of perceived personal or public wrongs and injuries; generally these matters have no rational basis and are typically rejected by correspondence.

[1] See the annex to the present report, attachment No. 68.
[2] *Ibid*., No. 69.
[3] *Ibid*., No. 70.

3. Multinational Force and Observers

1. MFO is a small organization which has been fortunate through the years in generally avoiding disputes with contributing States or in settling any matters that do arise without formal international claims being lodged. However, MFO has been the responding party in two international claims potentially relevant to the study.

2. Both of these international claims were based on provisions in the MFO participation agreements with contributing countries, not on customary international law. Like the United Nations, MFO concludes participation

agreements with the countries that provide its troops and certain large items of equipment. These are international agreements, viewed by MFO and by the participating countries concerned as binding under public international law. The details of these agreements have varied somewhat from country to country and over time. They typically contain a provision requiring MFO to reimburse the contributing country for sums it pays out under its national legislation or regulations in cases of death or disability of its service members on MFO duty. In addition, a few agreements with the contributing countries that provide major capital equipment for MFO (aircraft or ships) also include a provision making MFO responsible for damage to or loss of that equipment when any such damage or loss occurs while the property is being utilized for MFO purposes.

3. Each of these types of clause has given rise to a significant claim by a contributing country against MFO. Both claims were ultimately settled by means of settlement agreements between the claimant State and MFO. An unusual feature of MFO practice is to purchase commercial insurance as a risk management tool. With both claims, such insurance played a role in helping to fund the settlements, neither of which required exceptional requests for additional funds from the MFO fund-contributing States.

4. Information regarding both of these claims against MFO has been published in the MFO annual reports and in notes to the MFO financial reports, all of which are publicly available documents.

(a) *The United States Gander air crash claim against MFO*

5. The circumstances of this claim and of its resolution are briefly summarized in the auditors' note to the 1992 MFO financial statements, as follows:

> On December 12, 1985, an Arrow Air, Inc., "Arrow" DC-8 aircraft, chartered to the MFO, crashed at Gander, Newfoundland, Canada. The crash took the lives of 248 U.S. military personnel who had completed duty with the MFO in the Sinai and eight crew members.
>
> As a result of the crash, the MFO became involved in the following legal proceedings:
>
> (1) United States Government
>
> The MFO acknowledged liability to the United States Government for reimbursement of claims for certain expenses arising out of the death of the American servicemen aboard the aircraft which crashed at Gander, and other matters, based on the contractual arrangements under which U.S. Government participation in the MFO is defined. [NOTE: the "contractual arrangements" referred to in this auditors' note are the provisions in the USA-MFO participation agreement requiring reimbursement of certain amounts paid out due to death or disability on MFO duty, as described above]
>
> On May 3, 1990, the United States Government executed a settlement agreement settling the amount and manner of payment of these claims. The Agreement calls for the payment of $19,678,100, to be made no later than November 15, 1990.
>
> Payment was effected on 13 November 1990, settling the claim in full.

6. The United States Government has included the United States–MFO settlement agreement in its *Treaties and Other International Acts Series* as TIAS 11899.[1]

7. The settlement agreement includes a provision stating that MFO entered into the agreement with the authorization of Egypt and Israel. (Under the Protocol relating to the establishment of a Multinational Force and Observers,[2] the expenses of the organization not covered by other sources are borne equally by Egypt, Israel and the United States.) MFO annual reports indicate that the settlement was funded by funds derived from settlements of United States litigation, interest on settlement proceeds and funds from current operations. Egypt and Israel agreed to make a special pledge of additional funds if required for the settlement, but those funds were not required and the related "special pledge receivable" on the MFO financial statements was extinguished without the funds being requested.

8. In addition to the international claim against MFO described above, the Arrow crash involved MFO in extensive litigation in United States domestic courts, both as plaintiff and defendant. That litigation is not relevant for purposes of the present study and will not be discussed here.

(b) *Canada's helicopter claim against MFO*

9. This second claim against MFO was based on the second participation agreement provision noted above, that establishing MFO responsibility for damage or destruction of capital equipment provided to MFO if the damage or loss occurs while the equipment is being utilized for MFO purposes.

10. The origins of this claim were described in the notes to several years' MFO financial statements as follows:

> In December 1989 a Canadian CH–135 helicopter assigned to the MFO crashed and its crew was injured near El Gorah, Egypt, sometime after a test flight. The MFO is of the opinion that no uninsured material liability to the organization will result from this matter.

11. The crash led to considerable discussion between Canada and MFO regarding the circumstances of the accident and whether the aircraft was being utilized for MFO purposes at the time, as required by the participation agreement. Canada presented a formal claim for damage to the aircraft against MFO in 1992, followed in 1994 by a second claim for Canada's expenses related to two crewmen injured in the crash.

12. Then came a substantial period without any active discussion of the issue. Communications resumed in 1999. In response to Canada's recalculation of its claim, MFO proposed a global settlement in order to bring the matter to a mutually agreeable end. The MFO proposal was accepted by Canada, a formal claims settlement agreement was concluded in November 1999 and payment

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[1] Agreement between the United States of America and the Multinational Force and Observers, effected by exchange of notes (Rome, 3 May 1990).

[2] Signed in Washington, D.C., on 3 August 1981, United Nations, *Treaty Series*, vol. 1335, No. 22403, p. 327.

was made in December 1999. MFO maintained insurance cover on the value of the helicopter; the proceeds of that insurance provided the funds ultimately used to settle the matter.

4. Organisation for the Prohibition of Chemical Weapons

1. Apart from cases brought against OPCW by its staff members for alleged violation of their terms of appointment, in one form or another, OPCW has not been the subject of a claim alleging violation of international law. This, of course, is not to suggest that such claims are not foreseeable.

2. Even though there have as yet been no claims filed against the organization for violation of international law, the OPCW secretariat has examined the possibility of the organization being liable for acts or omissions of its officials to member States, to third parties and to staff members. This is part of a study on OPCW prepared for publication in 2000.[1]

[1] See the annex to the present report, attachment No. 78.

5. Organization of American States

1. The Legal Counsel's letter stated that the Commission is interested in receiving information from selected intergovernmental organizations as to the position they have taken in response to any claims made against them alleging violations of international law. OAS is aware that, in recent years, such claims have arisen against several international organizations in the context of peacekeeping operations involving the use of military personnel. Happily, however, OAS is unaware of any such claims having been formally lodged against OAS or its General Secretariat involving violations of international law of that nature.

2. The area in which OAS has had to respond to claims alleging violation of international law is labour relations. Indeed, the organization's decision to establish an Administrative Tribunal in 1971 was, in part, based on the need to provide a forum for adjudicating those claims consistent with international standards of due process and additional standards established by ILO.[1]

3. The majority of claims presented to the OAS Administrative Tribunal allege violations of the OAS General Standards, other resolutions of the OAS General Assembly, violations of rules promulgated by the Secretary General pursuant to his authority under the OAS Charter, and violations of rules established by the Tribunal itself in its jurisprudence. Those standards and rules, having been adopted by duly constituted international authorities, all constitute international law. Thus, the complaints claiming violations of those norms and rules may be characterized as alleging violations of international law.[2]

[1] See OAS resolutions AG/RES. 35 (1-O/71) of 22 April 1971; and AG/RES. 1318 (XXV-0/95) of 8 June 1995.

[2] All of the OAS Administrative Tribunal's judgements can be accessed on the Internet at www.oas.org.

4. Few of the complaints before the OAS Administrative Tribunal, however, and even fewer of the judgements, expressly cite conventions, treaties and general principles of "international law". Nonetheless, there have been exceptions. For example, in *Valverde* v. *Secretary General*,[3] the plaintiff alleged that his human right to freedom of expression, under article 13 of the American Convention on Human Rights: "Pact of San José, Costa Rica", had been violated when he had been summarily dismissed for having made derogatory remarks about the Secretary General to the broadcast media. The Tribunal concluded that because the staff member had not under the staff rules or otherwise in his employment contract expressly agreed to waive that right, the secretariat should not have sanctioned him for his remarks. The Staff Rules have since been amended accordingly.[4]

5. In 1978, 1982 and again in 1994, the OAS Administrative Tribunal ordered the organization to pay millions of dollars in back salary to staff members in class action lawsuits alleging violation of salary policies then in force.[5] On each occasion, several member States initially challenged the authority of the Tribunal to take jurisdiction of those cases and argued, therefore, that the organization was not bound by those judgements. Nonetheless, because, in part, of the obligation under the OAS Charter to respect the rule of law and the right to compensation under final judgements set out in the American Convention on Human Rights: "Pact of San José, Costa Rica", the General Assembly voted to comply with those judgements. [6]

[3] OAS, *Judgments of the Administrative Tribunal, 1991–1997*, vol. III, addendum, judgment No. 125, p. 220.

[4] See staff rule 110.5 (footnote 2 above).

[5] See, for example, *Torres and others* v. *Secretary General*, judgement No. 124 (footnote 3 above); *Chisman* v. *Secretary General*, judgement No. 64 (1982); and *Bucholz* v. *Secretary General*, judgement No. 37, (1978).

[6] OAS resolutions AG/RES. 499 (X–O/80) of 27 November 1980; AG/RES. 632 (XII–0/82); AG/RES.1278 (XXIV–O/94) of 10 June 1994.

6. United Nations Development Programme

UNDP is pleased to confirm that it does not have any cases raising issues of violations of international law.

7. World Health Organization

With reference to the Commission's request for information and primary source materials illustrating WHO practice with respect to claims of violations of international law made against it, WHO wishes to inform the Commission that to its knowledge no such claims have ever been made against WHO. WHO is, therefore, not in a position to provide the Commission with information or materials in this respect.

8. World Trade Organization

After verification, WTO wishes to inform the Commission that no claim was ever made against WTO alleging violation of international law. This may be explained not only by the young age of the organization—it was established in 1995—but also by the nature of its tasks: WTO is

essentially a forum for negotiations and dispute resolution between its members.

J. Inclusion of diplomatic protection of nationals employed by an international organization in the draft articles

1. European Commission

1. The EC would seize the opportunity to comment on paragraph 28 (*b*) of the International Law Commission's report.[1] The Special Rapporteur announced he might want to deal with diplomatic protection of nationals employed by an international organization. If the topic were to be included in the draft, account should be taken not only of the diplomatic protection by the State of the official's nationality but also of the functional protection offered by the international organization. In its advisory opinion in the *Reparations for Injuries* case,[2] ICJ acknowledged that cases may occur in which the injury suffered by an agent of an international organization may engage the interest of both his national State and of the organization. The Court found that, in such a case, there is no rule of law which assigns priority to the one or to the other.[3] Indeed, it is hard to design an abstract rule which would offer appropriate guidance for all hypothetical cases.

2. For example, situations where harm is done against an official who carries out an international civil or military mission on behalf of an organization, but remains paid by the national State, would not lend themselves to easy solutions. In other cases, where harm is done against an official carrying out the core tasks of his organization, one may argue for a prerogative of the international organization to exercise functional protection. In such cases, a prerogative is justified by the need to ensure the functional independence of the international organization and its officials.[4]

3. The EC therefore does not take a position on the issue at this stage, but would be prepared to elaborate on it once the topic is dealt with by the International Law Commission in more detail.

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[1] *Yearbook … 2003*, vol. II (Part Two).

[2] *Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports 1949*, p. 174.

[3] *Ibid*., p. 185.

[4] The EC fully subscribes to the ICJ view which aptly expressed this need in the following way:

> "In order that the agent may perform his duties satisfactorily, he must feel that this protection is assured to him by the Organization, and that he may count on it. To ensure the independence of the agent, and, consequently, the independent action of the Organization itself, it is essential that in performing his duties he need not have to rely on any other protection than that of the Organization … In particular he should not have to rely on the protection of his own State. If he had to rely on that State, his independence might well be compromised."

(*Ibid*., p. 183).

Annex

LIST OF ATTACHMENTS TO THE COMMENTS AND OBSERVATIONS RECEIVED FROM INTERNATIONAL ORGANIZATIONS [a]

A. European Commission

1. Oral pleadings of the European Communities to the Panel on "European Communities: customs classification of certain computer equipment" (12 June 1997)

2. European Communities—customs classification of certain computer equipment: replies to the questions of the United States posed during the first substantive meeting of the Panel with the parties (20 June 1997)

3. Oral pleadings of the European Communities at the second substantial meeting of the Panel on "European Communities: customs classification of certain computer equipment" (10 July 1997)

4. WTO, European Communities—customs classification of certain computer equipment: report of the Panel (WT/DS62/R; WT/DS67/R; WT/DS68/R of 5 February 1998)

5. WTO, European Community programme of minimum import prices, licences and surety deposits for certain processed fruits and vegetables: report of the Panel adopted on 18 October 1978 (L/4687–25S/68)

6. WTO, EEC restrictions on imports of apples from Chile: report of the Panel, adopted on 10 November 1980 (L/5047–27S/98)

7. WTO, European Economic Community—restrictions on imports of dessert apples—complaint by Chile: report of the Panel adopted on 22 June 1989 (L/6491–36S/93)

8. WTO, Portugal—patent protection under the Industrial Property Act: request for consultations by the United States (WT/DS37/1; IP/D/3 of 6 May 1996); and notification of a mutually agreed solution (WT/DS37/2; IP/D/3/Add.1 of 8 October 1996)

9. WTO, Denmark—measures affecting the enforcement of intellectual property rights: notification of mutually agreed solution (WT/DS83/2; IP/D/9/Add.1 of 13 June 2001); and request for consultations by the United States (WT/DS83/1; IP/D/9 of 21 May 1997)

10. WTO, Sweden—measures affecting the enforcement of intellectual property rights: notification of mutually agreed solution (WT/DS86/2; IP/D/10/Add.1 of 11 December 1998); and request for consultations by the United States (WT/DS86/1; IP/D/10 of 2 June 1997)

11. WTO, Greece—enforcement of intellectual property rights for motion pictures and television programs: notification of mutually agreed solution (WT/DS125/2; IP/D/14/Add.1 of 26 March 2001); and request for consultations by the United States (WT/DS125/1; IP/D/14 of 7 May 1998)

12. WTO, European Communities—enforcement of intellectual property rights for motion pictures and television programs: notification of mutually agreed solution (WT/DS124/2; IP/D/13/Add.1 of 26 March 2001); and request for consultations by the United States (WT/DS124/1; IP/D/13 of 7 May 1998)

13. WTO, Ireland—measures affecting the grant of copyright and neighbouring rights: request for the establishment of a panel by the United States (WT/DS82/2 of 12 January 1998); and request for consultations by the United States (WT/DS82/1; IP/D/8 of 22 May 1997)

14. WTO, Ireland—measures affecting the grant of copyright and neighbouring rights; European Communities—measures affecting the grant of copyright and neighbouring rights: notification of mutually agreed solution (WT/DS82/3; WT/DS115/3; IP/D/8/Add.1; IP/D/12/Add.1 of 13 September 2002)

15. WTO, European Communities—measures affecting the grant of copyright and neighbouring rights: request for the establishment of a panel by the United States (WT/DS115/2 of 12 January 1998); and request for consultations by the United States (WT/DS115/1; IP/D/12 of 12 January 1998)

16. WTO, Minutes of meeting held in the Centre William Rappard, 22 January 1998 (WT/DSB/M/41 of 26 February 1998)

17. Commission of the European Communities, Legal Service, Written observations to the President and members of the European Court of Human Rights, in case No. 56672/00: *DSR SENATOR LINES GmbH* v. *15 member States of the European Union*

18. Oral statement and comments on the US response, presented by the Member States of the European Union, before the Council of the International Civil Aviation Organization under its Rules for the Settlement of Differences (document 7782/2): disagreement with the United States arising under the Convention on International Aviation done at Chicago on 7 December 1944 (Montreal, 15 November 2000)

19. Communication from the Deputy Secretary General of the Council of the European Union to the Secretary General of ICAO, concerning the joint defence of the 15 member States (Brussels, 24 July 2000)

20. Decision of the European Commission of Human Rights, Application No. 13258/87 by M. & Co. against the Federal Republic of Germany (9 February 1990)

21. Decision of the European Commission of Human Rights, Application No. 8030/77, *Confédération Française Démocratique du Travail* v. *the European Communities, alternatively their Member States (1) a) jointly*

[a] The attachments are on file with the Codification Division of the Office of Legal Affairs and available for consultation.

and b) severally (decision of 10 July 1978 on the admissibility of the application)

22. Council decision of 25 June 2002 concerning the conclusion, on behalf of the European Community, of the Cartagena Protocol on Biosafety (2002/628/EC); and annex B: Declaration by the European Community in accordance with article 34 (3) of the Convention on Biological Diversity

23. Council decision of 23 March 1998 concerning the conclusion of the Convention on Transboundary Effects of Industrial Accidents (98/685/EC); and annex II: Declaration by the European Community pursuant to article 29 (4) of the Convention on the Transboundary Effects of Industrial Accidents concerning competence

24. United Nations Convention on the Law of the Sea, annex IX; Council decision of 23 March 1998 concerning the conclusion by the European Community of the United Nations Convention of 10 December 1982 on the Law of the Sea and the Agreement of 28 July 1994 relating to the implementation of Part XI thereof (98/392/EC); and annex II: The European Community's instrument of formal confirmation

25. Council decision of 25 April 2002 concerning the approval, on behalf of the European Community, of the Kyoto Protocol to the United Nations Framework Convention on Climate Change and the joint fulfilment of commitments thereunder (2002/358/CE)

26. Council decision of 15 December 1993 concerning the conclusion of the United Nations Framework Convention on Climate Change (94/69/EC)

27. Council decision of 25 October 1993 concerning the conclusion of the Convention on Biological Diversity (93/626/EEC)

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80. Administrative and budgetary aspects of the financing of the United Nations peacekeeping operations—financing of the United Nations peacekeeping operations: reports of the Secretary-General (A/51/389 of 20 September 1996 (sect. II in particular) and A/51/903 of 21 May 1997); as well as General Assembly resolution 52/247 of 26 June 1998 on third-party liability, which established temporal and financial limitations on the liability of the Organization arising from peacekeeping operations (now incorporated in status of forces and status of mission agreements). It is important to note that the resolution was adopted without a vote (see *Official Records of the General Assembly, Fifty-second Session, Plenary Meetings*, 88th meeting).

81. With regard to the arbitration and settlement of claims of a private law nature against the Organization, reference should also be made to Procurement-related arbitration: report of the Secretary-General (A/54/458 of 14 October 1999)

82. A legal opinion addressed by the Legal Counsel on 23 February 2001 to the Controller, advising on the basis for the settlement and payment of claims against the Organization. This opinion discusses, among other things, the capacity of the Organization to incur obligations and liabilities of a private law nature, the procedures for settling such claims and the internal legal framework under the Financial Regulations and Rules of the United Nations

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DIPLOMATIC PROTECTION

[Agenda item 3]

DOCUMENT A/CN.4/538

Fifth report on diplomatic protection, by Mr. John Dugard, Special Rapporteur

[*Original: English*]
[*4 March 2004*]

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Multilateral instruments cited in the present report

	Source
Geneva Convention relative to the Protection of Civilian Persons in Time of War (Geneva, 12 August 1949)	United Nations, *Treaty Series*, vol. 75, No. 973, p. 287.
Protocol Additional to the Geneva Conventions of 12 August 1949 relating to the protection of victims of non-international armed conflicts (Protocol II) (Geneva, 8 June 1977)	*Ibid.,* vol. 1125, No. 17513, p. 609.
Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) (Rome, 4 November 1950)	*Ibid.,* vol. 213, No. 2889, p. 221.

Convention (No. 108) concerning Seafarers' National Identity Documents (Geneva, 13 May 1958)	*Ibid.,* vol. 389, No. 5598, p. 277.
Vienna Convention on Diplomatic Relations (Vienna, 18 April 1961)	*Ibid.,* vol. 500, No. 7310, p. 95.
Convention on offences and certain acts committed on board aircraft (Tokyo, 14 September 1963)	*Ibid.,* vol. 704, No. 10106, p. 2195.
International Convention on the Elimination of All Forms of Racial Discrimination (New York, 21 December 1965)	*Ibid.,* vol. 660, No. 9464, p. 195.
International Covenant on Civil and Political Rights (New York, 16 December 1966)	*Ibid.,* vol. 999, No. 14668, p. 171.
American Convention on Human Rights: "Pact of San José, Costa Rica" (San José, 22 November 1969)	*Ibid.,* vol. 1144, No. 17955, p. 123.
Convention (No. 147) concerning minimum standards in merchant ships (Geneva, 29 October 1976)	*Ibid.,* vol. 1259, No. 20690, p. 335.
African Charter on Human and Peoples' Rights (Nairobi, 27 June 1981)	*Ibid.,* vol. 1520, No. 26363, p. 217.
United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982)	*Ibid.,* vol. 1833, No. 31363, p. 3.
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Introduction[1]

1. The Special Rapporteur has submitted four reports to the International Law Commission on the diplomatic protection of natural and legal persons and the exhaustion of local remedies.[2] Those reports have covered all the topics traditionally associated with these subjects and proposed 22 draft articles. The Commission has thoroughly considered the reports and given its approval to 16 of the proposed articles. Six draft articles have been discarded by the Commission on the ground that they did not properly belong to the subject of diplomatic protection or were not ripe for codification.

2. In his third report, in 2002, the Special Rapporteur addressed suggestions that the draft articles should be expanded to include a number of matters that do not traditionally fall within the field.[3] At its fifty-fourth session, in 2002, the Commission accordingly considered whether it was desirable to include in the present draft articles provisions dealing with the functional protection by international organizations of their officials; the right of the State of nationality of a ship or aircraft to bring a claim on behalf of the crew, irrespective of the nationality of the individuals concerned; the delegation of the right of diplomatic protection; the protection of persons in a territory controlled, occupied or administered by another State or administered by an international organization; the denial of justice; the "clean hands" doctrine in the context of diplomatic protection; and the legal consequences of diplomatic protection.[4] The debate in the Commission revealed little support for the inclusion of those topics in the present draft articles, with the possible exception of

[1] The Special Rapporteur wishes to acknowledge, with gratitude, the assistance in the preparation of this report of the following student interns: Amanda Rawls and Elina Kreditor of New York University; Frank Riemann of the Kennedy School of Government, Harvard University; Megan Hirst of the University of Queensland; and Michael Vagias of Leiden University.

[2] *Yearbook … 2000*, vol. II (Part One), p. 205, document A/CN.4/506 and Add.1; *Yearbook … 2001*, vol. II (Part One), p. 97, document A/CN.4/514; *Yearbook … 2002*, vol. II (Part One), p. 49, document A/CN.4/523 and Add.1; *Yearbook … 2003*, vol. II (Part One), p. 3, document A/CN.4/530 and Add.1.

[3] *Yearbook … 2002*, vol. II (Part One), p. 55, document A/CN.4/523 and Add.1, para. 16.

[4] *Ibid.*, vol. II (Part Two), pp. 50–53, paras. 118–149.

the right of the State of nationality of a ship or aircraft to bring a claim on behalf of its crew.[5] The Commission did, however, express the view that consideration should be given to the relationship between functional protection by the United Nations and diplomatic protection by a State and the possibility of competing claims to protection.[6]

3. In the report on its fifty-fifth session, in 2003, the Commission requested the Sixth Committee of the General Assembly to make comments on the diplomatic protection of the members of a ship's crew by the flag State and the diplomatic protection by States of nationals employed by an intergovernmental international organization and to express an opinion on whether there were any issues other than those already covered by the Commission which ought still to be considered by the Commission on the subject of diplomatic protection.[7] The majority of speakers on those subjects in the Sixth Committee were opposed or indifferent to the inclusion of the diplomatic protection of members of a ship's crew by the flag State and the diplomatic protection by States of nationals employed by an intergovernmental international organization. However, there was sufficient interest in those topics to warrant their further consideration by the Commission. Apart from two States, which expressed an interest respectively in the inclusion of provisions on the delegation of the right of diplomatic protection (Czech Republic)[8] and the protection of persons in a territory controlled or occupied by another State or administered by an international organization (Portugal),[9] there was no request for the consideration of any additional subjects by the Commission on the subject of diplomatic protection. On the contrary, many delegations expressed the view that all the subjects traditionally belonging to the field of diplomatic protection had been covered and that it was incumbent on the Commission to conclude its study of the subject as soon as possible, and certainly within the remaining three years of the current quinquennium. Similar views have also been expressed by members of the Commission.

4. The present report will first address the issues of the protection of persons in a territory controlled or occupied by a State or administered by an international intergovernmental organization and the delegation or transfer of the right of diplomatic protection, which the Special Rapporteur believes should not be included in the present draft articles. The report will then make proposals dealing with the subject of competing claims to protection of an individual by an international organization and a State, and the protection of a ship's crew by the flag State.

[5] *Ibid*., p. 52, para. 146.

[6] *Ibid*., para. 145.

[7] *Yearbook … 2003*, vol. II (Part Two), p. 14, tparas. 28–29.

[8] *Official Records of the General Assembly, Fifty-eighth Session, Sixth Committee*, 17th meeting (A/C.6/58/SR.17), para. 48.

[9] *Ibid*., 18th meeting (A/C.6/58/SR.18), para. 3.

Chapter I

Protection by an administering State or international organization

5. The Commission carefully considered the question whether the present draft articles should include the protection of persons of a territory administered, controlled or occupied by another State or international organization at its fifty-fourth session, in 2002.[10] There was no support for the inclusion of such a right in the context of military occupation as this falls within the purview of international humanitarian law, and particularly the 1949 Geneva Convention relative to the Protection of Civilian Persons in Time of War and the 1977 Protocol Additional to that Convention relating to the protection of victims of non-international armed conflicts.[11] Although there was some support in the Commission for the consideration of the protection by an international organization of persons living in a territory which it administered or controlled, the majority of the Commission took the view that the topic was one that "might be better addressed in the context of the responsibility of international organizations".[12]

6. The diplomatic protection of persons resident in a territory under the protection of a State that does not exercise sovereignty over that territory is not without precedent in international law. Persons living in "protectorates",[13] mandates[14] or trust territories[15] have on occasion been given diplomatic protection by the administering Power, but this practice is limited,[16] dependent on the treaty or institutional relationship between the administering State and the administered State and, in any event, rests on the consent of the State against which such protection is to be exercised.[17] There is possibly precedent for the protection of persons resident in a territory administered by an international organization or agency—or claimed to be so administered[18]—but, again, the nature and scope of this

[10] *Yearbook … 2002*, vol. II (Part Two), pp. 51–52, paras. 133–136.

[11] There is authority for the view that a belligerent occupant does not have the obligation to afford diplomatic protection to the nationals of an occupied territory: *Compensation (Germany) Case* (1959), ILR, vol. 28, p. 648; *Slovak National Internment Case* (1970), *ibid.*, vol. 70, p. 691.

[12] *Yearbook … 2002*, vol. II (Part Two), p. 53, para. 148.

[13] Jennings and Watts, *Oppenheim's International Law*, pp. 266–274 (especially p. 270).

[14] *Ibid*., pp. 298–300.

[15] *Ibid*., pp. 316–318.

[16] *National Bank of Egypt* v. *Austro-Hungarian Bank*, *Annual Digest of Public International Law Cases, 1923–1924*, vol. 2 (1933), case No. 10, p. 23; *Falla-Nataf and Brothers* v. *Germany*, *ibid*., *1927–1928*, vol. 4 (1931), case No. 24, p. 44; *Parounak and Bedros Parounakian* v. *Turkish Government*, *ibid.* 1929–1930, vol. 5 (1935), case No. 11, p. 25; Schwarzenberger, *International Law*, pp. 378–381.

[17] Schwarzenberger, *op. cit*., pp. 378–381 and 592–595.

[18] The United Nations Council for South West Africa, established by the General Assembly in 1967 in its resolution 2248 (S-V) of 19 May 1967, issued travel and identity documents to Namibians, while South Africa remained in occupation of Namibia (see Engers, "The United Nations travel and identity document for Namibians"). No doubt the Council believed that the issuance of such a document carried with it some right of protection. The writer is not, however, aware of any case

protection will depend on the institutional arrangement between the administered territory, the administering Power and third States. There is thus no evidence, or too little evidence, of a general practice sufficient to warrant codification or progressive development. In any event, here this is a form of functional protection,[19] of the kind recognized in the *Reparation for Injuries*[20] case, which the Commission has decided does not belong to the present study on diplomatic protection.

in which such protection was provided. See also Daillier and Pellet, *Droit international public*, pp. 612–613, para. 394.

[19] Schwarzenberger, *op. cit*., p. 593.

[20] *Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports 1949*, p. 174.

Chapter II

Delegation of the right of diplomatic protection and the transfer of claims

7. There is a clear distinction between the delegation of the right of diplomatic protection and the transfer of claims. In the former case, one State (or group of States) delegates its right to exercise diplomatic protection on behalf of a national to another State. In the latter case, on the other hand, the injured person transfers his claim arising from the injury to another person, who may or may not be a national of the same State.

8. A State may delegate by means of an international agreement the right to protect its nationals abroad to another State.[21] Such an agreement may be entered into when a State has no diplomatic representation in a foreign country where many of its nationals reside;[22] or when a State falls under the "protectorate" of another State;[23] or, following the outbreak of hostilities, when a belligerent will usually hand over to a neutral State the protection of its nationals in an enemy State.[24] The best known example of such a delegation of the right of diplomatic protection today is to be found in article 8c of the Treaty on European Union (Treaty of Maastricht), which provides:

> Every citizen of the Union shall, in the territory of a third country in which the Member State of which he is a national is not represented, be entitled to protection by the diplomatic or consular authorities of any Member State, on the same conditions as the nationals of that State. Member States shall establish the necessary rules among themselves and start the international negotiations required to secure this protection.[25]

It is not clear whether this provision, or indeed other arrangements of this kind, contemplates diplomatic protection as this term is understood in the present draft articles, that is, action taken by a State in its own right arising from an injury to a national caused by the internationally wrongful act of another State[26]—or only consular action, that is, immediate assistance to a national in distress.[27] In any event, it is difficult to suggest that a third State which has not consented to the exercise of diplomatic protection by a European State of which the injured person is not a national could be bound in law to recognize the right of such a State to protect a non-national. It is, after all, the bond of nationality between protecting State and individual upon which diplomatic protection is founded.[28] The necessity for the consent of non-European States to the scheme proposed in article 8c of the Treaty of Maastricht is made clear in the article itself as it requires international negotiations "to secure this protection".[29] This is in line with the Vienna Convention on Diplomatic Relations, which provides that if diplomatic relations are broken off between two States, or if a mission is permanently or temporarily recalled, "the sending State may entrust the protection of … its nationals to a third State *acceptable to the receiving State*".[30]

9. There are no general rules on the subject of delegated diplomatic protection. Everything depends on the nature of the treaty or institutional relationship between the delegating State, the delegated State and the third State against which the claim for diplomatic protections is brought. This factor, coupled with the limited State practice on the subject, confirms that it is not a topic ripe for codification.

10. The transfer of a claim to diplomatic protection from one person to another may arise in different situations, of which succession on death, assignment and subrogation in the case of insurance are probably the most common. In such cases the rule of continuous nationality, contained in article 4 of the draft articles, applies.[31] This means that as long as the claim continuously belongs to a national of the

[21] Jennings and Watts, *op. cit.*, p. 936.

[22] Oppenheim cites the case of the protection of nationals of Western Samoa in terms of a 1962 Treaty of Friendship (*ibid*., footnote 2).

[23] See footnotes 13 and 16 above.

[24] See De Lupis, *The Law of War*, p. 323.

[25] Art. 20 of the Consolidated Version of the Treaty establishing the European Community. See generally on this provision, Stein, "Interim report on 'diplomatic protection under the European Union treaty'", pp. 277 *et seq*.

[26] See article 1 of the draft articles on diplomatic protection provisionally adopted by the Commission (*Yearbook … 2002*, vol. II (Part Two), p. 67, para. 280).

[27] See Stein, *loc. cit*., particularly pp. 278 and 289.

[28] See article 2 of the draft articles adopted by the Commission (footnote 26 above); and *Panevezys-Saldutiskis Railway, Judgment, 1939, P.C.I.J., Series A/B, No. 76*, p. 16.

[29] See Stein, *loc. cit*., pp. 280–281, 284 and 287. See also Borchard, *The Diplomatic Protection of Citizens Abroad or the Law of International Claims*, p. 472.

[30] Art. 45 (*c*); see also article 46.

[31] Jennings and Watts, *op. cit.*, p. 514; Brownlie, *Principles of Public International Law*, pp. 461–463; O'Connell, *International Law*, pp. 1049–1051. See also the resolution of the Institute of International Law at its 1965 session in Warsaw, *Annuaire de l'Institut de Droit International*, vol. II p. 269. Article 2 of the resolution on the national character of an international claim presented by a State for injury suffered by an individual reads:

> "When the beneficiary of an international claim is a person other than the individual originally injured, the claim may be rejected by the State to which it is presented and is inadmissible before the court seised of it unless it possessed the national character of the claimant State both at the date of injury and at the date of its presentation."

claimant State from the time of the injury until the presentation of the claim, a change in ownership of the claim will not affect the right of the claimant State to exercise diplomatic protection. As a consequence a claim would be *denied*:

(*a*) If the claim had been transferred from a national to a non-national of the claimant State during the critical period, i.e. if the claim had been "denationalized";[32]

(*b*) If the claim had only been transferred from a non-national to a national of the claimant State after the time of the injury,[33] i.e. if the claim had been "nationalized".

11. There is ample authority for the proposition that if the person on whose behalf a diplomatic claim was made dies, the claim can only rightfully be pursued further if the heir or legatee is of the same nationality as the deceased.[34] The same principle applies to the assignment of claims.[35] According to Brownlie:

> If during the critical period a claim is assigned to or by a non-national of the claimant state, the claim must be denied. However, assignment does not affect the claim if the principle of continuity is observed.[36]

12. Subrogation is the legal mechanism allowing the insurer to assume the rights of the insured and make a legal claim for the wrong inflicted. Once the insurer has paid the insured, it steps into the shoes of the person originally injured. The insured can no longer claim damages on his own behalf insofar as he has been compensated by the insurer.[37] In insurance subrogation situations, the principle of continuous nationality is only observed when both the insured and the insurer are nationals of the claimant State.[38] The claimant State cannot intervene on behalf of foreign insurers even if the insured had been its national.[39] Conversely, a State may not claim on behalf of a national insurance company that has insured foreign property because the claim did not belong to a national at the time of the injury. Although there are a few cases in which the claims of insurers of foreign property have been allowed,[40] it would seem that this was done on the basis of equity. In any event, these cases do not provide sufficient evidence of a derogation from the continuous nationality rule to constitute an exceptional rule.

13. As the transfer of claims is regulated by the continuous nationality rule, there is no need to consider further codification of this subject.

[32] Borchard, *op. cit*., p. 637.

[33] *Dobozy* claim, ILR, vol. 26 (1958–II), p. 345.

[34] *Stevenson* case (1903), UNRIAA, vol. IX (Sales No. 1959.V.5), p. 385; *Gleadell* claim (1929), *ibid*., vol. V (Sales No. 1952.V.3), p. 44; *Flack* claim, *ibid*., p. 61; *Eschauzier* claim (1931), *ibid*., p. 207; *Kren* claim (1951–1954), ILR, vol. 20, p. 233; *Perle* claim (1951–1954), *ibid*., vol. 21, p. 161; *Bogovic* claim, *ibid*., p. 156; *Hanover Bank* claim (1957), *ibid*., vol. 26 (1958–II), p. 334; *Friede* claim (1956), *ibid*., p. 352; *Ruchwarger* claim (1959), *ibid*., vol. 30, p. 215.

[35] *Perle* claim (see footnote 34 above); *Dobozy* claim, ILR, vol. 26 (1958–II), p. 345; *First National City Bank of New York* claim (1957), *ibid*., p. 323; *Batavian National Bank* claim, *ibid*., p. 346.

[36] *Op. cit*., p. 462.

[37] See Whiteman, *Damages in International Law*, p. 1320.

[38] *The Home Insurance Company (U.S.A.)* v. *United Mexican States*, UNRIAA, vol. IV (Sales No. 1951.V.1), p. 48. There is, however, authority for the view that the insurer should bear the risks in the contemplation of the policy and therefore not qualify for protection: *The Eagle Star and British Dominions Insurance Company (Limited) and Excess Insurance Company (Limited)* (*(Great Britain)* v. *United Mexican States*) (1931), *ibid*., vol. V (Sales No. 1952.V.3), p. 142.

[39] See O'Connell, *op. cit*., p. 1051; and Hackworth, *Digest of International Law*, vol. V, p. 810.

[40] See the cases involving the ships *Caldera*, *Circassian* and *Mechanic* described in Whiteman, *Damages* …, pp. 1320–1328.

Chapter III

Protection by an international organization and diplomatic protection

A. Introduction

14. The relationship between protection by an intergovernmental organization of an agent of that organization (sometimes described as functional protection) and diplomatic protection has been raised on several occasions in debates in the Commission on the subject of diplomatic protection. The question that must now be addressed is whether—and, if so, to what extent and how—this relationship should be addressed in the draft articles on diplomatic protection. Several articles are proposed below for the consideration of the Commission which seek to cover all the issues arising from this relationship. It may well be that savings clauses of the kind proposed in draft articles 23–24 are unnecessary. On the other hand, a provision such as article 25 is probably necessary in order to take cognizance of the relationship between protection by an international organization and diplomatic protection.

"Part Four

"PROTECTION BY AN INTERNATIONAL ORGANIZATION AND DIPLOMATIC PROTECTION

"Article 23

"These articles are without prejudice to the right of an international organization to exercise protection in respect of an agent injured by the internationally wrongful act of a State.

"Article 24

"**These articles are without prejudice to the right of a State to exercise diplomatic protection against an international organization.**

"Article 25

"**These articles are without prejudice to the right of a State to exercise diplomatic protection in respect of a national who is also an agent of an international organization [where that organization is unable or unwilling to exercise functional protection in respect of such a person].**"

B. Article 23

These articles are without prejudice to the right of an international organization to exercise protection in respect of an agent injured by the internationally wrongful act of a State.

15. In its advisory opinion in the *Reparation for Injuries* case[41] ICJ held that the United Nations was "an international person", which meant "that it is a subject of international law and capable of possessing international rights and duties, and that it has capacity to maintain its rights by bringing international claims".[42] The Court reasoned that:

> In order that the agent may perform his duties satisfactorily, he must feel that this protection is assured to him by the Organization, and that he may count on it. To ensure the independence of the agent, and, consequently, the independent action of the Organization itself, it is essential that in performing his duties he need not have to rely on any other protection than that of the Organization (save of course for the more direct and immediate protection due from the State in whose territory he may be). In particular, he should not have to rely on the protection of his own State. If he had to rely on that State, his independence might well be compromised, contrary to the principle applied by Article 100 of the Charter. And lastly, it is essential that—whether the agent belongs to a powerful or to a weak State; to one more affected or less affected by the complications of international life; to one in sympathy or not in sympathy with the mission of the agent—he should know that in the performance of his duties he is under the protection of the Organization. This assurance is even more necessary when the agent is stateless.
>
> Upon examination of the character of the functions entrusted to the Organization and of the nature of the missions of its agents, it becomes clear that the capacity of the Organization to exercise a measure of functional protection of its agents arises by necessary intendment out of the Charter.[43]

The Court concluded by holding

> [t]hat, in the event of an agent of the United Nations in the performance of his duties suffering injury in circumstances involving the responsibility of a Member State, the United Nations as an Organization has the capacity to bring an international claim against the responsible *de jure* or *de facto* government with a view to obtaining the reparation due in respect of the damage caused to the United Nations [and] … to the victim or to persons entitled through him.[44]

16. The opinion of ICJ was approved by the General Assembly in its resolution 365 (IV) of 1 December 1949 and has been followed, albeit by necessary implication only, by the Court in other advisory opinions[45] and by the ILO Administrative Tribunal in *Jurado* v. *International Labour Organization (No. I)*.[46] The practice of the United Nations in asserting claims in respect of its agents wrongfully injured by States further testifies to the acceptance of the Court's opinion.[47]

17. Although there are similarities between functional protection and diplomatic protection, there are also important differences. Diplomatic protection is a mechanism designed to secure reparation for injury to the national of a State premised on the principle that an injury to a national is an injury to the State itself. Functional protection, on the other hand, is a method for promoting the efficient functioning of an international organization by ensuring respect for its agents. Differences of this kind have prompted both the Commission[48] and the Sixth Committee[49] to conclude that protection of an agent by an international organization does not belong in a set of draft articles on diplomatic protection. There are many unanswered questions relating to functional protection, of which the following are perhaps the most important: which agents of an international organization qualify for protection?[50] To which international organizations does it apply? To the United Nations only or to all intergovernmental organizations?[51] Does it apply only to injuries incurred in the course of official duties?[52] Is there an obligation on an international organization to

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[41] *I.C.J. Reports 1949* (see footnote 20 above).

[42] *Ibid*., p. 179.

[43] *Ibid*., pp. 183–184.

[44] *Ibid*., p. 187.

[45] *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations, Advisory Opinion, I.C.J. Reports 1989*, pp. 195–196; *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, I.C.J. Reports 1999*, especially pp. 84–85, paras. 50–51, and p. 88, paras. 63–64.

[46] ILR, vol. 40 (1970), pp. 296 and 301.

[47] See the report of the Secretary-General on reparation for injuries incurred in the service of the United Nations (A/1347 of 5 September 1950); on status of claims for injuries incurred in the service of the United Nations (A/1851 of 10 August 1951; A/2180 of 12 September 1952); see also *Official Records of the General Assembly, Fifth Session, Supplement No. 1* (A/1287), annual report of the Secretary-General on the work of the Organization, pp. 124–125; *ibid*., *Sixth Session* (A/1844), pp. 188–189; *ibid*., *Seventh Session* (A/2141), pp. 160–161; *ibid*., *Eighth Session* (A/2404), pp. 144–145; *ibid*., *Ninth Session* (A/2663), pp. 101–102; *ibid*., *Tenth Session* (A/2911), p. 109; *Yearbook ... 1967*, vol. II, document A/CN.4/L.118 and Add.1 and 2, "The practice of the United Nations, the specialized agencies and the International Atomic Energy Agency concerning their status, privileges and immunities: study prepared by the Secretariat", pp. 218–219; Seyersted, "United Nations forces: some legal problems", pp. 424–426; Bowett, *United Nations Forces*, p. 243; annual reports of the Director of UNRWA: 1 July 1955–30 June 1956 (A/3212), annex G, para. 17; 1 July 1956–30 June 1957 (A/3686), annex H, para. 8; 1 July 1957–30 June 1958 (A/3931), annex H, para. 5; 1 July 1958–30 June 1959 (A/4213), annex H, para. 7; Brownlie, *op. cit*., pp. 654–655; draft resolution on financing of the United Nations Force in Lebanon (A/51/725/Add.1 of 11 June 1997), para. 8; General Assembly resolution 51/233 of 13 June 1997, para. 8; see also the following General Assembly resolutions urging Israel to comply: 52/337 of 26 June 1998; 53/227 of 8 June 1999; 54/267 of 15 June 2000; 55/180 A of 19 December 2000; 55/180 B of 14 June 2001; 56/214 A of 21 December 2001); 56/214 B of 27 June 2002; and 57/325 of 18 June 2003.

[48] *Yearbook … 2002*, vol. II (Part Two), p. 50, para. 122, and p. 52, para. 145.

[49] Speakers in the Sixth Committee debate on the Commission's report in both 2002 and 2003 have made this clear.

[50] See the individual opinion by Judge Azevedo in *Reparation for Injuries* (footnote 20 above), pp. 193–195; and Hardy, "Claims by international organizations in respect of injuries to their agents", pp. 522–523.

[51] Brownlie, *op. cit*., pp. 654–655. See also the dissenting opinions by Judges Hackworth and Badawi Pasha in *Reparation for Injuries* (footnote 20 above), pp. 200 and 210 respectively; Pescatore, "Les relations extérieures des Communautés européennes: contribution à la doctrine de la personnalité des organisations internationales", pp. 218–219; and Schermers and Blokker, *International Institutional Law*, p. 1184, para. 1857.

[52] Hardy, *loc. cit*., pp. 521 and 523.

protect its agents?[53] Must the injured agent first exhaust local remedies?[54] May functional protection be exercised against the State of nationality of the injured agent?[55]

18. Protection of an agent by an international organization is inherently different from diplomatic protection. Moreover, there are so many uncertainties relating to this form of protection that it is difficult to discern any clear customary rules on the subject. In these circumstances it seems best to exclude the subject from the present study and to make this clear in a savings clause along the lines of article 23. The Commission may wish to express an opinion as to whether functional protection belongs in the study on the responsibility of international organizations. In many respects the subject enjoys the same relationship to the responsibility of international organizations as diplomatic protection enjoys to the responsibility of States. This would seem to indicate that there may be a case for a separate study on this topic.

C. Article 24

These articles are without prejudice to the right of a State to exercise diplomatic protection against an international organization.

19. The question whether a State may exercise diplomatic protection against an international organization on behalf of a national was not addressed by ICJ in *Reparation for Injuries*, although it was of concern to individual judges.[56] In 1962, Ritter wrote that this was one of the least explored areas of international law.[57] Forty years later, Wellens commented that Ritter's "observation is still valid today as state practice is rare and case law has not yet explicitly addressed the point of such an exercise being practicable".[58]

20. Clearly this is a subject related to diplomatic protection. The rules governing nationality will apply, although it may be necessary to make some modification to the rules on dual nationality where a person is a national of the claimant State and an agent of the defendant international organization. Whether the rules relating to exhaustion of local remedies will apply is not so certain, as is evidenced by the different views on this subject advanced by scholars.[59] Despite the closeness of this subject to diplomatic protection, it seems that it is one that belongs to the Commission's study on the responsibility of international organizations as it will largely be concerned with issues of attribution, responsibility and reparation. Moreover, the present draft articles are mainly concerned with diplomatic protection from the perspective of the claimant State—that is, the circumstances in which claims may be brought—and not from that of the defendant State. Inevitably a study of diplomatic protection against an international organization would focus attention on the question whether—and, if so, how—such protection might be exercised against a non-State entity with a legal personality defined by its own constitution rather than customary international law. In these circumstances it is suggested that this matter be considered in the study on the responsibility of international organizations. Whether it requires mention in a savings clause of the kind suggested in draft article 24 is highly doubtful.

D. Article 25

These articles are without prejudice to the right of a State to exercise diplomatic protection in respect of a national who is also an agent of an international organization [where that organization is unable or unwilling to exercise functional protection in respect of such a person].

21. The question whether a State may exercise diplomatic protection in respect of a national who is an agent of an international organization is clearly one that belongs to the present study. This is apparent from debates in both the Commission[60] and the Sixth Committee.[61]

22. The concern of States for the right of diplomatic protection if the United Nations was permitted to bring claims on behalf of their nationals as agents of the Organization[62] was reflected in the question addressed to ICJ in the *Reparation for Injuries* advisory opinion. The General Assembly requested the Court, if it decided that the United Nations might bring a claim against a State with a view to obtaining reparation due in respect of damage caused to an agent, to advise on "how is action by the United Nations to be reconciled with such rights as may be possessed by the State of which the victim is a national?"[63]

23. In responding to this question ICJ acknowledged at the outset that injury to an agent of the United Nations

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[53] See the *Jurado* case (footnote 46 above), p. 301; Pescatore, *loc. cit*., p. 218; and Akehurst, *The Law Governing Employment in International Organizations*, pp. 99–100.

[54] Cançado Trindade, "Exhaustion of local remedies and the law of international organizations", pp. 82–83; Eagleton, "International organization and the law of responsibility", pp. 351–352; Hardy, *loc. cit*., p. 526; Amerasinghe, *Principles of the Institutional Law of International Organizations*, pp. 440–441, and *Local Remedies in International Law*, pp. 372–373.

[55] ICJ answered this question in the affirmative in *Reparation for Injuries* (see footnote 20 above), p. 186. *Sed contra*, see the dissenting opinion by Judge Krylov, *ibid*., p. 218.

[56] See, for example, the dissenting opinion by Judge Krylov, *I.C.J. Reports 1949* (footnote 20 above), p. 219.

[57] "La protection diplomatique à l'égard d'une organisation internationale", p. 427. See also pages 454–455.

[58] *Remedies against International Organisations*, p. 74.

[59] Eagleton, *loc. cit*., pp. 411–412; Wellens, *op. cit*., pp. 76–78; Cançado Trindade, *loc. cit*., pp. 83–85; Amerasinghe, *Local Remedies ...*, pp. 373–377; Schermers and Blokker, *op. cit.*, pp. 1184–1185, para. 1858; Gramlich, "Diplomatic protection against acts of intergovernmental organs", p. 398; Ritter, *loc. cit*.

[60] *Yearbook … 2002*, vol. II (Part Two), p. 50, para. 123.

[61] In both the 2002 and 2003 debates in the Sixth Committee on the report of the Commission, support was expressed for the consideration of this topic. See in particular the interventions of Morocco (*Official Records of the General Assembly, Fifty-seventh Session, Sixth Committee*, 21st meeting (A/C.6/57/SR.21), para. 20), the Islamic Republic of Iran (*ibid*., para. 28), Portugal (*ibid*., 24th meeting (A/C.6/57/SR.24), para. 12) and Algeria (*ibid*., 26th meeting (A/C.6/57/SR.26), para. 39) in 2002; and Germany (*ibid*., *Fifty-eighth Session, Sixth Committee*, 14th meeting (A/C.6/58/SR.14), para. 61), the Republic of Korea (*ibid*., 16th meeting (A/C.6/58/SR.16), para. 81), Japan (*ibid*., para. 86) and Portugal (*ibid*., 18th meeting (A/C.6/58/SR.18), para. 2) in 2003.

[62] See the statements in the Sixth Committee in the debate preceding the adoption of the request for an advisory opinion: *Yearbook of the United Nations, 1948–49* (United Nations publication, Sales No. 1950. I.11), pp. 936–938; and *Official Records of the General Assembly, Part I, Third Session, Sixth Committee*, 112th–121st meetings, pp. 518–610.

[63] *I.C.J. Reports 1949* (see footnote 20 above), p. 175.

(who was not a national of the defendant State) might give rise to "competition between the State's right of diplomatic protection and the Organization's right of functional protection".[64] The Court continued:

> In such a case, there is no rule of law which assigns priority to the one or to the other, or which compels either the State or the Organization to refrain from bringing an international claim. The Court sees no reason why the parties concerned should not find solutions inspired by goodwill and common sense, and as between the Organization and its Members it draws attention to their duty to render 'every assistance' provided by Article 2, paragraph 5, of the Charter.
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> Although the bases of the two claims are different, that does not mean that the defendant State can be compelled to pay the reparation due in respect of the damage twice over. International tribunals are already familiar with the problem of a claim in which two or more national States are interested, and they know how to protect the defendant State in such a case.
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> The risk of competition between the Organization and the national State can be reduced or eliminated either by a general convention or by agreements entered into in each particular case. There is no doubt that in due course a practice will be developed, and it is worthy of note that already certain States whose nationals have been injured in the performance of missions undertaken for the Organization have shown a reasonable and co-operative disposition to find a practical solution.[65]

The Court then turned to the problem that might arise when the agent was a national of the defendant State. Here the Court stated:

> The ordinary practice whereby a State does not exercise protection on behalf of one of its nationals against a State which regards him as its own national, does not constitute a precedent which is relevant here. The action of the Organization is in fact based not upon the nationality of the victim, but upon his status as agent of the Organization. Therefore it does not matter whether or not the State to which the claim is addressed regards him as its own national, because the question of nationality is not pertinent to the admissibility of the claim.
>
> In law, therefore, it does not seem that the fact of the possession of the nationality of the defendant State by the agent constitutes any obstacle to a claim brought by the Organization for a breach of obligations towards it occurring in relation to the performance of his mission by that agent.[66]

The Court concluded:

> When the United Nations as an Organization is bringing a claim for reparation of damage caused to its agent, it can only do so by basing its claim upon a breach of obligations due to itself; respect for this rule will usually prevent a conflict between the action of the United Nations and such rights as the agent's national State may possess, and thus bring about a reconciliation between their claims; moreover, this reconciliation must depend upon considerations applicable to each particular case, and upon agreements to be made between the Organization and individual States, either generally or in each case.[67]

24. The failure of ICJ to give clear guidelines on how competing claims of functional protection and diplomatic protection might be reconciled troubled dissenting judges[68] and speakers in the Sixth Committee debate on the opinion.[69] However, no clear proposals were made for achieving such a reconciliation apart from negotiation between interested parties and the possibility of a general convention on the subject.[70] That *ad hoc* negotiation was seen to offer the best solution to the problem was confirmed by both the report of the Secretary-General on the advisory opinion[71] and the subsequent General Assembly resolution on the opinion, which authorized "the Secretary-General to take the steps and to negotiate in each particular case the agreements necessary to reconcile action by the United Nations with such rights as may be possessed by the State of which the victim is a national".[72] It is interesting to recall that Soviet-bloc speakers in the Sixth Committee strongly rejected the Court's opinion on the ground that it undermined the sovereign right of a State to protect its nationals.[73]

25. Essentially, there are four issues concerning the relationship between functional protection and diplomatic protection that warrant consideration and that were before ICJ in the *Reparation for Injuries* advisory opinion:

(*a*) The possibility of multiple claims;

(*b*) The right of the United Nations to bring a claim on behalf of an agent against the State of nationality of the agent;

(*c*) The question whether it is possible to distinguish clearly between functional protection and diplomatic protection;

(*d*) The priority of claims.

26. Multiple claims do not present a serious problem. As ICJ observed in *Reparation for Injuries*,[74] this is not a new phenomenon, but one that international tribunals have had experience in dealing with in the context of competing claims for diplomatic protection involving dual nationals. The important principle to apply here is

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[64] *Ibid*., p. 185.

[65] *Ibid*., pp. 185–186.

[66] *Ibid*., p. 186.

[67] *Ibid*., p. 188.

[68] See the opinions of Judges Azevedo, *ibid*., pp. 193–195, and Krylov, *ibid*., pp. 217–218.

[69] See *Official Records of the General Assembly, Fourth Session, Sixth Committee*, 183rd–187th meetings.

[70] *Ibid*., 183rd meeting, p. 277, Mr. Maktos (United States of America).; *ibid*., Mrs. Bastid (France); *ibid*., 184th meeting, p. 280, Mr. Fitzmaurice (United Kingdom); *ibid*., pp. 284–285, Mr. Mattar (Lebanon).

[71] *Ibid*., *Annex*, document A/955, "Reparation for injuries incurred in the service of the United Nations: advisory opinion of the International Court of Justice and report of the Secretary-General". Paragraph 21 of the report states:

> "Subject to the General Assembly's approval, the Secretary-General proposes to adopt the following procedure: Determine which of the cases appear likely to involve the responsibility of a State; consult with the Government of the State of which the victim was a national in order to determine whether that Government has any objection to the presentation of a claim or desires to join in submission; present, in each such case, an appropriate request to the State involved for the initiation of negotiations to determine the facts, and the amount of reparations, if any, involved. In the event of differences of opinion between the Secretary-General and the State concerned which cannot be settled by negotiation, it would be proposed that the differences be submitted to arbitration. The arbitral tribunal would be composed of one arbitrator appointed by the Secretary-General, one appointed by the State involved, and a third to be appointed by mutual agreement of the two arbitrators, or, failing such agreement, by the President of the International Court of Justice."

[72] Resolution 365 (IV), para. 2.

[73] See footnote 69 above: Mr. Koretsky (USSR), 183rd meeting, p. 278; Mr. Krajewski (Poland), 184th meeting, pp. 279–280; Mr. Gottlieb (Czechoslovakia), *ibid*., p. 286. See also Mitrofanov, *Officials of International Organizations*, p. 48.

[74] *I.C.J. Reports 1949* (see footnote 20 above), p. 185, quoted in paragraph 23 above. See also Kudriavtzev, *Course on International Law*, p. 79.

that there should be no duplication of payments of damages by the defendant State—a principle endorsed by both the Court[75] and by the Secretary-General in his report on the implementation of the advisory opinion.[76] The draft articles on claims in respect of multiple nationals[77] make no mention of this obvious principle. There seems to be no good reason, therefore, why it should be included in a provision on competing claims between functional and diplomatic protection.

27. The ICJ decision in *Reparation for Injuries*[78] in favour of the right of an international organization to bring a claim on behalf of an agent against his State of nationality was seen as a departure from general principle[79] largely because at that time, as acknowledged by the Court, it was not an accepted rule of customary international law that one State of nationality might bring a claim on behalf of a dual national against another State of nationality. Now that it is accepted that such a claim may be brought where the nationality of the claimant State is predominant,[80] this aspect of the Court's opinion is in line with the principles of diplomatic protection. There is no need to make special mention of this matter in a draft article for two reasons: first, because the principle accords with article 6 of the present draft articles; secondly, because any attempt to expound a principle of predominance of connection with an international organization would involve an examination of the employment practices and appointment of agents by the organization in question—a matter that does not belong in the present study.

28. Probably the most effective way of reconciling claims of functional protection and those of diplomatic protection would be to draw up guidelines that clearly identify the type of agents to which functional protection may apply and to further identify the parameters of the functions that qualify for such protection. Having determined who qualifies as an agent and which actions qualify as official functions for the purposes of functional protection, it would then be possible to confine functional protection within clearly demarcated boundaries. Persons and actions falling within these boundaries would qualify for functional protection only while those falling outside would qualify for diplomatic protection. In this way competition between the two regimes would be eliminated—completely reconciled. In practice, however, it is not so easy to draw a clear distinction between the two regimes along these lines.

29. The ICJ decision in *Reparation for Injuries* does not give clear guidelines on this subject. On the question of who is an agent, the Court states that it

> understands the word 'agent' in the most liberal sense, that is to say, any person who, whether a paid official or not, and whether permanently employed or not, has been charged by an organ of the Organization with carrying out, or helping to carry out, one of its functions—in short, any person through whom it acts.[81]

On the question of the type of functions that attract protection, it must be recalled that in *Reparation for Injuries* the Court was concerned with an injury incurred directly in the course of the agent's duties. This was emphasized by Mr. Kerno, arguing on behalf of the United Nations, who stressed that the United Nations did not seek a general right of claims-espousal on behalf of its officials but only a limited right in respect of injuries incurred during service.[82] The Court accordingly approached the question before it on the presupposition

> that the injury for which the reparation is demanded arises from a breach of an obligation designed to help an agent of the Organization *in the performance of his duties*.* It is not a case in which the wrongful act or omission would merely constitute a breach of the general obligations of a State concerning the position of aliens; claims made under this head would be within the competence of the national State and not, as a general rule, within that of the Organization.[83]

That the Court had only the official duties of the agent in mind was further clear from its statement that

> the Organization may find it necessary, and has in fact found it necessary, to entrust its agents with important missions to be performed in disturbed parts of the world. Many missions, from their very nature, involve the agents in unusual dangers to which ordinary persons are not exposed.[84]

While the Court's opinion may be interpreted as authority for the proposition that the United Nations has the right of protection where a staff member is injured while performing his official duties, but not where the injury occurs in the course of some private activity,[85] it fails to consider the outer limits of official duties.

30. That the term "agent" is open to different interpretations was emphasized by Judge Azevedo in his individual opinion in *Reparation for Injuries*. In his view "agent" included officials or experts appointed directly by the Organization, regardless of nationality, but not representatives of Member States, or experts appointed having regard to their nationality.[86] According to this interpretation, would "agent" include a special rapporteur appointed directly by the United Nations, regardless of nationality, but not members of the Commission elected by the General Assembly in elections in which geographical distribution is a relevant factor? This question illustrates the uncertainty attached to the term "agent".

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[75] *I.C.J. Reports 1949* (see footnote 20 above), p. 186, quoted in paragraph 23 above.

[76] A/955 (see footnote 71 above), para. 23.

[77] Arts. 5 and 7.

[78] *I.C.J. Reports 1949* (see footnote 20 above), p. 186.

[79] See the comment by Judge Krylov in *Reparation for Injuries* (footnote 20 above), p. 218. See also Boyars, *Citizenship in International and National Law*, p. 68.

[80] See article 6 in the present set of draft articles, *Yearbook … 2002*, vol. II (Part Two), p. 73, para. 280. See also Vereshchetin, *International Law*, p. 75.

[81] *I.C.J. Reports 1949* (see footnote 20 above), p. 177.

[82] *I.C.J. Pleadings, Reparation for Injuries Suffered in the Service of the United Nations*, p. 65.

[83] *I.C.J. Reports 1949* (see footnote 20 above), p. 182.

[84] *Ibid*., p. 183.

[85] Seyersted, *loc. cit*., p. 424; Amerasinghe, *Principles …*, p. 440. This interpretation of *Reparation for Injuries* was followed by the ILO Administrative Tribunal in the *Jurado* case (see footnote 46 above). See also Remiro Brotóns and others, *Derecho Internacional*, pp. 514–515.

[86] *I.C.J. Reports 1949* (see footnote 20 above), p. 195; see also the dissenting opinion by Judge Krylov, *ibid*., p. 218. Cf. Hardy, *loc. cit*., pp. 522–523, who suggests that there should be a "genuine connexion" between organization and agent. A similar suggestion was made by Portugal in the debate in the Sixth Committee in 2003 (*Official Records of the General Assembly, Fifty-eighth Session, Sixth Committee*, 18th meeting (A/C.6/58/SR.18), para. 2).

31. The limits to be placed on acts falling within the performance of official duties is even more controversial. Clearly there is a core of certainty, but there are many unresolved problems of the penumbra, to use the language of Fuller.[87] May the United Nations exercise functional protection where an agent's landlord, angered by failure to pay rent, bursts into his United Nations office and shoots him? Would it be different if the landlord killed him at home? Does functional protection extend to an injury to a United Nations official on paid vacation? Does it extend to a United Nations official on a special mission who is killed in a restaurant by terrorists not opposed to the United Nations but to the Government of the host State? Examples of this kind are legion. Hardy, after considering examples of this kind, and recalling the ICJ comment that "[w]hen the United Nations as an Organization is bringing a claim for reparation of damage caused to its agent, it can only do so by basing its claim upon a breach of obligations due to itself",[88] submits that:

> Although, therefore, the Opinion was only strictly concerned with claims in respect of injuries incurred during the performance of duty, it is suggested that it is in fact authority for the pursuit of claims on a less restricted basis, namely as a result of breaches of obligations due to the Organization itself, the objects of which are to safeguard the agent in the interests of the Organization.[89]

32. In the light of the uncertainties pertaining to the meaning of the term "agent" and of the scope of official duties, it seems unwise to draft a provision to the effect that functional protection may be exercised by an international organization in respect of injury to an agent incurred in the course of performing official duties and that all other injuries to such a person are to be the subject of diplomatic protection.[90] Not only would such a provision be flawed for reasons of uncertainty, it would also trespass on the field of functional protection which, it is generally agreed, belongs to another study.

33. The suggestion that the criterion to be employed in determining whether an international organization or the State of nationality should exercise protection is that of preponderance—whether the internationally wrongful act was preponderantly directed against the international organization or the State of nationality of the injured agent—is flawed for reasons similar to those advanced above. In penumbral situations of the kind described in paragraph 31 above, where it is unclear whether the agent is engaged in official duties at the time of the injury, it will not be possible to determine whether he was injured because he was an official of the international organization or because he was a national of a particular State. Indeed, in many such cases, he will be targeted for reasons unrelated to either his employment or his nationality.

34. A more helpful method of reconciling competing claims might be to give priority to functional protection where it conflicts with diplomatic protection. The foremost proponent of this view is Eagleton who, in his Hague lectures of 1950,[91] advanced the following reasons for according priority to a claim by the United Nations:

(*a*) It is important for the United Nations to be able to protect its agents. It is only because of the United Nations that the agent has been put at risk of harm, and as a result the United Nations should assume responsibility for the agent's protection. It is important for the Organization to be able to demonstrate to potential employees its willingness to offer protection, and this protection cannot be left to the State of nationality, which may not always be willing or able to provide competent protection.

(*b*) The State of nationality will often not be interested in pressing a claim and may "feel much happier if it were relieved of the burden"[92] of doing so, given the expense involved, the State's probable unfamiliarity with the circumstances of the case, and the possibility of souring its relations with the respondent State.

(*c*) The defendant State, particularly if a small State, will usually prefer to deal with the United Nations, rather than another (especially a more powerful or an aggressive) State.

(*d*) The individual agent will invariably prefer to have his or her claim made by the United Nations rather than his or her State of nationality. It will often be unclear whether the State of nationality will exercise diplomatic protection at all and, even if it does, how strongly it will advocate for the case of the individual, given political considerations. Moreover, smaller States in particular are unable to wield the same political power or achieve the same levels of publicity and sympathy as the United Nations.

(*e*) In the light of Article 100 of the Charter of the United Nations, which requires that United Nations staff act out of loyalty to the Organization and shun instructions from their State of nationality, the agent has a closer and more pertinent link to the United Nations than to his or her national State.

(*f*) International law requires a higher degree of diligence in protecting an official than for protecting a private individual.[93] For this reason the injured individual would prefer to have the United Nations, rather than its own State, press the claim.

(*g*) The United Nations "constitutes a whole more important than any of its parts".[94] Accordingly, by analogy with Article 103 of the Charter, the interests of the United Nations should prevail over those of a Member State in the case of conflict.

35. There is certainly substance in the arguments raised by Eagleton for a prior claim in favour of the United Nations. Whether these arguments apply with equal force to other international organizations is not so clear, as several of these arguments are founded in the Charter of the United Nations as a higher law. Moreover, there is no support for the principle of priority in the practice of the

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[87] "Positivism and fidelity to law: a reply to Professor Hart", p. 635.

[88] *I.C.J. Reports 1949* (see footnote 20 above), p. 188.

[89] *Loc. cit*., p. 520.

[90] A proposal to this effect was made by the Republic of Korea in the Sixth Committee in 2003 (*Official Records of the General Assembly, Fifty-eighth Session, Sixth Committee*, 16th meeting (A/C.6/58/SR.16), para. 81).

[91] *Loc. cit*., pp. 361–363.

[92] *Ibid*., p. 361.

[93] See further on this matter, Hardy, *loc. cit*., p. 517.

[94] Eagleton, *loc. cit*., p. 364.

United Nations. Despite this, the principle of priority for a claim of protection of an agent by an international organization is included in the bracketed part of article 25. The effect of this bracketed phrase is to give an international organization the opportunity first to assert its claim of functional protection against the wrongdoing State. The organization may be unable to do so for several reasons. For instance, the "agent" may not qualify for protection; the injurious act may have occurred outside the performance of duties; or the constitution of the organization may not recognize functional protection in general or in the particular circumstances of the case. In such a case, the residual right of the State of nationality of the agent will become effective if the national State decides to grant diplomatic protection. This residual right will also arise where, on the facts of the particular case, the organization decides, in the exercise of its discretion, not to provide protection. (Though it is uncertain whether this will be possible in the light of the authority for the view that there is a duty on the part of an organization to extend functional protection to an agent for injury suffered in the course of his official duties.)[95]

36. The Commission may prefer to adopt a provision that merely acknowledges the right of a State to exercise diplomatic protection where functional protection is also a possibility, by excluding the bracketed phrase in favour of the priority of functional protection. This would accord with the ICJ approach in *Reparation for Injuries*,[96] and the report of the Secretary-General following the rendering of that opinion,[97] that "there is no rule of law which assigns priority to the one [claim] or to the other" and leaves it to the "goodwill and common sense"[98] of the parties concerned to reconcile competing claims by negotiation and agreement. That there is merit in this pragmatic approach[99] is confirmed by the fact that, in practice, competing claims have been reconciled by negotiations[100] and, as far as the Special Rapporteur is aware, there is no recorded case in which a potential conflict between an international organization and State of nationality has materialized. On the other hand, it may be contended that without the principle of priority the provision adds little to existing law, restates the obvious and may therefore be omitted altogether.

[95] See the authorities cited in footnote 53 above.

[96] *I.C.J. Reports 1949* (see footnote 20 above), pp. 185–186 and 188.

[97] A/955 (see footnote 71 above). See also Remiro Brotóns and others, *op. cit*., p. 515.

[98] *I.C.J. Reports 1949* (see footnote 20 above), pp. 185–186.

[99] During the 2003 debate in the Sixth Committee on the report of the Commission, Germany made a pragmatic suggestion that incorporates the priority principle:

> "Regarding the conflict of competing rights to diplomatic protection between the State of nationality of the agent and the organization, a pragmatic approach should be adopted. As diplomatic protection deals with the right of a State or an international organization, Germany holds that the decisive criteria should be whether the internationally wrongful act is predominantly directed against the organization or the State of nationality of the acting agent. However, the less affected international person, be it the organization or the State, should be entitled to exercise the right of diplomatic protection if the most affected one is not capable or willing to exercise diplomatic protection."

(Summarized in *Official Records of the General Assembly, Fifty-eighth Session, Sixth Committee*, 14th meeting (A/C.6/58/SR.14), para. 61)

[100] See the report of negotiations entered into by the Secretary-General with France, Norway, Sweden and the United States before taking action in respect of the various deaths and injuries incurred in the Middle East in 1948: reports of the Secretary-General on reparation for injuries incurred in the service of the United Nations: A/1287, A/1851, A/1844 and A/2141 (footnote 47 above).

Chapter IV

Human rights, diplomatic protection and a general savings clause

A. Article 26

These articles are without prejudice to the right that a State other than a State entitled to exercise diplomatic protection or an individual may have as a result of an internationally wrongful act.

37. The first report on diplomatic protection submitted by the present Special Rapporteur in 2000 stressed that the customary international law rules on diplomatic protection that have evolved over several centuries, and the more recent principles governing the protection of human rights, complement each other and, ultimately, serve a common goal—the protection of human rights.[101] The present draft articles should therefore make it clear that they are not intended to exclude or to trump the rights of States other than the State of nationality of an injured individual to protect that individual under either customary international law or a multilateral or bilateral human rights treaty.

38. A State may protect a non-national against the State of nationality of an injured individual or a third State in inter-State proceedings under the International Covenant on Civil and Political Rights,[102] the International Convention on the Elimination of All Forms of Racial Discrimination,[103] the Convention against torture and other cruel, inhuman or degrading treatment or punishment,[104] the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights),[105] the American Convention on Human Rights: "Pact of San José, Costa Rica"[106] and the African Charter on Human and Peoples' Rights.[107] Similarly, custom-

[101] *Yearbook … 2000*, vol. II (Part One), document A/CN.4/506 and Add.1, particularly pp. 213–215, paras. 22–32. In paragraph 32, the Special Rapporteur stated that "diplomatic protection remains an important weapon in the arsenal of human rights protection".

[102] Art. 41.

[103] Art. 11.

[104] Art. 21.

[105] Art. 24.

[106] Art. 45.

[107] Arts. 47–54.

ary international law allows States to protect the rights of non-nationals by protest, negotiation and, if a jurisdictional instrument so permits, legal proceedings. The ICJ decision in the 1966 *South West Africa*[108] case holding that a State might not bring legal proceedings to protect the rights of non-nationals is today seen as bad law and was expressly repudiated by the Commission in its articles on State responsibility.[109] Moreover, article 48 of those articles permits a State other than the injured State to invoke the responsibility of another State if the obligation breached is owed to the international community as a whole.

39. The individual is also endowed with rights and remedies to protect itself against the injuring State, whether the individual's State of nationality or another State, in terms of international human rights conventions. A savings clause was inserted in the articles on State responsibility—article 33—to take account of this development in international law.

40. In these circumstances, it might be wise to include a savings clause in the present draft articles along the lines of article 26.

B. Alternative formulation for article 21

These articles are without prejudice to the rights of States or persons to invoke procedures other than diplomatic protection to secure redress for injury suffered as a result of an internationally wrongful act [that might also give rise to a claim for diplomatic protection by the State of nationality of the injured person].

41. In the debates in both the Commission[110] and the Sixth Committee on the proposal that a *lex specialis* clause be included in the present draft articles to exclude their application where the protection of corporations or their shareholders is governed by special rules of international law,[111] it was suggested that it might be preferable to include an omnibus "without prejudice" clause covering both bilateral investment treaties and human rights treaties. This would make it clear that the present draft articles are without prejudice to the existence and operation of other legal regimes governing the protection of persons, both natural and legal, or their property. The decision of the Commission to refer proposed article 21 on the subject of *lex specialis* to the Drafting Committee with a view to having it reformulated and located at the end of the draft articles, possibly, as a "without prejudice" clause,[112] was probably intended to achieve this goal. Whether it is desirable to include a general savings clause that embraces two such different alternative legal regimes to diplomatic protection as bilateral investment treaties and human rights treaties is questionable. However, such a clause might read as proposed above.

42. Such an omnibus savings clause would ensure that States, corporations and shareholders are entitled to invoke rights and remedies contained in bilateral investment treaties for the protection of foreign investment, without excluding their right to rely on principles of customary international law in the field of diplomatic protection that might support or complement their claim. At the same time it would allow both the State of nationality of an injured person and other States, as well as the injured person, to pursue remedies prescribed in international human rights conventions, again without exclusion of the right to use such principles of diplomatic protection that might assist the claimant. The phrase in square brackets is probably superfluous. It does, however, emphasize that procedures of the kind covered in this savings clause are complementary to diplomatic protection.

43. Diplomatic protection, bilateral investment treaties and human rights treaties are all mechanisms designed to protect persons who have suffered injury as a result of an internationally wrongful act. They are meant to complement and support each other in the pursuit of this goal. The present articles should make it clear that these regimes are not in competition or exclusive of each other. The proposed article, as reformulated, seeks to achieve this end.

[108] *South West Africa, Second Phase, Judgment, I.C.J. Reports 1966*, p. 6.

[109] *Yearbook ... 2001*, vol. II (Part Two), commentary to article 48, p. 127, footnote 725.

[110] *Yearbook … 2003*, vol. II (Part Two), pp. 31–33, paras. 124–139.

[111] *Ibid*., art. 21 of the proposed present draft articles, footnote 82.

[112] *Ibid*., para. 139.

Chapter V

Diplomatic protection of ships' crews by the flag State

Article 27

The State of nationality of a ship is entitled to exercise diplomatic protection in respect of the crew of the ship, irrespective of whether they are nationals of the State of nationality of the ship, when they have been injured in the course of an injury to the vessel resulting from an internationally wrongful act.

44. There is some support in the practice of States, as reflected in judicial decisions and in the writings of publicists, for the position that the State of nationality of a ship (the flag State) may protect members of the crew of the ship who do not have its nationality. There are also sound policy considerations in favour of such an approach.

45. State practice emanates mainly from the United States. Under American law foreign seamen have traditionally been entitled to the protection of the United States while serving on American vessels.[113] For protection purposes, the term "American seaman" included foreigners who regularly shipped on American vessels in a

[113] Borchard, *op. cit*., p. 475; O'Connell, *op. cit*., p. 1050.

United States port or in a foreign port if they declared their intent to become American citizens.[114] Once a foreign sailor thus acquired the character of an American seaman, he was able to reship in foreign ports without losing his rights and privileges under the laws of the United States.[115] The American view was that once a seaman enlisted on a ship, the only relevant nationality was that of the flag State.[116] In the *Ross* case, the United States Supreme Court applied this principle, holding that it had jurisdiction over a British subject serving on an American ship because:

> By … enlistment he becomes an American seaman—one of an American crew on board of an American vessel—and as such entitled to the protection and benefits of all the laws passed by Congress on behalf of American seamen, and subject to all their obligations and liabilities.[117]

The Court noted that although he was a British citizen, while serving on an American vessel he owed temporary allegiance to the United States and consequently could not expect protection from the British Government. He could, however, "insist upon treatment as an American seaman, and invoke for his protection all the power of the United States which could be called into exercise for the protection of seamen who were native born".[118] This unique status of foreigners serving on American vessels was consistently reaffirmed in diplomatic communications and consular regulations of the United States.[119] For instance, despite the Chinese exclusion acts, Chinese seamen were entitled to the same protection rights as American sailors so long as they served on American vessels.[120] In representations to the Government of China regarding injuries sustained by members of the crew of an American vessel, the United States Government stated that as seamen the crew members were entitled to the Government's protection irrespective of nationality.[121] The bombing of the American vessel *President Hoover* in the vicinity of Shanghai in 1937 caused the Department of State to instruct the United States Embassy at Nanking that "irrespective of nationality of surviving members of crew, they are, as American seamen on American vessel, regarded as entitled to this Government's assistance".[122] This practice was confirmed by the Department of State's General Instructions for Claimants, which provided that:

> The Government of the United States can interpose effectively through diplomatic channels only on behalf of itself, or of claimants (1) who have American nationality … or (2) who are otherwise entitled to American protection in certain cases (*such as certain classes of seamen on American vessels*, members of the military or naval forces of the United States, etc.). Unless, therefore, the claimant can bring himself within one of these classes of claimants, the Government can not undertake to present his claim to a foreign Government.[123]

46. That the practice of the United States provides evidence of a customary rule in favour of the protection of seamen by the flag State is open to question. In a seminal article on this subject written in 1958,[124] Watts contended that American practice was based on resistance to British claims during the Napoleonic wars of a right to stop foreign private vessels on the high seas and search them for deserters and those liable for military service in Britain. Consequently it "would appear to have originated in circumstances which make suspect its application in connection with nationality of claims".[125] In a communication dated 16 May 2003 addressed to the Commission, the United States Department of State associated itself with Watts' view, maintaining that its practice of providing diplomatic protection to crew members who hold the nationality of a third State "stemmed from U.S. opposition to British impressment of seamen on U.S-flag merchant vessels sailing on the high seas, especially during the Napoleonic Wars".[126] This historical explanation for the origin of United States practice, together with the failure of the United States to adhere consistently to this practice—as evidenced by the contrary position taken in the *S.S."I'm Alone"* case,[127] has led the Department of State to cast doubts upon the certainty of a customary rule allowing the State of nationality of a ship to protect third State crew members and to propose that the issue should be omitted from the present draft articles.

47. Although the United Kingdom has no basis in municipal law for making claims on behalf of alien seamen,[128] there is some support for the right to make such a claim in practice and case law. In 1804, Sir William Scott gave an opinion in which he appeared to assume that a foreign seafaring man who acquired a domicile in the United Kingdom thereby "assumes the character of a British Mariner" and became entitled to "all the advantages of British Protection and Navigation".[129] Moreover, in *The Queen* v. *Carr and Wilson* (1882), the Queen's Bench Division declared, in language similar to that of the United States Supreme Court in the *Ross* case, that:

> The true principle is, that a person who comes on board a British ship, where English law is reigning, places himself under the protection of the British flag, and as a correlative, if he thus becomes entitled to our law's protection, he becomes amenable to its jurisdiction, and li-

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[114] Borchard, *op. cit*., p. 475. An Act of 1870 provided:

> "Every seaman, being a foreigner, who declares his intention of becoming a citizen of the United States in any competent court ... shall, for all purposes of protection as an American citizen, be deemed such, after the filing of his declaration of intention to become such citizen."

(Sect. 2174 of the *Revised Statutes of the United States*; repealed and re-enacted in 1918 (40 Stat. 542); repealed in 1935 (49 Stat. 376))

[115] Hackworth, *op. cit*., vol. IV, p. 883.

[116] *Ross* case (1891), *United States Reports*, vol. 140, p. 453.

[117] *Ibid*., p. 472. See also Moore, *A Digest of International Law*, p. 797.

[118] *Ibid*.

[119] *Regulations Prescribed for the Use of the Consular Service of the United States* (Washington, D.C., Government Printing Office, 1888), sects. 171–172; Foreign Service Regulations of the United States (June 1941), quoted in Hyde, *International Law Chiefly as Interpreted and Applied by the United States*, p. 1180.

[120] See Moore, *A Digest …*, p. 798.

[121] Hackworth, *op. cit*., vol. IV, p. 884.

[122] *Ibid*., vol. III, p. 418.

[123] *Edward A. Hilson (United States)* v. *Germany* (1925), UNRIAA, vol. VII (Sales No. 1956.V.5), p. 177.

[124] "The protection of alien seamen".

[125] *Ibid.*, p. 708.

[126] This communication is on file with the Codification Division of the Office of Legal Affairs of the United Nations.

[127] UNRIAA, vol. III (Sales No. 1949.V.2), p. 1609. Discussed in paragraph 49 below.

[128] See the British Government's reply to the questionnaire of the Preparatory Committee for the Codification Conference for the Codification of International Law (The Hague, 1930), League of Nations, *Bases of Discussion for the Conference drawn up by the Preparatory Committee,* vol. III: *Responsibility of States for Damage caused in their Territory to the Person or Property of Foreigners* (C.75.M.69.1929.V), p. 206.

[129] McNair, *International Law Opinions*, p. 171.

able to the punishments it inflicts upon those who there infringe its requirements.[130]

48. International arbitral awards are inconclusive on the right of a State to extend diplomatic protection to non-national seamen, but tend to lean in favour of such right rather than against it. In *Francis McCready* v. *Mexico* the umpire, Sir Edward Thornton, held that "seamen serving in the naval or mercantile marine under a flag not their own are entitled, for the duration of that service, to the protection of the flag under which they serve".[131] (Both Schwarzenberger[132] and Watts[133] have suggested, however, that such a finding was unnecessary as there was evidence of the claimant's right to United States citizenship.) In *Richelieu (U.S.)* v. *Spain*, the Spanish Treaty Claim Commission made an award in favour of Richelieu, "a native of France, who, in 1872, declared his intention to become a citizen of the United States, and subsequently served as seaman and steward on American merchant vessels for more than twenty years".[134] (But, again, the value of this award is questioned by Watts, who contends that Richelieu had probably lost French nationality and *de facto* had become a United States national.[135]) In *Patrick Shields* v. *Chile*[136] and *Edward A. Hilson (United States)* v. *Germany*,[137] United States claims to an entitlement to protect aliens serving on United States vessels were dismissed, but mainly because the *compromis* in both cases expressly limited claims to United States citizens.[138]

49. In the *S.S. "I'm Alone"* case,[139] which arose from the sinking of a Canadian vessel by a United States coast-guard ship, the Canadian Government claimed compensation on behalf of three non-national crew members, asserting that where a claim was on behalf of a vessel, members of the crew were to be deemed, for the purposes of the claim, to be of the same nationality as the vessel.[140] Ironically, the United States contested Canada's right to claim on behalf of non-nationals. The Commission, without examining the issue of nationality, awarded compensation in respect of all three non-Canadian seamen.

50. In the *Reparation for Injuries* advisory opinion[141] two judges, in their dissenting opinions, went out of their way to approve the right of a State to exercise diplomatic protection on behalf of alien crew members. Judge Hackworth declared that:

> Nationality is a *sine qua non* to the espousal of a diplomatic claim on behalf of a private claimant. Aside from the special situation of protected persons under certain treaties and that of seamen and aliens serving in the armed forces, all of whom are assimilated to the status of nationals, it is well settled that the right to protect is confined to nationals of the protecting State.[142]

Judge Badawi Pasha interpreted the ICJ statement in this opinion that "there are important exceptions"[143] to the traditional nationality of claims rule "to relate to the protection of the flag …, in which case protection extends to everyone in the ship …, independent of nationality".[144]

51. There is not a wealth of literature on this subject and, as might be expected in the light of the practice and authorities discussed above, it is divided in its support for such a right. For instance, while Watts[145] and Schwarzenberger[146] doubt whether such a right exists, Brownlie,[147] Dolzer[148] and Meyers[149] support the existence of such a customary rule. Indeed Meyers, writing in 1967, states that he "does not know of any cases in which an international tribunal or Court took the ground that the flag state was not permitted to protect an alien member of the crew".[150]

52. In 1999, the International Tribunal for the Law of the Sea handed down its decision in the *M/V "Saiga" (No. 2)* case[151] which provides support, albeit not unambiguous, for the right of the flag State to protect non-national crew members.

53. The dispute in this case arose out of the arrest and detention of the *Saiga* by Guinea, while it was supplying oil to fishing vessels off the coast of Guinea. The *Saiga* was registered in Saint Vincent and the Grenadines and its master and crew were Ukrainian nationals. There were also three Senegalese workers on board at the time of the arrest. Following the arrest, Guinea detained the ship and crew. In 1997, the International Tribunal for the Law of the Sea, acting pursuant to article 292 of the United Nations Convention on the Law of the Sea (hereinafter UNCLOS), ordered the prompt release of the *Saiga* upon payment of a bond by Saint Vincent. Despite the posting of the bond, neither the *Saiga* nor its crew were released. Moreover, Guinea, which cited Saint Vincent as civilly liable, instituted criminal proceedings against the master and found him guilty. Saint Vincent subsequently began arbitral proceedings against Guinea protesting the continued detention of the *Saiga* and the legality of the master's prosecution. Meanwhile, the court of appeals in Guinea found the master guilty of illegal importation of fuel into Guinea and imposed a substantial fine and a suspended sentence of six months' imprisonment. Furthermore, the court ordered confiscation of the cargo

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[130] *Law Reports, Queen's Bench Division*, vol. X (1882–1883), p. 85. See also *R.* v. *Anderson* (1868), *All England Law Reports Reprint, 1861–1873*, p. 1000.

[131] Moore, *History and Digest of the International Arbitrations to which the United States has been a Party*, p. 2537.

[132] *Op. cit*., pp. 593–594.

[133] *Loc. cit*., p. 710.

[134] Cited by Watts, *loc. cit*., p. 694.

[135] *Ibid*., p. 710.

[136] Moore, *History and Digest …*, p. 2557.

[137] UNRIAA (see footnote 123 above), p. 176. See, however, the opinion of the American Commissioner in this case, who argued strongly in favour of a right to protect alien crew members (p. 178).

[138] Schwarzenberger, *op. cit*., p. 594.

[139] See footnote 127 above.

[140] See Fitzmaurice, "The case of the *I'm Alone*", pp. 91–92.

[141] *I.C.J. Reports 1949* (see footnote 20 above).

[142] *Ibid*., pp. 202–203.

[143] *Ibid*., p. 181.

[144] *Ibid*., pp. 206–207, footnote 1.

[145] *Loc. cit*., p. 711.

[146] *Op. cit*., p. 594.

[147] *Op. cit*., p. 460.

[148] "Diplomatic protection of foreign nationals", p. 1068. See also Geck, "Diplomatic protection", p. 1054.

[149] *The Nationality of Ships*, pp. 90–108.

[150] *Ibid*., p. 104.

[151] *M/V "Saiga"* case *(No. 2) (Saint Vincent and the Grenadines* v. *Guinea), Judgment, ITLOS Reports 1999*, p. 10. See also ILM, vol. XXXVIII, No. 5 (September 1999), p. 1323.

and seizure of the vessel in order to guarantee the payment of the fine. In 1998, the parties agreed to transfer the arbitral proceedings to the International Tribunal. The master and the crew, along with the ship, were released on 28 February 1998. Despite the agreement to transfer the proceedings to the Tribunal, Guinea objected to the admissibility of Saint Vincent's claim, *inter alia*, on the ground that the injured individuals were not nationals of Saint Vincent and had not exhausted local remedies. The Tribunal dismissed these challenges to the admissibility of the claim and held that Guinea had violated the rights of Saint Vincent by arresting and detaining the ship and its crew; confiscating the cargo, and prosecuting and convicting the master; violating the provisions of UNCLOS on hot pursuit of vessels; and using excessive force during the arrest. Finally, it ordered Guinea to pay compensation in the sum of US$ 2,123,357 to Saint Vincent for damages to the *Saiga* and for injury to the crew.

54. Although the International Tribunal for the Law of the Sea treated the dispute mainly as one of direct injury to Saint Vincent and the Grenadines,[152] the Tribunal's reasoning suggests that it also saw the matter as a case of diplomatic protection. Guinea clearly objected to the admissibility of the claim in respect of the crew on the ground that it constituted a claim for diplomatic protection in respect of non-nationals of Saint Vincent.[153] Saint Vincent, equally clearly, insisted that it had the right to protect the crew of a ship flying its flag "irrespective of their nationality".[154] In dismissing Guinea's objection, the Tribunal stated that UNCLOS, in a number of relevant provisions, including article 292, drew no distinction between nationals and non-nationals of the flag State.[155] It stressed that "the ship, every thing on it, and every person involved or interested in its operations are treated as an entity linked to the flag State. The nationalities of these persons are not relevant".[156] Finally, it indicated the reasons of policy in favour of such an approach. It stated that modern maritime transport was characterized by "the transient and multinational composition of ships' crews" and warned that "ships could have a crew comprising persons of several nationalities. If each person sustaining damage were obliged to look for protection from the State of which such person is a national, undue hardship would ensue".[157]

55. The International Tribunal for the Law of the Sea's reasoning in support of its dismissal of the objection of failure to exhaust local remedies is not unequivocal on the issue of diplomatic protection. First, the Tribunal held that Guinea had directly violated the rights of Saint Vincent and the Grenadines under UNCLOS with the result that local remedies need not be exhausted.[158] Then, it held that "even if … some of the claims made by Saint Vincent and the Grenadines in respect of natural or juridical persons did not arise from direct violations of the rights of Saint Vincent and the Grenadines",[159] there was no need to exhaust local remedies because there was "no jurisdictional connection between Guinea and the natural and juridical persons in respect of whom Saint Vincent and the Grenadines made claims".[160]

56. That the International Tribunal for the Law of the Sea treated the claims of Saint Vincent and the Grenadines as arising out of both *direct* injury to itself through injury to its ship and *indirect* injury stemming from unlawful treatment of the crew on board its ship is apparent from its decision on reparation, where it distinguished between "damage suffered directly" by Saint Vincent and "damage or other loss suffered by the *Saiga*, including all persons involved or interested in its operation", which comprised, *inter alia*, "injury to persons, unlawful arrest, detention or other forms of ill-treatment".[161] This distinction was confirmed by its assessment of compensation, where the Tribunal awarded compensation for both injury to the *Saiga* itself and injury to the crew arising out of unlawful detention and personal injury.

57. The inclusion of a provision recognizing the right of the flag State to exercise diplomatic protection on behalf of non-national crew members has been debated in both the Commission in 2002 (in an informal consultation)[162] and the Sixth Committee in 2002 and 2003 (in response to a request by the Commission for the expression of views on the subject). While the Commission was evenly divided on the subject, the majority of speakers in the Sixth Committee were opposed to its inclusion. In essence two reasons have been advanced against the inclusion of such a provision. First, the protection afforded by a rule of the kind contained in draft article 27 differs substantially from diplomatic protection in that it is not founded on nationality.[163] Secondly, protection of this kind is regulated by article 292 of UNCLOS. The first of these objections requires little discussion as it is readily conceded that traditional diplomatic protection is not of concern here. The question to be considered is whether this form of protection is sufficiently analogous to diplomatic protection to warrant inclusion in the same way that article 7 of the present draft articles provides for diplomatic protection of refugees and stateless persons. The second objection does, however, warrant closer attention.

58. It has been suggested in both the Commission and the Sixth Committee that the International Tribunal for the Law of the Sea in *M/V "Saiga" (No. 2)* based its decision on article 292 of UNCLOS rather than the right of the flag State to exercise protection on behalf of the whole crew, irrespective of nationality. Article 292 reads:

> 1. Where the authorities of a State Party have detained a vessel flying the flag of another State Party and it is alleged that the detaining State has not complied with the provisions of this Convention for the prompt release of the vessel or its crew upon the posting of a reasonable bond or other financial security, the question of release from detention

[152] ILM (see footnote 151 above), p. 1345, para. 98.

[153] *Ibid.*, p. 1346, para. 103.

[154] *Ibid*., para. 104.

[155] *Ibid*., para. 105.

[156] *Ibid*., p. 1347, para. 106.

[157] *Ibid*., para. 107.

[158] *Ibid*., p. 1345, para. 98.

[159] *Ibid*., para. 99.

[160] *Ibid*., p. 1346, para. 100. See also the separate opinions of Judges Wolfrum (*ibid*., pp. 1380–1382) and Warioba (*ibid*., p. 1434, para. 61).

[161] *Ibid*., p. 1357, para. 172.

[162] *Yearbook … 2002*, vol. II (Part Two), p. 11, para. 15.

[163] See Kamto, "La nationalité des navires en droit international", pp. 366–371, paras. 75–86.

may be submitted to any court or tribunal agreed upon by the parties or, failing such agreement within 10 days from the time of detention, to a court or tribunal accepted by the detaining State under article 287 or to the International Tribunal for the Law of the Sea, unless the parties otherwise agree.

2. The application for release may be made only by or on behalf of the flag State of the vessel.

3. The court or tribunal shall deal without delay with the application for release and shall deal only with the question of release, without prejudice to the merits of any case before the appropriate domestic forum against the vessel, its owner or its crew. The authorities of the detaining State remain competent to release the vessel or its crew at any time.

4. Upon the posting of the bond or other financial security determined by the court or tribunal, the authorities of the detaining State shall comply promptly with the decision of the court or tribunal concerning the release of the vessel or its crew.

59. Article 292 was included in response to the desire of delegations to include a safeguard procedural provision providing for the speedy release of crew and vessel.[164] It was initially proposed that the provision should protect not only the vessel, but detained members of the crew and passengers.[165] The informal working group on the settlement of disputes considered, but ultimately did not grant, the right to complain to the International Tribunal for the Law of the Sea directly to the owner or operator of the vessel, or to the members of the crew or passengers of the vessel.[166] The proposal for allowing individuals to bring the claims before the Tribunal was motivated by the ponderous nature of governmental mechanisms for dispute resolutions.[167] This proposal, however, was rejected and the right to bring claims before the Tribunal was restricted to the State of the ship's registry.[168] Moreover, the commentary to the article makes it clear that the right to complain is restricted to cases provided for in the substantive parts of UNCLOS and does not apply to all cases of detention, such as those in territorial waters.

60. Article 292 was thus not intended to cover the protection of crews in all cases. The article is largely a procedural mechanism designed to ensure the prompt release of the vessel for economic purposes. It may, however, be used as a mechanism to secure the prompt release of the crew as well as the vessel. This is illustrated by both the *M/V "Saiga" (No. 2)* and the *"Grand Prince"* cases.[169]

61. Article 292 is a useful mechanism for the release of the crew *in conjunction* with a request for the release of the vessel. However, it is not a substitute for the diplomatic protection of crews because there are numerous cases in which article 292 will not ensure their protection. Moreover, while the article may ensure the release of crews, it does nothing to ensure an internationally accepted standard of treatment while they are in custody. There are suggestions that the crew of the *Saiga* was maltreated while in detention.[170] It is not clear why this was not raised in the proceedings, but it is likely that this happened because the case was presented as a violation of the rights of the ship rather than a case about any violation of the human rights of crew members. There is, of course, nothing in article 292 which provides for the protection of human rights of the crew while in detention. In summary, article 292 does not cover all, or probably even most, cases in which ships' crews will be injured by an internationally wrongful act. There is therefore a need for a mechanism wider in scope than article 292 for the protection of ships' crews. Draft article 27 seeks to establish such a mechanism.

62. There are cogent policy reasons for allowing the flag State to exercise diplomatic protection in respect of a ship's crew. This was recognized by the International Tribunal for the Law of the Sea in *M/V "Saiga" (No. 2)* when it called attention to "the transient and multinational composition of ships' crews" and stated that large ships "could have a crew comprising persons of several nationalities. If each person sustaining damage were obliged to look for protection from the State of which such a person is a national, undue hardship would ensue".[171]

63. Many of today's ships' crews come from politically and economically weak States with undistinguished human rights records and little interest in the protection of their nationals who have lost close contact with their own States while employed on foreign ships and have suffered injuries in the service of foreign ships. It is true that sometimes the flag State will be a State that provides flags of convenience with little interest in the crews of the vessels which fly its flag. On the other hand, such flag States need to protect their reputation as providers of flags of convenience, and this may act as an incentive to protect foreign crew members. Certainly there will be more incentive to protect crew members in the case of such States than there will generally be for the State of nationality of crew members.

64. Crew members are closely linked with the flag State. They are subject to the criminal jurisdiction of the flag State and, in the words of the European Court of Justice, "it must be emphasized that the law governing the crew's activities does not depend on the nationality of the crew members, but on the State in which the vessel is registered".[172] Moreover, the flag State is obliged to afford proper labour conditions to all crew members[173] and to give them seafarers' identity documents enabling them to go onshore in ports of call.[174] In these circumstances it would seem appropriate for the flag State to be entitled to protect them when they are injured in the course of an injury resulting from an internationally wrongful act.

65. Practical considerations relating to the bringing of claims should not be overlooked. It is much easier and more efficient for one State to exercise protection on

[164] See Nordquist, *United Nations Convention on the Law of the Sea 1982: a Commentary*, p. 67.

[165] *Ibid.*

[166] *Ibid.*

[167] *Ibid.*, p. 68.

[168] *Ibid.*, p. 69.

[169] *ITLOS Pleadings, Minutes and Documents 2001, Vol. 7, "Grand Prince" (Belize* v. *France), Prompt Release*. See also Lazarev, *Contemporary International Law of the Sea*, p. 211.

[170] ILM (see footnote 151 above), p. 1358, para. 175.

[171] *Ibid.*, p. 1347, para. 107.

[172] *Anklagemyndigheden* v. *Peter Michael Poulsen and Diva Navigation Corp.*, judgement of 24 November 1992, case C–286/90.

[173] UNCLOS, art. 94, para. 3 (*b*); Convention (No. 147) concerning minimum standards in merchant ships, art. 2.

[174] Convention (No. 108) concerning Seafarers' National Identity Documents, art. 2.

behalf of all crew members than to require the States of nationality of all crew members to bring separate claims on behalf of their nationals. The multiplicity of claims was disapproved of by ICJ in the *Barcelona Traction* case[175] in respect of shareholders' claims. Similar considerations apply to ships' crews.

66. Allowing the flag State to exercise protection may result in the bringing of claims by both the flag State and the State of nationality of the members of a ship's crew. This remote possibility is not a problem as it resembles the protection of dual nationals covered by article 5 of the present draft articles.

67. The extension of diplomatic protection to ships' crews may give rise to claims for similar protection to ships' passengers, to crews and passengers on board aircraft and to the crews of spacecraft. It is submitted that neither policy considerations nor State practice support such an extension. Claims of this kind will, however, be briefly considered.

1. Passengers on board a ship

68. Although there is some support for the view that passengers on board a ship are entitled to the same protection as the crew,[176] it is submitted that there are important differences between crew and passengers which preclude such a conclusion. The rationale for extending protection to seamen rests to a substantial degree on the notion that by enlisting in the service of a merchant vessel the seaman temporarily subjects himself to the jurisdiction, laws and allegiance of the flag State. He thus acquires the character of a national and the corresponding right to the flag State's protection.[177] These protection rights are conferred solely because of the unique status of seamen and are strictly limited.[178] The same cannot be said of passengers, who have a more limited and transient connection with the ship. They must seek protection from their State of nationality. This is confirmed by the absence of State practice on the subject of protection of passengers by the flag State.

2. Aircraft crews and passengers

69. The analogy between a ship's crew and an aircraft's crew might suggest that the latter should likewise be protected by the State of registration of an aircraft. Support for such a position may be found in the Convention on offences and certain acts committed on board aircraft, which gives the State of registration the competence to exercise jurisdiction over acts committed on board the aircraft.[179] There is, however, a difference between jurisdictional competence and the right of diplomatic protection, and it is difficult to argue that such protection should be extended to aircraft crew in the absence of State practice. Furthermore, policy considerations do not support the extension of protection to aircraft crews. They are not isolated from their own State of nationality for many months or years, as are ships' crews. Moreover, they enjoy a status in society that renders it more likely that their State of nationality will, if necessary, protect them.

70. *A fortiori*, if the crew cannot be protected, passengers on board an aircraft should enjoy no protection. Support for this position is to be found in the Cathay Pacific incident of 1954,[180] in which the United States claimed compensation from China for the deaths of United States nationals who were passengers on board a British aircraft shot down by a Chinese military aircraft. The United States rejected the Chinese assertion that this was a matter to be settled by the United Kingdom and China through diplomatic channels.

71. Two recent calamities involving aircraft and their passengers may be thought to have some bearing on this subject. In both the Pan Am (*Lockerbie*)[181] and the UTA (Niger) cases claims were brought against the Libyan Arab Jamahiriya by victims' associations on behalf of the families of all those killed, irrespective of their nationality.[182] Although these claims were backed by the United States and France respectively, it is difficult to categorize them as examples of diplomatic protection. They are best seen as private claims brought by claimant associations supported by the State of nationality of the aircraft and the majority of the passengers and crew.

3. Spacecraft

72. Spacecraft resemble ships in terms of the multinational character of their crew and the length of time that the crew may be compelled to remain on board the spacecraft. Not surprisingly, there is no State practice in favour of protection of crew by the State of registration of the spacecraft. It would, however, be unwise at this stage to engage in progressive development of the law on this subject.

4. Conclusion

73. Draft article 27 serves to extend the principles of traditional diplomatic protection incrementally. It may be described as an exercise in codification rather than progressive development, as there is sufficient State practice

[175] *Barcelona Traction, Light and Power Company, Limited, Second Phase, Judgment, I.C.J. Reports 1970*, pp. 40–48. See also the dictum in the *M/V "Saiga" (No. 2)* case, ILM (footnote 151 above), p. 1347, para. 107.

[176] In *The Queen* v. *Carr and Wilson* (see footnote 130 above), Lord Coleridge stated, having found that an individual on board a British ship was amenable to British jurisdiction and protection regardless of his status: "I can draw no distinction between those who form part of the crew, those who come to work in or on the ship, those who are present involuntarily, or those who come voluntarily as passengers."

[177] See generally the *Ross* case (footnote 116 above); and *Edward A. Hilson* (*U.S.*) v. *Germany* (footnote 123 above).

[178] The right of protection does not, for instance, extend to the seaman's wife or immediate family: Moore, *A Digest* …, p. 800.

[179] Art. 3.

[180] Whiteman, *Digest of International Law*, pp. 534–535.

[181] *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United States of America), Order of 10 September 2003, I.C.J. Reports 2003*, p. 152.

[182] In the *Lockerbie* case (see footnote 181 above) it appears that most of the victims on board the Pan Am flight 103 in 1988 were of United States nationality. There were, however, 17 different nationalities involved in the shooting down of the UTA flight over Niger in 1989 (see *BBC News: Africa*, 9 January 2004; and Murphy, "Contemporary practice of the United States relating to international law: Libyan payment to families of Pan Am flight 103 victims").

to justify such a rule. It is not a bold provision, as it is limited to injuries to a foreign national sustained in the course of an injury to a ship and would not extend to injuries sustained by the foreign national on shore leave. It is moreover supported by sound policy considerations. It is therefore proposed that it should be adopted by the Commission. If, however, the Commission decides not to approve such a provision, it should adopt the following savings clause:

"These draft articles are without prejudice to the exercise of protection by the State of nationality of a ship [or aircraft] of the crew of such a ship [or aircraft], irrespective of whether the persons are its nationals."

Such a savings clause would at least ensure that the evolution of a customary rule on the protection of a ship's crew by the flag State is not prejudiced by the exclusion of such a rule from the present draft articles.

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)

[Agenda item 4]

DOCUMENT A/CN.4/540

Second report on the legal regime for the allocation of loss in case of transboundary harm arising out of hazardous activities, by Mr. Pemmaraju Sreenivasa Rao, Special Rapporteur

[*Original: English*]
[*15 March 2004*]

CONTENTS

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The Antarctic Treaty (Washington, D.C., 1 December 1959)	United Nations, *Treaty Series*, vol. 402, No. 5778, p. 71.
Protocol on Environmental Protection to the Antarctic Treaty (Madrid, 4 October 1991)	ILM, vol. XXX (1991), p. 1461.
Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water (Moscow, 5 August 1963)	United Nations, *Treaty Series*, vol. 480, No. 6964, p. 43.
1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (Brussels, 27 September 1968)	*Official Journal of the European Communities*, vol. 15, No. L 299 (31 December 1972), p. 32.
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Introduction[1]

1. It may be recalled that in his first report,[2] by way of summation and submissions, the Special Rapporteur identified some broad points, which, if agreed upon, could form the basis for drafting suitable principles governing the legal regime for the allocation of loss in case of transboundary harm arising out of hazardous activities. The International Law Commission, in the report on the work of its fifty-fifth session, in 2003, submitted to the General Assembly at its fifty-eighth session, also raised some specific questions soliciting the views of Member States to guide the future work of the Commission.[3]

2. States have since then offered a number of valuable comments on these issues and questions while participating in the debate within the Sixth Committee during the fifty-eighth regular session of the General Assembly, in 2003. A few States have also submitted comments separately. It would be useful to review the rich expression of views of States and draw some general conclusions before proceeding further. Such a summary appears in chapter I of the present report and the general conclusions of the Special Rapporteur are stated in chapter II. Chapter III concludes by offering some draft proposals for consideration, with brief explanatory notes.

[1] The Special Rapporteur is grateful to Alan Boyle, Professor of International Law, University of Edinburgh, and William Mansfield, member of the International Law Commission, for their valuable comments on earlier drafts. The Special Rapporteur, however, solely bears the responsibility for any errors or other deficiencies of the present report.

[2] *Yearbook … 2003*, vol. II (Part One), document A/CN.4/531, p. 102, paras. 150–153.

[3] *Ibid.*, vol. II (Part Two), pp. 14–15, para. 30.

Chapter I

Comments of States on the main issues concerning allocation of loss

A. General comments

3. Several delegations[4] welcomed the first report of the Special Rapporteur on the legal regime for allocation of loss in case of transboundary harm arising out of hazardous activities. The broad policy considerations underpinning the Special Rapporteur's conclusions and findings, including, most importantly, the basic consideration that to the extent feasible the victim should not be left to bear loss unsupported, were endorsed.[5]

4. With regard to the objective of the study, the new emphasis on "allocation of loss", for example, to the operator has made it possible to overcome the conceptual difficulties in delineating the contours of the topic, including separating it from State responsibility. Nevertheless, it was still deemed necessary to clarify and set out its implications in relation to traditional liability regimes, which are based on the concept of "damage".[6] Some delegations noted that the objective of liability regimes was not actually allocation of loss but allocation of the duty to compensate for damage deriving from acts not prohibited by international law.[7] Indeed, it was suggested that familiar terms such as "damage" and "compensation" should be employed.[8] It was also observed that "allocation of loss" appeared to deviate from the "polluter pays" principle and the principle that the innocent victim should not be left to bear the loss.[9] It was also felt that the main thrust of the mandate of the Commission was to address issues of liability and not issues concerning allocation of loss. However, given that the objective of the exercise is to address the loss to innocent victims, the difference between the two concepts—liability and allocation of loss—was considered to be not so very important.[10]

5. In developing any legal regime, emphasis was placed on the need for States to have sufficient flexibility to develop national or regional schemes of liability to address their particular needs, as well as those of victims of harm.[11] It was hoped that such an approach might aid States in selecting the most appropriate elements from the recently adopted instruments, keeping in view current developments in the ongoing negotiation of international liability regimes.[12] It was also felt that States had an obligation to ensure that some arrangement existed in national laws to guarantee equitable allocation of loss.[13]

[4] See, for example, *Official Records of the General Assembly, Fifty-eighth Session, Sixth Committee,* 14th meeting, statements by Germany (A/C.6/58/SR.14), para. 62; Nigeria, *ibid*., 16th meeting (A/C.6/58/SR.16), para. 14; the Netherlands, *ibid*., para. 60; New Zealand, *ibid*., para. 61; Greece, *ibid*., 17th meeting (A/C.6/58/SR.17), para. 22; Italy, *ibid*., para. 28; Poland, *ibid*., para. 36; the United States of America, *ibid*., 18th meeting (A/C.6/58/SR.18), para. 11; and the United Kingdom of Great Britain and Northern Ireland, *ibid*., para. 33.

[5] See, for example, statements by New Zealand, *ibid*., 16th meeting (A/C.6/58/SR.16), para. 62; Australia, *ibid*., 17th meeting (A/C.6/58/SR.17), para. 31; Portugal, *ibid*., 18th meeting (A/C.6/58/SR.18), para. 6; and separate comments by Mexico as well as Spain on file with the Special Rapporteur.

[6] See, for example, *Official Records of the General Assembly, Fifty-eighth Session, Sixth Committee*, 16th meeting, statement by Austria (A/C.6/58/SR.16), para. 43.

[7] *Ibid*. and Hungary, 18th meeting (A/C.6/58/SR.18), para. 37.

[8] See, for example, the statement by Poland, *ibid*., 17th meeting (A/C.6/58/SR.17), para. 36.

[9] See, for example, the statement by Mexico, *ibid*., 18th meeting (A/C.6/58/SR.18), para. 40.

[10] See, for example, separate comments by Mexico on file with the Special Rapporteur.

[11] See, for example, statements by Norway, on behalf of the Nordic countries, *Official Records of the General Assembly, Fifty-eighth Session, Sixth Committee*, 16th meeting (A/C.6/58/SR.16), para. 52; Poland, *ibid*., 17th meeting (A/C.6/58/SR.17), para. 37; and the United States, *ibid*., 18th meeting (A/C.6/58/SR.18), para. 11.

[12] See, for example, the statement of Austria on file with the Special Rapporteur.

[13] See, for example, *Official Records of the General Assembly, Fifty-eighth Session, Sixth Committee*, 16th meeting, statement by the Netherlands (A/C.6/58/SR.16), para. 60.

6. A model of allocation of loss that would be general and residual in character received wide support.[14] It is felt that this would allow States to shape more detailed regimes for particularly special forms of hazardous activity.[15] In that connection, the general preference of States for civil liability regimes that are both sectoral and sensitive to the nature of the activity involved was noted.[16]

7. On the other hand, while acknowledging the need for effective liability regimes, it was felt that States were not very keen on the development of a general international legal regime on liability.[17] As such, the view that States had a duty under international law to enact a law providing for some fair and equitable system of allocation of loss within their domestic jurisdictions was contested. It was also noted that although a number of instruments had been elaborated in recent years, their impact was rather limited, as only a small number of States were parties to such instruments.[18] Noting that while States should continue to provide for liability of private operators in appropriate circumstances, it was pointed out that no particular international legal obligation existed to oblige them to do so. It was also stressed that the general approach to the international regulation of liability ought to proceed in careful negotiations with respect to particular sectors or regions.[19]

8. It was further noted that a successful international liability regime, whereby a victim could recover loss and damage from the operator directly, would require considerable harmonization of substantive as well as procedural law to enable claims from foreign nationals to be filed before national tribunals or other forums. In that connection, doubt was expressed as to whether it would ever be possible to achieve a necessary level of harmonization.[20]

9. Several delegations welcomed the conclusions and findings contained in the first report of the Special Rapporteur,[21] but at least one delegation felt that it would be useful to investigate further the relative level of success or failure of the various instruments.[22] Another delegation desired investigation of national legislation and domestic and international practice.[23] A study to determine the extent to which recent environmental disasters were the result of a violation of the duty of prevention was also recommended.[24]

B. Scope

10. The need to clearly distinguish the scope of any liability regime dealing with acts not prohibited by international law from unlawful acts under the law of State responsibility was emphasized.[25] In that connection, support was affirmed for the principle that the legal regime to be considered by the Commission should be without prejudice to State responsibility under international law.[26] In addition, it was suggested that it should also be without prejudice to civil liability under national law or under rules of private international law.[27]

11. Given the relationship between prevention and liability as well as the need to maintain compatibility and uniformity, several delegations supported the idea that the scope of the topic should be the same as that of the draft articles on prevention of transboundary harm from hazardous activities.[28] It was further noted that the same threshold of "significant harm" as defined in the draft articles on prevention should be maintained for triggering liability.[29]

12. Several delegations stressed that any future regime should guarantee, to the maximum, compensation for harm caused to individuals and the environment.[30] Support was expressed for the definition of "harm" that would include any loss to persons and property, including elements of State patrimony and natural heritage as well as environment within national jurisdiction.[31] On the other hand, it was noted that since damage could not be physically traced back to the operator, if strict liability was preferred, a broader definition of environmental harm should be avoided. Moreover, effective application of liability

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[14] *Ibid.*, New Zealand, paras. 61 and 64; Australia, *ibid*., 17th meeting (A/C.6/58/SR.17), para. 31; Poland, *ibid*., para. 37; and separate comments by Mexico on file with the Special Rapporteur.

[15] See, for example, *Official Records of the General Assembly, Fifty-eighth Session, Sixth Committee*, 16th meeting statement by New Zealand (A/C.6/58/SR.16), para. 61.

[16] See, for example, the statement by India, *ibid*., para. 68.

[17] See, for example, the statement by the United States, *ibid*., 18th meeting (A/C.6/58/SR.18), paras. 12–13.

[18] See, for example, the statement by Austria on file with the Special Rapporteur.

[19] See footnote 17 above.

[20] See, for example, separate comments by the United Kingdom on file with the Special Rapporteur.

[21] See, for example, *Official Records of the General Assembly, Fifty-eighth Session, Sixth Committee*, 18th meeting, statements by the United Kingdom (A/C.6/58/SR.18), para. 33; Hungary, *ibid*., para. 37; and Poland, *ibid*., 17th meeting (A/C.6/58/SR.17), para. 36.

[22] See, for example, the statement by the United Kingdom, *ibid*., 18th meeting (A/C.6/58/SR.18), para. 33.

[23] See, for example, the statement by China, *ibid*., 19th meeting (A/C.6/58/SR.19), para. 42.

[24] See, for example, the statement by Nigeria, *ibid*., 16th meeting (A/C.6/58/SR.16), paras. 14–15.

[25] See, for example, the statement by Norway (on behalf of the Nordic countries), *ibid*., para. 50; and by Austria on file with the Special Rapporteur.

[26] See, for example, statements by India, *Official Records of the General Assembly, Fifty-eighth Session, Sixth Committee*, 16th meeting (A/C.6/58/SR.16), para. 69; Greece, *ibid*., 17th meeting (A/C.6/58/SR.17), para. 23; and Australia, *ibid*., para. 31.

[27] See, for example, statements by India, *ibid*., 16th meeting (A/C.6/58/SR.16), para. 69; Australia, *ibid*., 17th meeting (A/C.6/58/SR.17), para. 31; and China, *ibid*., 19th meeting (A/C.6/58/SR.19), para. 43.

[28] See, for example, statements by India, *ibid*. (A/C.6/58/SR.16), para. 68; Poland, *ibid*., 17th meeting (A/C.6/58/SR.17), para. 36; and separate comments by Spain on file with the Special Rapporteur.

[29] See, for example, statements by Germany, *Official Records of the General Assembly, Fifty-eighth Session, Sixth Committee*, 14th meeting (A/C.6/58/SR.14), para. 62; Austria, *ibid*., 16th meeting (A/C.6/58/SR.16), para. 44; Greece, *ibid*., 17th meeting (A/C.6/58/SR.17), para. 24; Poland, *ibid*., para. 36; and Argentina, *ibid*., 19th meeting (A/C.6/58/SR.19), para. 87.

[30] See, for example, statements by Belarus, *ibid*., 16th meeting (A/C.6/58/SR.16), para. 32; Australia, *ibid*., 17th meeting (A/C.6/58/SR.17), para. 30; and separate statement by Mexico on file with the Special Rapporteur.

[31] See, for example, *Official Records of the General Assembly, Fifty-eighth Session, Sixth Committee*, 17th meeting, statement by Greece (A/C.6/58/SR.17), para. 24.

provisions presupposed that the term "damage" should be narrowly defined.[32]

13. The non-inclusion of the global commons in the draft articles on prevention of transboundary harm from hazardous activities was considered a step backwards.[33] While acknowledging that the scope of the current work should be limited to that of the draft articles on prevention, some delegations regretted that it would exclude damage to the global commons.[34] Given the importance of that aspect of the topic, it was suggested that harm to the global commons should be considered separately[35] at some future point.[36]

C. Role of the operator

14. In any scheme covering either liability or a regime on allocation of loss, there was unanimous support for assigning liability first to the operator. In that regard, several delegations agreed with the view of the Special Rapporteur that the person most in command or control of the activity should bear the primary duty for redressing any harm caused.[37] In justification, it was observed that in most cases the operator was the main beneficiary of the activity, the creator of the risk and was in the best position to manage it.[38] In addition, it was emphasized that that policy was in line with the "polluter pays" principle.[39] It was also suggested, on the basis of the Protocol on liability and compensation for damage resulting from the transboundary movements of hazardous wastes and their disposal (hereinafter the 1999 Basel Protocol), that the term "operator" should be broadly defined to include all persons exercising control of the activity.[40]

1. Procedural and substantive requirements of the operator

15. It was acknowledged that specific procedural and substantive requirements which States imposed or might impose on operators might vary from activity to activity.[41] Nevertheless, it was suggested on the one hand that the model for allocation of loss that a State should provide for, should consist of a set of procedural minimum standards. These should address such issues as standing to sue, jurisdiction of domestic courts, designation of applicable domestic law, and recognition and enforcement of judgements. They should also encompass such substantive minimum standards as definitions, general principles (including that the victim, to the extent possible, should not be left to bear loss), the concept of damage, the causal connection between damage and the activity causing damage, basis of liability (fault liability, strict liability, absolute liability), identification of persons liable, including the possibility of multiple tiers of liability, limits of liability (time limits, financial limits) and coverage of liability.[42]

16. In addition, the requirement to obtain requisite insurance coverage[43] as well as other financial guarantees[44] was noted. Some delegations suggested that insurance coverage should be mandatory.[45] However, in view of the diversity of legal systems and differences in economic conditions, other delegations advocated flexibility with regard to these requirements.[46] It was also pointed out that an effective insurance system would require wide participation by potentially interested States.[47] Moreover, the point was made that to satisfy requirements of the insurance industry, operator liability might have to be limited to established ceilings.[48]

17. Further, delegations stressed the importance of national systems obliging operators to equip themselves to take prompt, effective action in order to minimize harm. This would require the operator to institute contingency, notification and other plans for responding to incidents that carried a risk of transboundary harm.[49] Simul-

[32] See, for example, the statement by Germany, *ibid*., 14th meeting (A/C.6/58/SR.14), para. 62.

[33] See, for example, the comments by Spain on file with the Special Rapporteur.

[34] See, for example, *Official Records of the General Assembly, Fifty-eighth Session, Sixth Committee*, 17th meeting, statement by Poland (A/C.6/58/SR.17), para. 37.

[35] See, for example, the statement by New Zealand, *ibid*., 16th meeting (A/C.6/58/SR.16), para. 63; and Mexico, *ibid.*, 18th meeting (A/C.6/58/SR.18), para. 41.

[36] See, for example, the statement by New Zealand, *ibid*., 16th meeting (A/C.6/58/SR.16), para. 63; and separate comments by Spain on file with the Special Rapporteur.

[37] See, for example, *Official Records of the General Assembly, Fifty-eighth Session, Sixth Committee*, statements by India, 16th meeting (A/C.6/58/SR.16), para. 70; the Netherlands, *ibid*., para. 60; New Zealand, *ibid*., para. 62; Norway (on behalf of the Nordic countries), *ibid*., para. 52; Australia, *ibid*., 17th meeting (A/C.6/58/SR.17), para. 31; Greece, *ibid*., para. 23; Poland, *ibid*., para. 36; Mexico, *ibid*., 18th meeting (A/C.6/58/SR.18), para. 41; and China, *ibid*., 19th meeting (A/C.6/58/SR.19), para. 43; and separate comments by Spain on file with the Special Rapporteur.

[38] See, for example, *Official Records of the General Assembly, Fifty-eighth Session, Sixth Committee*, 16th meeting, statement by New Zealand (A/C.6/58/SR.16), para. 62.

[39] See, for example, statements by Norway (on behalf of the Nordic countries), *ibid*., para. 52; Greece, *ibid*., 17th meeting (A/C.6/58/SR.17), para. 23; and Mexico, *ibid*., 18th meeting (A/C.6/58/SR.18), para. 41.

[40] See, for example, the statement by Mexico, *ibid*.

[41] See, for example, the statement by Australia, *ibid*., 17th meeting (A/C.6/58/SR.17), para. 30.

[42] See, for example, the statement by Portugal, *ibid*., 18th meeting (A/C.6/58/SR.18), para. 6; and statements by the Netherlands and New Zealand on file with the Special Rapporteur.

[43] See, for example, *Official Records of the General Assembly, Fifty-eighth Session, Sixth Committee*, 17th meeting, statements by Australia (A/C.6/58/SR.17), para. 30; Israel, *ibid*., para. 41; Hungary, 18th meeting (A/C.6/58/SR.18), para. 37; Mexico, *ibid*., para. 41; and Romania, *ibid*., 19th meeting (A/C.6/58/SR.19), para. 59.

[44] See, for example, the statement by Mexico, *ibid*., 18th meeting (A/C.6/58/SR.18), para. 41.

[45] See, for example, the statement by Romania, *ibid*., 19th meeting (A/C.6/58/SR.19), para. 59, and by Israel, *ibid*., 17th meeting (A/C.6/58/SR.17), para. 41; as well as separate comments by Spain on file with the Special Rapporteur.

[46] See, for example, *Official Records of the General Assembly, Fifty-eighth Session, Sixth Committee*, 19th meeting, statement by China (A/C.6/58/SR.19), para. 43.

[47] See, for example, the statement by Italy, *ibid*., 17th meeting (A/C.6/58/SR.17), para. 28.

[48] See, for example, separate comments by Spain on file with the Special Rapporteur.

[49] See, for example, *Official Records of the General Assembly, Fifty-eighth Session, Sixth Committee*, 17th meeting, statements by

taneously, improvement of public access to information as well as the development of mechanisms for public participation were also desired.[50] The value of the precautionary principle and the obligation of States to take all appropriate measures to prevent transboundary harm were stressed as a supplement to the strict civil liability of the operator.[51]

18. On the other hand, preference was expressed for a simpler scheme. It was suggested that it would be sufficient if the proposed regime on allocation of loss broadly specified the obligation of States to provide, in their national legislation, for rules governing liability of the operator, including the duty to pay compensation, subject to a minimum threshold for triggering liability.[52]

2. The basis and limits of allocation of loss to the operator

19. Concerning the basis of liability of the operator, several delegations spoke in favour of a strict civil liability regime.[53] It was noted that such an approach was in line with various international agreements on liability,[54] as well as with the "polluter pays" principle.[55] In relation to exceptions to strict liability, it was suggested that the liability of the operator should be subject to usual exceptions, including those concerning armed conflict or natural disasters.[56]

20. However, one delegation cautioned that strict liability should be approached with caution. It was pointed out that although it was well recognized in domestic legal systems, it could not be affirmed that it was well accepted or understood as a desirable policy in the context of transboundary harm.[57] Another delegation doubted whether international law should intervene in apportioning loss among the various actors. In principle, there was a preference among some delegations to leave resolution of the matter to domestic legal systems.[58]

21. Support is also expressed for limits on the liability of the operator. It was noted that such limits were necessary since the use of technology capable of causing transboundary harm might have serious consequences for the functioning of economic and other social systems, and would affect substantial individual interests.[59] Support was expressed in that connection for the imposition of time limits within which legal action could be initiated.[60] It was pointed out, however, that time or financial limits should only be available to the operator if (*a*) such limits were necessary to ensure that coverage of liability was available at reasonable cost; and (*b*) international or domestic arrangements provided for supplementary sources of funding.[61]

22. Concerning the level of financial limits, it was pointed out that ceilings needed to be set at significant but reasonable levels, in order to reflect the principle that the operators, being the beneficiaries of the activity, should internalize, to the extent possible, associated costs.[62] The point was also made that financial limits would make insurance and additional mechanisms feasible.[63]

3. Causation

23. As complicated scientific and technological elements were associated with hazardous activities to lessen the consequent burden placed on victims of harm caused by such activities, several delegations did not prefer strict proof of causal connection to establish liability.[64] It was stated that liability should arise once harm could reasonably be traced to the activity in question.[65] It was also suggested that, subject to a waiver clause, there should be presumption of a reasonable causal link between the actions of the operator and the injurious consequences.[66] It was even noted that the burden of proving a causal link between the activity and the damage should not fall on the victim.[67] The point was made, however, that the application of the "test of reasonableness" might require some adaptation or clarification, given the fact that different types of hazardous activities existed.[68]

Australia (A/C.6/58/SR.17), para. 30; and Romania, *ibid*., 19th meeting (A/C.6/58/SR.19), para. 59.

[50] See, for example, the statement by Germany on file with the Special Rapporteur.

[51] See, for example, *Official Records of the General Assembly, Fifty-eighth Session, Sixth Committee*, 14th meeting statement by Germany (A/C.6/58/SR.14), para. 62.

[52] See, for example, the statement by Israel, *ibid*., 17th meeting (A/C.6/58/SR.17), para. 39.

[53] See, for example, statements by Germany, *ibid*., 14th meeting (A/C.6/58/SR.14), para. 62; Belarus, *ibid*., 16th meeting (A/C.6/58/SR.16), para. 32; New Zealand, *ibid*., para. 62; India, *ibid*., para. 68; Hungary, *ibid*., 18th meeting (A/C.6/58/SR.18), para. 37; Mexico, *ibid*., para. 41; as well as the statement by the Netherlands and separate comments by Spain, on file with the Special Rapporteur.

[54] See, for example, *Official Records of the General Assembly, Fifty-eighth Session, Sixth Committee*, 16th meeting, statement by Belarus (A/C.6/58/SR.16), para. 32.

[55] See, for example, statements by Norway (on behalf of the Nordic countries), *ibid*., para. 52; and Mexico, *ibid*., 18th meeting (A/C.6/58/SR.18), para. 41.

[56] See, for example, the statement by Mexico, *ibid*.

[57] See, for example, the statement by Cyprus, *ibid*., 19th meeting (A/C.6/58/SR.19), para. 68.

[58] See, for example, the statement by Israel, *ibid*., 17th meeting (A/C.6/58/SR.17), para. 40.

[59] See, for example, the statement by Belarus, *ibid*., 16th meeting (A/C.6/58/SR.16), para. 32.

[60] See, for example, the statement by Mexico, *ibid*., 18th meeting (A/C.6/58/SR.18), para. 41.

[61] See, for example, the statement by the Netherlands on file with the Special Rapporteur.

[62] See, for example, the statement by New Zealand on file with the Special Rapporteur.

[63] See, for example, the statement by Mexico, *Official Records of the General Assembly, Fifty-eighth Session, Sixth Committee*, 18th meeting (A/C.6/58/SR.18), para. 41.

[64] See, for example, the statements by Austria, *ibid*., 16th meeting (A/C.6/58/SR.16), para. 42; Norway (on behalf of the Nordic countries), *ibid*., para. 52; Mexico, *ibid*., 18th meeting (A/C.6/58/SR.18), para. 41; and China, *ibid*., 19th meeting (A/C.6/58/SR.19), para. 43.

[65] See, for example, the statements by Norway (on behalf of the Nordic countries), *ibid*., 16th meeting (A/C.6/58/SR.16), para. 52; and Mexico, *ibid*., 18th meeting (A/C.6/58/SR.18), para. 41.

[66] See, for example, the statement by China, *ibid*., 19th meeting (A/C.6/58/SR.19), para. 43.

[67] See, for example, the statement by Mexico, *ibid*., 18th meeting (A/C.6/58/SR.18), para. 41.

[68] See, for example, the statement by Poland, *ibid*., 17th meeting (A/C.6/58/SR.17), para. 36.

4. Multiple sources of harm

24. Support was expressed for a provision to be made for joint and several liability for cases where damage could be traced to several operators or when damage resulted from more than one activity.[69]

D. The role of the State

25. State liability for failure to discharge its duty to exercise due diligence in controlling sources of harm in its territory would in effect be based on State responsibility for wrongful acts under customary law. Accordingly, it was noted that a regime based on State liability would add very little to the law already in force.[70] On the other hand, it was considered unfair to place the primary liability on the State in whose territory the hazardous activity was located to compensate for every incident of transboundary harm traced to such an activity. It was emphasized that, in most cases, the activity was chiefly conducted by, and primarily benefited, an operator.[71] Thus, some delegations noted that State liability was largely an exception and applicable only as provided for in a few conventions.[72] It was noted that, in principle, relevant losses should be borne by the operator or shared by the operator and other actors.[73] This was in contrast to the view which was also expressed that if strict liability of the State was established as the overriding principle, States themselves would be obliged to develop formulas for allocation of loss and mechanisms for funding.[74] Some favoured linking strict liability of the operator with some residual compensation regime involving the State. It was maintained that a system based solely on the liability of the operator or other actors might not be sufficient to protect victims from loss.[75]

1. The nature and extent of State involvement and funding

26. Different scenarios concerning the creation of supplementary funding envisaging a tier system were offered, involving different actors including the State. These involved some degree of liability of the State in cases where the operator was unable or unwilling to fully cover loss,[76] was insolvent, could not be identified,[77] or in certain well-defined cases where the liability of the operator was limited by insurance obligations[78] or compensation was inadequate.[79] It was also asserted that in the case where the operator was unable or unwilling to cover such loss, the regime should include "absolute State liability".[80]

27. The involvement of the State in the scheme of allocation of loss on a supplemental basis was justified on the ground that the activity to commence required the authorization of the State and was otherwise beneficial to it.[81] In any case it was deemed essential to give effect to the principle that the victim should not be left to bear the loss unsupported.[82] Some delegations sought to establish a closer nexus between the operator and the State. They suggested that harm not covered by the operator should be covered by the State to which that operator belonged[83] or the State under whose jurisdiction or control the activity was carried out.[84] It was felt in that connection that the State which was affected by the hazardous activity should not be burdened by requiring it to contribute to a scheme on allocation of loss.[85] In addition to providing back-up funding,[86] it was proposed that the State should be obliged to do its utmost to enact legislation designed to prevent uncovered losses and to exercise due diligence with a view to ensuring effective enforcement thereof.[87]

28. Differing from this perspective was the view that State liability should be designated only as a last resort.[88] Accordingly, it was argued that residual State liability should be provided for only in cases where the operator did not cover harm and supplementary sources of funding[89] were insufficient or otherwise unavailable.[90] While showing willingness to consider proposals for supplementary funding in which a State could participate, some States pointed out that not all States authorizing hazard-

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[69] See, for example, the statement by Mexico, *ibid*., 18th meeting (A/C.6/58/SR.18), para. 41.

[70] See, for example, the statement by Greece, *ibid*., 17th meeting (A/C.6/58/SR.17), para. 23.

[71] *Ibid.*

[72] See, for example, the statement by India, *ibid*., 16th meeting (A/C.6/58/SR.16), para. 70.

[73] See, for example, the statements by India, *ibid*.; New Zealand, *ibid*., para. 62; Norway (on behalf of the Nordic countries), *ibid*., para. 52; Australia, 17th meeting (A/C.6/58/SR.17), para. 31; Greece, *ibid*., para. 23; and Hungary, *ibid*., 18th meeting (A/C.6/58/SR.18), para. 37.

[74] See, for example, the statement by Norway (on behalf of the Nordic countries), *ibid*., 16th meeting (A/C.6/58/SR.16), para. 53.

[75] *Ibid*., para. 52.

[76] See, for example, the statements by New Zealand, *ibid*., para. 62; Norway (on behalf of the Nordic countries), *ibid*., para. 52; Australia, *ibid*., 17th meeting (A/C.6/58/SR.17), para. 31; Greece, *ibid*., para. 23; Hungary, *ibid*., 18th meeting (A/C.6/58/SR.18), para. 37; and Romania, *ibid*., 19th meeting (A/C.6/58/SR.19), para. 59.

[77] See, for example, the statement by Greece, *ibid*., 17th meeting (A/C.6/58/SR.17), para. 23.

[78] See, for example, the statement by India on file with the Special Rapporteur.

[79] See, for example, *Official Records of the General Assembly, Fifty-eighth Session, Sixth Committee*, 17th meeting, statement by Australia (A/C.6/58/SR.17), para. 31.

[80] See, for example, the statement by Norway (on behalf of the Nordic countries), *ibid*., 16th meeting (A/C.6/58/SR.16), para. 52.

[81] See statement by Australia, *ibid*., 17th meeting (A/C.6/58/SR.17), para. 31.

[82] See the statement by Norway (on behalf of the Nordic countries), *ibid*., 16th meeting (A/C.6/58/SR.16), para. 53.

[83] See, for example, the statement by Belarus, *ibid*., para. 32; and separate comments by Spain on file with the Special Rapporteur.

[84] See, for example, the statement by the Netherlands on file with the Special Rapporteur.

[85] See, for example, separate comments by Spain on file with the Special Rapporteur.

[86] See the statements by New Zealand on file with the Special Rapporteur; and the statement by Hungary, *Official Records of the General Assembly, Fifty-eighth Session, Sixth Committee*, 18th meeting (A/C.6/58/SR.18), para. 37.

[87] See the statement by Israel, *ibid*., 17th meeting (A/C.6/58/SR.17), para. 41. See also separate comments by Spain on file with the Special Rapporteur.

[88] See *Official Records of the General Assembly, Fifty-eighth Session, Sixth Committee*, 19th meeting, statement by Romania (A/C.6/58/SR.19), para. 59.

[89] See, for example, the statement by the Netherlands on file with the Special Rapporteur.

[90] See, for example, the statement by New Zealand on file with the Special Rapporteur, and the statement by Norway (on behalf of the Nordic countries), *Official Records of the General Assembly, Fifty-eighth Session, Sixth Committee*, 16th meeting (A/C.6/58/SR.16), para. 53.

ous activities might have the means to pay compensation resulting from such a residual liability.[91] The view was also expressed that that residual liability of a State should consist principally in taking preventive measures and establishing funds for the equitable allocation of loss, rather than assuming the liability itself in all cases in which the responsible party had defaulted.[92] It was also considered unacceptable for public funds to be used to compensate for loss that should be allocated to the operator. State funds, in that view, should be earmarked only if necessary to meet emergencies and contingencies arising from significant hazardous activities.[93] It was indicated that where the State itself was the operator or was directly and effectively related to the harmful operation, it should be treated at par with a private actor for the purpose of allocation of loss.[94]

2. Types of supplementary sources of funding

29. Several means of establishing an additional funding mechanism were noted: contributions from the private or public sector;[95] from beneficiaries of the activity in question,[96] including industry and corporate funds on a national, regional or international basis;[97] or from the States concerned,[98] including earmarked State funds.[99] It was further suggested that such funds should be created from contributions from States, relevant national and international organizations, NGOs and insurance based on mandatory contributions by operators belonging to the same sector of operations.[100]

E. Coverage of harm to the environment

30. The definition of "damage" eligible for compensation is referred to in many interventions. In that connection, it was noted that the proposal made by the Special Rapporteur provided a good working basis, namely damage to persons and property, as well as damage to the environment or natural resources within the jurisdiction or in areas under the control of a State.[101] Further, there was support for reimbursement of costs incurred by way of implementation of measures for reinstatement of a damaged environment.[102]

31. While accepting the proposed scope as put forward by the Special Rapporteur, it was felt that in certain situations restoration of the environment was not possible and quantification difficult. Thus, it was noted that there was merit in not limiting compensation for harm to the environment to the costs of measures of restoration, but to extend it to include loss of intrinsic value.[103] Concerning coverage of economic loss, some delegations stated that the right to compensation should include economic loss suffered where a person's ability to derive income was affected by an activity[104] and should include loss of profit.[105] The concept of economic loss, according to another view, should extend to loss incurred as a direct result of the perceived risk of physical consequences flowing from an activity even without those physical consequences actually occurring.[106]

32. It was suggested that issues concerning the environment *per se* should not be left out and should be considered at a later stage, even if they were not dealt with in the present context.[107] Under another view, the question was best treated in a framework concerned with the environment and not within the work schedule of the Commission.[108]

F. Final form of work on the topic

33. Any discussion of the final form of the Commission's work on the topic was considered to be premature. On the other hand, it was deemed useful for the Commission to decide from the outset on the form, for example, whether it aimed to formulate a series of recommendations for States or to develop a general model instrument that could be applied in the absence of any specific treaty regime. In the case of the latter, it would be difficult for the Commission to move beyond a preliminary text that would do no more than assist States in future negotiations.[109]

34. The final form on liability, according to some, should not be different from that of the draft articles on prevention of transboundary harm from hazardous activities, and both aspects could be addressed in a single instrument.[110] In that connection, some delegations expressed preference

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[91] See, for example, the statement by India, *ibid*., paras. 68 and 70.

[92] See, for example, the statement by China, *ibid*., 19th meeting (A/C.6/58/SR.19), para. 43.

[93] See, for example, separate comments by Spain on file with the Special Rapporteur.

[94] See, for example, *Official Records of the General Assembly, Fifty-eighth Session, Sixth Committee*, 17th meeting, statement by Israel (A/C.6/58/SR.17), para. 41.

[95] See, for example, the statement by the Netherlands on file with the Special Rapporteur.

[96] See, for example, *Official Records of the General Assembly, Fifty-eighth Session, Sixth Committee*, 16th meeting statements by Norway (on behalf of the Nordic countries) (A/C.6/58/SR.16), para. 53; and Mexico, *ibid*., 18th meeting (A/C.6/58/SR.18), para. 42.

[97] Statement by New Zealand on file with the Special Rapporteur.

[98] See, for example, *Official Records of the General Assembly, Fifty-eighth Session, Sixth Committee*, 16th meeting, statement by Belarus (A/C.6/58/SR.16), para. 32.

[99] See, for example, the statement by Norway (on behalf of the Nordic countries), *ibid*., para. 53.

[100] See, for example, separate comments by Spain on file with the Special Rapporteur.

[101] See, for example, *Official Records of the General Assembly, Fifty-eighth Session, Sixth Committee*, 16th meeting, statement by Austria (A/C.6/58/SR.16), para. 44.

[102] Statement by the Netherlands on file with the Special Rapporteur.

[103] See, for example, the statement by New Zealand, *Official Records of the General Assembly, Fifty-eighth Session, Sixth Committee*, 16th meeting (A/C.6/58/SR.16), para. 63.

[104] *Ibid*., para. 64, and Norway (on behalf of the Nordic countries), *ibid*., para. 52.

[105] See, for example, the statement by Greece, *ibid*., 17th meeting (A/C.6/58/SR.17), para. 24.

[106] See, for example, the statement by New Zealand, *ibid*., 16th meeting (A/C.6/58/SR.16), para. 64.

[107] See, for example, the statement by Mexico, *ibid*., 18th meeting (A/C.6/58/SR.18), para. 43.

[108] See, for example, the statement by Israel, *ibid*., 17th meeting (A/C.6/58/SR.17), para. 42.

[109] See, for example, the statement by Italy, *ibid*., para. 28.

[110] See, for example, the statement by the Netherlands on file with the Special Rapporteur and *Official Records of the General Assembly, Fifty-eighth Session, Sixth Committee*, 16th meeting, statements by New Zealand (A/C.6/58/SR.16), para. 65, and Portugal, *ibid*., 18th meeting (A/C.6/58/SR.18), para. 5.

for a convention.[111] Such a composite draft might treat regulation of the prevention of harm and provide for corrective measures to be taken, especially for the elimination of the harm and the compensation of those affected.[112] On the other hand, the conclusion of a protocol on liability to a convention on prevention, a suggestion put forward by the Special Rapporteur at the fifty-fifth session of the Commission, in 2003, was not favoured.[113]

35. Some delegations favoured a soft-law approach.[114] A comprehensive study of the existing law with a set of recommendations, for example, was considered a realistic and achievable goal.[115] It was also observed that, as the solution would depend on the development of specific liability regimes in the future, the final outcome could therefore take the form of a "checklist" of issues, which could be taken into consideration in future negotiations on the establishment of liability regimes for specific activities.[116] Others favoured guidelines or model rules for States.[117] Whatever form the final outcome of the work of the Commission on liability might take, some delegations saw the importance of including appropriate dispute settlement arrangements.[118]

[111] See, for example, statements by Belarus, *ibid*., 16th meeting (A/C.6/58/SR.16), para. 32; Norway (on behalf of the Nordic countries), *ibid*., para. 52; and Mexico, *ibid*., 18th meeting (A/C.6/58/SR.18), para. 43.

[112] See, for example, the statement by Belarus, *ibid*., 16th meeting (A/C.6/58/SR.16), para. 32.

[113] See, for example, the statement by the United States, *ibid*., 18th meeting (A/C.6/58/SR.18), para. 14.

[114] See, for example, the statement by Romania, *ibid*., 19th meeting (A/C.6/58/SR.19), para. 59.

[115] See, for example, the statement by the United Kingdom, *ibid*., 18th meeting (A/C.6/58/SR.18), para. 34.

[116] See, for example, the statement by Austria, *ibid*., 16th meeting (A/C.6/58/SR.16), para. 45.

[117] See, for example, statements by Poland, *ibid*., 17th meeting (A/C.6/58/SR.17), para. 37; and Israel, *ibid*., para. 43.

[118] See, for example, the statements by New Zealand, *ibid*., 16th meeting (A/C.6/58/SR.16), para. 62; and Cyprus, *ibid*., 19th meeting (A/C.6/58/SR.19), para. 68.

Chapter II

General conclusions of the Special Rapporteur

36. The debate in the Sixth Committee ran along lines which were in most respects similar to those of the debate that took place earlier within the Commission. However, some general conclusions appear to emerge:

(1) The legal regime that the Commission needs to fashion should be general and residuary. It should be sufficiently general to leave room and flexibility to States to develop more specific liability regimes bilaterally or regionally, governing individual hazardous activity or activities within a defined sector of operation of such activities. It should be residual in that it would not be applicable in the case where provisions of a bilateral, multilateral or regional agreement also apply. It would also safeguard the relevant rules of State responsibility and not duplicate or be in conflict with the operation of civil liability regimes within national jurisdictions;

(2) The scope of the present exercise of the Commission should be coterminous with the scope of the draft articles on prevention of transboundary harm from hazardous activities which the Commission adopted in 2001 and forwarded to the General Assembly for further action.[119] That means there would be no need to reopen the issues concerning the nature of activities covered or the designation of threshold of harm, that is, "significant harm" as the trigger for bringing the principles of allocation of loss into play;

(3) It is recognized that it is not always possible to prohibit or avoid engaging in hazardous or significant risk-bearing activities because they are crucial for economic development and are beneficial to society in general. However, States are under an obligation to authorize them only under controlled conditions and strict monitoring while discharging their duty of prevention of transboundary harm;

(4) It is possible that, through no fault of the State which has fully discharged its duties of prevention, damage may still occur. In such an eventuality, innocent victims who have no part in the operation of the activity or otherwise are not direct beneficiaries of the activity should not be allowed to bear the loss, as far as possible;

(5) Any scheme of allocation of loss should place the duty of compensation first on the operator. The operator is in control of the activity and is also its direct beneficiary. This approach would adequately reflect the "polluter pays" principle, in particular the policy of internalizing the costs of operation. Accordingly, the operator is required to obtain the necessary insurance coverage and show appropriate financial guarantees. It is also agreed that the operator's liability may be limited. In this regard, limits could be envisaged both for financial liability and for the period within which the claims for compensation could be entertained. Limited financial liability is justified on the ground that it would help the operator to obtain the necessary insurance for the high-risk activity. It would also allow operators to come forward to undertake the risky ventures without fear of total financial bankruptcy;

(6) In addition, the operator is also required to equip himself with the necessary contingency plans and emergency preparedness, including mechanisms for notification of emergency and other plans or safety measures expected of a reasonable and prudent person;

(7) The principle of the limited financial liability of the operator has to be balanced against the basic policy of not leaving the innocent victim as far as possible to bear the loss suffered. The necessary balance could be achieved

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

by mandating compensation of the victim through supplementary sources of funding. Several international conventions and State practice provide for this. Supplementary funding could be established through contributions from direct beneficiaries, operators engaged in similar activities, other public and private agencies and from funds established by competent international organizations;

(8) The definition of "damage" eligible for compensation can cover damage to persons and property, including elements of State patrimony and natural heritage, as well as damage to the environment or natural resources within the jurisdiction or in areas under the control of a State. A number of States emphasized that the concept of damage should be sufficiently broad to encompass damage to the environment *per se*. In their view damage to global commons should not be left uncovered. The question of covering damage to the environment *per se* in areas beyond national jurisdiction or global commons has also been the continuing concern of some members of the Commission. It is important therefore to address this issue with an open mind:

(*a*) First, there is no commonly agreed definition of a global commons. The reference, however, from the conservative point of view, is to the high seas beyond national jurisdiction, including the deep seabed and the ocean floor and the airspace above; outer space; the moon and other celestial bodies; and, with some possible disagreement, to Antarctica, where under article IV of the Antarctic Treaty, "[n]o new claim, or enlargement of an existing claim, to territorial sovereignty in Antarctica shall be asserted while the present Treaty is in force". As is well known, the United Nations Convention on the Law of the Sea deals with oceans, including the environment thereof, in as comprehensive a basis as possible. The International Seabed Authority is actively engaged in developing regulations for preventing and controlling any possible environmental threats to the deep seabed and the ocean floor due to prospecting and exploration for deep seabed resources, in particular manganese nodules.

Further, since much of the pollution of the sea is from land-based sources, it is regulated through regional treaties. Mention could also be made of several of the IMO conventions regulating oil spills and dumping of wastes. There is also the Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water. Issues relating to the Antarctic environment are the subject of regular consultation among the Antarctic Treaty Consultative Parties. Moreover, the United Nations Committee on the Peaceful Uses of Outer Space[120] is concerned about space debris and other related environmental issues arising from the space activities of States. Drawing attention to these conventions and activities, Mr. Tomuschat came to the conclusion that there was no justification for dealing with the problems arising from any one or more of these conventions within the Commission under a new topic of global commons. Any such study, he warned, would have to be only "at such a high level of abstractness"[121] and would not take the matters any further than the Stockholm Declaration on the Human Environment[122] or the Rio Declaration on Environment and Development.[123] He also felt that in essence a study on protection of global commons would not be any different from a study on transboundary harm, as the sources of pollution were essentially land-based. Accordingly, he felt that "[i]t would be extremely artificial, if not impossible, to draw up different rules on prevention according to the identity of the potential victim objects".[124]

On the other hand, there is perhaps room to improve upon each of these instruments, as most of them address damage or harm to persons and property and are not concerned with harm to global commons as such. Arsanjani and Reisman in their illuminating analysis of the problem aptly noted this point.[125] They have pointed out that the real but more modest efforts to focus upon liability for injury to global commons began only with principle 21 of the Stockholm Declaration on the Human Environment and principle 2 of the Rio Declaration on Environment and Development. But these were still hortatory in nature, requiring a more concerted effort on the part of States to negotiate more concrete obligations. The Convention on the Regulation of Antarctic Mineral Resource Activities provided liability for "damage to the Antarctic environment or dependent or associated ecosystems", arising from Antarctic mineral resources activities. Article 1, paragraph 15, of the Convention defined "damage" to mean "any impact on the living or non-living components of that environment or those ecosystems, including harm to atmospheric, marine or terrestrial life, beyond that which is negligible or which has been assessed and judged to be acceptable pursuant to this Convention". The Convention never entered into force and was superseded by the Protocol on Environmental Protection to the Antarctic Treaty, which provided the 50-year moratorium on mineral exploration and exploitation in Antarctica. It anticipates an annex dealing with liability, which is still under negotiation.

Similarly the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment (hereinafter the Lugano Convention), adopted by the Council of Europe, is notable for its emphasis on compensation and for its inclusion of loss or damage by impairment of the environment in the definition of damage.

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[120] Established in 1959 pursuant to General Assembly resolution 1472 (XIV) to review the scope of international cooperation in the peaceful uses of outer space, to devise programmes in this field to be undertaken under United Nations auspices, to encourage continued research and the dissemination of information on outer space matters, and to study legal problems arising from the exploration of outer space.

[121] *Yearbook ... 1993*, vol. II (Part One), document A/CN.4/454, Outlines prepared by members of the Commission on selected topics of international law: "The global commons", by Mr. Christian Tomuschat, p. 247, para. 19.

[122] *Report of the United Nations Conference on the Environment, Stockholm, 5–16 June 1972* (United Nations publication, Sales No. E.73.II.A.14), part one, chap. 1.

[123] *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 corrigenda), vol. I: *Resolutions adopted by the Conference*, resolution 1, annex I.

[124] *Yearbook ... 1993* (see footnote 121 above), para. 20. Mr. Tomuschat, however, noted that by including in its work programme the global commons as a new topic, the Commission would necessarily duplicate work under injurious consequences and it would seem infinitely preferable to bear in mind the need of the global commons for protection in establishing a code of duties of prevention (*ibid*., para. 21).

[125] Arsanjani and Reisman, "The quest for an international liability regime for the protection of the global commons", pp. 469–473.

However, this Convention did not come into force either, and does not appear likely to do so.

Questions of the liability of the State and other problems such as establishing the causal connection, standing to sue and quantification of damage are some of the stumbling blocks that stand in the way of constructing a liability regime for the global commons.[126] Arsanjani and Reisman conclude on a perceptive note, when they observe that:

> The problems in constructing a viable regime for the protection of the global commons that incorporates a liability component are, as we have seen, formidable. But the consequences of not fashioning such a regime—and doing it soon—may well constitute the most profound common threat to humanity in the twenty-first century.[127]

A more integrated approach to the regulation of environment of the global commons, with focus on duties *erga omnes*, may, under the circumstance as suggested by Mr. Yamada, be desirable.[128] But to bring that effort within the compass of the present exercise may not only delay the final product but, more importantly, may even fundamentally affect the economy of the present project;

(*b*) The above analysis still leaves out one other dimension to the problem of harm to the environment, namely harm caused to the global commons by activities coming within the scope of the present articles. In the case of a transboundary harm traversing all the State boundaries and affecting the global commons or environment *per se* in areas beyond national jurisdiction, it appears reasonable to allow for claims for restoration and any response measures taken or to be taken.

The question as to who may be allowed the necessary legal standing to bring such a claim, however, remains to be resolved. As one option, any entity which can substantiate the claim may be allowed to sue the operator. On a more limited basis, only States may be allowed to sue other States which authorized the activity. This is justified on the basis of the notion that protection of the global commons is an *erga omnes* obligation.[129]

Nevertheless, the formidable difficulties in establishing the causal connection, even under a liberalized scheme of inferences or rebuttable presumptions involving reversal of burden of proof, for damage affecting deep ocean areas, for example, cannot be underestimated. Ocean currents and winds could disperse the damage faster than people could reach it to study the extent of the damage. Other significant factors might intervene and the causal connection could become very evanescent. In the absence of established baselines for the preservation of the global commons, it may be extremely difficult to measure the extent and nature of the damage.

Nevertheless a suitable provision defining damage as including damage to the environment *per se* could still be useful for progressive development of the law. This may become very important in the course of time, as States expand natural resource exploitation into the marine spaces within their national jurisdiction. The danger of transboundary harm from such activities is as real to the areas beyond national jurisdiction as it is to areas within the national jurisdiction of one or more neighbouring States. There appears therefore to be a good case for expanding the definition of damage as noted above to cover damage to the environment and natural resources in areas beyond national jurisdiction.

(9) Another equally well-canvassed issue is the role of the State in any scheme of allocation of loss. It deserves careful attention. The State which authorized the risk-bearing activity has its own duties and responsibilities with respect to preventing transboundary harm. For the purpose of the present exercise, it is assumed it has fully discharged those duties, failing which it would be open to invoking of the relevant rules of State responsibility. In the case where damage occurs despite taking measures of prevention, it is possible that compensation to be paid to the victims may fall short of the actual loss because of the limits imposed on the liability of the operator under national law. In such cases, several States have provided for supplementary national funding or made *ex-gratia* payments.

However, the issue in the present context is whether it is desirable to impose upon the State an obligation to earmark funds to meet the shortfall, if any, as far as possible. Different justifications could be offered to bring the State into the scheme. Some prefer to view this as a subsidiary or residuary obligation, the primary obligation being that of the operator or other private entities having a share or interest in the profit-generating activity. Others would like to view it as a social or moral obligation of the State towards the victims. Some others reject the very idea of imposing any obligation on the State to provide or assume subsidiary liability. At most, it is suggested that the State may be obliged to ensure that necessary funds for compensation are in fact available. This may be done in several ways, only one of which is related to the introduction of some supplementary funding with an option for the State to make a suitable contribution.[130]

There is growing support for the idea of bringing the State into the scheme of supplementary funding. On the other hand there is also a strong reluctance among some States to accept any subsidiary liability for the operator's failure.

It is suggested, therefore, that the share of the State should be treated as a contribution to the supplementary funding in the same manner as contributions that may be required from other actors, like international organizations. It is for this reason that the legal regime to be con-

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[126] For a clear presentation of the difficulties on each of these counts (for example, elements relevant to the formulation of a regime on liability for harm to the global commons, namely, threshold of harm, assessment of harm, identification of the injured party, jurisdictional questions, and finally the question of compensation), see Arsanjani and Reisman, *loc. cit*., pp. 473–482.

[127] Arsanjani and Reisman, *loc. cit*., p. 488.

[128] *Yearbook … 1993*, vol. II (Part One), document A/CN.4/454, Outlines prepared by members of the Commission on selected topics of international law: "Rights and duties of States for the protection of the human environment", by Mr. Chusei Yamada, p. 248, paras. 16–17.

[129] See Charney, "Third State remedies for environmental damage to the world's common spaces", p. 157.

[130] See Gehring and Jachtenfuchs, "Liability for transboundary environmental damage towards a general liability regime?", p. 106.

structed is better designated as a scheme for the allocation of loss. In addition, the scheme is suggested as a progressive development of law. For many of its elements, other than the liability of the operator or the person in charge of the activity at the relevant point of time when the incident occurs, are not treated uniformly, consistently or in the same manner.

There are also differing views on how detailed the scheme of allocation of loss and on how specific and elaborate its definition of compensable damage should be. Even on the question of proof of damage and the necessary causal connection, there may be variation in views. Many States, but not all, endorsed the employment of a relatively flexible standard with a view to reducing the burden of proof for the victims. Some even suggested that the burden of proof should be reversed or that provision should be made for a presumption of causal connection, which then could be open to rebuttal by the operator. Some of the recently concluded conventions have provisions dealing with these issues, and compromises arrived at by majority have not been sufficiently shared or accepted as legal requirements under national law and practice to bring the relevant convention into force. This in turn raises difficult issues of harmonization and amendment of national laws to bring such international conventions into force.

(10) One other issue to be considered before proceeding to the presentation of proposals is the form in which such proposals are to be cast. It may be recalled that the draft articles on prevention of transboundary harm from hazardous activities were presented in the form of draft articles encased in some sort of a framework convention on the lines of the draft articles on the law of the non-navigational uses of international watercourses adopted by the Commission in 1994.[131] Those articles were further negotiated and the Convention on the Law of the Non-navigational Uses of International Watercourses was adopted in 1997.

As the topic is divided into the prevention and liability aspects and as one part was adopted in the form of draft articles, there is a justified expectation of finalizing the other part on liability in the form of draft articles as well. Some members of the Commission and representatives of States have already supported this approach. On the other hand, if the draft articles on prevention of transboundary harm from hazardous activities are treated as the main body of primary principles and liability is only one of its provisions, which is now developed separately, it could be linked to the main draft by way of a protocol, just as some protocols on liability have been developed. The Special Rapporteur, with a completely open mind, suggested this approach in the Commission during its fifty-fifth session in 2003. Several members of the Commission and at least one delegation in the Sixth Committee did not favour this approach. Moreover, several delegations have suggested that the conclusions and recommendations of the Commission should be drafted, not in the form of a convention or protocol, but in the form of general principles with options on various elements that they would encompass, leaving States to pick and choose as they developed their national laws or concluded regional or other sectoral arrangements.

The Special Rapporteur's first report[132] sufficiently brought home the point that there is a large diversity of preferences and practice among States concerning the various principles that constitute a regime on international liability. Several elements of civil liability and private international law involve many choices, which need to be settled if a full convention or even a protocol on liability is chosen as a goal: the definition of compensable damage, the designation of entities for the purpose of attaching the primary and secondary or subsidiary liability for compensation, the selection of standard of liability, the choice of exceptions to liability, the construction of the causal connection and the associated issue of who should discharge what standard of burden of proof, the appropriate national judicial forums for submission and settlement of claims of compensation and other issues of private law on choice of applicable law and the recognition and enforcement of foreign awards.

It is not difficult to suggest one model, but this would amount to making arbitrary choices, which some States might accept and others might reject, or might suit one type of hazardous activity but might not be suitable for the other types. Some members of the Commission and several States noted that it is not the task of the Commission to make these choices, particularly because they belong in the area of civil liability, which is the domain of national law, or in the field of private international law, which requires harmonization, taking due account of civil and common law.

37. Given the above considerations, and without prejudice to the final form in which the results of the work of the Commission could be adopted, the Special Rapporteur believes it useful to present his recommendations in the form of general principles with suitable explanations about the options that they may involve. These general principles are attempted on the basis of conclusions drawn by the Special Rapporteur.

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[131] *Yearbook ... 1994*, vol. II (Part Two), p. 89, para. 222.

[132] *Yearbook … 2003*, vol. II (Part Two), document A/CN.4/531.

Chapter III

Proposed draft principles

38. In the light of the above general conclusions, the following draft principles are suggested for consideration. They are offered without prejudging the final outcome.

"1. Scope of application

"The present draft principles apply to damage caused by hazardous activities coming within the scope of the draft articles on prevention of transboundary harm from hazardous activities, namely activities not prohibited by international law which involve a risk of causing significant transboundary harm through their physical consequences."

Explanation

(*a*) Given the scope of the 2001 draft articles on prevention of transboundary harm from hazardous activities and the interrelated nature of the concepts of prevention and liability, the 2002 Working Group of the Commission recommended that the Commission should limit the scope on liability to the same activities which are covered by the regime of prevention.[133] The Commission adopted the report of the Working Group and the proposal received wide support from the views expressed by States and their representatives.

(*b*) The provision is largely based on article 1 of the draft articles on prevention of transboundary harm from hazardous activities.[134] The four different criteria clarifying the scope of the draft articles on prevention would also apply in the present context.

"2. Use of terms

"For the purposes of the present draft articles:

"(*a*) 'Damage' means significant damage caused to persons, property or the environment; and includes:

"(i) Loss of life or personal injury;

"(ii) Loss of, or damage to, property other than the property held by the person liable in accordance with these articles;

"(iii) Loss of income from an economic interest directly deriving from an impairment of the use of property or natural resources or environment, taking into account savings and costs;

"(iv) The costs of measures of reinstatement of the property, or natural resources or environment, limited to the costs of measures actually taken;

"(v) The costs of response measures, including any loss or damage caused by such measures, to the extent of the damage that arises out of or results from the hazardous activity;

"(*b*) 'Damage to the environment' means loss or damage by impairment of the environment or natural resources;

"(*c*) 'Environment' includes: natural resources both abiotic and biotic, such as air, water, soil, fauna and flora and the interaction between the same factors; property which forms part of the cultural heritage; and the characteristic aspects of the landscape;

"(*d*) 'Hazardous activity' means an activity that has a risk of causing significant or disastrous harm";

"(*e*) 'Operator' means any person in command or control of the activity at the time the incident causing transboundary damage occurs and may include a parent company or other related entity whether corporate or not;

"(*f*) 'Transboundary damage' means damage caused in the territory or in other places outside the territory but under the jurisdiction or control of a State other than the State of origin or in other places beyond the jurisdiction or control of any State including the State of origin, whether or not the States or areas concerned share a common border;

"(*g*) 'Measures of reinstatement' means any reasonable measures aiming to assess, reinstate or restore damaged or destroyed components of the environment, or where this is not possible, to introduce, where appropriate, the equivalent of these components into the environment. Domestic law may indicate who will be entitled to take such measures;

"(*h*) 'Response measures' means any reasonable measures taken by any person, including public authorities, following the occurrence of the transboundary damage, to prevent, minimize or mitigate possible loss or damage or to arrange for environmental clean-up. Domestic law may indicate who will be entitled to take such measures;

"(*i*) 'State of origin' means the State in the territory or otherwise under the jurisdiction or control of which the activities referred to in principle 1 are carried out;

"(*j*) 'State of injury' means the State in the territory or otherwise under the jurisdiction or control of which transboundary damage occurs;

"(*k*) 'State likely to be affected' means the State or States in the territory of which there is a risk of significant transboundary harm, or the State or States which have jurisdiction or control over any other place which is exposed to the risk of such harm;

[133] *Yearbook … 2002*, vol. II (Part Two), p. 91, paras. 447–448.

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

"(*l*) 'States concerned' means the State of origin, the State likely to be affected and the State of injury."

Explanation

(*a*) This definition follows closely article 2 of the draft articles on prevention of transboundary harm from hazardous activities. The question whether it should be transboundary "damage" in respect of the liability aspects of the topic has been raised in the Commission. While it is consistent with existing instruments on liability to refer to "damage", the reference to the broader concept of harm has been retained where the reference is only to the risk of harm and not to the subsequent phase where harm has occurred. To refer to "harm" is consistent with the phase of prevention, and is employed with the same meaning as in the draft articles on prevention;

(*b*) The definition of damage suggested in principle 2 (*a*), as read with the definition of environment in principle 2 (*c*), goes beyond the definition mostly employed, which is generally confined to damage to persons and property.[135] It may also be noted that the reference to costs of assessment of damage in the definition of "reinstatement" in principle 2 (*g*), and the expression "to arrange for environmental clean-up" in the definition of response measures in principle 2 (*h*), are concepts incorporated in the 1999 Basel Protocol. Commenting on their introduction, it is noted that, in comparison to the civil liability conventions covering oil pollution, "there is a clear shift towards a greater focus on damage to the environment *per se* rather than primarily on damage to persons and to property";[136]

(*c*) The additional element in principle 2 (*g*), about the introduction of the equivalent of these components into the environment when restoration of the damaged or destroyed environment is not possible, is a further progressive step in the direction of protection of the environment. This element, which is not reflected in the 1999 Basel Protocol, found its place in the United States Oil Pollution Act of 1990,[137] as well as the Protocol to amend the Vienna Convention on civil liability for nuclear damage, the Lugano Convention, the Protocol on Civil Liability and Compensation for Damage Caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes and to the 1992 Convention on the Transboundary Effects of Industrial Accidents (hereinafter the Kiev Protocol)[138] and the Common Position on a proposed directive on liability adopted by the Council of Europe on 18 September 2003;[139]

(*d*) Reference to damage to the environment *per se*, that is, natural resources, which are in the domain of public property and cultural heritage, is widely recommended. The 2002 Working Group of the Commission agreed that loss to persons, property, including elements of State patrimony and natural heritage, and the environment within national jurisdiction should be covered.[140] This view was also endorsed by many delegations in their interventions in the Sixth Committee in 2003. In addition, for reasons stated in the Special Rapporteur's conclusions in paragraph 36, point 8 (*b*) above, the definition of transboundary damage in principle 2 (*f*), is extended to include damage to the environment to areas beyond national jurisdiction;

(*e*) Other portions of the definition are drafted to be in line with the conclusions and submissions made by the Special Rapporteur, which have received wide support.

"3. Compensation of victims and protection of the environment

"1. The main objective of the present principles is to ensure that victims are not left entirely on their own, within the limits prescribed under national law, to bear the loss that they may suffer due to transboundary damage.

"2. The objective is also to ensure that any transboundary damage to the environment or natural resources even in areas or places beyond the jurisdiction or control of States arising from the hazardous activities is compensated within the limits and under conditions specified in these principles."

Explanation

(*a*) There could be several objectives for any liability and compensation regime and hence also of any scheme of allocation of loss in case of transboundary damage.[141] One of the first objectives is to provide protection to victims suffering damage. However, modern concepts of victim protection would appear to relate not only to compensation but also to deterrence and risk-spreading and corrective or distributive justice. The overall objective is, however, to achieve "cost internalization",[142] which is closely related to the "polluter pays" principle. The European Union Common Position of September 2003 to establish a framework of environmental liability to prevent and remedy environmental damage is based on the principle of the "polluter pays" principle;[143]

[135] For a concise discussion of the differing approaches on the definition of environmental damage, see Sands, *Principles of International Environmental Law*, pp. 876–878.

[136] La Fayette, "The concept of environmental damage in international law", p. 167.

[137] Pub. L. No. 101-380, 104 Stat 484 or *United States Code*, title 33, chap. 40, sects. 2701 *et seq*.

[138] See *Yearbook … 2003*, vol. II (Part One), document A/CN.4/531, paras. 58, 92–94, 96, and article 2 (*g*) of the Kiev Protocol.

[139] See Common Position No. 58/2003, *Official Journal of the European Union*, No. C 277 (18 November 2003), p. 13, art. 2, para. (11).

[140] *Yearbook … 2002*, vol. II (Part Two), p. 91, para. 448 (*c*).

[141] See Bergkamp, *Liability and Environment: Private and Public Law Aspects of Civil Liability for Environmental Harm in an International Context*, p. 70, footnote 19. Seven functions are identified in this regard. These are: compensation, distribution of losses, allocation of risks, punishment, corrective justice, vindication or satisfaction, and deterrence and prevention.

[142] *Ibid*., p. 73.

[143] See footnote 139 above. Directive 2004/35/CE noted that the "polluter pays" principle, which is included in the Treaty on European Union and in line with the principle of sustainable development, requires that "an operator whose activity has caused the environmental damage or the imminent threat of such damage is to be held financially liable, in order to induce operators to adopt measures and develop practices to minimise the risks of environmental damage so that their exposure to financial liabilities is reduced" (*Official Journal of the European Union*, No. L 143, vol. 47 (30 April 2004), p. 56).

(*b*) Further, modern treaty regimes on liability and compensation have paid particular attention to the protection and to the restoration and clean-up of the environment and natural resources when they are affected by transboundary damage, even when no private or possessory interests are involved. This is in addition to or independent of the protection of victims. This was well stated by the Conference of Environment Ministers in adopting the Kiev Protocol. They recognized "the importance of civil liability regimes at the national, regional and, in certain cases, even the global level, to serve as mechanisms for internalizing the effects of industrial accidents and environmental harm";[144]

(*c*) However, as explained, the main objectives and elements of liability in environmental law which can be found repeatedly in respective agreements are

the restoration of the environment through the allocation of responsibilities, to give pollution victims a remedy to claim for their losses and to thereby promote the aim of restoration, to deter further pollution and to enforce environmental standards through both, restoration and deterrence;[145]

(*d*) The question of *locus standi* for making claims in respect of damage affecting the global commons and the environment *per se* and the natural resources regarded as public property within the jurisdiction of a State is a separate issue, which is dealt with below under principle 8 (*d*) of the explanation. While the focus of compensation is generally "victims" in the sense of natural or juridical persons, it also includes States, as appropriate, as custodians of public property or, in the case of areas beyond national jurisdiction and global commons, as constituent members of the international community of States to which *erga omnes* obligations are owed.

"4. Prompt and adequate compensation

"Alternative A

"1. The State of origin shall take necessary measures to ensure that prompt and adequate compensation is available for persons in another State suffering transboundary damage caused by a hazardous activity located within its territory or in places under its jurisdiction or control.

"2. The State of origin shall also take necessary measures to ensure that such prompt and adequate compensation is available for transboundary damage to the environment or natural resources of any State or of the areas beyond the jurisdiction and control of any State arising from the hazardous activity located within its territory or in places under its jurisdiction or control.

"3. Measures referred to in paragraphs 1 and 2 above may be subject to applicable conditions, limitations or exceptions under the law of the State of origin which authorized the activity.

"4. When considering evidence of the causal link between the hazardous activity and the transboundary damage, [due] account shall be taken of the risk of causing significant damage inherent in the hazardous activity.

"Alternative B

"1. The operator of a hazardous activity located within the territory or in places within the jurisdiction and control of a State shall be liable for the transboundary damage caused by that activity to persons or environment or natural resources within the territory or in places under the jurisdiction and control of any other State or to the environment or natural resources in areas beyond the jurisdiction and control of any State.

"2. The liability of the operator is subject to applicable conditions, limitations or exceptions under the law of the State of origin which authorized the activity.

"3. When considering evidence of the causal link between the hazardous activity and the transboundary damage, [due] account shall be taken of the risk of causing significant damage inherent in the hazardous activity."

Explanation

(*a*) This is a key provision in the structure of the draft principles. The two alternatives take into account the continuing differences in approach that seem to prevail. The Special Rapporteur is mindful of the fact that many of the instruments dealing with civil liability have not been widely ratified and some of them are not in force. The first alternative therefore seeks to establish a possible common ground for compromise. The promotional language used in alternative A is not intended to obscure the concrete legal obligation that it seeks to establish. At the same time, it is designed to give the State of origin the flexibility needed to achieve the broad objectives of these principles in any one of several ways of its choice;

(*b*) The long debate on the question of transboundary liability both within the Commission and in the Sixth Committee clearly identified priority for the operator's liability in any scheme of allocation of loss. The definition of operator, however, is not as clear.[146] Liability is channelled generally through a single entity and in the case of stationary operations, to the operator of the installation. However, other possibilities exist. In the case of ships, the owner, and not the operator, bears liability. Thus, charterers—who may be the actual operators—are not liable under the International Convention on Civil Liability for Oil Pollution Damage.[147] Under the 1999 Basel Protocol,

[144] Declaration by the Environment Ministers of the region of the United Nations Economic Commission for Europe (UNECE) (ECE/CEP/94/Rev.1 of 11 June 2003), para. 35.

[145] Wolfrum, Langenfeld and Minnerop, *Environmental Liability in International Law: Towards a Coherent Conception*.

[146] It is interesting to note that article 2, paragraph 6, of the EU Directive of 2004 (see footnote 143 above) defines operator as "any natural or legal, private or public person who operates or controls the occupational activity or, where this is provided for in national legislation, to whom decisive economic power over the technical functioning of such an activity has been delegated, including the holder of a permit or authorisation for such an activity or the person registering or notifying such an activity".

[147] See *Yearbook … 2003*, vol. II (Part One), document A/CN.4/531, paras. 47–54, for a description of the oil pollution liability regime.

waste generators, exporters, importers and disposers are all potentially liable at different stages in the transit of waste. The real underlying principle does not seem to be that the "operator" is always liable, rather it is the party with the most effective command or control of the risk at the time of the accident who is made primarily liable;

(*c*) In cases where harm is caused by more than one activity and could not reasonably be traced to any one of them or cannot be separated with a sufficient degree of certainty, jurisdictions have tended to make provision for joint and several liability. Joint and several liability has several disadvantages. It may be considered unfair; it constitutes "overdeterrence"; it gives rise to problems of insurability; it is uncertain and has administrative costs. Although not favourable to industry, it is protective of the interests of the victim. In order to obviate the possible adverse effects of the rule, the operator may be required to prove the extent of damage caused by him to identify his share of liability. Existing international instruments also provide for that kind of possibility. In any case it is for individual agreements or national choice to provide for joint and several liability;

(*d*) Strict liability has been recognized in many jurisdictions where liability is assigned to the operator in respect of inherently dangerous or hazardous activities. It is arguably a general principle of international law, or in any case could be considered as a measure of progressive development of international law. In the case of activities which are not dangerous but still carry the risk of causing significant harm, there is perhaps a better case for liability to be linked to fault or negligence. Strict liability has been adopted in some of the recently negotiated conventions, such as the Kiev Protocol (art. 4), the 1999 Basel Protocol (art. 4) and the Lugano Convention (art. 8). There are several reasons for this choice. It relieves courts of the difficult task of setting appropriate standards of reasonable care and plaintiffs of the burden of proving breach of those standards in relatively complex technical industrial processes and installations. The risk of very serious and widespread damage, despite its low probability, places all these activities in the ultrahazardous category. It would be unjust and inappropriate to make the plaintiff shoulder a heavy burden of proof of fault or negligence in respect of highly complex technological activities whose risks and operation the industry concerned closely guards as a secret;

(*e*) Further, profits associated with the risky activity are the main motivation for the industry in undertaking such activity. Strict liability regimes are generally assumed to provide incentives for better management of the risk involved. This is an assumption which may not always hold up. As these activities have been accepted only because of their social utility and indispensability for economic growth, States may consider at the opportune time reviewing their indispensability by exploring more environmentally sound alternatives which are also at the same time less hazardous. There should be an effort at international cooperation to eliminate ultrahazardous activities progressively through better technology and its availability to all States;

(*f*) Equally common is the concept of limited liability, particularly in cases where strict liability is opted for. Limited liability has several policy objectives. It is justified as a matter of convenience to encourage responsible—as opposed to unscrupulous—operators to continue engaging in the hazardous but socially and economically beneficial activity. It is also aimed at securing reasonable insurance coverage for the activity. Further, if liability has to be strict, that is if liability has to be established without a heavy burden of proof for the claimants, limited liability may be regarded as a *quid pro quo*. None of these statements are self-evident truths, but are widely regarded as relevant;[148]

(*g*) It is of course arguable that the scheme of limited liability is unsatisfactory insofar as it is incapable of providing sufficient incentive to the operator to take stricter measures of prevention. If the limits are set too low it could even become a licence to pollute or cause injury to others and externalize the real costs of the operator. Furthermore, it may be incapable of meeting all the legitimate demands and claims of innocent victims for reparation in case of injury. For this reason, it is important to set the limits of financial liability at a sufficiently high level, keeping in view the magnitude of the risk of the activity and the reasonable possibility for insurance to cover a significant portion of the same. One advantage of a strict but limited liability from the perspective of the victim is that the person concerned need not prove negligence and would also know precisely whom to sue. Such limits are well known in the case of regimes governing oil pollution at sea and nuclear incidents;[149]

(*h*) Article 9 of the Kiev Protocol and article 12 of the 1999 Basel Protocol provide for strict but limited liability. In contrast, the Lugano Convention opted for strict liability (arts. 6, para.1, and 7, para.1) with no provision for limiting the liability. Where limits are imposed on the financial liability of the operator, generally such limits do not affect any interest or costs awarded by the competent court. Moreover, limits of liability are subject to review on a regular basis;

(*i*) Most conventions exclude limited liability in case of fault. The operator is made liable for the damage caused or contributed to by his or her wrongful, intentional, reckless or negligent acts or omissions. Specific provisions to this effect are available in article 5 of the 1999 Basel Protocol and article 5 of the Kiev Protocol. In the case of operations involving highly complicated chemical or industrial processes or technology, fault liability could pose a serious burden of proof for the victims. Their rights could be more securely safeguarded in several ways. For example, the burden of proof could be reversed, requiring the operator to prove that no negligence or intentional wrongful conduct was involved. Liberal inferences might be drawn from the inherently dangerous activity. Or statutory obligations could be placed upon the operator to give the victims or the public access to the information concerning the operations;[150]

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[148] See Churchill, "Facilitating (transnational) civil liability litigation for environmental damage by means of treaties: progress, problems, and prospects", pp. 35–37.

[149] See *Yearbook … 2003*, vol. II (Part One), document A/CN.4/531, paras. 47–49, 56–57, and 83–85.

[150] *Ibid*., para. 119, for a discussion on fault-based liability as a tool of equal importance for securing the rights of victims.

(*j*) It is also usual for conventions and national laws providing for strict liability to specify a limited set of fairly uniform exceptions to the operator's liability. A typical illustration of the exceptions to liability can be found in articles 8–9 of the Lugano Convention or article 4 of the Kiev Protocol. Liability is excepted if, despite taking all appropriate measures, the damage was the result of (i) an act of armed conflict, hostilities, civil war or insurrection; or (ii) the result of a natural phenomenon of exceptional, inevitable, unforeseeable and irresistible character; or (iii) wholly the result of compliance with a compulsory measure of a public authority in the State of injury; or (iv) wholly the result of the wrongful intentional conduct of a third party;

(*k*) If, however, the person who has suffered damage has by his or her own fault caused the damage or contributed to it, the compensation may be denied or reduced, having regard to all the circumstances;

(*l*) If liability of the operator is exempted for any one of the reasons noted above, the victim would be left alone to bear the loss. It is customary for States to reimburse them with *ex-gratia* payments in addition to providing relief and rehabilitation assistance. Further, compensation would also be available from the supplementary funding mechanisms. In the case of exemption of operator liability because of the exception concerning compliance with the public policy and regulations of the Government, there is also the possibility to lay the claims of compensation before the State concerned.

"5. Supplementary compensation

"1. The States concerned shall take the necessary measures to establish supplementary funding mechanisms to compensate victims of transboundary damage who are unable to obtain prompt and adequate compensation from the operator for a [legally] established claim for such damage under the present principles.

"2. Such funding mechanisms may be developed out of contributions from the principal beneficiaries of the activity, the same class of operators, earmarked State funds or a combination thereof.

"3. The States concerned shall establish criteria for determining insufficiency of compensation under the present draft principles."

Explanation

(*a*) Most liability regimes concerning dangerous activities are complemented by additional funding sources to compensate victims of damage arising from such activities when the operator's liability is not adequate to provide necessary redress. Contributions to such additional funding are made either from operators engaged in the operation of the same category of dangerous activity or from entities that have a direct interest in carrying the hazardous activity. The International Convention on the establishment of an international fund for compensation for oil pollution damage,[151] the United States Superfund Amendments and Reauthorization Act of 1986,[152] to extend and amend the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), the arrangement to share the liability of the operator who is insolvent under the Offshore Pollution Liability Agreement (OPOL),[153] the special compensation facility available to developing States and States with economies in transition under article 15 of the 1999 Basel Protocol, as read with decision V/32 on the enlargement of the scope of the Technical Cooperation Trust Fund, provide for such supplementary funding mechanisms.

(*b*) In the context of managing nuclear liability, there are supplementary compensation schemes to which States also make direct contributions.[154]

"6. Insurance and financial schemes

"The States concerned shall take the necessary measures to ensure that the operator establishes and maintains financial security such as insurance, bonds or other financial guarantees to cover claims of compensation."

Explanation

(*a*) The States concerned may establish minimum limits for financial security for such purpose, taking into consideration the availability of capital resources through banks or other financial agencies. Even insurance schemes may require a certain minimum financial solvency from the operator to extend their coverage. Under most schemes, the operator is obliged to obtain insurance and such other suitable financial security. This may be particularly necessary to be able to take advantage of the limited financial liability scheme, where it is available. However, in view of the diversity of legal systems and differences in economic conditions, some flexibility for States in requiring and arranging suitable financial and security guarantees may be envisaged.[155] An effective insurance system may also require wide participation by potentially interested States;[156]

(*b*) As pointed out in 2002 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:

> Financial assurance … is beneficial for all stakeholders: for public authorities and the public in general, it is one of the most effective, if not the only, way of ensuring that restoration actually takes place in line with the polluter pays principle; for industry operators, it provides a way of spreading risks and managing uncertainties; for the insurance industry, it is a sizeable market.[157]

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[151] *Ibid*., paras. 47–54, for a description of the oil fund regime.

[152] Pub. L. Nos. 99–499; 100 Stat.1613.

[153] For the text of the Agreement (London, 4 September 1974), see ILM, vol. 13 (1974), p. 1409.

[154] *Yearbook … 2003*, vol. II (Part One), document A/CN.4/531, paras. 47, 61–62, 66–68 and 80–81.

[155] See, for example, the statement by China, *Official Records of the General Assembly, Fifty-eighth Session, Sixth Committee*, 19th meeting (A/C.6/58/SR.19), para. 43.

[156] See, for example, the statement by Italy, *ibid*., 17th meeting (A/C.6/58/SR.17), para. 28.

[157] *Official Journal of the European Communities*, No. C 151, vol. 45 (25 June 2002) (COM (2002) 17 final–2002/0021(COD) of 23

The proposal also noted that insurance coverage is available for clean-up costs. Similarly, such insurance is available at an even earlier stage in the United States. The experience gained in these markets can be quickly transferred to other markets, as the insurance industry is growing into a global market;

(*c*) One of the consequences of ensuring the availability of insurance and financial security is that a claim for compensation may be allowed as one option under domestic law directly against any person providing financial security coverage. However, such a person may be given the right to require the operator to be joined in the proceedings. Such a person is also entitled to invoke the defences to which the operator would be entitled under law. Article 11, paragraph 3, of the Kiev Protocol and article 14, paragraph 4, of the 1999 Basel Protocol provide for this possibility. However, both protocols allow States to make a declaration if they wish not to allow for such a direct action.

"7. Response action

"1. States shall require all operators involved in the conduct of activities falling within the scope of the present principles to take prompt and effective action in response to any incident involving such activities with a view to minimizing any damage from the incident, including any transboundary damage. Such response action shall include prompt notification, consultation and cooperation with all potentially affected States.

"2. In the event that the operator fails to take the required prompt and effective response action the State of origin shall, where appropriate, in consultation with the States likely to be affected, make arrangements for such action."

Explanation

(*a*) It may be recalled that articles 16–17 of the draft articles on prevention of transboundary harm from hazardous activities[158] deal with the requirements of "emergency preparedness" and "notification of an emergency". The present principle on responsive action is different and goes beyond those provisions. It deals with the need to take the necessary response action within the State of origin after the occurrence of an incident resulting in damage, but if possible before it acquires the character of a transboundary damage. The operator has the primary obligation to put in place all the emergency preparedness and press the same to action as soon as an incident has occurred. In case the operator is unable to take the necessary response action, the State of origin is required to make the necessary arrangements to take such action. In this process it can seek necessary and available help from other States or competent international organizations;

(*b*) There is also a duty for the State of origin to consult the States likely to be affected to determine the best possible response action to prevent or mitigate transboundary damage. Conversely, there is also a duty on the part of States likely to be affected to extend to the State of origin their full cooperation and take such response measures as are within their power in areas under their jurisdictions to help prevent or mitigate such transboundary damage.

"8. Availability of recourse procedures

"1. The States concerned shall ensure the availability of prompt, adequate and effective administrative and judicial remedies to all the victims of transboundary damage arising from the operation of hazardous activities.

"2. States shall ensure that such remedies are no less prompt, adequate and effective than those available to their nationals and include access to such information as is necessary to exercise their right of access to compensation.

"3. Each State shall ensure that its courts possess the necessary competence to entertain such claims for compensation."

Explanation

(*a*) Paragraph 1 seeks to ensure the availability of prompt and adequate access to judicial remedies to "all the victims". As noted above, victims for the purpose of the draft principles are in the first place persons, natural or juridical, who suffer the damage either to their person or to their property. There is a growing body of international conventions which provides for all persons, irrespective of their nationality or residence, or the place of occurrence of injury, non-discriminatory access, in accordance with its legal system, to judicial or other procedures to seek appropriate remedies, including compensation. The national procedures and remedies to which access is to be made available should be equal to those that are provided under national law to one's own citizens. It may be recalled that article 16 of the draft articles on prevention of transboundary harm from hazardous activities provides similar obligation for States in respect of the phase of prevention during which they are required to manage the risk with all due diligence. A similar non-discrimination provision covering the phase where injury actually occurred, despite all best efforts to prevent damage, can be found in article 32 of the Convention on the Law of the Non-navigational Uses of International Watercourses. Article 72 of the Helsinki Rules on international water resources as revised also has a similar provision;[159]

(*b*) The important point to note is that the principle of non-discriminatory and equal access does not guarantee any substantive standard of liability and no minimum procedural rights other than those that are granted under national law to the citizens. Furthermore, it does not alleviate problems concerning choice of law, which is, given the diversity and lack of any consensus among States, a significant obstacle to delivering prompt, adequate and

January 2002), p. 7. It may be noted that the proposal has since been revised and adopted as Common Position No. 58/2003 (see footnote 139 above).

[158] *Yearbook ... 2001*, vol. II (Part Two), p. 147.

[159] "The Revised ILA [International Law Association] Rules on Equitable and Sustainable Uses in the Management of Waters", 10th draft (February 2004).

effective judicial recourse and remedies to victims,[160] particularly if they are poor and not assisted by expert counsel in the field. In spite of these disadvantages, the principle is still a step in the right direction and may even be regarded as essential. States could move matters forward by promoting the harmonization of laws, by agreement to extend such access and remedies. At the election of the plaintiff, equal right of access could be made available in the courts of a party only where: (i) the damage was suffered; (ii) the operator has his or her habitual residence; or (iii) the operator has his or her principal place of business;

(*c*) Such an option is made available under the 1968 Brussels Convention on jurisdiction and the enforcement of judgements in civil and commercial matters. Article 19 of the Lugano Convention, article 17 of the 1999 Basel Protocol and article 13 of the Kiev Protocol provide for a similar choice of forums;

(*d*) Secondly, in respect of damage to the environment *per se* and natural resources, which are public property and available for collective and common enjoyment within the jurisdiction of a State, "victims" in the sense of paragraph 1 are also those designated under national laws to act as public trustees to safeguard those resources and hence the legal standing to sue. The concept of public trust in many jurisdictions provides proper standing to different designated persons to lay claims for restoration and clean-up in case of any transboundary damage.[161] Under United States law, the Oil Pollution Act of 1990, such a right is given to the United States Government, a state, an Indian tribe and a foreign Government. Under CERCLA, as amended by the Superfund Amendments and Reauthorization Act of 1986, *locus standi* has been given to only the federal Government, authorized representatives of states, as trustees of natural resources or by designated trustees of Indian tribes. In many European jurisdictions, public authorities have been given similar right of recourse. Norwegian law provides standing to private organizations and societies to claim restoration costs. In France, some environmental associations have been given the right to claim compensation in criminal cases involving violation of certain environmental statutes. The Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (hereinafter the Aarhus Convention) gives standing to NGOs to act on behalf of public environmental interests. The proposal for the European Union directive of 2002 also provides to certain recognized NGOs the right to request competent authorities to act in certain circumstances as a measure of good governance. Under articles 5–6, these competent authorities, to be designated under article 13, may require the operator to take the necessary preventive or restoration measures or take such measures themselves, if the operator does not take them or cannot be found;[162]

(*e*) In the case of damage to areas beyond the national jurisdiction of any State, the question of standing to sue is not a settled principle. If the damage is the result of breach of an obligation owed to a State or to a State as member of a group of States, or the breach is of a character such that it affects the enjoyment of rights and obligations by all States, then under the law of State responsibility, the State concerned could sue in its own right as an injured State. But in the case of the environmental damage of areas beyond the national jurisdiction of any State, that is, of global commons, where obligations to any one State are not adversely affected, it is widely accepted that it should be treated as a violation of the *erga omnes* obligation. Article 48 of the draft articles on responsibility of States for internationally wrongful acts adopted by the Commission in 2001[163] recognizes this principle; it recognizes the right of a State not directly injured to invoke the responsibility of the State if the injury involves any one of two types of breach of obligation. One relates to an obligation "owed to a group of States including that State, and is established for the protection of a collective interest of the group". The other relates to an obligation "owed to the international community as a whole". In the case of the first type of breach, the obligation should be one that is established in the collective interest, whereas in the latter case, all obligations are by definition established in the collective interest of all States.[164] Examples of such global common interests may be found in the growing number of international treaties and customary law concerned with the protection of the global environment or of areas of common interest or concern. "The same will be true", according to one comment, "of *erga omnes* customary obligations, including the duty to protect the marine environment or the environment of common areas beyond national jurisdiction";[165]

(*f*) States could also consider the feasibility and desirability of according legal standing to any legal person, entity or organization, whether intergovernmental or not, on the same lines as in the case of the protection of the environment and natural resources within domestic jurisdiction. The implication of this broad standing to sue must, however, be kept in view. Birnie and Boyle have aptly explained the limited significance of this right, from which it does not follow that the full range of reparations will be available, thus:

> What is clear is that third states have the same right as injured states to seek cessation of any breach of obligations owed to the international community as a whole. Beyond that, the availability of reparation will depend on the circumstances of the breach, the extent to which claimant's interests are affected, and the nature of the risk to community interests. It is, for example, unlikely that individual states will be entitled to demand compensation for material damage to the global environment beyond any clean-up or reinstatement costs which they may incur;[166]

(*g*) The right of recourse is a principle based on non-discrimination and equal access to national remedies. For all its disadvantages, the principle does go beyond the requirement that States meet a minimum standard of effectiveness in the availability of remedies for

[160] See Cuperus and Boyle, "Articles on private law remedies for transboundary damage in international watercourses", p. 406.

[161] See Wetterstein, "A proprietary or possessory interest: a *conditio sine qua non* for claiming damages for environmental impairment?", p. 50–51.

[162] COM (2002) 17 final–2002/0021(COD) (see footnote 157 above), pp. 20 and 22.

[163] *Yearbook ...2001*, vol. II (Part Two), p. 29, para. 76.

[164] See Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries*, p. 278, para. (10).

[165] Birnie and Boyle, *International Law and the Environment*, p. 197.

[166] *Ibid.*

transboundary claimants, in providing access to information, and in ensuring appropriate cooperation between the relevant courts and national authorities across national boundaries. This principle is also reflected in principle 10 of the Rio Declaration on Environment and Development,[167] and in principle 23 of the World Charter for Nature. It is also increasingly recognized in national constitutional law regarding protection of the environment.[168] The Aarhus Convention, which is an improvement over the 1990 EC directive[169] and article 9 of the Convention for the protection of the marine environment of the north-east Atlantic, obliges parties to ensure that public authorities make available to the public "environmental information" without any interest having to be stated, generally in the form requested, and without an unreasonable charge being made;[170]

(*h*) The right to access to information on industrial and hazardous activities having an impact on the environment and creating human health hazards in general, and for the purpose of safeguarding the legal rights of citizens and victims of damage arising from such activities, may be regarded as a second generation of rules following the obligations of reporting, notification, consultation and negotiation incorporated, for example, in the Commission's draft articles on prevention of transboundary harm from hazardous activities.[171] Without prejudice to existing international obligations, and with due regard to the legitimate interest of the person holding the information, States are required to provide for access to information and access to justice accordingly. There is much room for improvement in the further articulation and enforcement of this duty. With increased awareness of environmental and other hazards due to hazardous activities, the public will demand a greater role in decisions concerning their establishment and management. With the increasing focus on good governance, there are greater demands on governments around the world for accountability and transparency in their work. Greater systematization and retrieval of relevant information is also necessary. The right of access to information is only the lower end of the equation; the obligation of government to provide the public at large with that information, even without their seeking it, is at the other end;

(*i*) The right of recourse to judicial and procedural remedies could be subject to limitation periods, for example five years from the date on which the claimant knew or ought reasonably to have known of the damage and of the identity of the operator. It may also be stipulated that in no case may such actions be brought after, for example, 30 years from the date of the incident which caused the damage. Article 10 of the Kiev Protocol (3 and 15 years), article 13 of the 1999 Basel Protocol (5 and 10) and article 17 of the Lugano Convention (3 and 30) provide for similar limitations of time to bring forth claims for compensation;

(*j*) Proceedings pending in different courts concerning the same subject matter between the same parties could, by agreement among the States concerned, be left to be considered by the court that is first seized of the matter. Further, other courts may be obliged to decline to entertain their jurisdiction once they are under the jurisdiction of the first court. Similar provisions and the possibility of consolidation of claims in article 15, paragraphs 1–2, of the Kiev Protocol, in articles 14, paragraphs 3–5, and 18 of the 1999 Basel Protocol and articles 21–22 of the Lugano Convention are intended to guard against forum shopping and safeguard the integrity of the process of litigation by streamlining the procedures;

(*k*) Recognition and enforcement of judgements given in a foreign jurisdiction form an important component of an effective regime of remedies for victims of transboundary hazardous activities. A decision rendered in one State is meaningless if it cannot be recognized and enforced in another State. Article 18 of the Kiev Protocol, article 21 of the 1999 Basel Protocol and article 23 of the Lugano Convention provide for such recognition and enforcement.[172]

"9. Relationship with other rules of international law

"The present set of principles is without prejudice to rights and obligations of the parties under the rules of general international law with respect to the international responsibility of States."

Explanation

The need to develop any international regime on allocation of loss in case of transboundary damage without prejudice to other rules of international law, in particular the responsibility of States under international law, has been a cornerstone of the present exercise. This is also endorsed and finds reflection in article 12 of the Kiev Protocol.

"10. Settlement of disputes

"1. Any dispute concerning the interpretation or application of the present articles shall be settled expeditiously through peaceful means of settlement, including negotiations, mediation, conciliation, arbitration or judicial settlement.

[167] See footnote 123 above.

[168] Cuperus and Boyle, *loc. cit*., p. 407.

[169] Council directive 90/313/EEC of 7 June 1990 on the freedom of access to information on the environment, *Official Journal of the European Communities*, No. L 158 (23 June 1990).

[170] See Sands, *op. cit.*, p. 858.

[171] *Ibid*., p. 867. On environmental information in general, see chapter 17, pp. 826–868.

[172] A standard provision on recognition and enforcement may read as follows:

"1. Any decision given by a court with jurisdiction in accordance with article [on availability of recourse procedures] above where it is no longer subject to ordinary forms of review, shall be recognized in any party, unless: (*a*) such recognition is contrary to public policy in the party in which recognition is sought; (*b*) it was given in default of appearance and the defendant was not duly served with the document which instituted the proceedings or with an equivalent document in sufficient time to enable him to arrange for his defence; (*c*) the decision is irreconcilable with a decision given in a dispute between the same parties in the party in which recognition is sought; or (*d*) the decision is irreconcilable with an earlier decision given in another State involving the same cause of action and between the same parties, provided that this latter decision fulfils the conditions necessary for its recognition in the party addressed.

"2. A decision recognized under paragraph 1 above, which is enforceable in the party of origin, shall be enforceable in each party as soon as the formalities required by that party have been completed. The formalities shall not permit the merits of the case to be reopened."

"2. For a dispute not resolved in accordance with paragraph 1, parties may by mutual agreement accept either or both of the means of dispute settlement, that is, (*a*) submission of the dispute to the International Court of Justice or (*b*) arbitration."

Explanation

Apart from the fact that these provisions represent the demand of some members of the Commission and of some States or their representatives, article 26 of the Kiev Protocol provides for a similar obligation for the settlement of disputes. In addition, article 14 of the Protocol also provides for a final and binding arbitration in accordance with the Permanent Court of Arbitration Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment. In the event of a dispute between persons claiming damage pursuant to the Protocol and persons liable under the Protocol, such arbitration could be resorted to, however, only by agreement among all the parties involved.

"11. Development of more detailed and specific international regimes

"1. States shall cooperate in the development of appropriate international agreements on a global or regional basis in order to prescribe more detailed arrangements regarding the prevention and response measures to be followed in respect of a particular class of hazardous activities as well as the insurance and compensation measures to be provided.

"2. Such agreements may include industry- and/or State-funded compensation funds to provide supplementary compensation in the event that the financial resources of the operator, including insurance, are insufficient to cover the losses suffered as result of an incident. Any such funds may be designed to supplement or replace national industry-based funds."

Explanation

This principle points to the need for States to enter into more detailed arrangements and tailor them to the particular and specific circumstances of individual hazardous activities. It is also a recognition that there are several variables in the regime concerning liability for transboundary harm that are best left to the discretion of individual States or their national laws or practice as a basis for selection or choice, given their own particular needs and political and economic realities. Arrangements concluded on a regional basis with respect to a specific category of hazardous activities are likely to be more fruitful and durable in protecting the interest of their citizens, the environment and the natural resources on which they are dependent.

"12. Implementation

"1. States shall adopt any legislative, regulatory and administrative measures that may be necessary to implement the above provisions.

"2. These provisions and any implementing provisions shall be applied among all States without discrimination based on nationality, domicile or residence.

"3. States shall cooperate with each other to implement the provisions according to their obligations under international law."

Explanation

This provision is intended to complement the role played by States in establishing supplementary but necessary domestic implementing mechanisms for giving effect to their international obligations concerning international liability. It is drawn on the basis of article 8 of the Kiev Protocol.

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)

[Agenda item 4]

DOCUMENT A/CN.4/543

Survey of liability regimes relevant to the topic of 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), prepared by the Secretariat

[*Original: English*]
[*24 June 2004*]

CONTENTS

Abbreviations

CERCLA	Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (United States of America)
CIV	International Convention concerning the carriage of passengers and luggage by rail
CRAMRA	Convention on the Regulation of Antarctic Mineral Resource Activities
CRISTAL	Contract Regarding an Interim Supplement to Tanker Liability for Oil Pollution
CRTD	Convention on Civil Liability for Damage Caused during Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels

ELA	Environmental Liability Act (Germany)
EPA	United States Environmental Protection Agency
OPA	Oil Pollution Act (United States)
RCRA	Solid Waste Disposal Act (Resource Conservation and Recovery Act) (United States)
SARA	Superfund Amendments and Reauthorization Act (United States)
TOVALOP	Tank Owners Voluntary Agreement Concerning Liability for Oil Pollution

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International Convention for the Unification of Certain Rules relating to the Limitation of the Liability of Owners of Seagoing Vessels (Brussels, 25 August 1924)	League of Nations, *Treaty Series*, vol. CXX, No. 2763, p. 125.
Convention for the Unification of Certain Rules relating to International Carriage by Air (Warsaw, 12 October 1929)	*Ibid*., vol. CXXXVII, No. 3145, p. 11.
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Additional Protocol No. 3 to amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw on 12 October 1929 as Amended by the Protocol done at The Hague on 28 September 1955 and at Guatemala City on 8 March 1971 (Montreal, 25 September 1975)	ICAO document No. 9147.
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Convention on damage caused by foreign aircraft to third parties on the surface (Rome, 7 October 1952)	*Ibid*., vol. 310, No. 4493, p. 181.
Treaty establishing the European Economic Community (Treaty of Rome) (Rome, 25 March 1957)	*Ibid*., vol. 298, No. 4300, p. 3.
International Convention relating to the limitation of the liability of owners of sea-going ships (Brussels, 10 October 1957)	*Ibid*., vol. 1412, No. 23642, p. 73.
Convention on third party liability in the field of nuclear energy (Paris, 29 July 1960)	*Ibid*., vol. 956, No. 13706, p. 251.
Convention supplementary to the above-mentioned Convention (Brussels, 31 January 1963)	*Ibid*., vol. 1041, No. 13706, p. 358.
Protocol to amend the Convention of 31 January 1963, supplementary to the Convention of 29 July 1960, on third party liability in the field of nuclear energy, as amended by an additional Protocol of 28 January 1964 (Paris, 16 November 1982)	*Ibid*., vol. 1650, No. 13706, p. 446.
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Convention, Supplementary to the Warsaw Convention, for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person Other than the Contracting Carrier (Guadalajara, 18 September 1961)	*Ibid*., vol. 500, No. 7305, p. 31.

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Introduction

1. The present study further updates a study published in 1984 under the title "Survey of State practice relevant to international liability for injurious consequences arising out of acts not prohibited by international law"[1] and updated by the Secretariat in 1995.[2]

2. Bearing in mind that the International Law Commission has already adopted and submitted to the General Assembly the preamble and the draft articles on prevention of transboundary harm from hazardous activities,[3] the Secretariat has focused the study on liability aspects of the topic.

3. The study reviews existing international conventions, international case law, other forms of State practice as well as available domestic legislation and domestic courts' decisions bearing on the issue of liability. For the sake of comprehensiveness, it incorporates as far as possible material on liability included in the 1995 survey.

4. The inclusion of material on specific activities is without prejudice to the question whether such activities are "prohibited by international law". It is useful to consider the handling of some disputes in which there was no general agreement as to the lawfulness or unlawfulness of the activities giving rise to injurious consequences.

5. The study also includes, in addition to treaties, judicial decisions, arbitral awards and documents exchanged between foreign ministries and government officials. These documents are important sources of State practice. Another important source is settlements through non-judicial methods which, although they are not products of conventional judicial procedure, may represent a pattern in trends regarding substantive issues in dispute. Statements made by the State officials involved as well as the content of actual settlements are examined for their possible relevance to the substantive principles of liability.

6. The study has not ignored the difficulties of evaluating a particular instance as "evidence" of State practice.[4]

[1] *Yearbook ... 1985*, vol. II (Part One) (Addendum), p. 1, document A/CN.4/384.

[2] *Yearbook ... 1995*, vol. II (Part One), p. 61, document A/CN.4/471.

[3] The General Assembly, in its resolution 56/82 of 12 December 2001, expressed its appreciation to the Commission "for the valuable work done on the issue of prevention on the topic of 'international liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary harm from hazardous activities)'".

The text of the draft preamble and articles appears in *Yearbook … 2001,* vol. II (Part Two), p. 146, para. 97.

[4] For example, abstention by States from engaging in activities which, although lawful, may cause injuries beyond their territorial

Different policies may motivate the conclusion of treaties or decisions. Some may be compromises or accommodations for extraneous reasons. But repeated instances of State practice, when they follow and promote similar policies, may create expectations about the authoritativeness of those policies in future behaviour. Even though some of the policies may not have been explicitly stated in connection with the relevant events, or may purposely and explicitly have been left undecided, continuous similar behaviour may lead to the creation of a customary norm. Regardless of whether the materials examined here have been established as customary law, they demonstrate a trend in expectations and may contribute to the clarification of policies concerning some detailed principles of liability relevant to the topic. Practice also demonstrates ways in which competing principles, such as "State sovereignty" and "domestic jurisdiction", are to be reconciled with the new norms.

7. In referring to State practice, caution must be exercised in extrapolating principles, for the more general expectations about the degree of tolerance concerning the injurious impact of activities can vary from activity to activity.

8. The materials examined in the study are not, of course, exhaustive. They relate primarily to activities concerning the physical use and management of the environment, for State practice in regulating activities causing injuries beyond territorial jurisdiction or control has been developed more extensively in this area. The study is also designed to serve as useful source material; hence, relevant extracts from domestic legislation, treaties, judicial decisions and official correspondence are also cited. The outline of the study has been formulated on the basis of functional problems which may appear relevant to liability issues of the topic.

9. Chapter I describes the general characteristics of liability regimes such as the issue of causality. It reviews the historical development of the concept of strict liability in domestic law and provides an overview of the development of this concept in international law.

10. Chapter II examines the issue of the party that is liable. It describes the polluter pays principle, operator liability and instances where States are considered liable.

11. Chapter III attempts to identify instances and conditions in which the operator or the State may be considered exonerated from liability.

12. Chapter IV examines the issues relevant to compensation. Such issues include the content of compensation, namely compensable injuries, forms of compensation and limitation on compensation. The chapter also examines the authorities recognized in State practice as competent to decide on compensation.

13. Chapter V describes the statute of limitations provided mostly in treaties.

14. Chapter VI reviews the requirements of insurance and other anticipatory financial schemes to guarantee compensation in case of injury.

15. Finally, chapter VII examines the issue of enforcement of judgements granted mostly by domestic courts, in respect to compensation to injured parties.

jurisdiction, may or may not be relevant to creating customary behaviour. PCIJ and its successor, ICJ, have observed that the mere fact of abstention without careful consideration of the motivating factors is insufficient proof of the existence of an international legal custom. Abstention by States from acting in a certain way may have a number of reasons, not all of which have legal significance. See the judgment rendered on 7 September 1927 by PCIJ in the "*Lotus*" case (*"Lotus", Judgment No. 9, 1927, P.C.I.J., Series A, No. 10*, p. 28). A similar point was made by ICJ in its judgment of 20 November 1950 in the *Asylum* case (*Asylum, Judgment, I.C.J. Reports 1950*, p. 286), and in its judgment of 20 February 1969 relating to the *North Sea Continental Shelf* case (*North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 44, para. 77). See also *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, pp. 253–255). See further Parry, *The Sources and Evidences of International Law*, pp. 34–64.

However, in its judgment of 6 April 1955 in the *Nottebohm* case, ICJ relied on State restraint as evidence of the existence of an international norm restricting freedom of action (*Nottebohm, Second Phase, Judgment, I.C.J. Reports 1955*, pp. 21–22).

On the importance of norm-generating properties of "incidents", Reisman observes that:

> "The normative expectations that political analysts infer from events are the substance of much of contemporary international law. The fact that the people who are inferring norms from incidents do not refer to the product of their inquiry as 'international law' in no way affects the validity of their enterprise, any more than the obliviousness of Molière's Mr. Jourdain to the fact that he was speaking prose meant that he was not. Whatever it is called, law it is."

("International incidents: introduction to a new genre in the study of international law", p. 5).

Chapter I

General characteristics of liability regimes

A. The issue of causality

16. The concept of liability was developed in domestic law in connection with tortious acts. The evolution of the notion in domestic law reveals its policy considerations, many of which have shaped the current theory of liability and particularly the place of "fault" in accountability and payment of compensation in relation to certain activities. In order to understand fully the development of the concept of liability and to foresee its future configuration in international law, it is useful to review the historical development of this concept in domestic law.

17. This is not to suggest that the development of the liability concept in international law will or should have the same content and procedures as in domestic law. The concept of liability is much more developed in domestic law and its introduction to international law cannot ignore

the experience gained in this area in domestic law. The domestic law references to liability are mentioned only to provide guidelines when appropriate for understanding the concept of liability and its development.

18. Historically, one of the main concerns and most important elements in the evolution of the law of liability was the maintenance of public order by preventing individual vengeance. Under primitive law, causation was sufficient to establish liability. Damages were offered primarily to avoid recourse to private vengeance. So long as the misfortune was traceable to the cause of the injury, it did not matter that the victim was subjected to flagrant aggression or accidental injury.[5] Primitive law did not look "so much to the intent of the actor as [it did to] the loss and the damage of the party suffering".[6] Some explanations have been advanced for this apparent indifference to fault in the approach of primitive law. First, it has been suggested that it was a result of early law's lack of sophistication in its inability or unwillingness to assume that harm could occur unintentionally rather than a lack of concern for such intention.[7] Secondly, it was a myth that early common law was based on the unqualified principle that individual human beings acted at their own risk and therefore were responsible for all the consequences of their actions.[8] In view of the limited causes of action recognized then, it was easy to conceive of "the overall system as one of no liability rather than pervasive liability without fault".[9] Gradually, the law began to pay more attention to "exculpatory considerations and, partially under the influence of the Church, tilted towards moral culpability as the proper basis for tort".[10] This approach, which tended to benefit the party causing injury rather than the injured, was influenced by the industrial revolution:

> During the 19th century, the "moral advance" of tort law vastly accelerated. With the blessings of the moral philosophy of individualism (Kant) and the economic postulate of laissez faire, the courts attached increasing importance to freedom of action and ultimately yielded to the general dogma of "no liability without fault". This movement coincided with, and was undoubtedly influenced by, the demands of the Industrial Revolution. It was felt to be in the better interest of an advancing economy to subordinate the security of individuals, who happened to become casualties of the new machine age, rather than fetter enterprise with cost of "inevitable" accidents. Liability for faultless causation was feared to impede progress because it gave the individual no opportunity for avoiding liability by being careful and thus confronted him with the dilemma of either giving up his projected activity or incurring the cost of any resulting injury. Fault alone was deemed to justify a shifting of loss, because the function of tort remedies was seen as primarily admonitory or deterrent.[11]

19. This approach is undergoing revision. While morality continues to be predominant in intentional tortious injuries, views in the area of accidents have been changing drastically:

> It is being increasingly realised that human failures in a machine age exact a large and fairly regular toll of life, limb and property, which is not significantly reducible by standards of conduct that can be prescribed and enforced through the operation of tort law. Accident prevention is more effectively promoted through the pressure exerted by penal sanctions attached to safety regulations and such extra-legal measures as road safety campaigns, insurance premiums based on the insured's safety record, improvements in the quality of roads and motor vehicles and of production processes in industry. But despite all these controls, accidents and injuries remain. Some no doubt are attributable to negligence in the conventional sense, that is, to unreasonable risks, but others to "unavoidable" accidents. Either may fairly be ascribed, not just to the immediate participants, but to the activity or enterprise itself with which they are connected ... The question is simply, who is to pay for them, the hapless victim who may be unable to pin conventional fault on any particular individual or those who benefit from the accident producing activity? If rules of law can be devised that will require each industry or those engaging in a particular activity, like drivers of motor cars, to bear collectively the burden of its own operating costs, public policy may be better served than under a legal system that is content to leave the compensation of casualties to a "forensic lottery" based on outdated and unrealistic notions of fault and excessively expensive to operate.[12]

20. Recognizing the fact that in conditions of modern life, many activities may exact a high toll on life and limb and property, society has had to make several choices: (*a*) to proscribe the activity or enjoin its conduct; (*b*) to allow it for its social utility but specify conditions or prescribe the manner in which it would be carried out; or (*c*) to tolerate the activity on condition that it pays its way regardless of the manner in which it was conducted.[13]

21. The last choice leads to strict liability for hazardous activities. There are two paradigms for strict liability: strict liability for criminal and civil public welfare offences and "strict liability in tort for "ultrahazardous" or abnormally dangerous activities".[14] In the latter case, strict liability does not require proof of the *mens rea*. The focus of the inquiry is on the harm that flows from an instrumentality and not on the harm from the conduct of the specific individual defendant.[15] Thus, the liability of the defendant is based on the relationship of the defendant to the instrumentality. The defendant is the owner, the operator or the user, etc.[16] The person whose activity causes the injury

> is held liable not for any *particular* fault occurring in the course of the operation, but for the inevitable consequences of a dangerous activity which could be stigmatised as negligent on account of its foreseeably harmful potentialities, were it not for the fact that its generally beneficial character requires us to tolerate it in the public interest.[17]

22. Strict liability is in one sense another aspect of negligence. Both are based on responsibility for the creation of a risk which is abnormal. While strict liability is concerned with activities which remain dangerous despite all reasonable precaution, negligence is concerned primarily with an improper manner of doing things which are safe enough when properly carried out.[18] There is a dilemma in all this, which has been explained thus:

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[5] Fleming, *The Law of Torts*, p. 327.

[6] *Lambert & Olliot* v. *Bessey* (1681) T. Raym. 421 at 422, cited in Fleming, *op. cit*., pp. 6–7.

[7] See Ehrenzweig, "Psychoanalysis of negligence", p. 855, cited in Fleming, *op. cit*., p. 7.

[8] See Winfield, "Myth of absolute liability", p. 37, cited in Fleming, *op. cit*., p. 7.

[9] Fleming, *op. cit*., p. 7.

[10] *Ibid*.

[11] *Ibid*.

[12] *Ibid*., p. 8.

[13] *Ibid*., p. 328.

[14] MacAyeal, "The Comprehensive Environmental Response, Compensation, and Liability Act: the correct paradigm of strict liability and the problem of individual causation", p. 218.

[15] *Ibid*., p. 219.

[16] *Ibid*.

[17] Fleming, *op. cit*., p. 328.

[18] *Ibid*.

[I]f such an activity were branded as negligent on account of its irreducible risk, it would be tantamount to condemning it as unlawful. Some activities, no doubt, deserve that fate either because the object they serve is not sufficiently beneficial or because it can be attained in a safe manner. Other activities, however, may have to be tolerated despite their irreducible risk … These should not be penalised as reprehensible by labelling them negligent although the risk they entail may not be avoidable (at least statistically) despite all possible precaution. If all the same they should pay their way, it must be on some principle other than negligence. That principle is strict liability.[19]

23. Unlike the earlier primitive law's individualistic approach, the return to strict liability is "justified by considerations of social and economic expediency of our own age".[20] In domestic law, there are at least two underlying reasons for adopting strict liability: first, the limited knowledge about the increasingly developing science and technology and their effects;[21] and secondly, the difficulty in establishing which conduct is negligent and presenting evidence necessary to establish negligence.[22] The core of strict liability is therefore to impose liability on lawful, not "reprehensible"[23] activities which entail extraordinary risk of harm to others, because of either the seriousness or the frequency of the potential harm.[24] The activity has been permitted on the condition[25] and the understanding that the activity will absorb the cost of its potential accidents as part of its overhead.[26] Moreover, society ensures that the true costs of an activity are distributed among those benefiting from the activity. Usually, the costs of compensation are factored into the price of related goods and services. Those profiting from an activity are generally better positioned to compensate victims than the victims themselves.[27]

24. In essence, the main goal of strict liability for ultrahazardous activity is to compensate those injured by lawful conduct for the inevitable consequences of a highly hazardous instrumentality.[28] If injury ensues from the use of such instrumentality, there is legal cause.[29]

25. The need to link the defendant to the instrumentality gives rise to notions of causation intended to justify such linkage. Causation in strict liability is linked not so much to the personal acts of the defendant as it is to the instrumentality or the activity in which the instrumentality is used.[30] Doubt has been expressed as to whether the notion of "proximate causation" is applicable to strict liability since it arose mainly from the law of negligence and is not always applicable in cases involving intentional wrongs. However, this has not dissuaded the courts from employing it in strict liability cases, although they have focused such connection in reference to the instrumentality.

26. The notion of "proximate causation" is also conceptually challenging and difficult to define precisely. Its temporal or spatial attributes or its direct connotations of immediacy have sometimes been accentuated. Others have emphasized the sense that proximate causation produces a "result in a natural and continuous sequence". In yet other instances, "substantial cause" has been employed, without necessarily intending it to mean "sole cause" insofar as notions of "joint and several liability" also come into the picture when dealing with strict liability cases.

27. Some cases have defined proximate causation in terms of harm that is foreseeable. Others perceive it as a determination in judicial policy based on the circumstances of each case. Put simply, it is a practical way of cutting off liability on an *ad hoc* basis when it appears that the imposition of liability is too extreme.[31] On this account, "legal cause" is more apt a description:

[L]egal cause is not a question of causation: it is simply a policy determination of whether or not the defendant should be held responsible … Legal cause defines the scope of the legal duty. To the extent proximate cause is little more than a policy judgment to define the outer limits of liability for a particular claim, courts must look to the policies of the particular statute or area of law involved.[32]

… Any proximate cause analysis in a strict liability claim, to the extent applicable at all, should not include a component of foresight by a reasonable person in the shoes of the defendant.[33]

… The essence of strict liability … is that a plaintiff need not prove that the defendant acted intentionally or negligently[34] … If courts become bogged down in an analysis of the details of the use of the instrumentality, the analysis becomes one of negligence. To show legal cause in the context of strict liability for ultrahazardous activity, it should only be necessary to show that the defendant voluntarily engaged in the conduct subject to strict liability.[35]

28. Various designations are used to describe the modern doctrine imposing strict liability, among them "liability without fault" (*responsabilité sans faute*), "negligence without fault", "presumed responsibility", "fault *per se*", "objective liability" (*responsabilité objective*) or "risk liability"[36] (*responsabilité pour risque créé*).

B. Strict liability

1. Domestic law

(a) *Nature of the thing or activity*

29. A number of factors have influenced the development of strict liability under domestic law. In the first place, many legal systems have shown a persistent tendency to recognize the concept of strict liability based on

[19] *Ibid*., pp. 328–329.

[20] *Ibid*., p. 328. See also W. Page Keeton, *Prosser and Keeton on the Law of Torts*, p. 537.

[21] Goldie elaborates on this issue by stating that in the current state of the art of new industries, no amount of foresight or feasible measures may avert injuries ("Liability for damage and the progressive development of international law", p. 1203).

[22] *Ibid*.

[23] This term is used by Fleming, *op. cit*., p. 329, to distinguish between negligence and strict liability.

[24] Strahl, "Tort liability and insurance", pp. 213–218.

[25] See Robert E. Keeton, "Conditional fault in the law of torts", cited in Fleming, *op. cit*., p. 329, footnote 10.

[26] Fleming, *op. cit*., p. 329.

[27] MacAyeal, *loc. cit*., p. 233.

[28] *Ibid*., pp. 232 and 239.

[29] *Ibid*., p. 239.

[30] *Ibid*., p. 227.

[31] *Ibid*., p. 238. See generally pages 232–241.

[32] *Ibid*., pp. 238–239.

[33] *Ibid*., p. 239.

[34] *Ibid*., p. 240.

[35] *Ibid*., pp. 240–241. For an analysis of the notion of causing, see the judgement of Lord Hoffmann in *Empress Car Co. (Abertillery) Ltd.* v. *National Rivers Authority, All England Law Reports 1998*, vol. 1, p. 481.

[36] See Stone, "Liability for damage caused by things", p. 3, para. 1.

the "nature" of the thing or activity causing the damage, namely its dangerous qualities or propensities. Classifications have for example been made based on whether an animal is wild or domesticated. English common law has placed greater reliance on such a distinction based on animal classification. Thus, strict liability is imposed in respect of damage caused by wild animals (*ferae naturae*) or by tame animals (*mansuetae naturae*) which their keeper knows to have a "vicious, mischievous or fierce" propensity and the action was based on such scienter.[37] In the United Kingdom of Great Britain and Northern Ireland, under the Animals Act of 1971, any person who is a keeper of an animal is now liable for "any damage … caused by an animal which belongs to a dangerous species".[38] In respect of non-dangerous species the keeper is liable if the animal had abnormal characteristics which were known or must be taken as known to the keeper. The United States of America also draws a distinction between "dangerous animals" and those "normally harmless".[39]

30. The civil codes of many States, including those of Belgium, France, Italy and Spain, impose strict liability upon the owner or keeper of an animal for the damage it causes, whether the animal was in his keeping or had strayed or escaped. The same rule, however, is applied to all animals irrespective of their nature.[40] The German Civil Code of 1900 also imposes strict liability for all animal damage. However, its 1908 amendment provides for an exception in the case of domestic animals used by the owner in his profession or in his business, or under his care, in which case proof of *culpa* is required.[41] Article 1905 of the Spanish Civil Code contemplates exoneration for the owner of an animal when the damage is attributable to *force majeure*.

31. Strict liability is also recognized in respect of owners or keepers of animals in the following civil codes: Argentina (art. 1126), Brazil (art. 1527), Colombia (art. 2353), Greece (art. 924), Hungary (art. 353), Mexico (art. 1930), the Netherlands (art. 1404), Poland (art. 431), and Switzerland (art. 56).[42] Traditional concepts of fault remain in some jurisdictions although there is a shift in liability through "presumptions of fault".[43] Thus, under article 56 of the Swiss Code of Obligations the keeper may escape liability by proving that he exercised all reasonable care under the circumstances or that the damage would have occurred in spite of the exercise of such care.[44]

32. Strict liability for damage caused by fire is also widely recognized. Ancient common law, under the *ignis suus* rule, catered for a special action of trespass against occupiers for "negligently using fire and allowing its escape contrary to the general custom of the realm".[45] The reference to negligence may have been superfluous because liability was so stringent that it could only be excused by an act of God or an act of a stranger.[46] The law was later changed by statute to allow an excuse to "any person in whose house, chamber, stable, barn or other building, or on whose estate any fire shall accidentally begin".[47] Thus, the courts have held that the landholder was not ordinarily liable, unless the fire originated or spread through negligence on his part or was set intentionally.[48] However, in situations where the fire has its origin in the course of an activity which is considered abnormally dangerous, the earlier rule has been reverted to and the landowner held strictly liable.[49] American courts, on the other hand, have consistently rejected the earlier rule and have held, in the absence of statutory provisions to the contrary, that there is no liability for the escape of fire in the absence of negligence.[50] On its part, the French Civil Code, in article 1384, holds a person who possesses by whatever right all or part of a building or personal property in which a fire occurs liable *vis-à-vis* third persons for damage caused by such fire only if it is proved that it was attributable to his fault or to the fault of a person for whom he is responsible.[51] The 1979 Act concerning the Prevention of Fire and Explosions of Public Building and concerning Compulsory Insurance of Civil Liability of Belgium imposes strict liability for bodily or material damage to third parties upon the operator of certain categories of buildings specified by royal decree, such as restaurants and hospitals.

33. Article 178 of the Egyptian Civil Code, article 231 of the Iraqi Civil Code, article 291 of the Jordanian Civil Code and article 161 of the Sudanese Civil Code all establish the strict liability of persons in charge of machines or other objects requiring special care. Article 133 of the Algerian Civil Code goes even further and recognizes the strict liability of a person in charge of any object when that object causes damage.

(b) *State of economic development*

34. Secondly, the type of the economy in which the activity takes place is also an important factor which has shaped liability under domestic law. Germane examples are legion, including in developments concerning vicarious liability, product liability and genetic technology.

35. Vicarious liability, by which the law holds a person, without blameworthiness or fault, responsible for the acts of another, is a form of strict liability and was a common

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[37] *Ibid*., p. 12, para. 43.

[38] Animals Act 1971 (London, HM Stationery Office, 1971), chap. 22, para. 2 (1). See generally Mullholland, "Animals", chap. 21.

[39] Stone, *loc. cit*., p. 12, para. 42.

[40] *Ibid*.

[41] Art. 833 of the German Civil Code; see Stone, *loc. cit*., p. 13, para. 47.

[42] Stone, *loc. cit*., p. 14, paras. 51–52.

[43] Koch and Koziol, "Comparative conclusions", p. 396.

[44] Amendment to the Code: *Loi fédérale du 30 mars 1911 complétant le code civil suisse (Livre cinquième: Droit des obligations)*.

[45] Fleming, *op. cit*., p. 349.

[46] *Ibid*.

[47] Fires Prevention Act 1775, quoted in Fleming, *ibid*.

[48] *Job Edwards, Ltd.* v. *Birmingham Navigations* (1924), United Kingdom, *The Law Reports, King's Bench Division, 1924*, vol. 1, p. 341; *Vaughan* v. *Menlove* (1837), *Bingham's New Cases*, vol. 3, p. 468; *Filliter* v. *Phippard* (1847), United Kingdom, *The Law Reports, Queen's Bench Division, 1847*, vol. 11, p. 347, quoted in Keeton, *op. cit*., p. 543. See also Fleming, *op. cit.*, pp. 349–350.

[49] *Musgrove* v. *Pandelis* (1919), United Kingdom, *The Law Reports, King's Bench Division, 1919*, vol. 2, p. 43, quoted in Fleming, *op. cit*., p. 350.

[50] See Keeton, *op. cit*., pp. 544–545. It is noted that statutes in many States have restored the strict liability rule in certain very dangerous situations.

[51] As amended by act of 7 November 1922. The 1922 act does not apply to relations between lessor and lessee.

feature under primitive law. The fact that the head of the household was held responsible for the conduct of members of his family[52] gave way to the liability of the master for the torts of his servants.[53] With the end of the feudal system, the liability was subsequently limited to particular acts ordered or ratified.[54]

36. The modern theory for the liability of the employer has its origins in the early nineteenth century. In addition to the accident prevention value, the main policy consideration is that

> a person who employs others to advance his own economic interest should in fairness be placed under a corresponding liability for losses incurred in the course of the enterprise; that the master is a more promising source of recompense than his servant who is apt to be a man of straw; and that the rule promotes wide distribution of tort losses, the employer being a most suitable channel for passing them on through liability insurance and higher prices.[55]

Vicarious liability is based not on a breach of any personal duty owed by the master, but on imputability of the servant's tort.[56] The theory of strict liability, deriving from the limited tort liability of the master to his servant at common law, has for instance been incorporated in the workers' compensation acts in the United States; the employer is strictly liable for injuries to his employees. The policy behind liability for employers is one of social insurance and of determining who can best carry the loss.[57]

37. The strict liability of the employer is also recognized in France. Under article 1 of the 1898 law concerning liability for industrial accidents to workers (*concernant la responsabilité des accidents dont les ouvriers sont victimes dans leur travail*), the victim or his representatives are entitled to demand compensation from the employer if, in consequence of the accident, the person concerned is obliged to stop work for more than four days. Article 1384, subsection 3, of the Belgian Civil Code imposes liability for damage by servants and other appointed persons such as employees.

38. In a comparatively more recent development, the principle of strict liability has been applied in regard to defective products. Two types of product conditions may result in some kind of loss either to the buyer or to a third party. One concerns the dangerous condition of the product and the other the inferior condition of the product.[58] The former is likely to result in damaging events such as a traffic accident, an aeroplane crash, a medical mishap or an industrial accident, while the latter is likely to cause intangible economic losses.[59]

39. Four possible theories of recovery are available under modern product liability law, which involves the liability of those who supply goods or products for the use of others to buyers, users and bystanders for losses of various kinds arising from defects in such goods or products.[60] These theories are: (*a*) strict liability in contract for breach of a warranty express or implied; (*b*) negligence liability in contract for breach of a warranty, express or implied, that the product was designed and constructed in a workmanlike manner; (*c*) negligence liability in tort for physical harm to persons and tangible things; and (*d*) strict liability in tort for physical harm to persons and tangible things.[61] These policy considerations informed the adoption in the United States of section 402A[62] of *Restatement of the Law, Second, Torts*. However, section 402A was created to deal with manufacturing defects. It was ill-suited for application to questions of defects in the design or defects based on inadequate instructions or warnings. It has since been revised by *Restatement of the Law Third, Torts: Products Liability*:

> *1. Liability of Commercial Seller or Distributor for Harm Caused by Defective Products*
>
> One engaged in the business of selling or otherwise distributing products who sells or distributes a defective product is subject to liability for harm to persons or property caused by the defect.
>
> *2. Categories of Product Defect*
>
> A product is defective when, at the time of sale or distribution, it contains a manufacturing defect, is defective in design, or is defective because of inadequate instructions or warnings. A product:
>
> (*a*) contains a manufacturing defect when the product departs from its intended design even though all possible care was exercised in the preparation and marketing of the product;
>
> (*b*) is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe;
>
> (*c*) is defective because of inadequate instructions or warnings when the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the instructions or warnings renders the product not reasonably safe.
>
> …

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[52] Fleming, *op. cit.*, p. 366. A husband was, for example, held liable for the torts of his wife.

[53] *Ibid.*

[54] *Ibid.*

[55] *Ibid.*, p. 367.

[56] *Ibid.*, p. 368.

[57] See Keeton, *op. cit.*, pp. 568 *et seq.*

[58] *Ibid.*, p. 677.

[59] *Ibid.*, p. 678. See also the decision in *Greenman* v. *Yuba Power Products, Inc.* (1962), Supreme Court of California, *Pacific Reporter, Second Series*, vol. 377, p. 897.

[60] Keeton, *op. cit.*, p. 677.

[61] *Ibid.*, p. 678.

[62] "Special Liability of Seller of Product for Physical Harm to User or Consumer

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(*a*) the seller is engaged in the business of selling such a product, and

(*b*) it is expected to and does reach the user or consumer without substantial change in the condition in which is sold.

(2) The rule stated in Subsection (1) applies although

(*a*) the seller has exercised all possible care in the preparation and sale of his product, and

(*b*) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

(*Restatement of the Law, Second, Torts* (St. Paul, Minn., American Law Institute, 1965), division II, chap. 14, sect. 402A).

15. General Rule Governing Causal Connection Between Product Defect and Harm

Whether a product defect caused harm to persons or property is determined by the prevailing rules and principles governing causation in tort.[63]

40. The developments in the United States influenced developments in Europe. The European Union (EU) first took the initiative to develop community policy on product liability in 1985. The EU Directive on defective product liability[64] (hereinafter the 1985 Directive) seeks to ensure a high level of consumer protection against damage caused to health or property by a defective product as well as to reduce the disparities between national liability laws which distort competition and restrict the free movement of goods. It establishes the joint and several strict liability of the producer in cases of damage caused by a defective product. The person injured is required to prove the actual damage, the defect in the product and a causal relationship between damage and defect. The directive initially applied to all movables industrially produced and excepted "primary agricultural products and game".[65] In the aftermath of the mad cow crisis an amendment in 1999 extended the directive to primary agricultural products and game.[66]

41. Several European countries passed legislation to give effect to the 1985 Directive. In the United Kingdom, part I of the Consumer Protection Act 1987, which was introduced as a result of the 1985 Directive, limits claims in relation to a product that is dangerous and has actually caused damage to the claimant or other property of his. Section 2, paragraph (1), of the Act provides:

Subject to the following provisions of this Part, where any damage is caused wholly or partly by a defect in a product, every person to whom subsection (2) below applies (i.e. the manufacturer and various others) shall be liable for the damage.

42. The Belgian Product Liability Act (1991) and the Act on the Liability Caused by a Defective Product (1998) of the Czech Republic also give effect to the 1985 Directive. The Belgian Act complements an earlier application of the strict liability rule for defective goods introduced in article 1384, subsection 1, of the Civil Code by a decision of the Cour de Cassation of 26 May 1904. The decision sought to resolve problems arising from an increased number of accidents and imposes liability on the guardian for the defective goods (*le gardien de la chose*).[67] Article 1386, subsections 1–18, of the French Civil Code also give effect to the 1985 Directive and contains extensive exceptions.[68] The Spanish Product Liability Act (1994) also establishes a strict liability regime for producers of defective products. It also contains grounds for exoneration.

43. In another recent development, strict liability is established for the regulation of genetically modified organisms. For example, the Gene Technology Act 2000 of Australia, the Austrian Law on Genetic Engineering, the Gene Technology Act No. 377/95 and the Act on Compensation for Environmental Damage No. 737/94 of Finland, the German Genetic Engineering Act and the Gene Technology Act of 1993 of Norway are based on strict liability.[69]

(c) *Balancing of interests*

44. As a third factor, strict liability has been imposed based on the utility of an activity to society as a whole in comparison with its potential harm to individuals. A balancing of interests has come into play in deciding whether strict liability should be imposed in respect of transportation, installations of electricity, gas or nuclear power.

45. In the United States, the principle of strict liability was apparent in the Uniform Aeronautics Act of 1922. The object of the act was to place the liability for damage caused by accidents of aircraft upon operators and to protect innocent victims, even though the accident might not be attributable to the fault of the operator.[70] In the United Kingdom, New Zealand and several states in Australia, owners of aircraft are liable under strict liability for all damage to person or property during flight, take-off and landing.[71] In the United Kingdom, by section 76 of the Civil Aviation Act 1982:

[W]here material loss or damage is caused to any person or property on land or water by, or by a person in, or an article, animal or person falling from, an aircraft while in flight, taking off or landing, then unless the loss or damage was caused or contributed to by the negligence of the person by whom it was suffered, damages in respect of the loss or damage shall be recoverable without proof of negligence or intention or other cause of action, as if the loss or damage had been caused by the wilful act, neglect, or default of the owner of the aircraft.[72]

46. Section 10, paragraph (2), of the Civil Aviation Act, 1975 of Botswana is similar. A number of Latin American and European countries have also adopted the principle of strict liability, often similar to the Convention on damage caused by foreign aircraft to third parties on the surface. Argentina, Guatemala, Honduras and Mexico are among the Latin American countries which have imposed strict liability based on the concept of risk. Among European countries having done the same are Belgium, Denmark, Finland, France, Germany, Italy, Norway, Spain, Sweden

[63] *Restatement of the Law Third, Torts: Products Liability* (St. Paul, Minn., American Law Institute, 1998), chaps. 1 and 4, sects. 1, 2 and 15.

[64] Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products (*Official Journal of the European Communities*, No. L 210 (7 August 1985), p. 29).

[65] *Ibid*., art. 2.

[66] Directive 1999/34/EC of the European Parliament and of the Council of 10 May 1999 amending Council Directive 85/374/EEC on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products (*Official Journal of the European Communities*, No. L 141 (4 June 1999), p. 20).

[67] Cousy and Droshout, "Belgium", pp. 45 and 49.

[68] Act No. 98–389 of 19 May 1998 introduced changes to the Civil Code.

[69] See UNEP/CBD/ICCP/3/INF.1 of 2 April 2002.

[70] See Sweeney, "Is special aviation liability legislation essential", p. 166; and *Prentiss et al.* v. *National Airlines, Inc.*, 112 *Federal Supplement*, pp. 306 and 312.

[71] Civil Aviation Act 1982 (United Kingdom); Civil Aviation Act 1964 (New Zealand); Damage by Aircraft Act 1952 of New South Wales; Damage by Aircraft Act 1963 of Tasmania and Wrongs Act 1958 of Victoria.

[72] The Act only applies to liability in respect of civil aircraft. It does not apply to military aircraft.

and Switzerland.[73] Article 120 of the Air Navigation Act of Spain provides:

The recoverability of the loss has its objective foundation in the accident or damage and will be appropriate up to the limits of liability established in this chapter in any case, even in the case of casual accident and even if the carrier, operator or their employees can justify that they acted with due care.

47. Strict liability has also been applied in respect of train accidents in Austria,[74] Germany,[75] Spain[76] and Switzerland.[77] South Africa, the United Kingdom and the United States still adhere to the fault principle.[78]

48. The rule of strict liability has also been applied in respect of owners and operators of power sources for damage caused by the production or storage of electricity. In this area, the concept of strict liability corresponds to the notion that "electricity is a thing in one's keeping" (France, Civil Code, art. 1384), or to the notion that "the owner is presumed to be at fault" (Argentina, Civil Code, art. 1135), or to the notions of "dangerous things" (United Kingdom and United States), or of "dangerous activities" (Italy, Civil Code art. 2050).[79] Section 11, paragraph (1), of the Electricity Supply Act, 1973 of Botswana also imposes strict liability: "[I]t shall not be necessary for the plaintiff to prove that the damage or injury was caused by the negligence of the defendant, and damages may be recovered notwithstanding the absence of such proof." It is however a defence if "the damage or injury was due to the wilful act or to the negligence of the person injured or of some person not in the employ of the defendant or of some person operating the plant or machinery of the defendant without his consent" (sect. 11, para. (2)). South Africa dispensed with a prior strict liability rule, in favour of a rebuttable presumption of fault.[80]

49. Strict liability is also invoked in respect of nuclear power. Nuclear installations with their own inherent dangers have given rise to new problems of liability. The spectre of a nuclear accident makes it difficult to fathom whether the liable party would adequately recompense the damage. In the United Kingdom, under the Nuclear Installations Act 1965, as amended by the Energy Act 1983, no person other than the United Kingdom Atomic Energy Authority shall use any site for the operation of a nuclear plant unless a licence to do so has been granted in respect of that site by the Minister of Power. The Act regulates liability for a nuclear incident, and under section 7, subsection (1):

[I]t shall be the duty of the licensee to secure that—

(*a*) no such occurrence involving nuclear matter as is mentioned in subsection (2) of this section causes injury to any person or damage to any property of any person other than the licensee, being injury or damage arising out of or resulting from the radioactive properties, or a combination of those and any toxic, explosive or other hazardous properties, of that nuclear matter; and

(*b*) no ionising radiations emitted during the period of the licensee's responsibility—

(i) from anything caused or suffered by the licensee to be on the site which is not nuclear matter; or

(ii) from any waste discharged (in whatever form) on or from the site, cause injury to any person or damage to any property of any person other than the licensee.

50. Once damage within the Energy Act 1983 is proved to have resulted, the liability of the licensee is strict. There is no need to prove negligence on the part of anyone.[81]

51. The Act of 22nd July 1985 on Third Party Liability in the Field of Nuclear Energy of Belgium imposes liability for nuclear accidents on the operator of nuclear facilities, while the 1997 Act on the Peaceful Uses of Nuclear Energy and Ionising Radiation of the Czech Republic implements the Vienna Convention on civil liability for nuclear damage (hereinafter the 1963 Vienna Convention) and the Convention on third party liability in the field of nuclear energy (hereinafter the 1960 Paris Convention), as amended in 1964 and 1982.

52. The balancing of interests is also exemplified by the concept of nuisance under common law and the civil law concept of *troubles du voisinage*. The civil law concept was first elaborated on the basis of article 1382 of the French Civil Code and has since acquired an independent status: "No one may cause an abnormal degree of inconvenience in the neighbourhood" (*Nul ne doit causer à autrui un trouble anormal du voisinage*). Strict liability is imposed on the owner or occupier of a piece of land whose activity generates an "abnormal degree of inconvenience" (*un trouble anormal*) for his neighbours.[82] It is sufficient in such cases for the victim to show the inconvenience and its abnormal character.[83]

53. The maxim *sic utere tuo ut alienum non laedas* underlies the law of nuisance. Originally, nuisance meant nothing more than harm or annoyance.[84] Nuisance is an act or omission which is an interference with, disturbance of or annoyance to a person in the exercise or enjoyment of (*a*) a right belonging to him as a member of the public (public nuisance); or (*b*) his ownership or occupation of land or of some easement, profit or other right used or enjoyed in connection with land (private nuisance). Public nuisance is a criminal offence. It is only a civil wrong and actionable as such when a private individual has suffered particular damage over and above the general inconvenience and injury suffered by the public.[85] On the other hand, in private nuisance, the conduct of the defendant which results in the nuisance is, of itself, not necessarily or usually unlawful. It

may be and usually is caused by a person doing, on his own land, something which he is lawfully entitled to do. His conduct only becomes a

[73] See Stone, *loc. cit*., pp. 45–46, paras. 178–181.

[74] Rail and Road Traffic Liability Act of 21 January 1959.

[75] Liability Act of 4 January 1978.

[76] Road Traffic Liability Act.

[77] Federal Act on the Liability of Railways, and Steamship Companies and the Postal Service.

[78] Koch and Koziol, *loc. cit*., p. 396.

[79] Stone, *loc. cit*., pp. 48–49, paras. 193–197.

[80] Section 50, paragraph (1), of the Electricity Act, No. 40 of 1958 was replaced by section 19 of the Electricity Amendment Act, No. 54 of 1986.

[81] Buckley, "*Rylands v. Fletcher* liability", p. 1076, para. 83.

[82] Galand-Carval, "France", p. 134.

[83] *Ibid*.

[84] Prosser, *Selected Topics on the Law of Torts*, p. 164. See also Newark, "The boundaries of nuisance", p. 480.

[85] Buckley, "Nuisance", pp. 973–975, paras. 01–03.

nuisance when the consequences of his act are not confined to his own land but extend to the land of his neighbour by:

(1) causing an encroachment on his neighbour's land, when it closely resembles trespass;

(2) causing physical damage to the neighbour's land or building or works or vegetation upon it; or

(3) unduly interfering with his neighbour in the comfortable and convenient enjoyment of his land.[86]

54. A private nuisance is primarily a wrong to the owner or the occupier of the land affected.[87] At common law, the principle of strict liability has been applied in cases of encroachment and physical damage, without regard to the defendant's intent or precautions. In the case of interference with enjoyment, the degree of inconvenience is taken into account.[88] Although there is no universal formula, a useful test is what is reasonable according to ordinary usages of mankind living in a particular society.[89] In effect, if the user is reasonable, the defendant would not be liable for the consequent harm to his neighbour's enjoyment of his land. On the other hand, if the user is unreasonable, the defendant would be liable even if he may have exercised reasonable care and skill to avoid the harm.[90]

55. Nuisance, however, remains "immersed in undefined uncertainty".[91] The consequence of this has been that liability, which should have arisen only under the law of negligence, has been allowed under the law of nuisance, which historically was a tort of strict liability. There was also "a tendency for 'cross-infection' to take place, and notions of negligence began to make an appearance in the realm of nuisance proper".[92] In some instances, negligence has been found essential to liability, while in others it is irrelevant. Furthermore, in *Wagon Mound (No. 2)*,[93] the Privy Council noted that the liability of nuisance was limited, just like in negligence, to foreseeable consequences alone. On this basis, Fleming asserts that "[i]t would seem to follow that one cannot be liable for nuisance at all unless and until some injury is foreseeable".[94] This point was confirmed by the House of Lords in *Cambridge Water Co. Ltd.* v. *Eastern Counties Leather plc*. Lord Goff noted that:

[F]oreseeability of harm is indeed a prerequisite of the recovery of damages in private nuisance, as in the case of public nuisance … It is unnecessary in the present case to consider the precise nature of this principle; but it appears from Lord Reid's statement of the law [in *Wagon Mound (No. 2)*] that he regarded it essentially as one relating to remoteness of damage.[95]

(d) *Judicial interpretation and hazardous activities*

56. The fourth factor has been the imaginative recourse of the law in employing old techniques to solve problems that were previously not known or contemplated. Strict liability in the case of abnormally dangerous activities and objects is a comparatively new concept. The leading decision which has influenced domestic law, particularly in the United Kingdom and the United States, and has its origins in the law of nuisance, was rendered in 1868 in *Rylands* v. *Fletcher*.[96] Justice Blackburn, in the Exchequer Chamber, had this to say:

We think that the true rule of law is, that the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape.[97]

57. This broad language was later limited by the House of Lords, which stated that the principle applied only to a "non-natural use"[98] of the defendant's lands, as distinguished from "any purpose for which it might in the ordinary course of the enjoyment of land be used".[99] Numerous subsequent decisions by British courts have followed the ruling in this case, and strict liability has been confined to things or activities that are "extraordinary", "exceptional" or "abnormal", to the exclusion of those that are "usual and normal".[100] This doctrine does not appear to be applicable to the ordinary use of land or to such use as is proper for the benefit of the general community. It must be some special use bringing with it increased danger to others.[101] In determining what a "non-natural use" is, the British courts appear to have looked not only to the character of the thing or activity in question, but also to the place and manner in which it is maintained and its relation to its surroundings. In other words, the defendant would be liable when he causes damage to another by a thing or activity which is unduly dangerous and inappropriate to the place

[86] *Ibid*., p. 976, para. 06.

[87] *Hunter and Others* v. *Canary Wharf Ltd.*, United Kingdom, *The Law Reports 1997, Appeal Cases* (House of Lords), p. 655.

[88] Buckley, "Nuisance", pp. 978–979, paras. 09–10.

[89] Lord Wright in *Sedleigh-Denfield* v. *O'Callaghan and Others*, United Kingdom, *The Law Reports 1940, Appeal Cases* (House of Lords), p. 903.

[90] Lord Goff in *Cambridge Water Co. Ltd.* v. *Eastern Counties Leather plc, All England Law Reports 1994*, vol. 1, p. 71.

[91] C. J. Erlein the undelivered judgement in *Brand* v. *Hammersmith Railway* (1867), L.R. 2 Q.B.223, 247, quoted in Newark, *loc. cit.*, p. 480.

[92] Newark, *loc. cit.*, p. 487. For examples of inconsistencies in Mauritius, see also Sinatambou, "The approach of mixed legal systems: the case of Mauritius", pp. 272–273.

[93] *Overseas Tankship (U.K.) Ltd.* v. *The Miller Steamship Co. Pty and Another, The Law Reports 1967*, vol. I, *Appeal Cases (Privy Council)*, p. 617. Lord Reid (p. 640) noted:

"It could not be right to discriminate between different cases of nuisance so as to make foreseeability a necessary element of determining damages in those cases where it is a necessary element in determining liability, but not in others. So the choice is between it being a necessary element in all cases of nuisance or in none. In their Lordships' judgment the similarities between nuisance and other forms of tort to which *The Wagon Mound (No. 1)* [*Overseas Tankship (U.K.) Ltd.* v. *Morts Dock and Engineering Co., All England Law Reports 1961*] applies far outweigh any differences, and they must therefore hold that the judgment appealed from is wrong on this branch of the case. It is not sufficient that the injury suffered by the respondents' vessels was the direct result of the nuisance if that injury was in the relevant sense unforeseeable."

[94] Fleming, *op. cit.*, p. 428.

[95] *All England Law Reports 1994* (see footnote 90 above), p. 72.

[96] *The Law Reports, Court of Exchequer*, vol. I, 1866, p. 265, affd. in *Rylands* v. *Fletcher, House of Lords*, vol. 3, 1868, p. 330. In regard to the implications for United States law, see Keeton, *op. cit.*, pp. 545–559. See also Anderson, "The *Rylands v. Fletcher* doctrine in America: abnormally dangerous, ultrahazardous, or absolute nuisance?", p. 99.

[97] *The Law Reports, Court of Exchequer*, vol. I (1866), p. 279.

[98] *Ibid.*, *English and Irish Appeal Cases before the House of Lords,* vol. III (1868), p. 339.

[99] *Ibid.* p. 338.

[100] Keeton, *op. cit.*, p. 546. See also footnotes 6–9 (*ibid.*).

[101] *Ibid.*

where it is maintained, in the light of the character of that place and its surroundings.[102]

58. The House of Lords, in *Cambridge Water Co. Ltd.* v. *Eastern Counties Leather plc*,[103] has revisited the rule in *Rylands* v. *Fletcher* and has questioned whether indeed it sought to establish new law or was only a statement of the law existing at the time and whether it could be applied in the absence of foreseeability of the harm resulting from the actions of the defendant. Analysing the judgement of Justice Blackburn, Lord Goff observed concerning the former question that:

> [A]s is apparent from his judgment, he was concerned in particular with the situation where the defendant collects things upon his land which are likely to do mischief if they escape, in which event the defendant will be strictly liable for damage resulting from any such escape.[104]

59. And he concluded:

> It follows that the essential basis of liability was the collection by the defendant of such things upon his land; and the consequence was a strict liability in the event of damage caused by their escape, even if the escape was an isolated event. Seen in its context, there is no reason to suppose that Blackburn J intended to create a liability any more strict than that created by the law of nuisance; but even so he must have intended that, in the circumstances specified by him, there should be liability for damage resulting from an isolated escape.[105]

60. Further, Lord Goff observed that the *Rylands* v. *Fletcher* rule applied: where there was a non-natural use, the defendant would be liable for harm caused to the plaintiff by the escape, notwithstanding that he had exercised all reasonable care and skill to prevent the escape from occurring.[106]

61. Concerning the relevance of foreseeability of damage in the *Rylands* v. *Fletcher* rule, Lord Goff recalled that Justice Blackburn had spoken "of 'anything *likely* to do mischief if it escapes' … of something 'which he *knows* to be mischievous if it gets on to his neighbour's [property]', and the liability to 'answer for the natural *and anticipated* consequences'",[107] as well as the stress placed on strict liability imposed on the defendant. Lord Goff concluded thus:

> The general tenor of [Justice Blackburn's] statement of principle is therefore that knowledge, or at least foreseeability of the risk, is a prerequisite of the recovery of damages under the principle; but that the principle is one of strict liability in the sense that the defendant may be held liable notwithstanding that he has exercised all due care to prevent the escape from occurring.[108]

62. Further, it was noted that "the historical connection with the law of nuisance must now be regarded as pointing towards the conclusion that foreseeability of damage is a prerequisite of the recovery of damages under the rule".[109]

63. *Cambridge Water Co. Ltd.* v. *Eastern Counties Leather plc* also sought to establish whether instead of *Rylands* v. *Fletcher* being considered simply as an extension of the law of nuisance it could

> be treated as a developing principle of strict liability from which can be derived a general rule of strict liability for damage caused by ultra-hazardous operations, on the basis of which persons conducting such operations may properly be held strictly liable for the extraordinary risk to others involved in such operations.[110]

64. In that regard, Lord Goff noted that such a possibility would entail liability to all persons suffering injury as a result of hazardous operations. However, by relying on an earlier judgement in *Read* v. *J. Lyons & Company, Limited*,[111] which decided that the *Rylands* v. *Fletcher* rule did not apply to personal injury, the House of Lords discounted such a possibility. Moreover, it was noted that it was not the role of the courts to proceed "down the path of developing such a general theory",[112] but of Parliament.

65. In Australia, the High Court has taken the matter a step further. In *Burnie Port Authority* v. *General Jones Pty Ltd*,[113] the Court noted that the "rule in *Rylands* v.

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[102] *Ibid.* See Stallybrass, "Dangerous things and the non-natural user of land", p. 387. See also The Law Commission, *Civil Liability for Dangerous Things and Activities* (London, 1970). In *Rickards* v. *Lothian* (United Kingdom, *The Law Reports 1913, Appeal Cases (Privy Council)*, p. 280), Lord Moulton noted of the *Rylands* v. *Fletcher* rule:

> "It is not every use to which land is put that brings into play that principle. It must be some special use bringing with it increased danger to others, and must not merely be the ordinary use of the land or such a use as is proper for the general benefit of the community."

In *Cambridge Water Co. Ltd.* v. *Eastern Counties Leather plc* (see footnote 90 above), Lord Goff felt that "community" referred to local community rather than the community at large.

However, in *Ellison* v. *Ministry of Defence* (1996) (United Kingdom, *Building Law Reports 1997*, vol. 81, p. 108), J. Bowsher considered a use to be natural since it was for the benefit of the national community as a whole.

See generally Reid, "Liability for dangerous activities: a comparative analysis", p. 731.

[103] *All England Law Reports 1994* (see footnote 90 above).

[104] *Ibid.*, p. 70.

[105] *Ibid.*

[106] *Ibid.*, p. 71.

[107] *Ibid.*, p. 73.

[108] *Ibid.*

[109] *Ibid.*, p. 75.

[110] *Ibid.*

[111] United Kingdom, *The Law Reports 1947, Appeal Cases (House of Lords)*, p. 156. The House of Lords halted the expansion of the doctrine of *Rylands* v. *Fletcher* in *Read* v. *J. Lyons & Company, Limited*, in which the plaintiff, a government inspector, had been injured by an explosion in the defendant's munitions plant. The judges in this case limited the principle of strict liability to cases in which there had been an *escape* of a dangerous substance from land under the control of the defendant, and two other judges held that the principle was not applicable to *personal injury*. Fleming (*op. cit.*, p. 341) notes that "[t]he most damaging effect of the decision in *Read v. Lyons* is that it prematurely stunted the development of a general theory of strict liability for ultra-hazardous activities".

[112] *All England Law Reports 1994* (see footnote 90 above), p. 76. Lord Goff referred to the report of the Law Commission (see footnote 102 above) (Law Com 32) in which serious misgivings were expressed about the adoption of any test for the application of strict liability involving a general concept of "especially dangerous" or "ultra-hazardous" activity having regard to the uncertainties and practical difficulties of its application, and said that judges should be even more reluctant.

[113] *Australian Law Reports 1994*, vol. 120, p. 42. It was noted (p. 54):

> "Obviously, the question whether there has been a non-natural use in a particular case is a mixed question of fact and law which involves both ascertainment and assessment of relevant facts and identification of the content of the legal concept of a 'non-natural' use. Indeed, it is one of those questions which may be misleadingly converted into a pure question of fact or a pure question of law by an unexpressed assumption that either the precise content of applicable legal concepts or the relevant facts and factual conclusions are manifest and certain. Be that as it may, and regardless of whether one emphasises the legal or factual aspect of the question of non-natural use, the introduction of the descriptions 'special' and 'not ordinary' as alternatives to 'non-natural', without any identification of a

(*Continued on next page.*)

Fletcher, with all its difficulties, uncertainties, qualifications and exceptions, should now be seen, for the purposes of the common law of this country, as absorbed by the principles of ordinary negligence".[114] In Scotland, the application of *Rylands* v. *Fletcher* has been described by the House of Lords in *RHM Bakeries (Scotland) Ltd* v. *Strathclyde Regional Council* as "a heresy which ought to be extirpated",[115] preferring to determine liability for dangerous activities in the general framework of delictual liability on the basis of fault. In South Africa, despite the earlier application of the *Rylands* v. *Fletcher* rule, liability is now based on fault.[116] In Kenya, strict liability has also been applied mainly in cases involving fires. In *Muhoroni Sugar Company* v. *Chemoros Limited*, the court relied on *Rylands* v. *Fletcher* to hold the defendant liable for a fire which spread into and destroyed the sugar plantation of the plaintiff.[117] In Canada, *Rylands* v. *Fletcher* "is not dead, but alive and well".[118] Courts in Canada "are concerned with more than non-natural use, mischief and escape as outlined in *Rylands* v. *Fletcher*".[119] The rule has been applied to cases involving personal injuries, without limitation to actions between adjoining landowners.[120] It has also been applied to situations of "increased dangers or extra hazardous activities".[121]

66. In 2003, the House of Lords had the occasion to revisit *Rylands* v. *Fletcher* yet again in *Transco plc (formerly BG plc and BG Transco plc)* v. *Stockport Metropolitan Borough Council*.[122] The defendant in this case was the owner of a housing estate comprising a mixture of semi-detached houses and tower blocks of flats standing on a low escarpment from which the land sloped down to a country park. The estate and the park were separated by the bed of a disused branch railway with cuttings and embankments constructed across. Transco owned a 16-inch high-pressure steel gas main which lay beneath the surface of the old railway and had an easement to maintain its pipe in the soil of the railway bed. In the summer of 1992, a leak developed in a high-pressure pipe belonging to the Council which supplied water to a tower block on the estate. Although it was quickly repaired, some water escaped in considerable quantities, saturating the embankment and causing it to collapse, leaving Transco's gas main unsupported and depositing debris onto the nearby golf club. The possibility of a fracture in the unsupported gas pipe was obviously hazardous and Transco quickly took steps to repair the damage. The cost of the works required to restore support and cover the pipe was £93,681. Transco and the golf club sued the Council. The Court of Appeal overturned the ruling of the judge at first instance, which found that the Council's use was not an ordinary use of land and therefore strictly liable under the rule in *Rylands* v. *Fletcher*. Transco appealed to the House of Lords. Dismissing the appeal, the House of Lords held that the rule in *Rylands* v. *Fletcher* was applicable where the use of land was extraordinary. Applying contemporary standards of use, it found that the Council had not brought onto its land something likely to cause danger or mischief if it escaped. The piping of a water supply was an ordinary use of its land.

67. Their lordships acknowledged that the scope of operation of the rule had been restricted by the growth of statutory regulation of hazardous activities and the continuing development of the law of negligence. They considered the strength of the various arguments against retention of the rule but did "not think it would be consistent with the judicial function" of the "House to abolish the rule". Doing so was "too radical a step to take". It however considered it appropriate "to introduce greater certainty into the concept of natural user".[123] Lord Bingham encapsulated the rule as follows:

> I think it clear that ordinary user is a preferable test to natural user, making it clear that the rule in *Rylands* v. *Fletcher* is engaged only where the defendant's use is shown to be extraordinary and unusual. This is not a test to be inflexibly applied: a use may be extraordinary and unusual at one time or in one place but not so at another time or in another place (although I would question whether, even in wartime, the manufacture of explosives could ever be regarded as an ordinary user of land, as contemplated by Viscount Simon, Lord Macmillan, Lord Porter and Lord Uthwatt in *Read* v. *J Lyons & Co Ltd* [1947] AC 156, 169–170, 174, 176–177, 186–187). I also doubt whether a test of reasonable user is helpful, since a user may well be quite out of the ordinary but not unreasonable, as was that of *Rylands*, Rainham Chemical Works or the tannery in *Cambridge Water*. Again, as it seems to me, the question is whether the defendant has done something which he recognises, or ought to recognise, as being quite out of the ordinary in the place and at the time when he does it. In answering that question, I respectfully think that little help is gained (and unnecessary confusion perhaps caused)

(*Footnote 113 continued.*)

> standard or norm, goes a long way towards depriving the requirement of 'non-natural use' of objective content [the footnote refers to "*Webber* v. *Hazelwood* (1934) 34 SR (NSW) 155, at 159 per Jordan CJ: 'the adjectives which have been used in this connection do not of themselves supply a solution'"].
>
> "In *Read* v. *J Lyons & Co Ltd*, Lord Porter referred [p. 176; there is also a reference to a passage in *Cambridge Water Co. Ltd.* v. *Eastern Counties Leather plc*] to a possible future need 'to lay down principles' for determining whether the twin requirements of 'something which is dangerous' and 'non-natural use' have been satisfied. We are unable to extract any such principles from the decided cases. Indeed, if the rule in *Rylands* v. *Fletcher* is regarded as constituting a discrete area of the law of torts, it seems to us that the effect of past cases is that no such principles exist. In the absence of such principles, those twin requirements compound the other difficulties about the content of the 'rule' to such an extent that there is quite unacceptable uncertainty about the circumstances which give rise to its so-called 'strict liability'. The result is that the practical application of the rule in a case involving damage caused by the escape of a substance is likely to degenerate into an essentially unprincipled and ad hoc subjective determination of whether the particular facts of the case fall within undefined notions of what is 'special' or 'not ordinary'."

[114] *Ibid.*, pp. 67–68. The Court determined that "Blackburn J's qualification 'which he knows to be mischievous', has been refined into an objective test which is (at the least) a close equivalent of foreseeability of damage of the relevant kind" (*ibid.*, p. 58).

[115] Scotland, *Session Cases (House of Lords)* (1985), Lord Fraser, p. 41.

[116] The Privy Council applied the rule in *Eastern and South African Telegraph Company* v. *Cape Town Tramways Companies* (United Kingdom, *The Law Reports 1902, Appeal Cases (Privy Council)*, p. 381). See also Reid, *loc. cit.*, p. 750.

[117] Juma, "Environmental protection in Kenya: will the Environmental Management and Co-ordination Act (1999) make a difference?", p. 193.

[118] Baudoin and Linden, "Canada", p. 152, para. 395.

[119] *Ibid.*, p. 161, para. 413.

[120] *Ibid.*, pp. 157–158, paras. 408–409, quoting *Hale* v. *Jennings Brothers* (*All England Law Reports 1938*, vol.1, p. 579 (Court of Appeal)). See also *Aldridge and O'Brien* v. *Van Patter, Martin, and Western Fair Association, Ontario Reports 1952*, p. 595, a judgement delivered after *Read* v. *J. Lyons & Company, Limited* (footnote 111 above).

[121] Baudoin and Linden, *loc. cit.*, p. 161, para. 413.

[122] United Kingdom, *House of Lords* (2003), p. 61.

[123] *Ibid.*, paras. 43–44.

by considering whether the use is proper for the general benefit of the community. In *Rickards* v. *Lothian* itself, the claim arose because the outflow from a wash-basin on the top floor of premises was maliciously blocked and the tap left running, with the result that damage was caused to stock on a floor below: not surprisingly, the provision of a domestic water supply to the premises was held to be a wholly ordinary use of the land. *An occupier of land who can show that another occupier of land has brought or kept on his land an exceptionally dangerous or mischievous thing in extraordinary or unusual circumstances is in my opinion entitled to recover compensation from that occupier for any damage caused to his property interest by the escape of that thing, subject to defences of Act of God or of a stranger, without the need to prove negligence.*"[124]

68. In the United States, the *Rylands* v. *Fletcher* precedent was followed by a number of courts, but rejected by others, among them the courts of New York, New Hampshire and New Jersey. Since the cases before the latter courts bore on customary, natural uses "to which the English courts would certainly never have applied the rule", it has been contended that the *Rylands* v. *Fletcher* rule had been "misstated" and, as such, must be "rejected in cases in which it had no proper application in the first place".[125]

(e) *Codification in respect of hazardous activities*

69. The *Restatement of the Law Second: Torts*, established by the American Law Institute,[126] adopted the principle in *Rylands* v. *Fletcher*, but initially confined its application to ultrahazardous activities of the defendant. Ultrahazardous activities were defined as those that: (*a*) necessarily involved a risk of serious harm to the person, land or chattels of others which could not be eliminated by the exercise of the utmost care; and (*b*) were not a matter of common usage.[127] A revision of the *Restatement* replaced "ultra-hazardous" activity with "abnormally dangerous activities". Section 520 enumerates factors to be considered in determining whether an activity is abnormally dangerous:[128]

(*a*) existence of a high degree of risk of some harm to the person, land or chattels of others;

(*b*) likelihood that the harm that results from it will be great;

(*c*) inability to eliminate the risk by the exercise of reasonable care;

(*d*) extent to which the activity is not a matter of common usage;

(*e*) inappropriateness of the activity to the place where it is carried on; and

(*f*) extent to which its value to the community is outweighed by its dangerous attributes.

70. This definition has been criticized on the grounds that it is narrower than the ruling in the *Rylands* v. *Fletcher* case and for its emphasis on the nature of the activity—"extreme danger and impossibility of eliminating it with all possible care"—rather than on its relation to its surroundings.[129] Some commentators have suggested that the addition of the six factors, particularly "inappropriateness of the activity to the place where it is carried on", has brought the formulation closer to the original approach in *Rylands* v. *Fletcher* as enunciated by the House of Lords.[130] At the same time, the *Restatement* is broader than the ruling in the case, for it does not limit the concept to cases where the material "escapes" from the defendant's land or focus on "non-natural use" only.[131] Keeton notes that:

When a court applies all of the factors suggested in the Second Restatement it is doing virtually the same thing as is done with the negligence concept, except for the fact that it is the function of the court to apply the abnormally dangerous concept to the facts as found by the jury.[132]

Strict liability is now generally applied in relation to "abnormally dangerous activities".[133]

71. The rule of strict liability for ultrahazardous activities appears to be provided for in article 1384, subsection 1, of the French Civil Code,[134] which stipulates:

A person is liable not only for the damage he causes by his own act, but also for that caused by the acts of persons for whom he is responsible or by things that he has under his charge.

72. Under the rules laid down by that article and first confirmed by the Cour de Cassation in June 1896, it suffices that the plaintiff show that he has suffered damage from an inanimate object in the defendant's keeping for liability to be established.[135] All physical things fall under the article except those that are expressly covered by special rules, such as animals (French Civil Code, art. 1385), buildings which are falling in ruins (*ibid*., art. 1386) and motor vehicles (Act of 5 July 1985). It has been observed that:

A literal interpretation of the article [1384] undoubtedly gives a result comparable to—or rather more far-reaching than—that in *Rylands* v.

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[124] *Ibid.*, para. 11.

[125] Prosser, *op. cit.*, pp. 149–152.

[126] See *Restatement of the Law Second: Torts* (St. Paul, Minn., American Law Institute, 1977), division 3, chap. 21, sects. 519–524.

[127] Keeton, *op. cit.*, p. 551.

[128] "Abnormally dangerous" activities are described as dangers that "arise from activities that are in themselves unusual, or from unusual risks created by more usual activities under particular circumstances" (*Restatement …* (see footnote 126 above), chap. 520 (f)). *Bella* v. *Aurora Air, Inc.* (Supreme Court of Oregon (1977), *Pacific Reporter, Second Series*, vol. 566, p. 489), examined the concept of "abnormally dangerous", which could be found when "the harm threatened by the activity is very serious, even [with] a low probability of its occurrence", or even where the risk is moderate if the activity "can be carried on only with a substantially uncontrollable likelihood that the damage will sometimes occur".

[129] See Prosser, *op. cit.*, p. 158.

[130] Anderson, *loc. cit.*, p. 103.

[131] Looney, "*Rylands* v. *Fletcher* revisited: a comparison of English, Australian and American approaches to common law liability for dangerous agricultural activities", p. 154.

[132] Keeton, *op. cit.*, p. 555.

[133] Fleming, *op. cit.*, p. 330: "[T]hose with inherent risks that cannot be eliminated by the exercise of reasonable care."

[134] See Mazeaud, Mazeaud and Tunc, *Traité théorique et pratique de la responsabilité civile, délictuelle et contractuelle*, p. 342; Mehren and Gordley, *The Civil Law System*, p. 555; Lawson, *Negligence in the Civil Law*, pp. 46–50; Rodière, "Responsabilité civile et risque atomique", p. 505; and Starck, "The foundation of delictual liability in contemporary French law: an evaluation and a proposal", pp. 1044–1049.

[135] *Guissez, Cousin et Oriolle* v. *veuve Teffaine* (*Arrêt Teffaine* of 16 June 1896) (*Dalloz, Recueil périodique et critique, 1897* (Paris), part 1, p. 433). In this case, the victim died in an explosion of a steamer engine, which occurred because of a latent defect in the machinery. The owner of the steamer was held liable, as "keeper" of the engine, notwithstanding the fact that he did not know and could not know of the existence of the defect. See also *Jand'heur* v. *Galeries belfortaises* (*ibid.*, 1930, p. 57). The decision in this case also established a presumption of fault on the part of the person having in his charge the inanimate object that has caused the injury.

Fletcher, for there is nothing in the words of the article to restrict liability to cases where defendant can be proved to have been negligent in the custody of the things, or even to things which are inherently dangerous.[136]

73. Article 1384, subsection 1, of the Belgian Civil Code has a similar import as the French equivalent.

74. Moreover, the Conseil d'État in France has introduced several forms of strict liability into French administrative law. Since 1944, the Conseil has developed a general principle of liability without fault based on the theory of risk.[137] It has imposed risk theory in four categories of activities of the administration: (*a*) risks for assisting in the public service (similar to workmen's compensation); (*b*) risks arising from dangerous operations, where a public authority creates "an abnormal risk in the neighbourhood" (*risque anormal du voisinage*); (*c*) administrative refusal to execute a judicial decision;[138] and (*d*) State liability arising out of legislation.[139] Strict liability in administrative law has also been justified on the basis of the principle of "equality before public burdens" (*égalité devant les charges publiques*).[140] The principle here is that what is done in the general interest, even if it is done lawfully, may give rise to compensation if it injures a particular person.[141] Thus, under this principle of "equality before public burdens", whoever suffers from a special and abnormal loss as a result of a lawful act or decision which benefits the community as a whole must be compensated for the loss. Public authorities are held liable for any abnormal inconveniences suffered by persons through public works or as a result of lawful administrative action.[142]

75. In Mauritius, the civil remedies for environmental damage revolve around the notions of *faute*, negligence and imprudence, which do not require proof of duty of care *per se* and *garde* under articles 1382 to 1384 of the Civil Code, which bear the same numbers as the French Civil Code.[143]

76. Recognition of the principle of strict liability is also embodied in the 1964 Polish Civil Code, articles 435 to 437 of which recognize strict liability for damage caused by ultrahazardous activities. Article 1318 of the Austrian Civil Code, article 2050 of the Italian Civil Code and articles 1913 and 1932 of the 1928 Mexican Civil Code also recognize strict liability in respect of dangerous activities or things. Articles 345 and 346 of the Hungarian Civil Code pertain to activities of increased danger.

77. Article 1079 of the Russian Civil Code imposes strict liability for damage caused by hazardous activities ("responsibility for harm caused by activity creating increased danger"). Thus the conduct of oil and gas exploration and development is deemed a hazardous activity. A defendant charged with strict liability under this provision can escape liability only if it is proved that the damage was caused by the fault of the person who suffered the damage or was caused by an act of God. In Greece, article 29 of Law No. 1650 (1986) on the protection of the environment provides that any natural or legal person who causes pollution or other downgrading of the environment is liable in damages. There is no liability if it is proved that the loss was due to *force majeure* or that the loss was caused by a culpable act of a third party who acted intentionally.[144]

78. The General Principles of the Civil Law of China provide in article 106 that "[c]ivil liability shall still be borne even in the absence of fault, if the law [so] stipulates", and in article 124, that "[a]ny person who pollutes the environment and causes damage to others in violation of state provisions for environmental protection and the prevention of pollution shall bear civil liability in accordance with the law". On the other hand, article 123 provides that:

> If any person causes damage to other people by engaging in operations that are greatly hazardous to the surroundings, such as operations conducted high above ground, or those involving high pressure, high voltage, combustibles, explosives, highly toxic or radioactive substances or high-speed means of transport, he shall bear civil liability; however, if it can be proven that the damage was deliberately caused by the victim, he shall not bear civil liability.

79. With increased attention to the need to protect the environment, the potential use of strict liability rules has become accentuated. In particular, the public was more sensitized to the environmental dangers of oil transportation following the *Torrey Canyon* disaster off the coast of the United Kingdom on 18 March 1967, and subsequently an oil spill in 1969 in the United States off the coast of Santa Barbara, California.[145] In the United States, there has been an evolution in policies and the direction of statutes about dealing with environmental problems. The main policy in the 1970s was formed on the expectation that the Government would enact regulatory statutes and would police and enforce such statutes. The activities of those not complying with the regulations would be banned. It was believed that this policy of setting standards and enforcing them would compel industry to correct itself. Subsequently, it was realized that, though threats of Government involvement were important incentives in

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[136] Lawson, *op. cit.*, p. 44. For responsibility without fault in French law, see also Ancel, "La responsabilité sans faute en droit français".

[137] In the *Cames* case of 21 June 1895 (*Recueil des arrêts du Conseil ou Ordonnances royales, 1895*, p. 509), the Conseil d'État held that the State was strictly liable for the damage sustained by public agents in the cause of their employment. This was justified under the theory of the "*risque-profit*": whoever benefited from the activity of another must answer for the risks generated by that activity. See also Hauriou, *Notes d'arrêts sur décisions du Conseil d'État et du Tribunal des conflits*.

[138] In a landmark case (*Couitéas* of 30 November 1923, *Recueil des arrêts du Conseil d'État, 1923*, p. 789), the Conseil d'État refused to decide whether the Government was at fault and instead invoked the principle of equality in bearing public burdens.

[139] See the case (*Affaires Étrangères* v. *Consorts Burgat*, Conseil d'État, 29 October 1976), where a landlord, because of the Government's enactment of diplomatic immunity which applied to her tenant, was deprived of exercising her normal rights as a landlord. See also Brown and Bell, *French Administrative Law*, pp. 183–191; Lawson and Markesinis, *Tortious Liability for Unintentional Harm in the Common Law and the Civil Law*, pp. 146–177.

[140] This principle was expressed by Duguit in his *Traité de droit constitutionnel* (3rd ed., p. 469), cited in Brown and Bell, *op. cit.*, p. 184.

[141] *Ibid.*

[142] Galand-Carval, *loc. cit.*, pp. 134–135.

[143] Sinatambou, *loc. cit.*, p. 272.

[144] See generally Canellopoulou-Bottis, "Hellas".

[145] B. Lewis, "It's been 4380 days and counting since *Exxon Valdez*: is it time to change the Oil Pollution Act of 1990?", p. 101.

forcing the industry to correct environmentally unsound activities, they were insufficient by themselves to change the industry's attitude.[146] For one thing, environmental regulations were not comprehensive enough. The Government could not identify all the environmental problems, develop regulations and provide technologically workable and politically viable solutions.[147] For another, even with the substantial size of enforcement agencies for environmental regulations, the United States Government could not effectively monitor and enforce environmental regulations.[148] Moreover, such a policy would not be economically more efficient or creative. Consequently attention was drawn towards enacting statutes which were "self-executing", creating incentives for private parties to play an important role in implementing environmental law.

80. This new policy led to the enactment of a number of important federal statutes, including the Federal Water Pollution Control Act (FWPCA) (hereinafter the Clean Water Act),[149] the Comprehensive Environmental Response, Compensation and Liability Act 1980 (CERCLA)[150] and the Oil Pollution Act of 1990 (OPA).[151] "The effect of these new, liability-based statutes is to assign much of the responsibility for planning for a dangerous and uncertain environmental future to that segment of society most capable of finding innovative and efficient solutions: the private sector."[152]

81. These federal statutes have the following common characteristics. They:

(*a*) Impose strict liability with only limited defence available on persons made legally responsible for pollution from oil and other hazardous substances[153] for:

(i) Removal and clean-up costs, and

(ii) Damages for injury to or destruction of natural resources, private property and other economic interests of governmental and private parties;

(*b*) Limit the maximum amount of liability of the responsible party and enumerate the circumstances where limitation of liability is not available;

(*c*) Impose a duty on those who may be held liable to prove financial responsibility such as insurance or other financial guarantees; and

(*d*) Establish various governmentally administered funds to pay removal costs and damages when the party liable is not making payments.[154]

82. The Clean Water Act prohibits the "discharge of oil or hazardous substances (i) into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone",[155] and any person who is the owner, operator or person in charge of any vessel, onshore facility, or offshore facility from which oil or a hazardous substance is discharged in violation of the provision is subject to a civil penalty.

83. Under the terms of section 311 (*a*) (6) of the Clean Water Act,

> "owner or operator" means … in the case of a vessel, any person owning, operating, or chartering by demise, such vessel, and … in the case of an onshore facility, and an offshore facility, any person owning or operating such onshore facility or offshore facility, and … in the case of any abandoned offshore facility, the person who owned or operated such facility immediately prior to such abandonment.[156]

84. CERCLA applies to all hazardous substances other than oil. The liability regime established under CERCLA is strict, joint and several.[157] It applies to vessels and

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[146] Many American scholars argued that the policy of regulatory mechanism as the main instrument in pollution control is misguided. See, for example, Ackerman and Stewart, "Reforming environmental law"; Breyer, "Analyzing regulatory failure: mismatches, less restrictive alternatives, and reform"; and Hahn and Hester, "Marketable permits: lessons for theory and practice".

[147] Babich, "Understanding the new era in environmental law", p. 736.

[148] *Ibid.*, pp. 734 and 736.

[149] *United States Code*, title 33, chap. 26, sects. 1251 *et seq.* The original Water Pollution Control Act of 1948 (Public Law 845, *United States Statutes at Large*, vol. 62, p. 1155) has been amended extensively, with major amendments in 1961 (Federal Water Pollution Control Act Amendments (Pub.L. No. 87–88; 75 Stat.1204)); 1966 (Clean Water Restoration Act (Pub.L. No. 89–753; 80 Stat.1246)); 1970 (Water Quality Improvement Act (Pub.L. No. 91–224; 84 Stat.91)); 1972 (Federal Water Pollution Control Act Amendments (Pub.L. No. 92–500; 86 Stat.816)); 1977 (Clean Water Act (Pub.L. No. 95–217; 91 Stat.1566)); and 1987 (Water Quality Act (Pub. Law 100–4; 101 Stat.7)).

[150] *United States Code*, title 42, chap. 103, sects. 9601 *et seq.* The Superfund Statute was enacted in 1980 (Pub. L. 96–510; 94 Stat.2767), with major amendments in 1983 (42 U.S.C. 9601–9657, Pub. L. 98–80; 97 Stat.485) and in 1986 (the Superfund Amendment and Reauthorization Act (SARA), Pub. L. 99–499; 100 Stat.1613). SARA amended CERCLA and created the Emergency Planning and Community Right-to-Know Act (EPCRA or SARA Title III). For the history of the statute, see Light, *CERCLA Law and Procedure*; Grad, "A legislative history of the Comprehensive Environmental Response, Compensation and Liability ('Superfund') Act of 1980"; and Topol and Snow, *Superfund Law and Procedure*. Congress subsequently amended CERCLA in 1996 (Asset Conservation, Lender, Liability, and Deposit Insurance Protection Act, Pub. L. 104–208; 110 Stat.3009–3462) and in 1999 (sect. 127 to CERCLA pursuant to the Superfund Recycling Equity Act as a rider to H.R. 3421, the Consolidated Appropriation Act (Pub.L. No.106–113; 113 Stat.1501A–598).

[151] Pub. L. 101–380; 104 Stat.484 (18 August 1990), or *United States Code*, title 33, chap. 40, sects. 2701 *et seq.* For writings on that statute, see Randle, "The Oil Pollution Act of 1990: its provisions, intent, and effects"; Rodriguez and Jaffe, "The Oil Pollution Act of 1990"; and Strohmeyer, *Extreme Conditions: Big Oil and the Transformation of Alaska*.

[152] Babich, *loc. cit.*, p. 735. Not all members of the United States Congress considered the new era of legislative trends a success. See "Domenici declares Superfund 'failure', suggests revamped liability scheme", *Inside E.P.A. Weekly Report* (Washington, D.C.), vol. 10, No. 38 (22 September 1989), p. 4.

[153] For OPA, see section 2710 (*b*) ; for CERCLA, see section 9707 (*e*) (i) and for the Clean Water Act, see section 1321 (*f*).

[154] See Force, "Insurance and liability for pollution in the United States", p. 22. See also Rodgers Jr., *Environmental Law*, p. 685.

[155] *United States Code*, title 33, chap. 26, sect. 1321.

[156] *Ibid.*

[157] *Ibid.*, title 42, chap. 103, sect. 9601(8). CERCLA does not expressly impose strict liability. It does so by cross reference. In its definition section, it provides that "liable" and "liability" shall be construed as the standard of liability under section 1321 of title 33 (i.e. sect. 311 of the Clean Air Act). Federal courts have interpreted section 311 as imposing "strict liability" (e.g. *United States of America* v. *LeBeouf Brothers Towing Co.*, United States Court of Appeals, Fifth Circuit, *Federal Reporter*, 2nd ed., vol. 621 (1980), p. 789) and that CERCLA also imposes "strict liability" (e.g. *United States of America* v. *Alcan Aluminium Corp.*, *ibid.*, Third Circuit, *Federal Reporter*, 2nd ed., vol. 964 (May–June 1992), p. 259–263). See generally MacAyeal, *loc. cit.*

onshore and offshore facilities from which hazardous substances have been released.

85. Section 9607 (*a*) of CERCLA provides:

> Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (*b*) of this section—
>
> (1) the owner and operator of a vessel or a facility,
>
> (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
>
> (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and
>
> (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance,
>
> shall be liable for—
>
> (A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;
>
> (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;
>
> (C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and
>
> (D) the costs of any health assessment or health effects study carried out under section 9604 (i) of this title.[158]

86. The scheme of liability is outlined in section 107 of the Superfund Act and financial responsibility for clean-up is outlined in section 108. It provides compelling incentives for quick response to directives for removal or remedial action in section 107 (*c*) (3) by imposing punitive damages. The section reads:

> If any person who is liable for a release or threat of release of a hazardous substance fails without sufficient cause to properly provide removal or remedial action upon order of the President pursuant to section 104 or 106 of this Act, such person may be liable to the United States for punitive damages in an amount at least equal to, and not more than three times, the amount of any costs incurred by the Fund as a result of such failure to take proper action. The President is authorized to commence a civil action against any such person to recover the punitive damages, which shall be in addition to any costs recovered from such person pursuant to section 112 (c) of this Act. Any moneys received by the United States pursuant to this subsection shall be deposited in the Fund.[159]

87. Recognizing the conflicts and deficiencies in the laws existing, the United States Congress had already been working on legislation on oil pollution since 1980. The *Exxon Valdez* oil spill[160] in 1989, however, substantially affected the substance of OPA. A significant portion of the Act is devoted to a liability regime roughly comparable to the one imposed on responsible parties who release hazardous substances under CERCLA. Section 2702 (*a*) introduces the general theory of liability of the Act:

> Notwithstanding any other provision or rule of law ... each responsible party for a vessel or a facility from which oil is discharged, or which poses the substantial threat of a discharge of oil, into or upon the navigable waters or adjoining shorelines or the exclusive economic zone is liable for the removal costs and damages specified in subsection (*b*) of this section that result from such incident.[161]

88. OPA defines "incident" as "any occurrence or series of occurrences having the same origin, involving one or more vessels, facilities, or any combination thereof, resulting in the discharge or substantial threat of discharge of oil". The term "discharge" is defined as "any emission ... and includes, but is not limited to, spilling, leaking, pumping, pouring, emitting, emptying, or dumping". The term "facility" is defined as "any structure, group of structures, equipment, or device … which is used for one or more of the following purposes: … transferring, processing, or transporting oil". The term "vessel" is defined broadly to include "every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water, other than a public vessel". And a "public vessel" is defined as "a vessel owned or bareboat chartered and operated by the United States … or by a foreign nation, except when the vessel is engaged in commerce".[162]

89. Also of relevance is the Solid Waste Disposal Act, first enacted in 1965. It has since gone through a number of changes and amendments, so much so that it is now commonly known as the Resource Conservation and Recovery Act of 1976 (RCRA).[163] It provides the United States Environmental Protection Agency (EPA) with the authority to control hazardous waste from "cradle to grave" (generation, transportation, treatment, storage and disposal), focusing on active and future facilities, but does not address abandoned or historical sites. The Superfund Amendments and Reauthorization Act of 1986 enables EPA to deal with environmental problems resulting from underground tanks storing petroleum and other hazardous substances.[164]

90. The earlier amendments of 1984 (Hazardous and Solid Waste Amendment) required the phasing out of land disposal of hazardous waste. The criterion in the Solid Waste Disposal Act is not "unreasonable risk" used in earlier environmental legislation, but "[protection of] human health and the environment", a standard which appears "on 50 occasions throughout the Act".[165] It is recognized that the disposal of solid waste and hazardous waste in or on the land without careful planning and man-

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[158] See footnote 150 above.

[159] *Ibid.*, SARA, pp. 2782–2783.

[160] The *Exxon Valdez* accident has been referred to as the "Pearl Harbour" of United States environmental disasters. See Randle, *loc. cit.*, and Rodriguez and Jaffe, *loc. cit.*

[161] United States Code, title 33, chap. 40.

[162] *Ibid.*, sects. 2701 (7), (9), (14), (29) and (37) of the Act.

[163] See also Resource Recovery Act of 1970 (Pub. L. 91–512; 84 Stat. 1227); Used Oil Recycling Act of 1980 (Pub. L. 96–463; 94 Stat. 2055); Solid Waste Disposal Act Amendments of 1980 (Pub. L. 96–482; 94 Stat. 2334); Hazardous and Solid Waste Amendments of 1984 (Pub. L. 98–616; 98 Stat. 3221); Medical Waste Tracking Act of 1988 (Pub. L. 100–582; 102 Stat. 2950); Federal Facility Compliance Act of 1992 (Pub. L. 102–386; 106 Stat. 1505); Land Disposal Program Flexibility Act of 1996 (Pub.L. 104–119; 110 Stat. 830). See also Rodgers Jr., *op. cit.*, p. 534.

[164] Amending subtitle I of RCRA through SARA (sect. 205 of Pub. L. 99–499).

[165] Rodgers Jr., *op. cit.*, p. 536.

agement can present a danger to human health and the environment. The 1984 amendments also expanded the definition of solid waste, identified administrative standards as the minimum that could only be improved upon and provided administrative reform within EPA by establishing an ombudsman.[166] Section 6917 of the amendment established an Office of Ombudsman to receive individual complaints, grievances and requests for information submitted by any person with respect to any programme required under the relevant provisions of the Act.[167]

91. The amendments of 1992 (Federal Facility Compliance Act) resolved the question whether federal facilities were subject to enforcement measures under RCRA. They removed the Government's sovereign immunity from prosecution. Thus, federal facilities, federal departments and agencies may suffer penalties for non-compliance.

92. Other countries have also taken measures to address environmental concerns. In Germany, the Environmental Liability Act (ELA), adopted in 1990, provides a civil damages remedy for wrongful death, personal injury, or property damage caused by an environmental impact.[168] Under ELA, operators of certain facilities identified in the Act are strictly liable for causing such injuries. ELA increases the risk of liability for all enterprises capable of causing environmental injuries and has extraterritorial reach.[169]

93. ELA is a synthesis of pre-existing civil damage remedies with a broader scope. Section 1 of ELA defines the nature and scope:

> If anyone suffers death, personal injury, or property damage due to an environmental impact emitted from one of the facilities named in appendix 1, then the owner of the facility shall be liable to the injured person for the damages caused thereby.[170]

94. Liability is strict under ELA and the proof of causation suffices to establish liability. A claim under ELA must establish: (*a*) that the defendant operates a facility named under the Act; (*b*) that events having an environmental impact were emitted from that facility; and (*c*) that environmental impact caused the injury for which a remedy is sought. If there are multiple defendants, their liability is joint and several.[171] The amount of liability under the Act is limited to a maximum of DM 320 million.[172] Liability for personal injury and property damage is fixed at a maximum of DM 160 million each.[173]

95. To remedy the difficulty of proof of causation in respect of damage caused by long-distance pollution, ELA provides for presumption of causation. Section 6, subsection 1, provides that the element of causation will be presumed upon a *prima facie* showing that the particular facility is "inherently suited" (*geeignet*) to cause the damage.[174] The Act provides defences to the presumption of causation in section 6, subsections 2–4. The defences include a showing by the operator that its facility was "properly operated", meaning that all applicable administrative regulatory instructions aiming at preventing pollution were complied with. Such defences do not absolve the operator of liability if the claimant proves causation.

96. ELA amended the German Civil Procedure to allow actions to be brought in the court district where the facility causing alleged injury is located, unless the facility is located beyond the German territorial border. In the latter situation, the claimant can sue in any German court and have the Act apply to the substance of the complaint.[175]

97. In Switzerland, the Federal Law relating to the Protection of the Environment was amended with the addition of articles 59 (*a*) and (*b*) on 21 December 1995; the articles entered into force on 1 July 1997. Article 59 (*a*) concerning liability stipulates:

> 1. The owner of an enterprise or installation which represents a special threat to the environment shall be liable for damage arising from effects occurring when such a threat becomes reality. The actual damage to the environment shall be excluded.
>
> 2. As a rule, the following enterprises and installations shall be regarded as representing a special threat to the environment:
>
> (*a*) those which the Federal Council makes subject to Article 10[176] on the basis of the substances or organisms used or the wastes produced;
>
> (*b*) those which are used for waste disposal;
>
> (*c*) those in which liquids harmful to water are handled;
>
> (*d*) those containing substances or organisms for which the Federal Council introduces a licensing requirement or enacts other special regulations.
>
> 3. Anyone who can show that the damage was caused by force majeure or by gross negligence on the part of the injured party or of a third party shall be relieved of liability.
>
> 4. Articles 42–47, 49–51, 53 and 60 of the Swiss Code of Obligations shall apply.
>
> 5. The reservation in Article 3[177] shall apply as regards the provisions on liability in other Federal laws.
>
> 6. The Confederation, Cantons and Communes shall also be liable in accordance with paragraphs 1–5.

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[166] *Ibid.*, p. 535.

[167] See *United States Code*, title 42, chap. 82, sect. 6917, added in 1984.

[168] *Gesetz über die Umwelthaftung* (Environmental Liability Act) enacted on 7 November 1990 and effective as of 1 January 1991, cited in Hoffman, "Germany's new Environmental Liability Act: strict liability for facilities causing pollution", p. 27, footnote 1. The information regarding the German act is based on this article.

[169] See Kloepfer, *Umweltschutz: Textsammlung des Umweltrechts der Bundesrepublik Deutschland*, cited in Hoffman, *loc. cit.*, p. 28, footnote 2.

[170] Quoted in Hoffman, *loc. cit.*, p. 32.

[171] *Ibid.*, p. 33.

[172] *Ibid.*, sect. 15 of the Act.

[173] *Ibid.*, pp. 32–33.

[174] *Ibid.* Section 6, subsection 1, of ELA reads:

> "If a facility is inherently suited under the circumstances to cause the resulting damage, then it shall be presumed that this facility caused the damage. Inherently suitedness in a particular case is determined on the basis of the course of business, the structures used, the nature and concentration of the materials used and released, the weather conditions, the time and place of the commencement of the damage, as well as all other conditions which speak for or against a finding of causation."

(*Ibid.*, p. 35, footnote 43)

[175] *Ibid.*, p. 38, sect. 2 of ELA.

[176] Article 10, paragraph 1, provides in part: "Any person who operates or intends to operate installations which, in exceptional circumstances, could seriously damage persons or the environment shall take steps to protect the populations and the environment …"

[177] Article 3 provides:

"1. Stricter provisions of the Federal law shall not be prejudiced.

"2. Radioactive substances and ionizing rays shall be covered by the legislation on protection against radiation and atomic energy."

98. Article 59 (*b*) of the Swiss Federal Law concerning guarantees provides:

> For the protection of injured parties, the Federal Council may:
>
> (*a*) require owners of certain enterprises or installations to provide a guarantee for their liability by taking out insurance or in some other way;
>
> (*b*) set the scope and duration of this guarantee or leave this to the authority to decide on a case-by-case basis;
>
> (*c*) require those providing a guarantee for the liability to notify the enforcement authority of the existence, suspension and cessation of the guarantee;
>
> (*d*) prescribe that the guarantee shall not be suspended or cease until 60 days after receipt of the notification;
>
> (*e*) make provision for the land on which waste disposal sites are situated to become the property of the Canton when the site is closed, and enact regulations concerning any compensation.

99. In Hungary, Act LIII of 1995 relating to General Rules of Environmental Protection regulates the general basis of legal liability for the environment. Section 101 provides:

> (1) Those posing a hazard to, or polluting or damaging the environment with their activities or omissions, or those performing their activities by violating regulations regarding environmental protection (hereinafter together: "unlawful activity") shall be liable (under criminal law, civil law, administrative law, etc.) in accordance with the contents of this Act and the provisions of separate legal rules.
>
> (2) Those pursuing unlawful activities shall:
>
> (*a*) Stop posing a hazard to or polluting the environment and shall cease damaging the environment;
>
> (*b*) Accept responsibility for the damage caused;
>
> (*c*) Restore the state of the environment existing before the activity.
>
> (3) In case the measure in subsection (2), clause (*c*), is not taken or is unsuccessful, the authority or court entitled thereto may restrict the activity or may suspend or ban it until the conditions it established are ensured.

100. The Environmental Protection Act 1991 of Mauritius,[178] which establishes a liability and compensatory regime for environmental damage, is primarily intended to cover dangerous activities and oil spills. Spills are defined as the discharge of a pollutant into the environment from or out of a structure, vehicle, vessel, craft or other carrier or container, which (*a*) is abnormal having regard to all the circumstances of the discharge; and (*b*) poses a serious threat to the environment. The owner of a pollutant which is spilled shall immediately notify the Director of the Department of the Environment of such a spill, the circumstances thereof, and any measures taken or proposed to be taken as well as practical measures taken to prevent, eliminate and ameliorate the adverse effects of the spill and restore the environment.[179]

101. The Director of the Department of the Environment may recover from the owner of a pollutant which is spilled all costs and expenses incurred as a result of (*a*) any clean-up or removal operation; (*b*) any measure taken to prevent, eliminate and ameliorate adverse effects of a spill on the environment; and (*c*) any measure taken to dispose of or to deal with the pollutant.[180]

102. Under section 27, paragraph 1, of the Environmental Protection Act 1991, any person affected in any way by a spill has a right to damages. There is a presumption of liability against the owner of the pollutant for any damage caused by a spill. There is also a shift in the burden of proving that the damage was not caused by the pollutant.[181]

103. The Environment Act of 1983 of Turkey[182] provides in article 28:

> Those who pollute and degrade the environment are liable without fault for the damages occurred as a result of pollution and degradation they caused.

104. Article 28 was introduced in an amendment in Act No. 3416 of 3 March 1988. Despite the broad definition of article 28, the plaintiff is required to prove an unlawful act, causality and damage in order to hold the pollutant liable.[183] It does not provide a defence of "due care". This strict liability regime is an exception to the general rule of fault liability in tort law accepted in other areas of Turkish Civil Law.

105. Environmental pollution includes the destruction of the ecological balance, adverse developments produced in the air, water or soil as a result of all kinds of human activities and undesirable consequences occurring in the environment from odours, noise and discharges resulting from such activities.[184]

106. The Act on Compensation for Environmental Damage of Finland,[185] the Basic Act on the Environment of Portugal,[186] the Act on Compensation for Damage to the Environment of Denmark,[187] the Law on the Protection of the Environment of Greece,[188] the Environmental Code (*Miljöbalken*)[189] and the 1986 Environmental Damage Act of Sweden are pieces of environmental legislation that are based on strict liability for dangerous activities or installations.[190]

107. Some countries also have in place legislation concerning remediation of soil based on strict liability. These

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[178] Act No. 34 of 1991, as amended by the Environment Protection (Amendment) Act 1993. See generally Sinatambou, *loc. cit.*, pp. 275–279. The information regarding the Mauritian act is based on this article.

[179] Sect. 24, para. 2.

[180] Sect. 28, para. 1.

[181] Sinatambou, *loc. cit.*, p. 277.

[182] *Çevre Kanunu*, No. 2872, Resmi Gazete (11 August 1983) (amended in 1984, 1986, 1988, 1990 and 1991). See generally Turgut, "Definition and valuation of environmental damage in Turkey", pp. 281 and 283. The information regarding the Turkish act is based on this article.

[183] Turgut, *loc. cit.*, p. 284.

[184] *Ibid.*, p. 283.

[185] Act No. 737/94.

[186] *Lei de Bases do Ambiente* of 7 April 1987.

[187] Act No. 225 of 6 April 1994.

[188] Act No. 1650 of 1986, *Official Gazette* No. 160, part I (16 October 1986), pp. 3257–3272.

[189] Adopted in June 1998 and entered into force on 1 January 1999.

[190] For a general description, see generally Clarke, *Update Comparative Legal Study*.

include the 1999 Contaminated Soil Act of Denmark,[191] chapter 12 of the 2000 Environmental Protection Act of Finland,[192] the Federal Soil Protection Act of 17 March 1998 (BBodSchG) of Germany[193] as further implemented by the Federal Soil Protection and Contaminated Sites Ordinance (BBodSchV) of 12 July 1999, the Ronchi Decree or Waste Management Act of Italy,[194] the Wastes Law of Spain,[195] and the 2002 Soil Contamination Countermeasures Act of Japan.

108. Part IIA of the Environmental Protection Act 1990 of the United Kingdom, as amended in 1995, concerning contaminated land and abandoned mines,[196] establishes a new contaminated land and liability regime. It seeks to allow the enforcing authorities to establish the "appropriate person" who should bear the responsibility for remediation of contaminated land,[197] and to decide, after consultation, the remediation measures to be taken. This is done through agreement with the appropriate person, through the service of a remediation notice or through clean-up by the authorities themselves. The enforcing authorities also determine the proportion and by whom the costs should be borne. A public register on the regulatory actions is also established.

109. The Environmental Protection Act 1990 imposes strict, retroactive liability on persons who cause or knowingly permit contamination[198] or on current owners or occupiers of sites.[199] It has few defences and a detailed apportionment system which combines elements of joint and several, and proportionate, liability,[200] together with multiple exclusion tests.[201] "Harm" is defined as meaning harm to the health of living organisms or other interference with ecological systems of which they form part and, in the case of man, includes harm to property.[202]

110. One may not comply with a remediation notice if one of the other recipients has failed to comply with it. The regime includes 19 grounds for appeal[203] and a complex system of exclusions and apportionment rules for the remaining liability parties. Some of the exclusions contain recognizable elements of defences at civil law, such as third-party intervention and foreseeability. Such exclusions are, however, couched in more restrictive terms. The Environmental Protection Act does not specifically mention the defence of *force majeure*. Permit compliance is not a defence, and any breaches of permits are likely to be subject to criminal prosecution, involving both penalties and more onerous remediation requirements.[204] The Environmental Protection Act establishes a general principle that apportionment should reflect the relative responsibility of each liable party for creating or continuing the risk caused by the pollution.

112. The above review of domestic law indicates that strict liability, as a legal concept, now appears to have been accepted by most legal systems. The extent of activities subject to strict liability may differ; in some countries it is more limited than in others. The legal basis for strict liability also varies from "presumed fault" to the notion of "risk", or "dangerous activity involved", etc. However, it is evident that strict liability is a principle common to a sizeable number of countries with different legal systems which have had the common experience of having to regulate activities to which this principle is relevant. While States may differ as to the particular application of this principle, their understanding and formulation of it are substantially similar. Strict liability is also increasingly employed in legislation concerning protection of the environment.

2. International law

113. The introduction and application of the concept of liability in international law, on the other hand, is relatively new and less developed than in domestic law. One reason for this late start may have been that the types of activities leading to transboundary harm are relatively new. Moreover, not many activities conducted within a

[191] Act No. 370/99. This is a public and administrative law regime replacing earlier provisions under the Contaminated Sites Act (No. 420 of 13 June 1990) (also known as the Waste Deposits Act or the Contaminated Land Act) and the Environmental Protection Act (No. 358 of 6 June 1991).

[192] Act No. 86/2000. The Act entered into force on 1 March 2000. It introduces a new public and administrative law regime, replacing and supplementing separate provisions under waste (1993 Waste Act) and water legislation.

[193] The Act was adopted in March 1998. The majority of its provisions became effective on 1 March 1999.

[194] Legislative Decree 22/97 of 5 February 1997. The regime came into force on 16 December 1999 (Ministerial Decree 471/99).

[195] Act No. 10/1998 of 21 April 1998.

[196] In force in England on 1 April 2000 and on 14 July 2000 in Scotland. See generally Clarke, *op. cit.* The information regarding the British act is based on this article. See also Department of Environment, Transport and the Regions circular 02/2000, "Contaminated land: implementation of part IIA of the Environmental Protection Act 1990".

[197] Section 78A, subsection (2), defines contaminated land for the purposes of part IIA as:

"any land which appears to the local authority in whose area it is situated to be in such a condition, by reason of substances in, on or under the land, that—

"(*a*) significant harm is being caused or there is a significant possibility of such harm being caused; or

"(*b*) pollution of controlled waters is being, or is likely to be, caused."

The Secretary of State may issue a guidance circular for that purpose.

[198] Sect. 78F, subsect. (2): "… any person, or any of the persons, who caused or knowingly permitted the substances, or any of the substances, by reason of which the contaminated land in question is such land to be in, on or under that land is an appropriate person."

[199] Sect. 78F, subsects. (4)–(5), which provides that:

"(4) If no person has, after reasonable inquiry, been found who is by virtue of subsection (2) above an appropriate person to bear responsibility for the things which are to be done by way of remediation, the owner or occupier for the time being of the contaminated land in question is an appropriate person.

"(5) If, in consequence of subsection (3) above, there are things which are to be done by way of remediation in relation to which no person has, after reasonable inquiry, been found who is an appropriate person by virtue of subsection (2) above, the owner or occupier for the time being of the contaminated land in question is an appropriate person in relation to those things."

[200] *Ibid.*, subsects. (6)–(7).

[201] A few details of the regimes, including implementation dates, will vary between the constituent parts of the United Kingdom (England, Scotland, Wales and Northern Ireland), but in most respects they will be very similar.

[202] Sect. 78A, subsect. (4).

[203] These mainly concern failures on the part of the enforcement authorities to act in accordance with the Environmental Protection Act or the guidance and regulations, such that the wrong person has been served with a notice, the harm is not sufficient to merit remediation, or either the remedial action required or the liability imposed is excessive.

[204] Sect. 78M.

State have had significant transboundary injurious effects. Of course, the difficulties in accommodating the concept of liability with other well-established concepts of international law, such as domestic jurisdiction and territorial sovereignty, should also not be ignored. In fact, the development of strict liability in domestic law, as explained above, faced similar difficulties. But socio-economic and political necessity in many States led to accommodating this new legal concept with others in ways deemed to serve social policies and public order.

114. The need to develop liability regimes in an international context has been recognized and has found expression in a number of instruments. In principle 22 of the Declaration of the United Nations Conference on the Environment (Stockholm Declaration) 1972,[205] a common conviction was expressed that:

> States shall co-operate to develop further the international law regarding liability and compensation for the victims of pollution and other environmental damage caused by activities within the jurisdiction or control of such States to areas beyond their jurisdiction.

115. Principle 13 of the Rio Declaration on Environment and Development,[206] addresses the national and international contexts by broadly proclaiming:

> States shall develop national law regarding liability and compensation for the victims of pollution and other environmental damage. States shall also cooperate in an expeditious and more determined manner to develop further international law regarding liability and compensation for adverse effects of environmental damage caused by activities within their jurisdiction or control to areas beyond their jurisdiction.[207]

116. These principles, while lacking legally binding force, express the aspirations and preferences of the international community.[208]

(a) *Treaty practice*

117. Multilateral treaty practice touching on the issue of liability may be divided into three broad categories: first, civil liability conventions addressing the question of liability of operators and in some circumstances of States, in terms of both substantive and procedural rules; secondly, treaties which hold the State directly liable; and thirdly, treaties which make a general reference to liability without specifying any further the substantive or procedural rules related thereto.

118. The *first category* of multilateral treaties on liability addressing the question of civil liability is primarily concerned with navigation, oil and nuclear material as well as other sectors, including hazardous wastes. One of the very first conventions addressing the liability issue in the area of navigation was the International Convention for the Unification of Certain Rules relating to the Limitation of the Liability of Owners of Seagoing Vessels (hereinafter the 1924 Convention).[209] This Convention and the subsequent International Convention relating to the limitation of the liability of owners of sea-going ships (hereinafter the 1957 Convention) allowed the shipowner to limit liability.[210]

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[205] *Report of the United Nations Conference on the Environment, Stockholm, 5–16 June 1972* (United Nations publication, Sales No. E.73.II.A.14).

[206] *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 corrigenda), vol. I: *Resolutions adopted by the Conference*, resolution 1, annex I.

[207] At a meeting convened pursuant to General Assembly resolution 53/242 of 28 July 1999 to enable the world's environment ministers to review important and emerging environmental issues and to chart the course for the future, it was noted that the "evolving framework of international environmental law and the development of national law provide a sound basis for addressing the major environmental threats of the day. It must be underpinned by a more coherent and coordinated approach among international environmental instruments. We must also recognize the central importance of environmental compliance, enforcement and liability" (*Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 25* (A/55/25), annex I, decision SS.VI/1, para. 3). See also the Programme for the Development and Periodic Review of Environmental Law for the First Decade of the Twenty-first Century, approved and adopted by the UNEP Governing Council at its twenty-first session (*ibid.*, *Fifty-sixth Session, Supplement No. 25*, annex, decision 21/23), as well as the Plan of Implementation of the World Summit on Sustainable Development, *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 and corrigendum), chap. I, resolution 2, annex.

[208] Birnie and Boyle, *International Law and the Environment*, who note (p. 105) that "[t]hese principles all reflect more recent developments in international law and state practice; their present status as principles of general international law is more questionable, but the evidence of consensus support provided by the Rio Declaration is an important indication of their emerging legal significance".

[209] Historically, the statutory right to limit liability in selected circumstances is traced to the seventeenth century. Provisions which allowed shipowners to limit their liability by reference to the value of the ship and freight can be found in the 1603 Statutes of Hamburg, the 1614 and 1644 Hanseatic Ordinances and the 1681 Marine Ordinance of Louis XIV (see Pardessus, *Collection de lois maritimes antérieures au XVIIIe siècle*). In the United Kingdom, following the passing of the Responsibility of Shipowners Act 1733, the right was extended in 1786 to cover the consequences of "any act, matter, or thing or damage or forfeiture, done or occasioned, or incurred by the said master or mariners, or any of them, without the privity and knowledge of such owner or owners" (quoted in Griggs, "Limitation of liability for maritime claims: the search for international uniformity", p. 371).

In accordance with article 1 of the 1924 Convention, the liability of the *owner* of the vessel is limited to an amount equal to the value of the vessel, the freight, and the accessories of the vessel, in respect of:

> "1. Compensation due to third parties by reason of damage caused, whether on land or on water, *by the acts or faults** of the master, crew, pilot, or any other person in the service of the vessel;
>
> "...
>
> "4. Compensation due by reason of a fault of navigation committed in the execution of a contract."

In accordance with article 2 of the Convention, the limitation of liability in article 1 does not apply:

> "1. To obligations arising out of *acts or faults of the owner** of the vessel."

This Convention was followed later by the International Convention relating to the limitation of the liability of owners of sea-going ships . Under article 1 of this 1957 Convention, the owner of a seagoing ship may limit his liability in respect of:

> "(*a*) Loss of life of, or personal injury to, any person being carried in the ship, and loss of, or damage to, any property on board the ship;
>
> "(*b*) Loss of life of, or personal injury to, any other person, whether on land or on water, loss of or damage to any other property or infringement of any rights caused by the act, neglect or default of any person on board the ship for whose act, neglect or default the owner is responsible or any person not on board the ship for whose act, neglect or default the owner is responsible."

[210] The two Conventions were based on "actual fault or privity of the owner" (art. 1). The Convention on limitation of liability for maritime claims, 1976 changed the test of "actual fault or privity" to one whether "the loss resulted from [the shipowner's] personal act or omission, committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result" (art. 4). The Convention was amended in London by a Protocol of 1996 to amend the Convention on Limitation of Liability for Maritime Claims, 1976. For the civil aviation liability regime established under the "Warsaw system",

119. Gradually, oil pollution, either as the result of general navigation or transportation of oil by ships, became a major concern. However, until 1969, there was no multilateral treaty establishing a liability regime for oil pollution damage. In general, the rules of compensation were governed by various rules of tort law in each State[211] or by the 1924 and 1957 Conventions. The *Torrey Canyon* incident of 1967, in which a Liberian-registered oil tanker ran aground off the south-west coast of the United Kingdom and spilled thousands of tons of crude oil into the sea, provided the necessary background and political pressure for States to agree on a liability regime for oil pollution damage. The limits of liability under the 1924 and 1957 Conventions "would have been much too low to cover the damage resulting from"[212] *Torrey Canyon*. The International Convention on Civil Liability for Oil Pollution Damage (hereinafter the 1969 Civil Liability Convention),[213] addressed four important issues; namely, the need to: (*a*) harmonize liability by placing it on the shipowner and not on the operator or cargo owner; (*b*) ensure that the polluter would pay; (*c*) allocate loss and distribute costs; and (*d*) remove jurisdictional obstacles for coastal States in securing adequate compensation.[214]

120. The 1969 Civil Liability Convention established a strict liability regime channelled through the shipowner. Owners were held jointly and severally liable for all such damage which was not reasonably separable. It also contained provisions on compulsory insurance. Its definition of "pollution damage" in article 1, paragraph 6, was unclear. It defined "pollution damage" as "loss or damage caused outside the ship carrying oil by contamination resulting from the escape or discharge of oil from the ship, wherever such escape or discharge may occur, and includes the costs of preventive measures and further loss or damage caused by preventive measures". The interpretation of this definition was left to domestic courts, some of which considered that restoration of the environment was included in the notion of damage.[215]

121. The 1969 Civil Liability Convention was complemented by the International Convention on the establishment of an international fund for compensation for oil pollution damage (hereinafter the 1971 Fund Convention).[216] The establishment of the complementary funding mechanism financed by oil companies was part of the compromise leading to an agreement to attach liability to the shipowner instead of the shipper or cargo owner or operator.[217] It created a second-tier regime of compensation in that it enabled the availability of adequate compensation to persons who suffered damage caused by oil pollution discharged from ships in situations where the Civil Liability Convention was inadequate or liability could not be obtained.[218] The 1971 Fund Convention also established a fund (International Oil Pollution Compensation Fund) (IOPC).[219]

122. Liability under the 1969 Civil Liability Convention and the 1971 Fund Convention is strict, subject to limited defences. Both private claimant and shipowner can institute claims under the IOPC Fund. The Fund is financed by levying contributions from those who have received crude oil and fuel oil in the territory of contracting States. It is governed by an assembly of all contracting States to the 1971 Fund Convention. Once a claimant exhausts the procedure for collecting liability under the 1969 Convention, he may then follow the procedure for liability under the Fund. In essence, "[t]he combined effect of the [two] Conventions is thus that, in the more serious cases, the owners of the ship and the owners of the cargo are jointly treated as 'the polluter' and share equitably the cost of accidental pollution damage arising during transport".[220] Shipowners of States not party to the 1969 or the 1971 Conventions also devised other schemes to provide additional compensation. However, such schemes have been consolidated in view of the success of the Civil Liability and Fund Convention regime.[221]

123. The *Amoco Cadiz* incident in 1978, which caused massive pollution off the French coast, led to a review of the 1969 Civil Liability Convention and the 1971 Fund Convention. The Protocol of 1984 to the Civil Liability Convention clarified the meaning of pollution damage. Under the new definition, pollution damage was defined as:

see: 1929 Convention for the Unification of Certain Rules relating to International Carriage by Air; 1955 Protocol to amend the Convention for the Unification of Certain Rules relating to International Carriage by Air; 1961 Convention, Supplementary to the Warsaw Convention, for the Unification of Certain Rules relating to International Carriage by Air Performed by a Person Other than the Contracting Carrier; 1971 Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929 as Amended by the Protocol Done at The Hague on 28 September 1955; Additional Protocols Nos. 1 to 3 and Montreal Protocol No. 4 to amend the 1929 Convention as amended by the 1955 Protocol or the 1929 Convention as amended by both the 1955 Protocol and the 1971 Protocol; 1999 Convention for the Unification of Certain Rules for International Carriage by Air.

[211] See Abecassis and Jarashow, *Oil Pollution from Ships: International, United Kingdom and United States Law and Practice*, p. 181.

[212] Churchill, "Facilitating (transnational) civil liability litigation for environmental damage by means of treaties: progress, problems and prospects", p. 15.

[213] The International Legal Conference on Marine Pollution Damage also adopted the International Convention relating to intervention on the high seas in cases of oil pollution casualties. See generally Wu Chao, *Pollution from the Carriage of Oil by Sea: Liability and Compensation*, pp. 37–101.

[214] See generally Birnie and Boyle, *op. cit.*, p. 385, and Abecassis and Jarashow, *op. cit.*, pp. 181–182.

[215] See Abecassis and Jarashow, *op. cit.*, pp. 209–210. In *Commonwealth of Puerto Rico* v. *S.S. Zoe Colocotroni* (United States District Court, vol. 456, *Federal Supplement*, p. 1327 (1978); and Court of Appeals, *ibid.*, 2nd series, vol. 628 (June–November 1980), p. 652), a value was put on the estimated loss of marine organisms and the cost of replacing a mangrove swamp. On appeal, compensation was reduced to "reasonable" measures of restoration. This case was however not governed by the 1969 Convention. In *Antonio Gramsci* (see footnote 741 below) and in *Patmos*, claims for notional costs of damage to the environment were allowed (see Bianchi, "Harm to the environment in Italian practice: the interaction of international law and domestic law").

[216] See Larsson, *The Law of Environmental Damage: Liability and Reparation*, pp. 185–196.

[217] See Wu Chao, *op. cit.*, p. 54.

[218] Art. 4.

[219] Art. 2.

[220] Birnie and Boyle, *op. cit.*, p. 386.

[221] See Abecassis and Jarashow, *op. cit.*, chap. 12, pp. 303–325. The Tanker Owners Voluntary Agreement Concerning Liability for Oil Pollution (TOVALOP) of 7 January 1969 applied to tanker owners and the Contract Regarding an Interim Supplement to Tanker Liability for Oil Pollution (CRISTAL) of 14 January 1971 provided a fund comparable to the IOPC Fund. For the texts of these agreements, see ILM, vol. VIII, No. 3 (May 1969), p. 497, and *ibid.*, vol. X, No. 1 (January 1971), p. 137, respectively.

(*a*) loss or damage caused outside the ship by contamination resulting from the escape or discharge of oil from the ship, wherever such escape or discharge may occur, provided that compensation for impairment of the environment other than loss of profit from such impairment shall be limited *to costs of reasonable measures of reinstatement actually undertaken or to be undertaken*;*

(*b*) the costs of preventive measures and further loss or damage caused by preventive measures.[222]

124. Although the Protocol of 1984 never entered into force,[223] the definition was incorporated in the subsequent Protocol of 1992 to amend the 1969 Civil Liability Convention.[224] The definition also allows recovery for loss of profit arising out of impairment of the environment. It also extends to pollution damage to the exclusive economic zone of the coastal State or in an area up to 200 miles from its territorial sea baselines. While the environmental perspectives of the Protocols of 1992 to the 1969 Convention and the 1971 Fund Convention are preferable to the earlier Conventions, the definition is still limited and has been characterized as follows:

[I]t still stops short of using liability to penalize those whose harm to the environment cannot be reinstated, or quantified in terms of property loss or loss of profits, or which the government concerned does not wish to reinstate, or which occurs on the high seas. To this extent the true environmental costs of oil transportation by sea continue to be borne by the community as a whole, and not by the polluter.[225]

125. The liability of the owner under the Protocol of 1992 is strict, joint and several. However, it allows exemptions.[226] The Protocol imposed maximum limits payable at SDR 59.7 million.

126. The Protocol of 1992 to amend the 1971 Fund Convention, like the latter, establishes a fund which is financed by a levy on oil imports. The Protocol of 1992 imposes maximum limits payable at 135 million units of account (including the amount payable by the shipowner under the Protocol).

127. The overall limits have been gradually increased in the Protocols of 1992. Following the *Nakhodka* incident off the coast of Japan in 1997 and the sinking of the *Erika* off the west coast of France in 1999, in the 2000 amendments to the Protocol of 1992, the maximum limit was raised to SDR 89.77 million, effective 1 November 2003. In the 2000 amendments to the Protocol of 1992 to the Fund Convention, the maximum limit was also raised to SDR 203 million, and if three States contributing to the fund receive more than 600 million tons of oil per annum, the maximum is raised to SDR 300.74 million, up from SDR 200 million.

128. The Protocol of 2003 to the 1992 Fund Convention establishing an International Oil Pollution Compensation Supplementary Fund establishes a third tier supplementary compensation regime to apply to damage in the territory, including the territorial sea, of a contracting State as well as the exclusive economic zone or its equivalent.[227]

129. The total amount of compensation payable, including the amount of compensation paid under the existing 1992 Protocols, will be SDR 750 million.

130. The Civil Liability and Fund Convention regime does not encompass all types of cargo; it only covers oil from oil tankers or ships carrying oil as cargo. This lacuna is filled by other conventions. For example, the 2001 International Convention on Civil Liability for Bunker Oil Pollution Damage (hereinafter the Bunker Oil Convention) is concerned with bunker oil. It establishes a joint and several strict liability regime, with exemptions, for the shipowner and applies to damage caused on the territory, including the territorial sea, and in exclusive economic zones of States parties. Pollution damage is defined as:

(*a*) loss or damage caused outside the ship by contamination resulting from the escape or discharge of bunker oil from the ship, wherever such escape or discharge may occur, provided that compensation for impairment of the environment other than loss of profit from such impairment shall be limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken; and

(*b*) the costs of preventive measures and further loss or damage caused by preventive measures.[228]

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[222] Art. 2, para. 6.

[223] The corresponding Protocol of 1984 to amend the 1971 Fund Convention never entered into force either.

[224] The 1969 Civil Liability Convention as amended by the Protocol of 1992 is generally known as the International Convention on Civil Liability for Oil Pollution Damage, and the Fund Convention as amended by the Protocol of 1992 is known as the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage.

[225] Birnie and Boyle, *op. cit.*, p. 388.

[226] Arts. 4–5.

[227] Under articles 4–5 of the Protocol:

"1. The Supplementary Fund shall pay compensation to any person suffering pollution damage if such person has been unable to obtain full and adequate compensation for an established claim for such damage under the terms of the 1992 Fund Convention, because the total damage exceeds, or there is a risk that it will exceed, the applicable limit of compensation laid down in article 4, paragraph 4, of the 1992 Fund Convention in respect of any one incident.

"2. (*a*) The aggregate amount of compensation payable by the Supplementary Fund under this article shall in respect of any one incident be limited, so that the total sum of that amount together with the amount of compensation actually paid under the 1992 Liability Convention and the 1992 Fund Convention within the scope of application of this Protocol shall not exceed 750 million units of account.

"(*b*) The amount of 750 million units of account mentioned in paragraph 2 (*a*) shall be converted into national currency on the basis of the value of that currency by reference to the Special Drawing Right on the date determined by the Assembly of the 1992 Fund for conversion of the maximum amount payable under the 1992 Liability and 1992 Fund Conventions.

"3. Where the amount of established claims against the Supplementary Fund exceeds the aggregate amount of compensation payable under paragraph 2, the amount available shall be distributed in such a manner that the proportion between any established claim and the amount of compensation actually recovered by the claimant under this Protocol shall be the same for all claimants.

"4. The Supplementary Fund shall pay compensation in respect of established claims as defined in article 1, paragraph 8, and only in respect of such claims.

"Article 5

"The Supplementary Fund shall pay compensation when the Assembly of the 1992 Fund has considered that the total amount of the established claims exceeds, or there is a risk that the total amount of established claims will exceed the aggregate amount of compensation available under article 4, paragraph 4, of the 1992 Fund Convention and that as a consequence the Assembly of the 1992 Fund has decided provisionally or finally that payments will only be made for a proportion of any established claim. The Assembly of the Supplementary Fund shall then decide whether and to what extent the Supplementary Fund shall pay the proportion of any established claim not paid under the 1992 Liability Convention and the 1992 Fund Convention."

[228] Art. 1, para. 9.

131. The Bunker Oil Convention does not contain its own limits of liability. Instead, pursuant to article 6, the shipowner may limit liability "under any applicable national or international regime, such as the Convention on Limitation of Liability for Maritime Claims, 1976, as amended".[229] Neither does the Bunker Oil Convention contain a secondary-tier compensation scheme.

132. In a similar context, the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996 (hereinafter the HNS Convention), modelled on the Protocols of 1992 to the Civil Liability and Fund Conventions, covers substances based on lists of substances included in various instruments and codes adopted by IMO. It includes oils,[230] other liquid substances defined as noxious or dangerous; liquefied gases; liquid substances with a flashpoint not exceeding 60° C; dangerous, hazardous and harmful materials and substances carried in packaged form; and solid bulk materials defined as possessing chemical hazards, as well as residues left by the previous carriage of hazardous noxious substances, other than those carried in packaged form.[231]

133. It also establishes a joint and several strict liability regime of the shipowner for damage in the territory, including the territorial sea, of a contracting State, the exclusive economic zone or its equivalent as well as for damage, other than damage by contamination of the environment, caused outside the territory, including the territorial sea, of any State. It furthermore contains exemptions.[232] In addition, it covers pollution damage and risks of fire and explosion, including loss of life or personal injury as well as loss of or damage to property.[233]

134. The HNS Convention establishes a two-tier system of compensation. The maximum limit of shipowner liability is set at SDR 100 million. Insurance is compulsory. The Convention establishes an HNS Fund,[234] with contributions levied on persons in the Contracting Parties who receive a certain minimum quantity of hazardous and noxious cargo during a calendar year. In addition to a general account, separate accounts for oil, liquefied natural gas and liquefied petroleum gas are set up to avoid cross-subsidization. The maximum limit of liability is a maximum of SDR 250 million (including compensation paid by the shipowner).

135. The HNS Convention excludes pollution damage covered under the Civil Liability and Fund Conventions regime. It also excludes radioactive matter as well as bunker fuel.

136. In respect of road, rail and inland navigation vessels, an earlier Convention on Civil Liability for Damage Caused during Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels (hereinafter CRTD), adopted in the context of ECE, pursues similar approaches. It provides for joint and several strict liability of the carrier with some exemptions.[235] Article 5 of the Convention provides that "the carrier at the time of an incident shall be liable for damage caused by any dangerous goods during their carriage by road, rail or inland navigation vessel". The definition of damage covers loss of life or personal injury; loss or damage to property; loss or damage by contamination of the environment and costs of preventive measures. It does not cover nuclear substances under the 1960 Paris Convention or the Vienna Convention on civil liability for nuclear damage (hereinafter the 1963 Vienna Convention).[236]

137. CRTD applies to damage sustained in the territory of a State party and caused by an incident occurring in a State party and to preventive measures, wherever taken, to prevent or minimize such damage.

138. CRTD provides for a compulsory insurance scheme. Moreover, the carrier may protect his assets from claims by constituting a limitation fund either by a deposit or bank or insurance guarantee.[237] The maximum liability limit of the carrier in the case of road and rail carriage is set at SDR 18 million for loss of life and personal injury, and SDR 12 million is the limit for other claims. Lower limits apply in respect of carriage by inland navigation, namely SDR 8 million and SDR 7 million for loss of life and personal injury and other claims respectively.[238]

139. The Convention on Civil Liability for Oil Pollution Damage Resulting from Exploration for and Exploitation of Seabed Mineral Resources (hereinafter the Seabed Mineral Resources Convention) has a more limited territorial scope of application to States with frontiers on the North Sea, the Baltic Sea and 36° latitude of the North Atlantic Ocean, and addresses offshore operations. Like the 1969 Civil Liability Convention, it establishes a strict and limited liability regime.[239] It imposes liability on the operator of a continental shelf installation for damage.[240] Damage is defined as "loss or damage outside the installation caused by contamination resulting from the escape or discharge of oil from the installation".[241]

140. Liability is limited to SDR 40 million. However, a State party may opt for a higher or unlimited liability in respect of damage caused in its territory.[242] Insurance is compulsory and, as with the CRTD, the operator may

[229] The Convention was amended by the Protocol of 1996. Limits are specified for claims for loss of life or personal injury, and for property. The limits under this Convention are set at SDR 330,000 for personal claims for ships not exceeding 500 tons plus an additional amount based, on a sliding scale, on tonnage. For property claims, the limit is SDR 167,000 for ships not exceeding 500 tons, with additional amounts for larger ships depending on the size of the ship. The Protocol of 1996 raised the limit in respect of the former for ships not exceeding 2,000 gross tonnage to SDR 2 million. The additional amounts for larger ships were also raised. The liability limits for the latter, for ships not exceeding 2,000 gross tonnage, are SDR 1 million. The additional amounts for larger ships were also raised.

[230] See generally the Protocol of 1978 relating to the International Convention for the prevention of pollution from ships, 1973 (MARPOL Convention), annexes I–II.

[231] Art. 1, para. 5.

[232] Arts. 7–8.

[233] Art. 1, para. 6.

[234] Art. 13.

[235] Arts. 5–8.

[236] Art. 1, para. 10, defines damage. For the Paris and Vienna Convention regimes, see below.

[237] Arts. 11 and 13.

[238] Art. 9.

[239] Art. 3.

[240] Art. 3.

[241] Art 1, para. 6.

[242] Art. 15.

protect his assets from claims by constituting a limitation fund either by a deposit or a bank or insurance guarantee.[243] The liability of the operator is also unlimited if the pollution damage "occurred as a result of an act or omission by the operator himself, done deliberately with actual knowledge that pollution damage would result".[244]

141. With regard to nuclear damage, the 1960 Paris Convention was the first civil liability convention on nuclear material adopted in the context of the OECD Nuclear Energy Agency. It seeks to ensure "adequate and equitable compensation for persons who suffer damage caused by nuclear incidents whilst taking the necessary steps to ensure that the development of the production and uses of nuclear energy for peaceful purposes is not thereby hindered".[245] It establishes a strict and limited liability regime.[246] The operator of a nuclear installation is liable for loss of life, personal injury, or damage to, or loss of, property caused by a nuclear incident (*a*) within the installation; or (*b*) during the carriage of nuclear substances to or from the installation.

142. Liability of the operator in respect of a nuclear incident is limited to SDR 15 million, with a minimum liability of SDR 5 million for incidents involving low-risk installations and transportation of nuclear substances. However, a State may establish a greater or lower limit in accordance with national law (the variation should not fall below SDR 5 million).[247]

143. The Protocol to amend the Convention of 31 January 1963, supplementary to the 1960 Paris Convention, as amended by an additional Protocol of 28 January 1964 (hereinafter the 1982 Paris Convention) provides additional compensation up to a limit of SDR 300 million. Of this supplementary compensation, at least SDR 5 million is provided by insurance or other financial security; and as a second tier, SDR 170 million is to be paid out of public funds of the State party in which the nuclear installation is located. As a third tier, parties to the Convention pay any additional compensation over and above the limit (i.e. up to SDR 125 million) on a proportional basis.[248]

144. While the 1960 Paris Convention has a limited regional scope, the 1963 Vienna Convention has a more universal orientation. The 1960 and 1963 Conventions are linked by the Joint Protocol relating to the application of the Vienna Convention on civil liability for nuclear damage and the Paris Convention on third party liability in the field of nuclear energy, which seeks to mutually extend the benefit of civil liability set forth in each convention and to avoid any conflict that may arise as a result of the simultaneous application of the two conventions in a nuclear incident. The 1963 Convention, adopted under the auspices of IAEA, is substantially the same as the 1960 Convention. It provides that the liability of the operator shall be "absolute". However, it provides exceptions.[249]

145. The liability of the operator may be limited by the installation State to not less than US$ 5 million per incident. It also does not provide for additional compensation from public funds.

146. By the terms of article I of the 1963 Vienna Convention, nuclear damage includes loss of life and personal injury as well as any loss of, or damage to, property which arises out of or results from the radioactive properties or a combination of radioactive properties with toxic, explosive or other hazardous properties of nuclear fuel or radioactive products or waste in, or of nuclear material coming from, originating in, or sent to, a nuclear installation. It also includes: (*a*) any other loss or damage that may arise or result if so provided by the law of the competent court; as well as (*b*) loss of life, any personal injury or any loss of, or damage to, property which arises out of or results from other ionizing radiation emitted by any other source of radiation inside a nuclear installation if the law of the installation State so provides.

147. Following the Chernobyl nuclear disaster in 1986, there was an increased demand within IAEA to revise the definition of damage and enhance the amount of compensation under the 1963 Vienna Convention. These efforts culminated in the adoption of the Protocol to amend the Vienna Convention on civil liability for nuclear damage (hereinafter the 1997 Vienna Convention) and the Convention on Supplementary Compensation for Nuclear Damage (1997 Supplementary Compensation Convention).

148. The definition of nuclear damage under the 1997 Vienna Convention, in addition to loss of life or personal injury and loss of and damage to property, now includes, to the extent determined by the law of the competent court: (*a*) economic loss; (*b*) the costs of measures of reinstatement of impaired environment, unless such impairment is insignificant; (*c*) loss of income deriving from an economic interest in any use or enjoyment of the environment, incurred as a result of a significant impairment of that environment; (*d*) the costs of preventive measures, and further loss or damage caused by such measures; and (*e*) any other economic loss, other than any caused by the impairment of the environment, if permitted by the general law on civil liability of the competent court.[250]

149. The 1997 Vienna Convention also increased the limit of liability to SDR 300 million per incident. There are several possibilities: (*a*) the limit of the operator in the State of installation may be no less than SDR 300 million; (*b*) the liability of the operator may be limited to not less than SDR 150 million, in which case, public funds shall be made available for the excess and up to at least SDR 300 million by that State; (*c*) the State may also limit, for a maximum of 15 years following entry into force, the liability to a transitional amount of not less than SDR 100 million or some lower amount provided that public funds shall be made available by that State to compensate nuclear damage between that lesser amount and SDR 100 million; or (*d*) the installation State may still establish a lower amount of liability to be no less than SDR 5 million, it being understood that public funds would be available for the difference.[251]

[243] Arts. 6 and 8.

[244] Art. 6, para. 4.

[245] Preamble.

[246] Art. 3.

[247] Art. 7.

[248] Art. 3, i.e. on the basis of the ratio between the GNP of each Contracting Party and the total GNP of all Contracting Parties and the ratio between the thermal power of the reactors situated in the territory of each Contracting Party and the total thermal power of the reactors situated in the territories of all the Contracting Parties.

[249] Art. IV, para. 3 (*a*) –(*b*) .

[250] Art. 2.

[251] Art. 7.

150. The 1997 Vienna Convention also simplifies the procedure for revising the limits and extends the geographical scope of the Convention to apply to nuclear damage wherever suffered.

151. The 1997 Supplementary Compensation Convention is a stand-alone instrument. Its definition of damage is similar to the 1997 Vienna Convention definition. It also seeks to ensure (*a*) availability of SDR 300 million or a greater amount in respect of nuclear damage per incident; or (*b*) a transitional amount of at least SDR 150 million for 10 years following the date of opening for signature of the Convention. The contracting States shall make available additional amounts from public funds.[252] The amount of contribution is based on their nuclear capacity and their contribution to the United Nations regular budget. States on the minimum United Nations rate of assessment with no nuclear reactors shall not be required to make contributions.[253]

152. The changes to the "Vienna regime" have partly influenced changes to the "Paris regime", necessitated by the need to ensure compatibility between the two regimes. Thus, the 1960 Paris Convention and the Convention supplementary to it (hereinafter the 1963 Brussels Convention) have recently been a subject of revision culminating in the adoption on 12 February 2004 of Protocols to amend the two Conventions (hereinafter the 2004 Paris Convention and 2004 Brussels Supplementary Convention).[254] The 2004 Paris Convention has an expanded scope of application. It contains a broad definition of nuclear damage[255] and a broader geographical scope.[256] The liability of the operator has been enhanced to 700 million euros per incident and the minimum liability for low risk installations and transport activities, enhanced to 70 million euros and 80 million euros, respectively.[257]

[252] Art. III.

[253] Art. IV.

[254] Protocol to amend the Convention on Third Party Liability in the Field of Nuclear Energy of 29 July 1960, as amended by the Additional Protocol of 28 January 1964 and by the Protocol of 16 November 1982 (2004 Paris Convention) and the Protocol to amend the Convention of 31 January 1963 Supplementary to the Paris Convention of 29 July 1960 on Third Party Liability in the Field of Nuclear Energy, as amended by the Additional Protocol of 28 January 1964 and by the Protocol of 16 November 1982 (2004 Brussels Convention).

[255] Article 1, paragraph (*a*) , reads:

"(vii) 'Nuclear damage' means:

"1. loss of life or personal injury;

"2. loss of or damage to property;

and each of the following to the extent determined by the law of the competent court

"3. economic loss arising from loss or damage referred to in subparagraph 1 or 2 above insofar as not included in those subparagraphs, if incurred by a person entitled to claim in respect of such loss or damage;

"4. the costs of measures of reinstatement of impaired environment, unless such impairment is insignificant, if such measures are actually taken or to be taken, and insofar as not included in subparagraph 2;

"5. loss of income deriving from a direct economic interest in any use or enjoyment of the environment, incurred as a result of a significant impairment of that environment, and insofar as not included in subparagraph 2;

"6. the costs of preventive measures, and further loss or damage caused by such measures,

in the case of subparagraphs 1 to 5, to the extent that the loss or damage arises out of or results from ionising radiation emitted by any source of radiation inside a nuclear installation, or emitted from nuclear fuel or radioactive products or waste in, or of nuclear substances coming from, originating in, or sent to, a nuclear installation, whether so arising from the radioactive properties of such matter, or from a combination of radioactive properties with toxic, explosive or other hazardous properties of such matter.

"(viii) 'Measures of reinstatement' means any reasonable measures which have been approved by the competent authorities of the State where the measures were taken, and which aim to reinstate or restore damaged or destroyed components of the environment, or to introduce, where reasonable, the equivalent of these components into the environment. The legislation of the State where the nuclear damage is suffered shall determine who is entitled to take such measures.

"(ix) 'Preventive measures' means any reasonable measures taken by any person after a nuclear incident or an event creating a grave and imminent threat of nuclear damage has occurred, to prevent or minimise nuclear damage referred to in subparagraphs (*a*) (vii) 1 to 5, subject to any approval of the competent authorities required by the law of the State where the measures were taken.

"(x) 'Reasonable measures' means measures which are found under the law of the competent court to be appropriate and proportionate, having regard to all the circumstances, for example:

"1. the nature and extent of the nuclear damage incurred or, in the case of preventive measures, the nature and extent of the risk of such damage;

"2. the extent to which, at the time they are taken, such measures are likely to be effective; and

"3. relevant scientific and technical expertise."

[256] Article 2 reads:

"(*a*) This Convention shall apply to nuclear damage suffered in the territory of, or in any maritime zones established in accordance with international law of, or, except in the territory of a non-Contracting State not mentioned under (ii) to (iv) of this paragraph, on board a ship or aircraft registered by,

"(i) a Contracting Party;

"(ii) is a Contracting Party to the Vienna Convention on Civil Liability for Nuclear Damage of 21 May 1963 and any amendment thereto which is in force for that Party, and to the Joint Protocol relating to the Application of the Vienna Convention and the Paris Convention of 21 September 1988, provided however, that the Contracting Party to the Paris Convention in whose territory the installation of the operator liable is situated is a Contracting Party to that Joint Protocol;

"(iii) a non-Contracting State which, at the time of the nuclear incident, has no nuclear installation in its territory or in any maritime zones established by it in accordance with international law; or

"(iv) any other non-Contracting State which, at the time of the nuclear incident, has in force nuclear liability legislation which affords equivalent reciprocal benefits, and which is based on principles identical to those of this Convention, including, *inter alia*, liability without fault of the operator liable, exclusive liability of the operator or a provision to the same effect, exclusive jurisdiction of the competent court, equal treatment of all victims of a nuclear incident, recognition and enforcement of judgements, free transfer of compensation, interests and costs.

"(*b*) Nothing in this Article shall prevent a Contracting Party in whose territory the nuclear installation of the operator liable is situated from providing for a broader scope of application of this Convention under its legislation."

[257] Article 7 reads:

"(*a*) Each Contracting Party shall provide under its legislation that the liability of the operator in respect of nuclear damage caused by any one nuclear incident shall not be less than EUR 700 000 000.

"(*b*) Notwithstanding paragraph (*a*) of this Article and Article 21 (*c*) , any Contracting Party may,

"(i) having regard to the nature of the nuclear installation involved and to the likely consequences of a nuclear incident originating therefrom, establish a lower amount of liability for that installation, provided that in no event shall any amount so established be less than EUR 70 000 000; and

"(ii) having regard to the nature of the nuclear substances involved and to the likely consequences of a nuclear incident originating therefrom, establish a lower amount of liability for the carriage of nuclear substances, provided

(*Continued on next page.*)

153. The 2004 Brussels Supplementary Convention in turn increases the amounts in its three-tier compensation regime. In the first tier, the minimum liability to be sourced from the operator's financial security is 700 million euros. If the operator fails, the State of installation will provide from public funds. The second tier of 500 million euros is secured from public funds made available by the State of installation. The third tier of 300 million euros will be secured from public funds provided by the Contracting Parties. The total liability has thus increased almost fourfold to 1.5 billion euros under the combined regime.[258]

154. While the Paris and Vienna regimes revolve around imposing liability on the operator in respect of an installation to or from which the material is being transported, the question of maritime carriage of nuclear material is a matter that could also be governed by maritime law conventions. To avoid such potential conflict, the Convention relating to civil liability in the field of maritime carriage of nuclear material makes it clear that the Paris and the Vienna Conventions or no less favourable national law would have primacy.[259]

155. In addition to the Paris and Vienna regimes, the Convention on the Liability of Operators of Nuclear Ships (hereinafter the Nuclear Ships Convention), negotiated within the context of the Comité Maritime International in collaboration with IAEA, establishes that the operator of a nuclear ship shall be "absolutely liable"[260] for any nuclear damage upon proof that such damage has been caused by a nuclear incident involving nuclear fuel of such a ship or radioactive products or waste produced in it. However, it provides some exemptions in respect of a nuclear incident directly due to an act of war, hostilities, civil war or insurrection.[261] Nuclear damage is defined as: loss of life or personal injury and loss or damage to property which arises out of or results from the radioactive properties or a combination of radioactive properties with toxic, explosive or other hazardous properties of nuclear fuel or of radioactive products or waste.

156. The liability of the operator is limited to 1,500 million gold francs per incident notwithstanding that the nuclear incident may have resulted from any fault or privity of that operator. The operator is required to maintain insurance or other financial security. If the amount of liability exceeds the amount of insurance of the operator but not of the liability of 1,500 million gold francs, the licensing State is required to pay the balance.[262]

(*Footnote 255 continued.*)

that in no event shall any amount so established be less than EUR 80 000 000.

"(*c*) Compensation for nuclear damage caused to the means of transport on which the nuclear substances involved were at the time of the nuclear incident shall not have the effect of reducing the liability of the operator in respect of other nuclear damage to an amount less than either EUR 80 000 000, or any higher amount established by the legislation of a Contracting Party."

[258] Article 3 reads:

"(*a*) Under the conditions established by this Convention, the Contracting Parties undertake that compensation in respect of nuclear damage referred to in Article 2 shall be provided up to the amount of 1,500 million euros per nuclear incident, subject to the application of Article 12 bis.

"(*b*) Such compensation shall be provided as follows:

"(i) up to an amount of at least 700 million euros, out of funds provided by insurance or other financial security or out of public funds provided pursuant to Article 10 (c) of the Paris Convention, such amount to be established under the legislation of the Contracting Party in whose territory the nuclear installation of the operator liable is situated, and to be distributed, up to 700 million euros, in accordance with the Paris Convention;

"(ii) between the amount referred to in paragraph (b) (i) of this Article and 1,200 million euros, out of public funds to be made available by the Contracting Party in whose territory the nuclear installation of the operator liable is situated;

"(iii) between 1,200 million euros and 1,500 million euros, out of public funds to be made available by the Contracting Parties according to the formula for contributions referred to in Article 12, subject to such amount being increased in accordance with the mechanism referred to in article 12 bis.

"(*c*) For this purpose, each Contracting Party shall either:

"(i) establish under its legislation that the liability of the operator shall not be less than the amount referred to in paragraph (*a*) of this Article, and provide that such liability shall be covered by all the funds referred to in paragraph (*b*) of this article; or

"(ii) establish under its legislation the liability of the operator at an amount at least equal to that established pursuant to paragraph (*b*) (i) of this Article or Article 7 (*b*) of the Paris Convention, and provide that, in excess of such amount and up to the amount referred to in paragraph (*a*) of this Article, the public funds referred to in paragraph (*b*) (i) , (ii) and (iii) of this Article shall be made available by some means other than as cover for the liability of the operator, provided that the rules of substance and procedure laid down in this Convention are not thereby affected.

"(*d*) The obligation of the operator to pay compensation, interest or costs out of public funds made available pursuant to paragraphs (*b*) (ii) and (iii) and (*g*) of this Article shall only be enforceable against the operator as and when such funds are in fact made available.

"(*e*) Where a State makes use of the option provided for under Article 21 (*c*) of the Paris Convention, it may only become a Contracting Party to this Convention if it ensures that funds will be available to cover the difference between the amount for which the operator is liable and 700 million euros.

"(*f*) The Contracting Parties, in carrying out this Convention, undertake not to make use of the right provided for in Article 15 (*b*) of the Paris Convention to apply special conditions, other than those laid down in this Convention, in respect of compensation for nuclear damage provided out of the funds referred to in paragraph (*a*) of this Article.

"(*g*) The interest and costs referred to in Article 7 (*h*) of the Paris Convention are payable in addition to the amounts referred to in paragraph (*b*) of this Article, and shall be borne in so far as they are awarded in respect of compensation payable out of the funds referred to in:

"(i) paragraph (*b*) (i) of this Article, by the operator liable;

"(ii) paragraph (*b*) (ii) of this Article, by the Contracting Party in whose territory the installation of the operator liable is situated to the extent of the funds made available by that Contracting Party;

"(iii) paragraph (*b*) (iii) of this Article, by the Contracting Parties together.

"(*h*) The amounts mentioned in this Convention shall be converted into the national currency of the Contracting Party whose courts have jurisdiction in accordance with the value of that currency at the date of the incident, unless another date is fixed for a given incident by agreement between the Contracting Parties."

[259] Article 1 provides:

"Any person who by virtue of an international convention or national law applicable in the field of maritime transport might be held liable for damage caused by a nuclear incident shall be exonerated from such liability:

"(*a*) if the operator of a nuclear installation is liable for such damage under either the Paris or the Vienna Convention, or

"(*b*) if the operator of a nuclear installation is liable for such damage by virtue of a national law governing the liability for such damage, provided that such law is in all respects as favourable to persons who may suffer damage as either the Paris or the Vienna Convention."

[260] Art. II, para. 1.

[261] Art. VIII.

[262] Art. II, para. 2.

157. The regimes of liability for nuclear damage have been more diverse than in the case of oil pollution. These regimes seem to allow for greater accountability for States, a variation that may be explained by the ultrahazardous nature of nuclear activity and its possible widespread and long-lasting damage.[263] In this connection, Birnie and Boyle note succinctly:

> [A]lthough all the nuclear conventions focus liability on the operator as the source of damage or pollution, the … Supplementary Conventions clearly recognize that this approach is insufficient, and involve states in meeting substantial losses in excess of the operator's capacity to pay or cover through insurance. It cannot be said that any of the nuclear conventions fully implements the 'polluter pays' principle, or recognizes the unlimited and unconditional responsibility of states within whose border nuclear accidents occur: what they do recognize, if imperfectly, is that the scale of possible damage has to be widely and equitably borne if nuclear power is to be internationally acceptable.[264]

158. Under the nuclear civil liability conventions, States are also given discretion to adopt, in their domestic law, different ceilings on the amount of liability, insurance arrangements and definitions for nuclear damage or to continue to hold operators liable in cases of grave natural disasters.[265] Some countries have reserved the right to exclude article 9 on defences against liability under the 1960 Paris Convention, thus making liability absolute.[266]

159. Strict liability has also been followed in other instruments concerning other activities. The Protocol on Liability and Compensation for Damage resulting from the Transboundary Movements of Hazardous Wastes and their Disposal (1999 Basel Protocol) provides "a comprehensive regime for liability and for adequate and prompt compensation for damage"[267] resulting from the transboundary movement of hazardous wastes, based on both strict and fault liability. The essential features of the Protocol are similar to those of other liability conventions. It imposes joint and several strict liability with exemptions. It covers damage relating to loss of life or personal injury; loss or damage to property (other than property held by the person liable); loss of income; measures of reinstatement of the impaired environment; and costs of preventive measures.[268]

160. However, the 1999 Basel Protocol only applies to damage due to an incident occurring during a transboundary movement and disposal of waste.[269] Moreover, instead of assigning liability to a single operator, there is the potential to hold generators, exporters, importers and disposers liable at different stages of the movement of the transboundary waste.[270] Fault-based liability also lies for lack of compliance with the provisions implementing the Convention or for wrongful intentional, reckless or negligent acts or omissions.

161. Insurance and other financial guarantees are compulsory. The liability limit of the notifier, exporter or importer, or disposer is to be determined by domestic law. However, the 1999 Basel Protocol sets minimum limits.[271] This scheme imposing limits does not apply to fault-based liability.

162. The 1999 Basel Protocol also anticipates that additional and supplementary measures aimed at ensuring adequate and prompt compensation could be taken using existing mechanisms.[272] Article 14, paragraph 2, of the Basel Convention on the control of transboundary movements of hazardous wastes and their disposal (hereinafter the Basel Convention) provides that the parties shall consider the establishment of a revolving fund to assist on an interim basis in case of emergency situations to minimize damage from accidents.

163. Another instrument that has been elaborated rather recently, within a regional context, is the Protocol on Civil Liability and Compensation for Damage Caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes and to the 1992 Convention on the Transboundary Effects of Industrial Accidents, adopted by ECE (hereinafter the 2003 Kiev Protocol). The need for the Protocol arose in the wake of the *Baia Mare* dam accident in Romania in 2000, when 100,000 tons of highly toxic wastewater were released into the watercourse, resulting in massive pollution of the Danube and Tisza rivers. The involvement of States, industry, the insurance sector and

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[263] See Jenks, "Liability for ultra-hazardous activities in international law", p. 105; Smith, *State Responsibility and the Marine Environment: the Rules of Decision*, pp. 112–115; Handl, "Liability as an obligation established by a primary rule of international law: some basic reflections on the International Law Commission's work"; and Goldie, "Concepts of strict and absolute liability and the ranking of liability in terms of relative exposure to risk".

[264] Birnie and Boyle, *op. cit.*, p. 481.

[265] See article IV, para. 3 (*b*) , of the 1963 Vienna Convention and article 9 of the 1960 Paris Convention.

[266] See the Additional Protocol to the 1960 Paris Convention, annex I containing reservations. See also Birnie and Boyle, *op. cit*., chap. 9.

[267] Art. 1.

[268] Under article 2, paragraph 2 (*c*) .

[269] Art. 3.

[270] Article 4 reads:

> "1. The person who notifies in accordance with Article 6 of the Convention, shall be liable for damage until the disposer has taken possession of the hazardous wastes and other wastes. Thereafter the disposer shall be liable for damage. If the State of export is the notifier or if no notification has taken place, the exporter shall be liable for damage until the disposer has taken possession of the hazardous wastes and other wastes. With respect to Article 3, subparagraph 6 (*b*) , of the Protocol, Article 6, paragraph 5, of the Convention shall apply *mutatis mutandis*. Thereafter the disposer shall be liable for damage.
>
> "2. Without prejudice to paragraph 1, with respect to wastes under Article 1, subparagraph 1 (*b*), of the Convention that have been notified as hazardous by the State of import in accordance with Article 3 of the Convention but not by the State of export, the importer shall be liable until the disposer has taken possession of the wastes, if the State of import is the notifier or if no notification has taken place. Thereafter the disposer shall be liable for damage.
>
> "...
>
> "5. No liability in accordance with this Article shall attach to the person referred to in paragraphs 1 and 2 of this Article, if that person proves that the damage was:
>
> "(*a*) The result of an act of armed conflict, hostilities, civil war or insurrection;
>
> "(*b*) The result of a natural phenomenon of exceptional, inevitable, unforeseeable and irresistible character;
>
> "(*c*) Wholly the result of compliance with a compulsory measure of a public authority of the State where the damage occurred; or
>
> "(*d*) Wholly the result of the wrongful intentional conduct of a third party, including the person who suffered the damage."

[271] Art. 12 and annex B.

[272] Art. 15.

intergovernmental and non-governmental organizations in the negotiating process was unique.[273]

164. The 2003 Kiev Protocol seeks to provide for a comprehensive regime for civil liability and for adequate and prompt compensation for damage caused by the transboundary effects of industrial accidents on transboundary waters. It establishes a joint and several liability regime that is based on strict and fault liability. It places liability on the operator for damage caused by an industrial accident. It also attaches liability on any person for damage caused or contributed to by his or her wrongful intentional, reckless or negligent acts or omissions in accordance with the relevant rules of applicable domestic law, including laws on the liability of servants and agents.

165. The liability of the operator for damage due to an industrial accident is strict, joint and several, with exemptions.[274] An industrial accident occurs as a result of an uncontrolled development in the course of a hazardous activity at an installation, or during on-site or off-site transportation of the hazardous activity. The definition of damage includes: (*a*) loss of life or personal injury; (*b*) loss of, or damage to, property other than property held by the person liable; (*c*) loss of income directly deriving from an impairment of a legally protected interest in any use of the transboundary waters for economic purposes, incurred as a result of impairment of the transboundary waters; (*d*) the cost of measures of reinstatement of the impaired transboundary waters, limited to the costs of measures actually taken or to be undertaken; and (*e*) the cost of response measures.

166. Insurance and other financial guarantees are compulsory. The 2003 Kiev Protocol sets minimum limits for financial securities, grouped in three different categories according to the hazard potential of the hazardous activities.[275] The liability of the operator under the Protocol is limited. Limits are based on three categories of hazardous activities grouped according to their hazard potential.[276] Financial limits are not applicable to fault-based liability.[277]

167. The Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment[278] (hereinafter the Lugano Convention), adopted by the Council of Europe, establishes a strict liability regime for "dangerous" activities, because such activities constitute or pose "a significant risk for man, the environment or property".

168. Article 1 of the Lugano Convention sets forth the object and purpose of the Convention as follows:

> This Convention aims at ensuring adequate compensation for damage resulting from activities dangerous to the environment and also provides for means of prevention and reinstatement.

169. The Lugano Convention is thus the only horizontal instrument that addresses environmentally harmful activities generally. The Convention establishes joint and several strict liability of an operator in respect of a dangerous activity or an operator of a site for the permanent deposit of waste in respect of the damage caused by such activity or waste. Liability is thus on the operator for incidents occurring when he is exercising control of the dangerous activity or on the operator of a site for permanent deposit of waste.[279]

170. In article 2 of the Lugano Convention, "dangerous" activities and "dangerous" substances are defined broadly. Dangerous activities include dangerous substances; genetically modified organisms and micro-organisms; operation of an installation or site for the incineration, treatment, handling or recycling of waste as well as the operation of a site for the permanent deposit of waste.[280] As regards the *causal link* between the damage and the activity, article 10 of the Convention provides that "the court shall take due account of the increased danger of causing such damage inherent in the dangerous activity".

171. The strict liability of the operator under the Lugano Convention is subject to exemptions.[281] Liability under the Convention is unlimited. Article 12 envisages that each State party would "ensure that where appropriate, taking due account of the risks of the activity, operators conducting a dangerous activity on its territory" would have insurance or other financial security in order to cover liability under the Convention. Limits, types and terms of such insurance or other financial security would be specified by national law. The Convention does not establish a supplementary compensation fund.[282]

172. The efforts of the European Union to establish an environmental liability regime are also worth mentioning.

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[273] See generally Dascalopoulou-Livada, "The Protocol on Civil Liability and Compensation for Damage caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters".

[274] Art. 4.

[275] Art. 11 and annex II, part two.

[276] Art. 9 and annex II, part one.

[277] Art. 9.

[278] Article 4 of the Convention specifies exceptions where the Convention is not applicable. The Convention therefore does not apply to damage caused by a nuclear substance arising from a nuclear incident regulated by the 1960 Paris Convention and its Additional Protocol or by the 1963 Vienna Convention; nor to damage caused by a nuclear substance if liability for such damage is regulated by internal law and such liability is as favourable with regard to compensation as the Lugano Convention. The Lugano Convention does not apply to the extent that it is incompatible with the rules of the applicable law relating to workmen's compensation or social security schemes.

[279] Arts. 6–7.

[280] Art. 2.

[281] Article 8 provides:

"The operator shall not be liable under this Convention for damage which he proves:

"(*a*) was caused by an act of war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional, inevitable and irresistible character;

"(*b*) was caused by an act done with the intent to cause damage by a third party, despite safety measures appropriate to the type of dangerous activity in question;

"(*c*) resulted necessarily from compliance with a specific order or compulsory measure of a public authority;

"(*d*) was caused by pollution at tolerable levels under local relevant circumstances; or

"(*e*) was caused by a dangerous activity taken lawfully in the interests of the person who suffered the damage, whereby it was reasonable towards this person to expose him to the risks of the dangerous activity."

[282] Churchill, *loc. cit.*, pp. 27–28, notes that a plan to do so was frozen in view of the failure of the Lugano Convention to enter into force.

On 9 February 2000, the European Commission adopted a White Paper[283] which set out the parameters for a Union-wide uniform environmental liability regime. The development of the White Paper was preceded by a Green Paper[284] of the Commission in 1993, a joint hearing of the Commission and of the European Parliament and a subsequent parliamentary resolution requesting a directive and an opinion of the Economic and Social Committee. In January 1997, the Commission took a decision to produce a White Paper. Following its publication in February 2000, the White Paper was a subject of comments, including opinions of the Economic and Social Committee and of the Environment Committee of the European Parliament. It was also submitted to public consultation. This process culminated in a legislative proposal which was adopted by the Commission on 23 January 2002 and forwarded to the Council of Europe and the European Parliament in February 2002. The European Parliament rendered its opinion on first reading on 14 May 2003, while the Council adopted a common position with a view to the adoption of a directive on environmental liability on 18 September 2003. On 19 September 2003, the Commission adopted a communication expressing its opinion on the common position. On 17 December 2003, the European Parliament, on second reading, amended four points of the Council's common position. On 26 January 2004, the Commission adopted its opinion on the amendments of the European Parliament.[285]

173. In view of the inability of the Council of Europe to accept the proposals of the European Parliament, further discussions were held between the Council and the Parliament. The conciliation process culminated in a joint text approved by the Conciliation Committee on 27 February 2004. The joint text was adopted on 21 April 2004 by the Parliament and the Council as Directive 2004/35/CE on environmental liability with regard to the prevention and remedying of environmental damage.[286] Member States have until 30 April 2007 to ensure compliance of their laws, regulations and administrative provisions with the Directive.[287]

174. The policy of the European Union on the environment is based on the precautionary and polluter pays principles, in particular that where environmental damage occurs it should as a priority be rectified at source and that the polluter should pay. Under the joint text approved by the Conciliation Committee, the Directive will seek to ensure that polluters are held responsible for environmental damage. Under article 1, the purpose of the Directive is:

> to establish a framework of environmental liability based on the "polluter-pays" principle, to prevent and remedy environmental damage.

175. The Directive covers environmental damage, namely site contamination and biodiversity damage and traditional damage to health and property. Article 2, paragraph 1, defines environmental damage, which covers land, water and biodiversity, as:

> (*a*) damage to protected species and natural habitats, which is any damage that has significant adverse effects on reaching or maintaining the favourable conservation status of such habitats or species. The significance of such effects is to be assessed with reference to the baseline condition, taking account of the criteria set out in Annex I;
>
> Damage to protected species and natural habitats does not include previously identified adverse effects which result from an act by an operator which was expressly authorised by the relevant authorities in accordance with provisions implementing Article 6(3) and (4) or Article 16 of Directive 92/43/EEC or Article 9 of Directive 79/409/EEC or, in the case of habitats and species not covered by Community law, in accordance with equivalent provisions of national law on nature conservation.
>
> (*b*) water damage, which is any damage that significantly adversely affects the ecological, chemical and/or quantitative status and/or ecological potential, as defined in Directive 2000/60/EC, of the waters concerned, with the exception of adverse effects where Article 4(7) of that Directive applies;
>
> (*c*) land damage, which is any land contamination that creates a significant risk of human health being adversely affected as a result of the direct or indirect introduction, in, on or under land, of substances, preparations, organisms or micro-organisms.

176. It thus applies to environmental damage caused by occupational activities such as waste and water management and to any imminent threat of such damage occurring by reason of any of those activities. Such activities are listed in an annex III. A strict liability regime for the operator attaches to such activities. It also applies to damage to protected species and natural habitats caused by such occupational activities other than those listed in annex III, and to any imminent threat of such damage occurring by reason of any of those activities, whenever the operator has been at fault or negligent.[288] Thus, fault-based liability attaches to biodiversity damage. It only applies to damage caused by pollution of a diffuse character, where it is possible to establish a link between the damage and the activities of the individual operator.[289] The Directive does not apply to cases of personal injury, to damage to private property or to any economic loss and does not affect any rights regarding such types of damages.

177. The Directive also contains exclusions and exemptions.[290] It does not apply to damage arising from an incident in respect of which liability or compensation falls within the scope of the Protocol of 1992 to the Civil Liability Convention, the Protocol of 1992 to amend the Fund Convention, the HNS Convention, the Bunker Oil Convention and CRTD. Neither does it apply to nuclear risks or to liability falling within the scope of the 1960 Paris Convention, the 1963 Vienna Convention, the 1963 Brussels Convention, the Joint Protocol, and the Convention relating to Civil Liability in the field of Maritime Carriage of Nuclear Material. Moreover, the Directive does not prejudice the right of the operator to limit his liability in accordance with national legislation implementing the Convention on Limitation of Liability for Maritime Claims, 1976, including any future amendment to the Convention, or the Strasbourg Convention on Limitation

[283] Commission of the European Communities, "White Paper on Environmental Liability" (COM(2000) 66 final).

[284] COM (93) 47 final.

[285] COM(2004) 55 final.

[286] *Official Journal of the European Union*, No. L 143, vol. 47 (30 April 2004).

[287] Art. 19.

[288] Art. 3.

[289] Art. 4, para. 5.

[290] Arts. 4 and 6.

of Liability in Inland Navigation. These exclusions apply to future amendments to these instruments.

178. The Directive does not establish liability limits. Nor does it contain a system of compulsory insurance. Its article 12 confers standing on the natural or legal persons affected or likely to be affected by environmental damage or having a sufficient interest in environmental decision-making relating to the damage or, alternatively, alleging the impairment of a right, where administrative procedural law of a member State requires this as a precondition. While sufficient interest is determined by national law, the interest of any non-governmental organization promoting environmental protection and meeting any requirements under national law is deemed sufficient for the purposes of establishing standing.

179. Efforts have also been made to provide a regime of liability in respect of the Antarctic. Under the terms of article 8 of the Convention on the Regulation of Antarctic Mineral Resource Activities (hereinafter CRAMRA), an operator would be held strictly liable for: (*a*) damage to the Antarctic environment or dependent or associated ecosystems; (*b*) loss of or impairment to an established use, or dependent or associated ecosystems; (*c*) loss of or damage to property of a third party or loss of life or personal injury of a third party arising directly out of damage to the Antarctic environment; and (*d*) reimbursement of reasonable costs by whomsoever incurred relating to necessary response action, including prevention, containment, clean-up and removal measures, and action taken to restore the *status quo ante*.[291]

180. In addition, if the damage caused by the operator would not have occurred but for the failure of a sponsoring State to carry out its obligations in respect of its operator, CRAMRA also established liability of the sponsoring State for such failure. Such liability would have been limited to that portion of liability not satisfied by the operator.[292]

181. The Protocol on Environmental Protection to the Antarctic Treaty, which develops a comprehensive regime for the protection of the Antarctic environment and dependent and associated ecosystems in the interest of mankind as a whole, now prohibits any activities relating to mineral resources other than scientific research. This Protocol effectively supersedes CRAMRA. Rules relating to liability for damage arising from activities taking place in the Antarctic which are consistent with the environmentally friendly objectives of the Protocol are being elaborated.[293]

182. The *second category* of treaties addressing the question of liability relates to treaties which hold States directly liable. Currently, there is one treaty which falls completely within this category, namely, the Convention on international liability for damage caused by space objects.[294] Article II of the Convention provides that the launching State shall be absolutely liable to pay compensation for damage caused by its space object on the surface of the earth or to aircraft in flight.[295] On the other hand, proof of fault is required in the event of damage caused elsewhere other than on the surface of the earth or to persons or property on board a space object.[296]

183. In the event of an accident involving two space objects and causing injury to a third State or its nationals, both launching States are liable to the third State, as provided in article IV.[297]

184. Furthermore, article V provides that, when two or more States jointly launch a space object, they are both jointly and severally liable for any damage the space object may cause.[298]

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[291] Under article 8, paragraph 4:

"An Operator shall not be liable … if it proves that the damage has been caused directly by, and to the extent that it has been caused directly by:

"(*a*) an event constituting in the circumstances of Antarctica a natural disaster of an exceptional character which could not reasonably have been foreseen; or

"(*b*) armed conflict, should it occur notwithstanding the Antarctic Treaty, or an act of terrorism directed against the activities of the Operator, against which no reasonable precautionary measures could have been effective."

[292] Art. 8.

[293] Art. 16. The Working Group on Liability of the Antarctic Treaty Consultative Meeting has been convened to elaborate a liability regime.

[294] See also the Treaty on principles governing the activities of States in the exploration and use of outer space, including the moon and other celestial bodies, as well as the Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space, contained in General Assembly resolution 1962 (XVIII) of 13 December 1963; and General Assembly resolution 47/68 of 14 December 1992 on Principles Relevant to the Use of Nuclear Power Sources in Outer Space.

[295] Article VI provides for exoneration:

"1. Subject to the provisions of paragraph 2 of this Article, exoneration from absolute liability shall be granted to the extent that a launching State establishes that the damage has resulted either wholly or partially from gross negligence or from an act or omission done with intent to cause damage on the part of a claimant State or of natural or juridical persons it represents.

"2. No exoneration whatever shall be granted in cases where the damage has resulted from activities conducted by a launching State which are not in conformity with international law including, in particular, the Charter of the United Nations and the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies."

[296] Art. III.

[297] Article IV reads:

"1. In the event of damage being caused elsewhere than on the surface of the earth to a space object of one launching State or to persons or property on board such a space object by a space object of another launching State, and of damage thereby being caused to a third State or to its natural or juridical persons, the first two States shall be jointly and severally liable to the third State, to the extent indicated by the following:

"(*a*) If the damage has been caused to the third State on the surface of the earth or to aircraft in flight, their liability to the third State shall be absolute;

"(*b*) If the damage has been caused to a space object of the third State or to persons or property on board that space object elsewhere than on the surface of the earth, their liability to the third State shall be based on the fault of either of the first two States or on the fault of persons for whom either is responsible.

"2. In all cases of joint and several liability referred to in paragraph 1 of this Article, the burden of compensation for the damage shall be apportioned between the first two States in accordance with the extent to which they were at fault; if the extent of the fault of each of these States cannot be established, the burden of compensation shall be apportioned equally between them. Such apportionment shall be without prejudice to the right of the third State to seek the entire compensation due under this Convention from any or all of the launching States which are jointly and severally liable."

[298] Relevant paragraphs of article V read:

"1. Whenever two or more States jointly launch a space object, they shall be jointly and severally liable for any damage caused.

185. A launching State is a State which launches or procures the launching of a space object or a State from whose territory or facility a space object is launched.[299] Damage includes loss of life, personal injury or other impairment of health; or loss of or damage to property of States or of persons, natural or juridical, or property of international intergovernmental organizations.[300]

186. The launching State is liable to pay compensation for damage, which is determined in accordance with international law and the principles of justice and equity. Such compensation will seek to "restore the person, natural or juridical, State or international organisation on whose behalf the claim is presented to the condition which would have existed if the damage had not occurred".[301]

187. One other Convention which seems to envisage the application of State liability is the Convention on the Law of the Non-navigational Uses of International Watercourses.[302] Article 7 provides:

> 1. Watercourse States shall, in utilizing an international watercourse in their territories, take all appropriate measures to prevent the causing of significant harm to other watercourse States.
>
> 2. Where significant harm nevertheless is caused to another watercourse State, the States whose use causes such harm shall, in the absence of agreement to such use, take all appropriate measures, having due regard for the provisions of articles 5 and 6, in consultation with the affected State, to eliminate or mitigate such harm and, where appropriate, to discuss the question of compensation.

188. The *third category* of treaties includes those in which a reference to liability has been made in the text without further clarification as to the substantive or procedural rules of liability. These treaties, while recognizing the relevance of the liability principle to the operation of the treaties, do not resolve the issue. They seem to rely on the existence in international law of liability rules, or expect that such rules will be developed. A number of treaties belong to this category. For example, the Kuwait Regional Convention for co-operation on the protection of the marine environment from pollution provides that the contracting States shall cooperate in formulating rules and procedures for civil liability and compensation for damage resulting from pollution of the marine environment, but it does not stipulate those rules and procedures.[303] The same is true of the other regional sea conventions: the Convention for the protection of the Mediterranean Sea against pollution; the Convention for Co-operation in the Protection and Development of the Marine and Coastal Environment of the West and Central African Region; the Convention for the protection of the marine environment and the coastal area of the South-East Pacific;[304] the Regional Convention for the Conservation of the Red Sea and Gulf of Aden Environment;[305] the Convention for the protection and development of the marine environment of the wider Caribbean region;[306] the Convention for the Protection, Management and Development of the Marine and Coastal Environment of the Eastern African Region;[307] the Convention for the Protection of the Natural Resources and Environment of the South Pacific Region;[308] the Protocol for the protection of the marine environment against pollution from land-based sources;[309] the Convention on the protection of the marine environment of the Baltic Sea area, 1992;[310] the Convention for the protection of the marine environment of the north-east Atlantic (hereinafter the OSPAR Convention); and the Convention on the protection of the Black Sea against pollution.[311]

189. Similar requirements are established in the Convention on the prevention of marine pollution by dumping of wastes and other matter; the Basel Convention;[312] the Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa; the Convention on the Transboundary Effects of Industrial Accidents; the Convention on the Protection and Use of Transboundary Watercourses and International Lakes; the Convention on biological diversity; the Cartagena Protocol on Biosafety to the Convention on Biological Diversity; the Convention to ban the importation into Forum island countries of hazardous and radioactive wastes and to control the transboundary movement and management

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"2. A launching State which has paid compensation for damage shall have the right to present a claim for indemnification to other participants in the joint launching. The participants in a joint launching may conclude agreements regarding the apportioning among themselves of the financial obligation in respect of which they are jointly and severally liable. Such agreements shall be without prejudice to the right of a State sustaining damage to seek the entire compensation due under this Convention from any or all of the launching States which are jointly and severally liable.

"3. A State from whose territory or facility a space object is launched shall be regarded as a participant in a joint launching."

[299] Art. I (*c*). See also article IV for absolute liability for damage to a third State.

[300] Art. I (*a*). See also principle 9 of the Principles Relevant to the Use of Nuclear Power Sources in Outer Space adopted by the General Assembly in its resolution 47/68 of 14 December 1992:

"1. In accordance with article VII of the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, and the provisions of the Convention on International Liability for Damage Caused by Space Objects, each State which launches or procures the launching of a space object and each State from whose territory or facility a space object is launched shall be internationally liable for damage caused by such space objects or their component parts. This fully applies to the case of such a space object carrying a nuclear power source on board. Whenever two or more States jointly launch such a space object, they shall be jointly and severally liable for any damage caused, in accordance with article V of the above-mentioned Convention.

"2. The compensation that such States shall be liable to pay under the aforesaid Convention for damage shall be determined in accordance with international law and the principles of justice and equity, in order to provide such reparation in respect of the damage as will restore the person, natural or juridical, State or international organization on whose behalf a claim is presented to the condition which would have existed if the damage had not occurred.

"3. For the purposes of this principle, compensation shall include reimbursement of the duly substantiated expenses for search, recovery and clean-up operations, including expenses for assistance received from third parties."

[301] Art. XII of the Convention on international liability for damage caused by space objects.

[302] Art. 15.

[303] See article XIII of the Convention.

[304] Art. 11.

[305] Art. XIII.

[306] Art. 14.

[307] Art. 15.

[308] Art. 20.

[309] Art. XIII.

[310] See also the earlier 1974 Convention on the Protection of the Marine Environment of the Baltic Sea Area, art. 17.

[311] Art. XVI.

[312] Art. 12.

of hazardous wastes within the South Pacific Region; and the WHO Framework Convention on Tobacco Control.

190. CRAMRA makes the development of liability rules a precondition for the exploration and exploitation of mineral resources of Antarctica.[313] This is also envisaged in the subsequent Protocol on Environmental Protection to the Antarctic Treaty.

191. In some cases, progress has been made towards this end. One example of this is the 2003 Kiev Protocol, which is a protocol to the Convention on the Protection and Use of Transboundary Watercourses and International Lakes and the 1992 Convention on the Transboundary Effects of Industrial Accidents as well as the 1999 Basel Protocol, which is a protocol to the Basel Convention.

192. The African Convention on the Conservation of Nature and Natural Resources, provides in article XXIV that the parties shall as soon as possible adopt rules and procedures concerning liability and compensation for damage related to matters covered by the Convention. The Convention seeks, *inter alia*, to enhance environmental protection, foster the conservation and sustainable use of natural resources and harmonize policies in such areas with a view to achieving ecologically rational, economically sound and socially acceptable development policies and programmes. Its provisions encompass questions of land and soil, water, vegetation cover, species and genetic diversity, protected species, trade in specimen and products thereof, conservation areas, processes and activities affecting the environment and natural resources, and sustainable development and natural resources. Considering the wide range of activities covered by the Convention, it remains to be seen what type of liability regime will be established.

193. The apparent success in concluding civil liability conventions or instruments that envisage the elaboration of such regimes is attenuated largely by the inability of the liability instruments, except in a few cases, to command the wider acceptance of States. Many of the instruments have attracted fewer ratifications while others are yet to enter into force, with some having little or no prospect of ever entering into force. Only the Civil Liability/Fund Convention regime appears to have had practical success. The decision to become party to an instrument remains a sovereign decision and derives from a State's capacity to conclude treaties. In doing so, a State must take into account its own constitutional and legislative procedures as well as the interests of its various stakeholders. In some cases, wider consultations are required, while in others limited contacts suffice. Short of conducting a comprehensive survey of States concerned to determine their positions, it cannot be said with certainty why States, while continuing to perceive civil liability as a viable option for compensation, have not taken the required extra step to signify their acceptance of the various civil liability regimes. With this caveat, and proceeding with some degree of generality, the reasons could range from the substantive to a sheer lack of expertise to make the relevant recommendation, let alone study a particular instrument as relevant. The occurrence of an incident sometimes has spurred action, and interest has probably waned thereafter. In some instances, it may well be that the initial expectations are not fully realized, as compromises lead eventually to an instrument that is so watered down or so stringent as not to fully satisfy the various interests internally.

194. In noting the politics of law-making, Henkin observed:

> Negotiated at a particular time, with virtually all states participating, any emerging treaty will reflect what the participants perceived as their interests as regards the matter at issue, in the context of the system at large. But with ever more governments participating, with their interests often varied and complex, the process is confused and the result often not only impossible to predict but even difficult to explain when it appears. It may help to perceive both process and result with mathematical analogy or metaphor: when vectors of different magnitude and direction are brought to bear at one point, a vector of particular force and direction results. To be sure, political influence cannot be measured, and neither its magnitude nor direction is firm; both respond to other forces, to the bargaining situation, to conference procedures, strategy, personalities, to other issues in negotiation, to political interests and forces beyond the conference and the subject.[314]

195. The dynamics involved equally pervade negotiations of civil liability regimes. Different interests are involved in deciding subsequently whether to become party to a particular instrument. There are competing political, military, economic, environmental, industry and other public interests. Inasmuch as interests, efficiency and norms[315] are factors that inform the propensity of States to comply with their treaty obligations, such considerations should apply equally to the processes leading to the decision to effectuate the wish to be bound by a particular instrument. Thus, the negotiating history of, and other antecedents concerning, an instrument may be revealing of concerns that negotiating States may have expressed and would shed light upon the subsequent disposition of a State towards a particular treaty. Among other issues, questions have been raised at various stages of the negotiations about the scope of application of civil liability regimes, including the definition of damage. Aspects concerning channelling of liability, the standard of liability, limitation of liability as well as financial security have also been featured. So too has the relationship between the particular regime and other regimes as well as other obligations under international law. The following discussion presents a sampling of some of the issues that have been raised during the negotiations, and would probably have a bearing upon positions taken on whether to become party to a particular instrument.

196. Several aspects could be elaborated upon in respect of the scope of application. In the first place, the scope of the instrument concerned has sometimes been considered too broad. Thus, the scope *ratione materiae* of the Lugano Convention has been criticized as being too general and going beyond the situation obtaining in some States in respect of environmental damage as such.[316] In particular, the concept of hazardous activities was perceived as excessively broad and the relevant definitions vague,

[313] Art. 8, para. 7.

[314] Henkin, "The politics of law-making", pp. 21–22.

[315] On a theory of compliance, see generally Chayes and Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements*, pp. 1–28.

[316] COM(2000) 66 final (see footnote 283 above), para. 5.1.

especially with regard to biodiversity damage.[317] Denmark, Germany, Ireland and the United Kingdom made it clear that the approach of the Convention to liability differed from their own national law.[318]

197. Secondly, the scope of the instruments has conversely been perceived as narrow in some respects. The Lugano Convention does not require the adoption of measures of restoration or the equivalent. Nor does it not contain criteria for the restoration or economic valuation of biodiversity damage. Among other reasons, in preferring to pursue the option of elaborating a separate environmental liability regime within the European Union rather than acceding to the Convention, it was observed that such accession would require an EU act to supplement the Convention "in order to bring more clarity and precision to this new area [of environmental damage] where liability is concerned".[319] The concept of damage has also been a matter of intense debate in relation to other instruments. For example, the 1969 Civil Liability Convention applies to damage as a result of "contamination", a term that was omitted in the draft submitted to the International Legal Conference on Marine Pollution Damage, 1969, but revived during the Conference, against some opposition, which considered it "immoral ... not to compensate victims in cases of explosion or fire causing loss of life and resulting from an escape or discharge of oil".[320] The language linking pollution damage to contamination was retained in the adopted Convention. Increasingly, revisions of the nuclear and oil pollution regimes have led to broader definitions of "nuclear damage" and "pollution damage". Concerns remain, however, as to whether the definitions are precise enough to be fully appreciated and understood by victims and to be applied effectively in practice. Even the newer conventions such as the Bunker Oil Convention have not escaped such criticism.[321] While pleasing one side, those States that would prefer a more traditional, restrictive definition of damage would in turn have difficulties in taking steps to ratify such instruments.

198. Thirdly, the spatial scope, jurisdiction *ratione loci*, of the instrument concerned and its exclusionary clauses have been a source of differing viewpoints. In the work of the Standing Committee on a protocol to revise the 1963 Vienna Convention, the reluctance of non-nuclear-power-generating States to contribute to the "international tier" was linked to the geographical scope of the Convention. Insofar as the Convention was perceived to apply to damage suffered in the territory of States parties, those States that did not have nuclear power capacity had no additional incentive to join a regime which seemed to bring some additional financial burden for an eventuality that they perceived as fortuitous.[322] The exclusion of military nuclear installations was also a point of discussion in respect of the Vienna Convention regime.[323] Similarly, with respect to the Nuclear Ships Convention, the former Soviet Union and the United States had concerns because it applied to warships.

199. Fourthly, the scope of application of the various regimes has been considered to be less favourable than domestic law. It has been suggested that some nuclear States have deliberately chosen to ratify neither the 1963 Vienna Convention nor the 1960 Paris Convention because it may be possible for victims to obtain better relief under national law. Thus, some of the non-parties to the Vienna Convention include a number of significant nuclear States such as Canada, Japan, the Russian Federation and the United States.[324] Moreover, the Protocols of 1984 to amend the Civil Liability/Fund Conventions never entered into force partly because the United States decided not to join that regime. OPA, which imposes higher limits of liability and provides unlimited liability in a wider range of situations than the Civil Liability Convention/Fund regime, was considered to provide better relief. Indeed, following the *Amoco Cadiz* accident, victims preferred to bring action in the United States rather than be constricted by the narrower compensation regime of the Civil Liability Convention. With respect to the Nuclear Ships Convention, the United States was concerned with the constitutional and administrative problems relating to submission to foreign courts. The inability of key States to become party could have cascade effects, with impact on the entry into force of a convention. Churchill asserts that the "unwillingness of such states to ratify the treaty seems to deter other states, presumably for reasons concerned with solidarity and possible unequal burden-sharing, from ratifying and becoming bound by the treaty without most of the major players".[325]

200. Concerning channelling of liability, it is one of the hallmarks of the civil liability regimes to attach liability to a single entity. To whom such liability should be channelled has not always been easy to agree upon. In the Diplomatic Conference concerning the 1969 Civil Liability Convention, whether the shipper, the cargo owner, the operator or the shipowner should be liable was a major source of intensive debate. Compromise on the shipowner was only reached after it was agreed that there would be a supplementary compensation regime.[326] While an approach that attaches liability on a single entity brings uniformity and certainty, it has been impugned for denying victims a wider net of potential defendants. The various stakeholders have argued that it would be unfair to impose on them any additional liability. In defining shipowner to include the registered owner, the bareboat charterer, the manager and the operator, the Bunker Oil Convention goes some way in meeting these concerns. On the other hand, it does not assuage the concerns of those who place a premium on certainty and predictability in an industry where economic considerations might have an impact leading to unnecessary distortions in the market.

[317] Lefeber, "International/civil liability and compensation" (2000), p. 151.

[318] Churchill, *loc. cit*., p. 28.

[319] See footnote 316 above.

[320] Wu Chao, *op. cit*, p. 47, quoting the French delegation.

[321] La Fayette, "International Maritime Organization (IMO)", p. 701.

[322] See Lefeber, *loc. cit.* (1995), pp. 204–205.

[323] *Ibid*. (1997), p. 164.

[324] Churchill, *loc. cit*., p. 10.

[325] *Ibid*., p. 32. Finland noted in answer to a questionnaire on CRTD that it had not signed nor ratified CRTD in the early 1990s, not because of substantive concerns, but rather because the instrument failed to attract support from other States (ECE, Working Party on Transport of Dangerous Goods: note by the secretariat (TRANS/WP.15/2001/17/Add.4)).

[326] Wu Chao, *op. cit*., pp. 50–54.

The 1999 Basel Protocol also channels liability to more than one entity. Some countries, such as Australia and Canada, expressed the concern that channelling liability to the exporter/notifier as opposed to the person in operator control, namely the waste generator, did not reflect the polluter pays principle. Waste generators might pass on the burden of liability to exporters and would have no incentive to monitor disposal standards.[327]

201. The removal of immunity in the Bunker Oil Convention for responders who take measures to prevent and mitigate pollution was, on the one hand, perceived as a positive step in protecting victims while on the other hand, criticized, since it was seen as a substitute for a second tier of compensation. Environmental groups also viewed it as prejudicial to the protection of the environment, since the removal might lead to greater environmental damage.[328]

202. In regard to the standard of liability, strict liability, as noted above, is the preferred choice as the basis of liability for the civil liability regimes. This does not mean that the matter has been fully settled. The drafters of the 1969 Civil Liability Convention presented two draft texts to the International Legal Conference on Marine Pollution Damage, 1969, leaving the final choice to the negotiations. It was not until the final days of the Conference that agreement was reached after some delegations had withdrawn their opposition to strict liability, on the understanding that maximum insurable limits would be imposed and that there would be a supplementary funding mechanism.[329] Indeed, in some subsequent negotiations, fault-based liability has not been excluded. Motivated by concerns of affording the victim greater legal remedies, the Basel Convention provides for both a strict liability and a fault-based liability regime. This approach "upsets the traditional balance between, on the one hand, the channelling of liability to one or a few easily identifiable persons who have established financial security to cover the risk and, on the other, the imposition of strict and limited liability".[330] Concerns were expressed that such an approach diluted channelling of liability and created legal uncertainty. On the other hand, recourse to fault-based liability has also been justified as necessary for a State to make a claim under customary international law:

> There is only one way to understand why fault-based liability system has been combined with strict liability. If the strict liability system has already produced all of its effects, including the exhaustion of all possible remedies within the competent domestic courts of the contracting parties, there still remains the possibility for a state to have recourse to the procedures of customary international law against another state.[331]

203. There may still be some States that have concerns about the propriety of strict liability as the standard for attaching liability in an international context. Attendant questions have also been raised regarding causation and burden of proof. As has been noted above, different jurisdictions apply different rules to establish causation even in situations where strict liability is the preferred option. Providing pointers towards a causal link, as is the case with article 10 of the Lugano Convention, seeks to alleviate problems of causation without necessarily establishing "a true presumption of a causal link".[332]

204. As to limitation of liability, it has been justified as necessary to offset the harsh impact of imposing a strict liability regime. The question of the financial limits to be imposed or lack thereof has tended to be a point of contention in the negotiations. It has been speculated that some States have been put off by the fact that liability is unlimited under the Lugano Convention.[333] In respect of CRTD, it has been noted that the main obstacle to its entry into force is the high and new levels of liability in combination with the obligation to establish financial securities corresponding to the levels of liability.[334] This is coupled with the problem posed by the insurability of the risk, particularly in respect of the inland navigation industry.[335] On the other hand, the limits of the Seabed Mineral Resources Convention were, for example, considered low.[336] Similar concerns have been expressed with regard to the oil and nuclear industry regimes. Thus, the financial limits have been progressively increased to respond to a particular incident or to anticipate the effects of a potential accident.

205. The low liability limits protecting the nuclear industry and the imposition of financial obligations on non-nuclear-power-generating States parties have been highlighted in respect to the 1963 Vienna Convention regime.[337] The amounts in both the Paris and the Vienna regimes have progressively been increased.

206. In some cases, the absence of a fund has been a point of negotiation differences. In the negotiations of the 1999 Basel Protocol, financial limits remained one of the difficult issues to be resolved.[338] Several delegations, particularly those from African States, voiced con-

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[327] Birnie and Boyle, *op. cit*., p. 436.

[328] La Fayette, *loc. cit*., p. 701.

[329] Wu Chao, *op. cit*., pp. 50–59.

[330] Lefeber, *loc. cit.* (1999), p. 184.

[331] Silva Soares and Vieira Vargas, "The Basel Liability Protocol on liability and compensation for damage resulting from transboundary movements of hazardous wastes and their disposal", p. 95.

[332] Council of Europe, "Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment: explanatory report", para. 63.

[333] Churchill, *loc. cit*., p. 28.

[334] Lefeber, *loc. cit.* (2001), p. 189. The Netherlands considered the limits of liability, coupled with the compulsion involved, too high, and the insurance market was not amenable to providing a service, particularly in regard to inland navigation vessels and road transport. Lithuania also considered the limits high. It further viewed the additional certification in article 14 as likely to increase expenses for hauliers. On the other hand, Switzerland noted in answer to a questionnaire on CRTD that the majority of insurance contracts concluded by Swiss road hauliers provided for unlimited liability. It was therefore suggested that should CRTD be revised consideration should be given to the possibility of establishing guaranteed minimum amounts for claims for damage. Contracting Parties should nevertheless have the option to establish higher or unlimited levels of compensation in their national law. Austria suggested that any provision for limitation of liability should take account of the general principle that victims should receive full compensation (TRANS/WP.15/2001/17/Add.1, 2, 4 and 7). Austria also noted that there were economic concerns on the side of transport operators and that there was no urgent need for such a specific regulatory framework on the part of bodies acting in the interest of potential victims (Add.7).

[335] Cleton, "The CRTD Convention on Civil Liability and Compensation", p. 218. Switzerland noted that CRTD had received a mixed reception from the transport sector. While the railway sector was in favour, the inland navigation sector preferred a stand-alone instrument (TRANS/WP.15/2001/17/Add.1).

[336] Churchill, *loc. cit*., p. 23.

[337] Lefeber, *loc. cit.* (1997), p. 164.

[338] Silva Soares and Vieira Vargas, *loc. cit*., p. 102.

cerns against the Protocol for its failure to provide an adequate and permanent compensation fund.[339] OECD countries, on the other hand, preferred a more watered-down enabling provision that would allow additional and supplementary measures aimed at ensuring adequate and prompt compensation using existing mechanisms in cases where the costs of damage were not covered by the Protocol.[340] Concerns were also expressed regarding the role of domestic law in determining financial limits. The fact that the Protocol did not have uniform maximum limits of liability was also considered problematic. Some countries objected to a system that provided minimum limits based on the tonnage of shipment of wastes.

207. In other instances, the time limits within which claims may be brought have been a subject of contention. The three-year period within which claims may be brought may not be sufficient for claims relating to personal injury, where it may take many years for injury to materialize after exposure. Increasingly, such periods are being changed. On the other hand, longer periods may make it even harder to establish causation and satisfy other evidentiary requirements.

208. The question of insurance and financial security is always difficult to negotiate. Although protection is paramount, it is also essential that the costs of insurance are not prohibitive so as not to unduly impact the insurance industry and the industries in question. While insurance functions to spread the economic consequences of individual events across a multitude of parties, thus maximizing the utility, its potential is affected by other factors, such as concerns surrounding the risks being insured, the need to alleviate problems of uncertainty in insurance calculations, the availability of financial resources as well as the type of damage to be insured.[341] Whether insurance should be compulsory or voluntary is always a consideration in the light of the uncertainty of environmental damage costs, the diversity in national legislation and disparities in economies, let alone between developing and industrialized countries. It has also been suggested that a mandatory regime depends on improved qualitative and reliable quantitative criteria for the recognition and measurement of environmental damage.[342] While insurance in the various regimes is usually compulsory, that requirement may act as a disincentive to jurisdictions without elaborate insurance schemes.[343] While recognizing that it would erode effective application of the polluter pays principle, it has been asserted that capping liability for natural resources damages is likely to improve the chances of early development of the insurance market in this area.[344]

209. The question of the relationship between a particular regime and other regimes and obligations under international law has been raised mainly to ensure compatibility and to avoid overlap.[345] The adoption of the HNS Convention in 1996 impacted the negotiations of the 1999 Basel Protocol insofar as their scope of application seemed to overlap.[346] Article 12 of the Protocol gives precedence to the bilateral, multilateral or regional instrument. Doubts have also been raised at the outset of particular negotiations as to whether such an instrument was necessary in the light of existing instruments covering similar ground. In the initial discussions concerning the 2003 Kiev Protocol doubts were expressed concerning the desirability of such an instrument in the light of existing instruments such as CRTD and the Lugano Convention.[347] Such overlap may also relate to future regimes. It has been noted with respect to the Kiev Protocol that while the European Commission appeared in the beginning to be convinced that there was no danger of any overlap between the new instrument and the draft EU directive on environmental liability with regard to the prevention and restoration of environmental damage, since their respective approaches seemed to be different, it then found that such danger was real and that perhaps a full disconnection clause, that is, one comprising the whole of the Basel Protocol [unlike the one found in article 20 of the Kiev Protocol], would be needed to satisfy its concerns.[348]

210. Due to constraints of time and limitations in the mandate, the disconnection clause in article 20 of the 2003 Kiev Protocol only applies to articles 13, 15 and 18 of the Protocol.[349]

211. Furthermore, it has been suggested in respect of the Lugano Convention that those members of the Council of Europe that are also members of the European Union have probably been dissuaded from ratifying the Convention (at least for the time being) because of the Union's attempts to harmonize rules of civil liability for environmental damage and are waiting to see what the outcome of these attempts will be before taking a decision to ratify the Convention.[350]

212. In some situations, what is left out from the final text may also have a bearing on the acceptability of an instrument. States have debated the application of State liability during some of the negotiations. Major

[339] Birnie and Boyle, *op. cit*., p. 436.

[340] Art. 15, para. 1, of the 1999 Basel Protocol.

[341] See generally Richardson, "Mandating environmental liability insurance".

[342] COM(2000) 66 final (see footnote 283 above), para. 4.9.

[343] Kyrgyzstan noted that it could not accede to CRTD until such time as it was able to adopt a law on a mandatory civil liability insurance scheme for vehicle owners (TRANS/WP.15/2001/17/Add.1).

[344] See footnote 342 above. The Czech Republic, in responding to a questionnaire on CRTD, noted that some damage to which CRTD applied could not be insured within the EU. This was the case with damage to the environment. Until reinsurance companies expressed willingness to participate in this insurance in the EU, they would not be willing to accept such insurance from Czech companies (TRANS/WP.15/2001/17/Add.2).

[345] On a more general level, a State may have other priorities. The Czech Republic and Slovakia, in responding to a questionnaire on CRTD, observed that they were striving to be admitted into the EU and their priority was harmonization of their legal regulations with the laws of the EU. Since the EU was preparing new regulations concerning transport of dangerous goods, the possibility of becoming a party to the Convention would have to await consideration until the Czech Republic was able to adopt the new regulations in the context of the harmonization process. Slovakia noted also that CRTD would also bring additional economic pressure (TRANS/WP.15/2001/17/Add.2 and 6, respectively). On the question of insurance certification, Austria noted that the question should be discussed, not only from the viewpoint of insurance institutions, but also in the light of the role of monitoring compliance, and the need to make the system less bureaucratic (Add.7).

[346] Silva Soares and Vieira Vargas, *loc. cit*., p. 98.

[347] Lefeber, *loc. cit*. (2000), pp. 143–144.

[348] See Dascalopoulou-Livada, *loc. cit*., p. 135.

[349] *Ibid*.

[350] Churchill, *loc. cit*., pp. 28–29.

nuclear-power States such as France, the United Kingdom and the United States opposed amendments concerning State liability in discussions of the Standing Committee on Nuclear Liability to revise to the 1963 Vienna Convention. Moreover, in the initial discussions concerning the possibility of establishing the 2003 Kiev Protocol regime, some countries favoured a State liability regime or at least a regime that combined civil liability and State liability.[351] Furthermore, in the 1999 Basel Protocol negotiations, there was a preference among the developing States for the Protocol to provide redress for damage arising from illegal movements of hazardous wastes. For the developed countries, the main preoccupation was to preserve their trade interests notwithstanding their environmental discourse.[352]

213. In other cases, the impact of other existing schemes or subsequent developments may have a bearing on whether ratification of a particular regime would proceed. Thus, with respect to the Seabed Mineral Resources Convention, the Offshore Pollution Liability Agreement, a scheme provided by the industry, has provided an alternative scheme.[353] On the other hand, CRISTAL and TOVALOP were consolidated partly to encourage ratification of the Protocol of 1992 to amend the Civil Liability and Fund Conventions. Moreover, the entry into force of the Nuclear Ships Convention may have little practical significance inasmuch as civilian nuclear-powered ships no longer operate. When such ships were operational, bilateral arrangements governed their operations.[354]

214. Some instruments simply have demanding requirements. The Protocols of 1984 to amend to the Civil Liability Convention never entered into force, partly because of their demanding entry into force requirements.[355] The onerous responsibility on non-nuclear-power-generating States parties to enact complex legislation to give effect to the conventions was an issue during discussions concerning revisions of the Vienna Convention regime.[356] In the negotiations on the HNS Convention, some delegations also highlighted the administrative burden that would be imposed by negotiating a special regime leading to the adoption of that Convention.[357]

(b) *Judicial decisions and State practice outside treaties*

215. The concept of liability for damage caused by an activity beyond the territorial jurisdiction or control of the acting State appears to have been developed through State practice to a limited extent for some potentially harmful activities. Some sources refer to the concept in general terms, leaving its content and procedure for implementation to future developments. Other sources deal with the concept of liability only in a specific case.

216. In the past, liability has been considered as an outgrowth of the failure to exercise "due care" or "due diligence". In determining whether there has been a failure to exercise due diligence, the test has been that of balancing of interests. This criterion is similar to that used in determining harm and the permissibility of harmful activities, given the assessment of their impact. Liability for failure to exercise due care was established as early as 1872, in the *Alabama* case. In that dispute between the United Kingdom and the United States over the alleged failure of the United Kingdom to fulfil its duty of neutrality during the American Civil War, both sides attempted to articulate what "due diligence" entailed. The United States argued that due diligence was proportioned to the magnitude of the subject and to the dignity and strength of the Power which was to exercise it.[358]

217. In contrast, the British Government argued that, in order to show lack of due diligence and invoke the liability of a State, it must be proved that there had been a failure to use, for the prevention of a harmful act, such care as Governments ordinarily employed in their domestic concerns.[359]

218. The Tribunal referred to "due diligence" as a duty arising "in exact proportion to the risks to which either of the belligerents may be exposed from a failure to fulfil the obligations of neutrality on their part".[360] Thus, due diligence is a function of the circumstances of the activity.

219. Subsequent State practice appears to have dealt to a lesser extent with State liability arising out of failure to exercise due care, except in the area of the protection of aliens. These categories of claims include nationalization and confiscation of foreign properties, police protection and safety of foreigners, etc., which have been excluded from the present study.

220. In the claim against the former Soviet Union for damage caused by the crash of the Soviet satellite

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[351] Lefeber, *loc. cit.* (2001), p. 191.

[352] Silva Soares and Vieira Vargas, *loc. cit.*, p. 100.

[353] Churchill, *loc. cit.*, pp. 23–24.

[354] *Ibid.*, p. 15.

[355] See article 13.

[356] Lefeber, *loc. cit.* (1997), p. 164.

[357] *Ibid.* (1998), p. 163.

[358] The United States argument went as follows:

"The rules of the treaty … imposed upon neutrals the obligation to use *due diligence* to prevent certain acts. These words were not regarded by the United States as changing in any respect the obligations imposed by international law. 'The United States', said the Case, 'understands that the diligence which is called for by the rules of the treaty of Washington is a due diligence—that is, a diligence proportioned to the magnitude of the subject and to the dignity and strength of the power which is to exercise it; a diligence which shall, by the use of active vigilance, and of all the other means in the power of neutral, through all stages of the transaction, prevent its soil from being violated; a diligence that shall in like manner deter designing men from committing acts of war upon the soil of the neutral against its will, and thus possibly dragging it into war which it would avoid; a diligence which prompts the neutral to the most energetic measures to discover any purpose of doing the acts forbidden by its good faith as a neutral, and imposes upon it the obligation, when it receives the knowledge of an intention to commit such acts, to use all the means in its power to prevent it. No diligence short of this would be 'due', that is, commensurate with the emergency or with the magnitude of the results of negligence."

(Moore, *History and Digest of the International Arbitrations to which the United States has been a Party*, pp. 572–573)

[359] The Tribunal noted:

"[I]t was necessary to show that there had been a 'failure to use, for the prevention of an act which the government was bound to endeavour to prevent, such care as governments ordinarily employ in their domestic concerns, and may reasonably be expected to exert in matters of international interest and obligation'."

(*Ibid.*, p. 610)

[360] *Ibid.*, p. 654.

Cosmos-954 on Canadian territory in January 1978, Canada referred to the general principle of the law of "absolute liability" for injury resulting from activities with a high degree of risk.[361]

221. Similarly, in the *Trail Smelter* awards, the Tribunal established that:

> So long as the present conditions in the Columbia River Valley prevail, the Trail Smelter shall be required to refrain from causing any damage through fumes in the State of Washington; the damage herein referred to and its extent being such as would be recoverable under the decisions of the courts of the United States in suits between private individuals.[362]

222. The smelter company was nevertheless permitted to continue its activities. The Tribunal did not prohibit the activities of the smelter; it merely reduced them to a level at which the fumes which the smelter emitted were no longer, in the opinion of the Tribunal, injurious to the interests of the United States.[363]

223. The Tribunal established a permanent regime which called for compensation for injury to United States interests arising from fume emissions even if the smelting activities conformed fully to the permanent regime as defined in the decision:

> The Tribunal is of opinion that the prescribed régime will probably remove the causes of the present controversy and, as said before, will probably result in preventing any damage of a material nature occurring in the State of Washington in the future.
>
> But since the desirable and expected result of the régime or measure of control hereby required to be adopted and maintained by the Smelter may not occur, and since in its answer to Question No. 2, the Tribunal has required the Smelter to refrain from causing damage in the State of Washington in the future, as set forth therein, the Tribunal answers Question No. 4 and decides that on account of decisions rendered by the Tribunal in its answers to Question No. 2 and Question No. 3 there shall be paid as follows: (*a*) if any damage as defined under Question No. 2 shall have occurred since October 1, 1940, or shall occur in the future, whether through failure on the part of the Smelter to comply with the regulations herein prescribed or notwithstanding the maintenance of the régime, an indemnity shall be paid for such damage but only when and if the two Governments shall make arrangements for the disposition of claims for indemnity under the provisions of Article XI of the Convention; (*b*) if as a consequence of the decision of the Tribunal in its answers to Question No. 2 and Question No. 3, the United States shall find it necessary to maintain in the future an agent or agents in the area in order to ascertain whether damage shall have occurred in spite of the régime prescribed herein, the reasonable cost of such investigations not in excess of $7,500 in any one year shall be paid to the United States as a compensation, but only if and when the two Governments determine under Article XI of the Convention that damage has occurred in the year in question, due to the operation of the Smelter, and "disposition of claims for indemnity for damage" has been made by the two Governments; but in no case shall the aforesaid compensation be payable in excess of the indemnity for damage; and further it is understood that such payment is hereby directed by the Tribunal only as a compensation to be paid on account of the answers of the Tribunal to Question No. 2 and Question No. 3 (as provided for in Question No. 4) and *not* as any part of indemnity for the damage to be ascertained and to be determined upon by the two Governments under Article XI of the Convention.[364]

224. In the decision of 9 April 1949 in the *Corfu Channel* case, ICJ, after analysing the facts, reached the conclusion that the laying of the minefield which caused explosions in Albanian waters could not have been accomplished without the knowledge of the Albanian Government. It found that Albania had known or should have known of the mines lying within its territorial waters in sufficient time to notify and give warning to other States and their nationals of the imminent danger. The Court found that:

> In fact nothing was attempted by the Albanian authorities to prevent the disaster. These grave omissions involve the international responsibility of Albania.
>
> The Court therefore reaches the conclusion that Albania is responsible under international law for the explosions which occurred on October 22nd, 1946, in Albanian waters, and for the damage and loss of human life which resulted from them, and that there is a duty upon Albania to pay compensation to the United Kingdom.[365]

225. Owing to the difficult and circumstantial nature of the proof of Albania's knowledge of the injurious condition, it is unclear whether liability was based on a breach of the duty of due care in warning other international actors or on a standard of "strict liability" without regard to the concept of due care.

226. In the same judgment, ICJ made some general statements regarding obligations of States which are of considerable importance and of pertinence to liability. In one passage, the Court stated that it was "every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States".[366] It should be noted that in this passage the Court was making a general statement of law and policy, not limited or narrowed to any specific case. When the Court renders a decision in a case in accordance with Article 38 of its Statute, it may also declare general statements of law. The aforementioned passage is among such statements. It may therefore be concluded that, while the Court's decision addressed the point debated by the parties in connection with the *Corfu Channel* case, it also stressed a more general issue. It made a declaratory general statement regarding the conduct of any State which might cause extraterritorial injuries. In its advisory opinion on the *Legality of the*

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[361] Canada argued that:

> "The standard of absolute liability for space activities, in particular activities involving the use of nuclear energy, is considered to have become a general principle of international law. A large number of States, including Canada and the Union of Soviet Socialist Republics, have adhered to this principle as contained in the *1972 Convention on International Liability for Damage caused by Space Objects*. The principle of absolute liability applies to fields of activities having in common a high degree of risk. It is repeated in numerous international agreements and *is one of 'the general principles of law recognized by civilized nations'* (Article 38 of the Statute of the International Court of Justice). Accordingly, this principle has been accepted as a general principle of international law."

(ILM, vol. 18 (1979), p. 907, para. 22)

[362] UNRIAA, vol. III (Sales No.1949.V.2), p. 1966. The Tribunal had earlier reached the oft-quoted conclusion that:

> "[U]nder the principles of international law, as well as of the law of the United States, no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence."

(*Ibid*., p. 1965)

[363] The Tribunal noted:

> "[S]ince the Tribunal is of opinion that damage may occur in the future unless the operations of the Smelter shall be subject to some control, in order to avoid damage occurring, the Tribunal now decides that a régime or measure of control shall be applied to the operations of the Smelter."

(*Ibid*., p. 1966)

[364] *Ibid*., pp. 1980–1981.

[365] *Corfu Channel, Merits, Judgment, I.C.J. Reports* 1949, p. 23.

[366] *Ibid*., p. 22.

Threat or Use of Nuclear Weapons, in asserting that the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn, the Court affirmed this proposition of law:

> The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now the corpus of international law relating to the environment.[367]

227. It has been argued that the *Trail Smelter* arbitrations or the *Corfu Channel* judgment do not necessarily support the existence of strict liability in international law.[368] According to this view, as regards *Trail Smelter*, "it was not directly necessary for the Tribunal to decide, in an either/or sense, between strict liability and negligence as the requisite standard of care at international law".[369] It has also been suggested that since the *compromis* already anticipated the liability of Canada and required the application of both international law and the law of the United States, consequently making it difficult to determine the legal basis of the Tribunal's determination, *Trail Smelter* "can only be considered of limited relevance as an international legal precedent".[370] Moreover, "the whole decision does not allow any unambiguous inferences with regard to a theory of liability for extraterritorial environmental injuries in general; nor does it support the view of an incipient reception into international law of strict liability as a general category of international responsibility".[371]

228. With respect to the decision in *Corfu Channel*, it has been argued that it does not subscribe "to a theory of objective risk, if by that is meant that a State is automatically liable at international law for all the consequences of its acts, whatever the circumstances may be".[372] It has also been suggested that on the basis of that judgment the "possibility, if no more, remains ... that the defence of reasonable care might be raised by the defendant State".[373] Moreover, the "question of fault on the part of Albanian coast guard officials never was in issue".[374]

229. In opposition to these viewpoints, it has been contended that in both of these cases, liability was imposed without proof of negligence.[375] As regards the view expressed in paragraph 226 above regarding *Corfu Channel*, attention has been drawn to the dissents by Judges Winiarski[376] and Badawi Pasha[377] in which they argued that Albania had not breached any duty of care, that it had complied with existing international law standards and that ICJ was imposing novel and higher standards. It has been observed that in this case and in *Trail Smelter* the plaintiff State did not "affirmatively prove the defendant's negligence or wilful default".[378]

230. In the *Lake Lanoux* arbitration, the Tribunal, responding to the allegation of Spain that the French projects would entail an abnormal risk to Spanish interests, stated that only failure to take all necessary safety precautions would have entailed France's responsibility if Spanish rights had in fact been infringed.[379] While States were required to cooperate with one another in mitigating transboundary environmental risks, "the risk of an evil use has so far not led to subjecting the possession of these means of action to the authorization of the States which may possibly be threatened".[380]

231. In other words, responsibility would not arise as long as all possible precautions against the occurrence of the injurious event had been taken. Although the authority of the Tribunal was limited by the parties to the examination of the compatibility of French activities on the Carol River with a treaty, the Tribunal also touched on the question of dangerous activities.[381]

232. The passage quoted in footnote 379 above may be interpreted as meaning that the Tribunal was of the opinion that abnormally dangerous activities could constitute a special problem, which was not occasional, and that, if Spain had established that the proposed French project would entail an abnormal risk of injury to Spain, the decision of the Tribunal might have been different.

233. On the other hand, it has been observed that France would only have incurred liability for the diminution both

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[367] *I.C.J. Reports 1996* (see footnote 4 above), pp. 241–242. See also the dissenting opinion of Judge Weeramantry, *ibid*., pp. 429–555, and his dissenting opinion in *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, ibid.*, pp. 139–143.

[368] See Handl, "Balancing of interests and international liability for the pollution of international watercourses: customary principles of law revisited", pp. 162–165, who cautions against the use of "strict liability in international law" and suggests the use of the term "responsibility for risk".

[369] Hardy, "International protection against nuclear risks", p. 751. See also Hardy, "Nuclear liability: the general principles of law and further proposals", p. 229.

[370] Handl, "Balancing of interests ...", p.168.

[371] *Ibid*.

[372] Hardy, "International protection ...", p. 751.

[373] *Ibid*., "Nuclear liability ...", p. 229.

[374] Handl, "Balancing of interests ...", p. 167.

[375] Goldie, "Liability for damage …", pp. 1230–1231.

[376] *I.C.J. Reports 1949* (see footnote 365 above), pp. 49–52 and 55–56.

[377] *Ibid*., pp. 64–66. It is noted, however, that Judge Badawi Pasha (p. 65) stressed that:

> "international law does not recognize objective responsibility based upon the notion of risk, adopted by certain national legislations. Indeed, the evolution of international law and the degree of development attained by the notion of international co-operation do not allow us to consider that this stage has been reached, or is about to be reached."

[378] Goldie, "Liability for damage …", p. 1230.

[379] In the *Lake Lanoux* arbitration (France *v*. Spain), ILR, vol. 24 (1957), pp. 123–124, para. 6, the Tribunal stated:

> "The question was lightly touched upon in the Spanish Counter Memorial … , which underlined the 'extraordinary complexity' of procedures for control, their 'very onerous' character, and the 'risk of damage or of negligence in the handling of the watergates, and of obstruction in the tunnel'. But it has never been alleged that the works envisaged present any other character or would entail any other risks than other works of the same kind which today are found all over the world. It has not been clearly affirmed that the proposed works would entail an abnormal risk in neighbourly relations or in the utilization of the waters. As we have seen above, the technical guarantees for the restitution of the waters are as satisfactory as possible. If, despite the precautions that have been taken, the restitution of the waters were to suffer from an accident, such an accident would be only occasional and, according to the two Parties, would not constitute a violation of Article 9. "

[380] *Ibid*., p. 126.

[381] See footnote 379 above.

of the volume of waters due to Spain and of the quality of those waters as a consequence of an internationally wrongful act. The tribunal's view of liability for the reduction of the volume of waters was that it did not arise so long as all possible precautions against the occurrence of the event had been taken.[382]

234. During oral hearings in the *Nuclear Tests (Australia* v. *France)* case, in response to a question by the President of ICJ, Sir Humphrey Waldock, whether it took the view "that every transmission by natural causes of chemical or other matter from one State into another State's territory, air space or territorial sea automatically constitutes in itself a legal cause of action in international law without the need to establish anything more",[383] Australia asserted that:

> [W]here, as a result of a normal and natural use by one State of its territory, a deposit occurs in the territory of another, the latter has no cause of complaint unless it suffers more than merely nominal harm or damage. The use by a State of its territory for the conduct of atmospheric nuclear tests is not a normal or natural use of its territory. The Australian Government also contends that the radio-active deposit from the French tests gives rise to more than merely nominal harm or damage to Australia.
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> …
>
> [T]he basic principle is that intrusion of any sort into foreign territory is an infringement of sovereignty. Needless to say, the Government of Australia does not deny that the practice of States has modified the application of this principle in respect of the interdependence of territories. It has already referred to the instance of smoke drifting across national boundaries. It concedes that there may be no illegality in respect of certain types of chemical fumes in the absence of special types of harm. What it does emphasize is that the legality thus sanctioned by the practice of States is the outcome of the toleration extended to certain activities which produce these emissions, which activities are generally regarded as natural uses of territory in modern industrial society and are tolerated because, while perhaps producing some inconvenience, they have a community benefit.[384]

235. In making the interim protection order of 22 June 1973 in the *Nuclear Tests* case, ICJ took note of Australia's concerns that:

> [T]he atmospheric nuclear explosions carried out by France in the Pacific have caused widespread radioactive fallout on Australian territory and elsewhere in the southern hemisphere, have given rise to measurable concentrations of radio-nuclides in foodstuffs and in man, and have resulted in additional radiation doses to persons living in that hemisphere and in Australia in particular; that any radioactive material deposited on Australian territory will be potentially dangerous to Australia and its people and any injury caused thereby would be irreparable; that the conduct of French nuclear tests in the atmosphere creates anxiety and concern among the Australian people; that any effects of the French nuclear tests upon the resources of the sea or the conditions of the environment can never be undone and would be irremediable by any payment of damages; and any infringement by France of the rights of Australia and her people to freedom of movement over the high seas and superjacent airspace could not be undone.[385]

236. In indicating interim measures of protection, ICJ was satisfied that such information did not preclude the possibility that damage to Australia might be shown to be caused by the deposit on Australian territory of radioactive fallout resulting from such tests and to be irreparable. In his dissenting opinion, Judge Ignacio-Pinto, while expressing the view that the Court lacked jurisdiction to deal with the case, stated that:

> [I]f the Court were to adopt the contention of the Australian request it would be near to endorsing a novel conception in international law whereby States would be forbidden to engage in any risk-producing activity within the area of their own territorial sovereignty; but that would amount to granting any State the right to intervene preventively in the national affairs of other States.[386]

237. He further stated that "[i]n the present state of international law, the 'apprehension' of a State, or 'anxiety', 'the risk of atomic radiation', do not in my view suffice to substantiate some higher law imposed on all States and limiting their sovereignty as regards atmospheric nuclear tests".[387] In his view, "[t]hose who hold the opposite view may perhaps represent the figureheads or vanguard of a system of gradual development of international law, but it is not admissible to take their wishes into account in order to modify the present state of law".[388]

238. In the interim protection order of 22 June 1973, ICJ made a similar order in respect of concerns by New Zealand that:

> [E]ach of the series of French nuclear tests has added to the radioactive fallout in New Zealand territory; that the basic principles applied in this field by international authorities are that any exposure to radiation may have irreparable, and harmful, somatic and genetic effects and that any additional exposure to artificial radiation can be justified only by the benefit which results; that, as the New Zealand Government has repeatedly pointed out in its correspondence with the French Government, the radioactive fallout which reaches New Zealand as a result of French nuclear tests is inherently harmful, and that there is no compensating benefit to justify New Zealand's exposure to such harm; that the uncertain physical and genetic effects to which contamination exposes the people of New Zealand causes them acute apprehension, anxiety and concern; and that there could be no possibility that the rights eroded by the holding of further tests could be fully restored in the event of a judgment in New Zealand's favour in these proceedings.[389]

239. In the subsequent *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the* Nuclear Tests (New Zealand *v.* France) case, Judge Koroma, in his dissenting opinion, observed:

> Under contemporary international law, there is probably a duty not to cause gross or serious damage which can reasonably be avoided, together with a duty not to permit the escape of dangerous substances.[390]

240. ICJ, however, did not rule on the merits of the case for technical legal reasons.

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[382] Handl, "Balancing of interests …", pp. 169–170.

[383] *I.C.J. Pleadings, Nuclear Tests*, Vol. I, p. 524.

[384] *Ibid.*, pp. 525–526.

[385] *Nuclear Tests (Australia* v. *France), Interim Protection, Order of 22 June 1973, I.C.J. Reports 1973*, p. 104. The Court did not rule on the merits of the case.

[386] *Ibid*., p. 132.

[387] *Ibid.*

[388] *Ibid.*

[389] *Ibid.* (*New Zealand* v. *France*), *Interim Protection, Order of 22 June 1973*, *I.C.J. Reports 1973*, pp. 140–141. The Court did not rule on the merits of the case. See also the dissenting opinion of Judge Ignacio-Pinto, pp. 163–164.

[390] *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the* Nuclear Tests (New Zealand *v.* France) *Case, Order of 22 September 1995, I.C.J. Reports 1995*, pp. 378. See also the dissenting opinions of Judges Weeramantry and Sir Geoffrey Palmer in *ibid*., pp. 345–347 and 406–421.

241. The case concerning the *Gabčíkovo-Nagymaros Project*[391] also bears on questions concerning liability and the protection of the environment. While initially the application by Hungary was partly couched in the language of "liability", it was later refined and contextualized within the confines of the law of treaties and the law of State responsibility. The dispute in the case related to the 1977 Treaty on the Construction and Operation of the Gabčíkovo-Nagymaros Barrage System, by the terms of which Hungary and Czechoslovakia had agreed to erect, as a "joint investment", a reservoir upstream of Dunakiliti in Hungarian and Czechoslovak territory, a dam at Dunakiliti on the Hungarian side, a bypass canal on the Czech side diverting in part the course of the Danube river on which was to be constructed a system of locks, two hydroelectric power stations, one at Gabčíkovo on the Czech side and the other at Nagymaros on the Hungarian side, as well as the deepening of the riverbed. The power generators were supposed to begin between 1986 and 1990.

242. However, the deadline was extended to 1994 and in the meanwhile one of the parties, Hungary, commissioned a re-evaluation of the project, giving priority to ecological considerations over and above economic ones. It subsequently, in 1989, suspended construction on its side of the Gabčíkovo and at Nagymaros. Failure of diplomatic exchanges and negotiations between the two sides led the Government of Czechoslovakia to continue with a "provisional solution",[392] which essentially entailed limiting construction works and diverting the Danube to Slovak territory. The diversion was unilateral. Despite the efforts of the Commission of the European Communities, on 19 May 1992, Hungary gave notice of its unilateral termination of the 1977 Treaty effective 25 May 1992.

243. In October 1992, as a result of a failure to settle the dispute, Hungary submitted an application against the Czech and Slovak Federal Republic to ICJ claiming that it had been prompted to terminate the agreement because it could not accept, *inter alia*,

> that the population of the region suffers from the consequences of the functioning of a barrage system planned without professional and public control, that irreversible damage afflicts the ecological and environmental resources of the region, first of all the presently available and potential drinking water reserves of millions of people, that degradation and, in certain cases, extinction threaten the vegetation and fauna of the region, that serious damage afflicts unique landscapes, that imminent catastrophe threatens the population due to barrages and dykes of insufficient stability as a consequence of shortcomings of research and planning.[393]

244. Hungary further contended that the construction of the provisional solution would cause "practically as serious a danger as it would happen by the realization of the original plans of the Gabčíkovo power station" and that the provisional solution, by diverting the natural course of the Danube, violated the territorial integrity of Hungary,[394] rules and principles of customary international law regulating the utilization of international environmental resources,[395] as well as the "principle of the prohibition of transboundary harm affecting the neighbouring state" as reflected, *inter alia*, in the *Trail Smelter* arbitration, the *Corfu Channel* case and principle 21 of the Stockholm Declaration.[396]

245. On 1 January 1993, Slovakia became an independent State. On 2 July 1993, the parties requested ICJ, by Special Agreement which entered into force on 28 June 1993, "on the basis of the [1977] Treaty and rules and principles of international law, as well as such other treaties as the Court may find applicable",[397] to make determinations on a number of legal questions, including whether Hungary was entitled to suspend and subsequently abandon as it had in 1989 the works on the Nagymaros project and on the Gabčíkovo project which was under its responsibility and whether the Czech and Slovak Federal Republic was entitled, in November 1991, to the "provisional solution" and to put it into operation as from October 1992.

246. At the proceedings, Hungary changed focus and placed reliance on grounds embedded, albeit not exclusively, in the law of treaties and in the law of State responsibility, justifying its conduct on the ground of "state of ecological necessity",[398] alleging that there would be stagnation of water, siltation, serious impairment of water, extinction of fluvial fauna and flora, erosion of the riverbed, and that aquatic habitats would be threatened. For its part, Slovakia denied that the basis for suspending or abandoning the performance of a treaty obligation could be found outside the law of treaties.[399] It also argued that the state of necessity as contended by Hungary did not constitute a reason for the suspension of a treaty obligation recognized by the law of treaties. It also doubted "whether 'ecological necessity' or 'ecological risk' could, in relation to the law of State responsibility, constitute a circumstance precluding the wrongfulness of an act".[400] At any rate, it denied that there had been any state of necessity in the case, either in 1989 or subsequently.[401]

247. In rejecting part of Hungary's argument that, by suspending and subsequently abandoning the works it had not suspended or rejected the 1977 Treaty, ICJ noted that by invoking the state of necessity Hungary had placed itself from the outset within the ambit of the law of State responsibility. This implied that, in the absence of such a circumstance, its conduct would have been unlawful.[402]

248. ICJ went on to consider whether on the facts a State of necessity existed. It evaluated the matter in the

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[391] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 7.

[392] *Ibid*., p. 11. The alternative known as "Variant C" entailed a unilateral diversion of the Danube by Czechoslovakia on its territory some 10 km upstream of Dunakiliti. In its final stage, Variant C included the construction at Čunovo of an overflow dam and a levee linking the dam to the south bank of the bypass canal (*ibid*., p. 25).

[393] ILM, vol. XXXII (1993), p. 1261.

[394] *Ibid.*

[395] *Ibid*., p. 1286.

[396] *Ibid*., p. 1287. However, Hungary acknowledged that there was no basis on which ICJ could found its jurisdiction to consider the application.

[397] *I.C.J. Reports 1997* (see footnote 391 above), p. 11.

[398] *Ibid*., p. 35, para. 40. See also paragraphs 41–42.

[399] *Ibid*., p. 37, para. 43.

[400] *Ibid*., para. 44.

[401] *Ibid*.. See also paragraph 45.

[402] *Ibid*., p. 39, para. 48.

light of the criteria laid down by the Commission in its draft articles on responsibility of States for internationally wrongful acts. It determined that the state of necessity could only be invoked under certain strictly defined and cumulatively considered conditions, noting that the following conditions reflected customary international law:

> [I]t must have been occasioned by an "essential interest" of the State which is the author of the act conflicting with one of its international obligations; that interest must have been threatened by a "grave and imminent peril"; the act being challenged must have been the "the only means" of safeguarding that interest; that act must not have "seriously impair[ed] an essential interest" of the State towards which the obligation existed; and the State which is the author of that act must not have "contributed to the occurrence of the state of necessity".[403]

249. In ascertaining whether Hungary met those conditions at the time of suspension and abandonment, ICJ had "no difficulty in acknowledging that the concerns expressed by Hungary for its natural environment in the region affected by the Gabčíkovo-Nagymaros Project related to an 'essential interest' of that State, within the meaning"[404] of the Commission's draft articles. It stressed the great significance that it attached to respect for the environment, not only for States but also for the whole of mankind.

250. While acknowledging the gravity of the situation, namely the possible existence of facts on which the principle of ecological necessity could be grounded, ICJ nevertheless had difficulties in accepting that the alleged peril (i.e. the "uncertainties"[405] as to the ecological impact of the barrage system) was sufficiently certain and therefore imminent in 1989 when notice of suspension and abandonment was given. In adumbrating the definition of what was perilous, the Court did not preclude the possibility that "a 'peril' appearing in the long term might be held to be 'imminent' as soon as it is established, at the relevant point in time, that the realization of that peril, however far off it might be, is not thereby any less certain and inevitable".[406]

251. Concerning first the situation at Nagymaros, ICJ noted that the dangers ascribed to the upstream reservoir were of a mostly long-term nature and remained uncertain. In regard to the lowering of the riverbed downstream, it noted that, while the danger appeared more serious and more pressing since it would affect the supply of drinking water, the riverbed had been deepened prior to 1980. Consequently, it could not represent a peril arising entirely out of the project. Moreover, in its view, Hungary had other means of responding to the situation.[407]

252. Secondly, concerning the Gabčíkovo sector, ICJ noted that the peril (i.e. the quality of the surface water in the Dunakiliti reservoir, with its effects on the quality of the groundwater in the region as well as effects on the fauna and flora in the alluvial plain of the Danube), was long term and remained uncertain. Moreover, the quality of the water had improved and Hungary had other means to respond to the dangers that it apprehended.[408]

253. In the final analysis, ICJ found that the perils involved, without prejudging their possible gravity, were not sufficiently established in 1989, nor were they "imminent".[409] Moreover, Hungary had available to it at that time other means of responding to such perceived perils.[410] As a consequence, the Court did not consider it necessary to address the question whether Hungary, by proceeding as it did in 1989, had "seriously impair[ed] an essential interest of"[411] Czechoslovakia within the meaning of the Commission's draft articles. It thus found that Hungary was not entitled to suspend and subsequently abandon, in 1989, the works on the Nagymaros project and on the part of the Gabčíkovo project for which the 1977 Treaty and related instruments attributed responsibility to it.

254. Concerning the question whether the Czech and Slovak Federal Republic was entitled to proceed in 1991 to the "provisional solution",[412] Czechoslovakia, and subsequently Slovakia, had maintained that proceeding to such a solution and putting it into operation did not constitute internationally wrongful acts. In addition, Slovakia invoked the "principle of approximate application",[413] namely a solution which was as close to the original project as possible. In the alternative, it was maintained that the putting into operation could be justified as a countermeasure. Hungary, in turn, contended that the provisional solution was a material breach of the 1977 Treaty and a violation of obligations under other treaties and under general international law.

255. ICJ determined that the provisional solution differed sharply from the legal characteristics provided for in the 1977 Treaty for the construction of the project as a joint investment constituting a single and indivisible operational system of works. The solution also essentially led Czechoslovakia to appropriate for its use and benefit between 80 and 90 per cent of waters of the Danube before returning them to the main bed of the river. Consequently, by putting the provisional solution into operation, Czechoslovakia was not applying the 1977 Treaty. It also violated certain of its express provisions, thus committing an internationally wrongful act.[414]

256. Having found that an internationally wrongful act had been committed, ICJ proceeded to consider whether the plea of countermeasures was meritorious. It again had recourse to the draft articles of the Commission.

257. In the first place, ICJ found that, although the provisional solution was not primarily presented as a countermeasure, it was clear that it was a response to Hungary's suspension and abandonment of works and directed against Hungary in response to its previous internationally

[403] *Ibid*., pp. 40–41, para. 52.
[404] *Ibid*., p. 41, para. 53.
[405] *Ibid*., p. 42, para. 54.
[406] *Ibid*.
[407] *Ibid*., pp. 42–43, para. 55.
[408] *Ibid*., p. 43, para. 56.
[409] *Ibid*., p. 45, para. 57.
[410] *Ibid*.
[411] *Ibid*., p. 46, para. 58.
[412] *Ibid*., para. 60.
[413] *Ibid*., p. 51, para. 67.
[414] *Ibid*., p. 54, para. 78.

wrongful act, namely the suspension and abandonment of the project.[415]

258. Secondly, ICJ found that Czechoslovakia, as an injured State, by requesting Hungary to resume the performance of its treaty obligation on many occasions, had called upon the State committing the wrongful act to discontinue its wrongful conduct or to make reparation therefor.[416]

259. Thirdly, ICJ considered whether the response by Czechoslovakia was proportional to the injury. In determining whether the effects of the countermeasure were commensurate with the injury suffered, it found that Czechoslovakia, by unilaterally assuming control of a shared resource, thereby depriving Hungary of its right to an equitable and reasonable share of the natural resources of the Danube—with the continuing effects of the diversion of those waters on the ecology of the riparian area of Szigetköz—had failed to respect the proportionality required by international law. It did not view the fact that Hungary had agreed to the diversion of the Danube in the context of the original project as tantamount to an authorization for "Czechoslovakia to proceed with a unilateral diversion of this magnitude without Hungary's consent".[417] The diversion was an unlawful countermeasure. The Court therefore refrained from addressing the other pertinent question: whether its purpose was to induce the wrongdoing State to comply with its obligations under international law; and whether the measure must therefore be reversible.[418] In its reply to the question posed in the Special Agreement, the Court therefore found that Czechoslovakia was entitled to proceed in November 1991 to the provisional solution insofar as it then confined itself to undertaking works which did not predetermine the final decision to be taken by it. However, Czechoslovakia was not entitled to put the provisional solution into operation as from October 1992.[419]

260. Having disposed of the declaratory aspects of its judgment, ICJ proceeded also to prescribe certain rights and obligations for the parties the modalities of which would be the subject of agreement by the parties. It required the parties together to look afresh at the effects on the environment of the operation of the Gabčíkovo power plant and in particular find a satisfactory solution for the volume of water to be released into the old bed of the Danube and into the side arms on both sides of the river. In its prescription, the Court was:

> mindful that, in the field of environmental protection, vigilance and prevention are required on account of the often irreversible character of damage to the environment and of the limitations inherent in the very mechanism of reparation of this type of damage.
>
> Throughout the ages, mankind has, for economic and other reasons, constantly interfered with nature. In the past, this was often done without consideration of the effects upon the environment. Owing to new scientific insights and to a growing awareness of the risks for mankind—for present and future generations—of pursuit of such interventions at an unconsidered and unabated pace, new norms and standards have been developed, set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past. This need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development.[420]

[415] *Ibid*., pp. 55–56, para. 83.

[416] *Ibid.*, p. 56, para. 84.

[417] *Ibid*., para. 86.

[418] *Ibid*., pp. 56–57, para. 87.

[419] *Ibid*., p. 57, para. 88. The Court was also requested to determine the legal effects of the notification on 19 May 1992 of the termination of the 1977 Treaty by Hungary (see generally paragraphs 89–115).

[420] *Ibid*., p. 78, para. 140.

Chapter II

The party that is liable

261. In examining the issue of the liable party, reference should be made to the polluter pays principle, a principle developed first in a legal context by OECD in 1972. This principle is different from the principle of the operator's liability provided for in many civil liability conventions. However, new approaches to the principle seem to accentuate its remedial function, which is also extant in civil liability regimes. Therefore, the present chapter of this study provides an overview of the polluter pays principle and then examines the issue of the party that is liable in international law.

A. The polluter pays principle

1. Historical development

262. The polluter pays principle was enunciated by the OECD Council in 1972. In its recommendation, adopted on 26 May 1972, "Environment and economics: guiding principles concerning international economic aspects of environmental policies" (C(72)128), OECD recommended:

> The principle to be used for allocating costs of pollution prevention and control measures to encourage rational use of scarce environmental resources and to avoid distortions in international trade and investment is the so-called "Polluter-Pays Principle". This principle means that the polluter should bear the expenses of carrying out the above-mentioned measures decided by public authorities to ensure that the environment is in an acceptable state. In other words, the cost of these measures should be reflected in the cost of goods and services which cause pollution in production and/or consumption. Such measures should not be accompanied by subsidies that would create significant distortions in international trade and investment.[421]

263. The polluter pays principle holds the polluter who creates an environmental harm liable to pay compensation and the costs to remedy that harm. This principle was set out by OECD as an economic principle and as the most efficient way of allocating the costs of pollution prevention and control measures so as to encourage the rational use of scarce environmental resources and to avoid distortions in international trade and investment. The basis of the principle was the "assertion that as a matter of economic policy, free market internalization of the costs of

[421] *OECD and the Environment* (Paris, OECD, 1986), annex, p. 24, para. 4.

publicly-mandated technical measures is preferable to the inefficiencies and competitive distortions of governmental subsidies".[422]

264. The polluter pays principle was not set forth as a liability or a legal principle. Two years later, in 1974, OECD published a note on the implementation of the principle. The note was adopted as recommendation C(74)223 on 14 November 1974.[423]

265. The OECD recommendation on the implementation of the polluter pays principle reaffirms the economic basis of the principle. The relevant parts of the recommendation read as follows:

1. The Polluter-Pays Principle constitutes for Member countries a fundamental principle for allocating costs of pollution prevention and control measures introduced by the public authorities in Member countries;

2. The Polluter-Pays Principle, as defined by the Guiding Principles concerning International Economic Aspects of Environmental Policies, which take account of particular problems possibly arising for developing countries, means that the polluter should bear the expenses of carrying out the measures, as specified in the previous paragraph, to ensure that the environment is in an acceptable state. In other words, the cost of these measures should be reflected in the cost of goods and services which cause pollution in production and/or consumption.[424]

266. The recommendation goes on to indicate that the uniform application of the principle by the member countries in their environmental policies is indispensable to a successful implementation of the principle. It discourages States from providing any financial relief in terms of either subsidies or tax relief to their industries causing pollution. Its economic objective is to internalize the cost of environmental pollution. Internalizing in this context refers to the industry that causes the pollution. With the exception of a few cases, it discourages States from assisting the industry in the payment of that cost. Under this economic theory, the cost of pollution control will be borne by the users of the goods and services produced by that industry.

267. On 7 July 1989, OECD recommendation C(89)88(Final) extended the scope of the polluter pays principle beyond chronic pollution caused by ongoing activities to cover accidental pollution, in particular, hazardous installations.[425] The appendix to the recommendation, on guiding principles relating to accidental pollution, provides in paragraph 4 that:

In matters of accidental pollution risks, the Polluter-Pays Principle implies that the operator of a hazardous installation should bear the cost of reasonable measures to prevent and control accidental pollution from that installation which are introduced by public authorities in Member countries in conformity with domestic law prior to the occurrence of an accident in order to protect human health or the environment.[426]

268. The guiding principles relating to accidental pollution provide that for reasons of convenience, the operator or the administrator should bear the cost. According to paragraph 6, when a third party is liable for the accident, that party reimburses to the operator the cost of reasonable measures to control accidental pollution taken after an accident. The recommendation also provides that if the accidental pollution is caused solely by an event for which the operator clearly cannot be considered liable under national law, such as a serious natural disaster that the operator cannot reasonably have foreseen, it is consistent with the polluter pays principle that the public authorities do not charge the cost of control measures to the operator.

269. The Council of the European Communities also adopted its own recommendation on the application of the polluter pays principle on 7 November 1974.[427] In Council recommendation 74/436/Euratom, "polluter" was defined as "someone who directly or indirectly damages the environment or who creates conditions leading to such damage".[428] This is a broad definition which has been criticized as one that could possibly include automobile drivers, farmers, factory owners and community sewage treatment plants.[429] If the class of responsible polluters cannot be clearly defined, the Council recommended that the Government allocate costs with a view to administrative as well as economic efficiency.[430]

270. Paragraph 3 of the recommendation provides that if identifying the polluter proves impossible or too difficult, and hence arbitrary, particularly where environmental pollution arises from several simultaneous causes (cumulative pollution), or from several consecutive causes (pollution chain), the cost of combating pollution should be borne at the point in the pollution chain or in the cumulative pollution process, and by the legal or administrative means which offer the best solution from the administrative and economic points of view and which make the most effective contribution towards improving the environment. Thus, in the case of pollution chains, costs should be charged at the point at which the number of economic operators is least and control is easiest, or else at the point where the most effective contribution is made towards improving the environment, and where distortions to competition are avoided.

271. As regards what the polluters should pay for, the Council recommendation provides in paragraph 5 that:

Polluters will be obliged to bear …:

(*a*) Expenditure of pollution control measures (investment in anti-pollution installations and equipment, introduction of new processes,

[422] Gaines, "The polluter-pays principle: from economic equity to environmental ethos", p. 470.

[423] "The implementation of the polluter-pays principle", reproduced in *OECD and the Environment* (see footnote 421 above), p. 26.

[424] *Ibid*.

[425] Reproduced in *European Yearbook*, vol. XXXVII, 1991, p. 35. See also "Certain financial aspects of action by public authorities to prevent and control oil spills (C(81)32(Final)), adopted on 28 April 1982, reproduced in *OECD and the Environment* (footnote 421 above), p. 159; and the "Concluding statement of the OECD Conference on Accidents Involving Hazardous Substances", held in Paris on 9–10 February 1988 (C(88)83) (*OECD Environment Monographs No. 24* (Paris, May 1989), p. 9).

[426] *European Yearbook* (see footnote 425 above), p. 37.

[427] ILM, vol. 14 (1975), p. 138. See also the first Programme of Action of the European Communities on the Environment, issued in 1973, *Official Journal of the European Communities*, vol. 16, No. C 112, (20 December 1973), p. 6, noting that the "cost of preventing and eliminating nuisances must be in principle be borne by the polluter".

[428] 74/436/Euratom, ECSC, EEC: Council recommendation of 3 March 1975 regarding cost allocation and action by public authorities on environmental matters, *Official Journal of the European Communities*, vol. 18, No. L 194 (25 July 1975), annex, para. 3.

[429] Gaines, *loc. cit*., p. 472.

[430] See 74/436/Euratom (footnote 428 above).

cost of running anti-pollution installations, etc.), even when these go beyond the standards laid down by the public authorities;

(*b*) The charges.

The costs to be borne by the polluter (under the "polluter-pays principle") should include all the expenditure necessary to achieve an environmental quality objective including the administrative costs directly linked to the implementation of anti-pollution measures.

The costs to the public authorities of constructing, buying and operating pollution monitoring and supervision installations may, however, be borne by those authorities.[431]

272. The European Union's commitment to the polluter pays principle later appeared in the Single European Act, which amended the Treaty of Rome. The Act granted the European Community for the first time the express power to regulate environmental affairs. It specifically referred to the polluter pays principle as a principle governing such regulations (art. 130r, para. 2): "Action by the Community relating to the environment shall be based on the principle that preventive action should be taken, that environmental damage should as a priority be rectified at the source, and that the polluter should pay."

273. The Treaty establishing the European Community provides in article 174, paragraph 2, that:[432]

Community policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Community. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay.

In this context, harmonization measures answering environmental protection requirements shall include, where appropriate, a safeguard clause allowing Member States to take provisional measures, for non-economic environmental reasons, subject to a Community inspection procedure.

274. The European Union has also applied the polluter pays principle to other sources of pollution. For example, the Community approved the Directive on the supervision and control within the European Community of the transfrontier shipment of hazardous waste, which expressly instructed member States to impose the costs of waste control on the holder of waste and/or on prior holders or the waste generator in conformity with the polluter pays principle.[433]

275. Moreover, under Directive 2004/35/CE of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage, the polluter pays principle applies in respect of an operator causing environmental damage.[434]

276. The polluter pays principle is referred to in a number of international instruments. It appears in very general terms as principle 16 of the Rio Declaration on Environment and Development:

National authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment.[435]

277. It also finds reference, for example, in the International Convention on oil pollution preparedness, response and cooperation, 1990; the OSPAR Convention;[436] the Convention on the protection of the marine environment of the Baltic Sea area, 1992; the Convention on the protection of the Black Sea against pollution; the Convention on the Protection and Use of Transboundary Watercourses and International Lakes; the Convention on the Transboundary Effects of Industrial Accidents; and the Lugano Convention.[437]

278. The 2003 Kiev Protocol, in its preamble, refers to the polluter pays principle as "a general principle of international environmental law, accepted also by the Parties to" the Convention on the Protection and Use of Transboundary Watercourses and International Lakes and the Convention on the Transboundary Effects of Industrial Accidents.

279. In *Indian Council for Enviro-Legal Action* v. *Union of India and others*,[438] the Supreme Court of India held that the polluter pays principle was a sound principle. In *Vellore Citizens Welfare Forum* v. *Union of India and others*, the Court confirmed that the "precautionary principle and the polluter pays principle have been accepted as part of the law of the land".[439] After analysing the constitutional provisions guaranteeing the right to life and protection of personal liberty and other provisions concerning the protection and improvement of the environment as well as "plenty of post independence legislations on the subject", the Court had "no hesitation in holding that the precautionary principle and the polluter pays principle are part of the environmental law of the country". The Court went on to assert:

Even otherwise once these principles are accepted as part of the Customary International Law there would be no difficulty in accepting them as part of the domestic law.[440]

280. In the arbitration between France and the Netherlands concerning the application of the Convention on the Protection of the Rhine against Pollution from Chlorides and the Additional Protocol to that Convention, the arbitral

[431] *Ibid.*

[432] Consolidated version of the Treaty establishing the European Community. The 1993 Treaty on European Union (Treaty of Maastricht) introduced the protection of the environment as one of the aims of the Union in article 2. With the 1999 Treaty of Amsterdam, the articles were renumbered. The environmental protection provisions remained substantially unchanged in the 2001 Treaty of Nice.

[433] Council Directive 84/631/EEC of 6 December 1984 on the supervision and control within the European Community of the transfrontier shipment of hazardous waste, *Official Journal of the European Communities*, No. L 326 (13 December 1984), p. 31. The Directive was amended in 1986 to apply to movements of hazardous wastes leaving the Union (Directive 86/279/EEC, *ibid*., No. L 181, p. 13).

[434] Directive 2004/35/CE (see footnote 286 above), p. 56.

[435] See footnote 206 above.

[436] Article 2, paragraph 2, provides:
"The Contracting Parties shall apply:
…
(*b*) the polluter pays principle, by virtue of which the costs of pollution prevention, control and reduction measures are to be borne by the polluter."

[437] The preamble states, *inter alia*: "Having regard to the desirability of providing for strict liability in this field taking into account the 'Polluter Pays' Principle."

[438] *All India Reporter 1996*, vol. 83, Supreme Court section, p. 1446.

[439] *Ibid.*, p. 2721.

[440] *Ibid*., pp. 2721–2722.

tribunal was requested to consider the polluter pays principle in its interpretation of the Convention, although it was not expressly referred to therein. The tribunal concluded, in its award dated 12 March 2004, that, despite its importance in treaty law, the polluter pays principle was not a part of general international law and was therefore not pertinent to its interpretation of the Convention.[441]

281. In *Indian Council for Enviro-Legal Action* v. *Union of India and others*, the Supreme Court of India suggested that "any principle evolved in this behalf should be simple, practical and suited to the conditions obtaining in this country".[442]

282. In practice, the polluter pays principle has not been fully implemented. A report prepared by OECD in 1989 indicated that subsidies were widely used by Governments to ease the economic burden of the polluter. In addition, it has been interpreted in such a way as "to justify its subsidy schemes as being compatible with the" principle.[443] In its report on the implementation of Agenda 21, the United Nations noted:

> Progress has been made in incorporating the principles contained in the Rio Declaration on Environment and Development—including … the polluter pays principle … in a variety of international and national legal instruments. While some progress has been made in implementing United Nations Conference on Environment and Development commitments through a variety of international legal instruments, much remains to be done to embody the Rio principles more firmly in law and practice.[444]

283. The precise contours and breadth of the polluter pays principle are unclear. It has different interpretations in different contexts.[445] It has been suggested that the polluter pays principle "[i]n its original formulation … applies only to the costs of 'pollution prevention and control measures … decided by public authorities'". Such costs include: (*a*) the costs of pollution control at individual facilities; (*b*) the costs of collective measures on behalf of a group of polluters; and (*c*) associated administrative costs.[446] In its original formulation the principle also anticipated exceptional or special arrangements. On the other hand, the liability and compensation components of the 1989 OECD guiding principles relating to accidental pollution cover (*a*) the cost of "reasonable measures to prevent ... accidental pollution"; and (*b*) the cost of controlling and remedying accidental pollution.[447] Thus, "OECD moved the principle … from pure precaution to pure liability for compensation".[448] However, the polluter pays principle as extended does not seem to cover all the damages that are recoverable from private parties in civil liability regimes. The "guiding principles expressly exclude, for instance, 'measures to compensate victims for the economic consequences of an accident', even if those measures are instituted by public authorities".[449]

284. EU Directive 2004/35/CE on environmental liability with regard to the prevention and remedying of environmental damage would "be implemented through the furtherance of the 'polluter pays' principle, as indicated in the Treaty and in line with the principle of sustainable development".[450] Thus the Directive seeks to establish a common framework for the prevention and remedying of environmental damage at a reasonable cost to society. Its fundamental principle would be to make the operator of an activity financially liable for (*a*) the environmental damage; or (*b*) the imminent threat of such damage, as an inducement to such an operator to adopt measures and develop practices to minimize the risks of environmental damage so that their exposure to financial liabilities is reduced. It is asserted that, according to the polluter pays principle, an operator causing environmental damage or creating an imminent threat of such damage should, in principle, bear the cost of the necessary preventive or remedial measures. Moreover, in cases where a competent authority acts either by itself or with a third party, it shall ensure that it recovers costs incurred from the operator. Similarly, it is considered appropriate that the operator should ultimately bear the cost of assessing environmental damage as well as the imminent threat of occurrence of such damage occurring.

285. These new approaches seem to demonstrate a willingness to give the polluter pays principle a remedial and compensatory function.

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[441] Case concerning the audit of accounts between the Netherlands and France in application of the Protocol of 25 September 1991 Additional to the Convention for the Protection of the Rhine from Pollution by Chlorides of 3 December 1976: decision of 12 March 2004. The tribunal, composed of Messrs Krzysztof Skubiszewski (President), Gilbert Guillaume (France), and Pieter Kooijmans (Netherlands), stated, in pertinent part:

> "102. … The Tribunal notes that the Netherlands, in support of its claim, has referred to the 'polluter pays' principle.
>
> "103. The tribunal observes that this principle features in several international instruments, bilateral as well as multilateral, and that it operates at various levels of effectiveness. Without denying its importance in treaty law, the Tribunal does not view this principle as being a part of general international law."

(Arbitral award of 12 March 2004, UNRIAA, vol. XXV (Sales No. E/F.05.V.5), p. 267)

[442] *All India Reporter 1996* (see footnote 438 above), p. 1465.

[443] Gaines, *loc. cit*., p. 479.

[444] General Assembly resolution S-19/2 of 28 June 1997, annex, para. 14.

[445] Nash, "Too much market? Conflict between tradable pollution allowances and the 'polluter pays' principle", p. 472. He quotes (p. 473) Bugge, who identifies four versions:

(*a*) The polluter-pays principle as an economic principle; a principle of efficiency;
(*b*) As a legal principle; a principle of ('just') distribution of costs;
(*c*) As a principle of international harmonization of national environmental policy;
(*d*) As a principle of allocation of costs between States.

("The principles of 'polluter-pays' in economics and law")

[446] Gaines, *loc. cit*., p. 473.

[447] *Ibid*., pp. 483. Gaines points out that some of the costs involved in the control of accidental pollution may be prevention-oriented, but some others may be strongly remedy-oriented. Among the costs mentioned by the OECD guiding principles relating to accidental pollution (*European Yearbook* (see footnote 425 above)) are costs such as those involved in rehabilitating the polluted environment. The choice and types of environmental rehabilitation take the polluter pays principle fairly far towards a liability concept for what polluters should pay. In the United States, for example, if a source of accidental pollution is responsible for restoration of the environment, that responsibility is considered a measure for compensation of damage inflicted, not a preventive or protective measure. A similar approach is evident in the natural resources section of the United States statute that imposes liability for remedial costs of hazardous waste clean-up. For example, in the *Ohio* v. *Department of the Interior* case, the United States Court of Appeals held that the cost of restoration was the preferred measure of damages (880 F2d 432, District of Columbia Circuit (1989), p. 444).

[448] Gaines, *loc. cit*., p. 483.

[449] *Ibid*., p. 485.

[450] See footnote 286 above.

286. It has been countenanced that the polluter pays principle in its fullest sense be employed to establish "the legal principle that the polluter should bear *all* the costs that its activities may generate".[451] While departure from the general rule would be justified at the domestic level, it has been argued that it would be difficult to offer any justification in cases of transboundary harm:

> It is unlikely that the foreign injured party participated in the decision about the basic environmental standards to be adopted. Moreover, the foreign party probably benefits only remotely, if at all, from the source's economic activity. The source should therefore be obliged to compensate for and abate any harms inflicted beyond the border, with one important exception. If the state in which the injured party resides has an environmental standard applicable to the offending activity that would have permitted the activity to occur lawfully on the same basis or a less protective basis as the law of the source country, then principles of nondiscrimination dictate that the injured party should not be compensated. On the other hand, if the receiving state's standards are *more* stringent, the full application of the [polluter pays principle] dictates that the source should be liable on the same terms as it would have been if it had operated in the receiving state.[452]

2. Component elements of the polluter pays principle

(a) *The right to equal access*

287. Equal access to national remedies has been considered as one way of implementing the polluter pays principle. This principle has been endorsed by OECD and purports to afford equivalent treatment in the country of origin to transboundary and domestic victims of pollution damage, or to those likely to be affected. The purpose of the right to equal access is to provide foreign claimants, on an equal footing with domestic claimants, opportunities to influence the process of initiation, authorization and operation of activities with transboundary implications for pollution damage as well as, ultimately, the litigation phase. The equal right to access may involve: (*a*) access to information; (*b*) participation in administrative hearings and legal proceedings; and (*c*) the application of non-discriminatory standards for determining the illegality of domestic and transboundary pollution.

(i) *Access to information*

288. Principle 10 of the Rio Declaration on Environment and Development makes provision for the participation of the citizenry in decision-making processes involving environmental matters, including access to information on, for example, hazardous materials and activities in their communities.[453] Other international instruments also provide for access to information. These include the Code of Conduct on Accidental Pollution of Transboundary Inland Waters;[454] the Convention on environmental impact assessment in a transboundary context;[455] the OSPAR Convention; the Convention on the Protection and Use of Transboundary Watercourses and International Lakes;[456] the Convention on the Transboundary Effects of Industrial Accidents;[457] the United Nations Framework Convention on Climate Change;[458] the Convention on the Law of the Non-navigational Uses of International Watercourses;[459] and the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (hereinafter the Aarhus Convention).[460]

289. On 28 January 2003, the European Parliament and Council adopted Directive 2003/4/EC on public access to environmental information.[461] It repeals as at 14 February 2005 an earlier Council Directive, 90/313/EEC, on freedom of access to information on the environment.[462] The Directive was necessary to ensure the consistency of Community law with the Aarhus Convention, signed by the European Community on 25 June 1998. It recognizes that increased public access to environmental information and the dissemination of such information contribute to a greater awareness of environmental matters, a free exchange of views, more effective participation by the public in environmental decision-making and, eventually, to a better environment. The Directive contains a broad definition of environmental information.[463]

290. In the African context, the African Convention on the Conservation of Nature and Natural Resources provides in article XVI:

> 1. The Parties shall adopt legislative and regulatory measures necessary to ensure timely and appropriate
>
> (*a*) dissemination of environmental information;
>
> (*b*) access of the public to environmental information;
>
> (*c*) participation of the public in decision-making with a potentially significant environmental impact; ...

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[451] Gaines, *loc. cit.*, p. 492.

[452] *Ibid.*

[453] See footnote 206 above.

[454] United Nations publication, Sales No. E.90.II.E.28.

[455] Art. 3, para. 8.

[456] Art. 16.

[457] Art. 9.

[458] Art. 6.

[459] Art. 12.

[460] Article 3, paragraph 9, reads:

"Within the scope of the relevant provisions of this Convention, the public shall have access to information, have the possibility to participate in decision-making and have access to justice in environmental matters without discrimination as to citizenship, nationality or domicile and, in the case of a legal person, without discrimination as to where it has its registered seat or an effective centre of its activities."

[461] *Official Journal of the European Communities*, No. L 41, vol. 46 (14 February 2003), p. 26.

[462] *Ibid.*, No. L 158 (23 June 1990), p. 56.

[463] Article 2, paragraph 1, reads:

"'Environmental information' shall mean any information in written, visual, aural, electronic or any other material form on:

"(*a*) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;

"(*b*) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (*a*);

"(*c*) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (*a*) and (*b*) as well as measures or activities designed to protect those elements;

"(*d*) reports on the implementation of environmental legislation;

"(*e*) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (*c*); and

"(*f*) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (*a*) or, through those elements, by any of the matters referred to in (*b*) and (*c*)."

291. Access to information involves making information readily available to the users and potential users. The North American Agreement on Environmental Cooperation between Canada, Mexico and the United States requires each party to make a conscientious effort to publish laws, regulations, procedures and rulings that have a bearing on the Agreement, including information in advance of the measure to be taken.[464] The Aarhus Convention also contains a detailed provision on access to environmental information, covering both form and the substance, including circumstances in which access to information or disclosure may be denied.[465] EU Directive 2003/4/EC also contains detailed information on the obligations of member States in ensuring access to information free of charge or at a reasonable cost and its dissemination, as well as the circumstances in which access to information may be refused.[466] It essentially seeks to respond to some of the problems experienced

[464] Article 4 of the Agreement provides:

"1. Each Party shall ensure that its laws, regulations, procedures and administrative rulings of general application respecting any matter covered by this Agreement are promptly published or otherwise made available in such a manner as to enable interested persons and Parties to become acquainted with them.

"2. To the extent possible, each Party shall:

"(*a*) publish in advance any such measure that it proposes to adopt; and

"(*b*) provide interested persons and Parties a reasonable opportunity to comment on such proposed measures."

[465] Article 4 reads:

"1. Each Party shall ensure that, subject to the following paragraphs of this article, public authorities, in response to a request for environmental information, make such information available to the public, within the framework of national legislation, including, where requested and subject to subparagraph (*b*) below, copies of the actual documentation containing or comprising such information:

"(*a*) Without an interest having to be stated;

"(*b*) In the form requested unless:

"(i) It is reasonable for the public authority to make it available in another form, in which case reasons shall be given for making it available in that form; or

"(ii) The information is already publicly available in another form.

"2. The environmental information referred to in paragraph 1 above shall be made available as soon as possible and at the latest within one month after the request has been submitted, unless the volume and the complexity of the information justify an extension of this period up to two months after the request. The applicant shall be informed of any extension and of the reasons justifying it.

"3. A request for environmental information may be refused if:

"(*a*) The public authority to which the request is addressed does not hold the environmental information requested;

"(*b*) The request is manifestly unreasonable or formulated in too general a manner; or

"(*c*) The request concerns material in the course of completion or concerns internal communications of public authorities where such an exemption is provided for in national law or customary practice, taking into account the public interest served by disclosure.

"4. A request for environmental information may be refused if the disclosure would adversely affect:

"(*a*) The confidentiality of the proceedings of public authorities, where such confidentiality is provided for under national law;

"(*b*) International relations, national defence or public security;

"(*c*) The course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an enquiry of a criminal or disciplinary nature;

"(*d*) The confidentiality of commercial and industrial information, where such confidentiality is protected by law in order to protect a legitimate economic interest. Within this framework, information on emissions which is relevant for the protection of the environment shall be disclosed;

"(*e*) Intellectual property rights;

"(*f*) The confidentiality of personal data and/or files relating to a natural person where that person has not consented to the disclosure of the information to the public, where such confidentiality is provided for in national law;

"(*g*) The interests of a third party which has supplied the information requested without that party being under or capable of being put under a legal obligation to do so, and where that party does not consent to the release of the material; or

"(*h*) The environment to which the information relates, such as the breeding sites of rare species.

"The aforementioned grounds for refusal shall be interpreted in a restrictive way, taking into account the public interest served by disclosure and taking into account whether the information requested relates to emissions into the environment.

"5. Where a public authority does not hold the environmental information requested, this public authority shall, as promptly as possible, inform the applicant of the public authority to which it believes it is possible to apply for the information requested or transfer the request to that authority and inform the applicant accordingly.

"6. Each Party shall ensure that, if information exempted from disclosure under paragraphs 3 (*c*) and 4 above can be separated out without prejudice to the confidentiality of the information exempted, public authorities make available the remainder of the environmental information that has been requested.

"7. A refusal of a request shall be in writing if the request was in writing or the applicant so requests. A refusal shall state the reasons for the refusal and give information on access to the review procedure provided for in accordance with article 9. The refusal shall be made as soon as possible and at the latest within one month, unless the complexity of the information justifies an extension of this period up to two months after the request. The applicant shall be informed of any extension and of the reasons justifying it.

"8. Each Party may allow its public authorities to make a charge for supplying information, but such charge shall not exceed a reasonable amount. Public authorities intending to make such a charge for supplying information shall make available to applicants a schedule of charges which may be levied, indicating the circumstances in which they may be levied or waived and when the supply of information is conditional on the advance payment of such a charge."

[466] Arts 3–5 and 7–8 of the Directive. Article 3 reads:

"*Access to environmental information upon request*

"1. Member States shall ensure that public authorities are required, in accordance with the provisions of this Directive, to make available environmental information held by or for them to any applicant at his request and without his having to state an interest.

"2. Subject to Article 4 and having regard to any timescale specified by the applicant, environmental information shall be made available to an applicant:

"(*a*) as soon as possible or, at the latest, within one month after the receipt by the public authority referred to in paragraph 1 of the applicant's request; or

"(*b*) within two months after the receipt of the request by the public authority if the volume and the complexity of the information is such that the one-month period referred to in (*a*) cannot be complied with. In such cases, the applicant shall be informed as soon as possible, and in any case before the end of that one-month period, of any such extension and of the reasons for it.

"3. If a request is formulated in too general a manner, the public authority shall as soon as possible, and at the latest within the timeframe laid down in paragraph 2 (*a*) , ask the applicant to specify the request and shall assist the applicant in doing so, e.g. by providing information on the use of the public registers referred to in paragraph 5 (*c*) . The public authorities may, where they deem it appropriate, refuse the request under Article 4 (1) (*c*) .

"4. Where an applicant requests a public authority to make environmental information available in a specific form or format (including in the form of copies), the public authority shall make it so available unless:

"(*a*) it is already publicly available in another form or format, in particular under Article 7, which is easily accessible by applicants; or

"(*b*) it is reasonable for the public authority to make it available in another form or format, in which case reasons shall be given for making it available in that form or format.

For the purposes of this paragraph, public authorities shall make all reasonable efforts to maintain environmental information held by or for them in forms or formats that are readily reproducible and accessible by computer telecommunications or by other electronic means.

(*Continued on next page.*)

(*Footnote 466 continued.*)

The reasons for a refusal to make information available, in full or in part, in the form or format requested shall be provided to the applicant within the time limit referred to in paragraph 2 (*a*).

"5. For the purposes of this Article, Member States shall ensure that:

"(*a*) officials are required to support the public in seeking access to information;

"(*b*) lists of public authorities are publicly accessible; and

"(*c*) the practical arrangements are defined for ensuring that the right of access to environmental information can be effectively exercised, such as:

– the designation of information officers;
– the establishment and maintenance of facilities for the examination of the information required;
– registers or lists of the environmental information held by public authorities or information points, with clear indications of where such information can be found.

Member States shall ensure that public authorities inform the public adequately of the rights they enjoy as a result of this Directive and to an appropriate extent provide information, guidance and advice to this end."

Article 4 reads:

"*Exceptions*

"1. Member States may provide for a request for environmental information to be refused if:

"(*a*) the information requested is not held by or for the public authority to which the request is addressed. In such a case, where that public authority is aware that the information is held by or for another public authority, it shall, as soon as possible, transfer the request to that other authority and inform the applicant accordingly or inform the applicant of the public authority to which it believes it is possible to apply for the information requested;

"(*b*) the request is manifestly unreasonable;

"(*c*) the request is formulated in too general a manner, taking into account Article 3 (3);

"(*d*) the request concerns material in the course of completion or unfinished documents or data;

"(*e*) the request concerns internal communications, taking into account the public interest served by disclosure.

Where a request is refused on the basis that it concerns material in the course of completion, the public authority shall state the name of the authority preparing the material and the estimated time needed for completion.

"2. Member States may provide for a request for environmental information to be refused if disclosure of the information would adversely affect:

"(*a*) the confidentiality of the proceedings of public authorities, where such confidentiality is provided for by law;

"(*b*) international relations, public security or national defence;

"(*c*) the course of justice, the ability of any person to receive a fair trial or the ability of a public authority to conduct an enquiry of a criminal or disciplinary nature;

"(*d*) the confidentiality of commercial or industrial information where such confidentiality is provided for by national or Community law to protect a legitimate economic interest, including the public interest in maintaining statistical confidentiality and tax secrecy;

"(*e*) intellectual property rights;

"(*f*) the confidentiality of personal data and/or files relating to a natural person where that person has not consented to the disclosure of the information to the public, where such confidentiality is provided for by national or Community law;

"(*g*) the interests or protection of any person who supplied the information requested on a voluntary basis without being under, or capable of being put under, a legal obligation to do so, unless that person has consented to the release of the information concerned;

"(*h*) the protection of the environment to which such information relates, such as the location of rare species.

The grounds for refusal mentioned in paragraphs 1 and 2 shall be interpreted in a restrictive way, taking into account for the particular case the public interest served by disclosure. In every particular case, the public interest served by disclosure shall be weighed against the interest served by the refusal. Member States may not, by virtue of paragraph 2 (*a*), (*d*), (*f*), (*g*) and (*h*), provide for a request to be refused where the request relates to information on emissions into the environment.

Within this framework, and for the purposes of the application of subparagraph (*f*), Member States shall ensure that the requirements of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data are complied with.

"3. Where a Member State provides for exceptions, it may draw up a publicly accessible list of criteria on the basis of which the authority concerned may decide how to handle requests.

"4. Environmental information held by or for public authorities which has been requested by an applicant shall be made available in part where it is possible to separate out any information falling within the scope of paragraphs 1 (*d*) and (*e*) or 2 from the rest of the information requested.

"5. A refusal to make available all or part of the information requested shall be notified to the applicant in writing or electronically, if the request was in writing or if the applicant so requests, within the time limits referred to in Article 3 (2) (*a*) or, as the case may be, (*b*). The notification shall state the reasons for the refusal and include information on the review procedure provided for in accordance with Article 6."

in the implementation of Directive 90/313/EEC, such as determining the type of information to be divulged and by whom; the practical arrangements for ensuring actual availability of the information; applicable exceptions; the duty of reply to requests, deadlines therefor and grounds for refusal; review procedures; applicable charges; and the need for a continuous flow of information.

292. There have also been some judicial pronouncements that have asserted the importance of access to information. In a 1996 South African case, *Van Huyssteen and Others NNO* v. *Minister of Environmental Affairs and Tourism and Others*,[467] the applicants were granted the right to require information on how the environment in an area where they wanted to erect a holiday house would be impacted by the construction of a development project. In *Greenwatch (u) Ltd* v. *Attorney General and Uganda Electricity Transmission Company Ltd*, the High Court of Uganda held that every citizen has a right of access to information in the possession of the State.[468]

293. The *Dispute concerning access to information under article 9 of the OSPAR Convention between Ireland and the United Kingdom of Great Britain and Northern Ireland*,[469] in which a tribunal constituted pursuant to article 32 of the Convention had an opportunity to adjudicate over questions concerning access to information, bears on aspects of treaty interpretation concerning the treatment of confidential information. Acting on the basis of article 9 of the OSPAR Convention, Ireland requested access to information redacted from reports prepared as part of the approval process for the commissioning of a Mixed Oxide Plant ("the MOX plant") in the United Kingdom. It requested:

> full disclosure of two reports commissioned by the United Kingdom Government in the context of the authorisation of a new facility at Sellafield for the production of mixed oxide (MOX) fuel … in order to be in a better position to consider the impacts which the commissioning of the MOX plant will or might have on the marine environment … [and] to be able to assess the extent of the compliance by the United Kingdom with its obligations under … the OSPAR Convention, the 1982 United Nations Convention on the Law of the Sea … and various provisions of European Community law, including in particular Council Directive 96/29 Euratom.[470]

[467] *The South African Law Reports* (1996), vol. 1, p. 283.

[468] [2002] UGHC 28. See also Kurukulasuriya, "The role of the judiciary in promoting environmental governance and the rule of law".

[469] Final award: decision of 2 July 2003, UNRIAA, vol. XXIII (Sales No. E/F.04.V.15), p. 59.

[470] *Ibid*., p. 80, para. 41.

294. Ireland furthermore requested the Tribunal to declare, *inter alia*, that the United Kingdom had breached its obligations under article 9 of the OSPAR Convention by refusing to make available information deleted from reports prepared by PA Consulting Group of London and by Arthur D. Little (ADL) requested by Ireland.[471] In response, the United Kingdom refused to disclose the full reports, contending that article 9 of the OSPAR Convention did not establish a direct right to receive information since it only required Contracting Parties to establish a domestic framework for the disclosure of information and the United Kingdom had done this. In addition, it contended that at any rate Ireland was required to show that the information in question fell within the scope of article 9, paragraph 2. Furthermore, it contended that pursuant to the terms of paragraph 3 (*d*) of the same article, Contracting Parties, in accordance with their national legal systems and applicable international regulations, had the right to refuse a request for information on the grounds of commercial confidentiality. The United Kingdom thus requested the Tribunal to dismiss the claims for lack of jurisdiction and inadmissibility.[472]

295. The Tribunal had the following questions for determination:

(*a*) First, whether article 9, paragraph 1, of the Convention required a Contracting Party to disclose, or to set out a procedure to disclose, "information" within the meaning of paragraph 2 of the article;

(*b*) Secondly, whether, if so, the material the disclosure of which Ireland had requested constituted "information" for the purposes of article 9 of the Convention;

(*c*) And thirdly, whether, if so, the United Kingdom had redacted and withheld any—and what—information requested by Ireland contrary to article 9, paragraph 3 (*d*).

296. The Tribunal was unanimous in its decision to reject the request of the United Kingdom concerning questions of jurisdiction and admissibility. By a majority decision, however, it rejected the submission of the United Kingdom, as encapsulated in the first question, that the implementation of article 9, paragraph 1, of the OSPAR Convention was assigned exclusively to the competent authorities in the United Kingdom and not to a tribunal established under the OSPAR Convention. In response to the second question, it found by a majority decision that the claim by Ireland for information did not fall within article 9, paragraph 2, and as a consequence the majority did not deem it necessary to consider the third question, namely the claim by Ireland that the United Kingdom had breached its obligations under article 9 of the Convention by refusing, on the basis of its understanding of the requirements of paragraph 3 (*d*), to make available information.

297. Article 9, paragraph 1, of the OSPAR Convention reads as follows:

> The Contracting Parties shall ensure that their competent authorities are required to make available the information described in paragraph 2 of this Article to any natural or legal person, in response to any reasonable request, without that person's having to prove an interest, without unreasonable charges, as soon as possible and at the latest within two months.

298. It was central to the argument of the United Kingdom that by requiring that the Contracting Parties shall "ensure that their competent authorities are required to make available"[473] information, the article in question did not create a direct obligation to supply particular information. A breach could only arise if there was a failure to provide a domestic regulatory framework dealing with the disclosure of information. For its part, Ireland argued that the relevant article constituted an "obligation of result"[474] rather than an obligation to provide a domestic regulatory framework dealing with the disclosure of information.

299. In its reaching its decision, the majority observed that article 9 was an access-to-information provision that must be taken to articulate the intentions of the Contracting Parties as expressed within the framework of the general objectives and the other particular provisions of the Convention. It construed article 9 as an enforceable obligation in its particular subject matter like the other provisions of the Convention. "Its provisions for disclosure of defined information must be taken to have an intended bite beyond being an expression of aspirational objectives for the domestic laws of the Contracting Parties."[475]

300. The majority found that the main purpose of the OSPAR Convention was to protect the marine environment and to eliminate marine pollution in the North-East Atlantic. Read as a whole (annexes included), it was plain that the entire text of the Convention disclosed a carefully crafted hierarchy of obligations or engagement to achieve the disparate objectives of the Convention. It found that contextually the use of "shall ensure" was a reflection of a deliberate wish by the framers to use differential language rather than a lax choice of vocabulary. It therefore construed the phrase as positing an obligation of the United Kingdom, "as a Contracting Party, to ensure something, namely that its competent authorities 'are required to make available the information described in paragraph 2 … to any natural legal [sic] person, in response to any reasonable request'".[476] Such obligation was "at the mandatory end of the scale"[477] rather than merely making provision for access to a domestic regime which is directed at obtaining the required result.

301. The Tribunal also looked to the objective criteria specified in article 9, paragraph 1, namely that the information must be available: (*a*) to any natural or legal person; (*b*) in response to a reasonable request; (*c*) without the requester having to prove an interest; (*d*) without unreasonable charges; and (*e*) as soon as possible but at the latest within two months, and interpreted it as meaning that a compliance by contracting States with such criteria might itself become a separate issue for arbitration under article 32.[478]

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[471] *Ibid*., para. 42.

[472] *Ibid.*, para. 44.

[473] *Ibid.*, p. 93, para. 111.

[474] *Ibid.*

[475] *Ibid*., p. 96, para. 127.

[476] *Ibid*., p. 98, para. 134.

[477] *Ibid.*

[478] *Ibid*., para. 136.

302. The Tribunal also found support for its textual analysis from the relevant rules of international and EU law.[479] It noted, however, that the adoption of a similar or identical definition or term in international texts should be distinguished from the intention to bestow the same normative status upon both instruments. Consequently, it found that the OSPAR Convention and Directive 90/313/EEC were independent legal sources and that each "establishes a distinct legal regime and provides for different legal remedies".[480] While article 4 of Directive 90/313/EEC provides that legal action against a State in breach should be pursued domestically, "the OSPAR Convention contains a particular and self-contained dispute resolution mechanism in Article 32, in accordance with which this Tribunal acts".[481] In its view:

> The similar language of the two legal instruments, as well as the fact that the 1992 Regulations [promulgated in the United Kingdom] are an implementing instrument for both Directive 90/313 and the OSPAR Convention, does not limit a Contracting Party's choice of a legal forum to only one of the two available … The primary purpose of employing the similar language is to create uniform and consistent legal standards in the field of the protection of the marine environment, and not to create precedence of one set of legal remedies over the other.[482]

303. In a separate declaration, however, the Chairman of the Arbitral Tribunal disagreed with the finding of the majority on the interpretation of the majority.[483] In his view, the words "ensure that their competent authorities are required to", in their plain meaning, constituted no more than an obligation to adjust domestic law in a prescribed way by providing for certain institutional recourses, for which specific criteria are provided. Article 9, paragraph 1,

> is not expressed in terms to establish an obligation on the international plane to provide information, with the performance of that obligation in specific cases to be subject to the jurisdiction of a Tribunal established under Article 32.[484]

304. He noted that it would be anomalous and duplicitous for article 9, paragraph 1, to require that Contracting Parties ensure that their national competent authorities should do something and to prescribe how it should be done, and then to assign the role of application in specific cases to an international tribunal.[485] He also observed that his interpretation was consistent with the other goals expressed in article 9, paragraph 1, concerning timeliness of the responses, which could not otherwise be achieved by the cumbersome procedures envisaged under the dispute settlement mechanism envisaged under article 32.[486]

305. He disagreed with the majority on the textual and historical analysis of the provision. Textually, article 9 was the only provision that referred to another dispute settlement mechanism and, historically, article 9 of the OSPAR Convention was unique, in that the antecedent instruments, namely the Convention for the prevention of marine pollution by dumping from ships and aircraft and the convention for the prevention of marine pollution from land-based sources, did not contain a comparable provision.[487]

306. The fact that the *travaux préparatoires* of article 9, paragraph 1, indicated that the provisions of what later became article 9, paragraph 1, had been adjusted to ensure conformity with EC Directive 90/313/EEC was also found instructive in that both provisions were linked to an exclusive municipal remedy.[488]

307. In his conclusion, the Chairman stated that the interpretation could have been consistent with common treaty practice obliging States to make adjustments in domestic law and, to the extent that they were able to do so appropriately, they had fulfilled their treaty obligations. The only international claim that would lie would be that the respondent State had failed to ensure that its municipal law was created or structured in such a way as to accomplish the objectives prescribed by the particular convention.[489] In other words, article 9, paragraph 1, was still subject to international standards:

> Although such a provision must allow a certain discretion or "margin of appreciation" as to its implementation to the Contracting Parties, the national arrangements must nonetheless meet whatever objective criteria are set out in the provision if they are not to be in breach of the Convention.[490]

308. It was only questions relating to alleged violations of such criteria which would be admissible under article 32.

309. Concerning article 9, paragraph 2, the Tribunal unanimously found that the question raised by Ireland, namely whether the material the disclosure of which had been requested constituted "information" for the purposes of article 9 of the OSPAR Convention, was substantive rather than concerning a question of admissibility or jurisdiction. Paragraph 2 reads as follows:

> The information referred to in paragraph 1 of this Article is any available information in written, visual, aural or database form on the state of the maritime area, on activities or measures adversely affecting or likely to affect it and on activities or measures introduced in accordance with the Convention.

310. The majority avoided addressing the question in the abstract and preferred to address it in the context of the 14 categories of information redacted from the reports. Such information related to estimated annual production capacity of the MOX facility; time taken to reach such capacity; sales volumes; probability of achieving higher sales volumes; probability of being able to win contracts for recycling fuel in "significant quantities";[491] estimated sales demand; percentage of plutonium already on site; maximum throughput figures; lifespan of the MOX facility; number of employees; price of MOX fuel; whether, and to what extent, there were firm contracts to purchase MOX from Sellafield; arrangements for the transport of

[479] *Ibid*., p. 99, para. 139.

[480] *Ibid*., p. 100, para. 142.

[481] *Ibid.*, para. 143.

[482] Ibid.

[483] *Ibid*., p. 113, declaration of Mr. W. Michael Reisman.

[484] *Ibid*., p. 114, para. 6.

[485] *Ibid*., para. 7.

[486] *Ibid*., para. 8.

[487] *Ibid*., p. 115, para. 9.

[488] *Ibid*., paras. 10–11.

[489] *Ibid*., pp. 115–116, paras. 12–14.

[490] *Ibid.*, p. 117, para. 18.

[491] *Ibid*., p. 105, para. 161.

plutonium to and from the MOX facility and from Sellafield; and the likely numbers of such transports.

311. The specific issue before the Tribunal was "whether the redacted portions of the PA and ADL Reports, viewed as categories, constitute 'information' within the meaning of"[492] article 9, paragraph 2. The majority distinguished between the categories of the redaction and the content of those categories and felt that the former fell within the scope of paragraph 2, while the latter was to be determined in accordance with paragraph 3.[493]

312. The Tribunal noted that the scope of the information appertaining to paragraph 2 was not environmental, in general, but consistent with the tenor of the OSPAR Convention concerning the "state of the maritime area". And according to the majority, none of the 14 categories in Ireland's list could plausibly be characterized as "information … on the state of the maritime area".[494]

313. The tribunal further proceeded to consider whether the drafters of the OSPAR Convention had adopted the interpretative theory of inclusive causality, by the terms of which "anything, no matter how remote", was deemed to be part of an activity if it "facilitated the performance of an activity".[495] It observed that paragraph 2 was concerned with three categories of information, namely "any available information" on "the state of the maritime area"; "any available information" on "activities or measures adversely affecting or likely to affect … the maritime area"; and "any available information" on "activities or measures introduced in accordance with the Convention".[496] In their submissions, the parties focused on the second category, namely any available information on activities or measures adversely affecting or likely to affect the maritime area. Although the OSPAR Convention did not define "activities or measures", in its article 1, the majority determined that it was clear from other parts of the Convention that the term "measures" referred generically to regulatory initiatives by any part of the governmental apparatus of the Contracting Parties with respect to matters covered by the Convention, while "activities" referred to the actions, whether emanating from or expected by governmental or non-governmental entities, that would be the object of the "measures".[497] The Tribunal also acknowledged the identical language in article 2 (*a*) of Directive 90/313 and the decision of the European Court of Justice in the *Mecklenburg* case, which remarked that the term "measures" served merely to make it clear that the acts governed by the Directive included all forms of administrative activity. While the inclusion of both measures and activities denoted that the drafters intended the second category to cover a wide range of information, the Tribunal stressed that information must be related to the state of the maritime area.[498]

314. The Tribunal noted in addition that the second category also referred to two types of activities or measures, which included prospective activities and measures as well as those already under way. Unlike the other two categories, the second category was qualified by the adverbs "adversely" and "likely", thereby, in the view of the majority, excluding from the scope of the obligation of article 9 current activities or measures that affected or were likely to affect the maritime areas but did not affect it adversely and the prospective activities that were not likely to adversely affect the maritime area.[499] In adopting a restrictive construction, the Tribunal refused to attribute to article 9 any possibility that it was a provision on "information relating to the environment".[500] It thus found that Ireland had failed to demonstrate that the 14 categories of redacted items were "information" on the activities or measures adversely affecting or likely to affect the maritime area, or even if the 14 categories of items had constituted such information, the activities were not likely to adversely affect the maritime area.[501]

315. In his dissenting opinion, Gavan Griffith QC decried the majority's decision to opt for a strict temporal approach and its rejection of the normative value of other instruments invoked by Ireland, such as the Aarhus Convention. He lamented also that it had not taken into account the adoption of Council Directive 2003/4/EC on public access to environmental information, which had replaced the earlier Directive 90/313/EEC. He insisted that the OSPAR Convention should not have been interpreted as an isolated legal regime without taking into account newly emerged as well as emerging legal instruments.

316. He furthermore disagreed that the second and third categories of activities must be confined by reference to information "on the state of the maritime area". Indeed, the third category was defined by reference to "activities or measures introduced in accordance with the Convention". In his view, as a matter of unambiguous grammatical construction, the expression "any available information" on "activities or measures adversely affecting or likely to affect … the maritime area" was incapable of being confined to "information … on the state of the maritime area".[502] He also considered that the majority had erred in confining itself to a "simplistic application of the definition under review to the 14 objectives of redacted items"[503] and had failed to address the wider question concerning the extent and inclusiveness of the definition. The task of the Tribunal should have been to consider whether the reports as a whole, in principle, fell within the scope of the definition:[504]

> [O]nce [it is] established that the information contained in each Report is, in principle, within Article 9(2), the entire Reports have to be made available under the terms of Article 9(1) except as to parts protected as excepted matter under Article 9(3). There appears no room for a further analysis of redactions, category by category, in the Article 9(2) exercise in the manner summarily engaged by the majority.[505]

[492] *Ibid*.

[493] *Ibid*., pp. 105–106.

[494] *Ibid*., p. 106, para. 163.

[495] *Ibid.*, para. 164.

[496] *Ibid*., p. 107, para. 168.

[497] *Ibid*., p. 108, para. 171.

[498] *Ibid*., pp. 108–109, para. 172; see also *Wilhelm Mecklenburg* v. *Kreis Pinneberg—Der Landrat,* case C–321/96, European Court of Justice, *Reports of Cases before the Court of Justice and the Court of First Instance, 1998–6*, p. 3809.

[499] UNRIAA (see footnote 469 above), p. 109, para. 175.

[500] *Ibid*., p. 110, para. 178.

[501] *Ibid*., para. 179.

[502] *Ibid*., p. 127, para. 38.

[503] *Ibid*., p. 128, para. 41.

[504] *Ibid*., para. 44.

[505] *Ibid*., p. 129, para. 45.

317. The dissenting opinion also found fault with the reasoning of the majority in focusing on the second category of information. The majority had misdirected itself in making a determinative finding of fact of no adverse effect because neither party had contended that the PA and the ADL reports were in themselves activities or measures with respect to the commissioning and operation of the MOX plant.[506] The main point was whether the reports contained information on activities or measures within article 9, paragraph 2. In making the finding as it did, the majority had effectively determined that future radioactive discharges into the Irish Sea did not constitute an activity which was likely to adversely affect the state of the maritime area. In the dissenting view:

> The economic data collected and presented in the PA and ADL Reports was an integral and necessary part of the required process to determine whether the pollution of the marine environment might be legitimised under the nuclear regimes. It was this data that was deployed by the decision-makers, (at the executive level of Ministers of State) in the justification exercise for the commissioning of the MOX Plant.
>
> … It is inherent in the justification test that economic analyses may be determinative of whether future environmental harm is legitimate and whether the activity that is likely to affect the maritime area should be authorised.[507]

318. Mr. Griffith also averred that the majority had erred in assuming that the burden of proof was on Ireland to establish that the MOX fuel production was an activity that was likely to adversely affect the state of the maritime area. By finding that Ireland had "failed to demonstrate"[508] an adverse effect, the majority was acting contrary to the precautionary principle embraced in article 2, paragraph 2 (*a*), of the OSPAR Convention.[509] Moreover, he disagreed with the majority's interpretation of the adverb "likely", which in his view in fact raised a lower threshold than the one ascribed to it by the majority.[510]

319. The majority also had erred in not considering whether the information in the reports would fall within the third category of information. In the view of Mr. Griffith, the third category did not require a direct relationship between the maritime area and information on such activities or measures:[511]

> [I]t suffices to establish that the Reports contain information related to distinct measures or activities introduced in accordance with the OSPAR Convention ... Plainly, the PA and the ADL Reports have had determinative effects on the authorisation of discharges into the maritime area by the United Kingdom government, as the findings of the Reports were used … in preparing the Decision for the Manufacture of MOX fuel.[512]

(ii) *Participation in administrative hearings and legal proceedings*

320. The recommendation by OECD notes that participation in administrative hearings and legal proceedings is intended to facilitate the solution of transfrontier pollution problems. OECD defines the purpose in the following manner:

> The *principle of equal right of access* is designed to make available to actual or potential "victims" of transfrontier pollution who are in a country other than that where the pollution originates, the same administrative or legal procedures as those enjoyed by potential or actual "victims" of a similar pollution in the country where such pollution originates. The application of the principle leads in particular to a situation where two "victims" of the same transfrontier pollution situated on opposite sides of a common frontier have the same opportunity to voice their opinions or defend their interests both at the preventive stage before the pollution has occurred and in the curative stage after damage has been suffered. The national and foreign "victims" may thus participate on an equal footing at enquiries or public hearings organised, for example, to examine the environment impact of a given polluting activity, they may take proceedings in relation to environmental decisions which they wish to challenge without discrimination before the appropriate administrative or legal authorities of the country where the pollution originates, and they may take legal action to obtain compensation for damage, or its cessation.[513]

321. The implementation of the principle of equal access to national remedies requires that participating States remove jurisdictional barriers to civil proceedings for damages and other remedies in respect of environmental injury.[514] For example, the courts of some States do not hear cases where the installation or the conduct leading to injury was in a foreign territory.

322. Moreover, there are difficulties related to a long-standing tradition in some countries, whereby administrative courts have no jurisdiction to hear cases concerning the extraterritorial effects of administrative decisions. Another difficulty arises from conferring sole jurisdiction on the courts of the place where the damage occurred. OECD, while acknowledging these difficulties, nonetheless has supported and endorsed its application.

323. There are a number of instruments that recognize participation in administrative hearings and legal proceedings. Article 6 of the North American Agreement on Environmental Cooperation[515] and article 9 of the Aarhus

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[506] *Ibid.*, pp. 133–134, paras. 65–71.

[507] *Ibid*., p. 144, paras. 109–110.

[508] *Ibid*., p. 136, para. 75.

[509] *Ibid*..

[510] *Ibid*., p. 137, paras. 79–82.

[511] *Ibid*., p. 148, para. 126.

[512] *Ibid.*, p. 150, para. 134.

[513] OECD, Environment Directorate, "Equal right of access in relation to transfrontier pollution—recommendation of the OECD Council and report by the Environment Committee": note by the secretariat (Paris, OECD, 1976).

[514] Boyle, "Making the polluter pay? Alternatives to State responsibility in the allocation of transboundary environmental costs", p. 370.

[515] Article 6 of the North American Agreement on Environmental Cooperation reads:

> "*Private access to remedies*
>
> "1. Each Party shall ensure that interested persons may request the Party's competent authorities to investigate alleged violations of its environmental laws and regulations and shall give such requests due consideration in accordance with law.
>
> "2. Each Party shall ensure that persons with a legally recognized interest under its law in a particular matter have appropriate access to administrative, quasi-judicial or judicial proceedings for the enforcement of the Party's environmental laws and regulations.
>
> "3. Private access to remedies shall include rights, in accordance with the Party's law, such as:
>
> (*a*) to sue another person under that Party's jurisdiction for damages;
>
> (*b*) to seek sanctions or remedies such as monetary penalties, emergency closures or orders to mitigate the consequences of violations of its environmental laws and regulations;
>
> (*c*) to request the competent authorities to take appropriate action to enforce that Party's environmental laws and regulations in order to protect the environment or to avoid environmental harm; or
>
> (*d*) to seek injunctions where a person suffers, or may suffer, loss, damage or injury as a result of conduct by another person

Convention[516] are quite detailed in stipulating the required procedures. EU Directive 2003/4/EC also provides for access to justice provisions in respect of requests for information under the Directive.[517] The African Convention on the Conservation of Nature and Natural Resources provides, in article XVI:

1. The Parties shall adopt legislative and regulatory measures necessary to ensure timely and appropriate

…

(*d*) access to justice in matters related to protection of environment and natural resources.

2. Each Party from which a transboundary environmental harm originates shall ensure that any person in another Party affected by such harm has a right of access to administrative and judicial procedures equal to that afforded to nationals or residents of the Party of origin in cases of domestic environmental harm.

324. Other examples include the Convention on the protection of the environment, article 3 of which provides:

Any person who is affected or may be affected by a nuisance caused by environmentally harmful activities in another Contracting State shall have the right to bring before the appropriate Court or Administrative Authority of that State the question of the permissibility of such activities, including the question of measures to prevent damage, and to appeal against the decision of the Court or the Administrative Authority to the same extent and on the same terms as a legal entity of the State in which the activities are carried out.

325. In North America, the Uniform Transboundary Pollution Reciprocal Access Act provides a model for appropriate legislation removing jurisdictional limits on actions for transboundary damage. It has been implemented in Colorado, Connecticut, Manitoba, Michigan, Montana, New Jersey, Nova Scotia, Ontario, Oregon, Prince Edward Island, South Dakota and Wisconsin. Similarly, article II of the Treaty between the United States and Great Britain relating to boundary waters between the United States and Canada[518] provides for equal right of access, but it is not limited to environmental pollution only. The Agreement on third party liability in the field of nuclear energy between the Federal Republic of Germany and Switzerland[519] applies only to nuclear damage.

326. The 2004 EU Directive on environmental liability anticipates that persons who have standing pursuant to its article 12, paragraph 1, would have access to a court of law or other independent and impartial body competent to review the decisions made by the authority designated at the national level to implement the Directive. The provisions are without prejudice to national law provisions regulating access to justice and those that require that

under that Party's jurisdiction contrary to that Party's environmental laws and regulations or from tortious conduct."

[516] Article 9 of the Aarhus Convention reads:

"*Access to justice*

"1. Each Party shall, within the framework of its national legislation, ensure that any person who considers that his or her request for information under article 4 has been ignored, wrongfully refused, whether in part or in full, inadequately answered, or otherwise not dealt with in accordance with the provisions of that article, has access to a review procedure before a court of law or another independent and impartial body established by law.

"In the circumstances where a Party provides for such a review by a court of law, it shall ensure that such a person also has access to an expeditious procedure established by law that is free of charge or inexpensive for reconsideration by a public authority or review by an independent and impartial body other than a court of law.

"Final decisions under this paragraph 1 shall be binding on the public authority holding the information. Reasons shall be stated in writing, at least where access to information is refused under this paragraph.

"2. Each Party shall, within the framework of its national legislation, ensure that members of the public concerned

"(*a*) Having a sufficient interestor, alternatively,

"(*b*) Maintaining impairment of a right, where the administrative procedural law of a Party requires this as a precondition,

"have access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of article 6 and, where so provided for under national law and without prejudice to paragraph 3 below, of other relevant provisions of this Convention.

"What constitutes a sufficient interest and impairment of a right shall be determined in accordance with the requirements of national law and consistently with the objective of giving the public concerned wide access to justice within the scope of this Convention. To this end, the interest of any non-governmental organization meeting the requirements referred to in article 2, paragraph 5, shall be deemed sufficient for the purpose of subparagraph (*a*) above. Such organizations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (*b*) above.

"The provisions of this paragraph 2 shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law.

"3. In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.

"4. In addition and without prejudice to paragraph 1 above, the procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive. Decisions under this article shall be given or recorded in writing. Decisions of courts, and whenever possible of other bodies, shall be publicly accessible.

"5. In order to further the effectiveness of the provisions of this article, each Party shall ensure that information is provided to the public on access to administrative and judicial review procedures and shall consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice."

[517] Article 6 of the EU Directive reads:

"*Access to justice*

"1. Member States shall ensure that any applicant who considers that his request for information has been ignored, wrongfully refused (whether in full or in part), inadequately answered or otherwise not dealt with in accordance with the provisions of Articles 3, 4 or 5, has access to a procedure in which the acts or omissions of the public authority concerned can be reconsidered by that or another public authority or reviewed administratively by an independent and impartial body established by law. Any such procedure shall be expeditious and either free of charge or inexpensive.

"2. In addition to the review procedure referred to in paragraph 1, Member States shall ensure that an applicant has access to a review procedure before a court of law or another independent and impartial body established by law, in which the acts or omissions of the public authority concerned can be reviewed and whose decisions may become final. Member States may furthermore provide that third parties incriminated by the disclosure of information may also have access to legal recourse.

"3. Final decisions under paragraph 2 shall be binding on the public authority holding the information. Reasons shall be stated in writing, at least where access to information is refused under this Article."

[518] Signed in Washington, D.C. on 11 January 1909 (*Statutes at Large of the United States of America*, vol. XXXVI, part 2, p. 2448).

[519] United Nations, *Treaty Series*, vol. 1554, No. 27004, p. 169.

administrative review procedures be exhausted prior to recourse to judicial proceedings.[520] Further, the United Nations Convention on the Law of the Sea also appears to uphold the requirement of equal access in its article 235, paragraph 2, which reads:

> States shall ensure that recourse is available in accordance with their legal systems for prompt and adequate compensation or other relief in respect of damage caused by pollution of the marine environment by natural or juridical persons under their jurisdiction.

(iii) *Principle of non-discrimination*

327. As for the principle of non-discrimination, OECD states the following:

> The *principle of non-discrimination*, on the other hand, is mainly designed to ensure that the environment is given at least the same protection when pollution has effects beyond the frontier as when it occurs within the country where it originates, all other things being equal. A particular result of application of the principle is that a polluter, situated near the frontier of a country, will not be subject to less severe restrictions than a polluter situated in the interior of such a country in a situation where the two polluters produce similar effects on the environment, either at home or abroad. The principle implies indeed that environmental policies shall not be consistently less strict in frontier regions by reason of the fact that it induces a State to consider on an equal footing extraterritorial ecological damages and national ecological damages.
>
> A second aim of the principle is to ensure that the victims of transfrontier pollution situated in a foreign country receive at least the same treatment as that given to victims of the same pollution who are situated in the country where the pollution originated. In concrete terms, such an approach leads to the victims of transfrontier pollution receiving *at least* the same compensation as that given to a victim suffering the same damage under the same conditions within the national territory.[521]

328. The principle of non-discrimination aims at harmonizing the policies of the State for the protection of the environment within or outside its territory. It also aims at ensuring that the foreigners who suffer from the damage receive the same treatment as that provided for its own citizens under the domestic law of the State in which the damage originated. There is to some extent an analogy with the national treatment of aliens in the law of State responsibility. It may be recalled that there are two views in respect of the treatment of aliens under the international law of State responsibility. One view purports to give aliens the same treatment as the domestic law of the host State provides for its own nationals. The other view opts for a minimum standard of treatment to be granted to aliens when the law of the host State provides for less than the minimum international standard. The principle of non-discrimination, although it deals with the substantive rights of the claimants, does not affect the substance of the claim directly. The OECD secretariat, however, suggests that there may be channels available, because of equal right of access, to the claimants to petition the government and administrative authorities of the States where the harm has originated to change their substantive law, as well as to encourage their governments to negotiate with the government of the State of the polluter.

329. The potential problem with the application of the principle of non-discrimination in the area of the environment lies in the fact that there are sometimes drastic differences between the substantive remedies provided in various States. Because this principle was intended to be applied principally between neighbouring States, it was assumed that there would be some affinity even in the substantive law of the various States concerned or that there would at least be an attempt on their part to harmonize their domestic laws as regards the protection of the environment. A broad application of this principle in respect of long-distance pollution problems as well as between neighbouring States with very diverse environmental policies and laws would create considerable problems.

330. Although the North American Agreement on Environmental Cooperation seeks to provide for reciprocal access to courts and administrative agencies, it does not contain a non-discrimination clause.

(iv) *Limitations of right of equal access*

331. OECD recognizes that the principle of equal right of access is essentially a procedural principle, since it affects the way in which the substance of the victim's claims will be dealt with. The principle was designed primarily to deal with environmental problems occurring among neighbouring States. Geographical proximity presumes some affinity and similarity between the legal systems of the neighbouring States and some similarities between their policies for the protection of the environment. A good example is the Convention on the protection of the environment. The application of this principle in respect of long-distance pollution problems may not be practical or so felicitous.

332. Some authors have also mentioned that the principle favours litigation against defendants in the State where the activity causing the transboundary harm was undertaken. The courts of the State of the defendants may be more sympathetic to the defendants and less informed about the scope of the transfrontier harm. In other words, the State where the harm has occurred has a better chance of assessing the full impact of the damage and is more amenable to hearing actions involving multiple plaintiffs.[522] The jurisdictional regime established under the 1969 Civil Liability Convention whereby an action may be pursued in the courts of the contracting States where the damage has occurred was thus intended to offset such considerations. Such a choice, however, does not alleviate problems relating to service of process on foreign defendants, the inability to secure injunctive relief and difficulties concerning the recognition and enforcement of judgements. Other problems are linked to the possible invocation of sovereign immunity if a State-owned enterprise is the defendant and to the application of the double actionability rule. All these matters must be addressed in a particular agreement. Otherwise, proceeding in the State of injury may be daunting and ineffective.

333. In the circumstances where recourse is taken in the forum of the defendant, equal right of access may prove favourable to a polluter, at the expense of protection of the environment, particularly where the focus of the States concerned is on industrial development. Thus, it has been suggested that the plaintiff should be offered a choice of

[520] Art. 13.

[521] See footnote 513 above.

[522] Boyle, *loc. cit.*, p. 371.

venue. In *Handelskwerkerij G. J. Bier BV* v. *Mines de Potasse d'Alsace S.A.*,[523] the Court of Justice of the European Communities construed the phrase "in the courts of the place where the harmful events occurred" in article 5 of the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters 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 determined that the choice of forum belonged to the plaintiff whom the Convention seeks to protect. In that case, the plaintiff, a Dutch company, was able to proceed in Dutch courts against a French company which operated mines in Alsace, France, where its enterprises had discharged waste salts into the Rhine, causing harm downstream in the Netherlands to crops belonging to the plaintiff. The plaintiff could have proceeded against the defendants in the French courts, where the mine was located or where the defendant was domiciled.

334. Germany's ELA also offers the plaintiff the choice of forum. The Nuclear Ships Convention, the Seabed Mineral Resources Convention and the Lugano Convention[524] also do likewise.

335. The Protocol to amend the Vienna Convention on Civil Liability for Nuclear Damage addresses some of the problems posed by equal access by permitting a State to bring an action in a foreign court on behalf of its nationals, or those with its residence or domicile.[525]

336. It should also be noted that the right of equal access does not guarantee substantive rights of environmental protection. Nor does it provide for any additional procedural guarantees to those that are already available domestically. Moreover, it does not always resolve jurisdictional or choice of law questions. These are obviously critical issues in relation to environmental harm, particularly in a transboundary context. There is no preferred position and several possibilities exist. These include: (*a*) application of the law of the place where the harmful activity is located; (*b*) application of the law of the place where the injury occurred; (*c*) application of some other law, such as the law of the domicile or principal place of business of the defendant; or (*d*) application of the law more favourable to the plaintiff.

(b) *Civil liability*

337. Civil liability regimes have been considered as one other method for implementing the polluter pays principle. These regimes have been used in relation to nuclear and oil pollution as well as other activities such as those involving hazardous wastes. For example, the preamble to the Lugano Convention states that the Convention desires to provide for strict liability taking into account the polluter pays principle. On the other hand, it has been argued that the civil liability conventions do not necessarily implement the polluter pays principle, since States and voluntary contributions from other sources pay for the polluter.

338. It has thus been noted that:

> The extent to which civil liability makes the polluter pay for environmental damage depends on a variety of factors. If liability is based on negligence, not only does this have to be proved, but harm which is neither reasonably foreseeable nor reasonably avoidable will not be compensated and the victim or the taxpayer, not the polluter, will bear the loss. Strict liability is a better approximation of the "polluter pays" principle, but not if limited in amount, as in internationally agreed schemes involving oil tankers or nuclear installations.[526]

339. Other concerns include the possibility of a narrow definition of damage excluding environmental losses that cannot be quantified monetarily; and that the broader use of the strict liability principle does not always indicate who the polluter is, since the focus appears to be on how the liability is shared and the burden is alleviated.[527] In the nuclear field, the adoption of a strict polluter pays approach would create a heavy economic burden. Equitable sharing of risk, with an element of State involvement, appears to be the dominant consideration.

B. Operator liability

340. In some of the domestic laws which have adopted the concept of strict liability, the operator of the activity is liable for damage caused. The definition of operator changes depending upon the nature of the activity. For example, under the 1990 OPA of the United States, the following individuals may be held liable: (*a*) the responsible party, such as the owner or operator of a vessel, onshore or offshore facility, deep-water port and pipeline; (*b*) the "guarantor", the "person, other than the responsible party, who provides evidence of financial responsibility for a responsible party"; and (*c*) third parties (individuals other than those mentioned in the first two categories, their agents or employees or their independent contractors, whose conduct is the sole cause of injury).

341. The United States CERCLA imposes liability on owners and operators of vessels and facilities.[528] The terms "owner" and "operator" are defined as:

> (i) In the case of a vessel, any person owning, operating, or chartering by demise, such vessel;
>
> (ii) In the case of an onshore facility or an offshore facility, any person owning or operating a facility.[529]

342. Section 9607 (*a*) (3) also provides for *arranger* liability: any person who by contract, agreement or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances.

343. Both CERCLA and OPA authorize direct action again the financial guarantor of the responsible person.

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[523] Case 21/76, Court of Justice of the European Communities, *Reports of Cases before the Court, 1976*, No. 8 (Luxembourg), p. 1735.

[524] Art. 19.

[525] Art. XI A.

[526] Birnie and Boyle, *op. cit*., p. 93.

[527] *Ibid*., pp. 93–94.

[528] Sect. 9607 (*a*) (see footnote 150 above).

[529] Sect. 9601 (20) (A) (*ibid*.).

344. Under the Germany's ELA, the "owner" of the "facilities" which caused damage is strictly liable.[530]

345. The Swiss Environmental Protection Act attaches liability to the "owner" of "an enterprise" and "installation". Under the Contaminated Soil Act of Denmark,[531] liability under the Act falls on the "polluter", who is defined as:

(1) Any party who for commercial or public purposes operates or operated the enterprise or uses or used the plant from which the contamination originated. The contamination shall have been released in its entirety or in part during the operation period in question.

(2) Any other party who has caused contamination to occur through reckless conduct or by conduct which falls within stricter liability rules under other legislation.

346. In international law, with very few exceptions, operators and owners are held liable for the damage caused by their activities. This is particularly evident in treaty practice.

1. Treaty practice

347. The operator of activities causing extraterritorial damage or the insurer of the operator may be liable for damage. This is standard practice in conventions primarily concerned with commercial activities.[532] The Protocol of 1992 to amend the Civil Liability Convention provides for a regime of *strict liability* of the *shipowner*. Article 4, paragraph 1, of the Protocol provides:

Except as provided in paragraphs 2 and 3 of this Article, the owner of a ship at the time of an incident, or, where the incident consists of a series of occurrences, at the time of the first such occurrence, shall be liable for any pollution damage caused by the ship as a result of the incident.

348. This provision is largely similar to article III, paragraph 1, of the 1969 Civil Liability Convention.[533] Owner includes the person or persons registered as the owner of the ship or, in the absence of registration, the person or persons owning the ship. However, in the case of the ship owned by a State and operated by a company which

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[530] See article 1 of the Act, in Hoffman, *loc. cit.*, p. 32.

[531] See footnote 191 above.

[532] See, for example, the Additional Convention to the International Convention concerning the Carriage of Passengers and Luggage by Rail (CIV) of 25 February 1961 relating to the Liability of the Railway for Death of and Personal Injury to Passengers. Article 2 of the Additional Convention reads in part:

"1. The railway shall be liable for damage resulting from the death of, or personal injury or any other bodily or mental harm to, a passenger, caused by an accident arising out of the operation of the railway and happening while the passenger is in, entering or alighting from a train.

"...

"6. For the purposes of this Convention, the 'responsible railway' is that which, according to the list of lines provided for in article 59 of CIV, operates the line on which the accident occurs. If, in accordance with the aforementioned list, there is joint operation of the line by two railways, each of them shall be liable."

The operators of railways may be private entities or government agencies. The Additional Convention makes no distinction between them as far as liability and compensation are concerned.

Similarly, the Convention on damage caused by foreign aircraft to third parties on the surface provides for the liability of the operator of an aircraft causing injury to a person on the surface. The relevant articles of the Convention read:

"Principles of liability

"*Article 1*

"1. Any person who suffers damage on the surface shall, upon proof only that the damage was caused by an aircraft in flight or by any person or thing falling therefrom, be entitled to compensation as provided by this Convention …

"*Article 2*

"...

"2. (*a*) For the purposes of this Convention the term 'operator' shall mean the person who was making use of the aircraft at the time the damage was caused, provided that if control of the navigation of the aircraft was retained by the person from whom the right to make use of the aircraft was derived, whether directly or indirectly, that person shall be considered the operator.

"(*b*) A person shall be considered to be making use of an aircraft when he is using it personally or when his servants or agents are using the aircraft in the course of their employment, whether or not within the scope of their authority.

"3. The registered owner of the aircraft shall be presumed to be the operator and shall be liable as such unless, in the proceedings for the determination of his liability, he proves that some other person was the operator and, in so far as legal procedures permit, takes appropriate measures to make that other person a party in the proceedings.

"*Article 3*

"If the person who was the operator at the time the damage was caused had not the exclusive right to use the aircraft for a period of more than fourteen days, dating from the moment when the right to use commenced, the person from whom such right was derived shall be liable jointly and severally with the operator, each of them being bound under the provisions and within the limits of liability of this Convention.

"*Article 4*

"If a person makes use of an aircraft without the consent of the person entitled to its navigational control, the latter, unless he proves that he has exercised due care to prevent such use, shall be jointly and severally liable with the unlawful user for damage giving a right to compensation under Article 1, each of them being bound under the provisions and within the limits of liability of this Convention."

The operators of aircraft may also be private or Government entities. Under article 11, the operators enjoy limitation on liability. However, the operators do not enjoy limitation on liability if the injury was due to their negligence.

Article 12 reads:

"1. If the person who suffers damage proves that it was caused by a deliberate act or omission of the operator, his servants or agents, done with intent to cause damage, the liability of the operator shall be unlimited; provided that in the case of such act or omission of such servant or agent, it is also proved that he was acting in the course of his employment and within the scope of his authority.

"2. If a person wrongfully takes and makes use of an aircraft without the consent of the person entitled to use it, his liability shall be unlimited."

In some circumstances, liability can be imputed to the insurer of the aircraft. The relevant paragraphs of article 16 read:

"5. Without prejudice to any right of direct action which he may have under the law governing the contract of insurance or guarantee, the person suffering damage may bring a direct action against the insurer or guarantor only in the following cases:

"(*a*) where the security is continued in force under the provisions of paragraph 1 (*a*) and (*b*) of this Article;

"(*b*) the bankruptcy of the operator.

"6. Excepting the defences specified in paragraph 1 of this Article, the insurer or other person providing security may not, with respect to direct actions brought by the person suffering damage based upon application of this Convention, avail himself of any grounds of nullity or any right of retroactive cancellation.

"7. The provisions of this Article shall not prejudice the question whether the insurer or guarantor has a right of recourse against any other person."

[533] Article III, paragraph 1, reads:

"Except as provided in paragraphs 2 and 3 of this Article, the owner of a ship at the time of an incident, or where the incident consists of a series of occurrences at the time of the first such occurrence, shall be liable for any pollution damage caused by oil which has escaped or been discharged from the ship as a result of the incident."

in that State is registered as the ship's operator, "owner" shall mean such company.[534]

349. It will be recalled that concerns were voiced at the 1969 Conference that adopted the Civil Liability Convention regarding whether the shipowner or the cargo owner or both should bear the costs of strict liability.[535] The final agreement, holding the shipowner strictly liable, was secured by agreeing to adopt another convention (*a*) to ensure adequate compensation for the victim and (*b*) to distribute the burden of liability by indemnifying the shipowners against part of the liability. This arrangement led to the adoption of the 1971 Fund Convention. The preamble to the Convention sets out the two principal goals mentioned above:

Considering however that this regime does not afford full compensation for victims of oil pollution damage in all cases while it imposes an additional financial burden on shipowners,

Considering further that the economic consequences of oil pollution damage resulting from the escape or discharge of oil carried in bulk at sea by ships should not exclusively be borne by the shipping industry but should in part be borne by the oil cargo interests,

Convinced of the need to elaborate a compensation and indemnification system supplementary to the International Convention on Civil Liability for Oil Pollution Damage with a view to ensuring that full compensation will be available to victims of oil pollution incidents and that the shipowners are at the same time given relief in respect of the additional financial burdens imposed on them by the said Convention.

350. The International Convention on the establishment of an international fund for compensation for oil pollution damage reiterates:

Convinced that the economic consequences of pollution damage resulting from the carriage of oil in bulk at sea by ships should continue to be shared by the shipping industry and by the oil cargo interests.

351. The Bunker Oil Convention also attaches liability on the shipowner. It provides in article 3, paragraph 1:

Except as provided in paragraphs 3 and 4, the shipowner at the time of an incident shall be liable for pollution damage caused by any bunker oil on board or originating from the ship, provided that, if an incident consists of a series of occurrences having the same origin, the liability shall attach to the shipowner at the time of the first of such occurrences.

352. The definition of shipowner is broad. It includes the registered owner, bareboat charterer, manager and operator of the ship.[536]

353. The HNS Convention, in article 7, paragraph 1, provides for strict liability of the *owner* of the ship carrying hazardous substances. The definition of owner is the same as in the Protocol of 1992 to the Civil Liability Convention.

354. In respect of nuclear damage, the 1960 Paris Convention and the revised 2004 Paris Convention provide for the absolute but limited liability of the *operator of a nuclear installation*. In their preamble, both instruments state as their purpose to provide adequate compensation for the victims of nuclear damage and to unify the laws related to nuclear damage in the States parties. Operator in respect to a nuclear installation refers to the person designated by the competent public authority as the operator of the installation.[537]

355. The comparable 1963 Vienna Convention makes an explicit reference to the concept of absolute liability in article IV, where it states that "[t]he liability of the operator for nuclear damage under this Convention shall be *absolute**". The definition of operator is the same as in the 1960 Paris Convention. It further defines person as including an individual, a partnership, a private or public body, an international organization, and a State or any of its constituent subdivisions. The 1963 Vienna Convention contains similar definitions in respect of "operator" and "person".[538]

356. The Nuclear Ships Convention also provides for the absolute liability of the *operator of nuclear ships*.[539] Operator means the person authorized by the licensing State to operate a nuclear ship, or, where a contracting State operates a nuclear ship, that State.[540]

357. Under CRTD the *carrier* is liable.[541] The element of "control" appears in the definition of "carrier". Article 1, paragraph 8, defines "carrier" with respect to an inland navigation vessel as "the person who at the time of

[534] Art. I, para. 3.

[535] See LEG/CONF/C.2/SR.2–13, cited in Abecassis and Jarashow, *op. cit*., p. 253, footnote 1.

[536] Art. 1, para. 3.

[537] Art. 1 (*a*) (vi).

[538] Art. I (*c*) and (*a*).

[539] Article II of the Convention reads:

"1. The operator of a nuclear ship shall be absolutely liable for any nuclear damage upon proof that such damage has been caused by a nuclear incident involving the nuclear fuel of, or radioactive products or waste produced in, such ship.

"2. Except as otherwise provided in this Convention no person other than the operator shall be liable for such nuclear damage."

For writings on this Convention, see Szasz, "The Convention on the Liability of Operators of Nuclear Ships"; and Cigoj, "International regulation of civil liability for nuclear risk".

[540] Art. I, para. 3: "'Person' means any individual or partnership, or any public or private body whether corporate or not, including a State or any of its constituent subdivisions."

[541] The Convention for the Unification of Certain Rules for International Carriage by Air also imposes liability on the carrier in respect of death or bodily injury, damage to baggage or cargo and delay. The relevant articles read:

"*Article 17. Death and Injury of Passengers—Damage to Baggage*

"1. The carrier is liable for damage sustained in case of death or bodily injury of a passenger upon condition only that the accident which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

"2. The carrier liable for damage sustained in case of destruction or loss of, or of damage to, checked baggage upon condition only that the event which caused the destruction, loss or damage took place on board the aircraft or during any period within which the checked baggage was in the charge of the carrier. However, the carrier is not liable if and to the extent that the damage resulted from the inherent defect, quality or vice of the baggage. In the case of unchecked baggage, including personal items, the carrier is liable if the damage resulted from its fault or that of its servants or agents.

"3. If the carrier admits the loss of the checked baggage, or if the checked baggage has not arrived at the expiration of twenty-one days after the date on which it ought to have arrived, the passenger is entitled to enforce against the carrier the rights which flow from the contract of carriage.

"4. Unless otherwise specified, in this Convention the term "baggage" means both checked baggage and unchecked baggage.

"*Article 18. Damage to Cargo*

"1. The carrier is liable for damage sustained in the event of the destruction or loss of, or damage to, cargo upon condition only that the event which caused the damage so sustained took place during the carriage by air.

(*Continued on next page.*)

the incident controls the use of the vehicle on board which the dangerous goods are carried". Under this paragraph, "the person in whose name the vehicle is registered in a public register or, in the absence of such registration, the owner of the vehicle shall be presumed to control the use" of the vehicle unless he proves that "another person controls the use of the vehicle" and he discloses the identity of such a person. With respect to carriage by rail, "the person or persons operating the railway line" is considered the "carrier".

358. The Seabed Mineral Resources Convention attaches liability to the *operator of a continental shelf installation*. The definition of operator also contains an element of control. Operator means the person, whether licensee or not, designated as operator for the purposes of the Convention by the controlling State, or in the absence of such designation, the person who is in overall control of the activities carried on at the installation,[542] and person encompasses an individual or partnership or any public or private body, whether corporate or not, including a State or any of its constituent subdivisions.

359. The same is true of the 2004 EU Directive on environmental liability, which attaches liability on the *operator*. Operator includes any natural or legal, private or public person who operates or controls the occupational activity. In cases where national law so provides, it also includes that person to whom decisive economic power over the technical functioning of such an activity has been delegated, including the holder of a permit or authorization for such an activity or the person registering or notifying such an activity.[543]

360. Under the 2003 Kiev Protocol, the *operator* shall be liable for the damage caused by an industrial accident. The Protocol does not provide a definition of operator. The definition contained in the Convention on the Transboundary Effects of Industrial Accidents, namely any natural or legal person, including public authorities, in charge of an activity, e.g. supervising, planning to carry out or carrying out an activity, should apply to the Protocol.[544]

361. Under articles 6–7 of the Lugano Convention, the *operator* in respect of a dangerous activity or the operator of a site is strictly liable. Operator in article 2, paragraph 5, is defined as "the person who exercises the control of a dangerous activity". And "person" is defined in article 2, paragraph 6, as "any individual or partnership or any body governed by public or private law, whether corporate or not, including a State or any of its constituent subdivisions".

362. Instead of assigning liability to a single operator, the 1999 Basel Protocol envisages, in its article 4, holding *generators, exporters, importers and disposers* strictly liable at different stages of the movement of the transboundary waste.[545] The Basel Convention defines generator as any person, natural or legal, whose activity produces

(*Footnote 541 continued.*)

"2. However, the carrier is not liable if and to the extent it proves that the destruction, or loss of, or damage to, the cargo resulted from one or more of the following:

"(*a*) inherent defect, quality or vice of that cargo;

"(*b*) defective packing of that cargo performed by a person other than the carrier or its servants or agents;

"(*c*) an act of war or an armed conflict;

"(*d*) an act of public authority carried out in connection with the entry, exit or transit of the cargo.

"3. The carriage by air within the meaning of paragraph 1 of this Article comprises the period during which the cargo is in the charge of the carrier.

"4. The period of the carriage by air does not extend to any carriage by land, by sea or by inland waterway performed outside an airport. If, however, such carriage takes place in the performance of a contract for carriage by air, for the purpose of loading, delivery or transhipment, any damage is presumed, subject to proof to the contrary, to have been the result of an event which took place during the carriage by air. If a carrier, without the consent of the consignor, substitutes carriage by another mode of transport for the whole or part of a carriage intended by the agreement between the parties to be carriage by air, such carriage by another mode of transport is deemed to be within the period of carriage by air.

"*Article 19. Delay*

"The carrier is liable for damage occasioned by delay in the carriage by air of passengers, baggage or cargo. Nevertheless, the carrier shall not be liable for damage occasioned by delay if it proves that it and its servants and agents took all measures that could reasonably be required to avoid the damage or that it was impossible for it or them to take such measures.

"*Article 20. Exoneration*

"If the carrier proves that the damage was caused or contributed to by the negligence or other wrongful act or omission of the person claiming compensation, or the person from whom he or she derives his or her rights, the carrier shall be wholly or partly exonerated from its liability to the claimant to the extent that such negligence or wrongful act or omission caused or contributed to the damage. When by reason of death or injury of a passenger compensation is claimed by a person other than the passenger, the carrier shall likewise be wholly or partly exonerated from its liability to the extent that it proves that the damage was caused or contributed to by the negligence or other wrongful act or omission of that passenger. This Article applies to all the liability provisions in this Convention, including paragraph 1 of Article 21.

"*Article 21. Compensation in Case of Death or Injury of Passengers*

"1. For damages arising under paragraph 1 of Article 17 not exceeding 100,000 Special Drawing Rights for each passenger, the carrier shall not be able to exclude or limit its liability.

"2. The carrier shall not be liable for damages arising under paragraph 1 of Article 17 to the extent that they exceed for each passenger 100,000 Special Drawing Rights if the carrier proves that:

"(*a*) such damage was not due to the negligence or other wrongful act or omission of the carrier or its servants or agents; or

"(*b*) such damage was solely due to the negligence or other wrongful act or omission of a third party."

[542] Art. 1, para. 3. In article 1, paragraph 4, controlling State means the State Party which exercises sovereign rights for the purpose of exploring for and exploiting the resources of the seabed and its subsoil in the area in or above which the installation is situated. In the case of an installation extending over areas in which two or more States Parties exercise such rights, these States may agree which of them shall be the controlling State.

[543] Art. 2, para. 6 (see footnote 286 above).

[544] Art. 1 (*e*) of the Convention on the Transboundary Effects of Industrial Accidents.

[545] Article 4 reads:

"1. The person who notifies in accordance with Article 6 of the Convention, shall be liable for damage until the disposer has taken possession of the hazardous wastes and other wastes. Thereafter the disposer shall be liable for damage. If the State of export is the notifier or if no notification has taken place, the exporter shall be liable for damage until the disposer has taken possession of the hazardous wastes and other wastes. With respect to Article 3, subparagraph 6 (*b*), of the Protocol, Article 6, paragraph 5, of the Convention shall apply *mutatis mutandis*. Thereafter the disposer shall be liable for damage.

"2. Without prejudice to paragraph 1, with respect to wastes under Article 1, subparagraph 1 (*b*), of the Convention that have been notified as hazardous by the State of import in accordance with Article 3 of the Convention but not the State of export, the importer shall be liable until the disposer has taken possession of the wastes, if the State of import is the notifier or if no notification has taken place. Thereafter the disposer shall be liable for damage.

hazardous wastes or other wastes, and if that person is not known, the person who is in possession and/or control of such waste. The exporter or importer is the person under the jurisdiction of the State of export or import, as the case may be, who arranges for the export or import of such waste; and disposer is the person to whom such wastes are shipped and who carries out their disposal.[546]

363. Under article 8 of CRAMRA, the primary liability lies with the *operator*, which is defined as a party or an agency or instrumentality of a party or a juridical person established under the law of a party or a joint venture consisting exclusively of any combination of the aforementioned.[547] The sponsoring State remains liable (*a*) if it has failed to comply with its obligations under the Convention and (*b*) if full compensation cannot be provided through the liable operator or otherwise.

364. Pursuant to section 16.1 of the standard clauses for exploration contract annexed to the Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area adopted by the International Seabed Authority on 13 July 2000, the *contractor* is liable for the actual amount of any damage, including damage to the marine environment, arising out of its wrongful acts or omissions, and those of its employees, subcontractors, agents and all persons engaged in working or acting for them.[548]

365. Treaty practice also shows that liability in most of the conventions is joint and several mostly in situations where damage cannot be reasonably separable. Under article IV of the 1969 Civil Liability Convention, joint and several liability attaches to the owner when oil has escaped or has been discharged from two or more ships resulting in pollution damage which is not reasonably separable.[549] Article 5 of the Protocol of 1992 replacing that article IV has a comparable provision. However, it links joint and several liability to an incident involving two or more ships.[550] In both cases, the relevant provisions concerning exoneration of liability would also apply in situations of joint and several liability.

366. The Bunker Oil Convention[551] and the HNS Convention have similar provisions. The HNS Convention makes clear that owners are entitled to invoke the applicable limitations on liability and also that their right of recourse against another owner is not prejudiced.[552]

367. Joint and several liability also applies in respect of nuclear damage. The 1960 Paris Convention establishes a presumption of joint and several liability where separability cannot reasonably be established.[553] The 2004 Paris Convention has a similar provision and makes clear that any part of damage which cannot be reasonably separated is nuclear damage.[554] The 1963 Vienna Convention also provides for such liability where damage is not reasonably separable.[555] The 1997 Vienna

"…

"5. No liability in accordance with this Article shall attach to the person referred to in paragraphs 1 and 2 of this Article, if that person proves that the damage was:

"(*a*) The result of an act of armed conflict, hostilities, civil war or insurrection;

"(*b*) The result of a natural phenomenon of exceptional, inevitable, unforeseeable and irresistible character;

"(*c*) Wholly the result of compliance with a compulsory measure of a public authority of the State where the damage occurred; or

"(*d*) Wholly the result of wrongful intentional conduct of a third party, including the person who suffered damage."

[546] Art. 2, paras. 14–19 of the Basel Convention.

[547] Art. 1, para. 11.

[548] ISBA/6/A/18, annex 4. Section 16 reads:

"16.1 The Contractor shall be liable for the actual amount of any damage, including damage to the marine environment, arising out of its wrongful acts or omissions, and those of its employees, subcontractors, agents and all persons engaged in working or acting for them in the conduct of its operations under this contract, including the costs of reasonable measures to prevent or limit damage to the marine environment, account being taken of any contributory acts or omissions by the Authority.

"16.2 The Contractor shall indemnify the Authority, its employees, subcontractors and agents against all claims and liabilities of any third party arising out of any wrongful acts or omissions of the Contractor and its employees, agents and subcontractors, and all persons engaged in working or acting for them in the conduct of its operations under this contract."

[549] Article IV reads:

"When oil has escaped or has been discharged from two or more ships, and pollution damage results therefrom, the owners of all the ships concerned, unless exonerated under Article III, shall be jointly and severally liable for all such damage which is not reasonably separable."

[550] Article 5 reads:

"When an incident involving two or more ships occurs and pollution damage results therefrom, the owners of all the ships concerned, unless exonerated under Article III, shall be jointly and severally liable for all such damage which is not reasonably separable."

[551] Article 5 reads:

"Incidents involving two or more ships

"When an incident involving two or more ships occurs and pollution damage results therefrom, the ship-owners of all the ships concerned, unless exonerated under article 3, shall be jointly and severally liable for all such damage which is not reasonably separable."

[552] Article 8 reads:

"1. Whenever damage has resulted from an incident involving two or more ships each of which is carrying hazardous and noxious substances, each owner, unless exonerated under article 7, shall be liable for the damage. The owners shall be jointly and severally liable for all such damage which is not reasonably separable.

"2. However, owners shall be entitled to the limits of liability applicable to each of them under article 9.

"3. Nothing in this article shall prejudice any right of recourse of an owner against any other owner."

[553] Article 3 reads:

"…

"(*b*) Where the damage or loss is caused jointly by a nuclear incident and by an incident other than a nuclear incident, that part of the damage or loss which is caused by such other incident shall, to the extent that it is not reasonably separable from the damage or loss caused by the nuclear incident, be considered to be damage caused by the nuclear incident. Where the damage or loss is caused jointly by a nuclear incident and by an emission of ionizing radiation not covered by this Convention, nothing in this Convention shall limit or otherwise affect the liability of any person in connection with that emission of ionizing radiation."

[554] Article 3 reads:

"...

"(*b*) Where nuclear damage is caused jointly by a nuclear incident and by an incident other than a nuclear incident, that part of the damage which is caused by such other incident, shall, to the extent that it is not reasonably separable from the nuclear damage caused by the nuclear incident, be considered to be nuclear damage caused by the nuclear incident. Where nuclear damage is caused jointly by a nuclear incident and by an emission of ionizing radiation not covered by this Convention, nothing in this Convention shall limit or otherwise affect the liability of any person in connection with that emission of ionizing radiation."

[555] Article II reads:

"...

"3. (*a*) Where nuclear damage engages the liability of more than one operator, the operators involved shall, in so far as the damage

(*Continued on next page.*)

Convention[556] and the 1997 Supplementary Compensation Convention have similar provisions. However, they contemplate placement of limitations on the use of public funds by the State of installation.[557]

368. The Nuclear Ships Convention provides for joint and several liability in cases where damage cannot be reasonably separable. The share of contribution is proportional to the fault attributable, or where it cannot be determined, the share is equal.[558]

369. CRTD also anticipates joint and several liability with respect to carriage by rail, in which case the person or persons operating the railway line on which the incident occurred are each considered a carrier if they carried a joint operation.[559] The Lugano Convention also contemplates joint and several liability for operators of dangerous sites or installations. The burden of proof is on the operator to prove that he or she is liable for only part of the damage.[560]

370. Instead of focusing on joint and several liability as such, some instruments stress the procedural ability to sue more than one person. Thus, under 1999 Basel Protocol the claimant has a right to seek full compensation from generators, exporter, importer or disposer.[561] The 2003 Kiev Protocol has a provision of similar import. The claimant has a right to proceed with a claim for damages against any one of the operators. The operator has the burden of proving that he is only responsible for part of the damage.[562]

371. The 2004 EU Directive on environmental liability acknowledges that not all forms of environmental damage can be remedied through liability. In order for liability to be effective, there must be one or more identifiable polluters. Moreover, the damage should be concrete and quantifiable, and a causal link must be established between the damage and the identified polluter. Thus, liability is not a suitable instrument for dealing with pollution of a widespread, diffuse character, where it is impossible to link the negative environmental effects with the acts or failure to act of individual actors. Although it does not provide for joint and several liability, the EU Directive, in article 9, provides that it is without prejudice to any provisions of national regulations concerning cost allocation in cases of multiple-party causation, especially concerning the apportionment of liability between the producer and the user of a product.[563]

2. Judicial decisions and State practice outside treaties

372. No clear picture of the liability of the operator can be derived from judicial decisions or official correspondence. These sources yield no instances where the operator has been held to be solely liable for payment of compensation for transboundary injuries resulting from his activities. However, in a judgement rendered in a domestic context by the Indian Supreme Court in *Indian Council*

(*Footnote 555 continued.*)

attributable to each operator is not reasonably separable, be jointly and severally liable.

"(*b*) Where a nuclear incident occurs in the course of carriage of nuclear material, either in one and the same means of transport, or, in the case of storage incidental to the carriage, in one and the same nuclear installation, and causes nuclear damage which engages the liability of more than one operator, the total liability shall not exceed the highest amount applicable with respect to any one of them pursuant to article V.

"(*c*) In neither of the cases referred to in sub-paragraphs (*a*) and (*b*) of this paragraph shall the liability of any one operator exceed the amount applicable with respect to him pursuant to article V.

"4. Subject to the provisions of paragraph 3 of this article, where several nuclear installations of one and the same operator are involved in one nuclear incident, such operator shall be liable in respect of each nuclear installation involved up to the amount applicable with respect to him pursuant to article V."

[556] Article 4 reads:

"...

"3. (*a*) Where nuclear damage engages the liability of more than one operator, the operators involved shall, in so far as the damage attributable to each operator is not reasonably separable, be jointly and severally liable. The Installation State may limit the amount of public funds made available per incident to the difference, if any, between the amounts hereby established and the amount established pursuant to paragraph 1 of article V".

[557] Article 7 of the annex reads:

"1. Where nuclear damage engages the liability of more than one operator, the operators involved shall, in so far as the damage attributable to each operator is not reasonably separable, be jointly and severally liable. The Installation State may limit the amount of public funds made available per incident to the difference, if any, between the amounts hereby established and the amount established pursuant to Article 4.1. "

[558] Article VII reads:

"1. Where nuclear damage engages the liability of more than one operator and the damage attributable to each operator is not reasonably separable, the operators involved shall be jointly and severally liable for such damage. However, the liability of any one operator shall not exceed the limit laid down in Article III.

"2. In the case of a nuclear incident where the nuclear damage arises out of or results from nuclear fuel or radioactive products or waste of more than one nuclear ship of the same operator, that operator shall be liable in respect of each ship up to the limit laid down in Article III.

"3. In case of joint and several liability, and subject to the provisions of paragraph 1 of this Article:

"(*a*) Each operator shall have a right of contribution against the other in proportion to the fault attaching to each of them;

"(*b*) Where circumstances are such that the degree of fault cannot be apportioned, the total liability shall be borne in equal parts."

[559] Article 5 reads:

"…

"2. If an incident consists of a series of occurrences having the same origin, the liability shall attach to the carrier at the time of the first of such occurrences.

"3. If two or more persons referred to in article 1, paragraph 8 (*b*) are liable as a carrier under this Convention, they shall be jointly and severally liable."

[560] Article 11 reads as follows:

"*Plurality of installations or sites*

"When damage results from incidents which have occurred in several installations or on several sites where dangerous activities are conducted or from dangerous activities under Article 2, paragraph 1, sub-paragraph *d*, the operators of the installations or sites concerned shall be jointly and severally liable for all such damage. However, the operator who proves that only part of the damage was caused by an incident in the installation or on the site where he conducts the dangerous activity or by a dangerous activity under Article 2, paragraph 1, sub-paragraph *d*, shall be liable for that part of the damage only."

[561] Article 4 reads:

"…

"6. If two or more persons are liable according to this Article, the claimant shall have the right to seek full compensation for the damage from any or all of the persons liable."

[562] Article 4 reads:

"…

"4. If two or more operators are liable according to this article, the claimant shall have the right to seek full compensation for the damage from any or all of the operators liable. However, the operator who proves that only part of the damage was caused by an industrial accident shall be liable for that part of the damage only."

[563] Directive 2004/35/CE (see footnote 286 above).

for Enviro-Legal Action v. *Union of India and others* (see paragraph 279 above), the Court ruled that:

> [O]nce the activity carried on is hazardous or inherently dangerous, the *person** carrying on such activity is liable to make good the loss caused to any other person by his activity *irrespective* of the fact whether he took reasonable care while carrying on his activity. The rule is premised upon the very nature of the activity carried on.[564]

373. The Supreme Court of India thus held chemical industrial plants liable for operating without permits and for not adhering to effluent discharge standards. The industries were:

> absolutely liable to compensate for the harm caused by them to villagers in the affected areas, to the soil and to the underground water and, hence, they are bound to take all necessary measures to remove sludge and other pollutants lying in the affected areas. The "Polluter Pays principle" as interpreted by this Court means that the absolute liability for harm to the environment extends not only to compensate the victims of pollution but also the cost of restoring the environmental degradation. Remediation of the damaged environment is part of the process of "Sustainable Development" and as such [the] polluter is liable to pay the cost to the individual sufferers as well as the cost of reversing the damaged ecology.[565]

374. The above decision was cited with approval in *M. C. Mehta* v. *Kamal Nath and others*. The Supreme Court of India noted that: "It is thus settled by this Court that one who pollutes the environment must pay to reverse the damage caused by his acts."[566]

375. In other incidents, private operators have voluntarily paid compensation and taken unilateral action to minimize or prevent injuries, but without admitting liability. It is obviously difficult to determine the real reason for unilateral and voluntary action. But it cannot be entirely assumed that this action was taken solely on "moral" grounds. The factors of pressure from the home Government, public opinion or the necessity of a relaxed atmosphere for doing business should not be underestimated. All these pressures may lead to the creation of an expectation which is stronger than a mere moral obligation.

376. In 1972, the *World Bond*, a tanker registered in Liberia, leaked 12,000 gallons of crude oil into the sea while unloading at the refinery of the Atlantic Richfield Corporation, at Cherry Point, in the State of Washington. The oil spread to Canadian waters and fouled five miles of beaches in British Columbia. The spill was relatively small, but it had major political repercussions. Prompt action was taken both by the refinery and by the authorities on either side of the frontier to contain and limit the damage, so that the injury to Canadian waters and shorelines could be minimized. The cost of the clean-up operations was borne by the private operator, the Atlantic Richfield Corporation.[567]

377. In the case of the transfrontier pollution of the air with gaseous fumes from "the stench caused by the activities of"[568] the Peyton Packing Company and the Casuco Company, action was taken unilaterally by those two United States companies to remedy the injury. Similarly, in the *Trail Smelter* case, the Canadian operator, the Consolidated Mining and Smelting Company, acted unilaterally to repair the damage caused by the plant's activities in the State of Washington. On the other hand, in the case of an oil-prospecting project contemplated by a private Canadian corporation in the Beaufort Sea, near the Alaskan border, the Canadian Government undertook to ensure compensation for any damage that might be caused in the United States in the event that the guarantees furnished by the corporation proved insufficient.

378. Following the 2000 Tisza cyanide disaster, during which highly polluted water was discharged from a dam at the Aurul gold mine jointly owned by a Romanian Government-owned company, Remin, and an Australian mining company, Esmeralda Exploration Ltd., the European Commission Vice-President Loyola de Palacio characterized the disaster as "a true European catastrophe" while indicating that the European Union might offer financial assistance. She invoked the polluter pays principle and stated that "there is a clear principle in the EU that in general, who contaminates will pay for the restitution, although full restitution here is impossible".[569]

379. Concerning joint and several liability, the case concerning *Certain Phosphate Lands in Nauru*[570] has a bearing on the question whether a State may proceed to sue one of several States alone, irrespective of a determination as to their joint and several liability. In May 1989, Nauru submitted an application to ICJ that it declare Australia responsible for breaches of international legal obligations relating to its phosphate mining activities in Nauru. It contended that the responsibility of Australia in respect of Nauru's claim was not "qualified, limited or excluded in international law by reason of the involvement of the Governments of the United Kingdom and New Zealand in the arrangements for the administration of Nauru or the exploitation of its phosphate resources from 1919 onwards". Nauru based its claim on the presumption of "the several or concurrent responsibility of States". In its view, the "principle of separate or solidary liability [was] a general rule of international law". Among other cases, the *Corfu Channel* case was cited as illustrative of this proposition.[571]

380. Australia disputed the provenance of the "so-called principle of 'passive solidary responsibility'"[572] as a general rule of international law, and if such existed it could only do so by agreement. Thus, Australia claimed that in a case of an international claim based on joint liability of two or more States, the case was inadmissible and

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[564] *All India Reporter 1996* (see footnote 438 above), p. 1465.

[565] *M. C. Mehta* v. *Kamal Nath and others, Supreme Court Cases 1997*, vol. 1, p. 388.

[566] *Ibid*.

[567] See de Mestral, "Canadian practice in international law during 1972 as reflected in resolutions of the House of Commons and in Government statements in the House of Commons", pp. 333–334.

[568] Whiteman, *Digest of International Law*, vol. 6, pp. 256–259. See also Rubin, "Pollution by analogy: the Trail Smelter arbitration", p. 277, quoted in Handl, "Balancing of interests …", p. 172.

[569] Schwabach, "The Tisza cyanide disaster and international law", p. 10510.

[570] *Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 240.

[571] *I.C.J. Pleadings, Certain Phosphate Lands in Nauru (Nauru* v. *Australia)*, Vol. I, pp. 236–237, para. 622–624 and 628.

[572] *Ibid*., Vol. II, p. 123, para. 295.

jurisdiction exercisable only if all States jointly liable were before ICJ.

381. In its judgment on the preliminary objections, ICJ noted that Australia had raised the question whether the

> liability of the three States would be 'joint and several' (*solidaire*), so that any one of the three [Australia, New Zealand or the United Kingdom] would be liable to make full reparation for damage flowing from any breach of the obligations of the Administering Authority, and not merely a one-third or some other proportionate share. This is a question which the Court must reserve for the merits.[573]

382. ICJ, however, viewed this question to be independent of the question whether Australia could be sued alone. And it found that it did not consider that any reason had been shown

> why a claim brought against only one of the three States should be declared inadmissible *in limine litis* merely because that claim raises questions of the administration of the Territory, which was shared with two other States. It cannot be denied that Australia had obligations under the Trusteeship Agreement, in its capacity as one of the three States forming the Administering Authority, and there is nothing in the character of that Agreement which debars the Court from considering a claim of breach of those obligations by Australia.[574]

383. ICJ acknowledged that a finding by the Court regarding the existence or the content of responsibility attributable to Australia by Nauru might well have implications for the legal situations of New Zealand and the United Kingdom. It nevertheless determined that no finding in respect of that legal situation would be needed as a basis for the Court's decision on Nauru's claims against Australia. Accordingly, it could not decline to exercise its jurisdiction.[575]

384. In his dissenting opinion, Judge Ago recognized the complication involved, noting that "[i]n fact, it is precisely by ruling on these claims against Australia alone that the Court will, *inevitably*, affect the legal situation of the two other States, namely, their rights and their obligations".[576]

385. Judge Schwebel, also in a dissenting opinion, *inter alia*, cast doubt on the authority of the *Corfu Channel* case, noting that "the most that may be gleaned from this case is that, where it appears from the facts alleged or shown that there was some unknown joint tortfeasor, the Court will not dismiss the claim against the named tortfeasor".[577] In his view, if the ICJ judgment against a State would effectively determine the legal obligations of one or more States which were not before the Court, the Court should not proceed to consider rendering judgement against that State in the absence of the others.[578] Considering "the essential fact that, from 1919 until Nauruan independence in 1968, Australia always acted as a member of a joint Administering Authority composed of three States, and always acted on behalf of its fellow members of that Administering Authority as well as its own behalf", a judgment of the Court on the responsibility of Australia was tantamount to a judgment upon the responsibility of its "Partner Governments", New Zealand and the United Kingdom.[579]

386. In August 1993, Australia offered Nauru $A 107 million in full and final settlement of the claim. Nauru accepted the sum and undertook to discontinue the proceedings in ICJ and to bring no further claims.[580]

C. State liability

387. Past trends demonstrate that States have been held liable for injuries caused to other States and their nationals as a result of activities occurring within their territorial jurisdiction or under their control. Even treaties imposing liability on the operators of activities have not in all cases exempted States from liability.

1. Treaty practice

388. In some multilateral treaties, States have agreed to be held liable for injuries caused by activities occurring within their territorial jurisdiction or under their control. Some conventions regulating activities undertaken mostly by private operators impose certain obligations upon the State to ensure that its operators abide by those regulations. If the State fails to do so, it is held liable for the injuries caused by the operator. For example, under article III, paragraph 2, of the Nuclear Ships Convention, the operator is required to maintain insurance or other financial security covering his liability for nuclear damage in such forms as the licensing State specifies. Furthermore, the licensing State has to ensure the payment of claims for compensation for nuclear damage established against the operator by providing the necessary funds up to the limit laid down in article III, paragraph 1, to the extent that the yield of the insurance of the financial security is inadequate to satisfy such claims. Hence, the licensing State is obliged to ensure that the insurance of the operator or the owner of the nuclear ship satisfies the requirements of the Convention. In addition, under article XV of the Convention, the State is required to take all necessary measures to prevent a nuclear ship flying its flag from operating without a licence. If a State fails to do so, and a nuclear ship flying its flag causes injury to others, the flag State is considered to be the licensing State, and it will be held liable for compensation to victims in accordance with the obligations laid down in article III.[581]

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[573] *I.C.J. Reports 1992* (see footnote 570 above), p. 258, para. 48.

[574] *Ibid*., pp. 258–259.

[575] *Ibid*., pp. 261–262, para. 55.

[576] *Ibid*., dissenting opinion of Judge Ago, p. 328.

[577] *Ibid*., dissenting opinion of Judge Schwebel, p. 330.

[578] *Ibid*., p. 331.

[579] *Ibid*., p. 342.

[580] *I.C.J. Pleadings* (see footnote 571 above), Vol. III. See also ILM, vol. XXXII, No. 6 (November 1993), p. 1474.

[581] Article XV of the Convention reads:

"1. Each Contracting State undertakes to take all measures necessary to prevent a nuclear ship flying its flag from being operated without a licence or authority granted by it.

"2. In the event of nuclear damage involving the nuclear fuel of, or radioactive products or waste produced in, a nuclear ship flying the flag of a Contracting State, the operation of which was not at the time of the nuclear incident licensed or authorized by such Contracting State, the owner of the nuclear ship at the time of the nuclear incident shall be deemed to be the operator of the nuclear ship for all the purposes of this Convention, except that his liability shall not be limited in amount.

"3. In such an event, the Contracting State whose flag the nuclear ship flies shall be deemed to be the licensing State for all the purposes of this Convention and shall, in particular, be liable for compensation for victims in accordance with the obligations

389. Furthermore, the 1997 Vienna Convention mandates the installation State to ensure the payment of claims for compensation for nuclear damage which have been established against the operator to the extent that the yield of the financial security is inadequate to satisfy such claims. Article K (*c*) of the 2004 Paris Convention envisages that the Contracting Party within whose territory the nuclear installation of the liable operator is situated would ensure the payment of claims for compensation for nuclear damage which have been established against the operator by providing the necessary funds to the extent that the insurance or other financial security is not available or sufficient to satisfy such claims. The amounts fall within the various limits established by the Convention.

390. For activities involving primarily States, the States themselves have accepted liability. Such is the case under the Convention on international liability for damage caused by space objects. Furthermore, if the launching entity is an international organization, it has the same liability as a launching State, and independently of the launching international organization, those of its members that are parties to the Convention are also jointly and severally liable.[582]

391. The United Nations Convention on the Law of the Sea provides in article 139 that States parties to the Convention shall ensure that activities in the "Area", whether carried out by the State or its nationals, are in conformity with the Convention. When a State party fails to carry out its obligation, it will be liable for damage. The same liability is imposed upon an international organization for activities in the "Area". In this case, States members of international organizations acting together bear joint and several liability. States members of international organizations involved in activities in the "Area" must ensure the implementation of the requirements of the Convention with respect to those international organizations.[583] Similarly, article 263 of the United Nations Convention on the Law of the Sea provides that States and international organizations shall be liable for damage caused by pollution of the marine environment arising out of marine scientific research undertaken by them or on their behalf.

393. Regulation 30 of the Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area[584] provides in part that the responsibility and liability of the Authority shall be in accordance with the United Nations Convention on the Law of the Sea. Furthermore, it is envisaged under section 16 of the standard clauses for exploration contract that the Authority would be liable for the actual amount of any damage to the contractor arising out of its wrongful acts in the exercise of its powers and functions, including violations under article 168, paragraph 2, of the Convention.[585] Such liability takes into account the contributory acts or omissions by the contractor, its employees, agents and subcontractors, and all persons engaged in working or acting for them in the conduct of its operations under the contract. The Authority shall also provide indemnity against

imposed on a licensing State by Article III and up to the limit laid down therein.

"4. Each Contracting State undertakes not to grant a licence or other authority to operate a nuclear ship flying the flag of another State. However, nothing in this paragraph shall prevent a Contracting State from implementing the requirements of its national law concerning the operation of a nuclear ship within its internal waters and territorial sea."

It may also be noted that CRAMRA, in its article 8, paragraph 3 (*a*), provided that damage under the Convention which would not have occurred or continued if the sponsoring State had carried out its obligations under the Convention with respect to its operator should, in accordance with international law, entail *liability** which will be *limited to that portion of liability not satisfied by the operator or otherwise.** The subsequent Protocol on Environmental Protection to the Antarctic Treaty prohibited any activity relating to mineral resources, other than scientific research.

[582] The relevant paragraphs of article XXII read:

"3. If an international intergovernmental organization is liable for damage by virtue of the provisions of this Convention, that organization and those of its members which are States Parties to this Convention shall be jointly and severally liable; provided, however, that:

"(*a*) any claim for compensation in respect of such damage shall be first presented to the organization;

"(*b*) only where the organization has not paid, within a period of six months, any sum agreed or determined to be due as compensation for such damage, may the claimant State invoke the liability of the members which are States Parties to this Convention for the payment of that sum.

"4. Any claim, pursuant to the provision of this Convention, for compensation in respect of damage caused to an organization which has made a declaration in accordance with paragraph 1 of this article shall be presented by a State member of the organization which is a State Party to this Convention."

[583] Article 139 of the Convention reads:

"1. States Parties shall have the responsibility to ensure that activities in the Area, whether carried out by States Parties, or state enterprises or natural or juridical persons which possess the nationality of States Parties or are effectively controlled by them or their nationals, shall be carried out in conformity with this Part. The same responsibility applies to international organizations for activities in the Area carried out by such organizations.

"2. Without prejudice to the rules of international law and annex III, article 22, damage caused by the failure of a State Party or international organization to carry out its responsibilities under this Part shall entail liability; States Parties or international organizations acting together shall bear joint and several liability. A State Party shall not however be liable for damage caused by any failure to comply with this part by a person whom it has sponsored under article 153, paragraph 2 (*b*), if the State Party has taken all necessary and appropriate measures to secure effective compliance under article 153, paragraph 4, and annex III, article 4, paragraph 4.

"3. States Parties that are members of international organizations shall take appropriate measures to ensure the implementation of this article with respect to such organizations."

[584] ISBA/6/A/18, annex.

[585] Article 168 reads in part:

"2. The Secretary-General and the staff shall have no financial interest in any activity relating to exploration and exploitation in the Area. Subject to their responsibilities to the Authority, they shall not disclose, even after the termination of their functions, any industrial secret, proprietary data which are transferred to the Authority in accordance with Annex III, article 14, or any other confidential information coming to their knowledge by reason of their employment with the Authority.

"3. Violations of the obligations of a staff member of the Authority set forth in paragraph 2 shall, on the request of a State Party affected by such violation, or a natural or juridical person, sponsored by a State Party as provided in article 153, paragraph 2 (*b*), and affected by such violation, be submitted by the Authority against the staff member concerned to a tribunal designated by the rules, regulations and procedures of the Authority. The Party affected shall have the right to take part in the proceedings. If the tribunal so recommends, the Secretary-General shall dismiss the staff member concerned."

(*Continued on next page.*)

third-party liability concerning the conduct of operations under the contract.[586]

394. Following the invasion of Kuwait by Iraq, the Security Council, acting under Chapter VII of the Charter of the United Nations, stated, in paragraph 8 of its resolution 674 (1990), that under international law Iraq is "liable for any loss, damage or injury arising in regard to Kuwait and third States, and their nationals and corporations, as a result of the invasion and illegal occupation of Kuwait by Iraq".

395. In its subsequent resolution 687 (1991), the Security Council reaffirmed in paragraph 16 that "Iraq … is liable under international law for any *direct loss*,* damage—including environmental damage and the depletion of natural resources—or injury to foreign Governments, nationals and corporations as a result of its unlawful invasion and occupation of Kuwait". The Council also decided in paragraph 18 to create a fund to pay compensation for the claims falling within paragraph 16 and to establish a commission for the administration of the fund.

396. By its resolution 692 (1991), the Security Council, as contemplated in paragraph 18 of resolution 687 (1991), established the United Nations Compensation Fund as well as UNCC as its subsidiary organ functioning under its authority.[587]

397. In its decision 1, the UNCC Governing Council gave guidance to the Commissioners on the interpretation of "direct loss" as meaning losses resulting from the following situations:

…

(*c*) actions by officials, employees or agents of the Government of Iraq or its controlled entities during [the period 2 August 1990 to 2 March 1991] in connection with the invasion or occupation;

(*d*) the breakdown of civil order in Kuwait or Iraq during that period.[588]

(*Footnote 586 continued.*)

[586] Section 16 of the standard clauses for exploration contract reads (see footnote 548 above):

"…

"16.3 The Authority shall be liable for the actual amount of any damage to the Contractor arising out of its wrongful acts in the exercise of its powers and functions, including violations under article 168, paragraph 2, of the Convention, account being taken of contributory acts or omissions by the Contractor, its employees, agents and subcontractors, and all persons engaged in working or acting for them in the conduct of its operations under this contract.

"16.4 The Authority shall indemnify the Contractor, its employees, subcontractors, agents and all persons engaged in working or acting for them in the conduct of its operations under this contract, against all claims and liabilities of any third party arising out of any wrongful acts or omissions in the exercise of its powers and functions hereunder, including violations under article 168, paragraph 2, of the Convention.

"16.5 The Contractor shall maintain appropriate insurance policies with internationally recognized carriers, in accordance with generally accepted international maritime practice."

[587] For the institutional framework of UNCC, see the report of the Secretary-General pursuant to paragraph 19 of Security Council resolution 687 (1991) (S/22559), sect. I. See also Kazazi, "Environmental damage in the practice of the UN Compensation Commission".

[588] "Criteria for expedited processing of urgent claims" (S/AC.26/1991/1), para. 18. See also S/AC.26/1991/7/Rev.1, paras. 6, 21 and 34, concerning environmental losses.

398. It has thus been suggested that Iraq is responsible for damage to the environment caused by acts of Iraqi servicemen, even if those servicemen were acting in a wholly private capacity, such as private soldiers looting and destroying property in their retreat.[589] In practice, claimants are only required to prove the direct causal link between the environmental loss and the invasion and occupation of Kuwait, and the value of the alleged loss.[590]

2. Judicial decisions and State practice outside treaties

399. Judicial decisions, official correspondence and inter-State relations show that, in certain circumstances, States are held accountable for the private activities conducted within their territorial jurisdiction and for the activities they themselves conduct within or beyond the limits of their territorial border. Even when States have refused to accept liability as a legal principle, they have nevertheless acted as though they accepted such liability, whatever the terms used to describe their position. Most of the cases and incidents examined in this section relate to activities conducted by States.

400. In its judgment in the *Corfu Channel* case, ICJ found Albania responsible for failure to notify British shipping of a dangerous situation in its territorial waters, regardless of whether that situation had been caused by Albania. The Court found that it was the obligation of Albania to notify, for the benefit of shipping in general, the existence of mines in its territorial waters, not only by virtue of the Hague Convention No. VIII of 1907, but also of "certain general and well-recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war ... and every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States".[591] The Court found that no attempt had been made by Albania to prevent the disaster and it therefore held Albania "responsible under international law for the explosions ... and for the damage and loss of human life".[592]

401. In its claim against the USSR in 1979 following the accidental crash on Canadian territory of the nuclear-powered Soviet satellite Cosmos-954, Canada sought to impose "absolute liability" on the Soviet Union by reason of the damage caused by the accident. In arguing the liability of the Soviet Union, Canada invoked not only "relevant international agreements", including the Convention on international liability for damage caused by space objects, but also "general principles of international law".[593]

402. In connection with the construction of a highway in Mexico crossing two canyons draining northwards into the United States, the United States Government considered that, notwithstanding the technical changes that had been made in the project at its request, the highway

[589] Greenwood, "State responsibility and civil liability for environmental damage caused by military operations", p. 409.

[590] Kazazi, *loc. cit.*, p. 120.

[591] *I.C.J. Reports 1949* (see footnote 365 above), p. 22.

[592] *Ibid.*, p. 36. For diverse views as regards whether this judgment establishes strict liability for States, see paragraphs 227–229 above.

[593] See footnote 361 above.

construction, with the potential of failure in certain circumstances of flooding, did not offer sufficient guarantees for the security of property situated in United States territory and reserved its rights in the event of damage resulting from the construction of the highway. In a note dated 29 July 1959 addressed to the Minister for Foreign Relations of Mexico, the United States Ambassador to Mexico concluded:

> In view of the foregoing, I am instructed to reserve all the rights that the United States may have under international law in the event that damage in the United States results from the construction of the highway.[594]

403. In the correspondence concerning the Rose Street Canal,[595] both Mexico and the United States reserved the right to invoke the accountability of the State whose construction activities might cause damage in the territory of the other State. However, in a communication dated 12 May 1955, to the mayor of the city of Douglas, in the State of Arizona, Assistant Secretary of State Holland wrote:

> Since neither the United States nor the city of Douglas would have the right, without the consent of the Government of Mexico, to divert water from its natural course in the United States into Mexico to the detriment of citizens of the latter country, there would seem to be no doubt that Mexico has the right to prevent water coming into Mexico through the Rose Street canal by the construction at any time of a dike on the Mexican side of the international boundary. On the other hand, the principle of international law which obligates every state to respect the full sovereignty of other states and to refrain from creating or authorizing or countenancing the creation on its territory of any agency, such as the Rose Street canal, which causes injury to another state or its inhabitants, is one of long standing and universal recognition.[596]

404. In the correspondence between Canada and the United States regarding the United States Cannikin underground nuclear tests on Amchitka island in Alaska, Canada reserved its rights to compensation in the event of damage in the Pacific. Japan and New Zealand, in diplomatic protests, also reserved the right to hold France and the United States liable for any loss or damage inflicted by further nuclear tests. No claims were however made.[597]

405. The series of United States nuclear tests on Eniwetok Atoll on 1 March 1954 caused injuries extending far beyond the danger area: they injured Japanese fishermen on the high seas and contaminated a great part of the atmosphere and a considerable quantity of fish, thus seriously disrupting the Japanese fish market. Japan demanded compensation. In a note dated 4 January 1955, the United States Government, completely avoiding any reference to legal liability, agreed to pay compensation for injury caused by the tests:

> The Government of the United States of America has made clear that it is prepared to make monetary compensation as an additional expression of its concern and regret over the injuries sustained.
>
> ... The United States of America hereby tenders, ex gratia, to the Government of Japan, without reference to the question of legal liability, the sum of two million dollars for purposes of compensation for the injuries or damages sustained as a result of nuclear tests in the Marshall Islands in 1954.
>
> ...
>
> It is the understanding of the Government of the United States of America that the Government of Japan, in accepting the tendered sum of two million dollars, does so in full settlement of any and all claims against the United States of America or its agents, nationals or juridical entities for any and all injuries, losses or damages arising out of the said nuclear tests.[598]

406. In the case of the injuries sustained in 1954 by the inhabitants of the Marshall Islands, then a Trust Territory administered by the United States, the latter agreed to pay compensation. A report of the Committee on Interior and Insular Affairs of the United States Senate stated that, owing to an unexpected wind shift immediately following the nuclear explosion, the 82 inhabitants of the Rongelap Atoll had been exposed to heavy radioactive fallout. After describing the injuries to persons and property suffered by the inhabitants and the immediate and extensive medical assistance provided by the United States, the report concluded: "It cannot be said, however, that the compensatory measures heretofore taken are fully adequate".[599] The report disclosed that in February 1960 a complaint against the United States had been lodged with the High Court of the Trust Territory with a view to obtaining US$ 8,500,000 as compensation for property damage, radiation sickness, burns, physical and mental agony, loss of consortium and medical expenses. The suit had been dismissed for lack of jurisdiction. The report indicated, however, that bill No. 1988 (on payment of compensation) presented in the House of Representatives was "needed to permit the United States to do justice to these people".[600] On 22 August 1964, President Johnson signed into law an act under which the United States assumed "compassionate responsibility to compensate inhabitants of the Rongelap Atoll, in the Trust Territory of the Pacific Islands, for radiation exposures sustained by them as a result of a thermonuclear detonation at Bikini Atoll in the Marshall Islands on March 1, 1954"[601] and authorized US$ 950,000 to be paid in equal amounts to the affected inhabitants of Rongelap. According to another report, in June 1982, the Administration under President Reagan was prepared to pay US$ 100 million to the Government of the Marshall Islands in settlement of all claims against the United States by islanders whose health and property had been affected by United States nuclear weapons tests in the Pacific between 1946 and 1963.[602]

407. In deliberating the case entitled *In the matter of the People of Enewetak, et al., Claimants for Compensation*, the Marshall Islands Nuclear Claims Tribunal considered a class action claim for damages to land resulting from or arising out of the nuclear testing programme conducted by the United States between 1946 and 1958. The Marshall Islands Nuclear Claims Tribunal Act 1987, as amended, conferred upon "the Tribunal the duty and responsibility to 'decide claims by and disburse compensation to the Government and citizens and nationals of the Marshall

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[594] Whiteman, *op. cit*., vol. 6, p. 262.

[595] *Ibid*., pp. 262–265.

[596] *Ibid*., p. 265.

[597] Birnie and Boyle, *op. cit*., p. 474. See generally Whiteman, *op. cit*., vol. 4, pp. 556–607.

[598] *Department of State Bulletin* (Washington, D.C.), vol. 32, No. 812, 17 January 1955, pp. 90–91.

[599] Whiteman, *op. cit*., vol. 4, p. 567.

[600] *Ibid.*

[601] *Ibid.*

[602] *International Herald Tribune*, 15 June 1982, p. 5, col. 2.

Islands … for existing and prospective loss or damage to person or property which are based on, arise out of or are in any way related to the Nuclear Testing Program'".[603]

408. The framework for these considerations was the Compact of Free Association by which the Marshall Islands and the United States had made provision for the "just and adequate settlement" of claims by Marshallese citizens. Under a related agreement for the implementation of section 177 of the Compact of Free Association, a Claims Tribunal so established was required to "render final determination upon all claims past, present and future, of the Government, citizens and nationals of the Marshall Islands … and to make awards taking into account the validity of the claim, any prior compensation made as a result of such claim, and such other factors as it may deem appropriate".[604]

409. The related agreement also provided that: "In determining any legal issue, the Claims Tribunal may have reference to the laws of the Marshall Islands, including traditional law, to international law and, in the absence of domestic or international law, to the laws of the United States."[605]

410. The Claims Tribunal made a final determination of compensation in the sum of US$ 324,949,311, including US$ 194,154,811 for past and future loss of Eniwetok Atoll to the claimants; US$ 91,710,000 to restore Eniwetok to a safe and productive state; and US$ 34,084,500 for the hardships suffered by the people of Eniwetok as a result of their relocation attendant to their loss of use.

411. In an exchange of notes dated 10 December 1993, Australia accepted an *ex gratia* payment of £20 million from the United Kingdom in settlement of all claims relating to the nuclear tests undertaken by the United Kingdom on Australian territory in the 1950s and 1960s.[606]

412. Although the Chernobyl disaster caused widespread harm to agricultural produce and livestock in Europe, and Governments paid their citizens for destroyed produce as a consequence of precautionary measures taken and also incurred clean-up costs, no claims were made against the former USSR, nor was any voluntary offer of compensation made by the Soviet Government. However, some countries such as Germany, Sweden and the United Kingdom reserved the right to submit claims.[607] In a written response delivered in the House of Commons on 21 July 1986, the Secretary of State for Foreign and Commonwealth Affairs noted that:

> On 10 July we formally reserved our right with the Soviet government to claim compensation on our own behalf on behalf of our citizens for any losses suffered as a consequence of the accident at Chernobyl. The presentation of a formal claim, should we decide to make one, would not take place until the nature and full extent of any damage suffered had been assessed.[608]

413. This position was reiterated on 24 October 1986 when the Minister of State for Agriculture, Fisheries and Food observed: "We have reserved our position on whether the USSR will be required—as it should be if the case is proved—to pay compensation."[609] In a subsequent communication to the House of Commons, the Parliamentary Under-Secretary of State for Scotland stated:

> The USSR is not a party to any of the international conventions relating to third party liability in nuclear energy, and is therefore not subject to any specific treaty obligation to compensate for damage caused outside its national boundaries.[610]

414. The Swedish Government was cognizant of the legal and technical uncertainties involved when it observed:

> In terms of treaties there is no international agreement existing, whether bilateral or multilateral, on the basis of which a Swedish claim for damages against the USSR could be conceived. Insofar as customary international law is concerned, principles exist which might be invoked to support a claim against the USSR. The issues involved, however, are complex from the legal as well as the technical point of view and warrant careful consideration. In present circumstances, the Government has felt that priority should be given, in the wake of the Chernobyl accident, to endeavours of another nature.[611]

415. The arbitral award rendered on 27 September 1968 in the Gut Dam case also bears on State liability. In 1874, a Canadian engineer had proposed to his Government the construction of a dam between Adam Island, in Canadian territory, and Les Galops Island, in the United States, in order to improve navigation on the St. Lawrence River. Following investigations and the exchange of many reports, as well as the adoption of legislation by the United States Congress approving the project, the Canadian Government undertook the construction of the dam in 1903. However, it soon became clear that the dam was too low to serve the desired purposes and, with United States permission, Canada increased its height. Between 1904 and 1951, several man-made changes affected the flow of water in the Great Lakes-St. Lawrence River Basin. While the dam itself was not altered in any way, the level of the waters in the river and in nearby Lake Ontario increased. In 1951–1952, the waters reached unprecedented levels which, in combination with storms and other natural phenomena, resulted in extensive flooding and erosion, causing injuries on both the north and south shores of the lake. In 1953, Canada removed the dam as part of the construction of the St. Lawrence Seaway, but the United States claims for damages allegedly resulting from the presence of the Gut Dam continued to fester for some years.[612]

416. The Lake Ontario Claims Tribunal, established in 1965 to resolve the matter, recognized the liability of Canada, without finding any fault or negligence on the part

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[603] ILM, vol. 39, No. 5 (September 2002), p. 1214.

[604] *Ibid*., pp. 1214–1215.

[605] *Ibid*., p. 1215.

[606] Birnie and Boyle, *op. cit*., p. 494, endnote 195.

[607] *Ibid*., p. 474.

[608] House of Commons, *Hansard*, vol. 102, col. 5 (W) (21 July 1986), quoted in Sands, *Principles of International Environmental Law*, p. 888.

[609] *Ibid*., col. 1455 (24 October 1986), quoted in Sands, *op. cit*., p. 888.

[610] *Ibid*., vol. 122, col. 894 (16 November 1987), quoted in Sands, *op. cit*., p. 888.

[611] Quoted in Sands, *op. cit*., pp. 887–888. For comments of States concerning the question of international liability following the accident, see also IAEA documents GOV/INF/550/Add.1 (1988) and Add.2 (1989). See further Sands, *op. cit*., pp. 888–889, and footnotes 102–105.

[612] See the report of the United States agent before the Lake Ontario Claims Tribunal, "Canada–United States Settlement of Gut Dam Claims (27 September 1968)", ILM, vol. 8 (1969), pp. 128–138.

of Canada. The Tribunal, of course, relied a great deal on the terms of the second condition stipulated in the instrument signed on 18 August 1903 and 10 October 1904, whereby the United States Secretary of War had approved construction of the dam, as well as on Canada's unilateral acceptance of liability. Furthermore, the Tribunal found Canada liable not only towards the inhabitants of Les Galops in connection with the injuries caused by the dam, but also towards all United States citizens. Such responsibility was, moreover, found not to be limited in time to some initial testing period. The Tribunal concluded that the only questions remaining to be settled were whether the Gut Dam had caused the damage for which claims had been filed and the amount of compensation.[613]

417. In some cases, States have denied responsibility and recourse has been had to civil claims. In the 1979 oil well blowout and oil spill of the IXTOC I oil well in the Gulf of Mexico, resulting in a fire and flow of oil into the sea, ultimately entering the territorial waters of the United States and reaching the shores of Texas, Mexico refused to accept any responsibility for injury caused to the United States and the matter was resolved in civil claims. In the agreement concerning settlement of claims arising from the blowout between the United States and SEDCO, the company which chartered the SEDCO drilling rig to the Mexican national oil company, Petroleos Mexicanos (Pemex), it was agreed to resolve claims pending between them. It was also understood that neither party in any way admitted or conceded fault, negligence or legal liability for the initial blowout, the subsequent pollution or any damages actually or allegedly suffered by any party.[614]

418. Other transboundary incidents have occurred owing to activities carried out by Governments within their territories with effects on a neighbouring State, but they have not given rise to official demands for compensation. These incidents have been minor and of an accidental nature.

419. In 1949, Austria made a formal protest to the Government of Hungary against the installation of mines in Hungarian territory close to the Austrian border and demanded their removal, but it did not claim compensation for injuries caused by the explosion of some of the mines on its territory. Hungary had apparently laid the mines to prevent illegal passage across the border. Austria was concerned that during a flood the mines might be washed into Austrian territory and endanger the lives of its nationals resident near the border. These protests, however, did not prevent Hungary from maintaining its minefields. In 1966, a Hungarian mine exploded in Austrian territory, causing extensive damage. The Austrian Ambassador lodged a strong protest with the Hungarian Foreign Ministry, accusing Hungary of violating the uncontested international legal principle according to which measures taken in the territory of one State must not endanger the lives, health and property of citizens of another State. Following a second accident, occurring shortly thereafter, Austria again protested to Hungary, stating that the absence of a public commitment by Hungary to take all measures to prevent such accidents in the future was totally inconsistent with the principle of "good-neighbourliness". Hungary subsequently removed or relocated all minefields away from the Austrian border.[615]

420. In October 1968, during a shooting exercise, a Swiss artillery unit erroneously fired four shells into the territory of Liechtenstein. The facts concerning this incident are difficult to ascertain. However, the Government of Switzerland, in a note to the Government of Liechtenstein, expressed regret for the involuntary violation of the frontier. The Swiss Government stated that it was prepared to compensate all damage caused and that it would take all necessary measures to prevent a recurrence of such incidents.[616]

421. Judicial decisions and official correspondence demonstrate that States have agreed to assume liability for the injurious impact of activities by private entities operating within their territory. The legal basis for such State liability appears to derive from the principle of territorial sovereignty, a concept investing States with exclusive rights within certain portions of the globe. This concept of the function of territorial sovereignty was emphasized in the *Island of Palmas* case.[617] The arbitrator in that case stated that territorial sovereignty:

> cannot limit itself to its negative side, i.e. to excluding the activities of other States; for it serves to divide between nations the space upon which human activities are employed, in order to assure them at all points the minimum of protection of which international law is the guardian.[618]

422. This concept was later formulated in a more realistic way, namely, that actual physical control is the sound basis for State liability and responsibility. ICJ, in its advisory opinion of 21 June 1971 in the *Namibia* case, stated:

> Physical control of a territory, and not sovereignty or legitimacy of title, is the basis of State liability for acts affecting other States.[619]

423. From this perspective, the liability of States for extraterritorial damage caused by private persons under their control is an important issue to be examined in the context of the present study. The following are examples of State practice touching upon this source of State liability.

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[613] Cf. Handl, "State liability for accidental transnational environmental damage by private persons", pp. 538–540, who points out that the Tribunal was not called upon to pronounce on the liability of Canada nor on the standard of liability, but was only called upon to arbitrate on damages. It therefore distorts the issues to suggest that Gut Dam is an illustration of the application of strict liability.

[614] ILM, vol. XXII, No. 3 (May 1983), p. 583. SEDCO agreed to pay US$ 2 million in full and final settlement, and in exchange therefor the United States offered a full and unconditional release of SEDCO, with full reservation of its rights against Perforaciones Marinas del Golfo (Permargo) (the Mexican drilling contractor) and Pemex. On 22 March 1983, SEDCO also agreed to pay US$ 2.14 million to settle four lawsuits filed by fishermen, resorts and others affected by the oil spill.

[615] See Handl, "Conduct of abnormally dangerous activities in frontier areas: the case of nuclear power plant siting", pp. 23–24.

[616] Annuaire suisse de droit international, 1969–1970 (Zürich), vol. 26, p. 158.

[617] *Netherlands* v. *United States of America*, UNRIAA, vol. II (Sales No. 1949.V.1), p. 829.

[618] *Ibid*., p. 839.

[619] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 54, para. 118.

424. In 1948, a munitions factory in Arcisate, in Italy, near the Swiss frontier, exploded and caused varying degrees of damage in several Swiss communes. The Swiss Government demanded reparation from the Italian Government for the damage sustained; it invoked the principle of good-neighbourliness and argued that Italy was liable since it tolerated the existence of an explosives factory, with all its attendant hazards, in the immediate vicinity of an international border.[620]

425. In 1956, the River Mura, forming the international boundary between the former Yugoslavia and Austria, was extensively polluted by the sediments and mud which several Austrian hydroelectric facilities had released by partially draining their reservoirs in order to forestall major flooding. Yugoslavia claimed compensation for the economic loss incurred by two paper mills and for damage to fisheries. In 1959, the two States agreed on a settlement pursuant to which Austria paid monetary compensation and delivered a certain quantity of paper to Yugoslavia.[621] Although the settlement was reached in the framework of the Permanent Austro-Yugoslavian (now Slovenian Austrian) Commission for the Mura River, this is a case in which the injured State invoked the direct liability of the controlling State and the controlling State accepted the claim to pay compensation.

426. In 1971, the Liberian tanker *Juliana* ran aground and split apart off Niigata, on the west coast of the Japanese island of Honshu. The oil of the tanker washed ashore and extensively damaged local fisheries. Liberia, the flag State, offered 200 million yen to the fishermen for damage, which they accepted.[622] In this affair, the Liberian Government accepted the claims for damage caused by the act of a private person. It seems that no allegations of wrongdoing on the part of Liberia were made at an official diplomatic level.

427. Following the 1972 accidental spill of 12,000 gallons of crude oil into the sea at Cherry Point, in the State of Washington, United States, and the resultant pollution of Canadian beaches, the Government of Canada addressed a note to the United States Department of State in which it expressed its grave concern about this "ominous incident" and noted that "the Government wishes to obtain firm assurances that full compensation for all damages, as well as the cost of clean-up operations, will be paid by those legally responsible".[623] Reviewing the legal implications of the incident before the Canadian Parliament, the Canadian Secretary of State for External Affairs stated:

> We are especially concerned to ensure observance of the principle established in the 1938 *Trail Smelter* arbitration between Canada and the United States. This has established that one country may not permit the use of its territory in such a manner as to cause injury to the territory of another and shall be responsible to pay compensation for any injury so suffered. Canada accepted this responsibility in the *Trail Smelter* case and we would expect that the same principle would be implemented in the present situation. Indeed, this principle has already received acceptance by a considerable number of States and hopefully it will be adopted at the Stockholm Conference [United Nations Conference on the Human Environment] as a fundamental rule of international environmental law.[624]

428. Canada, referring to the precedent of the *Trail Smelter* arbitration, claimed that the United States was responsible for the extraterritorial damage caused by acts occurring under its territorial control, regardless of whether the United States was at fault. The final resolution of the dispute did not involve the legal principle invoked by Canada; the private company responsible for the pollution offered to pay the costs of the clean-up operations; the official United States response to the Canadian claim remains unclear.

429. In the 1986 Sandoz disaster, fire broke out at a warehouse located in Schweizerhalle, outside Basel, Switzerland, belonging to Sandoz S.A, a pharmaceutical company. The warehouse contained agricultural chemicals, mainly pesticides. The use of water to douse the fire led to the release into the Rhine river of thousands of cubic metres of water heavily polluted with toxic substances. For several days, fishing and drinking water production, even 1,000 km downstream into the Netherlands, were stopped.[625] The International Commission for the Protection of the Rhine and the Council of Ministers of the Environment of the European Community held meetings subsequently in connection with the spill. There appeared to be no indication of the responsibility of Switzerland in the communiqués issued in respect of those meetings. Instead, both forums spoke of the civil liability of Sandoz.[626] The International Commission decided that the damage had to be repaired or compensated quickly. It was reiterated that "victims would keep the right to claim directly from Sandoz, and that the good offices of the respective governments did not imply any recognition of liability, nor engage the liability of the governments".[627]

430. The Swiss Government indicated that it would offer "its good offices for the settlement of the damages, and even envisaged working towards compensation for damages on an equity basis (i.e., in the cases where according to strict law no damages would need to be paid)".[628] Subsequently, Switzerland agreed to make a "rapid and fair"[629] settlement for damages caused by the accident. Sandoz received, and paid, substantial claims for damages.

431. Immediately after the spill, the environment ministers of France and Germany announced their intentions to seek compensation against Sandoz and Switzerland.[630] The Government of Germany also maintained that the Swiss authorities had negligently omitted to obligate Sandoz to take safety measures and the Swiss Government

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[620] Guggenheim, "La pratique suisse (1956)", p. 169.

[621] See Handl, "State liability ...", pp. 545–546; and *The Times* (London), 2 December 1971, p. 8, col. 1.

[622] *The Times* (London), 1 October 1974; and *Revue générale de droit international public* (Paris), vol. 80, 1975, p. 842.

[623] *Canadian Yearbook of International Law* (Vancouver), vol. XI, 1973, p. 334.

[624] *Ibid.*

[625] See Oliveira, "The Sandoz blaze: the damage and the public and private liabilities"; Pisillo-Mazzeschi, "Forms of international responsibility for environmental harm"; and Schwabach, "The Sandoz spill: the Failure of international law to protect the Rhine from pollution".

[626] Oliveira, *loc. cit*., p. 434.

[627] *Ibid*., p. 435.

[628] *Ibid.*

[629] Schwabach, "The Sandoz spill ...", p. 453.

[630] *Ibid*., p. 469.

acknowledged its lack of due diligence in preventing the accident through adequate regulation of its own pharmaceutical industries.[631] However, no claims against Switzerland were pursued.[632]

432. In 1973, a major contamination occurred in the Swiss canton of Bâle-Ville owing to the production of insecticides by a French chemical factory across the border. The contamination caused damage to the agriculture and environment of the canton and destroyed some 10,000 litres of milk production per month.[633] The facts of the case and the diplomatic negotiations that followed are difficult to ascertain. The Swiss Government apparently intervened and negotiated with the French authorities in order to halt the pollution and obtain compensation for the damage. The reaction of the French authorities is unclear; it appears, however, that persons injured brought charges in French courts.

433. During negotiations between the Canada and the United States regarding a plan for oil prospection in the Beaufort Sea, near the Alaskan border, the Canadian Government undertook to guarantee payment of any damage that might be caused in the United States by the activities of the private corporation that was to undertake the prospecting. Although the private corporation was to furnish a bond covering compensation for potential victims in the United States, the Canadian Government accepted liability on a subsidiary basis for payment of the cost of transfrontier damage should the bonding arrangement prove to be inadequate.

[631] Pisillo-Mazzeschi, *loc. cit*., p. 31.

[632] Schwabach, "The Sandoz spill ...", p. 469.

[633] Caflisch, "La pratique suisse en matière de droit international public 1973", p. 147.

Chapter III

Exoneration from liability

434. Under domestic laws, some grounds for exoneration from liability have been anticipated. For example, in the United States, section 2703 (*a*) of OPA provides for "complete defense", meaning that a responsible party is not liable if it shows by a preponderance of evidence that

> the discharge … and the resulting damages or removal costs were caused solely by—
>
> (1) an act of God;
>
> (2) an act of war;
>
> (3) an act or omission of a third party, other than an employee or agent of the responsible party or a third party whose act or omission occurs in connection with any contractual relationship with the responsible party (except where the sole contractual arrangement arises in connection with carriage by a common carrier by rail).

435. But a "third party" defence is available only if the responsible party establishes by a preponderance of the evidence that it:

> (A) exercised due care with respect to the oil concerned, taking into consideration the characteristics of the oil and in light of all relevant facts and circumstances; and
>
> (B) took precautions against foreseeable acts or omissions of any such third party and the foreseeable consequences of those acts or omissions; or
>
> (4) any combination of [the above].

436. In addition, section 2702 (*d*) (1) (A) of OPA, on the liability of third parties, provides that in any case in which a responsible party establishes that a discharge and the resulting removal costs and damages were caused solely by an act or omission of one or more third parties described in section 2703 (*a*) (3), the third party shall be treated as the responsible party for the purposes of determining liability. The third-party defence of this provision seems illusory. Under section 2702 (*d*) (1) (B) (i)–(ii), the responsible party shall pay damages to the claimant and shall be entitled by subrogation to all rights of the United States Government and the claimant to recover removal costs and damages from the third party.

437. These defences are not available if, under section 2703 (*c*) of OPA, the responsible party fails or refuses:

> (1) to report the incident as required by law if the responsible party knows or has reasons to know of the incident;
>
> (2) to provide all reasonable cooperation and assistance requested by a responsible official in connection with the removal activities; or
>
> (3) without sufficient cause, to comply with an order issued under subsection (*c*) or (*e*) of section 1321 ... or the Intervention on the High Seas Act.

438. Furthermore, under section 2703 (*b*) of OPA, a responsible party is not liable to a claimant to the extent that the incident is caused by the *gross negligence or wilful misconduct of the claimant*.* Under sections 2709–2710, where a responsible party does not have a complete defence, it may proceed against a third party for contribution in case the discharge was caused, at least in part, by the third party or for indemnity.

439. Similar defences are available under the Clean Water Act, sect. 1321 (*f*). They include:

> (A) an act of God,
>
> (B) an act of war,
>
> (C) negligence on the part of the United States Government, or
>
> (D) an act or omission of a third party without regard to whether any such act or omission was or was not negligent, or any combination of the foregoing clauses.

440. CERCLA also provides the following defences in section 9607 (*b*) for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by:

> (1) an act of God;
>
> (2) an act of war;
>
> (3) an act or omission of a third party other than an employee or agent of the defendant, or other than one whose act or omission occurs

in connection with a contractual relationship, existing directly or indirectly, with the defendant … if the defendant establishes …that:

(*a*) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and

(*b*) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions; or

(4) any combination of the [above].[634]

441. Germany's ELA provides for the following grounds for exoneration from liability: (*a*) damage caused by force majeure (*höhere Gewalt*);[635] and (*b*) if the damage is "only insubstantial" or "reasonable according to the local conditions".[636] This exclusion applies only if the facility is "operated properly",[637] meaning that it has complied with all the required safety regulations. In contrast, the Federal Soil Protection Act,[638] which is an administrative environmental legislation providing a uniform national system of rules for soil protection and clean-up of contaminated sites, contains fewer defences against liability. Under article 4, paragraph 5, the objective of remediation may be reduced from full elimination to some less onerous measure, such as containment, where (*a*) at the time the pollution was caused, the defendant did not expect harm to occur because his actions were within the legal requirements; and (*b*) his good faith is worthy of protection, taking account of the circumstances of the case. The Act also provides for the defence of the innocent owner. However, it is available to past, and not current, owners and occupiers. Proportionality and discretion on the part of the competent authorities may also be invoked for protection.

442. Under the 1999 Contaminated Soil Act of Denmark, *war, civil unrest, nuclear damage or natural disaster* as well as fire or criminal damage, where the resulting harm was not caused by either reckless conduct on the part of the polluter or conduct subject to stricter liability rules elsewhere, constitute defences to remediation orders. Also applicable are the *de minimis* ("insignificant proportion"[639]) exemptions and the innocent owner or innocent successor defences. In the earlier 1994 Act on Compensation for Damage to the Environment, defences included compulsory order of a public authority and deliberate or negligent contribution of the plaintiff (gross negligence in cases of personal injury, simple negligence for property damage).

443. The Belgian Law of 20 January 1999 on protection of the marine environment in the marine areas under Belgian jurisdiction includes as *defences: war, civil war, terrorism or a natural phenomenon of an exceptional, unavoidable and irresistible nature*; a deliberate act or omission of a third party with the intention of causing the harm; and negligence or other prejudicial act on the part of an authority responsible for navigational aids.[640]

444. Under English common law, the *Rylands* v. *Fletcher* rule appears to recognize certain exceptions. Its application is excluded in works constructed or conducted under statutory authority. Acts of God or acts of third parties also exclude its application. Thus a rat gnawing a hole in a wooden gutter box sufficed as an act of God in *Carstairs* v. *Taylor*, and in *Rickards* v. *Lothian* an act of a vandal who blocked a washbasin and turned on the tap was enough to constitute an act of a third party thus excluding the application of *Rylands* v. *Fletcher*. Questions of remoteness, whether escape is an essential element of the rule, questions concerning "non-natural user"[641] and whether personal injuries are recoverable under the rule, have all been a subject of determination and may have a bearing on the application or non-application of the rule and therefore could constitute a basis for exoneration in the circumstances of a particular case.

445. Under section 27, paragraph 3 (*e*) the Environmental Protection Act 1991 of Mauritius, *force majeure*, third-party liability and exclusive liability of the victim (*la faute du tiers*, and *la faute exclusive de la victime*) do not constitute defences for purposes of an action for damages in relation to spills.[642]

446. In inter-State relations, as under domestic law, there are certain circumstances in which liability may be ruled out. The principles governing exoneration from liability in inter-State relations are similar to those applying in domestic law, such as *war, civil insurrection, natural disasters of an exceptional character*, etc. *Contributory negligence* by the injured party is also held to extinguish the total or partial liability of the operator or the acting State in some multilateral conventions.

A. Treaty practice

447. Under article III, paragraphs 2–3, of the 1969 Civil Liability Convention, *war, hostilities, civil war, insurrection or natural phenomena of an exceptional, inevitable and irresistible character* are elements providing exoneration from liability for the owner, independently of negligence on the part of the claimant. When the damage is wholly caused by the negligence or other wrongful act of any Government or authorities responsible for the maintenance of lights or other navigational aids, the owner is exonerated from liability. The burden of proof is on the shipowner.

[634] Where an owner or operator has actual knowledge of a release of a hazardous material at the facility and subsequently transfers the property to another person without disclosing that information, the former owner or operator remains liable and cannot invoke the defence under section 9607 (*b*) (3).

[635] Sect. 4 of the Act.

[636] Hoffman, *loc. cit*, p. 32, footnote 29.

[637] Sect. 5 of the Act. This exclusion applies only if the facility is "operated properly", meaning that it has complied with all the regulatory instructions and that there has been no interruption of the operation (Hoffman, *ibid*.).

[638] The Act was adopted in March 1998. The majority of its provisions became effective on 1 March 1999. The Act has been further implemented by the Federal Soil Protection and Contaminated Sites Ordinance of 12 July 1999. See generally Clarke, *op. cit*., p. 42.

[639] Clarke, *op. cit*., p. 31.

[640] *Ibid*., p. 65. See also, generally, Cousy and Droshout, *loc. cit*.

[641] See generally the judgement of Lord Hoffmann in *Transco plc* v. *Stockport Metropolitan Borough Council* (footnote 122 above), for analysis and citations of various cases.

[642] Sinatambou, *loc. cit*., p. 277.

448. Article III, paragraphs 2–3, of the 1969 Civil Liability Convention read:

2. No liability for pollution damage shall attach to the owner if he proves that the damage:

(*a*) resulted from an act of war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional, inevitable and irresistible character, or

(*b*) was wholly caused by an act or omission done with intent to cause damage by a third party, or

(*c*) was wholly caused by the negligence or other wrongful act of any Government or other authority responsible for the maintenance of lights or other navigational aids in the exercise of that function.

3. If the owner proves that the pollution damage resulted wholly or partially either from an act or omission done with intent to cause damage by the person who suffered the damage or from the negligence of that person, the owner may be exonerated wholly or partially from his liability to such person.

449. Article III of the 1969 Civil Liability Convention, article 3 of the Bunker Oil Convention and article 7 of the HNS Convention also contain similar exemptions in respect of liability and contributory negligence.[643] In addition, under article 7, paragraph 2 (*d*), of the HNS Convention, liability shall not attach to the owner if the owner proves that:

the failure of the shipper or any other person to furnish information concerning the hazardous and noxious nature of the substances shipped either

(i) has caused the damage, wholly or partly; or

(ii) has led the owner not to obtain insurance in accordance with article 12;

provided that neither the owner nor its servants or agents knew or ought reasonably to have known of the hazardous and noxious nature of the substances shipped.

450. Article 3 of the Seabed Mineral Resources Convention provides similar language in respect of the *operator of an installation*. Furthermore, the operator of an abandoned well is not liable for pollution damage if he proves that the incident which caused the damage occurred more than five years after the date on which the well was abandoned under the authority and in accordance with the requirements of the controlling State. If the well has been abandoned in other circumstances, the liability of the operator is governed by the applicable national law.

451. Under CRTD, the *carrier* shall not be liable if he can prove that:

(*a*) The damage resulted from an act of war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional, inevitable and irresistible character, or

(*b*) The damage was wholly caused by an act or omission with the intent to cause damage by a third party; or

(*c*) The consignor or any other person failed to meet his obligation to inform him of the dangerous nature of the goods, and that neither he nor his servants or agents knew or ought to have known of their nature.[644]

452. Exemptions are also provided for in respect of instruments concerning nuclear damage. Article IV, paragraph 3, of the 1963 Vienna Convention provides for exoneration from liability if the injury is caused by a nuclear incident *directly* due to an act of *armed conflict, hostilities, civil war or insurrection*. Unless the domestic law of the installation State provides to the contrary, the operator is not liable for nuclear damage caused by a nuclear incident directly due to a *grave natural disaster of an exceptional character*.[645] This provision was amended by the 1997 Protocol. Article 6, paragraph 3, of the 1997 Vienna Convention reads:

No liability under this Convention shall attach to an operator if he proves that the nuclear damage is directly due to an act of armed conflict, hostilities, civil war or insurrection.

[643] See also article 6 of the Convention on damage caused by foreign aircraft to third parties on the surface, which reads:

"1. Any person who would otherwise be liable under the provisions of this Convention shall not be liable for damage if he proves that the damage was caused solely through the negligence or other wrongful act or omission of the person who suffers the damage or of the latter's servants or agents. If the person liable proves that the damage was contributed to by the negligence or other wrongful act or omission of the person who suffers the damage, or of his servants or agents, the compensation shall be reduced to the extent to which such negligence or wrongful act or omission contributed to the damage. Nevertheless there shall be no such exoneration or reduction if, in the case of the negligence or other wrongful act or omission of a servant or agent, the person who suffers the damage proves that his servant or agent was acting outside the scope of his authority.

"2. When an action is brought by one person to recover damages arising from the death or injury of another person, the negligence or other wrongful act or omission of such other person, or of his servants or agents, shall also have the effect provided in the preceding paragraph."

Furthermore, article 2, paragraphs 3–4, of the Additional Convention to CIV, provides:

"3. The railway shall be relieved wholly or partly of liability to the extent that the accident is due to the passenger's wrongful act or neglect or to behaviour on his part not in conformity with the normal conduct of passengers.

"4. The railway shall be relieved of liability if the accident is due to a third party's behaviour which the railway, in spite of taking the care required in the particular circumstances of the case, could not avoid and the consequences of which it was unable to prevent."

[644] Article 3 of CRTD reads in part:

"3. No liability for pollution damage shall attach to the operator if he proves that the damage resulted from an act of war, hostilities, civil war, insurrection, or a natural phenomenon of an exceptional, inevitable and irresistible character.

"4. No liability for pollution damage shall attach to the operator of an abandoned well if he proves that the incident which caused the damage occurred more than five years after the date on which the well was abandoned under the authority and in accordance with the requirements of the Controlling State. Where a well has been abandoned in other circumstances, the liability of the operator shall be governed by the applicable national law.

"5. If the operator proves that the pollution damage resulted wholly or partly either from an act or omission done with intent to cause damage by the person who suffered the damage or from the negligence of that person, the operator may be exonerated wholly or partly from his liability to such person."

[645] Article IV, paragraph 3, of the 1963 Vienna Convention provides:

"3. (*a*) No liability under this Convention shall attach to an operator for nuclear damage caused by a nuclear incident directly due to an act of armed conflict, hostilities, civil war or insurrection.

"(*b*) Except in so far as the law of the Installation State may provide to the contrary, the operator shall not be liable for nuclear damage caused by a nuclear incident directly due to a grave natural disaster of an exceptional character."

453. The 1997 Vienna Convention provided a model for the subsequent 2004 Paris Convention, article J of which states: "The operator shall not be liable for damage caused by a nuclear incident *directly due to an act of armed conflict, hostilities, civil war, or insurrection*." It replaces the earlier article 9 of the 1960 Paris Convention, which provides:

> The operator shall not be liable for damage caused by a nuclear incident directly due to an act of armed conflict, hostilities, civil war, insurrection or, except in so far as the legislation of the Contracting Party in whose territory his nuclear installation is situated may provide to the contrary, a grave natural disaster of an exceptional character.

454. In both the 1997 and the 1963 Vienna Conventions, if the injury is caused as a result of the gross negligence of the claimant or an act or omission of such person with intent to cause damage, the competent court may, if its domestic law so provides, relieve the operator wholly or partly from his obligation to pay damage to such person. However, it is the operator who should prove the negligence of the claimant.[646]

455. Under article 1 of the Convention relating to civil liability in the field of maritime carriage of nuclear material, a person would be exonerated if the operator would otherwise be liable under the 1960 Paris Convention or the 1963 Vienna Convention or no less favourable national law. Article 4 has a provision on contributory negligence similar to article IV of the 1997 and 1963 Vienna Conventions.

456. The annex to the 1997 Supplementary Compensation Convention also provides for exemptions. Under article 3:

> ...
>
> 5. (*a*) No liability shall attach to an operator for nuclear damage caused by a nuclear incident directly due to an act of armed conflict, hostilities, civil war or insurrection.
>
> (*b*) Except insofar as the law of the Installation State may provide to the contrary, the operator shall not be liable for nuclear damage caused by a nuclear incident caused directly due to a grave natural disaster of an exceptional character.
>
> …
>
> 7. The operator shall not be liable for nuclear damage:
>
> (*a*) to the nuclear installation itself and any other nuclear installation, including a nuclear installation under construction, on the site where that installation is located; and
>
> (*b*) to any property on that same site which is used or to be used in connection with any such installation;
>
> (*c*) unless otherwise provided by national law, to the means of transport upon which the nuclear material involved was at the time of the nuclear incident. If national law provides that the operator is liable for such damage, compensation for that damage shall not have the effect of reducing the liability of the operator in respect of other damage to an amount less than either 150 million SDRs, or any higher amount established by the legislation of a Contracting Party.
>
> …
>
> 10. The operator shall incur no liability for damage caused by a nuclear incident outside the provisions of national law in accordance with this Convention.

457. Under the same article 3, paragraph 6, national law may relieve an operator wholly or partly from the obligation to pay compensation for nuclear damage suffered by a person if the operator proves the nuclear damage resulted wholly or partly from the gross negligence of that person or an act or omission of that person done with the intent to cause damage.

458. With regard to hazardous wastes, article 4 of the 1999 Basel Protocol also provides exemptions. There is no liability if it is proved that the damage was: (*a*) the result of an act of armed conflict, hostilities, civil war or insurrection; (*b*) the result of a natural phenomenon of exceptional, inevitable, unforeseeable and irresistible character; (*c*) wholly the result of compliance with a compulsory measure of a public authority of the State where the damage occurred; or (*d*) wholly the result of the wrongful intentional conduct of a third party, including the person who suffered the damage.

459. Some regional instruments also contain grounds for exoneration. Article 8 of the Lugano Convention provides grounds for exoneration from liability of the operator, including an act of war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional, inevitable and irresistible character; acts by a third party which are considered to be outside the control of the operator; and compliance with compulsory measures.[647] The administrative authorization to conduct the activity or compliance with the requirements of such authorization is not in itself a ground for exoneration from liability.[648]

460. The Lugano Convention also provides an exemption in respect of *de minimis* damage. Pollution at a tolerable level should be a ground for exemption. The level of pollution which is considered tolerable shall be determined in the light of local conditions and circumstances. The commentary to article 8 provides that the aim of this provision is to avoid extending the regime of strict liability to "acceptable inconveniences".[649] It is for the competent court to decide which inconveniences are acceptable having regard to local circumstances.[650] The Convention also permits an exemption from liability when a dangerous activity is carried out in the interests of the person suffering damage. This situation covers in particular activities undertaken in emergency cases, and those carried out with the consent of the person who has suffered

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[646] Article IV, paragraph 2, of both the 1997 and the 1963 Vienna Conventions reads:

> "If the operator proves that the nuclear damage resulted wholly or partly either from the gross negligence of the person suffering the damage or from an act or omission of such person done with intent to cause damage, the competent court may, if its law so provides, relieve the operator wholly or partly from his obligation to pay compensation in respect of the damage suffered by such person."

See also article 6, paragraph 5, of the 1997 Vienna Convention, under which the operator shall not be liable for nuclear damage:

> "(*a*) to the nuclear installation itself and any other nuclear installation, including a nuclear installation under construction, on the site where that installation is located; and
>
> "(*b*) to any property on that same site which is used or to be used in connection with any such installation."

[647] See footnote 281 above.

[648] Council of Europe, explanatory report to the Lugano Convention, as adopted on 8 March 1993, para. 59.

[649] *Ibid*., para. 60.

[650] *Ibid*.

damage.[651] Under article 9 of the Convention, the court may reduce or disallow compensation to an injured person if the injury was caused by the fault of the injured person, or by the fault of a person for whom he is responsible.

461. Under article 4, paragraph 2, of the 2003 Kiev Protocol:

> No liability in accordance with this article shall attach to the operator, if he or she proves that, despite there being in place appropriate safety measures, the damage was:
>
> (*a*) The result of an act of armed conflict, hostilities, civil war or insurrection;
>
> (*b*) The result of a natural phenomenon of exceptional, inevitable, unforeseeable and irresistible character.

462. Nor does liability attach where the damage was wholly the result of compliance with a compulsory measure of a public authority of the party where the industrial accident has occurred; or wholly the result of the wrongful intentional conduct of a third party.

463. Pursuant to its article 4, paragraph 1, the 2004 EU Directive on environmental liability does not cover environmental damage or an imminent threat of such damage caused by:

> (*a*) an act of armed conflict, hostilities, civil war or insurrection;
>
> (*b*) a natural phenomenon of exceptional, inevitable and irresistible character.

464. Nor does it apply to activities whose main purpose is to serve national defence or international security. Neither does it apply to activities whose sole purpose is to protect from natural disasters.[652]

465. In cases where third-party liability or compliance with compulsory measures of a public authority is proved, the operator is able to recover the costs incurred. Under article 8 of the Directive, the operator may escape bearing the costs of preventive or remedial actions when he proves that the environmental damage or imminent threat of such damage:

> (*a*) was caused by a third party and occurred despite the fact that appropriate safety measures were in place; or
>
> (*b*) resulted from compliance with a compulsory order or instruction emanating from a public authority other than an order or instruction consequent upon an emission or incident caused by the operator's own activities.

466. The EU Directive furthermore provides for a state-of-the art defence. Member States may allow the operator not to bear the costs of remedial actions where he demonstrates that he was not at fault or negligent and that the environmental damage was caused by: (*a*) an emission or event expressly authorized and is consistent with applicable national laws and regulations; or (*b*) an emission or activity or any manner of using a product in the course of an activity which the operator demonstrates was not considered likely to cause environmental damage according to the state of scientific and technical knowledge at the time when the emission was released or the activity took place.[653]

467. Under the Convention on international liability for damage caused by space objects, if the launching State proves that the damage caused to the claimant State was wholly or partly the result of gross negligence or of an act or omission of the claimant or its nationals with intent to cause damage, it will be exonerated from liability. However, there is no exoneration where the damage has resulted from activities conducted by a launching State which are not in conformity with international law.

468. Article 139 of the United Nations Convention on the Law of the Sea also provides for exoneration from liability of the State for damage caused by any failure of a person whom the State has sponsored to comply with regulations on seabed mining, if the State party has taken all necessary and appropriate measures to secure effective compliance under article 153, paragraph 4, and annex III, article 4, paragraph 4. Article 153, paragraph 2 (*b*) deals with joint activities undertaken by the authority, or by natural or juridical persons, or by States parties to exploit seabed resources. Paragraph 4 of the same article provides for control by the authority over activities undertaken by States parties, their enterprises or nationals.

469. The standard clauses for exploration contract also provide for exoneration in respect of *force majeure*, which is defined as "an event or condition that the Contractor could not reasonably be expected to prevent or control; provided that the event or condition was not caused by negligence or by a failure to observe good mining industry practice".[654] *Force majeure* does not have the effect of vitiating the contract; instead the contractor is entitled to a time extension.

470. Exoneration from liability is stipulated in some bilateral agreements. It is provided for in the case of injuries resulting from operations of assistance to the other party, or in such circumstances as war, major calamities, etc. Under the Convention on mutual assistance between

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[651] *Ibid*., para. 61.

[652] Directive 2004/35/CE (see footnote 286 above), art. 4, para. 6.

[653] *Ibid*., art. 8, para. 4.

[654] ISBA/6/A/18, annex 4. Section 17 reads:

"*Force majeure*

"17.1 The Contractor shall not be liable for an unavoidable delay or failure to perform any of its obligations under this contract due to force majeure. For the purposes of this contract, force majeure shall mean an event or condition that the Contractor could not reasonably be expected to prevent or control; provided that the event or condition was not caused by negligence or by a failure to observe good mining industry practice.

"17.2 The Contractor shall, upon request, be granted a time extension equal to the period by which performance was delayed hereunder by force majeure and the term of this contract shall be extended accordingly.

"17.3 In the event of force majeure, the Contractor shall take all reasonable measures to remove its inability to perform and comply with the terms and conditions of this contract with a minimum of delay; provided that the Contractor shall not be obligated to resolve or terminate any labour dispute or any other disagreement with a third party except on terms satisfactory to it or pursuant to a final decision of any agency having jurisdiction to resolve the dispute.

"17.4 The Contractor shall give notice to the Authority of the occurrence of an event of force majeure as soon as reasonably possible, and similarly give notice to the Authority of the restoration of normal conditions."

French and Spanish fire and emergency services,[655] the party called upon to provide assistance is exonerated from liability for any damage it might cause. Again, the Treaty relating to co-operative development of the water resources in the Columbia River Basin[656] provides, in article XVIII, that neither of the Contracting Parties shall be liable for injuries resulting from an act, an omission or a delay resulting from war, strikes, major calamity, act of God, uncontrollable force or maintenance curtailment.

B. Judicial decisions and State practice outside treaties

471. The few judicial decisions and sparse official correspondence relevant to liability reveal few instances in which a claim for exoneration from liability has been invoked. In one case, *United States of America* v. *Shell Oil Company*, the Ninth Circuit had an opportunity to make a determination whether the defence of "act of war"[657] was applicable to the Shell Oil Company, Union Oil Company of California, Atlantic Richfield Company, and Texaco, Inc. in relation to the clean-up of the McColl Superfund Site in Fullerton, California. The site was contaminated with hazardous wastes associated with the production of aviation fuel during the Second World War. The oil companies operated aviation fuel refineries in the Los Angeles area during the war and dumped their wastes at the McColl site. In the 1950s, McColl, with the assistance of the oil companies, filled and capped the waste sumps to allow residential development of nearby areas, even though approximately 100,000 cubic yards of hazardous waste remained at the site. The United States Government began removing this waste from the site in the 1990s, at an eventual cost of close to US$ 100 million.

472. The Court of Appeals examined, *inter alia*, whether the oil companies enjoyed a defence to liability because the Government's activities in regulating wartime petroleum production constituted an "act of war" under section 107 of CERCLA, codified at 42 U.S.C. section 9607 (*b*) (2). The oil companies argued that it was impossible to distinguish between acts of combat and acts taken pursuant to government direction. Thus, an "act of war" included any action by the federal Government under the authority of the Constitution, granting Congress the power "to declare war".[658]

473. In dismissing the argument, the Court of Appeals observed that any interpretation that any governmental act taken by authority of the war powers clause was an "act of war" was excessively broad. The Court agreed with an earlier rendering by the district court that the "act of war" defence was not available to the oil companies. The Court recapitulated the district court's examination of the issue, noting that CERCLA used expansive language to impose liability, but used circumscribed and narrow language to confer defences. It noted that although the legislative history of CERCLA, and of its amendment in the Superfund Amendments and Reauthorization Act of 1986, did not explain the nature of the "act of war" defence, it did emphasize that CERCLA was to be a strict liability statute with narrowly construed exceptions. It also "noted that the term 'act of war' appears to have been borrowed from international law, where it is defined as a 'use of force or other action by one state against another' which '[t]he state acted against recognizes ... as an act of war, either by use of retaliatory force or a declaration of war'".[659]

474. The Court of Appeals thus ascribed a narrow meaning to "act of war".[660] Moreover, the Court noted that even if it were to decide to the contrary, it was necessary to show that the actions taken were caused "solely"[661] by an act of war, as required under section 9607 (*b*) (2) of CERCLA. On the contrary, it found that the oil companies had other disposal options for their acid waste, that they had dumped acid waste both before and after the war, that they had dumped acid waste from operations at the McColl site, and that they were not compelled by the Government to dump waste in any particular manner.

475. As concerns inter-State relations, in the few cases where the acting State has not paid compensation for injuries caused, the injured State does not appear to have agreed with such conduct or recognized it to be within the right of the acting State. Even after the injuries caused by the nuclear tests which, according to the United States Government, had been necessary for reasons of security, that Government paid compensation for one reason or another without seeking to evade liability.

476. In their reservation to the 1960 Paris Convention, Austria and Germany envisaged the possibility of providing for operator liability for a nuclear incident in the case of armed conflict, hostilities, civil war, insurrection or natural disaster:

> Reservation of the right to provide, in respect of nuclear incidents occurring in the Federal Republic of Germany and in the Republic of Austria respectively, that the operator shall be liable for damage caused by a nuclear incident directly due to an act of armed conflict, hostilities, civil war, insurrection or a grave natural disaster of an exceptional character.[662]

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[655] Signed in Madrid, 14 July 1959 and 8 February 1973 (United Nations, *Treaty Series*, vol. 951, No. 13576, p. 135).

[656] Signed in Washington, D.C., 17 January 1961 (United Nations, *Treaty Series*, vol. 542, No. 7894, p. 245). The article reads in part:

> "1. Canada and the United States of America shall be liable to the other and shall make appropriate compensation to the other in respect of any act, failure to act, omission or delay amounting to a breach of the Treaty or of any of its provisions other than an act, failure to act, omission or delay occurring by reason of war, strike, major calamity, act of God, uncontrollable force or maintenance curtailment.
>
> "2. Except as provided in paragraph 1, neither Canada nor the United States of America shall be liable to the other or to any person in respect of any injury, damage or loss occurring in the territory of the other caused by any act, failure to act, omission or delay under the Treaty whether the injury, damage or loss results from negligence or otherwise."

[657] United States Court of Appeals, Ninth Circuit, *Federal Reporter*, 3rd ed., vol. 294 (June 2002), p. 1045.

[658] *Ibid*.

[659] *Ibid*.

[660] In *Farbwerke Vormals Meister Lucius & Brunning* v. *Chemical Foundation, Inc.*, 283 U.S. 152 (1931), p. 161, the Supreme Court characterized, *in dictum*, the United States' wartime seizure and assignment of patents owned by German companies as "act[s] of war". Thus, it was necessary to distinguish the unilateral acts of the United States from acts of mutually Contracting Parties.

[661] See footnote 657 above.

[662] Additional Protocol of 28 January 1964 to the Convention, annex I, para. 4.

Chapter IV

Compensation

477. State practice relates to both the content and the procedure of compensation. Some treaties provide for a limitation of compensation in case of injuries. Treaties relate principally to activities generally considered essential to modern-day civilization, such as the transport of goods and transport services by air, land and sea. The signatories to such treaties have agreed to tolerate such activities, with the potential risks they entail, provided that the damage they may cause is compensated. However, the amount of the compensation to be paid for injuries caused is generally set at a level which, from an economic point of view, does not paralyse the pursuit of these activities or obstruct their development. Clearly, this is a deliberate policy decision on the part of the signatories to treaties regulating such activities and in the absence of such treaties, judicial decisions do not appear to have set limits on the amount of compensation. The study of judicial decisions and official correspondence has not revealed any substantial limitation on the amount of compensation, although some sources indicate that it must be "reasonable" and that the parties have a duty to "mitigate damages".

A. Content

1. Compensable injuries

478. In a number of domestic laws, compensable injuries include at least death, personal injuries and property damage for torts incurring strict liability. For example, the 1990 ELA of Germany provides in section 1 that if anyone suffers death, personal injury, or property damage due to an environmental impact emitted from one of the facilities named, then the owner of the facility shall be liable to the injured person for the damages caused thereby.[663]

479. In the United States, some federal legislation goes even further and includes cost of clean-up and damage to the environment as well. Under section 2707 (*a*) of OPA, the responsible party is liable for removal costs; "removal costs" are defined as "the costs of removal that are incurred after a discharge of oil …, the costs to prevent, minimize, or mitigate oil pollution from such an incident".[664] A responsible party may recover removal costs incurred by it from the Oil Spill Liability Trust Fund where it is entitled to a complete defence. Moreover, section 9607 (*a*) of CERCLA states that the owner and operator of a vessel or facility from which there is a release or a threatened release of a hazardous substance which causes the incurrence of response costs shall be liable for:

(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;

(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;

...

(D) the costs of any health assessment or health effects study carried out under section 9604 (i) of [the Act].

480. Section 311 (*f*) of the Clean Air Act of the United States also provides for recovery of the expenses of replacing and restoring natural resources that have been damaged or destroyed.

481. Section 2702 of OPA states that a governmental entity may recover "[d]amages for injury to, destruction of, loss of, or loss of use of, natural resources, including the reasonable costs of assessing the damage". Section 2701 (20) of the Act defines "natural resources" as including "land, fish, wildlife, biota, air, water, ground water, drinking-water supplies, and other such resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States (including the resources of the exclusive economic zone), any State or local government or Indian tribe, or any foreign government". As regards measure of natural resource damages, as spelled out under section 2706 (*d*) of the Act, they consist of the following:

(A) the cost of restoring, rehabilitating, replacing, or acquiring the equivalent of, the damaged natural resources;

(B) the diminution of those natural resources pending restoration; plus

(C) the reasonable cost of assessing those damages.

482. Under section 2702 (*b*) (2) of OPA, the United States Government, a State and a political subdivision are authorized to recover "[d]amages equal to the net loss of taxes, royalties, rents, fees, or net profit shares due to the injury, destruction, or loss of real property, personal property, or natural resources" and "[d]amages for net costs of providing increased or additional public services during or after removal activities, including protection from fire, safety, or health hazards, caused by a discharge of oil".

483. The United States CERCLA also provides in section 9607 (*a*) for damages for injury to natural resources: "(C) damages for injuries to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release." Damages recovered may only be used to restore, replace or acquire the equivalent of the damage to natural resources.

484. In the case of the *Exxon Valdez* oil tanker, the United States Government, while taking steps in the clean-up operation, conducted a study on measuring damages to the environment.[665] The study was never released, as the case was settled out of court. The settlement called upon Exxon to pay US$ 25 million in criminal penalties and US$ 100 million in restitution to federal and State agencies for repairs to the damaged environment of

[663] Kloepfer, *op. cit*. (see footnote 169 above).

[664] Sect. 2701 (31) of OPA.

[665] See "Value of intangible losses from Exxon Valdez spill put at $3 billion", *The Washington Post*, 20 March 1991, p. A–4, and Cross, "Natural resource damage valuation", pp. 297–321.

Prince William Sound.[666] In consideration of the US$ 2.5 billion spent by Exxon by the time of settlement for cleaning up the spill, another US$ 125 million in criminal fines was forgiven.[667] This settlement was only with federal and State authorities and did not include private claims.

485. Damage to private individuals either in the form of personal injuries or loss of property has also been considered recoverable under domestic law. For example, under section 2702 (*b*) of OPA, any person may recover "[d]amages for injury to, or economic losses resulting from destruction of, real or personal property, which shall be recoverable by a claimant who owns or leases that property". Furthermore, any person who uses natural resources which have been injured, destroyed or lost is allowed to recover damages for loss of *subsistence* use of natural resources, without regard to the ownership or management of the resources. The section also provides that any person may recover "[d]amages equal to the *loss of profits or impairment of earning capacity** due to the injury, destruction, or loss of real property, personal property, or natural resources".

486. CERCLA did not expressly create the right of action for damages for private persons except, under certain circumstances, for removal costs. However, subsection 9607 (*h*) of the Act was amended to remedy this problem. It now provides that the owner or operator of a vessel shall be liable under maritime tort law and as provided under section 9614 of the Act, notwithstanding any provision on limitation of liability or the absence of any physical damage to the proprietary interest of the claimant.[668]

487. The Act on Compensation for Environmental Damage of Finland, in addition to covering personal injury and damage to property, also covers pure economic loss, except where such losses are insignificant. Damage caused by criminal behaviour is always compensable. Chapter 32 of the Environmental Code of Sweden also provides for compensation for personal injury, damage to property and pure economic loss. Pure economic loss not caused by criminal behaviour is compensable only to the extent that it is significant. The Act on Compensation for Damage to the Environment of Denmark covers personal injury and loss of support, damage to property, other economic loss and reasonable costs for preventive measures or for the restoration of the environment. Germany's ELA does not cover pure economic loss. Section 252 of the German Civil Code, however, provides that any loss of profit is to be compensated.[669]

(a) *Treaty practice*

488. Under a number of conventions, material injury such as loss of life or loss of or damage to property is compensable injury. Article I, paragraph 1 (*k*), of the 1963 Vienna Convention defines nuclear damage[670] as follows:

> (i) loss of life, any personal injury[671] or any loss of, or damage to, property which arises out of or results from the radioactive properties or a combination of radioactive properties with toxic, explosive or other hazardous properties of nuclear fuel or radioactive products or waste in, or of nuclear material coming from, originating in, or sent to, a nuclear installation;
>
> ...
>
> (iii) if the law of the Installation State so provides, loss of life, any personal injury or any loss of, or damage to, property which arises out

[666] "Exxon reaches 1.1 billion spill settlement deal", *Los Angeles Times*, 1 October 1991, p. A–1.

[667] *Ibid*.

[668] Force, *loc. cit*., p. 34.

[669] See generally Wetterstein, "Environmental damage in the legal systems of the Nordic countries and Germany".

[670] A few conventions dealing with nuclear materials include express provisions concerning damage other than nuclear damage caused by a nuclear incident or jointly by a nuclear incident and other occurrences. To the extent that those injuries are not reasonably separate from nuclear damage, they are considered nuclear damage and consequently compensable under the conventions. For example, article IV, paragraph 4, of the 1963 Vienna Convention provides:

> "Whenever both nuclear damage and damage other than nuclear damage have been caused by a nuclear incident or jointly by a nuclear incident and one or more other occurrences, such other damage shall, to the extent that it is not reasonably separable from the nuclear damage, be deemed, for the purposes of this Convention, to be nuclear damage caused by that nuclear incident. Where, however, damage is caused jointly by a nuclear incident covered by this Convention and by an emission of ionizing radiation not covered by it, nothing in this Convention shall limit or otherwise affect the liability, either as regards any person suffering nuclear damage or by way of recourse or contribution, of any person who may be held liable in connection with that emission of ionizing radiation."

See also article IV of the Nuclear Ships Convention, which provides:

> "Whenever both nuclear damage and damage other than nuclear damage have been caused by a nuclear incident or jointly by a nuclear incident and one or more other occurrences and the nuclear damage and such other damage are not reasonably separable, the entire damage shall, for the purposes of this Convention, be deemed to be nuclear damage exclusively caused by the nuclear incident. However, where damage is caused jointly by a nuclear incident covered by this Convention and by an emission of ionizing radiation or by an emission of ionizing radiation in combination with the toxic, explosive or other hazardous properties of the source of radiation not covered by it, nothing in this Convention shall limit or otherwise affect the liability, either as regards the victims or by way of recourse or contribution, of any person who may be held liable in connection with the emission of ionizing radiation or by the toxic, explosive or other hazardous properties of the source of radiation not covered by this Convention."

[671] The Additional Convention to CIV provides for the payment of necessary expenses such as the cost of medical treatment and transport, and compensation for loss due to partial or total incapacity to work and increased expenditure on the injured person's personal requirements necessitated by the injury. In the event of the death of the passenger, the compensation must cover the cost of transport of the body, burial or cremation. If the deceased passenger had a legally enforceable duty to support other persons who are then deprived of such support, such persons are entitled to compensation for those to whom the deceased was providing support on a voluntary basis: articles 3–4 of the Convention read:

> "*Article 3. Damages in case of death of the passenger*
>
> "1. In the case of the death of the passenger the damages shall include:
>
> "(*a*) any necessary expenses following on the death, in particular the cost of transport of the body, burial and cremation;
>
> "(*b*) if death does not occur at once, the damages defined in article 4.
>
> "2. If, through the death of the passenger, persons towards whom he had, or would have had in the future, a legally enforceable duty to maintain are deprived of their support, such persons shall also be indemnified for their loss. Rights of action for damages by persons whom the passenger was maintaining without being legally bound to do so shall be governed by national law.
>
> "*Article 4. Damages in case of personal injury to the passenger*
>
> "In the case of personal injury or any other bodily or mental harm to the passenger the damages shall include:
>
> "(*a*) any necessary expenses, in particular the cost of medical treatment and transport;
>
> "(*b*) compensation for loss due to total or partial incapacity to work, or to increased expenditure on his personal requirements necessitated by the injury."

of or results from other ionizing radiation emitted by any other source of radiation inside a nuclear installation.

489. The 1997 Vienna Convention replaces article I, paragraph 1 (*k*), of the 1963 Vienna Convention with a broader definition of nuclear damage. Thus, article I, paragraph 1 (*k*), of the 1997 Vienna Convention reads:

"Nuclear damage" means:

(i) loss of life or personal injury;

(ii) loss of or damage to property;

and each of the following to the extent determined by the law of the competent court;

(iii) economic loss arising from loss or damage referred to in subparagraph (i) or (ii), insofar as not included in those subparagraphs, if incurred by a person entitled to claim in respect of such loss or damage;

(iv) the costs of measures of reinstatement of impaired environment, unless such impairment is insignificant, if such measures are actually taken or to be taken, and insofar as not included in subparagraph (ii);

(v) loss of income deriving from an economic interest in any use or enjoyment of the environment, incurred as a result of a significant impairment of that environment, and insofar as not included in subparagraph (ii);

(vi) the costs of preventive measures, and further loss or damage caused by such measures;

(vii) any other economic loss, other than any caused by the impairment of the environment, if permitted by the general law on civil liability of the competent court,

in the case of subparagraphs (i) to (v) and (vii) above, to the extent that the loss or damage arises out of or results from ionizing radiation emitted by any source of radiation inside a nuclear installation, or emitted from nuclear fuel or radioactive products or waste in, or of nuclear material coming from, originating in, or sent to, a nuclear installation, whether so arising from the radioactive properties of such matter, or from a combination of radioactive properties with toxic, explosive or other hazardous properties of such matter.

490. This definition, which goes beyond damage to loss of life, or personal injury and loss of or damage to property, is largely replicated in article I of the 1997 Supplementary Compensation Convention.[672] It also covers economic loss, loss of income, measures of prevention and measures of reinstatement. Measures of reinstatement are defined as any reasonable measures which have been approved by the competent authorities of the State where the measures were taken, and which aim to reinstate or restore damaged or destroyed components of the environment, or to introduce, where reasonable, the equivalent of these components into the environment. The law of the State where the damage is suffered shall determine who is entitled to take such measures.

491. The 1960 Paris Convention does not contain a definition of nuclear damage. This is rectified in the 2004 Paris Convention in which a new article I, paragraph (vii), defines nuclear damage.[673]

492. The 2004 Paris Convention also makes measures of reinstatement and preventive measures compensable. The definition of measures of reinstatement is similar to the definition in the 1997 Vienna Convention.

493. In cases where nuclear damage and damage other than nuclear damage arise from a nuclear incident or jointly with some other occurrence, such damage, to the extent that it cannot reasonably be separated from the nuclear damage, is deemed to be nuclear damage for the purposes of the convention. Both the Vienna and the Paris Convention regimes have provisions dealing with this aspect.[674]

494. The Protocol of 1992 to the Civil Liability Convention, basing its definition on the 1984 Protocol, which never entered into force, expands the concept of "pollution damage" as contained in the 1969 Convention (para. 123 above).

495. The Bunker Oil Convention has a similar definition.[675] The concept of "damage" has also been defined in article 1, paragraph 10, of CRTD as:

(*a*) loss of life or personal injury ...;

(*b*) loss of or damage to property ...;

(*c*) loss or damage by contamination to the environment caused by the dangerous goods, provided that compensation for impairment of the environment other than for loss of profit from such impairment shall be limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken;

(*d*) the costs of preventive measures …

Under the last clause of the article, "[w]here it is not reasonably possible to separate damage caused by the dangerous goods from that caused by other factors, all such

[672] "(*f*) 'Nuclear damage' means:
"(i) loss of life or personal injury;
"(ii) loss of or damage to property;
and each of the following to the extent determined by the law of the competent court:
"(iii) economic loss arising from loss or damage referred to in subparagraph (i) or (ii), insofar as not included in those subparagraphs, if incurred by a person entitled to claim in respect of such loss or damage;
"(iv) the costs of measures of reinstatement of impaired environment, unless such impairment is insignificant, if such measures are actually taken or to be taken, and insofar as not included in subparagraph (ii);
"(v) loss of income deriving from an economic interest in any use or enjoyment of the environment, incurred as a result of a significant impairment of that environment, and insofar as not included in subparagraph (ii);
"(vi) the costs of preventive measures, and further loss or damage caused by such measures;
"(vii) any other economic loss, other than any caused by the impairment of the environment, if permitted by the general law on civil liability of the competent court,
in the case of subparagraphs (i) to (v) and (vii) above, to the extent that the loss or damage arises out of or results from ionizing radiation emitted by any source of radiation inside a nuclear installation, or emitted from nuclear fuel or radioactive products or waste in, or of nuclear material coming from, originating in, or sent to, a nuclear installation, whether so arising from the radioactive properties of such matter, or from a combination of radioactive properties with toxic, explosive or other hazardous properties of such matter."

[673] See footnote 255 above.

[674] Art. IV, para. 4, of the 1963 and 1997 Vienna Conventions (see footnote 670 above); and art. 3 (*b*) of the 1960 and 2004 Paris Conventions.

Article 3 (*b*) of the 2004 Paris Convention is reproduced in footnote 554 above. Article 3 (*b*) of the 1960 Paris Convention is similar except that it covered nuclear "damage or loss" (see footnote 553 above).

[675] Art. 1, para. 9 (see paragraph 130 above).

damage shall be deemed to be caused by the dangerous goods". The same definition has been adopted for "damage" in article 1, paragraph 6, of the HNS Convention.

496. Under the Seabed Mineral Resources Convention, not only "pollution damage" but also preventive measures are compensable.[676] Preventive measures are defined as "any reasonable measures taken by any person in relation to a particular incident to prevent or minimize pollution damage with the exception of well-control measures and measures taken to protect, repair or replace an installation".[677]

497. The 1999 Basel Protocol defines "damage", in article 2, paragraph 2 (*c*), as:

> (i) Loss of life or personal injury;
>
> (ii) Loss of or damage to property other than property held by the person liable in accordance with the present Protocol;
>
> (iii) Loss of income directly deriving from an economic interest in any use of the environment, incurred as a result of impairment of the environment, taking into account savings and costs;
>
> (iv) The costs of measures of reinstatement of the impaired environment, limited to the costs of measures actually taken or to be undertaken; and
>
> (v) The costs of preventive measures, including any loss or damage caused by such measures, to the extent that the damage arises out of or results from hazardous properties of the wastes involved in the transboundary movement and disposal of hazardous wastes and other wastes subject to the Convention.

498. Measures of reinstatement include any measures that aim at assessing, reinstating or restoring damaged or destroyed components of the environment. It is noted that domestic law may indicate who will be entitled to take such measures.

499. The 2003 Kiev Protocol has a similar provision.[678] However, it provides a more expansive definition of measures of reinstatement, encompassing any reasonable measures aiming to reinstate or restore damaged or destroyed components of transboundary waters to the conditions that would have existed had the industrial accident not occurred, or where this is not possible, to introduce, where appropriate, the equivalent of these components into the transboundary waters. It is noted that domestic law may indicate who will be entitled to take such measures. Moreover, instead of covering the costs of preventive measures, the provision includes the cost of response measures, which are defined as any reasonable measures taken by any person, including public authorities, following an industrial accident, to prevent, minimize or mitigate possible loss or damage or to arrange for environmental clean-up. It is also noted that domestic law may indicate who will be entitled to take such measures.

500. The Lugano Convention defines damage in article 2, paragraph 7, as:

> (*a*) loss of life or personal injury;
>
> (*b*) loss or damage to property other than to the installation itself or property held under the control of the operator, at the site of the dangerous activity;
>
> (*c*) loss or damage by impairment of the environment in so far as this is not considered to be damage within the meaning of subparagraphs (*a*) or (*b*) above provided that compensation for impairment of the environment, other than for loss of profit from such impairment, shall be limited to the costs of measures of reinstatement actually undertaken or to be undertaken;
>
> (*d*) the costs of preventive measures and any loss or damage caused by preventive measures, to the extent that the loss or damage referred to in subparagraphs (*a*) to (*c*) of this paragraph arises out of or results from the hazardous properties of the dangerous substances, genetically modified organisms or micro-organisms or arises or results from waste.[679]

501. Article 2, paragraph 8, of the Lugano Convention defines "[m]easures of reinstatement" as "any reasonable measures aiming to reinstate or restore damaged or destroyed components of the environment, or to introduce, where reasonable, the equivalent of these components into the environment". Article 2, paragraph 9, defines "[p]reventive measures" as "any reasonable measures taken by any person, after an incident has occurred to prevent or minimise loss or damage".

502. The Lugano Convention does not address the question of threshold of impairment to the environment in article 2. It attempts to deal with the issue in article 8 on exemptions where paragraph (*d*) exonerates the operator from liability if the operator can prove that damage "was caused by pollution at tolerable levels under local relevant circumstances".

503. The 2004 EU Directive on environmental liability does not cover or affect any right relating to cases of personal injury or of damage to private property or any economic loss. It applies only to environmental damage, which is defined by reference to damage to *protected and natural habitats* on the basis of criteria set out in an annex, excluding previously identified adverse effects, and damage to water as well as damage to land. Such damage should bring about a significantly measurable adverse change in a natural resource or measurable impairment of a natural resource service which may occur directly or indirectly.[680] Pursuant to articles 5 and 6 respectively, the

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[676] Art. 1, para. 6.

[677] *Ibid*., para. 7.

[678] Art. 2, para. 2 (*g*).

[679] Article 2, paragraph 10, reads:
" 'Environment', includes:
"– natural resources both abiotic and biotic, such as air, water, soil, fauna and flora and the interaction between the same factors;
"– property which forms part of the cultural heritage; and
"– the characteristic aspects of the landscape."

[680] See paragraph 175 above. Directive 2004/35/CE (see footnote 286 above), annex I, provides the following criteria in respect of article 2, paragraph (1) (A) :
"The significance of any damage that has adverse effects on reaching or maintaining the favourable conservation status of habitats or species has to be assessed by reference to the conservation status at the time of the damage, the services provided by the amenities they produce and their capacity for natural regeneration. Significant adverse changes to the baseline condition should be determined by means of measurable data such as:
"– the number of individuals, their density or the area covered,
"– the role of the particular individuals or of the damaged area in relation to the species or to the habitat conservation, the rarity of the species or habitat (assessed at local, regional and higher level including at Community level),
"– the species' capacity for propagation (according to the dynamics specific to that species or to that population), its viability or the habitat's capacity for natural regeneration (according to

operator is required to take preventive and remedial action in cases where there is an imminent threat of environmental damage occurring or where environmental damage has occurred. "[P]reventive measures" (art. 2, para. 10) are defined as any measures that are taken to respond to an event, act or omission that has created an imminent threat of environmental damage, with a view to preventing or minimizing that damage; while "remedial measures" means any action, or combination of actions, including mitigating or interim measures to restore, rehabilitate or replace damaged natural resources and/or impaired services, or to provide an equivalent alternative to those "resources or services" (art. 2, para. 11). An annex to the Directive provides an indication of such measures.[681]

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the dynamics specific to its characteristic species or to their populations),

"– the species' or habitat's capacity, after damage has occurred, to recover within a short time, without any intervention other than increased protection measures, to a condition which leads, solely by virtue of the dynamics of the species or habitat, to a condition deemed equivalent or superior to the baseline condition.

"Damage with a proven effect on human health must be classified as significant damage.

"The following does not have to be classified as significant damage:

"– negative variations that are smaller than natural fluctuations regarded as normal for the species or habitat in question,

"– negative variations due to natural causes or resulting from intervention relating to the normal management of sites, as defined in habitat records or target documents or as carried on previously by owners or operators,

"– damage to species or habitats for which it is established that they will recover, within a short time and without intervention, either to the baseline condition or to a condition which leads, solely by virtue of the dynamics of the species or habitat, to a condition deemed equivalent or superior to the baseline condition."

[681] Annex II provides:

"*Remedying of environmental damage*

"This annex sets out a common framework to be followed in order to choose the most appropriate measures to ensure the remedying of environmental damage.

"1. *Remediation of damage to water or protected species or natural habitats*

Remedying of environmental damage, in relation to water or protected species or natural habitats, is achieved through the restoration of the environment to its baseline condition by way of primary, complementary and compensatory remediation, where:

"(*a*) 'Primary' remediation is any remedial measure which returns the damaged natural resources and/or impaired services to, or towards, baseline condition;

"(*b*) 'Complementary' remediation is any remedial measure taken in relation to natural resources and/or services to compensate for the fact that primary remediation does not result in fully restoring the damaged natural resources and/or services;

"(*c*) 'Compensatory' remediation is any action taken to compensate for interim losses of natural resources and/or services that occur from the date of damage occurring until primary remediation has achieved its full effect;

"(*d*) 'Interim losses' means losses which result from the fact that the damaged natural resources and/or services are not able to perform their ecological functions or provide services to other natural resources or to the public until the primary or complementary measures have taken effect. It does not consist of financial compensation to members of the public.

"Where primary remediation does not result in the restoration of the environment to its baseline condition, then complementary remediation will be undertaken. In addition, compensatory remediation will be undertaken to compensate for the interim losses.

"Remedying of environmental damage, in terms of damage to water or protected species or natural habitats, also implies that any significant risk of human health being adversely affected be removed.

"1.1 *Remediation objectives*

"Purpose of primary remediation

"1.1.1 The purpose of primary remediation is to restore the damaged natural resources and/or services to, or towards, baseline condition.

"Purpose of complementary remediation

"1.1.2 Where the damaged natural resources and/or services do not return to their baseline condition, then complementary remediation will be undertaken. The purpose of complementary remediation is to provide a similar level of natural resources and/or services, including, as appropriate, at an alternative site, as would have been provided if the damaged site had been returned to its baseline condition. Where possible and appropriate the alternative site should be geographically linked to the damaged site, taking into account the interests of the affected population.

"Purpose of compensatory remediation

"1.1.3 Compensatory remediation shall be undertaken to compensate for the interim loss of natural resources and services pending recovery. This compensation consists of additional improvements to protected natural habitats and species or water at either the damaged site or at an alternative site. It does not consist of financial compensation to members of the public.

"1.2 *Identification of remedial measures*

"Identification of primary remedial measures

"1.2.1 Options comprised of actions to directly restore the natural resources and services towards baseline condition on an accelerated time frame, or through natural recovery, shall be considered.

"Identification of complementary and compensatory remedial measures

"1.2.2 When determining the scale of complementary and compensatory remedial measures, the use of resource-to-resource or service-to-service equivalence approaches shall be considered first. Under these approaches, actions that provide natural resources and/or services of the same type, quality and quantity as those damaged shall be considered first. Where this is not possible, then alternative natural resources and/or services shall be provided. For example, a reduction in quality could be offset by an increase in the quantity of remedial measures.

"1.2.3 If it is not possible to use the first choice resource-to-resource or service-to-service equivalence approaches, then alternative valuation techniques shall be used. The competent authority may prescribe the method, for example monetary valuation, to determine the extent of the necessary complementary and compensatory remedial measures. If valuation of the lost resources and/or services is practicable, but valuation of the replacement natural resources and/or services cannot be performed within a reasonable time frame or at a reasonable cost, then the competent authority may choose remedial measures whose cost is equivalent to the estimated monetary value of the lost natural resources and/or services.

"The complementary and compensatory remedial measures should be so designed that they provide for additional natural resources and/or services to reflect time preferences and the time profile of the remedial measures. For example, the longer the period of time before the baseline condition is reached, the greater the amount of compensatory remedial measures that will be undertaken (other things being equal).

"1.3 *Choice of the remedial options*

"1.3.1 The reasonable remedial options should be evaluated, using best available technologies, based on the following criteria:

"– The effect of each option on public health and safety,

"– The cost of implementing the option,

"– The likelihood of success of each option,

"– The extent to which each option will prevent future damage, and avoid collateral damage as a result of implementing the option,

"– The extent to which each option benefits to each component of the natural resource and/or service,

"– The extent to which each option takes account of relevant social, economic and cultural concerns and other relevant factors specific to the locality,

"– The length of time it will take for the restoration of the environmental damage to be effective,

"– The extent to which each option achieves the restoration of site of the environmental damage,

"– The geographical linkage to the damaged site.

"1.3.2 When evaluating the different identified remedial options, primary remedial measures that do not fully restore the damaged water or protected species or natural habitat to baseline or that restore it more slowly can be chosen. This decision can be taken only if the natural resources and/or services foregone at the primary site as a result of the decision are compensated for by increasing complementary or compensatory actions to provide a similar level of natural resources and/or services as were foregone. This will be the case, for example, when the equivalent natural resources and/or

(*Continued on next page.*)

504. In its decision 7, paragraph 35, the UNCC Governing Council provided guidance for Commissioners in deciding on questions concerning direct environmental damage and the depletion of natural resources as a result of Iraq's unlawful invasion and occupation of Kuwait. Compensation includes losses or expenses resulting from:

(*a*) Abatement and prevention of environmental damage, including expenses directly relating to fighting oil fires and stemming the flow of oil in coastal and international waters;

(*b*) Reasonable measures already taken to clean and restore the environment or future measures which can be documented as reasonably necessary to clean and restore the environment;

(*c*) Reasonable monitoring and assessment of the environmental damage for the purposes of evaluating and abating the harm and restoring the environment;

(*d*) Reasonable monitoring of public health and performing medical screenings for the purposes of investigation and combating increased health risks as a result of environmental damage; and

(*e*) Depletion of or damage to natural resources.[682]

505. Principle 9, paragraph 2, of the Principles Relevant to the Use of Nuclear Power Sources in Outer Space, as contained in General Assembly resolution 47/68 of 14 December 1992, provides for *restitution in integrum*. The relevant part of the paragraph states that "[the liable State shall] provide such reparation in respect of the damage as will restore the [the injured party] to the condition which would have existed if the damage had not occurred". Principle 9, paragraph 3, also provides that "compensation shall include reimbursement of the duly substantiated expenses for search, recovery and clean-up operations, including expenses for assistance received from third parties".

(*Footnote 681 continued.*)

services could be provided elsewhere at a lower cost. These additional remedial measures shall be determined in accordance with the rules set out in section 1.2.2.

"1.3.3. Notwithstanding the rules set out in section 1.3.2 and in accordance with Article 7 (3), the competent authority is entitled to decide that no further remedial measures should be taken if:

"(*a*) the remedial measures already taken secure that there is no longer any significant risk of adversely affecting human health, water or protected species and natural habitats, and

"(*b*) the cost of the remedial measures that should be taken to reach baseline condition or similar level would be disproportionate to the environmental benefits to be obtained.

"2. *Remediation of land damage*

The necessary measures shall be taken to ensure, as a minimum, that the relevant contaminants are removed, controlled, contained or diminished so that the contaminated land, taking account of its current use or approved future use at the time of the damage, no longer poses any significant risk of adversely affecting human health. The presence of such risks shall be assessed through risk-assessment procedures taking into account the characteristic and function of the soil, the type and concentration of the harmful substances, preparations, organisms or micro-organisms, their risk and the possibility of their dispersion. Use shall be ascertained on the basis of the land use regulations, or other relevant regulations, in force, if any, when the damage occurred.

"If the use of the land is changed, all necessary measures shall be taken to prevent any adverse effects on human health.

"If land use regulations, or other relevant regulations, are lacking, the nature of the relevant area where the damage occurred, taking into account its expected development, shall determine the use of the specific area.

"A natural recovery option, that is to say an option in which no direct human intervention in the recovery process would be taken, shall be considered."

[682] S/AC.26/1991/7/Rev.1 (see footnote 588 above).

506. Non-material injuries may also be compensable. Thus it is clearly stated in article 5 of the Additional Convention to CIV that, under national law, compensation may be required for mental or physical pain and suffering, and for disfigurement:

National law shall determine whether and to what extent the railway shall be bound to pay damages for injuries other than those for which there is provision in articles 3 and 4, in particular for mental or physical pain and suffering (*pretium doloris*) and for disfigurement.

507. Under article I of the 1963 Vienna Convention, any other loss or damage is compensable under the law of the competent court. Hence, if the law of the competent court provides for compensability of *non-material injury*, such injury is compensable under the Convention. In article I, paragraph 1 (*k*) (ii), of the Convention "nuclear damage" is defined as:

any other loss or damage so arising or resulting if and to the extent that the law of the competent court so provides.

(b) *Judicial decisions and State practice outside treaties*

508. Some domestic judicial decisions have dealt with the question of how to evaluate costs of clean-up and restoration. The issue of assessing compensation was discussed as early as 1880 in *Livingstone* v. *Rawyards Coal Company* in a well-known exposition by Lord Blackburn:

[W]here any injury is to be compensated by damages, in settling the sum of money to be given for reparation of damages you should as nearly as possible get at that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation.[683]

509. In 1908, in another British case, *Lodge Holes Colliery Co.* v. *Mayor of Wednesbury*,[684] the defendants' mining operations caused a public road to collapse. The local authorities restored the road to its former level, but at great cost. The House of Lords held that the principle of *restitutio in integrum* did not entitle the plaintiffs to the cost of precise restoration, regardless of the cost. The plaintiffs were entitled to recover from the defendants only the cost of construction of an equally suitable road.[685] This reasoning was applied in 1980 in the case of *Dodd Properties (Kent)* v. *Canterbury City Council*.[686] In assessing the damages to the building of the plaintiffs caused by pile-driving operations of the defendants, the Court stated:

The plaintiffs are ... not bound to accept a shoddy job or put up with an inferior building for the sake of saving expense to the defendants. But I [the judge] do not consider that they are entitled to insist on complete and meticulous restoration when a reasonable building owner would be content with less extensive work which produces a result which does not diminish to any, or any significant, extent the appearance, life or utility of the building, and when there is also a vast difference in the cost of such work and the cost of meticulous restoration.[687]

[683] United Kingdom, *Law Reports, Appeal Cases, House of Lords and Privy Council* (1880), vol. 5, p. 39.

[684] (1908) AC 323, cited in de la Rue, "Environmental damage assessment", pp. 70–71.

[685] *Ibid.*

[686] (1980) 1 WLR 333, *ibid.*, p. 71.

[687] *Ibid.*

510. A similar question arose in the United States First Circuit Court of Appeals in 1980 in the case of *Commonwealth of Puerto Rico* v. *The S.S. Zoe Colocotroni.*[688] The case concerned an oil tanker which ran aground because of its unseaworthy condition, causing pollution damage to the coast of Puerto Rico. First, the Puerto Rico authorities were awarded US$ 6 million, of which only US$ 78,000 was needed for cleaning up. The remainder was to cover the cost of replanting mangroves and replacing marine organisms killed by the spill. The Court did not endorse this approach. Emphasizing the need for a sense of proportion in assessing such costs, the Court observed:

> [Recoverable costs are costs] reasonably to be incurred ... to restore or rehabilitate the environment in the affected area to its pre-existing condition, or as close thereto as is possible without grossly disproportionate expenditures. The focus in determining such a remedy should be the steps a reasonable and prudent sovereign or agency would take to mitigate the harm done by the pollution, with attention to such factors as technical feasibility, harmful side effects, compatibility with or duplication of such regeneration as is naturally to be expected, and the extent to which efforts beyond a certain point would become either redundant or disproportionately expensive.[689]

511. In *Blue Circle Industries plc* v. *Ministry of Defence*,[690] the Court of Appeal in the United Kingdom had an opportunity to decide on the meaning and assessment of damage in a case involving the escape of flood waters from a nuclear weapons site belonging to the defendant onto the neighbouring property, including a marshland of the plaintiff, which caused its land to be contaminated with radioactive material.

512. Although the contamination did not pose a threat to health, it was above the levels permitted by statutory regulations. According to the evidence, the "incident resulted in levels of radioactivity well above the normal background levels and above the regulatory threshold. However, even before any remedial work, and applying pessimistic assumptions, they were well below levels which would have posed any risk to health."[691] The plaintiff spent £350,000 in remedial work undertaken to remove the contaminated topsoil. When the plaintiff subsequently intended to sell the property, negotiations with a potential buyer collapsed when evidence of the contamination emerged. The plaintiff subsequently brought a claim against the defendant for breach of duty arising under the Nuclear Installations Act 1965 for the cost of the remediation and all other costs associated with the contamination, including the loss in value of the property. The Court of Appeal held that contamination of the plaintiff's land by radioactive material from an overflowing pond on the defendant's land was a breach of the duty imposed by section 7 (1) (*a*) of the Act 1965 not to damage property by an "occurrence involving nuclear matter".[692]

513. It was argued on behalf of the defendant that the marshland had not been *physically* damaged by the radioactive properties of plutonium. It was physically the same as before although it had been mixed with a very small amount of plutonium. The radioactivity was not such as to cause harm and it had not changed the properties of the soil. The Court of Appeal referred to an earlier case, *Merlin* v. *British Nuclear Fuels plc*,[693] in which the plaintiffs had claimed that their house had been damaged by radioactive material that had been discharged into the Irish Sea from the Sellafield nuclear power plant and subsequently deposited in the house as dust. In that case, the judge had reached the conclusion that under the Nuclear Installations Act 1965 it was necessary to establish that there had been damage to tangible property. Although indeed the house had been contaminated, such contamination did not amount to damage to property for which compensation could be awarded under the Act. The fact that the house was less valuable was the economic result of the presence of radioactive material, not the result of the damage to the house from the radioactive properties of the material.

514. The Court of Appeal distinguished *Merlin*, noting that in that case the dust was in the house and the judge did not hold that the house and the radioactive material were so intermingled as to mean that the characteristics of the house had in any way been altered. On such account, it was possible on the same "facts for the judge to hold that the cause of the reduction in the value of the plaintiffs' house resulted from stigma, not from damage to the house itself".[694]

515. The Court of Appeal observed that the physical damage to property contemplated in section 7 (1) (*a*):

> is not limited to particular types of damage. Damage within the Act will occur provided there is some alteration in the physical characteristics of the property, in its case the marshland, caused by radioactive properties which render it less useful or less valuable …
>
> The plutonium intermingled with the soil in the marsh to such an extent that it could not be separated from the soil by any practical process.[695]
>
> …
>
> The damage … was not mere economic damage ... The land itself was physically damaged by the radioactive properties of the plutonium which had been admixed with it. The consequence was economic, in the sense that the property was worth less and required the owner to expend money to remove the topsoil, but the damage was physical.[696]

516. Concerning the assessment of damages, the Court of Appeal noted that the Nuclear Installations Act 1965 imposed a duty not to damage property by radioactive properties. Once it was established that such damage had occurred, the person in breach must be liable for the foreseeable losses caused by the breach of statutory duty, providing they were not too remote. The Court noted that for the plaintiff to recover, it must have an interest in the land damage. Thus, such losses would not be limited to damage to the marshland but would include damages for consequential loss and would "be affected by the size, commodiousness and value of the property".[697]

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[688] 628 F.2d, p. 652 (1st Cir. 1980), cited in *ibid*., from which the description of this case is taken.

[689] Quoted in *ibid*., p. 72.

[690] *All England Law Reports 1998*, vol. 3, p. 385.

[691] *Ibid*., p. 392.

[692] *Ibid.*, p. 390.

[693] *Ibid*., p. 392.

[694] *Ibid*., p. 393.

[695] *Ibid*., p. 393. See also *Hunter and others* v. *Canary Wharf Ltd*, *ibid. 1996*, vol. 1, 482, p. 499.

[696] *Ibid. 1998* (see footnote 690 above), pp. 393–394.

[697] *Ibid*., p. 395.

517. Consequently, the Court of Appeal rejected the defendant's contention that loss for which compensation should be paid should be "limited to the cost of reinstatement of the marshland or the diminution in its value". Instead, it considered it appropriate that the plaintiff "be compensated by an award of damages which would put them in the same position as they would have been in if they had not sustained the injury".[698] That included loss resulting from diminution in the value and saleability of the land. It was considered a foreseeable consequence of the contamination that the plaintiff would be unable to sell the estate until remedial work had been completed.[699]

518. As regards the determination of the presence of loss of profits, in the United Kingdom, the rule of "remoteness" has tended to exclude claims for "pure economic loss" except as an action in contract.[700] This is illustrated in the case of *Weller and Co.* v. *Foot and Mouth Disease Research Institute*,[701] where cattle had been infected with foot-and-mouth disease by a virus that escaped from the defendants' premises. The British Government made an order closing two markets in the area, causing a loss of profits to the plaintiff auctioneers. The Court held that the defendants owed a duty of care to the cattle owners but not to the auctioneers, who did not have any proprietary interest which could have been damaged by the escape of the virus.[702] It has been observed that this rule of "remoteness" is normally applied with considerable flexibility, taking into account policy considerations.[703]

519. Existing judicial decisions and State practice also reveal that only material injuries are compensable. Material injuries here refer to physical, tangible or quantitative injuries, as opposed to intangible harm to the dignity of the State. Material injuries which have been compensated in the past include loss of life, personal injury and loss of or damage to property. This has not, however, prevented States from claiming compensation for non-material injuries.

520. State practice shows that in some cases involving potential or actual nuclear contamination or other damage caused by nuclear accidents, which have given rise to great anxiety, reparation has neither been made nor claimed for non-material injury. The outstanding examples are the Palomares incident and the Marshall Islands case. The Palomares incident involved the collision between a United States B-52G nuclear bomber and a KC-135 supply plane during a refuelling operation off the coast of Spain, resulting in the dropping of four plutonium-uranium 235 hydrogen bombs, with a destructive power of 1.5 megatons (75 times the power of the Hiroshima bomb).[704] This incident not only created substantial material damage, but also gave rise to fears and anxiety throughout the western Mediterranean basin for two months, until the sources of potential damage had been neutralized. Two of the bombs that fell on land ruptured and discharged their TNT, scattering uranium and plutonium particles near the Spanish coastal village of Palomares, thereby causing imminent danger to the health of the inhabitants and the ecology of the area. Immediate remedial action was taken by the United States and Spain, and it was reported that the United States removed 1,750 tons of mildly radioactive Spanish soil and buried it in the United States.[705] The third bomb struck the ground intact, but the fourth bomb was lost somewhere in the Mediterranean. After a two-month search by submarines and growing apprehension among the nations of the Mediterranean area, the bomb was located, but was lost during the operation for nine more days. Finally, after 80 days of the threat of detonation of the bomb, the device was retrieved.

521. Apparently, the United States did not pay any compensation for the apprehension caused by the incident, and there was no formal "open discussion" between Spain and the United States about the legal liability. The accident, however, is unique; if the bomb had not been retrieved, the extent of its damage could not have been measured in monetary terms. The United States could not have left the dangerous "instrument" of its activity in or near Spain and discharged its responsibility by paying compensation.

522. Following the nuclear tests in the atmosphere undertaken by the United States in Eniwetok Atoll, in the Marshall Islands, the Government of Japan did not demand compensation for non-material injuries. In a note concerning the payment of damages through a global settlement, the United States Government referred to a final settlement with the Government "of Japan for any and all injuries, losses, or damages arising out of the said nuclear tests".[706] It was left to the Japanese Government to determine which individual injuries deserved compensation.

523. Following the testing on 1 March 1954, the Government of Japan announced that injuries from radioactive fallout had been sustained on that date by members of the crew of a Japanese fishing vessel, the *Diago Fukuryu Maru*, which at the time of the test was outside the danger zone previously defined by the United States. On 23 September 1954, the chief radio operator of the vessel, Aikichi Kuboyama, died. By an Agreement effected by exchange of notes on 4 January 1955, which entered into force the same day, the United States tendered, *ex gratia*, "as an additional expression of its concern and regret over the injuries sustained"[707] by Japanese fishermen as a result of the nuclear tests in 1954 in the Marshall Islands, the sum of US$ 2 million for purposes of compensation for the injuries or damages sustained, and in full settlement of any and all claims on the part of Japan for any and all

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[698] *Ibid.*

[699] But cf. the judgement of Chadwick LJ, who doubted whether the relevant statutory language gave rise to questions of foreseeability:

> "I am not persuaded that it is relevant to ask whether the wrongdoer, or anyone else, did foresee or should have foreseen that the damage to the relevant property would have led to the result that the claimant has been put in the position in which he finds himself … The question, in my view, is one of causation, not foreseeability: is the position in which the claimant now finds himself the result of the damage to the relevant property which has actually occurred?"

(*Ibid*., p. 406)

[700] De la Rue, *loc. cit*., p. 73.

[701] (1966) 1 QB 1966, p. 569, cited in *ibid.*

[702] *Ibid*., pp. 73–74.

[703] *Ibid*., p. 74.

[704] For further details on this accident, see Szulc, *The Bombs of Palomares*, and Flora Lewis, *One of Our H-bombs is Missing*.

[705] "Radioactive Spanish earth is buried 10 feet deep in South Carolina", *The New York Times*, 12 April 1966, p. 28, col. 3.

[706] Whiteman, *op. cit*., vol. 4, p. 565.

[707] *Ibid.*

injuries, losses, or damages arising out of the said nuclear tests. The sum paid was to be distributed in such an equitable manner as might be determined by the Government of Japan and included provision for a solatium on behalf of each of the Japanese fishermen involved and for the claims advanced by the Government of Japan for their medical and hospitalization expenses.

524. In the *Trail Smelter* arbitration, the Tribunal rejected the United States proposal that *liquidated damages* be imposed on the operator of the smelter whenever emissions exceeded the predefined limits, regardless of any injuries it might cause. The Tribunal stated that it had:

> carefully considered the suggestions made by the United States for a régime by which a prefixed sum would be due whenever the concentrations recorded would exceed a certain intensity for a certain period of time or a certain greater intensity for any twenty minute period.
>
> It has been unable to adopt this suggestion. In its opinion, and in that of its scientific advisers, such a régime would unduly and unnecessarily hamper the operations of the Trail Smelter and would not constitute a 'solution fair to all parties concerned'.[708]

525. The Tribunal took the view that only *actual injuries* incurred deserved compensation.

526. States have sometimes demanded reparation for non-material damage. When the Soviet nuclear-powered satellite Cosmos-954 crashed on Canadian territory, Canada demanded compensation for the injuries it had sustained by reason of the crash, including violation by the satellite of its territorial sovereignty. Basing its claim on "international precedents", Canada stated:

> The intrusion of the Cosmos-954 satellite into Canada's air space and the deposit on Canadian territory of hazardous radioactive debris from the satellite constitutes a violation of Canada's sovereignty. This violation is established by the mere fact of the trespass of the satellite, the harmful consequences of this intrusion being the damage caused to Canada by the presence of hazardous radioactive debris and the interference with the *sovereign right of Canada** to determine the acts that will be performed on its territory. *International precedents recognize that a violation of sovereignty gives rise to an obligation to pay compensation.**[709]

527. In the *Trail Smelter* arbitration, in reply to the United States claim for damages for wrong done in violation of its sovereignty, the Tribunal held that it *lacked jurisdiction*. The Tribunal found it unnecessary to decide on the main contention for "damages in respect of the wrong done the United States in violation of sovereignty"[710] independently of the Convention for Settlement of Difficulties arising from Operation of Smelter at Trail, B.C.[711] In its view, the only question to be decided was the interpretation of the Convention. It construed the words "damage caused by the Trail Smelter" in article III of the Convention as not encompassing money expended for investigation. It therefore decided that "neither as a separable item of damage nor as an incident to other damages should any award be made for that which the United States terms 'violation of sovereignty'".[712]

528. In declining to rule, in law and in fact, on whether indemnity for damage for "violation of sovereignty" could be awarded if specifically alleged, the Tribunal did not seem to exclude such possibility. In an earlier case, *S.S. "I'm Alone"*,[713] a British vessel of Canadian registry, was sunk on 22 March 1929, on the high seas, in the Gulf of Mexico by the United States revenue cutter *Dexter*. The vessel *S.S. "I'm Alone"* had been used for several years in running rum, illegally into, and for sale in, the United States. For some period in December 1928 and during the early months of 1929 up to the time of its sinking, the ship had been carrying liquor from Belize to a point in the Gulf of Mexico off the coast of the State of Louisiana, where the liquor would be offloaded into a smaller craft and smuggled into the United States. From September 1928 to March 1929, the *S.S. "I'm Alone"* was *de facto* owned, controlled, and at the critical times, managed, and its movements directed and its cargo dealt with and disposed of, by a group of persons who were predominantly American citizens.

529. Under the Convention between the United States of America and Great Britain to aid in the prevention of the smuggling of intoxicating liquors into the United States,[714] Great Britain agreed that it would not raise any objection to the boarding of private vessels under British flag outside the limits of territorial waters by the United States authorities, its territories or possessions for purposes of arresting the illegal importation of alcoholic beverages. The Convention also granted a British vessel the right to compensation for loss or injury suffered through improper or unreasonable exercise of the rights under the Convention. As envisaged under article IV of the Convention, in the joint final report of the commissioners in the case dated 5 January 1935 and filed with the Secretary of State at Washington and the Minister of External Affairs for Canada at Ottawa on 9 January 1935, it was considered in view of the fact that no compensation ought to be paid in respect of the loss of the ship or the cargo.

530. However, the act of sinking the ship by officers of the United States Coast Guard was considered an unlawful act for which the United States "ought formally to acknowledge its illegality, and to apologize"[715] to Canada. As material amends in respect of the wrong, it was recommended that the United States pay US$ 25,000. Compensation was also recommended for payment to Canada for the benefit of crew members, none of whom were part of the conspiracy to smuggle liquor. In the view of the commissioners, the sinking of the ship, which was admittedly intentional, was not justified by anything in the Convention or by any principle of international law.

531. State practice reveals remedies for instances of *potential material damage*. This category of practice is parallel to the role of *injunction* in judicial decisions, as in the *Nuclear Tests* cases (paras. 234–239 above). There can certainly be no material injury prior to the operation of a particular injurious activity. Nevertheless, in a few instances, negotiations have taken place to secure the

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[708] UNRIAA (see footnote 362 above), p. 1974.

[709] ILM (see footnote 361 above), para. 21.

[710] UNRIAA (see footnote 362 above), p. 1932.

[711] *Ibid*., p. 1907, text of the Convention, signed at Ottawa on 15 April 1935, with ratifications exchanged on 3 August 1935.

[712] *Ibid*., p. 1933.

[713] *S.S. "I'm Alone" case (Canada* v. *United States of America), ibid*., p. 1609.

[714] *Ibid*., p. 1611.

[715] *Ibid*., p. 1618.

adoption of protective measures, and even to demand the halting of the proposed activity. Such demands have been based on the gravity of the potential damage entailed. The general feeling seems to be that States must take reasonable protective measures to ensure, outside the limits of their territorial sovereignty, the safety and harmlessness of their lawful activities. Of course, the potential harm must be incidental and unintentional; nonetheless, the potentially injured States have the right to demand that protective measures be taken.

532. State practice regarding liability for reparation of actual damage is more settled. There is clearer acceptance of the explicit or implicit liability of States for their behaviour. In connection with a few incidents, States have also accepted responsibility for reparation of *actual damage* caused by the activities of private persons in their territorial jurisdiction or under their control. In the River Mura incident, the former Yugoslavia claimed damages from Austria for the *economic loss* incurred by two paper mills and by the fisheries, as a result of the extensive pollution caused by the Austrian hydroelectric facilities (para. 425 above). In the tanker *Juliana* incident (para. 426 above), the flag State, Liberia, offered 200 million yen to the Japanese fishermen in compensation for the damage which they had suffered as a result of the *Juliana* running aground and washing its oil onto the coast of Japan.

533. Compensation has been made where an activity occurring in the shared domain has required the *relocation of people*. In connection with the United States nuclear tests in the Eniwetok Atoll, the compensation entailed payment for temporary usage of land and for *relocation costs* (para. 407 above).

534. This matter has been a subject of further detailed consideration in the context of the Marshall Islands Nuclear Claims Tribunal established under the Marshall Islands Nuclear Claims Tribunal Act 1987. The Tribunal has had occasion to make a final determination of compensation to the claimants for past and future loss of use of the Eniwetok Atoll; for restoration of Eniwetok to a safe and productive state; and for the hardships suffered by the people of Eniwetok as a result of their relocation attendant to their loss of use.[716]

535. In December 1947, the people of Eniwetok were removed from the atoll to Ujelang Atoll. At the time of their removal, the acreage of the atoll was 1,919.49 acres. On their return, on 1 October 1980, after 43 tests of atomic devices had been conducted, 815.33 acres were returned for use, another 949.8 acres were not available for use and an additional 154.36 acres had been vaporized.[717]

536. Concerning the loss of use of lands, the Marshall Islands Nuclear Claims Tribunal based its determination on a joint appraisal report conducted by a team of appraisers, one selected by the claimants and the other by the defender of the fund established under the Marshall Islands Nuclear Claims Tribunal Act 1987. The value of the loss was calculated by multiplying the relevant annual rental value by the affected acreage and by the period of years' use of land was lost. The period of loss consisted of past loss (12 December 1947 to the date of valuation) and future loss (from the date of valuation to such time in the future as the affected property was returned to the people of Eniwetok in usable condition). This period was determined by the parties to be 30 years from the effective date of the evaluation (17 May 2026). The Tribunal also made adjustments for the deferred nature of the compensation for past loss and a discount for future loss.

537. In determining the annual rental value, the appraisers acknowledged that the circumstances of property ownership in the Marshall Islands challenged traditional appraisal methods: the customary system of land tenure was collective and did not include the concept of market value. Although landownership was forbidden by law, over time, the transfer of user rights or possessing interests in land for money had gained a measure of social acceptance. Consequently, the appraisers developed a database of comparable transactions from these transfers. Thus, the islands were categorized as rural, with a highest and best use of agricultural and residential uses. For rural lands there was no significant difference in pricing on the basis of the size of the parcel or the basis of use, whether residential or agricultural.

538. Over 470 transactions were collected for review, and of these 174 were determined as comparable, although there was a paucity of information for lost use in the earlier years. This problem was overcome by the use of "trending analysis", which combined "a pure exponential trend fit to the database" and "an exponential fit for the first twenty years of the period of lost use"[718] and subsequently the government rental rate was used as a benchmark. The correlated approach resulted in annual rental values ranging from US $41 per acre in 1947 to US $4,105 per acre in 1996.

539. The valuation also took into account the effect of the lost use of the proceeds from the annual rentals. Three periods were agreed upon for the valuation, namely 21 December 1947 to 30 September 1980 (1,919.49 acres); 1 October 1980 to 24 January 1997 (1,104.16 acres); and 24 January 1997 to 16 May 2026 (1,104.16 acres).

540. The Marshall Islands Nuclear Claims Tribunal also considered in the loss of use calculations, the acreage of the vaporized islands. The Tribunal elected to treat such islands as temporarily lost. In the context of the class action, such islands were regarded as part of an environmental whole consisting of the entire atoll ecosystem. Thus the atoll as a whole was a relevant unit for purposes of characterization of loss. Moreover, it was considered that the problems of determining a fee simple value in the Marshall Islands, where such transactions were virtually unknown and not subject to market analysis, precluded the evaluation of such loss.[719] Based on the annual rental rates, the affected acreage and the number of years to the date of the hearing, the rental values for past lost use (including interest) amounted to US$ 304 million. This amount was further adjusted against compensation already received by the people of Eniwetok. This included

[716] ILM (see footnote 603 above).

[717] *Ibid.*

[718] *Ibid.*, p. 1217.

[719] *Ibid.*

prior compensation in the sum of US$ 175,000 made on or about 19 November 1956; US$ 1,020,000 made on or about 19 August 1969; US$ 750,000 made on or about 30 September 1976; US$ 750,000 made on or about 18 December 1978; annual payments of US$ 3,250,000 from 1987 through 1999 made pursuant to the related agreement; and US$ 10 million for resettlement of Enjebi Island.[720]

541. Also taken into account in the adjustment was the use of Ujelang Atoll by the people of Eniwetok from 21 December 1947 to 30 September 1980. The annual per acre value for the use of Ujelang was determined to be 58 per cent of the annual per acre value of Eniwetok. This reduction was based upon the relative scarcity of resources in Ujelang and the relative lack of access to off-island resources because of poor transportation to the atoll. The annualized use value for each year between 1947 and 1980 was set off against the respective annual loss of use values for Eniwetok. Accordingly, the value of past lost use was adjusted to US$ 149 million.

542. In determining compensation for denied future use, the Marshall Islands Nuclear Claims Tribunal preferred to make a final determination on the matter and therefore declined to follow the suggestion of the claimants that the value of future lost use be calculated as the "annual rental for land not available … at the minimum of $3,000 per acre until the lands become fully usable by the people of Enewetak, plus interest of at least 6.86% on such annual rental until paid".[721] It determined that leaving undecided the question of how long the future use would last was not consistent with its responsibility to make a final determination in the claim.

543. The Tribunal therefore based its calculations on a time period of 30 years. The value for lost future use was determined to be US$ 50,154,811. This amount took into account anticipated payments of US$ 3,250,000 annually in 2000 and 2001 under the related agreement.[722]

544. The Tribunal also considered questions concerning resettlement as an element of compensation. The claimants had contended that such determinations were essential in order to put the Eniwetok people in a situation similar to their situation prior to their relocation in 1947. They were basically unable to engage in their traditional economic activities because of the residual radioactivity and the perception in the marketplace that anything produced was contaminated. After reviewing the positions of the two sides, the Tribunal denied the claim for US$ 52 million to provide for residences and community infrastructure. It noted that it:

> agrees with claimants that the economic situation of the community is an important element of consideration in the overall structure of compensation in this case. However, it disagrees that this element of damage should be addressed through the type of resettlement costs proposed by claimants. The economic values inherent in the request for claimants' resettlement costs are addressed through the award for loss of use … To allow additional compensation for resettlement costs on the order of those requested by claimants would amount to a duplicative award.[723]

545. The Tribunal also considered the question of compensation concerning hardship as a result of relocation to Ujelang and conditions on the atoll. It found that the nature of the hardships were more than a simple annoyance; they were closely related to the underlying subject matter of land damages and could not be addressed through the Tribunal's personal injury programme as suggested by the defender of the fund. They were community-wide and differed from personal injury damages. The Tribunal noted that:

> The injuries at issue here are those arising out of the relocation to Ujelang and the hardships endured there by the people because of its remoteness and lack of adequate resources to support the population sent there. The damages are a consequence of the loss of their land and their relocation attendant to that loss.[724]

546. The Tribunal quantified the damages by paying an annual amount for each person on Ujelang for each of the 33 years between 1947 and 1980 that the people of Eniwetok were on Ujelang. Based on the cases cited and the Tribunal's personal injury programme and in order to be fair and consistent to all personal injury claimants, whose maximum award was US$ 125,000 for serious medical conditions most likely to lead to death, the Tribunal ascertained that an individual should not receive hardship damages exceeding that amount. It also distinguished between two periods of hardships. Between 1956 and 1972, a period of greatest hardship, US$ 4,500 was determined as an annual amount per person. For the period preceding and following this period, the amount was US$ 3,000. Thus an individual who was on Ujelang for all the 33 years would receive US$ 123,000. Based upon the annual population figures for 33 years beginning in 1947, the damages were calculated at US$ 34,084,500.

547. In the *Trail Smelter* arbitration, the Tribunal awarded the United States damages in respect of physical damage to cleared and uncleared land and buildings by reason of the reduction in crop yield and in the rental value of the land and buildings and, in one instance, of *soil impairment*. The denial of damages for other injuries, it appears, resulted mainly from *failure of proof*. With respect to damage to cleared land used for crops, the Tribunal found that damage through reduction in crop yield due to fumigation had occurred in varying degrees during each of the years 1932 to 1936, but found no proof of damage in 1937. The properties owned by individual farmers which allegedly had suffered damage had been divided by the United States into three classes: (*a*) properties of "farmers residing on their farms"; (*b*) properties of "farmers who do not reside on their farms"; (*ab*) properties of "farmers who were driven from their farms"; and (*c*) properties of large owners of land. The Tribunal did not adopt that division. Instead, it "adopted as the measure of indemnity to be applied on account of damage in respect of cleared land used for crops, the measure of damages which the American courts apply in cases of nuisance or trespass of the type here involved, *viz*., the

[720] *Ibid*., pp. 1217–1218.

[721] *Ibid*., p. 1218.

[722] *Ibid*.

[723] *Ibid*., p. 1225.

[724] *Ibid*., pp. 1227–1228.

amount of reduction in the value of use or rental value of the land caused by fumigations".[725]

548. The Tribunal found that, in the case of farm land, reduction in the value of its use was in general equivalent to the amount of the reduction of the crop yield arising from injury to crops, less the cost of marketing the same.[726] In the opinion of the Tribunal, the *failure* of farmers to increase their seeded land in proportion to such increase in other localities might also be taken into consideration. This is an example of the *duty to mitigate the injury*.

549. With regard to the problem of abandonment of properties by their owners, the Tribunal noted that practically all such properties listed appeared to have been abandoned prior to 1932. In order to deal with that problem as well as with that of farmers who had been unable to increase their seeded land, the Tribunal, not having to adjudicate on individuals' claims, decided to estimate, on the basis of the *statistical data* available, the *average acreage* on which it was reasonable to believe that crops would have been seeded and harvested during the period under consideration but for the fumigations.[727]

550. Concerning claims for special damage for *impairment of the soil content* through increased acidity produced by the sulphur dioxide contained in the waters, the Tribunal considered that the evidence put forward in support of that contention was not conclusive, except for one small area in respect of which an indemnity was allowed for *reduction in the value* of farms in proximity to the frontier line that were injured by a serious increase in the acidity of the soil by reason of exposure to the fumigations.[728] The Tribunal also awarded an indemnity for special damage for *reduction in the value* of the use or rental value of farms by reason of proximity to the fumigations.[729]

551. With regard to the claim that the fumes had inhibited the growth and reproduction of timber, the Tribunal adopted the measure of damages applied in United States courts, namely, reduction in value of the land itself due to such destruction and impairment:

> (*b*) With regard to damage due to destruction and impairment of growing timber (not of merchantable size), the Tribunal has adopted the measure of damages applied by American courts, *viz*., the reduction in value of the land itself due to such destruction and impairment. Growing timberland has a value for firewood, fences, etc., as well as a value as a source of future merchantable timber. No evidence has been presented by the United States as to the locations or as to the total amounts of such growing timber existing on 1 January 1932, or as to its distribution into types of conifers—yellow pine, Douglas fir, larch or other trees. While some destruction or impairment, deterioration, and retardation of such growing timber has undoubtedly occurred since such date, it is impossible to estimate with any degree of accuracy the amount of damage. The Tribunal has, however, taken such damage into consideration in awarding indemnity for damage to land containing growing timber.[730]

552. The United States had *failed to prove* damage with respect to the alleged lack of production as well as in respect of livestock.[731] Again, proof of damage to property in the town of Northport was also insufficient.[732]

553. With regard to damages in respect of business enterprises, the United States had claimed that the businessmen had suffered loss of business and impairment of the value of goodwill because of the reduced economic status of the residents of the damaged area. The Tribunal found that such damage "due to reduced economic status"[733] was too indirect, remote and uncertain to be appraised and not such for which an indemnity could be awarded. In the opinion of the Tribunal, the argument that indemnity should be obtained for an injury to or reduction in a man's business due to the inability of his customers or clients to buy—which inability or impoverishment had been caused by a nuisance, even if proved—was too indirect and remote to become the basis, in law, for an award of indemnity.

554. Further, the Tribunal determined that the United States contention of *pollution of waterways had not been proved* and it did not consider the request for indemnity for *money expended in the investigation undertaken* concerning the problems created by the smelter. This claim was made in connection with its *action for violation of sovereignty*. The Tribunal, however, did not seem to exclude the possibility of *granting indemnity for the expenses of processing claims*. It recognized that in some cases involving the question of damage to individual claimants, international arbitration might award damages.

555. For the Tribunal, the difficulty lay not so much in the content of the claim as in its characterization as damages in a case of arbitration between two independent Governments where each had incurred expenses and "where it is to the mutual advantage of the two

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[725] *Ibid*., pp. 1924–1925.

[726] *Ibid*., p. 1925.

[727] *Ibid*.

[728] *Ibid*.

[729] *Ibid*., p. 1926.

[730] *Ibid*., p. 1929.

[731] "(c) With respect to damage due to the alleged lack of production, the Tribunal has carefully considered the contentions presented. The contention made by the United States that fumigation prevents germination of seed is, in the opinion of the Tribunal, not sustained by the evidence. Although the experiments were far from conclusive, Hedgecock's studies tend to show, on the contrary, that, while seedlings were injured after germination owing to drought or to fumes, the actual germination did take place."
(*Ibid*.)

"(3) With regard to 'damages in respect of livestock', claimed by the United States, the Tribunal is of opinion that the United States has failed to prove that the presence of fumes from the Trail Smelter has injured either the livestock or the milk or wool productivity of livestock since January 1, 1932, through impaired quality of crop or grazing. So far as the injury to livestock is due to reduced yield of crop or grazing, the injury to livestock is due to reduced yield of crop or grazing, the injury is compensated for in the indemnity which is awarded herein for such reduction of yield."
(*Ibid*., p. 1931)

[732] "(4) With regard to 'damages in respect of property in the town of Northport', the same principles of law apply to assessment of indemnity to owners of urban land as apply to owners of farm and other cleared land, namely, that the measure of damage is the reduction in the value of the use or rental value of the property, due to fumigations. The Tribunal is of opinion that there is no proof of damage to such urban property; that even if there were such damage, there is no proof of facts sufficient to enable the Tribunal to estimate the reduction in the value of the use or rental value of such property; and that it cannot adopt the method contended for by the United States of calculating damages to urban property."
(*Ibid.*)

[733] *Ibid.*

Governments that a just conclusion and permanent disposition of an international controversy should be reached".[734]

556. In the *Alabama* case, the Tribunal awarded damages in respect of net freight lost and other undefined damage resulting from Great Britain's failure to exercise "due diligence". However, damages in respect of the costs of pursuit of the Confederate cruisers outfitted in British ports were denied because such costs could not be distinguished from the ordinary expenses of the war, as were damages in respect of prospective earnings, since they depended on future and uncertain contingencies.[735]

557. In its claim against the Soviet Union for injuries resulting from the crash of the Soviet nuclear-powered satellite Cosmos-954 on Canadian territory, Canada stressed the duty to *mitigate damages*:

> Under general principles of international law, Canada had a duty to take the necessary measures to prevent and reduce the harmful consequences of the damage and thereby to mitigate damages. Thus, with respect to the debris, it was necessary for Canada to undertake without delay operations of search, recovery, removal, testing and clean-up. These operations were also carried out in order to comply with the requirements of the domestic law of Canada. Moreover, article VI of the Convention [on international liability for damage caused by space objects] imposes on the claimant State a duty to observe reasonable standards of care with respect to damage caused by a space object.[736]

558. The Canadian claim also indicated that:

> In calculating the compensation claimed, Canada has applied the relevant criteria established by general principles of international law according to which fair compensation is to be paid, by including in its claim only those costs that are reasonable, proximately caused by the intrusion of the satellite and deposit of debris and capable of being calculated with a reasonable degree of certainty.[737]

559. The Atlantic Richfield Corporation (ARCO), which operated the refinery at Cherry Point, in the State of Washington, where some 12,000 gallons of crude oil had spilled into the sea in 1972, paid an initial clean-up bill of US$ 19,000 submitted by the municipality of Surrey to cover its operations. ARCO later agreed to pay another US$ 11,696.50, to be transmitted by the United States to the Canadian Government, for its *costs incurred in connection with the clean-up operation*, but refused to reimburse an additional item of US$ 60 designated "bird loss (30 birds at $2 a bird)". The payment was made "without admitting any liability in the matter and without prejudice to its rights and legal position".[738]

560. In some cases, claims for ecological damage have been made. The jurisprudence, however, seems inconsistent. In two cases, the *Patmos* and the *Haven*, the courts in question had an opportunity to make determinations bearing on the interpretation of the 1969 Civil Liability/1971 Fund Conventions. In both cases, the Italian Government sought to claim from the IOPC Fund. In the *Patmos* litigation, which arose from the collision between the Greek oil tanker *Patmos* and the Spanish tanker *Castillo de Monte Aragón* in the Strait of Messina on 21 March 1985, during which more than 1,000 tons of oil spilled into the sea, with a few tons reaching shore on the coast of Sicily, the Italian Government first lodged a claim for ecological damage in the Tribunal of Messina. Measures were taken by the Government to contain the spill from polluting the coast. The claim, which was based on the 1969 Civil Liability Convention, was dismissed, with the Court construing article II as referring to damage done *on the territory* and not *to the territory* or the territorial waters of the Contracting Parties. This was interpreted as meaning that the damage had to be done to things which lay on the territory or in the territorial sea. Had Italy suffered damage to its shores, over which it had proprietary rights, as opposed to rights of territorial sovereignty, a claim for damages would have laid. The Court also ruled out compensation for damage to marine flora and fauna, which were considered *res communis omnium*.

561. Moreover, it held that Italy had not suffered any direct or indirect economic damage or loss of income. Nor had it incurred expenses in the clean-up of its shores.[739] The Court noted that IOPC Fund resolution No. 3 of 1980 did not allow it to assess compensation to be paid by the Fund "*on the basis of an abstract quantification of damage calculated in accordance with theoretical models*".[740] As such, the Court did not rely on expert evidence provided by the defence or order an independent expert report.

562. The IOPC Fund Assembly had adopted the 1980 resolution soon after the Executive Committee of the Fund had opposed a claim by the former Soviet Union in respect of damage arising from the 1979 *Antonio Gramsci* incident.[741] On 6 February 1979, the tanker *Antonio Gramsci* had run aground in the Baltic Sea and 570 tons of its crude oil spilled into the ice-covered sea. The oil continued to drift and spread in the ice and eventually covered an area of more than 3,500 square kilometres. In that case, the Government of the former Soviet Union lodged a claim within its courts of an abstract nature for compensation for ecological damage, the amount of which was

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[734] *Ibid*., p. 1933.

[735] Moore, *op. cit*., p. 658.

[736] ILM (see footnote 361 above) pp. 905–906, para. 17.

[737] *Ibid*., p. 907, para. 23.

[738] See footnote 623 above; and *The Montreal Star*, 9 June 1972.

[739] See generally Bianchi, *loc. cit*., pp. 113–129. See also Maffei, "The compensation for ecological damage in the 'Patmos' case", pp. 383–390; and Ong, "The relationship between environmental damage and pollution: marine oil pollution laws in Malaysia and Singapore", pp. 201–204. The information regarding the *Patmos,* the *Antonio Gramsci,* the *Haven* and the *Amoco Cadiz* is largely based on these articles; and Sands, *op. cit*., pp. 918–922.

[740] Sands, *op. cit*., p. 918.

[741] The second *Antonio Gramsci* incident occurred on 6 February 1987, when another Soviet-registered tanker ran aground off the southern coast of Finland, spilling about 600–700 tons of oil. The Finnish Government claimed compensation for surveys of the environment. The Fund views such expenses as falling outside the definition of "pollution damage". The claim by the Soviet Union used the same assessment. The Fund and the shipowner's insurer contested the validity of the calculation. Expert testimony also showed that the quantity of oil recovered according to the assessment used by the Soviet Union was much less than actually used in the calculation of the claim and the quantity recovered consisted partially of water. Thus, there was some indication that the calculations might in fact have been speculative. The Fund brought the 1980 resolution to the attention of the claimant. It also noted that the member State [the Soviet Union] was not a party to the Fund Convention at that time and had abstained from submitting claims for compensation of damage to the environment in order to comply with the interpretation of the Fund Assembly. The matter was closed in 1990 following a compromise settlement with the owner of the *Antonio Gramsci*. See generally Wu Chao, *op. cit*., pp. 365–366.

calculated on the basis of a mathematical formula contained in its statute which presumed that a certain quantity of oil discharged into the sea would pollute a given quantity of water (at a rate of 2 roubles per cubic metre of polluted water estimated according to the quantity of oil spilled). The Fund opposed the claim, noting that it did not fall within the definition of "pollution damage" under the 1969 Civil Liability Convention. It also noted that the Convention regime did not allow damages to be quantified through the use of mathematical models.

563. While the resolution was referred to in the Tribunal in the *Patmos* case, the Court of Appeal of Messina ignored the resolution when the Italian Government, through the relevant ministry, successfully appealed against the decision of the lower court. The Court of Appeal defined pollution damage in article I, paragraph 6, of the 1969 Civil Liability Convention broadly as encompassing environmental values relating to the conservation of flora and fauna. It did so by taking into account the provisions of the International Convention relating to intervention on the high seas in cases of oil pollution casualties. It essentially construed "related interests" in articles I and II of the International Convention, under which contracting States are allowed to take measures to, *inter alia*, prevent pollution to their coastline or *related interests*, as including damage to the coast and *related interests* of coastal States. It also noted that, although the notion of environmental damage could not be established by resorting to any mathematical or accounting method, it could be evaluated in the light of the economic relevance *per se* of the destruction, deterioration or alteration of the environment for the community benefiting from its resources. Since environmental damage could not be the object of a pecuniary appraisal since it had no market value, it could only be compensated on the basis of an equitable appraisal. The Court also authorized the preparation of an expert report in order to appraise environmental damage in more concrete terms.[742]

564. On the basis of the report of the group of experts, the Court of Appeal issued the final award in 1994. It held that in the light of the expert evidence and of the relevant acts submitted to it, environmental damage affecting marine life had been established even though it had not been quantified in precise terms. The expert report noted that the chemical and physical alterations of the marine environment could cause disturbances which could potentially affect pelagic organisms living in the different layers of the sea as well as the seabed. The Court, relying on the expert evidence, although it did not endorse fully all the findings, awarded damages on the basis of an equitable appraisal under article 1226 of the Italian Civil Code, which allowed such an approach in cases where damage could not be quantified in precise terms. The appraisal was made on the basis of, *inter alia*, such objective criteria provided by the expert evidence as damage to the benthos, the quantity of fish destroyed and the market value of the fish (reduced to an estimated wholesale value at the time of the accident). An award of 2,100 million lire was made for environmental damage.

565. In the *Haven* case, the IOPC Fund objected to a claim by Italy for ecological damage. In that case, the *Haven*, flying the flag of Cyprus and owned by Venha Maritime Ltd. of Monrovia, Liberia, sank several kilometres off the coast of the Arenzano commune, near Genoa on the western Ligurian Riviera, on 11 April 1991, following an explosion which led to its breaking up and burning. Italian State authorities, including the regional government of Liguria, some provinces and communes lodged claims for compensation for quantifiable and unquantifiable elements of damage to the marine environment under the 1969 Civil Liability Convention in the provisional sum of 100,000 million lire. It was also claimed that as a result of the 1986 law on environmental protection it was necessary to take into account the seriousness of the fault and the profit accruing to the person liable when such environmental damage was being estimated on an equitable basis. In denying the claim, the Fund maintained that no right to compensation for unquantifiable elements of damage to the marine environment existed under the 1969 Civil Liability/Fund Convention regime. Moreover, the Italian law in question introduced a punitive element in the calculation of compensation which could not have been intended by the framers of the 1969 Civil Liability/1971 Fund Convention regime. This view was supported at a session of the Executive Committee of the Fund by France, Japan and the United Kingdom as well as by the observer of the shipping, insurance and freight companies.

566. It was maintained by the Italian delegation that the 1969 Civil Liability and the 1971 Fund Conventions did not exclude compensation for environmental damage which was non-quantifiable and that under Italian law damage to the marine environment was compensable for both quantifiable and non-quantifiable elements.

567. The Court of First Instance in Genoa found in April 1996 that "pollution damage" in the 1969 Civil Liability and 1971 Fund Conventions encompassed natural resource and environmental damage. It awarded 40,000 million lire, about one third the clean-up cost, since the clean-up did not repair all the damage caused. In the final out-of-court settlement reached in 1999, all sides reserved their positions, in particular with the IOPC Fund reaffirming that there was no right of compensation for environmental damage under the Civil Liability/Fund Convention regime, while the Italian Government reaffirmed its right to compensation for environmental damage and claimed that equitable compensation for such damage was an acceptable head of liability. In addition to paying the 40 million lire indicated by the Court in Genoa, the shipowner and the insurance company made an *ex gratia* payment of 25,000 million lire without admitting liability beyond the limits established by the 1969 Convention.

[742] The Court of Appeal held that

> "the environment must be considered as a unitary asset, separate from those of which the environment is composed (territory, territorial waters, beaches, fish, etc.) and it includes natural resources, health and landscape. The right to the environment belongs to the State, in its capacity as representative of the collectivities. The damage to the environment prejudices immaterial values, which cannot be assessed in monetary terms according to market prices, and consists of the reduced possibility of using the environment. The damage can be compensated on an equitable basis, which may be established by the Court on the grounds of an opinion of experts … The definition of 'pollution damage' as laid down in Article I.6 … is wide enough to include damage to the environment of the kind described above."

(Summary of the judgement of the Court of Appeal (FUND/EXC.30/2 of 29 November 1991), para. 4.15)

568. The *Amoco Cadiz* disaster was also a subject of litigation in the United States. On the morning of 16 March 1978, the supertanker *Amoco Cadiz* broke apart in a severe storm, spilling most of its load of 220,000 tons of crude oil into the sea off the coast of Brittany, France. The spill damaged approximately 180 miles of coastline, destroying fisheries, oyster and seaweed beds, as well as bathing beaches, despite the efforts of 10,000 French soldiers deployed to clean the beaches. The clean-up lasted more than six months and involved equipment and resources from all over the country. Although the accident occurred in French territorial waters, victims lodged claims in the United States in order to avoid the application of the 1969 Civil Liability Convention regime and its limitations on compensation. The French Government, French individuals, businesses and associations sued the owner of the *Amoco Cadiz*, Amoco Transport Company ("Amoco Transport"), and its American parent Standard Oil Company ("Standard Oil") in the Northern District Court of Illinois (the jurisdiction of Standard Oil). The Court found that Amoco Transport, a Liberian corporation, was merely a nominal owner of the *Amoco Cadiz* and that Standard Oil controlled the design, construction, operation and management of the tanker and treated it as if it belonged to Standard Oil. The Court found Standard Oil liable in tort for the negligent supervision of its subsidiaries. In 1988, the Court ordered the Amoco Oil Corporation to pay US$ 85.2 million in fines—US$ 45 million for the costs of the spill and US$ 39 million in interest.

569. The Court denied compensation for non-economic damage. It thus dismissed claims concerning lost image and ecological damage. It noted that it was "true that the commune was unable for a time to provide clean beaches for the use of its citizens, and that it could not maintain the normal peace, quiet, and freedom from dense traffic which would have been the normal condition of the commune absent the cleanup efforts", but concluded that "the loss of enjoyment claim by the communes is not a claim maintainable under French law".[743]

570. Concerning lost image, the Court observed that the plaintiffs' claim was compensable in measurable damage, to the extent that it could be demonstrated that the loss of image had resulted in specific consequential harm to the commune in that tourists and visitors who might otherwise have come stayed away. Yet this was precisely the subject matter of the individual claims for damages by hotels, restaurants, campsites, and other businesses within the communes.[744]

571. As regards ecological damage, the Court dealt with problems of evaluating "the species killed in the intertidal zone by the oil spill" and observed that "this claimed damage is subject to the principle of *res nullius* and is not compensable for lack of standing of any person or entity to claim therefor".[745]

572. All decisions on jurisdiction and liability, grounded in negligence, were affirmed on appeal by the Seventh Circuit. The computation of damages was also affirmed. There were, however, a few exceptions. For example, France was found to be entitled to an additional 3.5 million francs (before interest) for the expense of the clean-up. Moreover, the French plaintiffs were entitled to compound pre-judgement interest at a rate of 11.9 per cent per annum as from 1 January 1980. Some awards were also vacated for lack of standing in respect of the French trade associations appearing as plaintiffs.[746]

573. In the case entitled *In the Matter of the People of Enewetak* before the Marshall Islands Nuclear Claims Tribunal, the Tribunal had an opportunity to consider whether restoration was an appropriate remedy for loss incurred by the people of the Enewetak Atoll arising from nuclear tests conducted by the United States. It awarded clean-up and rehabilitation costs as follows: US$ 22.5 million for soil removal; US$ 15.5 million for potassium treatment; US$ 31.5 million for soil disposal (causeway); US$ 10 million for clean-up of plutonium; US$ 4.51 million for surveys; and US$ 17.7 million for soil rehabilitation and revegetation.

574. The Marshall Islands Nuclear Claims Tribunal first reviewed the relevant parts of the Restatement (Second) Torts, paragraph 929 (1) (*a*), and determined that there were persuasive personal reasons in favour of restoration of the damaged land and that the diminution in market value was not an appropriate measure of damage: in the first place, for "Marshall Islanders in general, and Enewetak people in particular, land is a part of one's person and one's entire identity. It is an integral part of a person's sense of who they are in the world and how their life makes sense as part of a certain culture. One's sense of self, both personal and cultural, is deeply embedded in a particular parcel of land on a particular atoll".[747] Moreover, it found that traditionally Marshall Islanders did not sell land rights, which were acquired by birthright. It thus found that the diminution in value approach to damages could not be applied because there was no market in fee simple property to provide comparable values to assess the loss. Moreover, a market approach would not provide a true measure of loss because it would not account for the deeply personal reasons of the Enewetak people for restoring their land.[748]

575. The applicable law provided that "[i]n determining any legal issue, the Claims Tribunal may have reference to the laws of the Marshall Islands, including traditional law, to international law and, in the absence of domestic or international law, to the laws of the United States".[749] The Tribunal first considered the question of radiological clean-up costs. It accepted the position of IAEA on the applicable protection standard that:

> As a basic principle, policies and criteria for radiation protection of populations outside national borders from releases of radioactive sub-

[743] Maffei, *loc. cit*., p. 393.

[744] *Ibid.*

[745] *Ibid*., pp. 393–394.

[746] In the matter of oil spill by the *Amoco Cadiz* off the coast of France on 16 March 1978, United States Court of Appeals, Seventh Circuit, *Federal Reporter*, 2nd ed., vol. 954 (January–March 1992), p. 1279.

[747] ILM (see footnote 603 above), p. 1219.

[748] *Ibid*., p. 1220.

[749] *Ibid.*

stances should be at least as stringent as those for the population within the country of release.[750]

576. Thus, the Marshall Islands Nuclear Claims Tribunal found support for restoration by reference to United States statutes on the environment, in particular certain policies and criteria of CERCLA, and applied "the current standards of the U.S. that would apply to Enewetak, were it within the United States".[751]

577. Expert testimony indicated that the major source of radiation exposure to residents of Eniwetok would be ingestion of locally grown food. This was considered particularly significant because the soils of the atoll allowed a high uptake of certain radionuclides by local plants. Cesium 137 was the primary radionuclide of concern. Based on United States standard computer analysis, a concentration of cesium in the soil between 0.32 and 0.35 picocuries per cubic gram (including background) would result in an annual effective dose equivalent to 15 millirem assuming a local only diet.

578. Although an exclusively local diet was unlikely, the Marshall Islands Nuclear Claims Tribunal considered it the appropriate working assumption to capture the "reasonably maximally exposed individual".[752] The results of two expert reports conducted in Eniwetok showed minor differences in the levels of concentration: assuming a local diet, one report showed that a cesium concentration of 0.247 to 0.274 picocuries per cubic gram (depending on the methodology utilized for determination of exposure) above background would result in an exposure of 15 millirem per year to the reasonably maximally exposed individual, and with background of 0.08 picocuries per cubic gram added in, the amount would range between 0.327 and 0.354 picocuries per cubic gram. The other methodology determined that a concentration of 0.35 picocuries per cubic gram would lead to an exposure of 15 millirem per year based upon a local food-only diet.

579. The parties therefore developed their remediation scenarios utilizing this concentration target. The basic techniques included removal of contaminated soil, application of potassium to the soil to reduce the plant uptake of cesium, and phytoremediation (the use of plants to strip the radioactive contaminants from the soil). While phytoremediation is a promising developing technology, its effectiveness in Eniwetok, a coral atoll environment, could not be reliably evaluated.

580. On the other hand, the application of potassium to the soil to block the uptake of Cesium 137 had been tested considerably, and was found to reduce such uptake by a factor of 10. However, it was ineffective where concentrations were higher. Moreover, potassium only blocked uptake without "cleaning up" the soil. Soil removal was also a tested technology which had been used in earlier clean-up efforts on the atoll, but it involved excavation and significant disposal of contaminated soil, resulting in ecological disruption because of the removal of the topsoil from the environment. It was also costly.

581. The Marshall Islands Nuclear Claims Tribunal decided to proceed with a combined solution, involving shielding and dilution and soil removal. Thus the Tribunal ordered the payment of US$ 22 million for soil removal; US$ 15.5 million for potassium treatment for 100 years, including a sound soil management programme; and US$ 4.51 million for radiological surveys to support the clean-up effort.[753] Such surveys included:

> A characterization survey consisting of field measurements and laboratory analysis ... to provide information as to the exact location and nature of the contamination to allow compliance with guideline levels. An on-going remedial action support survey … to support the clean-up effort while it is being performed. Finally, a survey to insure that areas subjected to remediation have met required clean-up levels.[754]

582. Concerning the removal and disposal of contaminated soil, the Marshall Islands Nuclear Claims Tribunal analysed the various options considered by the parties, including lagoon dumping, ocean dumping, disposal (with no waste stabilization) on an uninhabited island in the atoll, use of contaminated soil as backfill to extend land mass, construction of a causeway, crater entombment and disposal in the United States.

583. It was generally observed that disposal in the United States would be more expensive than local disposal of the contaminated soil, with dumping in the lagoon the most inexpensive option. The latter option was ruled out, though, because of legal and political concerns about ocean dumping of radioactive waste.[755]

584. The Marshall Islands Nuclear Claims Tribunal found that the causeway construction alternative "more fully protects the residents from risk of harm from exposure to radiation compared to other feasible local disposal options".[756] Considering that the major pathway for exposure was ingestion of foods, particularly plants, which had absorbed radioactive substances from the soil, a causeway could separate the contaminated soil from agriculturally productive areas, thereby protecting the people from exposure. At a cost of US$ 31.5 million, the causeway option proved to be the most effective disposal alternative.

585. The option of on-site disposal on an uninhabited island was disregarded because no site had been identified, nor was there a landowner who would consent to such disposal. The Tribunal also recognized that this was not the preferred option for the people of Enewetak. It also disregarded the option of crater entombment. Although that had precedents, it would not enhance the productivity of the community. Moreover, no site had been identified and the procedure would be more costly (US$ 84.7 million) than the causeway option.

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[750] *Ibid.*

[751] *Ibid.* Under the Environmental Protection Agency, "Establishment of cleanup levels for CERCLA sites with radioactive contamination":

> "Cleanup should generally achieve a level of risk with the 10^{-4} to 10^{-6} carcinogenic risk range based on the reasonable maximum exposure for an individual … If a dose assessment is conducted at the site then 15 millirem per year (mrem/yr) effective dose equivalent (EDE) should generally be the maximum dose limit for humans."

(*Ibid.*, pp. 1220–1221)

[752] *Ibid.*, p. 1221.

[753] *Ibid.*, p. 1222.

[754] *Ibid.*

[755] *Ibid.*, pp. 1222–1223.

[756] *Ibid.*, p. 1223.

586. In respect of the island of Runit, the Marshall Islands Nuclear Claims Tribunal noted the presence of residual Plutonium 239. The radiation levels exceeded the acceptable limits and the island remained quarantined from use. The Tribunal noted that clean-up of the plutonium was feasible through soil-sorting methods and dissolving the coral soil to separate out the plutonium for disposal. It awarded US$ 10 million for these purposes.[757]

587. In addition to the costs of removal of contaminated soil and its disposal, the Tribunal determined that the land must be restored to productivity. While the backfill to replace the removed soil would be dredged from the lagoon, it was felt that it would not contain sufficient organic material to be agriculturally productive. Out of the two possibilities considered—importing topsoil from off-island or rehabilitating the soil through agricultural means—the Tribunal expressed preference for the latter:

> This approach would restore the soil through natural means, utilizing local resources and involving landowners and a local workforce. The method has been tested … on Enewetak. The unit cost for this approach is estimated to be $29,000 per acre [compared to $40,062 per acre for topsoil importation], although it is acknowledged that it would take up to 50 years to completely restore the land to the level where it is self-sustaining. However, the import option would not include the cost of revegetation or maintenance and care. Additionally, there is the concern that imported soil may introduce foreign pests or plants inappropriate to the Enewetak ecological system.[758]

588. The Marshall Islands Nuclear Claims Tribunal determined the cost of soil rehabilitation and revegetation of affected lands to be US$ 17.7 million, as requested by the claimants.[759]

589. In some situations, compensation could be pursued and considered in the context of an overall settlement to be agreed upon between the parties to a dispute. In the case concerning the *Gabčíkovo-Nagymaros Project*,[760] ICJ, in considering the question of determining the consequences of its judgement as they bore upon the payment of damages, affirmed as a well-established rule of international law that an injured State is entitled to obtain compensation from the State which has committed an internationally wrongful act for the damage which it has caused. Having concluded that both parties had committed internationally wrongful acts, and noting also that those acts had given rise to the damage sustained by the parties, the Court determined that Slovakia was entitled to compensation for the damage suffered by Czechoslovakia as well as by itself as a result of Hungary's decision to suspend and subsequently abandon the works at Nagymaros and Dunakiliti, as those actions had caused the postponement of the putting into operation of the Gabčíkovo power plant, and changes in its mode of operation once in service. On its part, Hungary was entitled to compensation for the damage sustained as a result of the diversion of the Danube, since Czechoslovakia, by putting into operation Variant C, and Slovakia, in maintaining it in service, had deprived Hungary of its rightful part in the shared water resources, and both had exploited those resources essentially for their own benefit.

590. However, given that there had been intersecting wrongs by both parties, ICJ observed that the issue of compensation could be resolved satisfactorily in the framework of an overall settlement if each of the parties were to renounce or cancel all financial claims and counterclaims. At the same time, the Court pointed out that the settlement of accounts for the construction of the works was different from the issue of compensation, and must be resolved in accordance with the 1977 Treaty and related instruments.

2. Forms of compensation

591. In State practice, compensation for extraterritorial damage caused by activities conducted within the territorial jurisdiction or under the control of States has been paid either in the form of a lump sum to the injured State, so that it might settle individual claims, or directly to the individual claimants. The forms of compensation prevailing in relations between States are similar to those existing in domestic law. Indeed, some conventions provide that national legislation is to govern the question of compensation. When damages are monetary, States have generally sought to select readily convertible currencies.

(a) *Treaty practice*

592. While there are references to the forms of compensation in multilateral conventions, they are not very detailed. Attempts have been made in the conventions to make the compensation provisions useful to the injured party in terms of currency and of its transferability from one State to another. Under the 1960 Paris Convention, for example, the nature, form and extent of the compensation as well as its *equitable distribution* must be governed by *national law*. Furthermore, the compensation must be freely *transferable* between the Contracting Parties.[761] The 2004 Paris Convention contains similar provisions.[762] It further provides that the sums to which article 7 concerning liability relates may be converted into national currency in round figures. Each Contracting Party shall also ensure that rights of compensation may be enforced without bringing separate proceedings according to the origin of the funds provided for such compensation.[763] These provisions find precedent in the 1997 Vienna Convention, where the amounts established for liability may

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[757] *Ibid*.

[758] *Ibid*.

[759] *Ibid*.

[760] *I.C.J. Reports 1997* (see footnote 391 above), p. 81, paras. 151–154.

[761] The relevant provisions of the Convention are:

"*Article 7* ...

"(*g*) Any interest and costs awarded by a court in actions for compensation under this Convention shall not be considered to be compensation for the purposes of this Convention and shall be payable by the operator in addition to any sum for which he is liable in accordance with this article."

"*Article 11.* The nature, form and extent of the compensation, within the limits of this Convention, as well as the equitable distribution thereof, shall be governed by national law.

"*Article 12.* Compensation payable under this Convention, insurance and reinsurance premiums, sums provided as insurance, reinsurance, or other financial security required pursuant to article 10, and interest and costs referred to in article 7 (*g*), shall be freely transferable between the monetary areas of the Contracting Parties."

[762] Arts. 7 (*h*) and 11–12.

[763] Arts. 7 (*i*) –(*j*).

be converted into national currency in round figures. Moreover, each Contracting Party shall also ensure that rights of compensation may be enforced without bringing separate proceedings according to the origin of the funds provided for such compensation.[764]

593. Under article VIII, paragraph 1, of the 1997 Vienna Convention, and article VIII of the 1963 Vienna Convention, the *nature, form and extent of compensation*, as well as its *equitable distribution*, are governed by the competent courts of the Contracting Parties:

> Subject to the provisions of this Convention, the nature, form and extent of the compensation, as well as the equitable distribution thereof, shall be governed by the law of the competent court.

594. Following an amendment introduced through article 10 of the 1997 Vienna Convention, it envisages in article VIII, paragraph 2, that priority in the distribution of compensation shall be given to claims in respect of loss of life or personal property.

595. Article 8 of the 2004 Brussels Supplementary Convention provides:

> Any person who is entitled to benefit from the provisions of this Convention shall have the right to full compensation in accordance with national law for nuclear damage suffered, provided that where the amount of such damage exceeds or is likely to exceed 1,500 million euro, a Contracting Party may establish equitable criteria for apportioning the amount of compensation that is available under this Convention. Such criteria shall be applied whatever the origin of the funds and, subject to the provisions of Article 2, without discrimination based on the nationality, domicile or residence of the person suffering the damage.

596. Moreover, under article 9, the system of payment of public funds shall be that of the Contracting Party whose courts have jurisdiction. However, each Contracting Party shall ensure that persons suffering nuclear damage may enforce their rights to compensation without having to bring separate proceedings according to the origin of the funds provided for such compensation.[765]

597. The Nuclear Ships Convention states the value in gold of the franc, the currency in which compensation must be paid. It also provides that the awards may be converted into each national currency in round figures and that conversion into national currencies other than gold shall be effected on the basis of their gold value.[766]

598. The Additional Convention to CIV provides that, for certain injuries, compensation may be awarded in the form of a lump sum. However, if *national law* permits, payment of an *annuity* or, if the injured passenger so requests, compensation shall be awarded as an annuity. Such forms of damages are also provided for injuries suffered by persons for whose support the deceased passenger was legally responsible, as well as for the medical treatment and transport of an injured passenger and for loss due to his total or partial incapacity to work.[767]

599. If so agreed between the parties concerned, compensation under the Convention on international liability for damage caused by space objects may be paid in any currency; otherwise, it is to be paid in the currency of the *claimant State*. If the claimant State agrees, the compensation may be paid in the *currency of the State from which compensation is due*.[768]

(b) *Judicial decisions and State practice outside treaties*

600. Forms of compensation are referred to in judicial decisions and official correspondence in only a few cases, such as the compensation afforded Japan by the United States for injuries arising out of the Pacific nuclear tests and the compensation required of the United Kingdom in the *Alabama* case.[769] In each case, a lump sum payment was made to the State, which could then pay equitable compensation to the injured individuals. On the other hand, in *S.S. "I'm Alone"* compensation was recommended for payment to Canada for the benefit of the captain and other crew members or their representatives. Specific amounts were indicated for each individual. In *Vellore Citizens Welfare Forum* v. *Union of India*, the Supreme Court of

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[764] Arts. V A–B.

[765] See also articles 8–9 of the 1963 Brussels Convention:

"*Article 8.* Any person who is entitled to benefit from the provisions of this Convention shall have the right to full compensation in accordance with national law for damage suffered, provided that, where the amount of damage exceeds or is likely to exceed:

"(i) 120 million units of account; or

"(ii) if there is aggregate liability under Article 5(*b*) of the Paris Convention and a higher sum results therefrom, such higher sum,

any Contracting Party may establish equitable criteria for apportionment. Such criteria shall be applied whatever the origin of the funds and, subject to the provisions of Article 2, without discrimination based on the nationality, domicile or residence of the person suffering the damage.

"*Article 9.* (*a*) The system of disbursements by which the public funds required under Article 3 (*b*) (ii) and (iii) and (*f*) are to be made available shall be that of the Contracting Party whose courts have jurisdiction.

"(*b*) Each Contracting Party shall ensure that persons suffering damage may enforce their rights to compensation without having to bring separate proceedings according to the origin of the funds provided for such compensation.

"(*c*) No Contracting Party shall be required to make available the public funds referred to in Article 3 (*b*) (ii) and (iii) so long as any of the funds referred to in Article 3 (*b*) (i) remain available."

[766] Article III, paragraph 4, of the Convention reads:

"The franc mentioned in paragraph 1 of this Article is a unit of account constituted by sixty-five and one half milligrams of gold of millesimal fineness nine hundred. The amount awarded may be converted into each national currency in round figures. Conversion into national currencies other than gold shall be effected on the basis of their gold value at the date of payment."

[767] The relevant provisions of the Convention read:

"*Article 6. Form and limit of damages in case of death or personal injury to the passenger*

"1. The damages under article 3, paragraph 2, and article 4 (*b*) shall be awarded in the form of a lump sum; however, if national law permits payment of an annuity, damages shall be awarded in this form if so requested by the injured passenger or the claimants designated in article 3, paragraph 2."

"*Article 9. Interest and refund of compensation*

"1. The claimant shall be entitled to claim interest on compensation which shall be calculated at the rate of 5 per cent per annum. Such interest shall accrue from the date of the claim, or, if a claim has not been made, from the date on which legal proceedings are instituted, save that for compensation due under articles 3 and 4, interest shall accrue only from the day on which the events relevant to its assessment occurred, if that day is later than the date of the claim or the date on which legal proceedings were instituted.

"2. Any compensation improperly obtained shall be refunded."

[768] Article XIII of the Convention reads:

"Unless the claimant State and the State from which compensation is due under this Convention agree on another form of compensation, the compensation shall be paid in the currency of the claimant State or, if that State so requests, in the currency of the State from which compensation is due."

[769] Moore, *op. cit.*, p. 658.

India mandated the central Government to constitute an authority under the relevant environment legislation to compute compensation for "reversing the ecology and for payment to individuals". It further directed that:

A statement showing the total amount to be recovered, the names of the polluters from whom the amount is to be recovered, the amount to be recovered from each polluter, the persons to whom the compensation is to be paid and the amount payable to each of them shall be forwarded to the Collector/District Magistrates of the area concerned …

The authority shall direct the closure of the industry owned/managed by a polluter in case he evades or refused to pay the compensation awarded against him. This shall be in addition to the recovery from him as arrears of land revenue.[770]

601. In 1981, Canada agreed to a lump-sum payment of Can$ 3 million from the former Soviet Union in full and final settlement of all matters connected with the disintegration of the Soviet satellite Cosmos-954 in Canada.[771]

602. In addition to monetary compensation, compensation has occasionally taken the form of removing the danger or effecting *restitutio in integrum*. That was the case, for example, in the Palomares incident, in 1966, when nuclear bombs were dropped on Spanish territory and near the coast of Spain following a collision between a United States nuclear bomber and a supply plane. In a situation where the damage or danger of damage is so grave, the primary compensation is *restitution*, that is, removing the cause of the damage and restoring the area to its condition prior to the incident. The United States removed the causes of danger from Spain by retrieving the bombs and by removing the contaminated Spanish soil and burying it in its own territory.[772]

603. Following the nuclear tests conducted in the Marshall Islands, the United States reportedly spent nearly US$ 110 million to clean up several of the islands of the Eniwetok Atoll so that they might once again become habitable. However, one of the islands of the Runit Atoll, which had been used to bury nuclear debris, was declared off-limits for 20,000 years.[773] Although a clean-up operation does not constitute restitution, the intention and the policy underlying it are similar. Following the accidental pollution of the Mura River, Austria, in addition to paying monetary compensation for the damage caused to the fisheries and paper mills of the former Yugoslavia, delivered a certain quantity of paper to Yugoslavia.

604. In the *Amoco Cadiz* litigation, Petroleum Insurance Limited (PIL), the subrogee of Royal Dutch Shell, sought to recover from the Amoco International Oil Company for loss of cargo, claiming negligence and breach of contract. In October 1987, the Northern District Court of Illinois entered a judgement in favour of PIL in the sum of £11,212,349.50. The Court had first computed the damages in dollars and converted the award in pounds since English law required the Court to use the money in which the "loss is felt".[774] It converted in 1989 using the exchange rate prevailing in 1978, which proved prejudicial to PIL. On appeal, the United States Court of Appeal for the Seventh Circuit determined that the approach taken had not produced certainty. Nor had it honoured the currency choice of the parties in which to transact business and bear risks, which was the dollar. "Having computed the loss in dollars, it should have entered judgment in dollars."[775] Moreover, it had not adhered to the domestic norm of making the judgement creditor whole. The Court of Appeal therefore reversed the District Court's decision and instructed it to enter judgement in favour of PIL denominated in dollars.

3. Limitation on compensation

605. As in domestic law, State practice has provided for limitations on compensation, particularly in connection with activities which, although important to present-day civilization, can be injurious, as well as with activities capable of causing accidental but devastating injuries, such as those involving the use of nuclear materials. The provisions on limitation of compensation have been carefully designed to fulfil two objectives: (*a*) to protect industries from an unlimited liability that would paralyse them financially and discourage their future development; and (*b*) to ensure reasonable and fair compensation for those who suffer injuries as a result of those potentially dangerous activities.[776]

606. The United States OPA provides for limitation of liability. However, limitation cannot be invoked if, under section 2704 (*c*) (1), the incident was proximately caused by:

(A) gross negligence or wilful misconduct of, or

(B) the violation of an applicable Federal safety, construction, or operating regulation by, the responsible party, an agent or employee of the responsible party, or a person acting pursuant to a contractual relationship with the responsible party.

607. Under section 2704 (*c*) (2) of OPA, the responsible party is not entitled to limit its liability if it "fails or refuses":

(A) to report the incident as required by law and the responsible party knows or has reason to know of the incident;

(B) to provide all reasonable cooperation and assistance requested by a responsible official in connection with removal activities; or

(C) without sufficient cause, to comply with an order issued under

[770] *All India Reporter 1996* (see footnote 438 above), p. 2726, para. 24.

[771] See "Canada–Union of Soviet Socialist Republics: Protocol on settlement of Canada's claim for damages caused by 'Cosmos 954'", ILM, vol. XX, No. 3 (May 1981), p. 689.

[772] See footnote 705 above.

[773] See footnote 602 above.

[774] *Federal Reporter* (see footnote 746 above), p. 1327.

[775] *Ibid*., p. 1329.

[776] The preamble to the International Convention relating to the limitation of the liability of owners of sea-going ships clearly indicates the objectives of the Contracting Parties as:

"Having recognised the desirability of determining by agreement certain uniform rules relating to the limitation of liability of owners of sea-going ships;

"Have decided to conclude a Convention for this purpose …"

Article 1 of the Convention only reiterates the preamble. Under article 1, paragraph (3), the limitation of liability of the seagoing ship will cease if it is proved that the injury was caused by the negligence of the shipowner or of persons for whose conduct he is responsible. The question upon whom lies the burden of proving whether there has been a fault is to be determined by the law of the forum.

subsection (*c*) or (*e*) of section 1321 of this title or the Intervention on the High Seas Act.

608. The limitation of liability provided under section 2714 (*a*) of OPA may also be lost in accordance with section 2714 (*c*) by the wilful misconduct or violation of a safety regulation by an employee of the responsible party or by an independent contractor performing services for the responsible party.

609. The United States CERCLA contains, in section 9607 (*c*) (1), provisions on limitation of liability. The subsection also authorizes the imposition of *punitive damages* if a liable person fails without sufficient cause properly to provide removal or remedial action upon order of the President in an amount at least equal to and not more than three times the amount of costs incurred as a result of the failure to take proper action. As in OPA, the right to limit liability is lost if the defendant fails to cooperate or provide assistance to public officials.

610. Section 15 of the 1990 ELA of Germany also provides for limitations of liability.

(a) *Treaty practice*

611. The Protocol of 1992 to amend the Civil Liability Convention provides for limitation of liability. Since the amount of limitation in the earlier 1969 Civil Liability Convention was viewed as too low, it was amended by the Protocol of 1984 to increase the maximum amount of compensation available in case of oil pollution and was intended to attract some States, in particular the United States, to join the Protocol. Article 6, paragraph 2, of the Protocol amended article V, paragraph 2, of the 1969 Convention by providing that:

> The owner shall not be entitled to limit his liability under this Convention if it is proved that the pollution damage resulted from *his personal act or omission, committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result*.*

612. However, in March 1989, when the *Exxon Valdez* ran aground in Prince William Sound, Alaska, there was strong public reaction. This led to a decision by the United States Congress to reject the Protocol and to enact the OPA of 1990, which introduced limits on liability substantially higher than the Protocol of 1984 and provided unlimited liability in more circumstances than the earlier instrument, such as in situations of gross negligence, wilful misconduct and violations of applicable federal regulations.[777] The Protocol of 1984 never entered into force and the limits situation was not improved by the Protocol of 1992 to the Civil Liability Convention. That Convention increased the aggregate amount per incident and retained in article V, paragraph 2, a provision such as the one cited above. The limits established by that Convention, however, appear meagre in view of the fact that the total clean-up costs of *Exxon Valdez* alone were estimated at US$ 2.5 billion. The Protocol of 2003 to the 1992 Fund Convention, which provides a third-tier supplementary regime, is intended to maintain "the viability of the international oil pollution liability and compensation system". It was recognized that the maximum "afforded by the 1992 Fund Convention might be insufficient to meet compensation needs in certain circumstances in some Contracting States to that Convention".

613. Both the HNS Convention and CRTD contain limits on liability. In the case of the HNS Convention, the owner shall not be entitled to limit liability if it is proved that the damage resulted from the personal act or omission of the owner. Such act or omission should be with the intent to cause damage, or recklessly and with the knowledge that such damage would probably result.[778] With CRTD, limitation of liability is not applicable if, under article 10, paragraph 1, of the Convention,

> it is proved that the damage resulted from his personal act or omission or an act or omission of his servants or agents, committed with the intent to cause such damage or recklessly and with knowledge that such damage would probably result, provided that, in the case of such act or omission of a servant or agent, it is also proved that he was acting within the scope of his employment.

614. Articles 9, paragraph 3, and 13 of the HNS Convention require the owner to constitute a fund for the total sum representing the limit of liability and to carry compulsory insurance. Article 13 of CRTD also requires compulsory insurance from the carrier which should be equivalent to the maximum amount of liability.[779] Article 14 provides that every State party shall designate one or several competent authorities to issue or approve certificates attesting that the carrier has valid insurance.

615. In the field of nuclear energy, article 7 of the 1960 Paris Convention limits the liability of the operator. It also provides that the aggregate of compensation required to be paid in respect of damage caused by a nuclear incident shall not exceed the maximum liability established in accordance with the article.[780] Article 7 of the 2004 Paris Convention requires each contracting State to provide under its legislation a liability minimum of not less than 700 million euros per incident. Moreover, the minimum liability for low-risk installations and transport activities is enhanced to 70 million euros and 80 million euros respectively. The 1963 and 1997 Vienna Conventions also provide for limited liability. The liability of an individual under both Conventions is not affected by an act or omission done with intent to cause damage.[781]

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[777] Birnie and Boyle, *op. cit*., p. 388.

[778] Art. 9, para. 2.

[779] Article 13 of the Convention reads:

"1. The carrier's liability shall be covered by insurance or other financial security, such as a bank guarantee, if the dangerous goods are carried in the territory of a State Party.

"2. The insurance or other financial security shall cover the entire period of the carrier's liability under this Convention in the sums fixed by applying the limits of liability prescribed in article 9 and shall cover the liability of the person named in the certificate as carrier or, if that person is not the carrier as defined in article 1, paragraph 8, of such person as does incur liability under this Convention.

"3. Any sums provided by insurance or by other financial security maintained in accordance with paragraph 1 of this article shall be available only for the satisfaction of claims under this Convention."

[780] Article 7 (*a*) of the Convention defines the minimum and maximum amounts of compensation:

"The aggregate of compensation required to be paid in respect of damage caused by a nuclear incident shall not exceed the maximum liability established in accordance with this article."

[781] Art. 6, para. 4, of the 1997 Vienna Convention and art. IV, para. 7 (*a*) of the 1963 Vienna Convention.

616. The 1999 Basel Protocol establishes liability based on a strict liability regime and on fault. Insurance and other financial guarantees are compulsory in respect of the former. Fault liability is imputed to any person who caused or contributed to damage by his lack of compliance with the implementation provisions of the Basel Convention or by his wrongful, intentional, reckless or negligent acts or omissions.

617. The 2003 Kiev Protocol also establishes liability on the basis of strict liability and fault liability. Financial limits apply to the former and not to the latter.[782]

618. The liability of the operator is also limited under article 6 of the Seabed Mineral Resources Convention. Under paragraph 4, the operator will not be entitled to limit his liability if it is proved that the pollution damage occurred as a result of an act or omission of the operator himself, done deliberately with actual knowledge that pollution damage will result. Two elements are thus required to remove the limitation on liability: (*a*) an act or omission of the operator, and (*b*) actual knowledge that pollution damage will result. Hence the negligence of the operator does not, under this Convention, remove the limitation on liability.

619. The original draft of the Lugano Convention contained a provision on limitation of liability. The provision was deleted in the final draft.

620. Under the Convention on damage caused by foreign aircraft to third parties on the surface, if the total amount of claims established exceeds the limit of liability, they shall be reduced in proportion to their respective amounts in respect of claims exclusively for loss of life or personal injury or exclusively for damage to property. But if the claims concern both loss of life or personal injury and damage to property, one half of the total sum shall be allocated preferentially for loss of life or personal injury. The remainder shall be distributed proportionately among the claims in respect of damage to property and the portion not already covered of the claims in respect of loss of life and personal injury.[783]

621. The Additional Convention to CIV provides for limitation of liability. However, if the damage is caused by the wilful misconduct or gross negligence of the railway, the limitation of liability is removed.[784]

622. Article 10 of the Additional Convention nullifies any agreement between passengers and the railway in which the liability of the railway is precluded or has been limited to a lower amount than that provided for in the Convention.[785]

(b) *Judicial decisions and State practice outside treaties*

623. Judicial decisions and official correspondence reveal no limitation on compensation other than that agreed upon in treaties or specified in national legislation. Some references have been made to equitable, fair and adequate compensation. By a broad interpretation, limitation on compensation may sometimes be compatible with equitable and fair compensation.

B. Authorities competent to award compensation

624. Article 33, paragraph 1, of the Charter of the United Nations provides for a wide choice of peaceful modes of dispute settlement, from the most informal to the most formal:

> The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.

625. State practice reveals that these modes of settlement of disputes have been utilized to resolve questions of liability and compensation relating to acts with extraterritorial injurious consequences. International courts, arbitral tribunals, joint commissions as well as domestic courts have decided on those questions. Generally, on the basis of prior agreements among States, PCIJ, ICJ and arbitral tribunals have dealt with disputes relating to the utilization of and activities on the continental shelf, in the territorial sea, etc. When there have been ongoing

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[782] Art. 9.

[783] Article 14 of the Convention reads:

"If the total amount of the claims established exceeds the limit of liability applicable under the provisions of this Convention, the following rules shall apply, taking into account the provisions of paragraph 2 of article 11:

"(*a*) If the claims are exclusively in respect of loss of life or personal injury or exclusively in respect of damage to property, such claims shall be reduced in proportion to their respective amounts.

"(*b*) If the claims are both in respect of loss of life or personal injury and in respect of damage to property, one half of the total sum distributable shall be appropriated preferentially to meet claims in respect of loss of life and personal injury and, if insufficient, shall be distributed proportionately between the claims concerned. The remainder of the total sum distributable shall be distributed proportionately among the claims in respect of damage to property and the portion not already covered of the claims in respect of loss of life and personal injury."

[784] Articles 7–8 read:

"*Article 7. Limit of damages in case of damage to or loss of articles*

"When, under the provisions of this Convention, the railway is liable to pay damages for damage to, or for total or partial loss of any articles which the passenger who has sustained an accident had either on him or with him as hand luggage, including any animals which he had with him, compensation for the damage may be claimed up to the sum of 2,000 francs per passenger."

"*Article 8. Amount of damages in case of wilful misconduct or gross negligence*

"The provisions of articles 6 and 7 of this Convention or those of the national law which limit compensation to a fixed amount shall not apply if the damage results from wilful misconduct or gross negligence of the railway."

[785] Articles 10 and 12 read:

"*Article 10. Prohibition of limitation of liability*

"Any terms or conditions of carriage or special agreements concluded between the railway and the passenger which purport to exempt the railway in advance, either totally or partially, from liability under this Convention, or which have the effect of reversing the burden of proof resting on the railway, or which provide for limits lower than those laid down in article 6 (2) and article 7, shall be null and void. Such nullity shall not, however, avoid the contract of carriage, which shall remain subject to the provisions of CIV and this Convention.

"*Article 12. Bringing of actions not within the provisions of this Convention*

"No action of any kind shall be brought against a railway in respect of its liability under article 2 (1) of this Convention, except subject to the conditions and limitations laid down in this Convention. The same shall apply to any action brought against persons for whom the railway is liable under article 11."

activities, usually among neighbouring States, such as the use of shared waters, for which there are established institutions constituted by States, claims arising from these activities have normally been referred to the joint institution or commission concerned. Domestic courts have been used on issues involving civil liability and in particular the liability of the operator.

1. Local courts and authorities

(a) *Treaty practice*

626. A number of multilateral agreements designate local courts and authorities as competent to decide on questions of liability and compensation. With regard to activities, primarily of a commercial nature, in which the actors are private entities and the primary liability is that of the operator, local courts have been recognized as appropriate decision makers. This is typical of the civil liability conventions.

627. Under the Protocol of 1992 to the Civil Liability Convention, only the courts of the contracting State or States in whose territory, including the territorial sea, the exclusive economic zone or an area beyond and adjacent to the territorial sea not extending more than 200 nautical miles, the pollution damage has occurred, or preventive measures have been taken to prevent or minimize damage, are to entertain claims for compensation. Thus, each contracting State has to ensure that its courts possess the necessary jurisdiction. Once a fund has been established in accordance with the requirements of article V of the Convention, the courts of the State where the fund is established have *exclusive* jurisdiction to decide on all matters relating to its apportionment and distribution.[786]

628. Under article XI of the Protocol of 1992 to the Civil Liability Convention, the domestic courts also have jurisdiction in respect of ships owned by a contracting State and used for commercial purposes.

629. Similarly, the 1992 Fund Convention provides that the domestic courts of the contracting States are competent to decide on actions against the Fund, and that the contracting States must endow their courts with the necessary jurisdiction to entertain such actions. The Fund is not bound by a judgement or decision in proceedings to which it has not been party or by any settlement to which it is not a party. However, in a case where the Fund is notified in such a manner as to be able to effectively intervene as a party in the proceedings, the Fund may be bound by a judgement rendered to the extent that it may not dispute the facts and findings of such judgement.[787]

630. Under the Protocol of 2003 to the Fund Convention, actions shall be brought against the owner of a ship before a court competent under article IX of the Protocol of 1992 to the Civil Liability Convention, which shall have "*exclusive jurisdictional competence over any action against the Supplementary Fund*".*[788] In addition, the court where the Supplementary Fund is headquartered or the court of a contracting State to the Protocol would have competence.[789]

631. The provisions of the Bunker Oil Convention are similar to article IX of the Protocol of 1992 to the Civil Liability Convention. Since it does not have a fund, it does not have a corresponding provision concerning jurisdiction in respect of the fund.[790] Like the Protocol, the HNS Convention, pursuant to its article 38, also confers jurisdiction on the courts of the territory in which the incident has occurred or where preventive measures have been taken. Where the incident has occurred exclusively outside the territory of any State, jurisdiction is also established on the basis of the State of registration, or of the flag State for unregistered ships, as well as on the basis of the habitual residence or principal place of business of the owner.[791] An action against the HNS Fund or taken by

[786] Art. 8. Article IX of the 1969 Civil Liability Convention had a similar provision, except that the jurisdiction *ratione materiae* did not extend to the exclusive economic zone and its equivalent.

[787] Art. 9. Article 7 of the 1971 Fund Convention had a substantially similar provision.

[788] Art. 7.

"1. The provisions of article 7, paragraphs 1, 2, 4, 5 and 6 of the 1992 Fund Convention shall apply to actions for compensation brought against the Supplementary Fund in accordance with article 4, paragraph 1, of this Protocol."

[789] Art. 7:

"2. Where an action for compensation for pollution damage has been brought before a court competent under article IX of the 1992 Liability Convention against the owner of a ship or his guarantor, such court shall have exclusive jurisdictional competence over any action against the Supplementary Fund for compensation under the provisions of article 4 of this Protocol in respect of the same damage. However, where an action for compensation for pollution damage under the 1992 Liability Convention has been brought before a court in a Contracting State to the 1992 Liability Convention but not to this Protocol, any action against the Supplementary Fund under article 4 of this Protocol shall at the option of the claimant be brought either before a court of the State where the Supplementary Fund has its headquarters or before any court of a Contracting State to this Protocol competent under article IX of the 1992 Liability Convention.

"3. Notwithstanding paragraph 1, where an action for compensation for pollution damage against the 1992 Fund has been brought before a court in a Contracting State to the 1992 Fund Convention but not to this Protocol, any related action against the Supplementary Fund shall, at the option of the claimant, be brought either before a court of the State where the Supplementary Fund has its headquarters or before any court of a Contracting State competent under paragraph 1. "

[790] Article 9 provides:

"1. Where an incident has caused pollution damage in the territory, including the territorial sea, or in an area referred to in article 2(*a*) (ii) of one or more States Parties, or preventive measures have been taken to prevent or minimize pollution damage in such territory, including the territorial sea, or in such area, actions for compensation against the shipowner, insurer or other person providing security for the shipowner's liability may be brought only in the courts of any such States Parties.

"2. Reasonable notice of any action taken under paragraph 1 shall be given to each defendant.

"3. Each State Party shall ensure that its courts have jurisdiction to entertain actions for compensation under this Convention."

[791] Art. 38:

"1. Where an incident has caused damage in the territory, including the territorial sea or in an area referred to in article 3 (*b*), of one or more States Parties, or preventive measures have been taken to prevent or minimize damage in such territory including the territorial sea or in such area, actions for compensation may be brought against the owner or other person providing financial security for the owner's liability only in the courts of any such States Parties.

"2. Where an incident has caused damage exclusively outside the territory, including the territorial sea, of any State and either the conditions for application of this Convention set out in article 3 (*c*) have been fulfilled or preventive measures to prevent or minimize such damage have been taken, actions for compensation may be

the HNS Fund shall be brought only before a court having jurisdiction under article 38 in respect of actions against the owner who is liable for damage caused by the relevant incident or before a court in a State party which would have been competent if an owner had been liable.[792]

632. Under article 19, paragraph 1, of CRTD, actions for compensation may only be brought in the courts of any State party "(*a*) where the damage was sustained as a result of the incident; (*b*) where the incident occurred; (*c*) where preventive measures were taken to prevent or minimize damage; or (*d*) where the carrier has his habitual residence". Each contracting State is also required to ensure that its courts possess the necessary jurisdiction to entertain such actions for compensation.

633. In the nuclear field, the 1960 Paris Convention confers jurisdiction over actions concerning the liability of the operator *only* on the courts of the contracting State in whose territory the nuclear incident occurred or, in cases where the incident occurs outside the territory of the contracting States or the place of the nuclear incident cannot be determined with certainty, on those of the contracting State in whose territory the nuclear installation is located. When the nuclear incident has occurred during transportation, jurisdiction lies, unless otherwise provided, with the courts of the contracting State in whose territory the nuclear substances involved were at the time of the incident. Article 13 of the Convention indicates in detail how jurisdiction is divided among the *domestic* courts of the Contracting Parties, according to the place of occurrence of the nuclear incident.[793] The 2004 Paris Convention also provides that jurisdiction shall only lie with the courts of the Contracting Party in whose territory the nuclear incident occurred.[794]

634. Similarly, the 1997 Vienna Convention provides, in article 12, that jurisdiction in respect of the liability of the operator lies with the domestic courts of the Contracting Party in whose territory the nuclear incident occurred.[795]

635. Article 12 of the 1997 Vienna Convention also confers jurisdiction only on courts of that Contracting Party if a nuclear incident occurs within the area of the exclusive economic zone or its equivalent for actions concerning nuclear damage occurring in such areas. The contracting State is required to notify the depositary of such area prior to the occurrence of a nuclear incident. The extension to the exclusive economic zone or its equivalent was introduced by this Convention.[796]

636. If the incident occurred outside the territory of any Contracting Party, or outside the exclusive economic zone or its equivalent, or if the place of the incident cannot be determined with certainty, the courts of the installation State of the operator liable have jurisdiction.

637. If in the circumstances jurisdiction would still lie with the courts of more than one Contracting Party, under the terms of article XI, paragraph 3, of the 1963 Vienna Convention jurisdiction shall be determined as follows:

(*a*) if the nuclear incident occurred partly outside the territory of any Contracting Party, and partly within the territory of a single Contracting Party, with the courts of the latter; and

(*b*) in any other case, with the courts of that Contracting Party which is determined by agreement between the Contracting Parties whose courts would be competent under [article XI].

638. The Contracting Party whose courts have jurisdiction shall also ensure that only one of its courts shall have jurisdiction in relation to any one nuclear incident.[797]

brought against the owner or other person providing financial security for the owner's liability only in the courts of:

(*a*) the State Party where the ship is registered or, in the case of an unregistered ship, the State Party whose flag the ship is entitled to fly; or

(*b*) the State Party where the owner has habitual residence or where the principal place of business of the owner is established; or

(*c*) the State Party where a fund has been constituted in accordance with article 9, paragraph 3.

"3. Reasonable notice of any action taken under paragraph 1 or 2 shall be given to the defendant.

"4. Each State Party shall ensure that its courts have jurisdiction to entertain actions for compensation under this Convention.

"5. After a fund under article 9 has been constituted by the owner or by the insurer or other person providing financial security in accordance with article 12, the courts of the State in which such fund is constituted shall have exclusive jurisdiction to determine all matters relating to the apportionment and distribution of the fund."

[792] Art. 39:

"1. Subject to the subsequent provisions of this article, any action against the HNS Fund for compensation under article 14 shall be brought only before a court having jurisdiction under article 38 in respect of actions against the owner who is liable for damage caused by the relevant incident or before a court in a State Party which would have been competent if an owner had been liable.

"2. In the event that the ship carrying the hazardous or noxious substances which caused the damage has not been identified, the provisions of article 38, paragraph 1, shall apply *mutatis mutandis* to actions against the HNS Fund.

"3. Each State Party shall ensure that its courts have jurisdiction to entertain such actions against the HNS Fund as are referred to in paragraph 1.

"4. Where an action for compensation for damage has been brought before a court against the owner or the owner's guarantor, such court shall have exclusive jurisdiction over any action against the HNS Fund for compensation under the provisions of article 14 in respect of the same damage.

"5. Each State Party shall ensure that the HNS Fund shall have the right to intervene as a party to any legal proceedings instituted in accordance with this Convention before a competent court of that State against the owner or the owner's guarantor.

"6. Except as otherwise provided in paragraph 7, the HNS Fund shall not be bound by any judgement or decision in proceedings to which it has not been a party or by any settlement to which it is not a party.

"7. Without prejudice to the provisions of paragraph 5, where an action under this Convention for compensation for damage has been brought against an owner or the owner's guarantor before a competent court in a State Party, each party to the proceedings shall be entitled under the national law of that State to notify the HNS Fund of the proceedings. Where such notification has been made in accordance with the formalities required by the law of the court seized and in such time and in such a manner that the HNS Fund has in fact been in a position effectively to intervene as a party to the proceedings, any judgement rendered by the court in such proceedings shall, after it has become final and enforceable in the State where the judgement was given, become binding upon the HNS Fund in the sense that the facts and findings in that judgement may not be disputed by the HNS Fund even if the HNS Fund has not actually intervened in the proceedings."

[793] Annex II to the Convention provides that it should not be interpreted as depriving a Contracting Party, on whose territory damage was caused by a nuclear incident occurring on the territory of another Contracting Party, of any recourse which might be available to it under international law.

[794] Art. 13 (*a*).

[795] See also article XI of the 1963 Vienna Convention.

[796] Art. 12, para. 1 *bis*.

[797] Art. 12, para. 4, of the 1997 Vienna Convention.

This provision was introduced by the 1997 Protocol. Article 13 of the 2004 Paris Convention has largely similar provisions.[798]

639. The 1997 Supplementary Compensation Convention also confers jurisdiction over actions concerning nuclear damage from a nuclear incident to courts of the Contracting Party within which the nuclear incident has occurred.[799] Moreover, under article XIII, paragraph 2:

> Where a nuclear incident occurs within the area of the exclusive economic zone of a Contracting Party or, if such a zone has not been established, in an area not exceeding the limits of an exclusive economic zone, were one to be established by that Party, jurisdiction over actions concerning nuclear damage from that nuclear incident shall, for the purposes of this Convention, lie only with the courts of that Party. The preceding sentence shall apply if that Contracting Party has notified the Depositary of such area prior to the nuclear incident. Nothing in this paragraph shall be interpreted as permitting the exercise of jurisdiction in a manner which is contrary to the international law of the sea, including the United Nations Convention on the Law of the Sea. However, if the exercise of such jurisdiction is inconsistent with the obligations of that Party under article XI of the Vienna Convention or article 13 of the Paris Convention in relation to a State not Party to this Convention, jurisdiction shall be determined according to those provisions.

640. Where the incident occurs outside the territory of any Contracting Party, or outside the exclusive economic zone or its equivalent, or where the place of the incident cannot be determined with certainty, the courts of the installation State have jurisdiction.[800]

641. In cases where jurisdiction will lie with the courts of more than one Contracting Party, such Contracting Parties shall determine which Contracting Party's courts shall have jurisdiction.[801]

642. Under article X of the Nuclear Ships Convention, the claimant has the option to bring an action for compensation either before the courts of the licensing State or before the courts of the contracting State or States in whose territory nuclear damage has been sustained.

643. Under article 17 of the 1999 Basel Protocol, claims for compensation may be brought in the courts of a Contracting Party only where the damage was suffered, or where the incident occurred; or where the defendant has his habitual residence or has his principal place of business. Each Contracting Party shall ensure that its courts possess the necessary jurisdiction to entertain such claims for compensation. The 2003 Kiev Protocol has a substantially similar provision:

> 1. Claims for compensation under the Protocol may be brought in the courts of a Party only where:
>
> (*a*) The damage was suffered;
>
> (*b*) The industrial accident occurred; or
>
> (*c*) The defendant has his or her habitual residence, or, if the defendant is a company or other legal person or an association of natural or legal persons, where it has its principal place of business, its statutory seat or central administration.
>
> 2. Each Party shall ensure that its courts possess the necessary competence to entertain such claims for compensation.[802]

644. The Additional Convention to CIV provides that, unless otherwise agreed upon by States, or stipulated in the licence of the railway, the domestic courts of the State in whose territory the accident to the passenger occurs are competent to entertain actions for compensation. Article 15 of the Convention reads:

> Actions brought under this Convention may only be instituted in the competent court of the State on whose territory the accident to the passenger occurred, unless otherwise provided in agreements between States, or in any licence or other document authorising the operation of the railway concerned.

645. Under article 19 of the Lugano Convention, actions for compensation may be brought only within a State party at the court of the place: "(*a*) where the damage was suffered; (*b*) where the dangerous activity was conducted; or (*c*) where the defendant has his habitual residence". In accordance with its article 21, when proceedings involving the same course of action and between the same parties are brought in the courts of different States parties, any court other than the court first seized shall, of its own motion, stay its proceedings until the jurisdiction of the court first seized is established, and when such jurisdiction is established, other courts shall decline jurisdiction. In addition to providing for the bases of jurisdiction, the Lugano Convention contemplates access to information held by bodies with public responsibilities for the environment,[803] access to specific information held by operators[804] and requests by associations or foundations which aim to protect the environment.[805] In accordance with article 19:

> 2. Requests for access to specific information held by operators under Article 16, paragraphs 1 and 2 may only be submitted within a Party at the court of the place:
>
> (*a*) where the dangerous activity is conducted; or
>
> (*b*) where the operator who may be required to provide the information has his habitual residence.
>
> 3. Requests by organisations under Article 18, paragraph 1, subparagraph (*a*) may only be submitted within a Party at the court or, if internal law so provides, at a competent administrative authority of the place where the dangerous activity is or will be conducted.
>
> 4. Requests by organisations under Article 18, paragraph 1, subparagraphs (*b*), (*c*) and (*d*), may only be submitted within a Party at the court or, if internal law so provides, at a competent administrative authority:
>
> (*a*) of the place where the dangerous activity is or will be conducted; or
>
> (*b*) of the place where the measures are to be taken.

646. The 2004 EU Directive on environmental liability contemplates that member States would designate an authority with responsibility to fulfil the duty under the Directive, and natural or legal persons, including non-governmental organizations, shall have standing to submit

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[798] Art. 13 (*b*) –(*f*).

[799] Art. XIII, para. 1, of the Convention.

[800] *Ibid*., para. 3.

[801] *Ibid*., para. 4.

[802] Art. 13.

[803] Art. 15.

[804] Art. 16.

[805] Art. 18.

requests for action to that authority. Decisions made by such authority are subject to review.[806]

647. Under the Convention on the Protection of the Environment between Denmark, Finland, Norway and Sweden, the nuisance which an activity entails or may entail in the territory of another contracting State is equated with a nuisance in the State where the activity is carried out. Thus any person who is or may be affected by such a nuisance may bring a claim before the court or administrative authority of that State for compensation. The rules on compensation must not be less favourable to the injured party than those in the State where the activity is carried out. Indeed, the Convention provides for *equal access* to the competent authorities and for *equal treatment* of the injured parties, whether local or foreign.[807]

648. In accordance with article 232 of the United Nations Convention on the Law of the Sea, States are liable for damage or loss attributable to them arising from measures taken in accordance with section 6 of part XII, relating to the protection and preservation of the marine environment, when such measures are unlawful or exceed those reasonably required. Accordingly, States are required to endow their courts with appropriate jurisdiction to deal with actions brought in respect of such loss or damage.

(b) *Judicial decisions and State practice outside treaties*

649. The existing judicial decisions and official correspondence contain no indication concerning the competence of local courts and authorities to rule on questions of liability and compensation, except possibly on the distribution of lump-sum payments. However, in the *Amoco Cadiz* litigation, although the suits were rooted in the failure of due diligence obligations, the court in the United States found that it had competence. This was despite the fact that the damage had occurred in the territorial waters of France. In the *Patmos* litigation and the *Haven* case, the Italian courts proceeded to adjudicate on matters that had a bearing on the application of the 1969 Civil Liability/1971 Fund Convention regime.

2. International courts, arbitral tribunals and joint commissions

(a) *Treaty practice*

650. In the case of activities not exclusively of a commercial nature, in which the acting entities are primarily States, the competent organs for deciding on questions of liability and compensation are generally arbitral tribunals.

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[806] Arts. 11–13 (see footnote 286 above).
Article 11 reads:

"*Competent authority*

"1. Member States shall designate the competent authority(ies) responsible for fulfilling the duties provided for in this Directive.

"2. The duty to establish which operator has caused the damage or the imminent threat of damage, to assess the significance of the damage and to determine which remedial measures should be taken with reference to Annex II shall rest with the competent authority. To that effect, the competent authority shall be entitled to require the relevant operator to carry out his own assessment and to supply any information and data necessary.

"3. Member States shall ensure that the competent authority may empower or require third parties to carry out the necessary preventive or remedial measures."

Article 12 reads:

"*Request for action*

"1. Natural or legal persons:

"(*a*) affected or likely to be affected by environmental damage or

"(*b*) having a sufficient interest in environmental decision making relating to the damage or, alternatively,

"(*c*) alleging the impairment of a right, where administrative procedural law of a Member State requires this as a precondition,

shall be entitled to submit to the competent authority any observations relating to instances of environmental damage or an imminent threat of such damage of which they are aware and shall be entitled to request the competent authority to take action under this Directive.

What constitutes a 'sufficient interest' and 'impairment of a right' shall be determined by the Member States.

To this end, the interest of any non-governmental organisation promoting environmental protection and meeting any requirements under national law shall be deemed sufficient for the purpose of subparagraph (*b*). Such organisations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (*c*).

"2. The request for action shall be accompanied by the relevant information and data supporting the observations submitted in relation to the environmental damage in question.

"3. Where the request for action and the accompanying observations show in a plausible manner that environmental damage exists, the competent authority shall consider any such observations and requests for action. In such circumstances the competent authority shall give the relevant operator an opportunity to make his views known with respect to the request for action and the accompanying observations.

"4. The competent authority shall, as soon as possible and in any case in accordance with the relevant provisions of national law, inform the persons referred to in paragraph 1, which submitted observations to the authority, of its decision to accede to or refuse the request for action and shall provide the reasons for it.

"5. Member States may decide not to apply paragraphs 1 and 4 to cases of imminent threat of damage."

Article 13 reads:

"*Review procedures*

"1. The persons referred to in Article 12 (1) shall have access to a court or other independent and impartial public body competent to review the procedural and substantive legality of the decisions, acts or failure to act of the competent authority under this Directive.

"2. This Directive shall be without prejudice to any provisions of national law which regulate access to justice and those which require that administrative review procedures be exhausted prior to recourse to judicial proceedings."

[807] The relevant articles of the Convention read:

"*Article 2*

"In considering the permissibility of environmentally harmful activities, the nuisance which such activities entail or may entail in another Contracting State shall be equated with a nuisance in the State where the activities are carried out.

"*Article 3*

"Any person who is affected or may be affected by a nuisance caused by environmentally harmful activities in another Contracting State shall have the right to bring before the appropriate court or administrative authority of that State the question of the permissibility of such activities, including the question of measures to prevent damage, and to appeal against the decision of the court or the administrative authority to the same extent and on the same terms as a legal entity of the State in which the activities are being carried out.

"The provisions of the first paragraph of this article shall be equally applicable in the case of proceedings concerning compensation for damage caused by environmentally harmful activities. The question of compensation shall not be judged by rules which are less favourable to the injured party than the rules of compensation of the State in which the activities are being carried out.

"...

"*Protocol*

"...

"The right established in article 3 for anyone who suffers injury as a result of environmentally harmful activities in a neighbouring State to institute proceedings for compensation before a court or administrative authority of that State shall, in principle, be regarded as including the right to demand the purchase of his real property."

The Convention on international liability for damage caused by space objects provides that, if the parties fail to reach agreement through diplomatic negotiations, the question of compensation shall be submitted to arbitration. Accordingly, a claims commission composed of three members, one appointed by the claimant State, one appointed by the launching State and a chairman, is to be established upon the request of either party.[808]

651. In part XV of the United Nations Convention on the Law of the Sea, the parties are encouraged and requested to settle their disputes by peaceful means. The Convention provides for a wide range of possible modes of settlement of disputes, as well as for an elaborate system according to which the competent organs for deciding a dispute, depending upon the nature of the dispute, are the International Tribunal for the Law of the Sea, ICJ, or an arbitral tribunal. Articles 279–285 set out the modes of settlement compatible with Article 33 of the Charter of the United Nations.

652. The possibility of referring a dispute between persons claiming for damages to arbitration is not entirely restricted to State actors. The 2003 Kiev Protocol envisages claims for damages being submitted for a binding arbitration. Article 14 provides:

In the event of a dispute between persons claiming for damage pursuant to the Protocol and persons liable under the Protocol, and where agreed by both or all parties, the dispute may be submitted to final and binding arbitration in accordance with the Permanent Court of Arbitration Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment.

(b) *Judicial decisions and State practice outside treaties*

653. Most judicial decisions in this matter have been rendered by PCIJ, by ICJ or by arbitral tribunals on the basis of an agreement between the parties or of a prior treaty obligation. At least one arbitral tribunal, called upon to adjudicate in the *Trail Smelter* case, provided in its award for an arbitration mechanism in the event that the States parties were unable to agree on the modification or amendment of the regime proposed by one side.

3. Applicable law

(a) *Treaty practice*

654. The Nuclear Ships Convention provides in article VI for the application of *national laws* in respect of rights of beneficiaries in cases where insurance and related social security schemes include compensation for nuclear damage.[809]

655. Article VIII of the 1963 Vienna Convention stipulates that, subject to the provisions of the Convention, the nature, form and extent of the compensation, as well as the equitable distribution thereof, shall be governed by the law of the competent court. The 1997 Vienna Convention

[808] The relevant articles of the Convention read:

"*Article VIII*

"1. A State which suffers damage, or whose natural or juridical persons suffer damage, may present to a launching State a claim for compensation for such damage.

"2. If the State of nationality has not presented a claim, another State may, in respect of damage sustained in its territory by any natural or juridical person, present a claim to a launching State.

"3. If neither the State of nationality nor the State in whose territory the damage was sustained has presented a claim or notified its intention of presenting a claim, another State may, in respect of damage sustained by its permanent residents, present a claim to a launching State.

"*Article IX*

"A claim for compensation for damage shall be presented to a launching State through diplomatic channels. If a State does not maintain diplomatic relations with the launching State concerned, it may request another State to present its claim to that launching State or otherwise represent its interests under this Convention. It may also present its claim through the Secretary-General of the United Nations, provided the claimant State and the launching State are both Members of the United Nations.

"*Article XI*

"1. Presentation of a claim to a launching State for compensation for damage under this Convention shall not require the prior exhaustion of any local remedies which may be available to a claimant State or to natural or juridical persons it represents.

"2. Nothing in this Convention shall prevent a State, or natural or juridical persons it might represent, from pursuing a claim in the courts or administrative tribunals or agencies of a launching State. A State shall not, however, be entitled to present a claim under this Convention in respect of the same damage for which a claim is being pursued in the courts or administrative tribunals or agencies of a launching State or under another international agreement which is binding on the States concerned.

"…

"*Article XIV*

"If no settlement of a claim is arrived at through diplomatic negotiations as provided for in Article IX, within one year from the date on which the claimant State notifies the launching State that is has submitted the documentation of its claim, the parties concerned shall establish a Claims Commission at the request of either party.

"*Article XV*

"1. The Claims Commission shall be composed of three members: one appointed by the claimant State, one appointed by the launching State and the third member, the Chairman, to be chosen by both parties jointly. Each party shall make its appointment within two months of the request for the establishment of the Claims Commission.

"2. If no agreement is reached on the choice of the Chairman within four months of the request for the establishment of the Commission, either party may request the Secretary-General of the United Nations to appoint the Chairman within a further period of two months.

"*Article XVI*

"1. If one of the parties does not make its appointment within the stipulated period, the Chairman shall, at the request of the other party, constitute a single-member Claims Commission.

"2. Any vacancy which may arise in the Commission for whatever reason shall be filled by the same procedure adopted for the original appointment.

"3. The Commission shall determine its own procedure.

"4. The Commission shall determine the place or places where it shall sit and all other administrative matters.

"5. Except in the case of decisions and awards by a single-member Commission, all decision and awards of the Commission shall be by majority vote.

"…

"*Article XVIII*

"The Claims Commission shall decide the merits of the claim for compensation and determine the amount of compensation payable, if any."

[809] Article VI of the Convention reads:

"Where provisions of national health insurance, social insurance, social security, workmen's compensation or occupational disease compensation systems include compensation for nuclear damage, rights of beneficiaries under such systems and rights of subrogation, or of recourse against the operator, by virtue of such systems, shall be determined by the law of the Contracting State having established such systems. However, if the law of such Contracting State allows claims of beneficiaries of such systems and such rights of subrogation and recourse to be brought against the operator in conformity with the terms of this Convention, this shall not result in the liability of the operator exceeding the amount specified in paragraph 1 of Article III."

has the same provision.[810] However, under the 1997 Convention, priority in the distribution of compensation is afforded to claims in respect of loss of life or personal injury.[811] The 1997 Supplementary Compensation Convention envisages the application of its annex, the 1963 Vienna Convention or the 1960 Paris Convention as well as the law of the competent court. Article XIV of the Supplementary Compensation Convention provides:

1. Either the Vienna Convention or the Paris Convention or the Annex to this Convention,[812] as appropriate, shall apply to a nuclear incident to the exclusion of the others.

2. Subject to the provisions of this Convention, the Vienna Convention or the Paris Convention, as appropriate, the applicable law shall be the law of the competent court.

656. Under article I, paragraph (*k*), of the Supplementary Compensation Convention, the law of the competent court means the law of the court having jurisdiction under the Convention, and includes any rules of such law relating to conflict of laws.

657. The 1960 and 2004 Paris Conventions also provide, in their article 11, that the nature, form and extent of the compensation, within the limits of the Convention, as well as the equitable distribution thereof, shall be governed by national law. Article 14, paragraph (*b*), of both Conventions defines national law and national legislation. Article N of the 2004 Paris Convention, replacing article 14, paragraph (*b*), reads:

"National law" and "national legislation" mean the law or the national legislation of the court having jurisdiction under this Convention over claims arising out of a nuclear incident, excluding the rules on conflict of laws relating to such claims. That law or legislation shall apply to all matters both substantive and procedural not specifically governed by this Convention.

658. The 1960 Paris Convention defines national law narrowly as national law and does not exclude expressly the application of conflict of laws rules:

"National law" and "national legislation" mean the national law or the national legislation of the court having jurisdiction under this Convention over claims arising out of a nuclear incident, and that law or legislation shall apply to all matters both substantive and procedural not specifically governed by this Convention.

659. Article 19 of the 1999 Basel Protocol states that all matters of substance or procedure regarding claims brought before a competent court, which are not specifically regulated in the Protocol shall be governed by the law of that court including any rules of such law regarding conflict of jurisdiction.[813]

660. The 2003 Kiev Protocol has a similar import.[814] However, the injured party may request that the law where the accident occurred should apply. Article 16, paragraph 2, provides:

At the request of the person who has suffered the damage, all matters of substance regarding claims before the competent court shall be governed by the law of the Party where the industrial accident has occurred, as if the damage had been suffered in that Party.

661. The Convention on international liability for damage caused by space objects regulates space activities controlled by States. It provides that international law and the principles of justice and equity are the applicable law in accordance with which compensation and such reparation in respect of the damage as will restore the person, natural or juridical, shall be determined.[815]

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[810] See paragraph 593 above.

[811] See article 10 of the 1997 Convention. Article VIII, paragraph 2, of the 1963 Convention, as amended, reads:

"Subject to application of the rule of sub-paragraph (*c*) of paragraph 1 of Article VI, where in respect of claims brought against the operator the damage to be compensated under this Convention exceeds, or is likely to exceed, the maximum amount made available pursuant to paragraph 1 of Article V, priority in the distribution of the compensation shall be given to claims in respect of loss of life or personal injury."

[812] The annex is an integral part of the Convention. A Contracting Party which is not party to the 1963 Vienna Convention nor the 1960 Paris Convention shall ensure that its national legislation is consistent with the provisions of the annex insofar as those provisions are not directly applicable within that Contracting Party. A Contracting Party having no nuclear installation on its territory is required to have only that legislation which is necessary to enable such party to give effect to its obligations under the Convention.

[813] With respect to other conventions, the Additional Convention to CIV, which regulates an essentially commercial activity, provides in article 6, paragraph 2, for the application of *national law*.

Under article 5, paragraph 5, of the International Convention relating to the limitation of the liability of owners of sea-going ships, claims for liability and compensation are to be brought before the appropriate national courts of the Contracting Parties. In addition, the time limit within which such claims may be brought or prosecuted shall be decided in accordance with the *national law* of the contracting State in which the claim is brought. The Convention further provides, in article 1, paragraph 6, that the *national law* shall determine the question upon whom lies the burden of proving whether or not the accident causing the injury resulted from a fault.

The Convention on the law applicable to products liability, which is intended to resolve the issue of jurisdiction and applicable law regarding litigations on products liability, provides in its article 4 for the application of the internal law of the State of the place of injury, if that State is also:

"(*a*) the place of the habitual residence of the person directly suffering damage, or

"(*b*) the principal place of business of the person claimed to be liable; or

"(*c*) the place where the product was acquired by the person directly suffering damage."

Article 5 of the same Convention provides that, notwithstanding the provisions of article 4, the applicable law shall be the internal law of the State of the habitual residence of the person directly suffering damage, if that State is also:

"(*a*) the principal place of business of the person claimed to be liable, or

"(*b*) the place where the product was acquired by the person directly suffering damage."

Under article 6 of the same Convention, where neither of the laws designated in articles 4 and 5 applies, the applicable law shall be the internal law of the State of the principal place of business of the person claimed to be liable, unless the claimant bases his claim upon the internal law of the State of the place of injury.

Under the Convention on limitation of liability for maritime claims, 1976, the law of the State party in which the fund is constituted governs the rules relating to the constitution and distribution of a limitation fund, and all rules of procedure in connection with the fund.

[814] Art. 16, para. 1:

"Subject to paragraph 2, all matters of substance or procedure regarding claims before the competent court which are not specifically regulated in the Protocol shall be governed by the law of that court, including any rules of such law relating to conflict of laws."

[815] Article XII of the Convention reads:

"The compensation which the launching State shall be liable to pay for damage under this Convention shall be determined in accordance with international law and the principles of justice and equity, in order to provide such reparation in respect of the damage as will restore the person, natural or juridical, State or international organisation on whose behalf the claim is presented to the condition which would have existed if the damage had not occurred."

662. Similarly, article 293 of the United Nations Convention on the Law of the Sea provides that a court (that is, ICJ or the International Tribunal for the Law of the Sea) or a tribunal having jurisdiction, in accordance with section 2 of part XV of the Convention, to rule in a dispute concerning the application or interpretation of the Convention, shall apply the provisions of the Convention and other rules of international law not incompatible with the Convention. However, if the parties to a dispute so agree, the court or tribunal can adjudicate *ex aequo et bono*.

(b) *Judicial decisions and State practice outside treaties*

663. Under Article 38 of the Statute of PCIJ as well as of ICJ, the function of the Court is to decide such disputes as are submitted to it in accordance with international law, the sources of which are:

(*a*) international conventions, whether general or particular, establishing rules expressly recognized by the contesting States;

(*b*) international custom, as evidence of a general practice accepted as law;

(*c*) the general principles of law recognized by civilized nations;

(*d*) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

664. Under this Article, if the parties agree, ICJ has the competence to decide their case *ex aequo et bono*. It is within this legal framework that international courts have adjudicated on issues of extraterritorial injuries and liability.

665. The decisions of arbitral tribunals have also been based on the treaty obligations of the Contracting Parties, on international law and occasionally on the domestic law of States. In the *Trail Smelter* case, the Tribunal examined the decisions of the United States Supreme Court as well as other sources of law and reached the conclusion that "under the principles of international law, as well as of the law of the United States, no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another".[816]

666. In their official correspondence, States have invoked international law and the general principles of law, as well as treaty obligations. Canada's claim for damages for the crash of the Soviet satellite Cosmos-954 was based on treaty obligations as well as the "general principles of law recognized by civilized nations".[817] Regional principles or standards of behaviour have also been considered relevant in relations between States. The principles accepted in Europe concerning the obligation of States whose activities may be injurious to their neighbours to negotiate with them were invoked by the Government of the Netherlands in 1973 when the Government of Belgium announced its intention to build a refinery near its frontier with the Netherlands. Similarly, in an official letter to Mexico concerning the protective measures taken by that country to prevent flooding, the Government of the United States referred to the "principle of international law"[818] which obligates every State to respect the full sovereignty of other States.

667. In their decisions, domestic courts, in addition to citing domestic law, have referred to the applicability of international law, the principles of international comity, etc. For example, the German Constitutional Court, in rendering a provisional decision concerning the flow of the waters of the Danube in the *Donauversinkung* case, raised the question of accountability, under international law, of acts of interference with the flow of the waters. It stated that "only considerable interference with the natural flow of international rivers can form the basis for claims under international law".[819] Again, in the *Roya* case, the Italian Court of Cassation referred to international obligations. It stated that a State "cannot disregard the international duty ... not to impede or to destroy ... the opportunity of the other States to avail themselves of the flow of water for their own national needs".[820] Finally, in its judgement in the *United States* v. *Arjona* case, the United States Supreme Court invoked the *law of nations,* which "requires every national Government to use 'due diligence' to prevent a wrong being done within its own dominion to another nation".[821]

[816] UNRIAA (see footnote 362 above).

[817] See footnote 361 above.

[818] Whiteman, *op. cit*., vol. 6, p. 265.

[819] *Württemberg and Prussia* v. *Baden*, *Entscheidungen des Reichgerichts in Zivilsachen* (Berlin, 1927), vol. 116, appendix 2, p. 18; reprinted in *Annual Digest of Public International Law Cases, 1927–1928* (London), vol. 4, 1931, p. 128, case No. 86.

[820] *Société énergie électrique du littoral méditerranéen* v. *Compania imprese elettriche liguri, Il Foro Italiano* (Rome), vol. 64, 1939, part 1, col. 1036; reprinted in *Annual Digest of International Law Cases, 1938–1940*, p. 1201.

[821] *United States Reports*, vol. 120, p. 485 (1887).

Chapter V

Statute of limitations

668. In certain circumstances, the liability of the operator or of the State may be precluded. Some multilateral conventions provide for exoneration. The typical exoneration is that which results from prescription.

669. The Nuclear Ships Convention provides for a ten-year period of prescription from the date of the nuclear incident. The domestic law of the licensing State may provide for a longer period.[822]

[822] Article V of the Convention reads:

"1. Rights of compensation under this Convention shall be extinguished if an action is not brought within ten years from the date of the nuclear incident. If, however, under the law of the licensing State the liability of the operator is covered by insurance or

670. A ten-year period of prescription, which was provided for in the 1963 Vienna Convention,[823] was amended by the 1997 Vienna Convention, which introduced different periods for the different types of nuclear damage. Thus the 1997 Convention, in article 8, paragraph 1, provides:

(*a*) Rights of compensation under this Convention shall be extinguished if an action is not brought within –

(i) with respect to loss of life and personal injury, thirty years from the date of the nuclear incident;

(ii) with respect to other damage, ten years from the date of the nuclear incident.

(*b*) If, however, under the law of the Installation State, the liability of the operator is covered by insurance or other financial security including State funds for a longer period, the law of the competent court may provide that rights of compensation against the operator shall only be extinguished after such a longer period which shall not exceed the period for which his liability is so covered under the law of the Installation State.

(*c*) Actions for compensation with respect to loss of life and personal injury or, pursuant to an extension under sub-paragraph (*b*) of this paragraph with respect to other damage, which are brought after a period of ten years from the date of the nuclear incident shall in no case affect the rights of compensation under this Convention of any person who has brought an action against the operator before the expiry of that period.

671. Rights of compensation under the 1997 Vienna Convention shall be subject to prescription or extinction, as provided by the law of the competent court, if an action is not brought within three years from the date on which the person suffering damage had knowledge or ought reasonably to have had knowledge of the damage and of the operator liable for the damage.[824]

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other financial security or State indemnification for a period longer than ten years, the applicable national law may provide that rights of compensation against the operator shall only be extinguished after a period which may be longer than ten years but shall not be longer than the period for which his liability is so covered under the law of the licensing State. However, such extension of the extinction period shall in no case affect the right of compensation under this Convention of any person who has brought an action for loss of life or personal injury against the operator before the expiry of the aforesaid period of ten years.

"2. Where nuclear damage is caused by nuclear fuel, radioactive products or waste which were stolen, lost, jettisoned, or abandoned, the period established under paragraph 1 of this Article shall be computed from the date of the nuclear incident causing the nuclear damage, but the period shall in no case exceed a period of twenty years from the date of the theft, loss, jettison or abandonment.

"3. The applicable national law may establish a period of extinction or prescription of not less than three years from the date on which the person who claims to have suffered nuclear damage had knowledge or ought reasonably to have had knowledge of the damage and of the person responsible for the damage, provided that the period established under paragraphs 1 and 2 of this Article shall not be exceeded.

"4. Any person who claims to have suffered nuclear damage and who has brought an action for compensation within the period applicable under this Article may amend his claim to take into account any aggravation of the damage, even after the expiry of that period, provided that final judgment has not been entered."

[823] Article VI of the Convention reads:

"1. Rights of compensation under this Convention shall be extinguished if an action is not brought within ten years from the date of the nuclear incident. If, however, under the law of the Installation State the liability of the operator is covered by insurance or other financial security or by State funds for a period longer than ten years, the law of the competent court may provide that rights of compensation against the operator shall only be extinguished after a period which may be longer than ten years, but shall not be longer than the period for which his liability is so covered under the law of the Installation State. Such extension of the extinction period shall in no case affect rights of compensation under this Convention of any person who has brought an action for loss of life or personal injury against the operator before the expiry of the aforesaid period of ten years.

"2. Where nuclear damage is caused by a nuclear incident involving nuclear material which at the time of the nuclear incident was stolen, lost, jettisoned or abandoned, the period established pursuant to paragraph 1 of this article shall be computed from the date of that nuclear incident, but the period shall in no case exceed a period of twenty years from the date of the theft, loss, jettison or abandonment.

"3. The law of the competent court may establish a period of extinction or prescription of not less than three years from the date on which the person suffering nuclear damage had knowledge or should have had knowledge of the damage and of the operator liable for the damage, provided that the period established pursuant to paragraphs 1 and 2 of this article shall not be exceeded."

The same period of prescription is provided for in the 1960 Paris Convention. Articles 8–9 of the 1964 Additional Protocol to the Convention read:

"*Article 8*

"(*a*) The right of compensation under this Convention shall be extinguished if an action is not brought within ten years from the date of the nuclear incident. National legislation may, however, establish a period longer than ten years if measures have been taken by the Contracting Party in whose territory the nuclear installation of the operator liable is situated to cover the liability of that operator in respect of any actions for compensation begun after the expiry of the period of ten years and during such longer period: provided that such extension of the extinction period shall in no case affect the right of compensation under this Convention of any person who has brought an action in respect of loss of life or personal injury against the operator after the expiry of the period of ten years.

"(*b*) In the case of damage caused by a nuclear incident involving nuclear fuel or radioactive products or waste which, at the time of the incident have been stolen, lost, jettisoned or abandoned and have not yet been recovered, the period established pursuant to paragraph (*a*) of this article shall be computed from the date of that nuclear incident, but the period shall in no case exceed twenty years from the date of the theft, loss, jettison or abandonment.

"(*c*) National legislation may establish a period of not less than two years for the extinction of the right or as a period of limitation either from the date at which the person suffering damage has knowledge or from the date at which he ought reasonably to have known of both the damage and the operator liable: provided that the period established pursuant to paragraphs (*a*) and (*b*) of this article shall not be exceeded.

"(*d*) Where the provisions of article 13 (*c*) (ii) are applicable, the right of compensation shall not, however, be extinguished if, within the time provided for in paragraph (*a*) of this article,

"(i) prior to the determination by the Tribunal referred to in article 17, an action has been brought before any of the courts from which the Tribunal can choose; if the Tribunal determines that the competent court is a court other than that before which such action has already been brought, it may fix a date by which such action has to be brought before the competent court so determined; or

"(ii) a request has been made to a Contracting Party concerned to initiate a determination by the Tribunal of the competent court pursuant to article 13 (*c*) (ii) and an action is brought subsequent to such determination within such time as may be fixed by the Tribunal.

"(*e*) Unless national law provides to the contrary, any person suffering damage caused by a nuclear incident who has brought an action for compensation within the period provided for in this article may amend his claim in respect of any aggravation of the damage after the expiry of such period provided that final judgement has not been entered by the competent court.

"*Article 9*

"The operator shall not be liable for damage caused by a nuclear incident directly due to an act of armed conflict, hostilities, civil war, insurrection or, except in so far as the legislation of the Contracting Party in whose territory his nuclear installation is situated may provide to the contrary, a grave natural disaster of an exceptional character."

[824] Article 8, paragraph 3, reads:

"Rights of compensation under the Convention shall be subject

(*Continued on next page.*)

672. The 2004 Paris Convention largely follows the provisions of the 1997 Vienna Convention. A ten-year period after which an action would be extinguished, as provided for in the 1960 Paris Convention, is now replaced by a 30-year period for loss of life and personal injury and ten years for other nuclear damage. National law may establish longer periods without prejudice to the rights of third parties.[825]

673. Pursuant to article VIII of the Protocol of 1992 to the Civil Liability Convention, rights of compensation shall be extinguished unless an action is brought thereunder within three years from the date when the damage occurred. However, in no case shall an action be brought after six years from the date of the incident which caused the damage. Where this incident consists of a series of occurrences, the six-year period shall run from the date of the first such occurrence. Under article 6 of the 1992 Fund Convention similar periods are provided.

674. Article 8 of the Bunker Oil Convention contains a provision similar to that of article VIII of the Protocol of 1992 to the Civil Liability Convention.[826]

675. Under article 37 of the HNS Convention, the rights to compensation under chapter II concerning liability of the owner shall be extinguished unless an action is brought thereunder within three years from the date when the person suffering the damage knew or ought reasonably to have known of the damage and of the identity of the owner. A similar period applies in respect of rights to compensation under chapter III concerning the HNS Fund. In no case, however, shall an action be brought later than ten years from the date of the incident which caused the damage. Where the incident consists of a series of occurrences, the ten-year period begins to run from the date of the last of such occurrences.

676. Under article 18 of CRTD, the claimant must bring a claim against the carrier or its guarantor within three years from the date at which the person suffering the damage knew or ought reasonably to have known of the damage and of the identity of the carrier. This period may be extended, if the parties so agree, after the incident. However, in no case shall an action be brought after ten years from the date of the incident which caused the damage. Where the incident consists of a series of occurrences, the periods begin to run from the date of the last of such occurrences.

677. Article 17 of the Lugano Convention provides a limitation of three years from the date on which the claimant knew or ought reasonably to have known of the damage and of the identity of the operator. However, in no case shall actions be brought after 30 years from the date of the incident which caused the damage. Where the incident consists of a series of occurrences, the 30 years shall run from the date of the last of such occurrences. In respect of a site for the permanent deposit of waste, the 30 years shall, at the latest, run from the date on which the site was closed in accordance with the internal law.

(*Footnote 824 continued.*)

to prescription or extinction, as provided by the law of the competent court, if an action is not brought within three years from the date on which the person suffering damage had knowledge or ought reasonably to have had knowledge of the damage and of the operator liable for the damage, provided that the periods established pursuant to sub-paragraphs (*a*) and (*b*) of paragraph 1 of this Article shall not be exceeded."

See also article VI, paragraphs 4–5, of the 1963 Vienna Convention, which provides other forms of relief:

"4. Unless the law of the competent court otherwise provides, any person who claims to have suffered nuclear damage and who has brought an action for compensation within the period applicable pursuant to this article may amend his claim to take into account any aggravation of the damage, even after the expiry of that period, provided that final judgment has not been entered.

"5. Where jurisdiction is to be determined pursuant to subparagraph (*b*) of paragraph 3 of article XI and a request has been made within the period applicable pursuant to this article to any one of the Contracting Parties empowered so to determine, but the time remaining after such determination is less than six months, the period within which an action may be brought shall be six months, reckoned from the date of such determination."

[825] Article I of the 2004 Paris Convention reads:

"(*a*) The right of compensation under this Convention shall be subject to prescription or extinction if an action is not brought,

"(i) with respect to loss of life and personal injury, within thirty years from the date of the nuclear incident;

"(ii) with respect to other nuclear damage, within ten years from the date of the nuclear incident.

"(*b*) National legislation may, however, establish a period longer than that set out in subparagraph (i) or (ii) of paragraph (*a*) of this Article, if measures have been taken by the Contracting Party within whose territory the nuclear installation of the operator liable is situated to cover the liability of that operator in respect of any actions for compensation begun after the expiry of the period set out in subparagraph (i) or (ii) of paragraph (*a*) of this Article and during such longer period.

"(*c*) If, however, a longer period is established in accordance with paragraph (*b*) of this Article, an action for compensation brought within such period shall in no case affect the right of compensation under this Convention of any person who has brought an action against the operator:

"(i) within a thirty year period in respect of personal injury or loss of life;

"(ii) within a ten year period in respect of all other nuclear damage.

"(*d*) National legislation may establish a period of not less than three years for the prescription or extinction of rights of compensation under the Convention, determined from the date at which the person suffering nuclear damage had knowledge, or from the date at which that person ought reasonably to have known of both the nuclear damage and the operator liable, provided that the periods established pursuant to paragraphs (*a*) and (*b*) of this Article shall not be exceeded.

"(*e*) Where the provisions of Article 13 (*f*) (ii) are applicable, the right of compensation shall not, however, be subject to prescription or extinction if, within the time provided for in paragraphs (*a*), (*b*) and (*d*) of this Article,

"(i) prior to the determination by the Tribunal referred to in Article 17, an action has been brought before any of the courts from which the Tribunal can choose; if the Tribunal determines that the competent court is a court other than that before which such action has already been brought, it may fix a date by which such action has to be brought before the competent court so determined; or

"(ii) a request has been made to a Contracting Party concerned to initiate a determination by the Tribunal of the competent court pursuant to Article 13 (*f*) (ii) and an action is brought subsequent to such determination within such time as may be fixed by the Tribunal.

"(*f*) Unless national law provides to the contrary, any person suffering nuclear damage caused by a nuclear incident who has brought an action for compensation within the period provided for in this Article may amend his claim in respect of any aggravation of the nuclear damage after the expiry of such period, provided that final judgement has not been entered by the competent court."

[826] Article 8 reads:

"Rights to compensation under this Convention shall be extinguished unless an action is brought thereunder within three years from the date when the damage occurred. However, in no case shall an action be brought more than six years from the date of the incident which caused the damage. Where the incident consists of a series of occurrences, the six years' period shall run from the date of the first such occurrence."

678. The 2004 EU Directive does not apply to damage if more than 30 years have passed since the emission, event or incident resulting in the damage occurred. Cost recovery proceedings shall be initiated against the operator, or a third party as appropriate, within five years from the date on which such measures have been completed or the liable operator, or third party, has been identified, whichever is the later.[827]

679. Articles 16–17 of the Additional Convention to CIV provide for a period of time after which a right of action will be extinguished. [828]

680. Article 21 of the Convention on damage caused by foreign aircraft to third parties on the surface provides that actions under the Convention are limited to two years from the date of the incident. Any suspension or interruption of these two years is determined by the law of the court where the action is brought. Nevertheless, the maximum time for bringing an action may not extend beyond three years from the date of the accident.[829]

681. Other instruments couch limitations in the language of admissibility. Pursuant to article 13 of the 1999 Basel Protocol, claims for compensation under the Protocol shall not be admissible unless they are brought within ten years from the date of the incident. Such claims should be brought within five years from the date the claimant knew or ought reasonably to have known of the damage provided that the ten-year time limit is not exceeded. Where the incident consists of a series of occurrences having the same origin, time limits established pursuant to the article shall run from the date of the last of such occurrences. Where the incident consists of a continuous occurrence, such time limits shall run from the end of that continuous occurrence.

682. Similarly, under article 10 of the 2003 Kiev Protocol, for claims for compensation to be admissible, they shall be brought within 15 years from the date of the industrial accident. Such claims have to be brought within three years from the date that the claimant knew or ought reasonably to have known of the damage and of the person liable, provided that the 15-year time limit is not exceeded. Where the industrial accident consists of a series of occurrences having the same origin, the time limits shall run from the date of the last of such occurrences. Where the industrial accident consists of a continuous occurrence, such time limits shall run from the end of that continuous occurrence.

683. The Convention on international liability for damage caused by space objects provides for a one-year limit

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[827] Arts. 17 and 10 (see footnote 286 above). See also article 19.
Article 10 reads:

"*Limitation period for recovery of costs*

"The competent authority shall be entitled to initiate cost recovery proceedings against the operator, or if appropriate, a third party who has caused the damage or the imminent threat of damage in relation to any measures taken in pursuance of this Directive within five years from the date on which those measures have been completed or the liable operator, or third party, has been identified, whichever is the later."

Article 17 reads:

"*Temporal application*

"This Directive shall not apply to:

"– damage caused by an emission, event or incident that took place before the date referred to in Article 19 (1),

"– damage caused by an emission, event or incident which takes place subsequent to the date referred to in Article 19 (1) when it derives from a specific activity that took place and finished before the said date,

"– damage, if more than 30 years have passed since the emission, event or incident, resulting in the damage, occurred."

Article 19 reads:

"*Implementation*

"1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 30 April 2007. They shall forthwith inform the Commission thereof.

"When Member States adopt those measures, they shall contain a reference to this Directive or shall be accompanied by such a reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.

"2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive together with a table showing how the provisions of this Directive correspond to the national provisions adopted."

[828] Articles 16–17 read:

"*Article 16. Extinction of rights of action*

"1. A claimant shall lose his right of action if he does not give notice of the accident to a passenger to one of the railways to which a claim may be presented in accordance with Article 13 within three months of his becoming aware of the damage.

"When notice of the accident is given orally by the claimant, confirmation of this oral notice must be delivered to the claimant by the railway to which the accident has been notified.

"2. Nevertheless the right of action shall not be extinguished:

"(*a*) If, within the period of time provided for in paragraph 1, the claimant has made a claim to one of the railways designated in Article 13 (1);

"(*b*) If the claimant proves that the accident was caused by the wrongful act or neglect of the railway;

"(*c*) If notice of the accident has not been given, or has been given late, as a result of circumstances for which the claimant is not responsible;

"(*d*) If during the period of time specified in paragraph (1), the railway responsible—or one of the two railways if in accordance with Article 2 (6) two railways are responsible—knows of the accident to the passenger through other means.

"*Article 17. Limitation of actions*

"1. The limitation of actions for damages brought under this Convention shall be:

"(*a*) In the case of the passenger who has sustained an accident, three years from the day after the accident;

"(*b*) In the case of other claimants, three years from the day after the death of the passenger, or five years from the day after the accident, whichever is the earlier.

"2. When a claim is made to the railway in accordance with Article 13, the three periods of limitation provided for in paragraph 1 shall be suspended until such date as the railway rejects the claim by notification in writing, and returns the document attached thereto. If part of the claim is admitted, the period of limitation shall start to run again only in respect of that part of the claim still in dispute. The burden of proof of the receipt of the claim or of the reply and of the return of the documents shall rest with the party relying upon these facts.

"The running of the period of limitation shall not be suspended by further claims having the same object.

"3. A right of action which has become barred by lapse of time may not be exercised even by way of counterclaim or set-off.

"4. Subject to the foregoing provisions, the limitation of actions shall be governed by national law."

[829] The article reads:

"1. Actions under this Convention shall be subject to a period of limitation of two years from the date of the incident which caused the damage.

"2. The grounds for suspension or interruption of the period referred to in paragraph 1 of this Article shall be determined by the law of the court trying the action; but in any case the right to institute an action shall be extinguished on the expiration of three years from the date of the incident which caused the damage."

for bringing actions for damages. The one year runs from the occurrence of the damage or from the identification of the launching State which is liable. This latter period, however, shall not exceed one year following the date by which the State could reasonably be expected to have learned of the facts.[830]

[830] Article X of the Convention reads:

"1. A claim for compensation for damage may be presented to a launching State not later than one year following the date of the occurrence of the damage or the identification of the launching State which is liable.

"2. If, however, a State does not know of the occurrence of the damage or has not been able to identify the launching State which is liable, it may present a claim within one year following the date on which it learned of the aforementioned facts; however, this period shall in no event exceed one year following the date on which the State could reasonably be expected to have learned of the facts through the exercise of due diligence.

"3. The time-limits specified in paragraphs 1 and 2 of this Article shall apply even if the full extent of the damage may not be known. In this event, however, the claimant State shall be entitled to revise the claim and submit additional documentation after the expiration of such time-limits until one year after the full extent of the damage is known."

Chapter VI

Insurance and other anticipatory financial schemes to guarantee compensation

684. When it is decided to permit the performance of certain activities, with the knowledge that they may cause injuries, it has generally been considered necessary to provide, in advance, for guarantees of payment of damages. This means that the operator of certain activities must either take out an insurance policy or provide financial security. Such requirements are similar to those stipulated in the domestic laws of a number of States in connection with the operation of complex industries, as well as with more routine activities such as driving a car.

685. For example, section 2716 (*a*) of the United States OPA provides that owners and operators of vessels and oil production facilities must provide evidence of financial responsibility to meet the maximum amount of liability to which the responsible party could be subjected. Under section 2716 (*b*), if such evidence of financial responsibility is not provided, the vessel's clearance will be revoked, or the vessel will not be given an entry permit in the United States. Any vessel subject to this requirement which is found in navigable waters without the necessary evidence of financial responsibility for the vessel shall be subject to seizure by and forfeiture to the United States. Under section 2716 (*e*), the financial responsibility requirement may be satisfied by evidence of insurance, surety bond, guarantee, letter of credit, qualification as a self-insurer or other evidence of financial responsibility. The requirement of section 2716 of OPA applies also in relation to the Clean Water Act.

686. Under section 2716 (*f*) of OPA any claim for removal costs or damages authorized under the Act may be brought *directly against the guarantor* of the responsible party. The guarantor may assert against the claimant all rights and defences which would be available to a responsible party, including the defence that the incident was caused by the wilful misconduct of the responsible party. The guarantor, however, may not defend against the claim even if the responsible party has obtained insurance through fraud or misrepresentation.

687. Similarly, CERCLA, in its section 9608, requires proof of financial responsibility, which may be established by insurance, guarantee, surety bond or qualification as a self-insured. If the owner or the operator fails to provide the required guarantee, the clearance requirement will be withheld or revoked, and entry to any port or place or navigable waters in the United States will be denied or the vessel will be detained.

688. Section 9608 (*c*) of CERCLA authorizes direct action against the guarantor. As in OPA, the guarantor may invoke the defence that the incident was caused by the wilful misconduct of the owner or operator. Under section 9608 (*d*), a guarantor's liability is limited to the amount of the insurance policy, etc. However, this statute does not bar additional recovery under any other state or federal statute, contractual or common law liability of a guarantor, including liability for bad faith in negotiating or failing to negotiate the settlement of a claim.[831]

689. Germany's ELA lists, in appendix 2, three types of facilities which should provide evidence of financial capacity to provide compensation in case of liability under the Act. The requirements of such evidence of financial capacity will be satisfied under article 19 of the Act by one of following: (*a*) purchasing insurance; (*b*) obtaining a hold—harmless or indemnity guarantee from the State or the federal Government; or (*c*) obtaining such a guarantee from specific credit institutions.[832]

A. Treaty practice

690. Some multilateral treaties include provisions to ensure the payment of compensation in case of harm and liability. Most multilateral agreements concerning nuclear activities are in this category. Thus, they require the maintenance of insurance or other financial security for the payment of damages in case of liability. The Nuclear Ships Convention requires the maintenance of such security. The terms and the amount of the insurance carried by the operators of nuclear ships are determined by the licensing State. Although the licensing State is not required to carry insurance or to provide other financial security, it must "ensure"[833] the payment of claims for compensation

[831] Force, *loc. cit.*, p. 43.

[832] Hoffman, *loc. cit.*, p. 39.

[833] The relevant paragraphs of article III of the Convention read:

"1. The liability of the operator as regards one nuclear ship shall be limited to 1500 million francs in respect of any one nuclear incident, notwithstanding that the nuclear incident may have resulted from any fault or privity of that operator; such limit shall include neither any interest nor costs awarded by a court in actions for

for nuclear damage if the operator's insurance or security proves to be inadequate.

691. Similar requirements are stipulated in article VII of the 1997 Vienna Convention, which are largely similar to the earlier 1963 Vienna Convention. The operator is required to maintain an insurance or other financial security required by the installation State. While the installation State is not required to carry insurance or to provide other financial security to cover its liability as operator, it must ensure the payment of claims for compensation established against the operator by providing the necessary funds if the insurance is inadequate.[834]

692. The system of compensation under national law is supplemented by a fund mechanism under the 1997 Supplementary Compensation Convention.[835]

693. The 1960 Paris Convention, in its article 10, also requires the operator of nuclear plants to maintain insurance or provide other financial security in accordance with the Convention.[836] The 2004 Paris Convention has a similar provision. It requires the operator to have and maintain insurance or other financial security. It also imposes an obligation on the contracting State to ensure availability of resources.[837] The 2004 Brussels Supplementary Convention establishes a supplementary funding mechanism.

compensation under this Convention.

"2. The operator shall be required to maintain insurance, or other financial security covering his liability for nuclear damage, in such amount, of such type and in such terms as the licensing State shall specify. The licensing State shall ensure the payment of claims for compensation for nuclear damage established against the operator by providing the necessary funds up to the limit laid down in paragraph 1 of this Article to the extent that the yield of the insurance or the financial security is inadequate to satisfy such claims.

"3. However, nothing in paragraph 2 of this Article shall require any Contracting State or any of its constituent subdivisions, such as States, Republics or Cantons, to maintain insurance or other financial security to cover their liability as operators of nuclear ships."

[834] Article VII of the Convention, as amended, reads:

"1. (*a*) The operator shall be required to maintain insurance or other financial security covering his liability for nuclear damage in such amount, of such type and in such terms as the Installation State shall specify. The Installation State shall ensure the payment of claims for compensation for nuclear damage which have been established against the operator by providing the necessary funds to the extent that the yield of insurance or other financial security is inadequate to satisfy such claims, but not in excess of the limit, if any, established pursuant to article V. Where the liability of the operator is unlimited, the Installation State may establish a limit of the financial security of the operator liable, provided that such limit is not lower than 300 million SDRs. The Installation State shall ensure the payment of claims for compensation for nuclear damage which have been established against the operator to the extent that the yield of the financial security is inadequate to satisfy such claims, but not in excess of the amount of the financial security to be provided under this paragraph.

(*b*) Notwithstanding sub-paragraph (*a*) of this paragraph, where the liability of the operator is unlimited, the Installation State, having regard to the nature of the nuclear installation or the nuclear substances involved and to the likely consequences of an incident originating therefrom, may establish a lower amount of financial security of the operator, provided that in no event shall any amount so established be less than 5 million SDRs, and provided that the Installation State ensures the payment of claims for compensation for nuclear damage which have been established against the operator by providing necessary funds to the extent that the yield of insurance or other financial security is inadequate to satisfy such claims, and up to the limit provided pursuant to sub-paragraph (*a*) of this paragraph.

"2. Nothing in paragraph 1 of this article shall require a Contracting Party or any of its constituent sub-divisions, such as States or Republics, to maintain insurance or other financial security to cover their liability as operators.

"3. The funds provided by insurance, by other financial security or by the Installation State pursuant to paragraph 1 of this article or sub-paragraphs (*b*) and (*c*) of paragraph 1 of Article V shall be exclusively available for compensation due under this Convention.

"4. No insurer or other financial guarantor shall suspend or cancel the insurance or other financial security provided pursuant to paragraph 1 of this article without giving notice in writing of at least two months to the competent public authority or, in so far as such insurance or other financial security relates to the carriage of nuclear material, during the period of the carriage in question."

Article VII of the 1963 Vienna Convention reads:

"1. The operator shall be required to maintain insurance or other financial security covering his liability for nuclear damage in such amount, of such type and in such terms as the Installation State shall specify. The Installation State shall ensure the payment of claims for compensation for nuclear damage which have been established against the operator by providing the necessary funds to the extent that the yield of insurance or other financial security is inadequate to satisfy such claims, but not in excess of the limit, if any, established pursuant to article V.

"2. Nothing in paragraph 1 of this article shall require a Contracting Party or any of its constituent sub-divisions, such as States or Republics, to maintain insurance or other financial security to cover their liability as operators.

"3. The funds provided by insurance, by other financial security or by the Installation State pursuant to paragraph 1 of this article shall be exclusively available for compensation due under this Convention.

"4. No insurer or other financial guarantor shall suspend or cancel the insurance or other financial security provided pursuant to paragraph 1 of this article without giving notice in writing of at least two months to the competent public authority or, in so far as such insurance or other financial security relates to the carriage of nuclear material, during the period of the carriage in question."

[835] Article III, paragraph 1, of the Convention reads:

"1. Compensation in respect of nuclear damage per nuclear incident shall be ensured by the following means:

"(*a*) (i) the Installation State shall ensure the availability of 300 million SDRs or a greater amount that it may have specified to the Depositary at any time prior to the nuclear incident, or a transitional amount pursuant to sub-paragraph (ii);

"(ii) a Contracting Party may establish for the maximum of 10 years from the date of the opening for signature of this Convention, a transitional amount of at least 150 million SDRs in respect of a nuclear incident occurring within that period.

"(*b*) beyond the amount made available under sub-paragraph (*a*), the Contracting Parties shall make available public funds according to the formula specified in Article IV."

[836] Article 10 of the Convention reads:

"(*a*) To cover the liability under this Convention, the operator shall be required to have and maintain insurance or other financial security of the amount established pursuant to article 7 and of such type and terms as the competent public authority shall specify.

"(*b*) No insurer or other financial guarantor shall suspend or cancel the insurance or other financial security provided for in paragraph (*a*) of this article without giving notice in writing of at least two months to the competent public authority or in so far as such insurance or other financial security relates to the carriage of nuclear substances, during the period of the carriage in question.

"(*c*) The sums provided as insurance, reinsurance, or other financial security may be drawn upon only for compensation for damage caused by a nuclear incident."

[837] Article 10 reads:

"(*a*) To cover the liability under this Convention, the operator shall be required to have and maintain insurance or other financial security of the amount established pursuant to Article 7 (*a*) or 7 (*b*) or Article 21 (*c*) and of such type and terms as the competent public authority shall specify.

"(*b*) Where the liability of the operator is not limited in amount, the Contracting Party within whose territory the nuclear installation of the liable operator is situated shall establish a limit upon the financial security of the operator liable, provided that any limit so established shall not be less than the amount referred to in Article 7 (*a*) or 7 (*b*).

(*Continued on next page.*)

694. In addition to conventions dealing with nuclear materials, conventions regulating other activities with a risk of substantial injury also require guarantees for payment of compensation in case of injury.

695. The Protocol of 1992 to amend the Civil Liability Convention, in its article V, requires that the owner of a ship registered in a contracting State maintain insurance or some other financial security in respect of a ship concerning any one incident to an aggregate amount calculated on the basis of tonnage, commencing with 3 million units of account for a ship not exceeding 5,000 units of tonnage. Under paragraph 3 of the same article, the owner shall constitute a fund for the total sum representing the limit of his liability with the court or other competent authority of any one of the contracting States in which action is brought under article IX or, if no action is brought, with any court or other competent authority in any one of the contracting States in which an action can be brought under article IX. The fund can be constituted either by depositing the sum or by producing a bank guarantee or other guarantee, acceptable under the legislation of the contracting State where the fund is constituted, and considered to be adequate by the court or other competent authority.

696. Under article VII of the Protocol of 1992 to amend the Civil Liability Convention, a certificate attesting that insurance or other financial security is in force in accordance with the provisions of the Convention shall be issued to each ship and such certificate shall be carried on board the ship.

697. The 1992 Fund Convention and its Protocol of 2003 provide supplementary compensation mechanisms. Pursuant to article 4 of the Protocol, the Supplementary Fund established by the Protocol shall pay compensation to any person suffering pollution damage if such person has been unable to obtain full and adequate compensation for an established claim for such damage under the terms of the Fund Convention, because the total damage exceeds, or there is a risk that it will exceed, the applicable limit of compensation laid down under the Convention in respect of any one incident.

698. Under article 12 of the HNS Convention, the owner of a ship registered in a State party and actually carrying hazardous and noxious substances shall be required to maintain insurance or other financial security, such as the guarantee of a bank or similar financial institution to cover liability for damage under the Convention. A compulsory insurance certificate attesting to that fact shall be issued and carried on board the ship.

699. The Bunker Oil Convention has similar provisions. Pursuant to article 7, the registered owner of a ship having a gross tonnage greater than 1,000 registered in a State party shall be required to maintain insurance or other financial security, such as the guarantee of a bank or similar financial institution, to cover the liability for pollution damage in an amount equal to the limits of liability under the applicable national or international limitation regime. Such amount, however, shall not exceed an amount calculated in accordance with the Convention on limitation of liability for maritime claims, 1976, as amended. A certificate attesting that insurance or other financial security is in force shall be issued and be carried on board the ship.

700. The 1999 Basel Protocol also provides for insurance coverage. Pursuant to article 14, paragraph 1, the persons liable under the strict liability regime shall establish and maintain during the period of the time limit of liability, insurance, bonds or other financial guarantees covering their liability for amounts not less than the minimum limits specified by the Protocol. States may fulfil their obligation under the paragraph by a declaration of self-insurance. It is envisaged under article 15 that additional and supplementary measures aimed at ensuring adequate and prompt compensation may be taken using existing mechanisms.

701. Article 11 of the 2003 Kiev Protocol also requires the operator to ensure coverage by financial security in the form of insurance, bonds or other financial guarantees including financial mechanisms providing compensation, in the event of insolvency as well as by declaration of self-insurance in respect of State-owned operators.

702. Article 12 of the Lugano Convention requires parties to the Convention, where appropriate, to ensure under internal law that operators have financial security to cover the liability under the Convention and to determine its scope, conditions and form. Such financial security may be subject to a certain limit. Under the article, the parties, in determining which activities should be subject to the requirement of financial security, should take account of the risks of the activity.

703. The 2004 EU Directive does not establish any fund or a system of harmonized mandatory financial security. Instead, it requires member States to take measures to encourage the development of financial security instruments and markets by the appropriate economic and financial operators, including financial mechanisms in case of insolvency, with the aim of enabling operators to use financial guarantees to cover their responsibilities under the Directive.[838] It envisages the preparation of a report

(*Footnote 837 continued.*)

"(*c*) The Contracting Party within whose territory the nuclear installation of the liable operator is situated shall ensure the payment of claims for compensation for nuclear damage which have been established against the operator by providing the necessary funds to the extent that the insurance or other financial security is not available or sufficient to satisfy such claims, up to an amount not less than the amount referred to in Article 7 (*a*) or Article 21 (*c*).

"(*d*) No insurer or other financial guarantor shall suspend or cancel the insurance or other financial security provided for in paragraph (*a*) or (*b*) of this Article without giving notice in writing of at least two months to the competent public authority or, in so far as such insurance or other financial security relates to the carriage of nuclear substances, during the period of the carriage in question.

"(*e*) The sums provided as insurance, reinsurance, or other financial security may be drawn upon only for compensation for nuclear damage caused by a nuclear incident."

[838] Article 14 (see footnote 286 above) reads:

"*Financial security*

"1. Member States shall take measures to encourage the development of financial security instruments and markets by the appropriate economic and financial operators, including financial mechanisms in case of insolvency, with the aim of enabling operators to use financial guarantees to cover their responsibilities under this Directive.

"2. The Commission, before 30 April 2010 shall present a report on the effectiveness of the Directive in terms of actual remediation

by the European Commission on the effectiveness of the Directive. In the light of that report, and of an extended impact assessment, including a cost-benefit analysis, the Commission shall, if appropriate, submit proposals for a system of mandatory financial security.

704. Under article 15 of the Convention on damage caused by foreign aircraft to third parties on the surface, the operators of aircraft registered in another contracting State are required to maintain insurance or provide other security for possible damage that they may cause on the surface. Paragraph 4 (*c*) of that article provides that a contracting State may accept, instead of insurance, the guarantee of the contracting State in which the aircraft is registered, provided that State undertakes to waive immunity from suit in respect of that guarantee.

705. Article 235 of the United Nations Convention on the Law of the Sea also provides, in paragraph 3, that States shall cooperate in developing procedures for the payment of adequate compensation funds.

706. Some of these instruments make provision for subrogation. Any claim under the 1999 Basel Protocol may be asserted directly against any person providing insurance, bonds or other financial guarantees. The insurer or the person providing the financial guarantee shall have the right to require the person liable pursuant to the strict liability regime under article 4 of the Protocol to be joined in the proceedings. Insurers and persons providing financial guarantees may invoke the defences which the person liable under article 4 would be entitled to invoke. A Contracting Party may nevertheless notify the depositary that it does not provide for a right to bring a direct action.

707. Similarly, under the 2003 Kiev Protocol, any claim under the Protocol may be asserted directly against any person providing financial cover. In such a situation, the insurer or the person providing the financial cover shall have the right to require the person liable to be joined in the proceedings as well as invoke the defences that the person liable would be entitled to invoke.

708. The Bunker Oil Convention is more detailed. Under article 7, paragraph 10, any claim for compensation for damage may be brought directly against the insurer or other person providing financial security for the owner's liability for damage. In such case the defendant may, even if the owner is not entitled to limitation of liability, benefit from the limit of liability. The defendant may further invoke the defences (other than the bankruptcy or winding up of the owner) which the owner would have been entitled to invoke as well as the defence that the damage resulted from the wilful misconduct of the owner. However, the defendant shall not invoke any other defence which the defendant might have been entitled to invoke in proceedings brought by the owner against the defendant. The defendant shall in any event have the right to require the owner to be joined in the proceedings. The earlier HNS Convention has similar provisions.[839]

of environmental damages, on the availability at reasonable costs and on conditions of insurance and other types of financial security for the activities covered by Annex III. The report shall also consider in relation to financial security the following aspects: a gradual approach, a ceiling for the financial guarantee and the exclusion of low-risk activities. In the light of that report, and of an extended impact assessment, including a cost-benefit analysis, the Commission shall, if appropriate, submit proposals for a system of harmonised mandatory financial security."

B. Judicial decisions and State practice outside treaties

709. In a few cases, a State engaged in activities entailing risks of damage to other States has unilaterally guaranteed reparation of possible damage. The United States has adopted legislation guaranteeing reparation for damage caused by certain nuclear incidents. On 6 December 1974, by Public Law 93–513, adopted in the form of a joint resolution of Congress, the United States assured compensation for damage that might be caused by nuclear incidents involving the nuclear reactor of a United States warship.[840]

710. Public Law 93–513 was subsequently supplemented by Executive Order 11918, of 1 June 1976, which provided for prompt, adequate and effective compensation in the case of certain nuclear incidents.[841]

[839] Art. 12.

[840] The relevant paragraphs of the Law read:

"Whereas it is vital to the national security to facilitate the ready acceptability of United States nuclear powered warships into friendly foreign ports and harbours; and

"Whereas the advent of nuclear reactors has led to various efforts throughout the world to develop an appropriate legal regime for compensating those who sustain damages in the event there should be an incident involving the operation of nuclear reactors; and

"Whereas the United States has been exercising leadership in developing legislative measures designed to assure prompt and equitable compensation in the event a nuclear incident should arise out of the operation of a nuclear reactor by the United States as is evidenced in particular by section 170 of the Atomic Energy Act of 1954, as amended; and

"Whereas some form of assurance as to the prompt availability of compensation for damage in the unlikely event of a nuclear incident involving the nuclear reactor of a United States warship would, in conjunction with the unparalleled safety record that has been achieved by United States nuclear powered warships in their operation throughout the world, further the effectiveness of such warships:

"Now, therefore, be it

"*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled*, That it is the policy of the United States that it will pay claims or judgments for bodily injury, death, or damage to or loss of real or personal property proven to have resulted from a nuclear incident involving the nuclear reactor of a United States warship: *Provided*, that the injury, death, damage, or loss was not caused by the act of an armed force engaged in combat or as a result of civil insurrection. The President may authorize, under such terms and conditions as he may direct, the payment of such claims or judgments from any contingency funds available to the Government or may certify such claims or judgments to the Congress for appropriation of the necessary funds."

(Public Law 95–513, *United States Statutes at Large, 1974*, vol. 88, part 2, pp. 1610–1611)

[841] The Executive Order reads:

"By virtue of the authority vested in me by the joint resolution approved December 6, 1994 (Public Law 93–513. 88 Stat. 1601. 42 U.S.C.2211), and by section 301 of Title 3 of the *United States Code*, and as President of the United States of America, in order that prompt, adequate and effective compensation will be provided in the unlikely event of injury or damage resulting from a nuclear incident involving the nuclear reactor of a United States warship, it is hereby ordered as follows:

"Section 1. (*a*) With respect to the administrative settlement of claims or judgments for bodily injury, death, or damage to or loss

(*Continued on next page.*)

711. In an exchange of notes between the United States and Spain in connection with the Treaty of friendship and cooperation concluded between the two Governments in 1976, the United States gave the assurance that "it will endeavour, should the need arise, to seek legislative authority to settle in a similar manner claims for bodily injury, death or damage to or loss of real or personal property proven to have resulted from a nuclear incident involving any other United States nuclear component giving rise to such claims within Spanish territory".[842]

712. In other words, the United States unilaterally expanded its liability and volunteered, if necessary, to enact legislation expressing such obligation towards Spain.

713. Similarly, a statement made by the United States Department of State in connection with weather modification activities also speaks of advance agreements with potential victims' States. In connection with the 1966 hearings before the United States Senate on pending legislation concerning a programme to increase usable precipitation in the United States, the State Department made the following statement:

> The Department of State's only concern would be in case the experimental areas selected would be close to national boundaries which might create problems with the adjoining countries of Canada and Mexico. In the event of such possibilities the Department would like to ensure that provision is made for advance agreements with any affected countries before such experimentation took place.[843]

714. In one case, a State undertook to guarantee compensation for injuries that might be caused in a neighbouring State by a private company operating in its territory. Thus Canada and the United States conducted negotiations concerning a project for petroleum prospecting that a private Canadian company planned to undertake in the Beaufort Sea, off the Mackenzie delta. The project aroused grave concern in the neighbouring territory of Alaska, in particular in respect of the safety measures envisaged and the funds available for compensating potential victims in the United States. As a result of negotiations, the Canadian company was required to constitute a fund that would ensure payment of the required compensation. The Government of Canada, in turn, undertook to guarantee the payment of compensation.[844]

(*Footnote 841 continued.*)

> of real or personal property proven to have resulted from a nuclear incident involving the nuclear reactor of a United States warship, the Secretary of Defense is designated and empowered to authorize, in accord with Public Law 93–513, the payment, under such terms and conditions as he may direct, of such claims and judgments from contingency funds available to the Department of Defense.
>
> "(*b*) The Secretary of Defense shall, when he considers such action appropriate, certify claims or judgments described in subsection (*a*) and transmit to the Director of the Office of Management and Budget his recommendation with respect to appropriation by the Congress of such additional sums as may be necessary.
>
> "Sec. 2. The provision of section 1 shall not be deemed to replace, alter or diminish the statutory and other functions vested in the Attorney General, or the head of any other agency, with respect to litigation against the United States and judgments and compromise settlements arising therefrom.
>
> "Sec. 3. The functions herein delegated shall be exercised in consultation with the Secretary of State in the case of any incident giving rise to a claim of a foreign country or national thereof, and, international negotiations relating to Public Law 93–513 shall be performed by or under the authority of the Secretary of State."

(*Federal Register* (Washington, D.C.), vol. 41, No. 108, 3 June 1976, p. 22329)

[842] *Digest of United States Practice in International Law 1976* (Washington, D.C.), p. 441.

[843] Letter addressed by the Department of State to Senator Magnuson, Chairman of the Senate Committee on Commerce, "Weather Modification", *Hearings before the Committee on Commerce*, United States Senate, 89th Congress, second session, part 2, 1966, p. 321.

[844] *International Canada* (Toronto), vol. 7, No. 3, 1976, pp. 84–85.

Chapter VII

Enforcement of judgements

715. If the rights of injured parties are to be protected effectively, it is essential that decisions and judgements awarding compensation should be enforceable. State practice has established the principle that States must not impede or claim immunity from judicial procedures dealing with disputes arising from extraterritorial injuries resulting from activities undertaken within their jurisdiction. States have thus agreed to enforce the judgements or awards rendered by the competent organs concerning disputes arising from such injuries.

A. Treaty practice

716. Multilateral agreements generally contain provisions relating to this last step in the protection of the rights of injured parties. They provide that, once a final judgement on compensation has been rendered, it shall be enforced in the territories of the Contracting Parties and that parties may not invoke jurisdictional immunity. For example, the 1960 Paris Convention provides, in article 13 (*d*)–(*e*), that final judgements rendered by a court competent under the Convention are enforceable in the territory of any of the Contracting Parties, and that, if an action for damages is brought against a Contracting Party as an operator liable under the Convention, such party may not invoke jurisdictional immunity.[845] Similarly, the 2004 Paris Convention provides in article 13, as amended:

[845] Article 13 of the Convention, as amended by the Additional Protocol of 28 January 1964 and by the Protocol of 16 November 1982, reads:

> "...
>
> "(*d*) Judgements entered by the competent court under this article after trial, or by default, shall, when they have become enforceable under the law applied by that court, become enforceable in the territory of any of the other Contracting Parties as soon as the formalities required by the Contracting Party concerned have been complied with. The merits of the case shall not be the subject of further proceedings. The foregoing provisions shall not apply to interim judgements.
>
> "(*e*) If an action is brought against a Contracting Party under this Convention, such Contracting Party may not, except in respect of measures of execution, invoke any jurisdictional immunities before the court competent in accordance with this article."

Similar provisions are contained in the Convention on damage caused by foreign aircraft to third parties on the surface, article 20 of which reads in part:

(*i*) Judgements entered by the competent court under this Article after trial, or by default, shall, when they have become enforceable under the law applied by that court, become enforceable in the territory of any of the other Contracting Parties as soon as the formalities required by the Contracting Party concerned have been complied with. The merits of the case shall not be the subject of further proceedings. The foregoing provisions shall not apply to interim judgements.

(*j*) If an action is brought against a Contracting Party under this Convention, such Contracting Party may not, except in respect of measures of execution, invoke any jurisdictional immunities before the court competent in accordance with this Article.

717. Article XII of the 1997 Vienna Convention, as amended, contains substantially similar language to article XII of the 1963 Vienna Convention.[846] It provides:

1. A judgment that is no longer subject to ordinary forms of review entered by a court of a Contracting Party having jurisdiction shall be recognized, except –

(*a*) where the judgment was obtained by fraud;

(*b*) where the party against whom the judgment was pronounced was not given a fair opportunity to present his case; or

(*c*) where the judgment is contrary to the public policy of the Contracting Party within the territory of which recognition is sought, or is not in accord with fundamental standards of justice.

2. A judgment which is recognized under paragraph 1 of this Article shall, upon being presented for enforcement in accordance with the formalities required by the law of the Contracting Party where enforcement is sought, be enforceable as if it were a judgment of a court of that Contracting Party. The merits of a claim on which the judgment has been given shall not be subject to further proceedings.

"4. Where any final judgment, including a judgment by default, is pronounced by a court competent in conformity with this Convention, on which execution can be issued according to the procedural law of that court, the judgment shall be enforceable upon compliance with the formalities prescribed by the laws of the Contracting State, or of any territory, State or province thereof …"

Under the Additional Convention to CIV, the final judgements rendered by competent courts are enforceable in any other contracting State. Article 20 of the Convention provides:

"1. Judgments entered by the competent court under the provisions of this Convention after trial, or by default, shall, when they have become enforceable under the law applied by that court, become enforceable in any of the other Contracting States as soon as the formalities required in the State concerned have been complied with. The merits of the case shall not be the subject of further proceedings.

"The foregoing provisions shall not apply to interim judgments nor to awards of damages in addition to costs, against a plaintiff who fails in his action.

"Settlements concluded between the parties before the competent court with a view to putting an end to a dispute, and which have been entered on the record of that court, shall have the force of a judgment of that court.

"2. Security for costs shall not be required in proceedings arising out of the provisions of this Convention."

[846] Article XII reads:

"1. A final judgment entered by a court having jurisdiction under article XI shall be recognized within the territory of any other Contracting Party, except:

"(*a*) where the judgment was obtained by fraud;

"(*b*) where the party against whom the judgment was pronounced was not given a fair opportunity to present his case; or

"(*c*) where the judgment is contrary to the public policy of the Contracting Party within the territory of which recognition is sought, or is not in accord with fundamental standards of justice.

"2. A final judgment which is recognized shall, upon being presented for enforcement in accordance with the formalities required by the law of the Contracting Party where enforcement is sought, be enforceable as if it were a judgment of a court of that Contracting Party.

"3. The merits of a claim on which the judgment has been given shall not be subject of further proceedings."

718. Article XIII, paragraphs 5–6, of the 1997 Supplementary Compensation Convention are analogous.[847] It further provides in paragraph 7 that settlements effected in respect of the payments of compensation out of public funds in accordance with the conditions established by national legislation shall be recognized by the other Contracting Parties.[848]

719. In addition to conventions dealing with nuclear materials, conventions regulating other activities with a risk of substantial injury also contain rules on enforcement and recognition of judgements. The Protocol of 1992 to the Civil Liability Convention, like the earlier 1969 Convention, provides that final judgements rendered in a contracting State are enforceable in any other contracting State.[849] The Convention provides further, in article XI, paragraph 2, that States shall waive all defences based on their status as sovereign States.[850]

720. Under article 12 of the Seabed Mineral Resources Convention, a judgement given by a competent court, which is enforceable in the State of origin where it is not subject to ordinary forms of review, shall be recognized in the territory of any other State party. If, however, the

[847] Article XIII reads in part:

"5. A judgment that is no longer subject to ordinary forms of review entered by a court of a Contracting Party having jurisdiction shall be recognized except:

"(*a*) where the judgment was obtained by fraud;

"(*b*) where the party against whom the judgment was pronounced was not given a fair opportunity to present his case; or

"(*c*) where the judgment is contrary to the public policy of the Contracting Party within the territory of which recognition is sought, or is not in accord with fundamental standards of justice.

"6. A judgment which is recognized under paragraph 5 shall, upon being presented for enforcement in accordance with the formalities required by the law of the Contracting Party where enforcement is sought, be enforceable as if it were a judgment of a court of that Contracting Party. The merits of a claim on which the judgment has been given shall not be subject to further proceedings.

"7. Settlements effected in respect of the payment of compensation out of the public funds referred to in Article III.1 (*b*) in accordance with the conditions established by national legislation shall be recognized by the other Contracting Parties."

[848] Article 10 (*d*) of the Convention supplementary to the 1960 Paris Convention reads:

"Settlements effected in respect of the payment of compensation out of the public funds referred to in Article 3 (*b*) (ii) and (iii) in accordance with the conditions established by national legislation shall be recognized by the other Contracting Parties, and judgments entered by the competent courts in respect of such compensation shall become enforceable in the territory of the other Contracting Parties in accordance with the provisions of Article 13 (*e*) of the Paris Convention."

[849] Article X reads:

"1. Any judgment given by a Court with jurisdiction in accordance with Article IX which is enforceable in the State of origin where it is no longer subject to ordinary forms of review shall be recognized in any Contracting State except:

(*a*) where the judgment was obtained by fraud; or

(*b*) where the defendant was not given reasonable notice and a fair opportunity to present his case.

"2. A judgment recognized under paragraph 1 of this Article shall be enforceable in each Contracting State as soon as the formalities required in that State have been complied with. The formalities shall not permit the merits of the case to be re-opened."

[850] Article XI reads:

"...

"2. With respect to ships owned by a Contracting State and used for commercial purposes, each State shall be subject to suit in the jurisdictions set forth in Article IX and shall waive all defences based on its status as a sovereign State."

judgement is obtained by fraud, or if the defendant was not given reasonable notice and a fair opportunity to present his case, the judgement is not enforceable. The article provides further that a judgement recognized as valid shall be enforceable in the territory of any State party once the "formalities"[851] required by that State have been complied with, but that those formalities may neither reopen the case nor raise the question of applicable law.

721. Article 13 of the same Convention provides that, if the operator is a State party, it will still be subject to the national court of the controlling State or the State in whose territory the damage has occurred, and must waive all defences based on its status as a sovereign State.[852]

722. The provisions of article 40 of the HNS Convention and article 10 of the Bunker Oil Convention also provide for recognition of judgements by the other Contracting Party.[853] The same is true of CRTD and the 1999 Basel Protocol. Article 20 of CRTD[854] and article 21 of the 1999 Basel Protocol provide further that non-recognition may exist where the judgement is irreconcilable with an earlier judgement validly pronounced in another Contracting Party with regard to the same cause of action and the same parties. Moreover, under the Basel Protocol, where there is an agreement or arrangement in force between the Contracting Parties on mutual recognition and enforcement of judgements under which the judgement would be recognizable and enforceable, the Protocol provisions do not apply.[855]

723. Article 18 of the 2003 Kiev Protocol is similar to article 21 of the 1999 Basel Protocol.[856] The Kiev Protocol also recognizes the application of community law in respect of States parties which are members of the European Community. Article 20 states:

1. The courts of Parties which are members of the European Community shall apply the relevant Community rules instead of article 13

[851] Article 12 reads:

"1. Any judgement given by a court with jurisdiction in accordance with Article 11, which is enforceable in the State of origin where it is no longer subject to ordinary forms of review, shall be recognized in any State Party, except:

"(*a*) where the judgement was obtained by fraud, or

"(*b*) where the defendant was not given reasonable notice and a fair opportunity to present his case.

"2. A judgement recognized under paragraph 1 of this Article shall be enforceable in each State Party as soon as the formalities required in that State have been complied with. The formalities shall not permit the merits of the case to be re-opened, nor a reconsideration of the applicable law."

[852] Article 13 reads:

"Where a State Party is the operator, such State shall be subject to suit in the jurisdiction set forth in Article 11 and shall waive all defences based on its status as a sovereign State."

[853] Article 40 of the HNS Convention reads:

"1. Any judgement given by a court with jurisdiction in accordance with article 38, which is enforceable in the State of origin where it is no longer subject to ordinary forms of review, shall be recognized in any State Party, except:

"(*a*) where the judgement was obtained by fraud; or

"(*b*) where the defendant was not given reasonable notice and a fair opportunity to present the case.

"2. A judgement recognized under paragraph 1 shall be enforceable in each State Party as soon as the formalities required in that State have been complied with. The formalities shall not permit the merits of the case to be reopened."

Article 10 of the Bunker Oil Convention reads:

"*Recognition and enforcement*

"1. Any judgement given by a Court with jurisdiction in accordance with article 9 which is enforceable in the State of origin where it is no longer subject to ordinary forms of review, shall be recognized in any State Party, except:

"(*a*) Where the judgement was obtained by fraud; or

"(*b*) Where the defendant was not given reasonable notice and a fair opportunity to present his or her case.

"2. A judgement recognized under paragraph 1 shall be enforceable in each State Party as soon as the formalities required in that State have been complied with. The formalities shall not permit the merits of the case to be reopened."

[854] Article 20, paragraph 1, reads:

"Any judgment given by a court with jurisdiction in accordance with article 19 which is enforceable in the State of origin where it is no longer subject to ordinary forms of review, shall be recognized in any State Party, except:

"(*a*) where the judgment was obtained by fraud; or

"(*b*) where the defendant was not given reasonable notice and a fair opportunity to present his case; or

"(*c*) where the judgment is irreconcilable with an earlier judgment given in the State where the recognition is sought, or given in another State Party with jurisdiction in accordance with article 19 and already recognized in the State where the recognition is sought, involving the same cause of action and between the same parties."

Paragraph 2 of the article provides that any judgement recognized under paragraph 1 shall be enforceable in each State party as soon as the formalities required (which shall not reopen the merits of the case) in that State have been complied with.

[855] Article 21 of the 1999 Basel Protocol reads:

"*Mutual recognition and enforcement of judgements*

"1. Any judgement of a court having jurisdiction in accordance with article 17 of the Protocol, which is enforceable in the State of origin and is no longer subject to ordinary forms of review, shall be recognized in any Contracting Party as soon as the formalities required in that Party have been completed, except:

"(*a*) Where the judgement was obtained by fraud;

"(*b*) Where the defendant was not given reasonable notice and a fair opportunity to present his case;

"(*c*) Where the judgement is irreconcilable with an earlier judgement validly pronounced in another Contracting Party with regard to the same cause of action and the same parties; or

"(*d*) Where the judgement is contrary to the public policy of the Contracting Party in which its recognition is sought.

"2. A judgement recognized under paragraph 1 of this Article shall be enforceable in each Contracting Party as soon as the formalities required in that Party have been completed. The formalities shall not permit the merits of the case to be re-opened.

"3. The provisions of paragraphs 1 and 2 of this Article shall not apply between Contracting Parties that are Parties to an agreement or arrangement in force on mutual recognition and enforcement of judgements under which the judgement would be recognizable and enforceable."

[856] Article 18 of the 2003 Kiev Protocol reads:

"1. Any judgement of a court having jurisdiction in accordance with article 13 or any arbitral award which is enforceable in the State of origin of the judgement and is no longer subject to ordinary forms of review shall be recognized in any Party as soon as the formalities required in that Party have been completed, except:

"(*a*) Where the judgement or arbitral award was obtained by fraud;

"(*b*) Where the defendant was not given reasonable notice and a fair opportunity to present his or her case;

"(*c*) Where the judgement or arbitral award is irreconcilable with an earlier judgement or arbitral award validly pronounced in another Party with regard to the same cause of action and the same parties; or

"(*d*) Where the judgement or arbitral award is contrary to the public policy of the Party in which its recognition is sought.

"2. A judgement or arbitral award recognized under paragraph 1 shall be enforceable in each Party as soon as the formalities required in that Party have been completed. The formalities shall not permit the merits of the case to be reopened.

"3. The provisions of paragraphs 1 and 2 shall not apply between Parties to an agreement or arrangement in force on the mutual recognition and enforcement of judgements or arbitral awards under which the judgement or arbitral award would be recognizable and enforceable."

[concerning competent courts], whenever the defendant is domiciled in a member State of the European Community, or the parties have attributed jurisdiction to a court of a member State of the European Community and one or more of the parties is domiciled in a member State of the European Community.

2. In their mutual relations, Parties which are members of the European Community shall apply the relevant Community rules instead of articles 15 and 18.

724. It also contemplates the possibility of a Contracting Party applying other rules for the recognition and enforcement of judgements. The effect of such rules, however, would be to ensure that judgements are recognized and enforced at least to the same extent as provided by the 2003 Kiev Protocol.

725. The earlier Lugano Convention has provisions that are analogous to those of the 1999 Basel and 2003 Kiev Protocols. Under article 23, paragraph 1, any decision given by a court with jurisdiction under the Convention, where it is no longer subject to ordinary forms of review, shall be recognized in any party, unless:

(*a*) such recognition is contrary to public policy in the Party in which recognition is sought;

(*b*) it was given in default of appearance and the defendant was not duly served with the document which instituted the proceedings or with an equivalent document in sufficient time to enable him to arrange for his defence;

(*c*) the decision is irreconcilable with a decision given in a dispute between the same parties in the Party in which recognition is sought; or

(*d*) the decision is irreconcilable with an earlier decision given in another State involving the same cause of action and between the same parties, provided that this latter decision fulfils the conditions necessary for its recognition in the Party addressed.

726. Under article 23, paragraph 2, a decision recognized under paragraph 1 which is enforceable in the State of origin shall be enforceable in each State party as soon as the formalities required (which shall not permit the merits of the case to be reopened) by the laws of that party have been completed.

727. The rules of that article are based on the 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and the 1988 Convention on jurisdiction and the enforcement of judgments in civil and commercial matters.

728. As regards the relationship between the Lugano Convention and other treaties dealing with the enforcement of judgements, article 24 of that Convention provides that:

Whenever two or more Parties are bound by a treaty establishing rules of jurisdiction or providing for recognition and enforcement in a Party of decisions given in another Party, the provisions of that treaty shall replace the corresponding provisions of [the relevant articles of the Convention].

729. As far as the relations between the Lugano Convention and the domestic law of States parties are concerned, article 25 states that the Convention is without prejudice to the domestic laws of States parties or any other agreements which they may have. As regards parties that are members of the European Community, the Community rules will be the governing rules among them and the provisions of the Convention apply only to the extent that there is no Community rule governing a particular issue.[857]

730. Provisions are also provided in respect of recognition of judgements concerning the funds established in various instruments. Under the 1992 Fund Convention, as in the 1971 Fund Convention, a judgement rendered by a court in proceedings in which the Fund has effectively intervened is enforceable in the State where the judgement is rendered and shall also be recognized and enforceable in each Contracting Party.[858] Under article 40, paragraph 3, of the HNS Convention, any judgement given against the HNS Fund by a court with jurisdiction, when it has become enforceable in the State of origin and is in that State no longer subject to ordinary forms of review, shall be recognized and enforceable in each State party.

731. The Protocol of 2003 to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992 has a provision of similar import. Article 8 provides:

1. Subject to any decision concerning the distribution referred to in article 4, paragraph 3 of this Protocol, any judgment given against the Supplementary Fund by a court having jurisdiction in accordance with

[857] Article 25 of the Convention reads:

"1. Nothing in this Convention shall be construed as limiting or derogating from any of the rights of the persons who have suffered the damage or as limiting the provisions concerning the protection or reinstatement of the environment which may be provided under the laws of any Party or under any other treaty to which it is a Party.

"2. In their mutual relations, Parties which are members of the European Economic Community shall apply Community rules and shall therefore not apply the rules arising from this Convention except in so far as there is no Community rule governing the particular subject concerned."

[858] Article 7 of the Fund Convention reads:

"...

"5. Except as otherwise provided in paragraph 6, the Fund shall not be bound by any judgment or decision in proceedings to which it has not been a party or by any settlement to which it is not a party.

"6. Without prejudice to the provisions of paragraph 4, where an action under the Liability Convention for compensation for pollution damage has been brought against an owner or his guarantor before a competent court in a Contracting State, each party to the proceedings shall be entitled under the national law of that State to notify the Fund of the proceedings. Where such notification has been made in accordance with the formalities required by the law of the court seized and in such time and in such a manner that the Fund has in fact been in a position effectively to intervene as a party to the proceedings, any judgment rendered by the court in such proceedings shall, after it has become final and enforceable in the State where the judgment was given, become binding upon the Fund in the sense that the facts and findings in that judgment may not be disputed by the Fund even if the Fund has not actually intervened in the proceedings."

And article 8 reads:

"Subject to any decision concerning the distribution referred to in Article 4, paragraph 5, any judgment given against the Fund by a court having jurisdiction in accordance with Article 7, paragraphs 1 and 3, shall, when it has become enforceable in the State of origin and is in that State no longer subject to ordinary forms of review, be recognized and enforceable in each Contracting State on the same conditions as are prescribed in Article X of the Liability Convention."

The 1971 Fund Convention has similar provisions in respect of the 1969 Civil Liability Convention.

article 7 of this Protocol, shall, when it has become enforceable in the State of origin and is in that State no longer subject to ordinary forms of review, be recognized and enforceable in each Contracting State on the same conditions as are prescribed in article X of the 1992 Liability Convention.

732. The 2004 Paris Convention also provides in article 10, paragraph (*d*), that settlements effected from public funds shall be recognized by the other Contracting Parties, and judgements entered by the competent courts in respect of such compensation shall become enforceable in the territory of the other Contracting Parties.

733. In the Convention on international liability for damage caused by space objects, the language on enforceability of awards is different. Under article XIX, a decision of the Claims Commission shall be final and binding if the parties have so agreed; otherwise, the Commission shall render a recommendatory award, which the parties shall consider in good faith. The enforceability of awards thus depends entirely upon the agreement of the parties.[859]

B. Judicial decisions and State practice outside treaties

734. The issue of enforcement of awards and judgements by arbitral tribunals and courts has not been raised in judicial decisions. In their official correspondence, States have usually arrived at compromises and in most cases have complied with the solutions agreed upon. The content of such correspondence has been examined in the preceding chapters.

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[859] Article XIX of the Convention reads in part:

"1. The Claims Commission shall act in accordance with the provisions of Article XII.

"2. The decision of the Commission shall be final and binding if the parties have so agreed; otherwise the Commission shall render a final and recommendatory award, which the parties shall consider in good faith. The Commission shall state the reasons for its decision or award."

UNILATERAL ACTS OF STATES

[Agenda item 5]

DOCUMENT A/CN.4/542*

Seventh report on unilateral acts of States, by Mr. Víctor Rodríguez Cedeño, Special Rapporteur

[*Original: English/French/Spanish*]
[*22 April 2004*]

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Multilateral instruments cited in the present report

	Source
Convention on the Prevention and Punishment of the Crime of Genocide (New York, 9 December 1948)	United Nations, *Treaty Series*, vol. 78, No. 1021, p. 277.
Convention relating to the Status of Refugees (Geneva, 28 July 1951)	*Ibid*., vol. 189, No. 2545, p. 137.
Security Treaty between Australia, New Zealand and the United States of America (San Francisco, 1 September 1951)	*Ibid*., vol. 131, No. 1736, p. 83.
Treaty of Friendship, Co-operation and Mutual Assistance (Warsaw, 14 May 1955) (Warsaw Pact)	*Ibid*., vol. 219, No. 2962, p. 3.
Convention on the Territorial Sea and the Contiguous Zone (Geneva, 29 April 1958)	*Ibid*., vol. 516, No. 7477, p. 205.
Treaty on the Non-Proliferation of Nuclear Weapons (London, Moscow and Washington, D.C., 1 July 1968)	*Ibid.*, vol. 729, No. 10485, p. 161.
Vienna Convention on the Law of Treaties (Vienna, 23 May 1969)	*Ibid.*, vol. 1155, No. 18232, p. 331.
United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982)	*Ibid*., vol. 1833, No. 31363, p. 3.
General Framework Agreement for Peace in Bosnia and Herzegovina (Paris, 14 December 1995)	ILM, vol. XXXV, No, 1, January 1996, p. 89.
Kyoto Protocol to the United Nations Framework Convention on Climate Change (Kyoto, 11 December 1997)	United Nations, *Treaty Series*, vol. 2303, No. 30822, p. 162.

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Introduction

1. At its fifty-fifth session, in 2003, the International Law Commission established a Working Group on unilateral acts of States, which recommended (recommendation 4) that:

The report which the Special Rapporteur will submit to the Commission at its next session will be exclusively as complete a presentation as possible of the practice of States in respect of unilateral acts. It should also include information originating with the author of the act or conduct and the reactions of the other States or other actors concerned.[1]

2. The question of the definition of a unilateral act is still under discussion within the Commission. As an interim measure, with a view to being able to make progress with its work, the Commission endorsed the Working Group's recommendation and adopted the definition given below. While this is only a working definition, it will serve as a basis for the adoption in due course of a definitive definition of a unilateral act which the Commission can use for its work of codification and progressive development:

Recommendation 1

For the purposes of the present study, a unilateral act of a State is a statement expressing the will or consent by which that State purports to create obligations or other legal effects under international law.[2]

3. In accordance with the Commission's regular practice, a suitable definition of a unilateral act, one that can be used for purposes of developing rules governing the functioning of this category of legal acts, must be based on adequate consideration of the practice of States. This point was made by a number of members of the Commission in 2003, with reference to the Special Rapporteur's sixth report on unilateral acts of States.[3]

[T]he examination of State practice was limited. The analysis should focus on relevant State practice for each unilateral act, with regard to its legal effects, requirements for its validity and questions such as revocability and termination; State practice needed to be assessed so as to decide whether it reflected only specific elements or could provide the basis for some more general principles relating to unilateral acts.[4]

[I]t was felt that, based on State practice, unilateral acts which created international obligations could be identified and a certain number of applicable rules developed.[5]

4. Similar remarks were made by representatives of several States in the Sixth Committee of the General Assembly in 2003: that in the absence of a systematic analysis of existing State practice in that area it would be difficult, if not premature, to proceed until a wider response from States had been received;[6] that at the current stage more information should be gathered on State practice in that field;[7] that information on State practice would be useful;[8] and that the Special Rapporteur should submit as complete a presentation as possible of the practice of States in respect of unilateral acts.[9]

5. The Working Group on unilateral acts of States, established in 2003, offered some guidelines which the Special Rapporteur has taken into consideration in preparing this report:

Recommendation 5

The material assembled on an empirical basis should also include elements making it possible to identify not only the rules applicable to unilateral acts *sensu stricto*, with a view to the preparation of draft articles accompanied by commentaries, but also the rules which might apply to State conduct producing similar effects.

Recommendation 6

An orderly classification of State practice should, insofar as possible, provide answers to the following questions:

(*a*) What were the reasons for the unilateral act or conduct of the State?

(*b*) What are the criteria for the validity of the express or implied commitment of the State and, in particular, but not exclusively, the criteria relating to the competence responsible for the act or conduct?

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[1] *Yearbook … 2003*, vol. II (Part Two), para. 308.

[2] *Ibid*., para. 306.

[3] *Yearbook … 2003*, vol. II (Part One), document A/CN.4/534.

[4] *Ibid*., vol. II (Part Two), para. 277.

[5] *Ibid*., para. 282.

[6] *Official Records of the General Assembly, Fifty-eighth Session, Sixth Committee*, 17th meeting, statement by Israel (A/C.6/58/SR.17), para. 44.

[7] *Ibid*., 19th meeting, statement by Portugal (A/C.6/58/SR.19), para. 13.

[8] *Ibid*., statement by Chile, para. 75.

[9] *Ibid*., statement by France, para. 34.

(*c*) In which circumstances and under which conditions can the unilateral commitment be modified or withdrawn*Recommendation 7*

In his next report, the Special Rapporteur will not submit the legal rules which may be deduced from the material thus submitted. They will be dealt with in later reports so that specific draft articles or recommendations may be prepared.[10]

6. As he had stated last year that he would do, the Special Rapporteur—with the invaluable assistance of the University of Málaga, Spain, to the professors and students of which he wishes to express his sincere thanks for their excellent work—undertook a study of the practice of States, based on an abundant bibliography, from which he has selected a series of unilateral acts, some of which may be useful for the purposes of a consideration of the topic under review.

7. It is important to note that an assessment of the practice of States can only be subjective, inasmuch as Governments' own views on the nature of their statements are not available; this, indeed, may be one of the characteristics of these acts. Consequently, acts, statements and conduct discussed in this report are essentially factual.

8. In chapter I below, an attempt has been made to organize the practice of States by subdividing it into acts that fall into various categories of material acts, as usually designated in international doctrine. These acts, despite previous statements to the contrary, have been assigned to the three categories that appeared to be most satisfactory as a basis for a general classification, namely (*a*) acts whereby a State assumes obligations (promise and recognition); (*b*) acts whereby a State renounces a right (renunciation); and (*c*) acts whereby a State asserts a right or legal claim (protest). Notification is discussed separately; certainly it is no less unilateral from a formal standpoint, but there is some disagreement as to whether it is a unilateral act in the sense with which the Commission is concerned. In every case, moreover, the Special Rapporteur has sought to convey some idea of the formal aspects of the issue under discussion, albeit the topics in question have been fully documented and examined in terms of practice.

9. This report, then, focuses on a comprehensive, organized survey of the practice of States, supplemented by information previously received from Governments in their replies to questionnaires prepared by the Commission.[11] It is hoped that it will serve as a basis for conclusions enabling the Commission to determine whether there are any principles or standards of customary origin that govern the matter.

10. The presentation of the examples of practice assembled in this report is preceded by a very preliminary survey of the various acts analysed herein, although it is essential to realize that the classification scheme has been adopted solely in order to facilitate the study of declarations and unilateral acts of States that can be deemed unilateral in the sense with which the Commission is concerned. As has been seen, it is by no means a simple matter to determine the nature of an act and identify its legal consequences. Both theory and practice reflect the fact that a statement indicating a unilateral act may constitute something more than an act in accordance with the designation assigned by theory. Nonetheless, in the interests of a systematic approach to the study of practice, such acts must be grouped into categories which are recognized and accepted by most authors.

11. Also in chapter I, an attempt has been made, using the same representative format and with some accompanying theoretical remarks, to present some examples of the conduct of States which, while not legal acts *sensu stricto*, may produce similar legal effects, in line with the above-mentioned recommendations of the Working Group on unilateral acts of States.

12. Chapter I contains comments on the characteristics of the acts formulated with a view to facilitating the task of drawing conclusions about common factors and the issue of the existence or formation of standards of customary origin. In particular, this part deals with the context in which an act is formulated; its most usual form; the person who formulates it; the confirmation or non-confirmation of the act by means of subsequent statements or through conduct; the reaction, if any, of the addressee or addressees; the subsequent conduct of the State concerned in relation to the execution or observance of its act or declaration; and the reaction of the addressee or addressees to the execution or non-execution or observance on the part of the author State. The discussion will also include any reaction or conduct by other States that did not participate in the formulation of the act and that were not addressees, except in cases involving a declaration *erga omnes*.

[10] *Yearbook … 2003*, vol. II (Part Two), pp. 57–58, para. 308.

[11] See *Yearbook … 2000*, vol. II (Part One), p. 265, document A/CN.4/511, and *Yearbook … 2002*, vol. II (Part One), document A/CN.4/524.

Chapter I

Acts and declarations that may represent the practice of States

A. Acts whereby States assume obligations

1. Promise

(a) *The concept of promise in international law*

13. While a promise is regarded as a unilateral act par excellence, this does not mean that the concept of promise has always remained unaltered; in the thinking of such authors as Grotius[12] or Pufendorf,[13] the obligatory nature

[12] For this author, "*[u]t autem promissio jus transferat, acceptatio hic non minus quam in dominii translatione requiritur*" (In order that a promise may transfer a right, the acceptance is made), *De Jure Belli ac Pacis* (On the Law of War and Peace), book II, chap. XI, p. 224.

[13] *Elementorum Jurisprudentiae Universalis: Libri Duo*, definition XII, para. 10.

of a promise is associated with the need for acceptance by the party to which the act in question is directed, with the result that a promise is barely distinguishable from a formal agreement. Even in more recent times, and despite the position suggestive of the existence of unilateral promises that has been adopted by such authors as Suy[14] (one of a group of internationalists who taught general courses at The Hague Academy of International Law at about the same period[15]), there has been some hesitancy about recognizing the binding character of a promise in the absence of a concomitant need for its acceptance or inclusion in a formal agreement. This emerges from some arbitral decisions, as in the case of the *Island of Lamu* dispute between Germany and the United Kingdom in 1889: the arbitrator acknowledged the existence of a promise made by the sultans, but did not regard it as creating an obligation, on the grounds that

> in order to convert that intent into a unilateral promise equivalent to a formal agreement, there would have had to be mutual assent in the form of an express promise by one of the parties, combined with acceptance by the other party, and such mutual assent would have had to refer to essential factors constituting the subject of the agreement.[16]

14. Judge de Castro, in his dissenting opinion in the *Nuclear Tests* case, pointed out that "any promise (with the exception of *pollicitatio*) can be withdrawn at any time before its regular acceptance by the person to whom it is made (*ante acceptationem, quippe iure nondum translatum, revocari posse sine iniustitia*)".[17] However, the ICJ judgment clearly stated the reverse:

> An undertaking of this kind, if given publicly, and with an intent to be bound, even though not made within the context of international negotiations, is binding. In these circumstances, nothing in the nature of a *quid pro quo* nor any subsequent acceptance of the declaration, nor even any reply or reaction from other States, is required for the declaration to take effect, since such a requirement would be inconsistent with the strictly unilateral nature of the juridical act by which the pronouncement by the State was made.[18]

15. A promise may, in principle, be couched in one of two different forms: it may either be positive (a promise to do something) or negative (a promise not to do something). As Sicault notes, the latter formulation may be liable to confusion with renunciation. However, it is essential to distinguish between the two: the former is a means of creating an obligation, whereas the latter is the extinction of an obligation or a right.[19]

16. On occasion, the concept of promise has been associated with what are termed "unilateral agreements" or "contracts", which frequently arise under specific domestic codes of law. An illustration is to be found in the separate opinion written by Judge Jessup in the *South-West Africa* case:[20]

> It is also generally recognized that there may be unilateral agreements, meaning agreements arising out of unilateral acts in which only one party is promisor and may well be the only party bound. Unilateral contracts of the same character are recognized in some municipal legal systems. In the United States, for instance: "In the case of unilateral contract, there is only one promisor; and the legal result is that he is the only party who is under an enforceable legal duty. The other party to this contract is the one to whom the promise is made, and he is the only one in whom the contract creates an enforceable legal right." The assent of the promisee is not always required.[21]

This is actually a second formulation of a promise, one not involving any requirement for acceptance or anything of the sort as a condition for the creation of the unilateral act as such.[22]

17. The doctrine has also considered the question of whether a promise and the principle of estoppel, both of which are grounded in good faith and generate an expectation, could amount to the same thing. According to Jacqué, the distinction between the two consists in the way the obligation is created: whereas a promise is a legal act, the obligation arising from the manifestation of the author's will, estoppel acquires its effect, not from that will as such, but from the representation of the author's will made in good faith by the third party. The author goes on to state that, for that reason, the behaviour of the addressee is fundamental in the framework of estoppel. It alone will afford a means of demonstrating that the State has placed its faith in the representation. With promise, in contrast, the addressee's behaviour adds nothing to the binding force of the unilateral declaration.[23]

(b) *International practice*

18. An interesting case of promise, in which the promisee was an international organization, the United Nations, is as follows. In the course of negotiations aimed at settling the question of the legal status that Switzerland would grant to United Nations employees, Mr. Perréard, a member of the Council of State of the Canton of Geneva, stated that the Geneva authorities were "prepared to grant

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[14] *Les actes juridiques unilatéraux en droit international public* (Unilateral legal acts in international public law), p. 110, where the author points out that the existence of promise as such in international law must be regarded as an established fact, despite the difficulties that this may entail, as he notes on page 111:

> "[P]urely unilateral promises do exist in international law, although they are very rare. Their rarity is readily understandable in view of the fact that no State is willing to make gratuitous concessions on its own initiative. The task of detecting such purely unilateral promises calls for a painstaking research effort to determine whether a formally unilateral declaration of will may not conceal an underlying bilateralism."

[15] As, for example, the courses given by Reuter, "Principes de droit international public", p. 532, and Quadri, "Cours général de droit international public", pp. 364–365.

[16] Translation by the Special Rapporteur. See the arbitral award made by Baron Lambermont on 17 August 1889 in the *Island of Lamu* dispute (De Martens, *Nouveau Recueil Général de Traités et Autres Actes Relatifs aux Rapports de Droit International*, p. 101). The paragraph reproduced above is also quoted in Suy, *op. cit.*, p. 128, and in Coussirat-Coustère and Eisemann, *Repertory of International Arbitral Jurisprudence*, p. 47.

[17] *Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 374, para. 3. This reasoning does not appear to imply in any way that a promise becomes complete—and consequently cannot be withdrawn—when such acceptance takes place.

[18] *Ibid.*, p. 267, para. 43.

[19] Sicault, "Du caractère obligatoire des engagements unilatéraux en droit international public", p. 639.

[20] *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 319.

[21] *Ibid.*, pp. 402–403.

[22] The Special Rapporteur emphasized this aspect in particular, noting that a strictly unilateral promise should be distinguished from a promise made by a State in response to the request of another State; from a promise whose purpose is to obtain its acceptance by another State; and from a promise made on condition of reciprocity (*Yearbook ... 1998*, vol. II (Part One), document A/CN.4/486, p. 338, para. 167).

[23] Jacqué, "A propos de la promesse unilatérale", p. 339.

the United Nations the benefit of the same exemptions and the same privileges as had previously been granted to other international institutions".[24] The other international institutions in question were ILO and WHO. An official statement released to the press by the head of the Federal Political Department following a meeting with the Secretary-General of the United Nations, Trygve Lie, indicated that the Swiss authorities were "prepared to grant the United Nations and its employees treatment at least as favourable as the treatment granted any other international organization on Swiss territory".[25] This statement was subsequently reiterated by the Swiss Federal Council in its message to the Federal Assembly on 28 July 1955, thereby granting the United Nations the benefit of this "most-favoured-organization clause". The issue arose again when the taxation authorities of the Canton of Geneva tried to compel a United Nations staff member to pay alimony, whereupon the United Nations Office at Geneva cited the above-mentioned statements, which were nothing more nor less than unilateral acts formulated by the Swiss Confederation.[26]

19. Perhaps the best instance of a promise intended to produce particularly clear-cut legal effects (the most formal and explicit formulated up to that time, according to Degan) was the Declaration made by Egypt on the Suez Canal and the arrangements for its operation,[27] acknowledging all relevant rights and obligations and guaranteeing freedom of passage through the Canal as from late October and early November 1956.[28] This was a very advanced system of commitment, formulated in writing and also deposited and registered with the United Nations Secretariat. As the same author also emphasizes:

> There was certainly a strong political interest on the part of Egypt to assume these far-reaching and very precise international obligations by a formal unilateral declaration in written form. It thus avoided an international conference on [the] Suez Canal, which in the political circumstances of that time could probably fail. By that Declaration Egypt calmed and normalized the situation over the Suez Canal and enabled at the same time efficient exploitation of the Canal to its profit.[29]

20. Nonetheless, this declaration gave rise to a host of reactions; indeed, many of those reactions were somewhat rigid in nature, as a result of the political storm aroused by the issue. In the United Nations Security Council, for example, it was argued that the declaration was inadmissible, on the grounds that the terms of an international agreement could not be altered by means of a unilateral act.[30]

21. In recent years, grants of aid or credits between States based on unilateral promises have become a familiar phenomenon. Such grants tend to be made particularly frequently between neighbouring States or States having particularly smooth relations.[31]

22. Some examples of promise found in the jurisprudence, as reported by Barberis,[32] are: the statement of Poland before PCIJ in the case concerning *Certain German Interests in Polish Upper Silesia*;[33] the assurances given by Germany between 1935 and 1939 that it would respect the territorial integrity of Austria, Belgium, Czechoslovakia and the Netherlands;[34] and, of course, the well-known statements made by the French authorities relating to nuclear tests in the Pacific must not be omitted.[35]

23. More recent international practice affords a number of instances of promise; the cases referred to below are some that have been found from the period extending from the 1980s to the present. The promises involved are concerned with a wide range of matters, including an intent to address a humanitarian crisis[36] or an

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[24] Caflisch, "La pratique suisse en matière de droit international public 1982", p. 182.

[25] *Ibid*., p. 183.

[26] This is the conclusion that emerges from the note issued by the International Law Directorate of the Swiss Federal Political Department on 2 April 1979, which acknowledged that the declaration made on 5 August 1946 had created an obligation. That declaration by the head of the Federal Political Department granted the United Nations the benefit of the "most-favoured-organization clause". Other organizations, such as ILO and WHO, were subject to advantageous income-tax rules under the Headquarters Agreements of 1921/1926. It will be seen from the foregoing discussion that the United Nations had a right to demand that its employees should enjoy the same tax advantages as had been granted to employees of ILO and WHO (*ibid*., pp. 183–186).

[27] Declaration made by the Government of Egypt on the Suez Canal and the arrangements for its operation (Cairo, 24 April 1957), United Nations, *Treaty Series*, vol. 265, No. 3821, p. 299.

[28] See Degan, *Sources of International Law*, p. 300.

[29] *Ibid*., p. 301.

[30] This was the view expressed in the Security Council, on 26 April 1957. France stated that:

> "The system of operation of the Suez Canal, as established under the concession granted to the Universal Suez Maritime Canal Company, was confirmed by the Convention of 1888. It was the outcome of international agreements, and hence could be modified only by a new international agreement, not by a unilateral declaration, even one registered with the United Nations."

(Official Records of the Security Council, Twelfth Year, 776th meeting, para. 45)

[31] On 4 August 1973, during Raúl Lastiri's provisional presidency in Argentina, a government minister, Mr. Gelbard, announced that a US$ 200 million credit would be made available to Cuba: "Initial steps towards the implementation of an independent foreign policy. Argentina makes a US$ 200 million credit available to Cuba and is in the process of joining the Andean Group" (*La Opinión*, 7 August 1973, p. 1. See also the article by F. Ramírez, *ibid.*, 9 August 1973, p. 12).

[32] "Los actos jurídicos unilaterales como fuente del derecho internacional público", p. 108.

[33] *Certain German Interests in Polish Upper Silesia, Merits, Judgment No. 7, 1926, P.C.I.J., Series A, No. 7*. In its judgment, PCIJ noted that:

> "The representative before the Court of the respondent Party, in addition to the declarations above mentioned regarding the intention of his Government not to expropriate certain parts of the estates in respect of which notice had been given, has made other similar declarations which will be dealt with later; the Court can be in no doubt as to the binding character of these declarations."

(*Ibid.*, p. 13)

[34] *Trial of the Major War Criminals before the International Military Tribunal* (Nuremberg, 1947), vol. I, pp. 90–91.

[35] *I.C.J. Reports 1974* (see footnote 17 above), p. 259, para. 20, and pp. 265–267, paras. 34–41; and *Nuclear Tests (New Zealand* v. *France), Judgment, I.C.J. Reports 1974*, p. 462, para. 20, and pp. 469–472, paras. 35–44.

[36] As, for example, the announcement by the Ministry of Foreign Affairs of Thailand concerning the establishment of a refuge area between the borders of Cambodia and Thailand (4 April 1980) to enable Cambodians fleeing from fighting, hunger and the pro-Vietnamese regime in Phnom Penh to find safety, food and medical assistance without having to enter Thailand (Rousseau, "Chronique des faits internationaux" (1980), p. 1081). A similar case was the announcement by the Australian authorities on 8 December 1989 that Chinese citizens who had entered the country unlawfully following repressive measures in China the previous month would not be expelled (*ibid.* (1990), p. 481). This case is perhaps unclear in that, while an obligation was

exceptionally critical situation in which the promisor is concerned to express solidarity;[37] a desire to settle outstanding monetary issues;[38] granting of permission to use specific areas;[39] adoption of unilateral moratoriums on the pursuit of specific activities;[40] withdrawal from areas that have been militarily occupied[41] or used for strategic purposes;[42] forgiveness of foreign debt[43]

assumed *vis-à-vis* individuals who had left China, no such obligation was assumed *vis-à-vis* third States. A different type of example that may be noted here was the resolution adopted by the Spanish Council of Ministers on 13 November 1998 approving an initial allocation of 18,192 million pesetas as emergency assistance following the devastation caused by Hurricane Mitch. In addition, the President of the Spanish Government announced a three-year moratorium on debt repayments by the four countries that had been hit by the hurricane (REDI, vol. LI, No. 2 (1999), p. 497). On 13 March 2001, the Office of Diplomatic Information announced that the Spanish International Cooperation Agency (AECI) had decided to provide increased funding under WFP for Mozambique in the light of reports of serious flooding in that country. Specifically, the Government, through AECI, intended to make an additional US$ 300,000 (52.5 million pesetas) available to WFP to enable it to transport rescue helicopters to Mozambique (*ibid.*, vol. LIII, Nos. 1–2 (2001), p. 628). In response to torrential rains in Albania, Japan announced on 30 September 2002 that it would provide assistance: "[T]he Government of Japan decided to extend emergency assistance (20 tents, 4,065 blankets, 10 water purifiers, 12 electric power generators and 12 reels of electric cord, valued at roughly 14 million yen), to the Republic of Albania, which has sustained damage from recent floods" (http://www.mofa.go.jp). More recently, on 25 March 2003, the Embassy of Ireland in Washington, D.C., released a message from the Minister of State worded as follows: "I have today announced that the Government is putting aside €5 million in humanitarian assistance for the alleviation of suffering of innocent Iraqi civilians. This funding will be distributed to our partner NGOs and International Agencies who have the capacity to respond effectively to the current crisis" (http://www.foreignaffairs.irlgov.ie).

[37] See the message broadcast by the Minister for Foreign Affairs of Cuba on 11 September 2001:

> "In this bitter hour for all Americans, our people express their solidarity with the American people and their full willingness to cooperate, to the extent of their modest possibilities, with the health care institutions and any other medical or humanitarian organization in that country in the treatment, care and rehabilitation of the victims of this morning's events."

(http:// cuba.cu/gobierno/discursos)

The provision of assistance to combat specific diseases is evident in the following declaration by Cuba:

> "The Government of Cuba will keep its word, and early in June will deliver to Uruguay the remaining 800,000 of the total of 1,200,000 doses of meningitis vaccine which it is committed to donating to that country."

(http://europa.cubaminrex.cu)

[38] On 26 October 1980, on the occasion of a visit by the Prime Minister of France to Tunisia, the Tunisian Government officially announced that it was determined to proceed immediately to unblock, within a relatively short period of time, French funds that had been frozen following the country's accession to independence in 1956. Measures to that end came into force on 1 January 1981 (Rousseau, *loc. cit.* (1981), pp. 395–396).

[39] An example of this is the promise made to the United States of America by New Zealand in 1982, confirming that American nuclear-powered warships would be allowed to enter New Zealand ports (Rousseau, *loc. cit.* (1983), p. 405).

[40] However, some of these "promises" include an intrinsic conditionality that makes their real binding force questionable, and in some instances makes it unclear whether the act in question is actually a promise or a renunciation. For example, on 1 August 1984, Japanese officials announced that Japan was prepared to discontinue commercial whaling in Antarctic waters on condition that whaling for scientific research purposes should be allowed to continue (Rousseau, *loc. cit.* (1985), p. 165). An official announcement that commercial whaling operations had been discontinued, after four centuries, was issued by the Japanese Government on 15 March 1987 (*ibid.* (1987), p. 962). A more clear-cut case was a statement made by the Japanese Ambassador to Australia to the effect that his country's Ministry of Foreign Affairs had announced on 17 July 1990 that Japan was suspending drift-net fishing in the Pacific during 1990 and 1991, a year before the adoption of United Nations resolutions on the matter (*ibid.* (1991), p. 155). Declarations renouncing nuclear testing have been comparatively frequent as well (e.g. the statement by the Prime Minister of India on 21 March 2000 (Poulain, "Chronologie des faits internationaux d'intérêt juridique (2000)", p. 848). Some interesting examples have been declarations giving rise to cooperation and initiatives aimed at resolving situations of conflict between two States, as in the case of the dispute between India and Pakistan over Kashmir: early in November 2003 a number of statements (widely reported in the international press) were made by both countries, with one side (India) offering and the other (Pakistan) accepting a series of rapprochement measures.

[41] An example illustrating this situation might be the announcement made by the Prime Minister of Israel on 10 June 1985 concerning the evacuation of southern Lebanon, which had been occupied since 18 March 1978 (Rousseau, *loc. cit*. (1985), p. 1038). On 5 March 2000, Israel announced that its troops stationed in southern Lebanon would be withdrawn by July at the latest, regardless of whether a peace agreement with Syria had been reached (Poulain, *loc. cit*., p. 853). Similarly, late in 1989 the Soviet Deputy Minister for Foreign Affairs sent a letter to the Secretary-General of the United Nations stating that a unilateral withdrawal of all Soviet troops stationed outside the Soviet Union was under consideration, but without specifying a definite date for such a withdrawal. The letter was made public on 15 December 1989. This is perhaps an example of a somewhat vague promise (Rousseau, *loc. cit.* (1990), p. 517).

[42] In response to repeated questions on the issue, the Minister of State of the United Kingdom issued a statement containing a promise to cede the Chagos Islands to Mauritius when they were no longer needed for defence purposes:

> "My right hon. Friend the Foreign Secretary has made clear both in a letter to the Mauritian Foreign Minister and during a meeting in January this year, that the UK will continue to maintain sovereignty over the Chagos Islands, but that when they are no longer needed for defence purposes, we will be willing to cede them to Mauritius subject to the requirements of international law."

(Marston, "United Kingdom materials on international law 2001", p. 633)

[43] For example, President Chirac of France, in the course of a visit to Central America, announced that France would write off a total of 739 million francs in bilateral debt that had been incurred by El Salvador, Guatemala, Honduras and Nicaragua for development aid, inasmuch as those countries had been devastated by Hurricane Mitch, and also promised to negotiate a reduction in their commercial debt at the next meeting of the Paris Club (RGDIP, vol. CIII (1999), p. 195). Another case arose as a result of the crisis that shook South-East Asia in mid-1997: on 2 October 1998, the President of the United States proposed that the World Bank and the Inter-American Development Bank should provide States that were suffering from withdrawals of capital with new guarantees and emergency credits. He also suggested that IMF should make standby loans available to States experiencing economic difficulties, but not yet in a full crisis situation. This proposal was supported by other industrial powers. On 22 October 1998, the United States enacted domestic legislation providing US$ 17.9 billion in additional United States funds for IMF financing (Murphy, "Contemporary practice of the United States relating to international law", p. 191).

On 4 April 2000, the Spanish Head of Government stated: "I should also like to inform you that I have announced that US$ 200 million of official development assistance to the main Sub-Saharan African countries is being written off. That is to say, Spain is announcing the cancellation of US$ 200 million worth of sub-Saharan African countries' indebtedness to our country" (*Actividades, Textos y Documentos de la Política Exterior Española* (Madrid, Ministry of Foreign Affairs and Cooperation, 2000), p. 102).

Increasingly, economic issues are bound up with the performance of specified conditions. It might perhaps be said that such a case is not really a unilateral act, but a warning relating to the granting of assistance, rather than a promise as such. There is no simple answer; it all depends whether it appears that greater weight should be assigned to the promise or to the associated condition, but at all events the necessary correlation between the two means that we cannot properly speak of a unilateral act *sensu stricto*, inasmuch as the compulsory nature of the condition imposes specific actions upon the promisee State. The matter requires further consideration, but such consideration must start from the fact that acts of this kind, subject to conditions, are becoming increasingly frequent.

Nonetheless, it is important to emphasize that States are not always as consistent as might be wished in imposing conditions relating to

(*Continued on next page.*)

or provision of economic assistance;[44] elimination of tariffs,[45] a measure closely related to the preceding item; contribution to a specific international action where such contribution is not obligatory *per se*;[46] or collaboration in the destruction of a particular category of weapons.

24. Some cases may be described as unclear, such as offers to mediate between parties to a conflict;[47] where

(*Footnote 43 continued.*)

human rights upon third parties in return for economic assistance. In this connection, action of the United States in granting most-favoured-nation status to China may be noted. At a press conference in Washington, D.C. on 26 May 1994, the President of the United States announced that he had decided to renew that status. He agreed, he said, with the Secretary of State's conclusion that China had not achieved "overall significant progress in all the areas outlined in the executive order relating to human rights … and that serious human rights abuses continued in China", but in his judgement, renewal of that country's most-favoured-nation status would afford "the best opportunity to lay the basis for long-term sustainable progress in human rights and for the advancement of ... other [U.S.] interests with China" (Nash Leich, "Contemporary practice of the United States relating to international law", p. 745).

A somewhat clearer instance is the position of the Spanish Government in the matter of assistance to Paraguay to enable that country to stabilize and develop its political situation. In the words of the Minister for Foreign Affairs:

> "At each and every step taken by the Spanish Government to normalize relations with Paraguay since the fall of the military dictatorship, it has demonstrated its clear intention of supporting Governments that are in transition to the recovery of democracy and full respect for human rights, and are working to achieve sustainable development, the fair distribution of wealth and genuine social justice.
>
> "...
>
> "Naturally, the Spanish Government is following the situation of the rights of ethnic minorities and, in general, the human rights situation in Paraguay, with close attention, and will continue to do so. Over and above its interest in this issue, however, the Spanish Government is also prepared to help the Government of Paraguay achieve full respect for those rights. That, essentially, is the reason why the Cooperation Plan has been initiated and the assistance just mentioned made available. Accordingly, it is necessary to wait for a reasonable length of time in order to give the Government of Paraguay a chance to take appropriate action."

(*Boletín Oficial de las Cortes Generales*, Congress, Fifth Legislature, series D (1994), No. 173, p. 259; see also REDI, vol. XLVII, No. 2 (1995), p. 170)

[44] For an example, see Royal Executive Order No. 1/2001 of 19 January 2001 (published in the 20 January 2001 issue (No. 18) of the *Boletín Oficial del Estado*) approving a loan guarantee to Argentina and giving the Council of Ministers broader authority to approve operations to be financed from the Development Assistance Fund established by Spain as a tool aimed at helping Argentina cope with its economic crisis. The preamble to the Order stated (p. 2505): "This Executive Order makes provision for a mechanism designed to make financial support from Spain available to Argentina, in close cooperation with the International Monetary Fund and subject to the same conditions of economic reform and progress as are required by the Fund."

Another example is the statement issued on 29 October 2002 by the Japanese Ministry of Foreign Affairs concerning the assistance that Japan was about to make available to Palestine for the implementation of legislative and other reforms. A further relevant example from Japan involves an aid package for reconstruction in Afghanistan:

> "Japan decided to extend a new assistance package of more than a total of about $136 million (about 16,700 million yen) utilizing Grant Aid Cooperation and other forms of assistance to support the Transitional Administration of Afghanistan, headed by President Hamid Karzai, and to promote the peace and reconstruction process in the country.
>
> "Japan announced at the International Conference on Reconstruction Assistance to Afghanistan (Tokyo Conference) that it would provide up to $500 million over two and a half years of which up to $250 million would be provided in the first year. With this package, Japan's assistance for recovery and reconstruction amounts to about $282 million, thereby attaining the commitment for the first year that Japan announced at the Tokyo Conference. Combining humanitarian, recovery, and reconstruction assistance, the total since the terrorist attacks in September 2001 amounts to about $375 million."

(http://www.mofa.go.jp)

In the context of the reconstruction of Iraq, Australia announced on 28 October 2003 that it was making US$ 110 million available as assistance for the Iraqi people (http://www.ausaid.gov.au).

[45] The Prime Minister of Australia announced that all customs duties and quotas on products imported from the world's 50 poorest nations would be eliminated. "I am pleased to announce," he said, "that Australia will provide duty-free, quota-free access for the world's 49 least developing countries, as well as Timor-Leste." The Australian leader made this announcement on the eve of the tenth Economic Leaders' Meeting of the Asia-Pacific Economic Cooperation forum held in the resort of Los Cabos in north-eastern Mexico ("Tariff-free access for the world's poorest countries", *Media Release*, 25 October 2002).

[46] An example of Spanish practice may serve to clarify this situation. Spain contributed a frigate and two corvettes to the naval forces deployed by a number of Western Powers in the Gulf region and in the Red Sea during the latter half of August 1990, pursuant to Security Council resolutions adopted in the wake of Iraq's invasion of Kuwait. The Minister for Foreign Affairs stated on 28 August that the decision to send the ships was, in the first place:

> "a consequence of the measures expressly called for under successive United Nations resolutions, in a context of European cooperation ... In the second place, the Government of Spain was under no obligation, either legal or political, to take this decision by virtue of its membership in NATO, the European Community or WEU. Any speculation along those lines is sheer demagoguery. There are member countries of those organizations that have not taken such measures, such as Portugal, Iceland or Ireland. That is to say, this is Spain's own decision, aimed at protecting not only common interests, but our own national interests, pursuant to United Nations resolutions."

(*Diario de sesiones del Congreso de los Diputados*, Committees, Fourth Legislature (1990), No. 126, p. 3722; see also REDI, vol. XLIII, No. 1 (1991), p. 135)

[47] For example, the German Federal Republic's offer in February 1981 to mediate between the El Salvador regime and the rebels of the Democratic Revolutionary Front in order to put an end to the civil war (Rousseau, *loc. cit*. (1981), pp. 591–592).

It is essential to take account of the fact that in inflamed situations of conflict over territory, willingness to negotiate frequently stems from public demonstrations. A case in point might be the Spanish position on Gibraltar and the ongoing negotiations on that issue, as the Minister for Foreign Affairs pointed out in the General Assembly:

"I wish to reiterate my Government's firm decision to continue the process of negotiation with the United Kingdom in a constructive spirit and on the basis of the Brussels Declaration of 27 November 1984".

(Official Records of the General Assembly, Forty-eighth Session, Plenary Meetings, 11th meeting; see also REDI, vol. XLVI, No. 1 (1994), p. 159)

The tone of these demonstrations tends to be very similar in all cases, as may be seen from the following passage dealing with the situation in Equatorial Guinea. The passage is taken from a statement by the Spanish Minister for Foreign Affairs, appearing before the Foreign Affairs Committee of the Spanish Congress on 1 June 1994:

> "As you ladies and gentlemen are well aware—I mention this very briefly, because you are all familiar with the matter—the Spanish Government had publicly undertaken, before Equatorial Guinean, Spanish and world opinion, to contribute to a process of genuine democratization in that country. A public statement was issued the day after the elections, in which the Government indicated that it had drawn the same conclusions as the greater part of the Spanish democratic opposition concerning the absence of democratic legitimacy, and this would logically affect the formulation of our future policy relating to Equatorial Guinea. At the same time, we stated that in our view, the democratic transition process had not ended with those elections, and consequently that we intended to continue, by every means in our power, to work for a renewal of dialogue between the Government and the political forces to enable the process of transition to a genuinely democratic system to continue."

(*Diario de sesiones del Congreso de los Diputados*, Committees, Fifth Legislature (1994), Congress, No. 225, p. 6818; see also REDI., vol. XLVI, No. 2 (1994), p. 656)

Another recent instance is afforded by the answer to a question about the border between Belize and Guatemala that was asked in the Parliament of the United Kingdom. In his reply, the Minister of State indicated that the United Kingdom was prepared to cooperate to bring about a resolution to the conflict:

> "I want to emphasise that the United Kingdom has no legal responsibilities in relation to Guatemala's border dispute with Belize,

such an offer is not accepted, the initial act produced no effects, even though it was a genuine case of promise.[48]

25. Another example of a promise is one relating to the non-application of domestic regulations where to do so would have given rise to criticism or negative effects in a third country. In such a case, the State commits itself by issuing a declaration to that effect.[49] There are even examples of a State promising to reduce the effects of some harmful activity, but without binding itself through a formal agreement.[50] In addition, there have been declarations which appear to be promises but do not indicate by their content that the State formulating the declaration has actually assumed an obligation.[51]

26. In addition, there have been some recent instances of what may be regarded as a promise "not to do something", in the sense of not placing difficulties in the way of activities conducted by a third party, as for example in a case of disputed territory. By way of illustration, a statement by the President of Venezuela may be considered, undertaking "not to put obstacles in the way of any project that may be implemented in that region [referring to the Essequibo region, which is the subject of a territorial dispute with Guyana] where the project in question is deemed likely to be beneficial for its inhabitants".[52] This unilateral declaration, which was made in the context of negotiations between Guyana and Venezuela, may even affect a formal agreement of long standing: the Agreement to resolve the controversy over the frontier between Venezuela and British Guiana (Geneva, 17 February 1966).[53]

27. The President of Venezuela's declaration was reiterated to the press, although in somewhat qualified terms, by the country's Minister for Foreign Affairs. The Chancellor stated that Venezuela would not oppose development projects in the Essequibo region that benefit the Guyanese population, but "projects that affect our interests will be analysed". He added that "to maintain the present status of that region would be to accept the term of 'no man's land'", but he also insisted that that decision did not constitute a relinquishment of Venezuela's claim.[54]

28. On 25 February 2004, the President's statement was challenged before the Supreme Court of Venezuela, which was asked to find it unconstitutional and null and void. It would have been highly interesting from the standpoint of the present study if the Court had analysed the issue,

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which goes back to 1859. However, *we are ready to give diplomatic assistance to both sides to bring about a peaceful solution. That is our role, and we will continue to work towards it.*"
(Marston, "United Kingdom … 2000", p. 539)

[48] Another similar case is to be found in the Spanish Government's offer of the possibility of asylum for Manuel A. Noriega, of Panama:

> "The Spanish Government declared on 27 February 1988, in a statement issued by the Office of Diplomatic Information, that … it would like to see Panama's problems solved in a context of respect for its sovereignty … without outside interference."

(*Boletín Oficial de las Cortes Generales*, Senate, Third Legislature (1988), Series I, No. 185, p. 7705)

Similar declarations were made by the European Community and the Ministers for Foreign Affairs of various Ibero-American countries. The Spanish Government went on to indicate that it would be prepared, in the framework of a Panamanian solution, to receive General Noriega if he should so request, provided this would contribute to the consolidation of civilian authority, the strengthening of democracy and the dignity of the Panamanian people. The objective was to provide a framework for a negotiated solution reached by the various Panamanian political forces (*ibid.*, p. 7706; see also REDI, vol. XLI, No. 1 (1989), p. 163).

[49] As, for example, following the tense situation between Spain and Canada in the so-called "Greenland halibut war", when Canada made a promise to Spain relating to fisheries. In reply to a question about Canada's new Fisheries Act that was asked by the socialist parliamentary group on 15 November 1999, the Government informed the Congress of this fact, according to the information found in the *Spanish Yearbook of International Law*, vol. VII (1999–2000), p. 107:

> "[T]he Commission received a letter from the Canadian ambassador in Brussels ... and made particular mention that it would not apply Canadian extra-territorial legislation against Spanish or Portuguese vessels.
>
> To formalize this commitment in a way that is legally binding for Canada, Spain insists that it be reiterated by Canada by means of a Note Verbale from the Canadian embassy in Helsinki, capital of the Member State that currently holds the Presidency of the European Union, at the end of July ...
>
> On 30 September a response was sent in the form of a note verbale by the competent institutions of the European Union (Commission Council) as acknowledgement of receipt and to formally show their agreement with the guarantees offered by Canada without prejudice to the legal opinion of the European Union on certain extra-territorial aspects not respectful of the New York Agreement and of the Law of the Sea in force that would be dealt with in due time with the Canadian authorities."

[50] Such as the promise made by the United States relating to the reduction of greenhouse gases, as an alternative measure following its refusal to sign the Kyoto Protocol to the United Nations Framework Convention on Climate Change. In February 2002, the President of the United States announced the adoption of alternative measures to offset the effects of climate change; the measures in question would be voluntary in nature. The President's announcement ran in part as follows:

> "Our immediate goal is to reduce America's greenhouse gas emissions relative to the size of our economy.
>
> "My administration is committed to cutting our Nation's greenhouse gas intensity, how much we emit per unit of economic activity, by 18 percent over the next 10 years. This will set America on a path to slow the growth of our greenhouse gas emissions and, as science justifies, to stop and then reverse the growth of emissions.
>
> "… We will challenge American businesses to further reduce emissions. Already, agreements with the semiconductor and aluminum industries and others have dramatically cut emissions of some of the most potent greenhouse gases. We will build on these successes with new agreements and greater reductions.
>
> "Our Government will also move forward immediately to create world-class standards for measuring and registering emission reductions. And we will give transferable credits to companies that can show real emission reductions. We will promote renewable energy production and clean coal technology, as well as nuclear power, which produces no greenhouse gas emissions. And we will work to safely improve fuel economy for our cars and our trucks."

(Murphy, *loc. cit.* (2002), pp. 487–488)

[51] An example of this is a declaration made in the course of a press conference held in Seoul by the Minister for Foreign Affairs of Ecuador, indicating:

> "the willingness of the Government of Ecuador to help ensure that this country's business activities will flourish in the South American market, and that consideration will be given to the possibility of establishing a free trade zone for Korean firms, which would then be able to manufacture goods and export them to third countries."

(Ministry of Foreign Affairs Newsletter, No. 11/85, p. 6, quoted in Lira B., "La política exterior de Ecuador: del multilateralismo al bilateralismo", p. 242)

[52] "De Rangel a Chávez", *El Universal* (Caracas), 23 February 2004.

[53] United Nations, *Treaty Series*, vol. 561, No. 8192, p. 321. Specifically, article V, paragraph (1), of that agreement states:

> "In order to facilitate the greatest possible measure of cooperation and mutual understanding, nothing contained in this Agreement shall be interpreted as a renunciation or diminution by the United Kingdom, British Guiana or Venezuela of any basis of claim to territorial sovereignty in the territories of Venezuela or British Guiana, or of any previously asserted rights of or claims to such territorial sovereignty, or as prejudicing their position as regards their recognition or non-recognition of a right of, claim or basis of claim by any of them to such territorial sovereignty."

[54] *El Universal* (Caracas), 24 February 2004.

but it did not: it declined to hear the case on the grounds that the petition had not been accompanied by "the documents that would have been indispensable in order for the Court to be able to determine whether the action was admissible".[55]

29. Membership of an international organization is a situation which in some cases has resulted in promises that are formulated along lines such that the promised action is made subject to a decision by the organization in question aimed at coordinating the actions of its members.[56] Recent examples have been found of promises—subject to conditions, to be sure—in the matter of the lifting of sanctions, as in the case of the Libyan Arab Jamahiriya and the sanctions imposed by the Security Council.[57] Subsequent events suggest that this conflict has taken a positive turn.[58] Also in relation to international organizations, promises concerning the lifting of sanctions imposed on a State have sometimes been made.[59]

30. In addition, still in the context of the activities of international organizations, there have been some recent examples of promises of support for countries seeking membership of a particular organization[60] or one of its constituent bodies,[61] including one case where the promise was made in return for support for a specific country's application to join the European Union,[62] to mention one of several particularly significant cases.

31. Furthermore, even at multilateral meetings held at the highest level, joint statements or declarations may be adopted that contain promises which are effectively unilateral acts, even though issued at a multilateral forum. An example is the announcement below by Taiwan, Province of China (disregarding any controversial aspects of the status of that entity).[63]

32. Recent international practice affords a number of instances of promises that have elicited responses by third parties (an example might be a promise that triggers a protest[64]), or have even involved recognition of a particular situation,[65] in which case the task of analysing the nature of the promise in question is rather more complex. Moreover, it is becoming increasingly frequent for a State to offer economic assistance—in a word, to make a promise—but subject to specified conditions, notably in cases in which the addressee State is unstable.[66] Can this

[55] The ruling of inadmissibility was handed down on 25 March 2004. It may be consulted at the website http://www.tsj.gov.ve.

[56] Following the announcement on 19 August 1991 by Radio Moscow that President Mikhail Gorbachev had been overthrown, the Minister for Foreign Affairs of Spain issued the following statement:

> "Spain will act in concert with the other members of the Community with respect to Community credits and assistance to the USSR"

(REDI, vol. XLIII, No. 2 (1991), pp. 415–416)

[57] In the course of a debate in Parliament on relations between the United Kingdom and the Libyan Arab Jamahiriya, the British Minister of State stated:

> "The Security Council—I stress that it is the Security Council that imposes these requirements rather than individual countries—requires Libya to accept responsibility for the actions of its officials and to pay appropriate compensation. Libya also needs to satisfy us that it has renounced terrorism and disclosed all that it knows of the Lockerbie crime.
>
> … We shall be discussing with Libya how we can achieve compliance with all the requirements and I can confirm that, once satisfactory arrangements have been made, we will agree to the lifting of sanctions."

(Marston, "United Kingdom … 2001", pp. 643–644).

[58] Official relations between the Libyan Arab Jamahiriya and the United Kingdom were resumed on 7 August 2002, as a result of a meeting between the British Foreign Secretary and the President of the Libyan Arab Jamahiriya. Following that meeting, the Libyan Arab Jamahiriya stated that with respect to compensation for the victims of the Lockerbie bombing: "In principle, the question of compensation is on the table, and we are ready to discuss it" (*Cape Argus* (South Africa), 8 August 2002; see also RGDIP, vol. CVI (2002), p. 939). On the same issue, as a result of a visit by the French Minister for Foreign Affairs to Tripoli, significant progress was made on the question of compensation for the victims of the bombing of a UTA DC-10. The Libyan Arab Jamahiriya was prepared to pay compensation to French victims who had not received any compensation as yet, and to pay additional compensation to other persons in accordance with French court rulings. In July 1999, the Libyan Arab Jamahiriya transferred US$ 210 million to France for the purpose of compensating the families of the 170 victims of the bombing. This transfer was tantamount to acknowledging that Libyan officials had been behind the bombing (*ibid.*, vol. CVII (2003), p. 140).

[59] For example, on 19 June 2000 the United States announced that it intended to lift the economic sanctions that had been imposed upon the Democratic People's Republic of Korea following the end of the Korean War in 1953 (Poulain, *loc. cit*., p. 860).

[60] This emerges from a joint announcement by the Ministers for Foreign Affairs of Belgium and Latvia on 5 September 1991, which read in part as follows:

> "Belgium favours the full and urgent integration of Latvia in an orderly way into the international organisations. As a member of the Security Council, Belgium will facilitate its entry in the United Nations."

(Klabbers and others, State Practice regarding State Succession and Issues of Recognition: the Pilot Project of the Council of Europe, p. 177)

[61] At a meeting with the Minister for Foreign Affairs in Madrid, the Head of Government of Andorra undertook to support Spain as a non-permanent member of the Security Council (REDI, vol. LIII, Nos. 1–2, (2001) p. 608).

[62] The Minister for Foreign Affairs of Cyprus visited Madrid on 22 January 2001 and met with his Spanish counterpart to discuss, in particular, the expansion of the European Union. In that connection, the Spanish Minister for Foreign Affairs informed his visitor that his Government was working within the EU in an effort to ensure that negotiations over Cyprus' membership would be concluded during the first half of 2002, during Spain's presidency. The Cypriot Minister, for his part, announced that his country would support Spain's candidacy for membership of the Security Council (*ibid.*).

[63] See *Chinese Yearbook of International Law and Affairs*, vol. 18 (1999–2000), pp. 41–42:

> "The President of the Republic of China promised to enhance cooperation in those areas in support of the region, including also such subjects as the promotion of Taiwanese investment in the isthmus, given the vital importance of investment to the generation of employment, technological modernization, and increasing the productivity of the economies of the Central American region; as well as those areas related to the fostering and diversification of trade, the development of sustainable tourism and complementary production among the industries of the Central American states and of the Republic of China."

[64] As happened when a Russian listening station in Cuba was dismantled, with diametrically opposite reactions in Cuba and the United States. In the former country, the Russian announcement that the station was to be closed down was viewed as a concession to the United States Government (RGDIP, vol. CVI (2002), p. 149).

[65] On 5 February 2002, the Belgian Minister for Foreign Affairs presented an official apology for the role that his country had played in the assassination of Patrice Lumumba in 1961: "In the light of today's standards ... there were Belgian individuals or agencies at the time that unquestionably bore some responsibility for the events leading up to the death of Patrice Lumumba." The Minister also announced in Brussels that Belgium would donate €3.75 million to the Lumumba Foundation, which had been established for the purpose of promoting democracy in the former Belgian colony (RGDIP, vol. CVI (2002), p. 377).

[66] This was the case with the offer made by the United Kingdom on 27 April 2000: it would make a financial contribution to the process of land reform in Zimbabwe, but not until land occupations and political

be regarded as a unilateral act *sensu stricto*, if it has conditions associated with it? The question is worth considering, inasmuch as practice affords clear indications that phenomena of this kind are occurring fairly frequently.

33. In practical terms, a specific issue such as disarmament serves to demonstrate that conditionality is a constant feature of many declarations. Should it therefore be concluded that as far as that particular issue is concerned, the declarations in question are not unilateral *sensu stricto* and should be excluded from this study? Or should it rather be concluded that, owing to the distinctive nature and special relevance of the issue in question, practice shows that as a rule, conditionality is one of the aspects that induces States to undertake commitments which otherwise they would not have undertaken? It will be worthwhile to look at a number of specific examples illustrating practice in the matter of disarmament or commitments not to use a particular type of weapon.[67]

34. Let us begin with the unilateral declaration committing China not to be the first to use nuclear weapons[68] made on 15 November 1971 by the Deputy Minister for Foreign Affairs and head of the Chinese delegation at the twenty-sixth session of the General Assembly, in the course of an address setting forth China's positions on a number of international issues. The main points covered in that address may be summarized as follows: China would never participate in the so-called nuclear disarmament talks between the nuclear Powers. It was developing nuclear weapons solely for the purpose of defence. The Chinese Government had consistently stood for the complete prohibition and the thorough destruction of nuclear weapons, and had proposed to convene a summit conference of all countries of the world to discuss that question

and, as the first step, to reach an agreement on the non-use of nuclear weapons. *The Chinese Government has on many occasions declared, and ... once again solemnly declare[s], that at no time and under no circumstances will China be the first to use nuclear weapons. If the United States and the Soviet Union really and truly want disarmament, they should commit themselves not to be the first to use nuclear weapons*.*[69]

35. On 23 October 1972, the issue of disarmament was discussed by the First Committee of the General Assembly; the following day, the representative of China outlined the basic principles underpinning his country's position on disarmament.

The Chinese Government had consistently stood for the *complete prohibition and the thorough destruction of nuclear weapons*.* It was prepared to work actively for the convening of an effective world conference on disarmament. But certain necessary *preconditions** must be met, namely:

(*a*) All nuclear countries, and particularly the Soviet Union and the United States, must commit themselves not to be the first to use nuclear weapons under any circumstances. They must also undertake not to use nuclear weapons against non-nuclear countries;

(*b*) All countries must undertake to withdraw from abroad all their armed forces and dismantle all their military bases, including nuclear bases, on foreign soil.[70]

36. On 2 October 1973, the head of the Chinese delegation to the United Nations delivered an important address in the General Assembly, outlining China's attitude to major international problems, including, the question of disarmament:

The Chinese Government is in favour of convening a world conference on genuine disarmament. But there must be the necessary preconditions … for the conference. That is, all nuclear countries … must … undertake the unequivocal obligation that at no time and in no circumstances will they be the first to use nuclear weapons, particularly against non-nuclear countries and in nuclear-weapon-free zones …they must withdraw from abroad all their armed forces, including nuclear missile forces, and dismantle all their military bases, including nuclear bases, on the territories of other countries.[71]

The situation appears to have changed a good deal, if the above is compared with the position held by China during the 1990s. On 29 July 1996, China conducted a nuclear test, the forty-fourth since 1964, promising that it would be the last and announcing a moratorium on nuclear testing effective from 30 July 1996.[72]

37. Particular interest attaches to the unilateral declarations formulated by the nuclear States on 5–6 April 1995, in the context of the negotiations leading to the indefinite extension of the Treaty on the Non-Proliferation of Nuclear Weapons. As García Rico points out:

while they did entail the acceptance of an obligation not to use nuclear weapons against those States, that obligation would not apply (except in the case of the People's Republic of China) in the event of an invasion or any other attack against the nuclear powers, their territory, their armed forces or their allies, or any State with which they had a security agreement, on the part of a non-nuclear State in association or alliance with a nuclear State.[73]

In the view of the Special Rapporteur, this was a declaration meant as a unilateral act binding on the State formulating it, but framed in accordance with the specific parameters with which that State wished to associate its performance.[74] It was, to use descriptive terminology, a

violence against the opposition had ceased (Beukes, "Southern African events of international significance: 2000", p. 314).

A similar instance arose when the United States, on 5 December 2001, offered Zimbabwe an aid package with the condition of an end to violence and equitable land reform. A few days later, on 18 December, the President of Zimbabwe denounced the offer as "a bold insult to the people of Zimbabwe" (*ibid.*, (2002), p. 365).

[67] The discussion of international practice in the following pages draws extensively on material collected and systematized by Elena del Mar García Rico, Professor of Public International Law and International Relations at the University of Málaga, Spain, who has very kindly placed her documentation at the Special Rapporteur's disposal.

[68] Commitment—conditional promise—taken from Focsaneanu, "La République populaire de Chine à l'ONU", pp. 118–119.

[69] *Official Records of the General Assembly, Twenty-sixth Session, Plenary Meetings*, 1983rd meeting, para. 211.

[70] Focsaneanu, *loc. cit*., pp. 125–126.

[71] *Official Records of the General Assembly, Twenty-eighth Session, Plenary Meetings*, 2137th meeting, para. 46. See also Focsaneanu, *loc. cit*., p. 137.

[72] A/51/262, annex; see also *Asian Yearbook of International Law*, vol. 7 (1997), p. 410.

[73] García Rico, *El Uso de las Armas Nucleares y el Derecho Internacional: Análisis sobre la Legalidad de su Empleo*, p. 127.

[74] Another example occurred when the President of the United States announced on 27 September 1991 a series of unilateral decisions relating to a reduction in tactical nuclear weapons, on the grounds of the dissolution of the Warsaw Pact (in this connection, see Furet, "Limitation et réduction des armements stratégiques en 1992", pp. 612–619). On 5 October 1991, the President of the Soviet Union did the same (RGDIP, vol. XCVI (1992), p. 128). Both positions were clarified in the State of the Union message of 28 January 1992: the President of

(*Continued on next page.*)

unilateral act that was "limited or subject to conditions", constituting a characteristic expression of the will of the State formulating it and reflecting that State's position on the specific issue involved.

38. Another even more recent example occurred after the Democratic People's Republic of Korea had reactivated its nuclear programme,[75] one explicitly involving conditionality in its wording: on 19 January 2003, the Deputy Secretary of Defense announced that the United States would guarantee the security of the regime of the Democratic People's Republic of Korea if Pyongyang would agree to abandon its nuclear programme. On 15 February the offer was rejected. In a conciliatory gesture, the United States Secretary of State announced on 25 February that the United States would resume its food aid to the Democratic People's Republic of Korea.

39. Other very recent examples may be found in declarations that were the outcome of concerted action involving a number of States and were assented to by the Islamic Republic of Iran, having to do with that country's acceptance of inspections by IAEA and its assumption of a commitment to the use of atomic energy for peaceful purposes.[76]

2. Recognition

(a) *The concept of recognition in international law*

40. Some decades ago, Schwarzenberger defined recognition as "a general device of international law for the purpose of making a situation or transaction *opposable* to the recognising entity";[77] doubtless the political nature of the act of recognizing a particular state of affairs is self-evident, but at the same time, it is essential to note that an act of this kind produces legal consequences of the utmost significance. This has led to the general view that recognition is something more—a good deal more, the Special Rapporteur suggests—than a mere political act.[78] Some studies on unilateral acts, such as the work by Suy referred to earlier, have emphasized the characteristics of this important type of initiative, defining it as a general legal institution which authors have unanimously regarded as a unilateral manifestation of will emanating from a subject of law whereby that subject first takes note of an existing situation and expresses the intention of being willing to regard it as legitimate, as being lawful.[79] Nonetheless, despite the impressive weight of legal scholarship devoted to recognition, the fact remains, as Ruda points out, that "[r]ecognition is one of the most difficult subjects to define in international law, since it is governed by no clear-cut customary rules, and legal opinion has been divided over fundamental issues".[80]

41. No attempt will be made here to conduct an exhaustive study of the institution of recognition, nor of the available body of scholarship dealing with it, a task which would not be feasible in any case. Rather, the Special Rapporteur proposes simply to survey recent practice as it relates to recognition in its various forms, noting the more innovative aspects found in contemporary usage. The unilateral act of recognition, of course, was covered in the sixth report submitted by the Special Rapporteur,[81] and this should be taken into account.

42. Nor is it proposed to dwell at undue length on the arduous debate—which is largely academic today—between what are known as the declarative and constitutive theories of recognition. In point of fact, there are precedents from as long ago as the nineteenth century which have affirmed specifically that "[r]ecognition is based upon the preexisting fact; does not create the fact. If this does not exist, the recognition is falsified".[82] Not, of course, that this has prevented some writers from closing their eyes to more recent international events, which afford plenty of evidence that some States, when they have decided to recognize a particular entity as a State, have made such recognition subject to particular criteria or conditions, thereby approximating fairly closely

(*Footnote 74 continued.*)

the United States clearly indicated his Government's intentions, announcing numerous unilateral disarmament measures, followed by proposals for negotiation addressed to the Commonwealth of Independent States. The following day, the President of the Russian Federation, in a television interview, offered a number of similar proposals with a view to fresh negotiations.

[75] See RGDIP, vol. CVII (2003), pp. 440–442.

[76] On the occasion of a visit to Tehran by the Ministers for Foreign Affairs of France, Germany and the United Kingdom on 21 October 2003, Hassan Rohani, the Iranian official in charge of the nuclear issue, stated that his country was prepared to take the necessary action to sign the Protocol Additional to the IAEA agreement for the application of safeguards in connection with the Treaty on the Non-Proliferation of Nuclear Weapons [authorizing IAEA inspections] and become the eighty-first signatory before 20 November. He subsequently qualified this statement by saying that the Iranian authorities reserved the right to resume work on uranium enrichment if they should deem it necessary within a day, a year or a longer period of time, as their interests might require. They would also continue to use that energy for peaceful purposes, since all their peaceful nuclear activities, including uranium enrichment, were an inalienable national right of which no one could deprive them. The second statement qualifies the earlier promise by making an exception for peaceful uses of atomic energy and declaring that the promise is subject to withdrawal in due course (see *Le Monde*, 23 October 2003). In an interview with Kyodo, a Japanese news agency, Kamal Kharazi, the Iranian Minister for Foreign Affairs, stated that his country was determined to enhance cooperation with IAEA and to remove the international community's concern about the Islamic Republic of Iran's nuclear programme. On 22 October 2003, the Minister for Foreign Affairs of the Russian Federation announced that his country was prepared to continue to cooperate with the Islamic Republic of Iran. An English-language summary of the Minister's statement reads as follows: "The Russian Federation is ready to continue to cooperate with Iran, including in the nuclear field, with strict observance of international obligations" (http://www.mid.ru).

[77] *International Law*, p. 549.

[78] Duculesco notes that:

> "We thus reach the conclusion that while the act of recognition—regardless of the particular case of recognition at issue—is a political act by virtue of *its content*, yet it cannot be regarded as an 'exclusively political' act, because of its legal consequences."

("Effet de la reconnaissance de l'état de belligérance par les tiers, y compris les organisations internationales, sur le statut juridique des conflits armés à caractère non-international", p. 127)

[79] Suy, *op. cit.*, p. 191.

[80] "Recognition of States and Governments", p. 449, where the author goes on to define recognition as "a unilateral act by which a State acknowledges the existence of certain facts, which may affect its rights, obligations or political interests, and by which it expressly states or implicitly admits that these facts will count as determining factors when future legal relations are established, on the lines laid down by the same act".

[81] *Yearbook … 2003*, vol. II (Part One), document A/CN.4/534.

[82] Coussirat-Coustère and Eisemann, *op. cit.*, p. 108. See the *Joseph Cuculla* v. *Mexico* case, between Mexico and the United States, which was settled by a mixed commission on 20 November 1876 (*ibid.*, p. 480).

to traditional constitutive theory, at any rate as regards the consequences flowing from the recognition or non-recognition of the entity in question.[83]

(b) *Earlier practice relating to recognition*[84]

43. Unquestionably, the forms of recognition of States and governments have been the two that have traditionally occupied a preponderant place both in doctrinal analysis and in practice. Both, moreover, have been regarded as forms that commonly give rise to a great variety of legal consequences,[85] but which are unmistakably unilateral acts.[86] However, the recognition of States is somewhat more clear-cut than the recognition of Governments: in the latter case, the interplay of a variety of conflicting theories[87] complicates the situation that this analysis of practice must consider.[88] In addition, recognition may be either explicit[89] or implicit,[90] and it may be either *de jure* or *de facto*, making the task of analysis still more difficult. As a rule, recognition produces its full legal effects from the time when it occurs, and not retroactively. This is clear from the jurisprudence: "[I]t is not a principle accepted by the best recognized opinions of authors on international law, as is alleged, that the recognition of a new state relates back to a period prior to such recognition."[91]

44. As regards the recognition of governments, early nineteenth-century practice did not require a new government to have come to power democratically in order to be granted recognition;[92] democratic legitimacy, as such, began to emerge more strongly only from approximately the mid-nineteenth century onwards, although even then practice was by no means uniform.[93] Within the British Commonwealth, for example, recognition by the Crown ordinarily extended automatically to other territories,

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[83] As Ribbelink has noted, the cases of State succession that occurred in Europe during the 1990s may be said to indicate something of a return to the "constitutive theory" of recognition. He bases this statement on the fact that the European Community and its member States, as well as other States which have followed the same guidelines, have set conditions that new States must meet in order to be admitted to the pre-existing community of States ("State succession and the recognition of States and Governments", p. 44). The book from which this article is taken contains a highly useful survey of recent European practice.

[84] This initial section is very short, a focus on more recent practice in the matter of recognition (since the 1980s in particular) having been preferred. Examples of earlier practice relating to recognition may be found in digests dealing with the matter, including the following, photocopies of which were placed at the disposal of the Special Rapporteur: Castel, *International Law Chiefly as Interpreted and Applied in Canada*; Lapradelle and Niboyet, *Répertoire de droit international*; Hackworth, *Digest of International Law*; Moore, *A Digest of International Law*, and *History and Digest of the International Arbitrations to which the United States has been a Party*; Parry, *A British Digest of International Law*; Wharton, *A Digest of the International Law of the United States*; Whiteman, *Digest of International Law*.

[85] This was clearly indicated by the representative of the French Government to PCIJ at the public session of 4 August 1931, when he stated that recognition of (a State's) independence implies, on the one hand, that its Government's acts will be deemed to commit the State so recognized, in accordance with international law, and, on the other hand, that the rules of international law will be applied with respect to that State (*Customs Régime between Germany and Austria, P.C.I.J., Series C, No. 53, p. 569*). See also Kiss, *Répertoire de la pratique française en matière de droit international public*, vol. III, p. 15.

[86] The fact that recognition of a government is a unilateral act was emphasized in a statement made in the Assembly of the French Union, at its session of 21 March 1950, that when a country recognizes a government or an authority that may constitute a government, it performs a unilateral act, but it does not enter into a contract with that authority (Kiss, *op. cit.*, vol. III, p. 33).

[87] The principle of democratic legitimacy, postulated by the Minister for Foreign Affairs of Ecuador, Mr. Tobar, and the principle of effectiveness, upheld by the Minister for Foreign Affairs of Mexico, Mr. Genaro Estrada, are two of the criteria that are commonly applied at the present time. The latter theory was set forth in a statement made by Mr. Estrada on 27 September 1930:

> "After a very careful study of the subject, the Government of Mexico has transmitted instructions to its Ministers or Chargés d'Affaires in the countries affected by the recent political crises, informing them that the Mexican Government is issuing no declarations in the sense of grants of recognition, since that nation considers that such a course is an insulting practice and one which, in addition to the fact that it offends the sovereignty of other nations, implies that judgment of some sort may be passed upon the internal affairs of those nations by other governments, inasmuch as the latter assume, in effect, an attitude of criticism, when they decide, favorably or unfavorably, as to the legal qualifications of foreign régimes.
>
> "Therefore, the Government of Mexico confines itself to the maintenance or withdrawal, as it may deem advisable, of its diplomatic agents, and to the continued acceptance, also when it may deem advisable, of such similar accredited diplomatic agents as the respective nations may have in Mexico; and in so doing, it does not pronounce judgment, either precipitately or *a posteriori*, regarding the right of foreign nations to accept, maintain or replace their governments or authorities."

("Estrada doctrine of recognition", *Supplement to* AJIL, vol. 25, No. 4 (October 1931). See also Seara Vázquez, *La paz precaria: de Versalles a Danzig*, p. 377.

[88] A clear example of the Estrada doctrine is to be found in the position adopted by the Netherlands in recognizing the government that took power in Iraq in 1958, on the grounds that:

> "It may further be pointed out that *according to the rules of international law* the recognition of a new government can in no regard be deemed to imply any judgment concerning the manner or circumstances in which it came to power."

(Panhuys and others, *International Law in the Netherlands*, p. 379). The Netherlands subsequently altered its position on the recognition of governments, as shall be seen in the following section.

[89] See, for example, the statement issued by the Ministry for Foreign Affairs of France on 12 August 1974 explicitly recognizing Guinea-Bissau and supporting its application for membership of the United Nations:

> "Recognition and best wishes for successful development:
>
> The French Government, which welcomes the decisions made by Portugal, declares that it recognizes the State of Guinea-Bissau and supports its application for membership of the United Nations and international organizations."

(*La politique étrangère de la France: textes et documents 1974* (Paris, Ministry for Foreign Affairs), p. 58)

[90] Implicit recognition is illustrated by a number of examples relating to the annexation of Estonia, Latvia and Lithuania by the Soviet Union. When the Netherlands recognized the Soviet Union on 10 July 1942, it did not formulate any reservations concerning the Baltic States, which at that time were under German occupation. Many years later, the same thing happened with Spain, which restored diplomatic relations with the Soviet Union in 1977 without formulating any reservations in the matter, and thereby implicitly recognizing the annexation of those countries. Portugal took a different position: it established diplomatic relations with the Soviet Union in 1973, but announced at the same time that it did not recognize the annexation of the Baltic countries (see Klabbers and others, *op. cit.*, p. 283).

[91] Coussirat-Coustère and Eisemann, *op. cit.*, p. 54. See the case of *Eugène L. Didier, adm.* et al. v. *Chile*, between Chile and the United States (9 April 1894), quoted in *ibid*., p. 490.

[92] This was the reasoning used by the Secretary of State of the United States when he declared to the British Ambassador in 1833 that:

> "It has been the principle and the invariable practice of the United States to recognize that as the legal Government of another nation which by its establishment in the actual exercise of political power might be supposed to have received the express or implied assent of people."

(Wharton, *op. cit.*, vol. I, p. 530)

[93] Peterson, *Recognition of Governments: Legal Doctrine and State Practice, 1815–1995*, pp. 53–55.

although the latter would communicate formal confirmation of their assent in the matter,[94] even in straightforward cases of annexation of territory.[95]

45. At this point, it will be of some interest to note some instances of actions by States that might entail legal consequences analogous to recognition in cases where statehood is not clear-cut. An example is the action of Belgium and Italy in establishing official relations with the Palestine Liberation Organization (PLO) on 27 and 29 October 1979 respectively. The official visit of the Chief of the PLO Political Department to Rome was regarded by the Italian Ministry for Foreign Affairs as a highly positive step, although it was not equivalent to formal recognition of the PLO. Similarly, when the PLO official visited Belgium, he was received by the Belgian Minister for Foreign Affairs, making the visit *de facto* recognition, although that interpretation was neither confirmed nor denied by Brussels.[96]

46. In addition, it is important to bear in mind that in cases where statehood is controversial, the recognition of a government frequently occasions an act of protest by a State deeming itself wronged by such recognition. On 13 March 1980, for example, the Austrian Government announced that it was recognizing a PLO diplomat as that organization's official representative in Austria. In response, the Minister for Foreign Affairs of Israel, Mr. Shamir, summoned Austria's chargé d'affaires in Tel Aviv on 14 March and delivered a vigorously worded verbal protest, alleging that that aspect of Austria's international policy was jeopardizing the security and existence of the State of Israel.[97] This explains why Spain proceeded so cautiously when it decided to establish diplomatic relations with Israel in 1986, sending individual letters to the heads of all the Arab countries to explain the reasons for its decision.[98]

(c) *Recent practice relating to recognition*

47. Traditionally, the sending of an official note of recognition had been the procedure whereby the act produced its full effects. This form of action fell out of use for a time, but has recently experienced something of a revival.[99] The most usual procedure is the establishment of diplomatic relations;[100] while this might be termed implicit recognition, it is unquestionably a form of recognition that leaves no room for doubt as to its consequences.

48. As regards recognition of States, the international practice of the past decade offers a host of cases, essentially as a result of events occurring in Central and Eastern Europe; moreover, there have been substantial changes in this form of recognition, such as the appearance of so-called "conditional recognition", which has become

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[94] A useful illustration is the practice of the Department of External Affairs of Australia, as for example in the matter of recognition of General Franco's regime in Spain (see *Documents on Australian Foreign Policy* (Canberra, Australian Government Publishing Service, 1976), vol. 2 (1939), document 30). See also http://www.info.dfat.gov.au, section devoted to historical documents.

[95] Once the United Kingdom had recognized Italy's annexation of Abyssinia, Australia sent a telegram to the British Government in October 1938, worded as follows:

> "Commonwealth Government strongly of opinion that, as a contribution to peace, Anglo-Italian agreement should be brought into operation forthwith and de jure recognition accorded to Italian Empire in Abyssinia … To refuse de jure recognition seems to us to ignore the facts and to risk danger for a matter which is now immaterial."

(*Documents on Australian Foreign Policy* (Canberra, Australian Government Publishing Service, 1975), vol. 1 (1937–1938), document 317). See also http://www.info.dfat.gov.au.

[96] See Rousseau, *loc. cit*. (1980), p. 664.

[97] *Ibid.*, p. 1077.

[98] All these letters are reproduced in Sagarra Trías, "El reconocimiento de Estados y de gobiernos", pp. 258–259.

[99] In recent cases of State succession (Czechoslovakia, the former Soviet Union, Yugoslavia), the procedure of explicit recognition has frequently been followed. An example is the letter sent by the Prime Minister of the United Kingdom to the President of Croatia on 15 January 1992. The case of Slovenia was much the same: the British Prime Minister sent a letter to the President of that country as well, bearing the same date and with contents that were virtually identical (Marston, "United Kingdom … 1992", pp. 636–637). Another instructive illustration is the Prime Minister's letter recognizing Georgia (although the letter is careful to state that recognition does not imply any position with respect to other situations involving territorial disputes):

> "The Presidency of the European Community has today issued a statement noting the assurance of the Government of Georgia that it is ready to fulfil the requirements of the 'Guidelines on the Recognition of the New States in Eastern Europe and the Soviet Union' approved by the Council of Ministers of the European Community.
>
> "I am writing to place on record that the British Government formally recognises Georgia as an independent sovereign state … I can confirm that, as appropriate, we regard Treaties and Agreements in force to which the United Kingdom and the Union of Soviet Socialist Republics were parties as remaining in force between the United Kingdom and Georgia.
>
> "Recognition shall not be taken to imply acceptance by Her Majesty's Government of the position of any of the Republics concerning territory which is the subject of a dispute between two or more Republics".

(*Ibid.*, pp. 640–641)

Nor was this the case in the European context exclusively; on 14 May 1993, the British Prime Minister wrote to the Secretary-General of the Provisional Government of Eritrea to inform him of the United Kingdom's recognition of Eritrea as a State:

> "I am writing to place on record that the British Government formally recognises Eritrea as an independent sovereign state. The Foreign Secretary … will be writing to his opposite number in your Government concerning the establishment of diplomatic relations."

(*Ibid*. 1993, p. 602)

The position adopted by the United Kingdom in the matter is clear from the virtually identical letters dated 1 January 1993 from the Prime Minister addressed to the Prime Ministers of the Czech and Slovak Republics, recognizing both republics. The passage reproduced below contains the most salient features of the letters:

> "I am writing to place on record that the British Government formally recognises the Czech Republic as an independent sovereign state.
>
> "We have noted that the Czech Republic, by the terms of the arrangements for the dissolution of the Czech and Slovak Federal Republic, has assumed its share of the legal and financial obligations of the former Czech and Slovak Federal Republic."

(*Ibid.*, "United Kingdom … 1994", p. 587)

[100] On 27 April 1993, the Eritrean authorities officially announced that the people of Eritrea had voted in favour of the independence of that State in a referendum held on 23–25 April 1993. Following the announcement, the United States consul in Asmara confirmed in informal talks that the United States was recognizing Eritrea as a State, although it was not until 28 April 1993 that a State Department representative indicated that formalities leading up to the establishment of diplomatic relations with Eritrea were under way. In actual fact, it is probably true to say that diplomatic relations are the mark of recognition, as may be seen from a note from the United States Ambassador to Ethiopia addressed to the Minister for Foreign Affairs of Eritrea (Nash Leich, *loc. cit*. (1993), pp. 597–598). Another recent case of the same kind involved Namibia: the British Foreign Secretary himself stated that the establishment of diplomatic relations in March 1990 indicated not formal but implicit recognition (Marston, "United Kingdom … 1992", pp. 642–643).

a factor in the context of European Community members and some other States that are geographically part of Europe.[101] New States are required to comply with a series of principles designed to ensure that certain conditions relating to stability are met and that fundamental safeguards for specific rights are in place, and while this has not altered the essentially political and unilateral nature which has traditionally been the defining characteristic of the act of recognition, it has added some innovative features.

49. It may even be reasonable to ask whether "conditional recognition" is really a unilateral act or a proposal for an agreement. The third State's compliance with the condition or conditions imposed upon it, or, more realistically, the validation of the situation by the State or States imposing the condition and its/their willingness to grant recognition, must in the last analysis depend on the recognizing State or States, and in that case the recognition retains its status as a unilateral act.[102] Several noteworthy examples of what some authors have been calling the "dawn of conditional recognition"[103] have arisen out of the situation that prevailed during the 1990s in the former Yugoslavia and the ex-Soviet Union.

50. On 16 December 1991, the European Community adopted a joint statement in Brussels in an effort to establish common guidelines, acceptable to all Community members, on the recognition of the territories that had broken away from the former Yugoslavia.[104] Other European States that were not EC members maintained a wait-and-see attitude,[105] keeping a close watch on the EC position. However, events developed at a rather less leisurely pace than had originally been anticipated. The Community's recognition of Croatia and Slovenia on 15 January 1992 was unexpected, to say the least; it was precipitated by a statement by the Chancellor of Germany in which, disregarding the Commission's recommendations, he announced that Germany would recognize Croatia and Slovenia as subjects of international law. That same day, in the framework of European political cooperation, a statement by the Presidency on recognition of those Yugoslav Republics was published.[106] A variety of mechanisms have been used by EC members to recognize Croatia and Slovenia.[107]

51. Greater difficulties arose in the case of Macedonia, owing to opposition from Greece, which pointed to the presence of inadequately protected ethnic minorities in the territory in question and did not want the new republic to bear the same name as one of its own provinces; as a result, the issue was postponed.[108] Problems between this

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[101] An example is the position adopted by Switzerland in the matter of recognition of the Baltic States (Estonia, Latvia and Lithuania), as outlined by the head of the Federal Department of Foreign Affairs at a press conference held in Bern on 28 August 1991 (reproduced in Klabbers and others, *op. cit.*, pp. 344–348), that it is essential for a State to be recognized only when its security is, insofar as possible, assured and safeguarded … recognition is sometimes used as a political weapon to compel one of the parties to withdraw from a potential conflict. An in-depth analysis is indispensable.

[102] In answer to a question about the recognition of Croatia, the British Minister of State stated on 5 February 1992:

> "The criteria are that a country should have a clearly defined territory with a population; a Government with a prospect of retaining control; and independence in its foreign relations. These criteria are always subject to interpretation in the light of circumstances on the ground. In this case we and our EC partners recognised Croatia on the basis of advice from the arbitration commission that Croatia largely fulfilled the guidelines on recognition adopted last December. These were that the state to be recognised shall respect the United Nations charter; guarantee the rights of minorities; respect the inviolability of frontiers except by peaceful agreement; accept commitments on disarmament, nuclear non-proliferation, security and regional stability; and promise to settle by agreement questions of state-succession and regional disputes. We also took account of additional undertakings from the Croatian Government on minorities legislation."

(Marston, "United Kingdom … 1992", p. 639). On 5 March 1992, during a debate on the same issue, the Minister of State was asked about the "premature recognition" of Croatia, and replied:

> "I understand the argument of those who have suggested that our recognition of Croatia was premature ... But by January of this year it became plain that many states within the Community were determined to recognise Croatia … it was inevitable. It was right to do it at that time, and we would have gained nothing by withholding our own recognition."

(*Ibid*.)

[103] González Campos, Sánchez Rodríguez and Sáenz de Santa María, *Curso de Derecho Internacional Público*, p. 494.

[104] Community member States held various positions, some because they were directly (Greece) or indirectly (Germany) involved in the conflict. Given this situation, it was essential to adopt a unanimous position, as otherwise various parties might have attempted to expedite or impede independence movements, relying on the support or opposition of member States, as Quel López points out in "La actitud de España en el marco de la coordinación de la política exterior comunitaria: el reconocimiento de los nuevos Estados surgidos de la antigua URSS y de la República Socialista Federativa de Yugoslavia", p. 707. The full English text of the above-mentioned joint statement may be found in the *Bulletin of the European Communities*, vol. 24, No. 12 (1991), p. 119. See also ILR, vol. 92 (1993), p. 174. See further Charpentier, "Les déclarations des Douze sur la reconnaissance des nouveaux États".

[105] This was the case with Austria: on 25 June 1991, the Federal Minister for Foreign Affairs declared that Austria would continue to regard international treaties to which Yugoslavia was a party as applying, mutatis mutandis, to all the republics. This would make it possible to maintain relations in matters relating to the movement of persons and economic, social and legal issues. A decision on formal recognition would be taken when the requirements prescribed by international law had been met (Klabbers and others, op. cit., p. 163). Finland adopted a similar position: in the course of a parliamentary debate on 14 November 1991, the Minister for Foreign Affairs stated:

> "The question of the recognition of Slovenia and Croatia has been left to the deliberations of the EC and its Member States. The matter is indissolubly connected with a political settlement of the Yugoslavian crisis."

(*Ibid*., p. 188)

[106] It ran as follows:

> "The Presidency wishes to state that, in conformity with the declaration on 16 December 1991 on the recognition of States and its application to Yugoslavia, and in the light of the advice of the Arbitration Commission, the Community and its Member States have now decided, in accordance with these provisions and in accordance with their respective procedures, to proceed with the recognition of Slovenia and Croatia."

(*Bulletin of the European Communities*, vol. 25, Nos. 1/2 (1992), p. 108)

[107] As an example, see the joint declaration of 17 January 1992 on the establishment of diplomatic relations between Italy and Slovenia, which begins as follows:

> "Upon recognition by Italy of full independence, sovereignty and international personality of the Republic of Slovenia, the Italian Republic and the Republic of Slovenia have agreed, as of today, the establishment of diplomatic relations."

(Klabbers and others, *op. cit.*, p. 264)

[108] On 2 May 1992, following an informal meeting of foreign ministers of the European Community, in the framework of European political cooperation, a joint statement on The former Yugoslav Republic of Macedonia was published, in which the EC member States declared themselves to be "willing to recognize that State as a sovereign and independent State, within its existing borders, and under a name that can be accepted by all parties concerned" (Bulletin of the European

(*Continued on next page.*)

ex-Yugoslav republic and Greece did not dissipate when the new State joined the United Nations on 8 April 1993 with the curious name of The former Yugoslav Republic of Macedonia.[109] However, its admission as a member of the United Nations appears to have resulted in its recognition by a substantial part of the international community.[110]

52. Spain, for its part, regarded itself as an unwavering follower of the agreements adopted in the framework of European political cooperation on recognition of the new States that had hived off from the former Yugoslavia.[111] Spain's position was closer to France's advocacy of conditions for recognition than to Germany's urging for immediate recognition, unilateral recognition if need be, even at the cost of breaking ranks with the rest of the EC on the issue.[112] Spain's formal recognition of Croatia and Slovenia followed the adoption of a Community position: diplomatic relations were established with the latter in March 1992. Bosnia and Herzegovina, for its part, was recognized by EC members shortly after Croatia and Slovenia, by a decision published on 7 April 1992.[113] This was the position adopted by Belgium, among others.[114]

53. The declaration issued on 27 April 1992 by the Assembly of the Socialist Federal Republic of Yugoslavia was an attempt to realize an ambitious plan for the "transformation" of the former Yugoslavia into a new State comprising two republics (Serbia and Montenegro); needless to say, the international community did not accept a single continuator State of the former Yugoslavia,[115] whatever interpretations may have been devised subsequently, after the conflict was over. It thus appears that there are a number of unilateral acts which must be taken into account here: the unilateral declaration by Yugoslavia, followed by various protests indicating a refusal to accept that position. As the Badinter Commission pointed out, the Federal Republic of Yugoslavia was a new State, and as such must apply for admission to membership of the corresponding international organizations.[116] Mutual recognition between two ex-Yugoslav republics, Bosnia and Herzegovina and the Federal Republic of Yugoslavia, was achieved with the Dayton peace agreement, in the following terms: "The Federal Republic of Yugoslavia and the Republic of Bosnia and Herzegovina recognize each other as sovereign independent States within their international borders. Further aspects of their mutual recognition will be subject to subsequent discussions."[117]

54. Paragraph IV of the joint declaration signed in Paris on 3 October 1996 stated that the purposes of the

(*Footnote 108 continued.*)

Communities, vol. 25, No. 5 (1992), p. 103). However, the European Council, meeting in Lisbon on 26–27 June 1992, decided that the Republic would be recognized under a name which did not include the term Macedonia (ibid., No. 6, p. 22), although in the event this proved not to be the case.

[109] See RGDIP, vol. XCVII (1993), p. 1010, and vol. IC (1995), p. 679. On 13 September 1995 a provisional agreement on their mutual relations was signed in New York. Under that agreement, Greece lifted its embargo, the sovereignty, territorial integrity and political independence of both States was acknowledged, and the existing border between them was confirmed, as was its inviolability. The agreement was ratified on 15 October in the city of Skopje (*Keesing's Record of World Events*, vol. 41 (1995), pp. 40737–40783). For further discussion, see Pazartzis, "La reconnaissance d''une république yougoslave': la question de l'ancienne République yougoslave de Macédoine (ARYM)".

[110] Arcos Vargas, "El reconocimiento de Estados: Nuevos aspectos de la institución tras las declaraciones de los doce respecto a las antiguas repúblicas yugoslavas", p. 118. In the case of the United Kingdom, the Government spokeswoman said in the course of a debate on Macedonia in the House of Lords:

> "We shall continue to act as honest broker in order to obtain recognition of that State under any name except Macedonia ... Bulgaria, Croatia, the Philippines, Russia and Turkey have already recognized the former Yugoslav republic of Macedonia. Until the name is settled, our policy remains as I stated earlier."

(Marston, "United Kingdom … 1992", p. 648)

The situation, of course, has remained largely unchanged since that time, as the British Minister of State emphasized in reply to a question as to whether Macedonia had been recognized or not:

> "We have already done so. The United Kingdom's support for an application for United Nations membership means that the United Kingdom recognises the applicant as a state. Macedonia's application was accepted by the General Assembly on 8 April."

(*Ibid.*, "United Kingdom ... 1993", p. 601)

[111] See Rodríguez-Ponga y Salamanca, "La Comisión de Arbitraje de la Comunidad Europea sobre Yugoslavia", pp. 255–256. The recognition of Bosnia and Herzegovina by the EC member States and the United States as from 7 April 1992 prompted recognition by other States (Bulgaria and Turkey had extended recognition earlier, on 15 January 1992 and 6 February 1992 respectively): Croatia on 7 April, Canada and New Zealand on 8 April, Czechoslovakia, Hungary and Poland on 9 April, Egypt on 16 April, Saudi Arabia on 17 April, and Australia on 1 May 1992 (Rich, "Recognition of States: the collapse of Yugoslavia and the Soviet Union", pp. 49–51).

[112] As pointed out by Quel López in "La práctica reciente en materia de reconocimiento de Estados: problemas en presencia", p. 78.

[113] It was on that date that the joint statement on Yugoslavia was published in Brussels, Lisbon and Luxembourg (*Bulletin of the European Communities*, vol. 25, No. 4 (1992), p. 81).

[114] As appears from a note verbale of 10 April 1992 from the Belgian Ministry of Foreign Affairs addressed to the Ministry of International Cooperation of Bosnia and Herzegovina (unpublished text, reproduced in part in Klabbers and others, *op. cit.*, p. 184, which reads as follows: "The Kingdom of Belgium recognizes the Republic of Bosnia and Herzegovina as a successor State of Yugoslavia as regards its international status and within the limits of its territory as at 10 April 1992.").

[115] The Spanish Government's refusal to recognize the Federal Republic of Yugoslavia (Serbia and Montenegro) as the continuator of the former Yugoslavia was expressed in the following terms by the Minister for Foreign Affairs, speaking in the Foreign Affairs Committee of the Spanish Congress:

> "[T]his new Republic has proclaimed itself the successor, the continuator, of the former Yugoslavia. We cannot accept this, any more than the other Republics have done, because the matter is still unresolved, and in any case, in our view, it should be negotiated, and we should be prepared to assent to whatever settlement is reached by all the successor Republics of the former Yugoslavia, assuming they do reach a settlement, *inter alia* in the framework of the peace conference chaired by Lord Carrington. At all events, I wish to make it quite clear that we have not accepted the new Yugoslavia's claim to be automatically the continuator, the successor of the old Yugoslavia"

(*Boletín Oficial de las Cortes Generales*, Committees, Fourth Legislature, Foreign Affairs, No. 499 (1992), p. 14661. See also REDI, vol. XLIV, No. 2 (1992), p. 558)

A virtually identical view was expressed on 14 May 1992 by the representative of Belgium at the 620th plenary meeting of the Conference on Disarmament in Geneva. Referring to Yugoslavia's failure to win recognition as the continuator State, he said:

> "As a matter of fact, Australia, Belgium, France, Germany, Italy, the Netherlands, the United Kingdom and the United States have not accepted the automatic continuity of the Federal Republic of Yugoslavia in international organizations and conferences, including the Conference on Disarmament.
>
> At this stage they reserve their position on this question and consider that the participation in the Conference on Disarmament of the delegation in question is without prejudice to future decisions which might be taken on this and related issues."

(CD/PV.620. See also Marston, "United Kingdom … 1992", pp. 655–656)

[116] See Rich, *loc. cit.*, p. 54, and Hille, "Mutual recognition of Croatia and Serbia (+Montenegro)", p. 610.

[117] General Framework Agreement for Peace in Bosnia and Herzegovina, art. X.

declaration were the mutual recognition of both States, acceptance by Bosnia and Herzegovina of the continuity of the Federal Republic of Yugoslavia and reaffirmation of the territorial integrity of that State, in accordance with the principles approved at Dayton.[118] On 23 August 1996 an agreement on the establishment of normal relations was signed between Croatia and the Federal Republic; article 5 of that agreement, by which both States agreed to recognize each other, is particularly noteworthy.[119]

55. The disparities between EC members in the matter of granting recognition to the former Yugoslav republics and their failure to coordinate with the Badinter Commission doubtless served to sideline the issue. However, in view of the variety of solutions applied, it is particularly striking to find the EC member States adopting a common stance following their joint statement of 9 April 1996 on recognition of the Federal Republic of Yugoslavia.[120]

56. It appears offhand that the change of government which occurred in Yugoslavia in late 2000 has made it easier for the international community to accept that State, albeit not before it had applied for admission to the United Nations, as it had been called upon to do. However, actions have been conducted on other fronts, including an application to ICJ requesting confirmation of the Federal Republic of Yugoslavia (at any rate implicitly, as the Court did not rule on that point as such) as a continuing party to the Convention on the Prevention and Punishment of the Crime of Genocide. As a result, a few months after the Federal Republic had joined the list of States Members of the United Nations (from which, paradoxically, it had never been barred, under the name of Yugoslavia), it petitioned the Court for a review of its ruling of 11 July 1996, ultimately without success.[121] Furthermore, the latest change undergone by that State, when it became the Union of Serbia and Montenegro on 4 February 2003, has had no effect on the institution of recognition in the sense with which the Commission is concerned.

57. In a different geographic setting, the various positions adopted in the matter of the former Soviet Republics are also worthy of note. Here, it is necessary to distinguish between the respective situations of the Baltic Republics, the Russian Federation[122] and the other Republics that emerged from the break-up of the Soviet Union.

58. The joint statement on the Baltic States published by the States members of the European Communities in The Hague and Brussels on 28 August 1991 stated, *inter alia*:

> The [European] Community and its Member States warmly welcome the restoration of the sovereignty and independence of the Baltic States, which they lost in 1940. They have consistently regarded the democratically elected parliaments and governments of these States as the legitimate representatives of the Baltic peoples ...
>
> It is now time, after more than 50 years, that these States resume their rightful place among the nations of Europe.[123]

59. This whole process culminated in the progressive recognition of these countries as independent States by a significant number of members of the international community.[124] In the case of the Baltic Republics in par-

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[118] A/51/461–S/1996/830, annex.

[119] Agreement on Normalization of Relations between the Federal Republic of Yugoslavia and the Republic of Croatia (Belgrade, 23 August 1996), A/51/318–S/1996/706, annex. See also ILM, vol. XXXV, No. 5 (September 1996), p. 1221.

[120] See Bühler, "State succession, identity/continuity and membership in the United Nations", pp. 301–302. The statement on recognition of the Federal Republic of Yugoslavia by the member States of the European Union may be consulted in the *Bulletin of the European Union*, No. 4 (1996), p. 58. As the United Kingdom Minister of State noted on 22 April 1999:

> "The UK recognised the Federal Republic of Yugoslavia in line with EU partners on 9 April 1996 following the change in regional circumstances post-Dayton."

(Marston, "United Kingdom … 1999", p. 424)

[121] Application for revision submitted on 24 April 2001 (*I.C.J. Pleadings, Application for Revision of the Judgment of 11 July 1996 in the Case concerning* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina *v.* Yugoslavia), Preliminary Objections *(Yugoslavia v. Bosnia and Herzegovina)* (not yet published). Yugoslavia, in its application, relied on Article 61, paragraph 1, of the Statute of the Court, arguing that it had been clearly shown that before 1 November 2000 (the date on which it was admitted to membership of the United Nations), Yugoslavia was not a continuation of the legal and political personality of the Federal Republic of Yugoslavia, was not a member of the United Nations and was not a party to either the Statute of the Court or the Convention on the Prevention and Punishment of the Crime of Genocide (see www.icj-cij.org).

[122] Evidence of this is to be found in the document issued by Finland on 28 February 1992 (entitled "Government Bill 8/1992 on the acceptance of the Agreement on the Foundation of Relations between Finland and the Russian Federation", reproduced in Klabbers and others, *op. cit.*, p. 190 (FIN/23), which reads as follows:

> "Finland accepted on 30 December 1991 the status of Russia as continuation of former USSR and concurrently recognized ten former Soviet republics as independent states."

In the case of France, on 13 November 1992 the Minister for Foreign Affairs referred to the Russian Federation as the continuator of the USSR in the course of a debate in the French Senate on the ratification of a treaty between France and the Russian Federation in which that expression was used:

> "[T]he treaty acknowledges the fact that Russia is the continuator State of the USSR … Russian diplomacy admirably illustrates the paradox of that country, which, as the 'continuator State of the USSR', refuses to be regarded as a State that has arisen *ex nihilo*, but at the same time constitutes a young State whose identity, having been dissolved in the Soviet crucible for seventy years, must be defined."

(*Ibid*., pp. 201–202)

[123] *Bulletin of the European Communities*, vol. 24, Nos. 7/8 (1991), p. 115. The statement on the Baltic States has some unusual features owing to the distinctive nature of those countries. For example, the term "recognition" does not occur in it, and that politico-legal act is not the subject of the statement; rather, the statement is an expression of unanimous agreement on the establishment of diplomatic relations, as a direct consequence of the previous recognition and not of recognition as such, as Quel López notes in "La actitud de España …", p. 705.

[124] Many political factors entered into the recognition of the Baltic States. Iceland was the first country to recognize the independence of Lithuania, on 22 March 1990, and of Estonia and Latvia on 22 August 1991; Denmark did the same on 24 August, and Norway followed suit one day later. Most of the States members of the European Community recognized the Baltic States on 27 August; then came Bulgaria, Czechoslovakia, Hungary and Romania on 1 September. The United States followed on 2 September, the Council of State of the USSR adopted the same decision on 6 September, and on 7 September it was the turn of Afghanistan, the Democratic People's Republic of Korea, Japan, Pakistan and Viet Nam, among other countries (Rousseau, *loc. cit.* (1992), pp. 125–126). Belgium's position is particularly noteworthy: a joint statement signed by the Belgian and Latvian Ministers for Foreign Affairs on 5 September 1991 announced the re-establishment of diplomatic relations between Belgium and Latvia. Some particularly relevant passages of that statement read as follows:

> "Belgium recognized de jure the Republic of Latvia on January 26, 1921 ... On August 27, 1991 Belgium decided with its European partners to meet the demands of the three Baltic States to reestablish diplomatic relations ... Today, we reestablish the diplomatic relations by the exchange of verbal notes."

(Klabbers and others, *op. cit.*, p. 176)

ticular, it is important to emphasize the position adopted by States that had never recognized their annexation by the Soviet Union.[125] The position adopted by Spain is worth some attention, since its recognition was in a sense dependent on recognition by the Soviet Union.[126] Following the statement of 28 August 1991, in the framework of the European Community, Spain encountered an obstacle in the form of the exchange of notes of March 1977 between itself and the USSR on the establishment of diplomatic relations: the notes in question referred expressly to recognition and respect for the territorial integrity of the Soviet Union, not excluding—and thereby implicitly including—the Baltic Republics. Consequently, Spain was automatically barred from taking a position on the recognition of those Republics until the USSR had done so.[127] The solution that was adopted was *de jure* recognition of the new Republics through official communications addressed to their respective Ministers for Foreign Affairs, worded as follows:

> Having regard to the Declaration that we, the Ministers for Foreign Affairs of the EEC, have just published, I am writing to offer you my congratulations and to inform you that the Spanish Government is prepared immediately to initiate procedures leading to the re-establishment of diplomatic relations between our two countries.[128]

60. International reactions were not slow in coming. A few days later, the European Council (Maastricht, 9–10 December 1991) issued a declaration on developments in the Soviet Union. After mentioning various aspects such as the inviolability of borders and the importance of resolving all issues by peaceful means, the declaration stated:

> The Community and its Member States attach particular importance to necessary measures being taken without delay at the level of the republics concerned to put into effect the agreements in the field of arms control, nuclear non-proliferation and the effective control and security of nuclear weapons.[129]

Six days after that, the Council published its Guidelines on the recognition of new States in Eastern Europe and in the Soviet Union,[130] which laid down the minimal bases (protection of human rights and respect for the fundamental international instruments dealing with the matter) for obtaining recognition by the European Community's member States.

61. On 31 December 1991, the 12 member States of the European Community issued a statement that simultaneously closed one door (the existence of the Soviet Union) and opened another (the possibility of recognizing the Republics that were breaking off from it). The statement began:

> The Community and its Member States welcome the assurances received from Armenia, Azerbaijan, Belarus, Kazakhstan, Moldova,

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[125] The position of the United Kingdom was emphasized by the Prime Minister, who stated on 1 May 1990 in reply to an oral question:

> "I have indicated before in the House that this country never recognized the legality of the annexation of Lithuania, Latvia and Estonia into the Soviet Union. Thus, we have never had any representation in those states and we do not recognize the legality of their annexation now. The Helsinki accord recognized the boundaries in fact but not in law."

(Marston, "United Kingdom … 1990", p. 497)

On 16 October 1990, the Federal Republic of Germany declared:

> "The Federal Government has never recognized the annexation of the Baltic States. Therefore, when diplomatic relations were established with the USSR on 13 September 1955, it has formulated a reservation concerning the recognition of the territorial possessions of both parties and has taken into account this reservation ever since."

(Klabbers and others, *op. cit.*, p. 211)

As a consequence of this non-recognition of the annexation of those countries, on 23 September 1991 the Amtsgericht Berlin Tiergarten handed down a decision settling the question of the ownership of a building that had been the Embassy of Estonia before its annexation by the Soviet Union. The ruling read in part:

> "After the end of World War II, the embassy of Estonia has been put under legal guardianship. After the independence of Estonia, its membership in the United Nations and its recognition by the Federal Republic of Germany this guardianship had to be lifted and property be restituted to Estonia."

(*Ibid*., p. 225)

Italy had not recognized the Soviet annexation either, and that fact was emphasized in the joint declaration by which diplomatic relations between Italy and Latvia were re-established on 30 August 1991 (*ibid*., pp. 259–260). Norway took a very similar attitude: a protocol of 20 April 1994 on the agreements governing bilateral relations between Lithuania and Norway stated, *inter alia*:

> "*Predicating* the non-recognition of the illegal incorporation of Lithuania into the former Soviet Union ... *Recognizing* the continued validity of bilateral treaties entered into between Norway and Lithuania in the period between 1920 and 1940. "

(*Ibid*., p. 299)

Turkey's stand was blunter still: the Ministry for Foreign Affairs issued a statement on 3 September 1991 announcing that:

> "Turkey, welcoming the Statement of Lithuania, Letonia and Estonia regarding the re-establishment of status of independence, has decided to re-establish diplomatic relations with the above mentioned Republics."

(*Ibid*., p. 353)

A joint declaration was issued on 22 October 1991 announcing the formal establishment of diplomatic relations between Latvia and Turkey (*ibid*., p. 355).

[126] The situation was similar in the case of Sweden: the Swedish Government recognized the three Baltic Republics on 27 August 1991, after the Russian Federation had done so (Klabbers and others, *loc. cit.*, pp. 303–304). Similarly, on 16 January 1992 Sweden publicly announced its recognition of Armenia, Azerbaijan, Kazakhstan, Kyrgyzstan, the Republic of Moldova, Tajikistan, Turkmenistan and Uzbekistan (*ibid*., p. 306). Sweden's position on recognition was emphasized in a reply from the Ministry for Foreign Affairs to the Swedish Parliament stating:

> "There is no obligation to recognize new states in international law and, in some cases, Sweden has for political reasons postponed recognition. In general, however, Sweden has avoided adding political conditions or prerequisites to the three legal criteria."

(*Ibid*., p. 309)

The French Minister for Foreign Affairs, for his part, announced in Paris on 16 January 1992 that the Community and its member States had received confirmation from the Kyrgyz Republic and the Republic of Tajikistan of their intention to respect the "Guidelines on the recognition of the new States in Eastern Europe and the Soviet Union" defined by the Community on 16 December 1991. Like its European Community partners, France recognized those two Republics, after having recognized eight other new States from the former USSR (*La politique étrangère de la France: textes et documents 1992* (Paris, Documentation française, Ministry for Foreign Affairs), p. 57).

[127] In this connection, see the remarks made by the Minister for Foreign Affairs of Spain before the Foreign Affairs Committee of the Congress of Deputies. The Minister outlined Spain's position on recognition of the Baltic Republics, and in particular the re-establishment of diplomatic relations with them, taking into account Spain's peculiar position resulting from its having established relations with the USSR in March 1977 (*Spanish Yearbook of International Law*, vol. I (1991), pp. 48-49). See also *Diario de Sesiones del Congreso de los Diputados* (1991), Fourth Legislature, No. 294, pp. 8418–8419 and 8439.

[128] Communications 2178, 2179 and 2180, addressed to the Ministers of Lithuania, Latvia and Estonia, quoted in Quel López, "La actitud de España …", p. 705.

[129] *Bulletin of the European Communities*, vol. 24, No. 12 (1991), p. 11.

[130] *Ibid*., p. 119. On 8 January 1992, a statement on Georgia was issued in the framework of European political cooperation (*ibid*., vol. 25, Nos. 1/2 (1992), p. 107).

Turkmenistan, Ukraine and Uzbekistan that they are prepared to fulfil the requirements contained in the "Guidelines on the recognition of new States in Eastern Europe and the Soviet Union". Consequently, they are ready to proceed with the recognition of these republics.

They reiterate their readiness also to recognize Kyrgyzstan and Tadjikistan once similar assurances will have been received.[131]

Shortly thereafter, Belgium recognized Tajikistan,[132] while Turkey had recognized Kazakhstan even before the publication of the EC guidelines.[133]

62. Considering the development of this process and its repercussions on the international community, it may be said that radical change has occurred with respect to two matters: agreement as the determinative procedure for the changes occurring in the Soviet Union, and the technique of conditional recognition.[134] This idea is corroborated in the above-mentioned study by Ribbelink, which emphasizes these two new aspects of recognition that have emerged recently: "What is new, at least in comparison with the post Second World War practice in Europe, is first of all the revival of collective decision-making, and second, the rehabilitation of the constitutive approach. And in both the European Community plays a vital role."[135]

63. As an example of the rehabilitation of this long-neglected practice, which was in vogue in the era when the "Concert of Europe" was a reality, let us consider the reply submitted by the Netherlands to the questionnaire from the Commission.[136] It emphasized the idea of collective decision-making, in the light of actual facts: recognition was extended to the former Yugoslav and Soviet Republics individually by each European Community State as it deemed that action timely, with the result that the intended concerted action was not taken into account by all member States on a footing of equality. The Netherlands itself recognized Croatia and Slovenia in 1991, while in 1992 it recognized those republics of the Community of Independent States that met the conditions laid down in the European Community framework.

64. More recently, of course, other States have made their appearance on the international scene, in addition to the instances discussed above, but there can be no doubt that in other cases agreement between the parties involved has given rise to fewer problems as far as recognition is concerned, as for example German unification[137] or the break-up of Czechoslovakia.[138]

65. Traditionally, a State's membership of a particular international organization has not implied recognition of all other member States.[139] However, that tradition seems to stand in fairly stark contrast to a more recent approach as observed in a number of cases. The Spanish Minister for Foreign Affairs, for example, replying to a deputy who had asked about the recognition of the former Yugoslav Republic of Macedonia, said: "We recognized the former Yugoslav Republic of Macedonia; on 8 April 1993, when the Security Council … voted in favour of the admission … of that new State as a full member of the United Nations."[140]

66. According to the predominant internationalist doctrine, and in accordance with Spain's contemporary diplomatic practice, that vote should be regarded, to all intents and purposes, as an act of recognition, no subsequent declaration to support or reinforce that decision being necessary. Clearly, then, Spain's recognition of the new Republic was not reserved in any sense; rather, the latter's

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[131] *Ibid.*, vol. 24, No. 12 (1991), p. 123. See also Dehousse, "The international practice of the European Communities—current survey: European political cooperation in 1991" , p. 143.

[132] Unpublished note verbale dated 20 January 1992 from the Embassy of Belgium in Moscow to the Ministry for Foreign Affairs of Tajikistan, which stated, in part, that Belgium, in view of the agreements of the Minsk Conference of 8 December 1991 and the Alma-Ata Conference of 21 December 1991, recognized Tajikistan as a successor State of the USSR in respect of its international status and within the limits of its territory (Klabbers and others, *loc. cit.*, p. 185).

[133] As appears from a letter sent by the Turkish Prime Minister to the President of Kazakhstan on 24 December 1991, making Turkey the first State to extend recognition to Kazakhstan:

"I have the honour to inform you that the Turkish Government has decided to recognize the decision of 16 December 1991 of the Supreme Soviet of Kazakhstan Republic concerning the independence of Kazakhstan at the same date.

On this occasion, I would like to convey to you that we have the honour of being the first state who recognizes the independence of Kazakhstan."

(Klabbers and others, *op. cit.*, p. 357)

The Council of Ministers of Turkey had decided on 16 December 1991 to establish consulates-general in Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan and Uzbekistan (*ibid*., p. 359).

[134] Rich, *loc. cit*., and Türk, "Recognition of States: a comment", pp. 66–71.

[135] *Loc. cit*., p. 76. The author goes on to state (p. 78) that the constitutive element—towards which practice has been converging in recent years—is illustrated by the fact that the above-mentioned criteria were additional. In brief, the statehood of the entities in question is not in doubt, but it had been decided that those new States, in order to be recognized, were required to accept norms and standards that the (European) community of States regarded as vital. Nonetheless, making recognition dependent on a series of criteria—which, moreover, might not be the same in every case—might open the door to arbitrariness and lack of clarity.

[136] *Yearbook … 2000*, vol. II (Part One), document A/CN.4/511, p. 267.

[137] In a case before the High Court of Justice of the United Kingdom, the Government's legal counsellor, with the authorization of the Secretary of State for Foreign and Commonwealth Affairs, submitted an affidavit dated 24 February 1995 stating that "the United Kingdom recognises the Federal Republic of Germany that exists today as the continuation of the Federal Republic of Germany that existed prior to 3 October 1990 and that the Federal Republic of Germany remains the same international person as it was before 3 October 1990" (Marston, "United Kingdom … 1997", p. 522).

[138] For example, on 11 November 1993, a Protocol on the agreements governing bilateral Norwegian-Czech relations was signed by the Czech Republic and Norway. It stated that:

"The Government of the Kingdom of Norway and the Government of the Czech Republic,

Predicating that the Czech Republic is successor to the Czech and Slovak Federal Republic ..."

(Klabbers and others, *op. cit.*, p. 295)

[139] As an illustrative example, let us consider a note dated 25 April 1934 from the French Legal Service, in which the Ministry for Foreign Affairs of France set forth its position in the following terms:

"The admission of the USSR as a member of the League of Nations can only facilitate relations between the Soviet Government and the Governments of all States Members of the League and the resumption of diplomatic relations in cases where such relations are still suspended. But the fact that two States are members of the League of Nations does not necessarily imply that diplomatic relations between them should be established; that is a question of timeliness and circumstances."

(Kiss, *op. cit.*, vol. III, p. 157)

[140] *Diario de Sesiones del Congreso de los Diputados* (1994), Fifth Legislature, No. 110, p. 3507.

admission to full membership of the United Nations was taken as the mark of that recognition.[141] The situation is somewhat unclear, although it appears that increasingly States are inclined to adopt the position expressed by Spain in the case under discussion.[142]

67. It is of interest to note at this point that in the course of the study of State practice in recent years, a number of procedures have been found that do not fit any of the standard models. One of these is what has sometimes been called, in Spanish practice, "cross-recognition". The Secretary General for Foreign Policy of Spain's Ministry for Foreign Affairs, speaking in explanation of the Spanish Government's policy *vis-à-vis* the Democratic People's Republic of Korea, said that Spain's recognition of that State was conditional on the granting of what he referred to as "cross-recognition":

> [W]hen the Western countries, beginning with Washington and Tokyo, recognized North Korea, the Eastern countries, beginning with Moscow and Beijing, recognized South Korea at the same time. It is the Government's position that all options should be left open, but we believe that an isolated recognition at this time does not fit into the context of balance which we consider it is important to maintain.[143]

As the compilers of REDI have noted, this so-called "cross-recognition" appears to be acquiring a curious kind of "naturalization paper" in Spain's international practice, without having made any noteworthy impact in the field of legal theory, which knows nothing of this singular concept.[144] In point of fact, "cross-recognition" might usefully be regarded as a somewhat more complex form of conditional recognition.

68. As regards recognition of governments, the concept of effectiveness is a criterion that weighs heavily in the balance, as has been seen. Accordingly, this form of recognition tends to be qualified as it applies to ambiguous or transitory situations in which a government cannot be said to be fully functional;[145] there are, for example, a number of European States that prefer to withhold recognition where there are two rival governments at the same time. Rather than choose between recognizing one government or the other, they prefer to wait until the situation has become stable.[146] For some time now, moreover, there have been States that have made a well-established tradition of not recognizing governments as such, but States exclusively, in the light of the specific conditions which they will use to determine, on a case-by-case basis, what policy they wish to follow in relation to the entity in question.[147]

69. Spanish practice in this area appears to be clear, as the Minister for Foreign Affairs noted in the course of remarks delivered in Congress:

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[141] See *Actividades, Textos y Documentos de la Política Exterior Española* (1994), p. 676. A similar example is furnished by Sweden, which on 22 May 1992 announced that it had voted in favour of a General Assembly resolution whereby Bosnia and Herzegovina, Croatia and Slovenia became members of the Organization. The announcement went on to state expressly:

> "In accordance with Swedish practice this means that Sweden has also recognized the Republic of Bosnia-Herzegovina. Croatia and Slovenia have already been recognized by Sweden."

(Klabbers and others, *op. cit.*, p. 313)

[142] The idea that a vote in favour is tantamount to recognition has recently been put forward by Sweden as well as by the United Kingdom; but Belgium and Finland have advocated a more nuanced position, namely that a vote in favour should be viewed as *de facto* recognition, to be followed in due course by formal recognition.

[143] *Diario de Sesiones del Congreso de los Diputados* (1988), Third Legislature, No. 282, p. 9725; see also REDI, vol. XLI, No. 1 (1989), pp. 190–191. The Democratic People's Republic of Korea was recognized by Germany and the United Kingdom on 19 October 2000 (Poulain, *loc. cit.*, p. 858).

[144] The Spanish Minister for Foreign Affairs used the term in speaking of Greece's recognition of the Palestinian State:

> "[T]he Government of Greece may indeed decide to recognize the Palestinian State, and there may indeed be cross-recognition. The only information at our disposal is the message that we received yesterday from the Greek Minister for Foreign Affairs, who is here today, to the effect that a decision had not yet been taken, but that a decision to that effect, in favour of cross-recognition, would probably be taken."

(*Diario de Sesiones del Senado*, Foreign Affairs Committee (1988), Third Legislature, No. 136, p. 7; see also REDI, vol. XLI, No. 1 (1989), p. 191).

[145] However, in cases where a change of government is the result of a coup d'état, the response to the situation is frequently one of rejection; for example, this can be inferred from the position of the Spanish Government towards the situation of political instability in Paraguay:

> "The events in which General Lino Oviedo played a leading role in Asunción during the period 22–25 April of this year constituted an attempt to subvert the constitutional order and institutional normality, and soon reached the point of being a political and military crisis.
>
> "... [T]he Spanish Government immediately, clearly and unequivocally condemned that attempt in a press release issued by the Office of Diplomatic Information on 23 April, indicating that Spain was determined to support democracy, reaffirming the supremacy of civil authority, and also strongly condemning any attempt to alter the institutional democratic order."

(*Boletín Oficial de las Cortes Generales*, Senate, series I, No. 51 (18 September 1996), p. 59; see also REDI, vol. XLIX, No. 2 (1997), p. 92)

[146] To take only one example, this is the line that the Netherlands regularly adopts:

> "For that reason the Netherlands is very rarely among the first countries to recognize a new government."

(Panhuys and others, *op. cit.*, p. 382)

[147] A useful illustration in this connection is a document issued on 9 November 1998 by the Canadian Legal Bureau, indicating the adoption of a different policy from the one that had been previously applied in the matter of recognition; in essence, governments that had come to power by unconstitutional means would not be recognized (*Canadian Yearbook of International Law*, vol. XXVII (1989), pp. 387–388; see also the same publication, vol. XXVI (1988), pp. 324–326). Similarly, in the European context there are many States that are tending to recognize other States rather than governments as such, as has been emphasized by Germany, the Netherlands, Switzerland and the United Kingdom. In the case of the Netherlands, on 4 July 1990, the Dutch Minister for Foreign Affairs sent a letter to Parliament stating:

> "I should like to inform you hereby of the practice that will be followed in future by the Dutch Government with regard to the recognition of governments.
>
> "The Dutch view is that there is no duty to recognise a new government and no right to recognition of a new government …
>
> "[I]t is desirable to follow the policy of all the other EPC [European Political Cooperation] partners, the Dutch Government has come to the conclusion that it will no longer recognise governments.
>
> "…
>
> "The answer to questions whether the Dutch Government regards an entity as a foreign government will have to be inferred from the nature of the relations which it has with that entity. Discussion of such issues will not disappear as a result of a change of this kind in Dutch policy, but will instead concentrate on the nature of the relations."

(Siekmann, "Netherlands State practice for the parliamentary year 1989–1990", pp. 237–238)

In a different geographic setting, on 19 January 1988 the Australian Minister for Foreign Affairs and Trade announced that his Government had decided to abandon the practice of recognizing governments (Bergin, "The new Australian policy on recognition of States only", p. 150).

Spain recognizes States and not governments. We maintain diplomatic relations with States, as do all of the nations of the world ... This certainly does not mean that we agree with the current state of affairs there or with Mr. Fujimori's coup.

…

Democratic Spanish governments have coexisted with Mr. Pinochet or Mr. Videla based on the Estrada doctrine ... without ever supporting any of these regimes.[148]

70. In Latin America, there have been a number of clear-cut examples of a military regime winning acceptance after it has seized power.[149] The Estrada doctrine has been applied in some recent cases, as, for example, Mexico's response to the events that occurred in Venezuela in 2002.[150] More recently still, the abandonment of the Presidency in Bolivia and the subsequent change were met with a variety of responses, especially within Latin America.[151]

71. However, States have not always proceeded in the same way as regards the recognition of governments. The United Kingdom affords an instructive example: the year 1980 marked a major turning point,[152] with a discernible trend in the direction of not recognizing governments after that date.[153] On occasion, it has also been the case that no act recognizing the new government has been performed, but other governments have stated their objections to the way that government has come to power.[154]

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[148] *Spanish Yearbook of International Law*, vol. II (1992), p. 152.

[149] The Videla Government in Argentina was the first in the region to recognize the dictatorship of García Meza, who came to power in Bolivia in July 1980 (daily newspaper *Clarín* (Buenos Aires), 6 August 1980, pp. 2–3).

[150] The following statement was issued on 12 April 2002:

"Mexico—without abdicating any of its humanitarian responsibilities or its solidarity with the people of Venezuela, strictly in accordance with the Estrada doctrine in its precise and only sense—will refrain from either recognizing or not recognizing the new Government of Venezuela, and will restrict itself to maintaining diplomatic relations with that Government. In addition, the Government of Mexico will ask OAS to apply the procedures laid down in the Inter-American Democratic Charter in response to the breakdown of the democratic order in Venezuela, in accordance with the relevant provisions of that document."

(*Revista Mexicana de Política Exterior*, Nos. 67–68 (July 2002–February 2003), pp. 191–192)

[151] See, for example, the position adopted by Mexico, which was that in view of the political and social events in Bolivia, which had led to the resignation of President Gonzalo Sánchez de Lozada, the Government of Mexico appealed for respect for the constitutional order and the rule of law as an indispensable condition for peace, governability and development. Mexico affirmed that it would collaborate fully with the Government of President Carlos Diego Mesa, with a view to strengthening the democratic process and furthering Bolivia's economic and social development.

Chile also made its position clear in an official statement issued by the Chancellery on 18 October 2003. After referring to the obligations that applied in the Latin-American context, the statement went on to say that Chile "[a]ssures the new Government that it is fully prepared to maintain constructive dialogue with a view to the mutual benefit of our respective peoples and the progress of development and regional integration" (OAS Permanent Council, OEA/Ser.G, CP/ACTA 1387/03 of 22 October 2003). Nor were statements along these lines confined to the Latin-American geographic context, as may be seen from a statement issued by the Presidency of Spain on 28 October 2003, which echoes a statement issued by the European Union:

"The European Union welcomes the appointment of Mr Carlos Diego de Mesa Gisbert as constitutional President of Bolivia.

"Presenting its congratulations to President Mesa ...

"Recalling the European Council conclusions of 17 October last on the dramatic events that led to the loss of human lives in Bolivia, the EU will continue to provide help and assistance to Bolivia, for strengthening democratic institutions, the rule of law and respect for human rights, and in order to promote a more effective climate of social progress and economic development."

(Bulletin of the European Union, No. 10 (2003), p. 93)

In addition, on 14 October 2003 Argentina issued a statement to the effect that it was prepared to provide Bolivia with assistance to enable it to emerge from its crisis.

[152] The point of view adopted by the United Kingdom until the 1980s arose from the case of *R.* v. *the Government of Spain and Others ex parte Augusto Pinochet Ugarte,* in which the two questions set forth below had to be answered. The text quoted here is taken from a letter dated 21 January 1999 that was sent to the Crown Prosecution Service by the Head of the Protocol Department at the Foreign and Commonwealth Office:

"1) Did Her Majesty's Government recognise the Respondent, Augusto Pinochet Ugarte, as Head of State of the Republic of Chile?

"2) If so, from what time was he so recognised?

"2. At the time, Her Majesty's Government still adhered to the policy (abandoned in 1980, see Hansard HC Vol. 983 col. 277) of according recognition to new Governments which came to power unconstitutionally, provided that they met certain conditions, in particular that the new regime had effective control over most of the State's territory, and that it was, in fact, firmly established. Recognition was not understood to be a judgement on the constitutional or other legitimacy of the governing authorities in question. Its effect was to signal Her Majesty's Government's willingness to deal with the authorities in question as the government of the State concerned. There was no practice of according separate or express recognition to Heads of State.

"…

"4. The coup which brought to power the military junta took place on 11 September 1973. The new Government was recognised by Her Majesty's Government on 22 September the same year, through the medium of a Diplomatic Note from the British Embassy responding to a Note from the Ministry of Foreign Affairs the day after the coup".

(Marston, "United Kingdom … 2000", p. 584)

[153] In a written answer delivered in the House of Lords on 28 April 1980, the Secretary of State for Foreign and Commonwealth Affairs stated:

"[W]e have decided that we shall no longer accord recognition to Governments. The British Government recognise States in accordance with common international doctrine.

"Where an unconstitutional change of régime takes place in a recognised State, Governments of other States must necessarily consider what dealings, if any, they should have with the new régime, and whether and to what extent it qualifies to be treated as the Government of the State concerned. Many of our partners and allies take the position that they do not recognise Governments and that therefore no question of recognition arises in such cases. By contrast, the policy of successive British Governments has been that we should make and announce a decision formally 'recognising' the new Government.

"This practice has sometimes been misunderstood, and, despite explanations to the contrary, our 'recognition' interpreted as implying approval. For example, in circumstances where there might be legitimate public concern about the violation of human rights by the new régime, or the manner in which it achieved power, it has not sufficed to say that an announcement of 'recognition' is simply a neutral formality.

"We have therefore concluded that there are practical advantages in following the policy of many other countries in not according recognition to Governments. Like them, we shall continue to decide the nature of our dealings with régimes which come to power unconstitutionally in the light of our assessment of whether they are able of themselves to exercise effective control of the territory of the State concerned, and seem likely to continue to do so."

(Marston, "United Kingdom … 1980", p. 367)

[154] For example, following the coup d'état in Liberia on 11 April 1980, the question of the new Government's relations with third States arose. The new Head of State was not invited to attend the Fifth ECOWAS Conference in Lomé on 27 April 1980; in protest against his exclusion, Liberia broke off diplomatic relations with Côte d'Ivoire, Nigeria and Senegal. Other States did not expressly recognize the new regime, but maintained their diplomatic representation in Monrovia (Rousseau, *loc. cit*. (1980), p. 1145). In 1992 there was a similar case

(*Continued on next page.*)

Moreover, a distinction is frequently drawn between the continuation of some forms of relations and recognition of the traumatic change of government, with the former not necessarily implying the latter.[155] Practice unquestionably affords growing numbers of examples of non-recognition of governments, at any rate explicitly. There were many such cases in the 1970s and 1980s, including Iran[156] and Nicaragua,[157] among others.

72. Another recent example of express non-recognition was the statement by the Minister for Foreign Affairs of Venezuela explicitly refusing to recognize the new Government of Haiti which had been in power since the departure from office of former President Jean-Bertrand Aristide.[158]

73. Recent practice also affords a number of instances of formal, explicit acts of non-recognition formulated by international organizations. One example is the decision adopted by CARICOM in 2004, expressly condemning the new Government in Haiti, after the departure of former President Aristide.[159]

74. International practice offers various examples involving neither recognition of States nor recognition of governments properly so called, inasmuch as the entities involved have not yet achieved what might be termed "full statehood",[160] or recognition of entities whose state-

(*Footnote 154 continued.*)

involving Venezuela: in response to an attempted coup d'état in that country, the Office of Diplomatic Information, an arm of Spain's Ministry for Foreign Affairs, issued the following statement on 4 February:

> "The Spanish Government emphatically condemns the attempted coup d'etat that took place in the last few hours in Venezuela against a democratically elected government that represents the public will.
>
> "The Spanish Government reiterates its unconditional endorsement of the constitutional Government of Venezuela, grants complete support for the measures adopted by the president of the Republic, Carlos Andrés Pérez, to quash the attempted coup."

(*Spanish Yearbook of International Law*, vol. II (1992), pp. 144–145)

[155] In response to a question asked in the Senate on the measures that would be taken to revise diplomatic relations and general cooperation with Peru if democracy was not be re-established there, the Spanish Government stated:

> "As has been stated on many occasions, Spain maintains normal diplomatic relations with all Latin American countries without this fact implying support for a particular regime in any of them. Therefore, the Spanish Government has no plans to take any measures to revise its diplomatic relations with Peru."

(*Spanish Yearbook of International Law*, vol. II (1992), p. 153)

A number of measures were taken nonetheless: negotiations on treaties of friendship and cooperation were suspended, assistance was frozen, bilateral visits and contacts were suspended, contacts with the Peruvian authorities were reduced, and so on (*ibid.*, p. 224).

[156] It is of interest to recall the situation that arose after the fall of the imperial regime and the establishment of an Islamic Republic in Iran, with the resulting problems relating to the change of government and recognition of that government (Rousseau, *loc. cit.* (1979), pp. 807–810). In principle, all States maintained diplomatic relations with Iran. Some indicated their acceptance of the new regime by expressly recognizing it, once the Bazargan Government had been established on 5 February 1979. This course was adopted by the Soviet Union on 12 February, by Algeria, Belgium, India, Iraq, Jordan, Kuwait, the Libyan Arab Jamahiriya, Saudi Arabia, Tunisia, the United Kingdom and Yemen on 13 February, and by China on 14 February 1979. Except for Belgium and the United Kingdom, other Western States, as well as Czechoslovakia and Poland, simply maintained their diplomatic relations with the new Iranian regime, a procedure which was tantamount to tacit recognition. At a press conference on 13 February 1979, President Carter stated:

> "We hope that the differences that have divided the Iranian people for so many months will soon come to an end. During this entire period, we have been in contact with those in control of the government of Iran, and we are prepared to work with them."

(*International Herald Tribune*, 14 February 1979, and *Le Monde*, 15 February 1979)

France implicitly recognized the new regime. On 13 February 1979, the Ministry for Foreign Affairs issued the following statement:

> "The French Government has closely followed the development of the political crisis in Iran. As the President of the Republic stated on 17 January, the French Government will make no judgement in this matter, nor will it intervene in events which are and must continue to be the responsibility of the Iranians.
>
> "The practice of the French Government … in any case, is to recognize States and not Governments. France is prepared to continue its cooperation with Iran in the interests of both countries. Its ambassador in Tehran has contacted Mr. Bazargan. The French Government sincerely hopes that the process of normalization will lead to the re-establishment of civil peace and security in Iran."

(Rousseau, *loc. cit*. (1979), p. 808)

[157] As a result of the resignation of General Somoza in Nicaragua on 17 July 1979 and the seizure of power by the insurgents, problems relating to recognition arose. After the ephemeral designation of an interim President, who remained in office for 24 hours, power was vested in a five-member junta and an 18-member ministerial cabinet. Many States quickly recognized the new Government, including Panama on 18 June, Grenada on 22 June, Guyana on 5 July, Costa Rica on 18 July, Bolivia, Colombia, Ecuador, Peru and Venezuela on 19 July, the Soviet Union, the Eastern States as well as Ethiopia on 20 July, and Brazil, Cuba, Honduras, Denmark and Sweden on 23 July 1979. As regards France, for all its frequently reiterated practice of recognizing States and not governments, there can be no doubt that, as a practical matter, the French Government recognized the revolutionary junta. This may be inferred from a number of facts. Paul Fauré was sent to Managua as the French Ambassador on 23 October 1979. Earlier, the prospective recognition had been made clear by a number of actions: (*a*) the Second Secretary of the French Embassy in Mexico City had been sent to Managua to look after routine matters; (*b*) the Deputy Director for Latin America had authorized Eduardo Kuhl, the junta's ambassador-at-large with residence in Bonn, to take possession on 28 July of the Nicaraguan Embassy in Paris, which had been abandoned by its occupants; and (*c*) Alejandro Serrano Aldera had been appointed Ambassador of Nicaragua in Paris a few weeks later, on 18 August. All these events point to the conclusion drawn above. The United States, for its part, did not undertake any formal act of recognition, but it is significant that the Secretary of State, Cyrus Vance, was in Quito on 10 August 1979, where he met with representatives of the new regime, including the Minister for Foreign Affairs, who were attending the ceremonial investiture of the new President of Ecuador. This may be regarded as a case of tacit recognition (see Rousseau, *loc. cit.* (1979), pp. 1056–1057).

[158] See James Painter, "Dimisión bajo la lupa", *BBCMundo.com*, 1 March 2004.

[159] See, for example, the letter dated 11 March 2004 from the Permanent Representative of Jamaica to the United Nations addressed to the Secretary-General (A/58/731–S/2004/191).

[160] This was the case with Greece's recognition of the PLO on 16 December 1981 as having diplomatic status as the sole representative of the Palestinian people. The Head of the Greek socialist Government, Mr. Papandreou, had signalled his Government's intention of taking this step some weeks earlier, on 23 October. The Greek Government had decided to promote the PLO's information office in Athens, which had been opened in February 1981, to the rank of diplomatic representation. The PLO would have the same number of diplomats as Israel (which did not have an embassy, but only a representation), namely 12 persons. At that time, Greece was the only European Community country to grant the PLO such high status (Rousseau, *loc. cit*. (1982), p. 376). Spain's position in the matter was outlined by the Minister for Foreign Affairs in the following terms:

> "Spain has made no grandiose demagogic declarations, but it has recognized the fact that the PLO is an interlocutor for us. At this time, within the Palestinian State, it is the PLO that actually exercices what we may term the managerial and political capacity of that Palestinian State.
>
> "How have we done this? Two years ago I sent a letter to the Chief of the PLO Political Department, and a reply to that letter was received. That is, there was an exchange of letters, in the international meaning of the term. In my letter, I stated that the Spanish Government, reaffirming its traditional policy of friendship and solidarity with the Palestinian people—this was two years ago—and being convinced of the key role that the Palestine Liberation Organization must play in the search for a peaceful, just and lasting solution to the Arab-Israeli conflict, had decided, as from that date,

hood is questionable.[161] On other occasions, States have proceeded cautiously by not recognizing problematic entities,[162] or making it clear that they regard the entity in question as an integral part of some particular State. [163] In other cases, non-recognition has been the outcome of the fact that the territory concerned has been annexed, and States have wished to make it clear that they are opposed to the annexation.[164]

75. To take a different issue, recognition of a situation of belligerency constitutes another important class of unilateral act producing legal consequences, and accordingly is worth being attended to here.[165] When, for example, nationals of third countries sustain loss or damage as a result of a conflict, recognition may play a very important role. The jurisprudence has arrived at the position that, where the situation of belligerency is not recognized by the State in which the conflict is taking place: "The sovereign is responsible to alien residents for injuries they receive in his territories from belligerent action, or from insurgents whom he could control or whom the claimant government has not recognized as belligerents".[166] A number of recent cases have been identified involving the situation of belligerency and its resolution.[167]

76. The Special Rapporteur cannot claim to have exhausted the list of situations in which the issue of recognition may arise, as appears from some other examples of recent practice. [168] For example, a State's responsibility for

to formalize the status of that Organization's office in Spain. The PLO's office in Spain is on the diplomatic list, and this, to all intents and purposes, constitutes recognition of the status of the PLO as an interlocutor.

"Consequently, this special formula, recognition of the fundamental organ of the Palestinian State, serves to enable Spain to act in this case, or so I believe, in the forefront of the countries that are following the Palestine problem closely and attentively."

(*Diario de Sesiones del Senado* (1988), Third Legislature, No. 136, p. 7)

The position of the United Kingdom in this connection is noteworthy:

"The British Government support the right of the Palestinian people to establish a sovereign, independent and viable Palestinian state and looks forward to early fulfilment of this right, provided there is a concomitant recognition of Israel's right as a state, and the right of its citizens to live in peace with security."

(Marston, "United Kingdom … 2001", p. 596)

[161] This situation has arisen fairly frequently in connection with the issues of recognition of the statehood of the Saharan Arab Democratic Republic (SADR) and the People's Republic of China or Taiwan Province of China. Recognition of SADR, for example, has frequently triggered protests by Morocco, or even caused that country to break off diplomatic relations, as it did with Yugoslavia on 29 November 1984, on the grounds that such conduct was an unfriendly act (Rousseau, *loc. cit.* (1985), p. 463). Similarly, when Belize, Grenada and Liberia recognized Taiwan Province of China on 13 and 24 October 1989, the People's Republic of China broke off diplomatic relations with them on those same dates (*ibid.* (1990), p. 484). The position of the United Kingdom in the matter is quite clear, as will be seen from the answer that was given to a question asked in Parliament:

"Like most countries, we do not recognise Taiwan as an independent state. We acknowledge the position of the Chinese Government that Taiwan is a province of the People's Republic of China and recognise the Chinese Government as the sole legal government of China. Taiwan and the UK nevertheless enjoy an excellent relationship, particularly in the commercial and cultural spheres. We wish to build on that to our mutual benefit. We believe that the issue of Taiwan should be solved peacefully through dialogue by the Chinese people on the two sides of the Taiwan Strait. We are firmly opposed to the use of military means, and we make that view clear to the Chinese on every appropriate occasion."

(*Marston*, "United Kingdom … 2000", p. 538)

France does not recognize Taiwan Province of China as a State either, and a curious situation resulted when on 24 September 1978, the French Minister for Foreign Affairs confirmed that the entry visas held by a number of Taiwanese gymnasts, coming to compete at the world gymnastics championships being held in Strasbourg, France, from 22 to 29 October 1978, had not been accepted. "France," he said, "has always refused to issue entry visas to any delegation from Taiwan since the latter has withdrawn recognition from Beijing. Entry visas are issued to Taiwanese persons only on an individual basis." A few days later, the International Gymnastics Federation excluded Taiwan Province of China from membership and readmitted the People's Republic of China. (Rousseau, *loc. cit*. (1979), p. 494)

[162] In the course of a debate on the future of the Western Sahara, the British Minister of State, Foreign and Commonwealth Office, said: "We neither support the Moroccan claim to sovereignty over the territory, nor recognise the Polisario's self-proclaimed Saharwi Arab Democratic Republic." (Marston, "United Kingdom … 1998", p. 478)

[163] For example, as was emphasized in the British Parliament when the Parliamentary Under-Secretary of State, Foreign and Commonwealth Office, wrote:

"We recognise Chechnya as an integral part of the Russian Federation. The UK position is shared by our international partners. President Maskhadov was elected in 1997 in a process recognised as democratic by the Organisation for Security and Co-operation in Europe (OSCE)."

(Marston, "United Kingdom … 2000", p. 536)

In the matter of the northern part of Cyprus, the position of the United Kingdom was clearly stated by the Minister of State at a press conference held on 3 October 2000: "We have never recognised the so-called Republic of Northern Cyprus and we have no intention of doing so." (*Ibid.*, p. 539)

[164] On 14 September 1999, the Spanish Minister for Foreign Affairs, Abel Matutes Juan, informed the Spanish Congress: "Spain never recognised the annexation of Timor by Indonesia ... a territory the annexation to Indonesia of which was never recognised either by the UN or by the international community" (*Spanish Yearbook of International Law*, vol. VII (1999–2000), pp. 84–85). Despite this statement, it should be noted that on 20 January 1978, Australia had, in fact, recognized Indonesia's annexation of the eastern part of Timor (Rousseau, *loc. cit.* (1978), p. 1085).

[165] Although it may be true, as Verhoeven asserts, that this form of act has virtually disappeared, in view of the fact that States are usually very reluctant to proceed with recognition where to do so may intensify hostilities ("Relations internationales de droit privé en l'absence de reconnaissance d'un État, d'un gouvernement ou d'une situation", p. 21).

[166] Coussirat-Coustère and Eisemann, *op. cit.*, p. 310, case of *Aroa Mines (Ltd.)*, United Kingdom/Venezuela, settled by the Mixed Claims Commission in 1903 (*ibid*., p. 508).

[167] On 15 August 2002, the Minister for Foreign Affairs of Japan issued a statement on the opening of peace talks between the Government of Sri Lanka and the Liberation Tigers of Tamil Eelam (LTTE):

"The Government of Japan welcomes the fact that the Government of Sri Lanka and the Liberation Tigers of Tamil Eelam (LTTE), through the facilitation of the Government of Norway, have agreed to commence formal talks in order to resolve the ethnic conflict in Sri Lanka.

…

With a view to supporting the peace process, the Government of Japan has given its assistance to the North and East areas mainly in the field of humanitarian assistance of emergent nature. The Government of Japan will continue such assistance. Japan reiterates its readiness that once a durable peace is established, Japan will spare no efforts to extend cooperation toward the reconstruction and rehabilitation of those areas."

(www.mofa.go.jp)

[168] See the statement issued on 22 July 2003 by the Press Secretary/Director-General for Press and Public Relations, Ministry for Foreign Affairs of Japan, on the situation in the Solomon Islands:

"Japan recognizes that the Government of Solomon Islands made an official request to the Australian Government and the Pacific Islands Forum (PIF) member countries for deploying police and armed forces for the stabilization of law and order in the country, and that the Australian Government, responding to this request, decided on 22 July to dispatch police and other personnel together with other PIF member countries. Japan supports the initiative of

(*Continued on next page.*)

some particular form of conduct might be recognized.[169] In such a case, it must be asked whether recognition could be conditional, as some instances appear to suggest.[170]

77. Recognition is not restricted to a government, a State or a particular situation; it may also refer to a legal claim. In practice, this form of recognition has consisted of express acts and conduct implying a particular attitude, and consequently, as far as its effects are concerned, is similar to renunciation, where the required conditions are met.

78. There is such a thing as recognition of a State that is a party to the relationship involved and recognition of other States that are not parties to it and even the international community; this type of recognition may take the form of express acts, or it may be reflected in conduct and attitudes. In addition, the case may be considered of a State that concludes an agreement with another State, over a matter of territory, which deals with an object of which only the sovereign may dispose.[171] In the case of Delagoa (Lourenço Marques) Bay,[172] the United Kingdom granted formal, but implicit, recognition in favour of Portugal by the 1817 Treaty.[173]

79. A clear-cut example of a formal, explicit unilateral act of recognition is the Government of Colombia's recognition of Venezuela's legal and historic title to the Los Monjes archipelago by note on 22 November 1952. This was confirmed by the Minister for Foreign Affairs of Colombia before a session of that country's Senate on 3 August 1971.[174]

B. Acts by which a State waives a right or a legal claim

Waiver

80. Just as a State is free to assume obligations—as noted in the context of promise and recognition—it can also waive certain rights or claims.[175] Of course, it can waive only its subjective, current rights. But, as demonstrated in relation to promise in the events of the *Nuclear Tests* cases,[176] the same is true of waiver; notification must be given, at least to those States which may be affected by this expression of will. As a unilateral legal act (which it is), waiver may be defined as "an expression of will by which a subject of law renounces a subjective right without any intervention of will by a third party".[177] However, although possible, such acts are rare in practice; this has led one author to state that explanations of them are mostly based on deduction from other applicable rules of international law, rather than on the existence of many examples of waiver on the basis of which its specific characteristics could be established.[178]

81. Another interesting issue related to waiver is the distinction in doctrine between waivers involving abdication (through which a right is simply renounced) and those involving transfer (through which the right is transferred to another subject of international law). As Suy notes, a waiver involving abdication is any legal act through which a State merely renounces a right without stipulating that it does so in favour of another subject of law; generally speaking, the waiving State does not concern itself with the future of the rights in question. In the case of waivers involving transfer, however, the process is far more complex; it involves not only the renunciation of a right, but also its transfer to another subject.[179] Thus, the unilateral nature of the act remains somewhat questionable; in reality, the act constitutes an agreement in the strictest sense of the word.[180]

(*Footnote 168 continued.*)

the PIF member countries based on the request made by the Government and the National Parliament of Solomon Islands since the recovery of the law and order of Solomon Islands is important for the peace and stability in the region."

(www.mofa.go.jp)

[169] An example is Chile's conduct in the *Carmelo Soria Espinoza* case. The Chancellery informed the Inter-American Commission on Human Rights (IACHR) that the Chile had reached agreement with the family of Carmelo Soria Espinoza, as a result of which the case brought by that family before IACHR was then resolved. Following negotiations between the parties, an agreement had been reached which put an end to the dispute. The Soria family accepted the symbolic reparation measures offered by Chile, consisting of: a public declaration by the Government of Chile recognizing the responsibility of the State, through the action of its agents, for the death of Mr. Carmelo Soria Espinoza; the declaration included an offer to erect a monument of remembrance to Mr. Carmelo Soria Espinoza in a location designated by his family in Santiago. Chile undertook to pay a lump sum of US$ 1.5 million as compensation to the family of Mr. Carmelo Soria Espinoza, which payment will be made *ex gratia* through the offices of the Secretary-General of the United Nations. The Government of Chile would present before the Chilean courts an application to reopen criminal proceedings that had been initiated to prosecute those who killed Mr. Carmelo Soria Espinoza (*Annual Report of the Inter-American Commission on Human Rights 2003*, report No. 19/03, case 11.725 (Chile) (OEA/Ser.L/V/II.118, Doc. 5 rev. 2)).

[170] The promise made by Saudi Arabia to Israel in 2002—recognition and normalization of relations with Israel—was conditional on effective Israeli withdrawal from the occupied territories. Prince Abdullah bin Abdul Aziz declared that they were offering full normalization of relations, including recognition of the State of Israel, if Israel withdrew completely from all the occupied territories, in accordance with United Nations resolutions, including Jerusalem.

[171] Kohen. *Possession contestée et souveraineté territoriale*, p. 327.

[172] Award on the claims of Great Britain and Portugal to certain territories formerly belonging to the Kings of Tembe and Mapoota, on the eastern coast of Africa, including the islands of Inyack and Elephant (Delagoa Bay or Lorenzo Marques), decision of 24 July 1875, *British and Foreign State Papers, 1874–1875*, vol. LXVI, p. 554.

[173] Additional Convention between Great Britain and Portugal, for the prevention of Slave Trade (London, 28 July 1817), *ibid., 1816–1817*, vol. IV, p. 85. See also Kohen, *op. cit*., p. 328.

[174] Rojas Cabot and Viña Laborde, *Al otro lado del Golfo, Colombia refuta a Colombia*, pp. 293 *et seq*.

[175] The term "waiver" has been defined, for example, by Jacqué (*Éléments pour une théorie de l'acte juridique en droit international public*., p. 342), as "an act through which a subject of international law voluntarily relinquishes a subjective right".

[176] *Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 253; *ibid. (New Zealand* v. *France)*, p. 457.

[177] Suy, *op. cit*., p. 156.

[178] Degan, "Unilateral act as a source of particular international law", p. 221.

[179] *Op. cit*., p. 155.

[180] One example of this situation is Mauritania's waiver of its claims to Western Sahara on 5 August 1979. An agreement signed by Mauritania and the Frente Polisario states that the "Islamic Republic of Mauritania solemnly declares that it does not have and will not have any territorial or other claims on Western Sahara" (*Official Records of the Security Council, Thirty-fourth Year, Supplement for July, August and September 1979*, document S/13503, annex I, pp. 111–112). In reality, this waiver is formalized in an international agreement, although one of the parties thereto is not a "State" as such (see also *Keesing's Contemporary Archives*, vol. XXV (1979), p. 29917). The United States' waiver of its claim of sovereignty over 25 Pacific islands is an example

82. However, the international situation is far more complex than can be conveyed by any attempt to distinguish between waivers involving abdication and those involving transfer, as seen from the following example: on 31 July 1988, King Hussein of Jordan announced that he was breaking the legal and administrative ties between Jordan and the West Bank. The Hashemite monarch had affirmed his desire to bow to the will of the PLO as the sole legitimate representative of the Palestinian people and to the stated wish of the Arab Heads of State to promote Palestinian identity. With an area of 5,878 km^2 and 900,000 inhabitants, the West Bank had been part of the Hashemite Kingdom from 1950 until its occupation by Israel in 1967. In reality, this was a renunciation of a territory which Jordan did not, *de facto*, hold because it was occupied by another State; the waiver was presumably made with the intent that the Palestinian people living there should ultimately achieve statehood.[181]

83. Some authors provide various examples of cases which were settled by arbitral and judicial courts in which, as a general rule, a State is not presumed to have waived its rights.[182] For example, in the *Closure of the Port of Buenos Aires* case (Argentina *v.* United Kingdom),[183] which concerned Argentina's right to raise a claim, the President of Chile, in the award of 1 August 1870, said that the fact that a party had not reserved for itself a right did not mean that it had abandoned it. In the *Campbell* case of 10 June 1931 (United Kingdom *v.* Portugal), the arbitrator, Count Carton de Wiart, said in regard to the abandonment of the lease of a mining concession that renunciation is never presumed.[184] In the case of the Swedish motor ship "*Kronprins Gustaf Adolf*" (Sweden *v.* United States) of 18 July 1932, the arbitrator Eugène Borel said that "[a] renunciation to a right or a claim is not to be presumed. It must be shown by conclusive evidence, which in this case does not exist".[185] This position, although in a different context, was also taken in the *"Lotus"* case (France *v.* Turkey) of 7 September 1927, in which PCIJ stated that: "Restrictions upon the independence of States cannot ... be presumed."[186] In a more recent example, that of the *Nottebohm* case of 6 April 1955, ICJ had to decide whether waivers must be explicit in nature:

> It would constitute an obstacle to the opening of negotiations for the purpose of reaching a settlement of an international dispute or of concluding a special agreement for arbitration ... to interpret an offer to have recourse to such negotiations or such means, consent to participate in them or actual participation, as implying the abandonment of any defence which a party may consider it is entitled to raise or as implying acceptance of any claim by the other party, when no such abandonment or acceptance has been expressed and where it does not indisputably follow from the attitude adopted.[187]

84. Doctrine has also supported the idea that waivers must be explicit, invoking the ICJ decision of 27 August 1952 in the *United States Nationals in Morocco* case.[188] A restrictive interpretation is called for: silence or acquiescence is not considered sufficient for a waiver to produce effects. In any event, a tacit waiver is deemed acceptable only where it arises from acts which are, or at least appear to be, of an unequivocal nature.[189]

85. However, some doubt arises if certain assumptions made in practice in connection with the exercise of jurisdiction over a territory are considered. In many such

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of a similar form of waiver. On 20 May 1980, the State Department officially announced that the United States had waived its claim of sovereignty over 25 islands in the Central and South Pacific: (*a*) the Gilbert Islands, which had been known as Kiribati since July 1979; (*b*) the Ellice Islands, which had declared their independence in 1978 as Tuvalu; (*c*) the 14 islands of the Phoenix group; (*d*) the Canton and Enderbury Islands, which had been jointly administered by the United Kingdom and the United States under an exchange of notes dated 6 April 1939; (*e*) four atolls which formed part of the Cook Islands; and (*f*) three atolls which formed part of the Tokelau group and belonged to New Zealand (Rousseau, *loc. cit*. (1980), p. 1101). In fact, this notification was later amplified when, on 22 June 1983, the United States Senate adopted four treaties renouncing all United States claims of sovereignty over 25 islands in the South Pacific. This is clear evidence that territorial waivers are now generally made in writing through conventions, thereby providing an authoritative record of the resulting international situation. Under the first of the aforementioned treaties, concluded with New Zealand, the United States waived its territorial claims to Tokelau, an island north of the 10th parallel, while confirming its sovereignty over the Swains Islands. The second treaty established the maritime boundaries between the United States territory of Samoa and the Cook Islands: longitude 165° west. The third treaty ceded four islands (the Ellice Islands) in the archipelago of Tuvalu, north of the Fiji Islands. The fourth treaty ceded 14 islands, formerly known as the Gilbert Islands, located north of Tuvalu, to Kiribati (*ibid*. (1984), p. 234).

[181] Between 9 and 16 August 1988, as a consequence of its waiver of territorial claims to the West Bank, Jordan officially dismissed over 21,000 Palestinian civil servants in the territory occupied by Israel, including 5,200 Palestinian civil servants who had been recruited by Jordan prior to June 1967 and 16,105 more who had been employed prior to that date but did not, in fact, have the status of civil servants. On 20 August 1988, the West Bank adopted a series of measures establishing the new status of the inhabitants, who would henceforth be considered Palestinian rather than Jordanian citizens; this resolved the issue of relations between the two banks of the Jordan (Rousseau, *loc. cit.* (1989), pp. 141–142).

[182] See Degan, *op. cit*., pp. 321–322.

[183] *Ibid*. See also *British and Foreign State Papers,1872–1873*, vol. LXIII, p. 1173.

[184] See Degan, *op. cit*., p. 321. "It is a matter of principle, accepted in the law of all countries, that there can never be a presumption of waiver and that, as waivers constitute the renunciation of a right, an option or even a hope, they must always be interpreted in the narrowest sense ... even if we accept that waivers may be tacit, only facts which do not lend themselves to any other interpretation in the context of the situation may be deduced therefrom" (UNRIAA, vol. II (Sales No. 1949.V.1), p. 1156).

[185] *Ibid*. See also UNRIAA (footnote 184 above), p. 1299.

[186] *"Lotus", Judgment No. 9, 1927, P.C.I.J., Series A, No. 10*, p. 18. See also Degan, *op. cit*., p. 321.

[187] *Nottebohm, Second Phase, Judgment, I.C.J. Reports 1955*, pp. 19–20. See also Degan, *op. cit*., p. 322.

[188] *Rights of Nationals of the United States of America in Morocco, Judgment, I.C.J. Reports 1952*, p. 176. In this regard, Bentz has stated that "[a] rule of international law established in the interests of the community of nations cannot be waived" ("Le silence comme manifestation de volonté en droit international public", p. 75), but some authors, such as Jacqué (*op. cit*., p. 342), have maintained that a waiver may arise either from an explicit manifestation of will or from a series of acts from which it can be deduced conclusively. However, this position does not appear to have received much support from doctrine because of the evidential problems involved.

[189] In the *Free Zones of Upper Savoy and the District of Gex* case, at the public session of PCIJ on 26 April 1932, the French Government's representative maintained that "with respect to tacit waiver, as a matter of principle, a right cannot easily be presumed to have been waived; the concept of waiver comes into play only where unequivocal acts are involved" (*P.C.I.J., Series C, No. 58, p. 587*). See also Kiss, *op. cit*., vol. I, p. 644).

cases, the idea of effectiveness prevails (see the *Island of Palmas*[190] and the *Temple of Preah Vihear* cases[191]).

86. The principle that waiver may never be presumed is deduced from international practice; it is also a principle of law recognized by almost all States.[192]

87. International practice offers occasional cases involving waiver of interest payments on previously contracted debts. For example, in its decision of 11 November 1912 in the *Russian Indemnity* case between Russia and Turkey, the Permanent Court of Arbitration rejected Russia's attempt to change its position once the debt had been paid, on the understanding that Russia had waived the interest payments.[193] In many of these cases, as demonstrated above in the discussion of "promise", a promise of cancellation of a debt is equivalent to a waiver. In this instance, it does not matter what type of unilateral act is involved; what matters is that it is indeed a unilateral act which may give rise to the legal consequences produced by such acts.

88. Another example of waiver is the decision to discontinue the proceedings in a State prosecution (for example, the waiver of appeal against the British Government's decision not to extradite General Pinochet to Spain).[194]

C. Acts by which a State reaffirms a right or a legal claim

1. Protest

89. As Suy notes, a simple perusal of the newspapers suggests that States often lodge protests against violations of their rights or actions by third parties which they view as unwarranted interference in their affairs.[195] Venturini defines protest as "a declaration of the intent not to recognize a given claim as legitimate or, in any event, to challenge the validity of a given situation".[196] Even greater weight is attached to the definition provided by MacGibbon, for whom:

> A protest constitutes a formal objection by which the protesting State makes it known that it does not recognize the legality of the acts against which the protest is directed, that it does not acquiesce in the situation which such acts have created or which they threaten to create, and that it has no intention of abandoning its own rights in the premises.[197]

90. Protest has exactly the opposite effects to recognition.[198] "Its purpose is to prevent a situation from becoming opposable to a State which protested against it, and may thus deprive it of any legal effect."[199]

91. It is clear from this that protest must be reiterated and, as indicated by jurisprudence, followed where circumstances permit by decisive action, such as an appeal before an organ of an international organization[200] or a similar court,[201] although such extremes are not necessary for the protest to produce effects. In reality, in order for protest to actually produce effects, it must not only be explicit, but expressed in an active, reiterated manner; in short, it must be clearly enunciated since, in many cases, its effects are contingent on the force and determination with which it was made.[202]

92. Protest can have, in particular, a negative effect on the formation of historic titles, such as acquisitive prescription, or of extinctive prescription; it has a paralyzing effect, since it interrupts the lapse of time which is

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[190] UNRIAA (see footnote 184 above), p. 829.

> "In view of the condition formulated in the Award in the *Island of Palmas Arbitration*—that effectiveness is, and since the nineteenth century has been, necessary for the maintenance of a title by occupation—failure to protest against competing acts of sovereignty, openly performed, might suffice to indicate that the requisite degree of effectiveness in maintaining the title was not being shown."

(MacGibbon, "The scope of acquiescence in international law", p. 168).

[191] *Temple of Preah Vihear, Merits, Judgment, I.C.J. Reports 1962*, p. 23.

[192] See Suy, *op. cit*., p. 163.

[193] It was established in this case involving the Russian Imperial Government and the Sublime Porte that Russia had waived its interests since its Embassy had accepted without discussion or reservation and, on many occasions, had reproduced in its own diplomatic correspondence an outstanding total balance in an amount equal to the outstanding principal balance. Once the entire amount of the loan had been repaid or made available, the Russian Imperial Government could not legitimately reject, on a unilateral basis, an interpretation which had been accepted and implemented in its name by its Ambassador (UNRIAA, vol. XI (Sales No. 1961.V.4), p. 446).

[194] Spain's waiver of appeal against the British Government's decision not to extradite General Pinochet on humanitarian grounds. On 17 January 2000, the Office of Diplomatic Information of the Spanish Ministry for Foreign Affairs issued the following communiqué:

> "The Spanish Ambassador has also been instructed to reiterate to the Home Office the decision taken by Spain not to file any sort of appeal against the eventual decision taken by the Home Office in the extradition process of Senator Pinochet."

(*Spanish Yearbook of International Law*, vol. VII (1999–2000), p. 96)

The Office of Diplomatic Information made a similar statement on 26 January 2000:

> "This Ministry of Foreign Affairs ... has simply reiterated on a number of occasions that it is the firm decision of the Spanish Government to abstain from appealing a possible government decision taken by the British Home Office that could bring a definitive halt to the extradition process of Senator Pinochet.
>
> "...
>
> "It has simply formally reiterated its decision not to file an appeal."

(*Ibid*., p. 97)

[195] *Op. cit*., p. 47.

[196] "The scope and legal effects of the behaviour and unilateral acts of States", p. 433.

[197] "Some observations on the part of protest in international law", p. 298.

[198] Charpentier considers that protest is the opposite, not of recognition, but of notification; he adds that "protests do not of themselves produce effects unless they constitute official notification of a refusal to accept a given claim" ("Engagements unilatéraux et engagements conventionnels: différences et convergences", p. 368).

[199] Degan, *op. cit*., p. 346.

[200] Suy presents various examples of notes of protest addressed to the Security Council; furthermore, when a protest is sent to an international organization, it is also often sent to the party against which it is directed (usually the State which is the subject of the protest); see Suy, *op. cit*., pp. 59–60.

[201] See Cahier, "Le comportement des États comme source de droits et d'obligations", p. 251. As an example of jurisprudence on this issue, he mentions the *Chamizal* case (UNRIAA (see footnote 193 above), p. 309) and the individual opinion of Judge Levi Carneiro in *Minquiers and Ecrehos, Judgment, I.C.J. Reports 1953*, p. 108.

[202] Where this is not the case, it does not produce the desired effects: "If the protest is an isolated one, it is presumed that the protester did not have the real will to oppose the allegedly unlawful situation" (Suy, *op. cit*., p. 79).

deemed necessary for an adverse possession to transform into a valid, conclusive title for all purposes. What happens is that there is really no rule of international law which establishes the length of time required in order for prescription—whatever its nature—to produce full effect. As Venturini notes, its function in international law is replaced by other legal institutions "which follow the general principle of effectiveness, according to which any *de facto*, stable, well-known and uncontested situation eventually acquires legal validity".[203]

93. This unilateral act has as its primary purpose the preservation of the rights of the protesting State. It can be expressed by oral or by written statements of competent organs, and communicated, either directly or through intermediaries, to another State or States which may be affected by it.[204] However, as Suy notes, such protests may also be inferred from certain implicit acts, such as bringing a dispute before the Security Council or the General Assembly, initiating an arbitral proceeding or bringing a case before ICJ, breaking off diplomatic relations or expelling the members of a mission, or taking measures such as retorsion, reprisals or self-defence, if these acts were undertaken in protest against an unlawful act by another State.[205] Furthermore, the protest is generally addressed to a specific party and is confined to a specific issue, except in situations which may be defined as "breaches of international obligations having serious consequences for the international community as a whole"[206] or "serious breaches of obligations under peremptory norms of general international law".[207]

94. ICJ had occasion to consider the concept of protest in the *Fisheries* case,[208] in which it stressed that a protest must be lodged with a certain immediacy and with the intent to prevent the unilateral act being opposed from achieving recognition. This view was reiterated in the *Land, Island and Maritime Frontier Dispute* case.[209] The strength of its arguments is usually one of the factors which allows a protest to produce its full effect; this is, in a sense, a logical circumstance based on the nature of things, since, if the intent of the protest is to prevent a given act, conduct or situation from producing effects in respect of the protesting State, its terms must be absolutely clear so that third parties will have no doubts as to the position adopted by that State with regard to the act against which it is protesting. In that respect, practice reveals many examples of every kind, as may be seen from the preceding attempts at a definition of this unilateral act.

(a) *Protest against acts contrary to international law*

95. Certain cases are illustrative of these unilateral acts, although not all are juridical according to the Special Rapporteur's definition. Some acts of States, those that could be regarded as protests, will simply be looked at and a basic classification of them will be attempted. First to be considered will be protests against a prior act of a State which, in the judgement of the protesting State, breaches a previous international agreement or is generally contrary to international law, or is even considered to be merely disproportionate.[210]

96. A note handed to the German Government by the French Ambassador in Berlin on 21 March 1935 expressed the French protest against the attitude of Germany as being contrary to various international treaties preventing or restricting the country's rearmament:

> The Government of the Republic is obliged to protest in the most formal manner against these measures, concerning which it now expresses the gravest reservations.
>
> ...
>
> Being determined, for its part, to seek every possible means of international cooperation to dispel this sense of disquiet and to preserve the peace of Europe, it wishes to reaffirm its respect for treaty law and its firm resolve that unilateral decisions made in defiance of international commitments shall not be accepted in negotiations.[211]

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[203] *Loc. cit*., p. 393.

[204] In one such case, on 23 September 1999, the Spanish Minister for Foreign Affairs cancelled a scheduled meeting with the Permanent Representative of Yugoslavia to the United Nations in protest against a Yugoslavian court's charge against the outgoing NATO Secretary-General (REDI, vol. LII, No. 1 (2000), p. 105).

[205] *Op. cit*., p. 49–52. However, the "implicit" character of the protest which may be inferred from some of these acts, realistically speaking, is somewhat unusual (*ibid*., p. 53).

[206] This is not the time to reopen each and every one of the discussions which, beginning with the debate on the concept of "international crime" in former article 19 under part one of the draft articles on State responsibility, prepared by the Commission and later modified owing to serious reservations regarding draft chapter III, led to the adoption of this language in the summer of 2000. In that regard, see the fourth report on State responsibility by Mr. James Crawford (*Yearbook … 2001*, vol. II (Part One), document A/CN.4/517 and Add.1), and, in particular, paragraphs 43–53 thereof.

[207] General Assembly resolution 56/83 of 12 December 2001, annex. These words echo the title of chapter III of the draft articles on responsibility of States for internationally wrongful acts.

[208] *Fisheries, Judgment, I.C.J. Reports 1951*, p. 116. The Court stated (pp. 131 and 138): "In any event, the ten-mile rule would appear to be inapplicable as against Norway inasmuch as she has always opposed any attempt to apply it to the Norwegian coast ... [T]he Court is bound to hold that the Norwegian authorities applied their system of delimitation consistently and uninterruptedly from 1869 until the time when the dispute arose."

[209] *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening), Judgment, I.C.J. Reports 1992*, p. 351.

> "The Chamber considers that this protest of Honduras, coming after a long history of acts of sovereignty by El Salvador in Meanguera, was made too late to affect the presumption of acquiescence on the part of Honduras. The conduct of Honduras vis-à-vis earlier *effectivités* reveals an admission, recognition, acquiescence or other form of tacit consent to the situation. Furthermore, Honduras has laid before the Chamber a bulky and impressive list of material relied on to show Honduran *effectivités* relating to the whole of the area in litigation, but fails in that material to advance any proof of its presence on the island of Meanguera."

(*Ibid*., p. 577, para. 364)

[210] An example of this latter category occurred in early November 2003 with the closure of the border between Spain and the United Kingdom in Gibraltar, owing to the risk of infection from a virus which had been brought to the Rock by the vessel *Aurora*. The British Foreign Secretary made a formal protest, in the following terms:

> "I regret the action taken by the Spanish Government, which is unnecessary and disproportionate. There have been active discussions over the weekend with the Spanish Government and the decision made by the operator of this cruise liner to withhold the passports of those who go on to the shore in Gibraltar is a perfectly adequate safeguard to ensure that none of these people can actually go through the border control in to Spain. So the action is unnecessary and unwelcome."

(www.nationalarchives.gov.uk)

[211] Text reproduced by Kiss, *op. cit*., vol. I, pp. 15–16.

97. The protest by China, in its statement of 21 June 1980, against sales of arms to Taiwan Province of China by the United States, has been regarded as the most severe issued by the Government in Beijing since the recognition of the Government of Beijing by the United States of 15 December 1978.[212] In the course of 1982 there was a further series of protests by China against the attitude of the United States to this matter. An attempt was made to resolve the problem through a joint communiqué published in Washington, D.C., and Beijing on 17 August 1982, declaring the intention of the United States Government not to continue a long-term policy of selling arms to Taiwan Province of China, and to cut back supplies drastically. The sales which followed prompted a reaction from China, in the form of a protest on 24 July 1983. On 20 June 1984 the Chinese Government made a fresh protest, against the supply of United States military transport aircraft to Taiwan Province of China.[213] In early 2001 the United States declared that it would give military assistance to Taiwan Province of China, resulting in a protest by China.[214]

98. In fact, the ambiguous situation of Taiwan Province of China tends to excite angry protests from China whenever third States act in a manner which can be construed as recognition, or a step towards it. This is the thrust of the protest by the Chinese Government on 15 October 1980 against the signing of an agreement between the United States and Taiwan Province of China providing for the grant of certain privileges and immunities to their respective representatives. China perceives this agreement as a flagrant breach of the agreements entered into by the Government of the United States since the latter's recognition of China on 15 December 1978, and the establishment of diplomatic relations between the two States. This protest was conveyed by one of the Chinese deputy Ministers for Foreign Affairs to the United States Ambassador in Beijing.[215] In this connection, mention may be made of the protest of the Chinese Government, on 26 March 1982, against certain provisions of the United States Immigration Act of 29 December 1981. The protest was particularly aimed at the clause permitting the issue of 20,000 visas a year to immigrants from mainland China, and the same number to immigrants from Taiwan Province of China. The Beijing Government took the view that this measure was equivalent to treating Taiwan Province of China as a State or as an independent entity, contrary to the undertakings between the two States.[216]

99. Again in respect of Taiwan Province of China, diplomatic relations between China and the Netherlands were downgraded as from 20 January 1981 to the level of chargé d'affaires, in consequence of the sale of two submarines by the Government of the latter country to the authorities in Taiwan Province of China. The Chinese Government issued a protest against the sale of the submarines, stating that it not only created obstacles to a peaceful reunification of Taiwan Province of China with mainland China, but also undermined peace and stability in the region.[217]

100. A further protest ensued from China "when the new President of Taiwan Province of China visited the United States. Beijing expressed its opposition to the visit, claiming that the authorities of Taiwan Province of China were using it to carry out separatist activities".[218]

101. The invasion of Afghanistan by the Soviet Union resulted in numerous protests. The Special Rapporteur notes in particular the force of the language used in the statement issued on 23 June 1980 by the Group of Seven (G7) Summit (Canada, Federal Republic of Germany, France, Italy, Japan, United Kingdom, United States):

> We therefore reaffirm hereby that the Soviet military occupation of Afghanistan is unacceptable now and that we are determined not to accept it in the future. It is incompatible with the will of the Afghan people for national independence, as demonstrated by their courageous resistance, and with the security of the States of the region.[219]

102. On 30 July 1980 the Parliament of Israel adopted the basic law proclaiming the reunification of Jerusalem, now to be called the eternal capital of Israel, and arranging for the transfer of national institutions. This caused numerous hostile reactions. For example, on 31 July 1980 the Government of the Federal Republic of Germany declared that the adoption of the law was contrary to international law and to United Nations resolutions. On the same day, the French Ministry for Foreign Affairs deplored what it described as "a unilateral decision which is part of a whole collection of measures aiming to challenge the status of Jerusalem". A communiqué from the State Department of the United States declared that the United States considered unilateral acts purporting to modify the status of Jerusalem outside the framework of a negotiated settlement to be without effect. In addition, the States which had diplomatic missions established in Jerusalem announced that they had decided to transfer them to Tel Aviv.[220]

103. Egypt's protest against Israel's plan to build a canal linking the Mediterranean with the Dead Sea was based on the argument that the projected canal, which began in the Gaza Strip and transected part of the occupied West Bank, was contrary to the spirit and letter of the Camp

[212] According to the statement, while claiming that it would not do anything to endanger the process of rapprochement between continental China and Taiwan Province of China, the United States Government was sending huge quantities of weapons to Taiwan Province of China. The protest went on to state that such discrepancy between words and deeds was an example of bad faith in international relations, and that it was obvious that continuing to sell increasing quantities of arms to Taiwan Province of China was a breach of the principles enshrined in the agreement on the establishment of diplomatic relations between China and the United States and adversely affected the normal development of Sino-American relations. Certainly the Chinese people could not remain indifferent to that situation (Rousseau, *loc. cit*. (1981), p. 119).

[213] See Rousseau, *loc. cit*. (1983), p. 839, and (1985), p. 124.

[214] On 23 April 2001, Washington agreed to sell Taiwan Province of China much of the weaponry it had asked for (destroyers, patrol aircraft, helicopters, artillery, surface-to-air missiles). The United States Administration played down the scale of this transaction, claiming it was made under the Taiwan Relations Act, which requires the United States to secure the defence of the island (RGDIP, vol. CV (2001), p. 735.

[215] See Rousseau, *loc. cit.* (1981), p. 389.

[216] *Ibid.* (1982), pp. 781–782.

[217] *Ibid*. (1981), pp. 545–546.

[218] RGDIP, vol. CIV (2000), p. 1012.

[219] United States, Department of State, *Bulletin*, No. 2041 (August 1980). See also Rousseau, *loc. cit.* (1980), p. 845.

[220] Rousseau, *loc. cit.* (1981), pp. 182–183.

David agreements and an obstacle to peace.[221] The British Minister of State, when asked to comment, replied: "The project as planned is contrary to international law, as it involves unlawful works in occupied territory and infringes Jordan's legal rights in the Dead Sea and neighbouring regions. No official support will be given by Her Majesty's Government in respect of the project."[222]

104. On 15 June 1981, one day after elections had been held by direct universal suffrage in the eastern sector of Berlin at the instigation of the Soviet Government, France, the United Kingdom and the United States transmitted a protest to that Government through their ambassadors in Moscow. The Western States took the view that the new electoral procedure was an endeavour to make East Berlin an integral part of the Democratic Republic of Germany, contrary to the Quadripartite Agreement of 3 September 1971.[223]

105. A protest was sent to the Ambassador of the Soviet Union in Rome by the Italian Minister for Foreign Affairs as a consequence of what Italy regarded as an unacceptable violation of its territorial waters in the Gulf of Tarento by a Soviet submarine on 24 February 1982.[224]

106. A protest note was sent by the Swedish Prime Minister to the Soviet Ambassador in Stockholm as a consequence of incursions by Soviet submarines into Swedish waters in March, April, May and July of 1983, which were construed as a violation of Sweden's territorial integrity and a form of espionage.[225]

107. Third States took action with respect to the mining of ports in Nicaragua by the United States. Several States protested and declared their concern at the measures taken by the Central Intelligence Agency (CIA) relating to the mining of Nicaraguan ports; among them were the Governments of the Federal Republic of Germany, France, Japan, Mexico, the Netherlands and the United Kingdom. On 8 April 1984 the four States members of the Contadora Group published a joint statement condemning the action, which had also been criticized by the Ministers for Foreign Affairs of the member States of the European Economic Community.[226]

108. On 18 March 1986 the Soviet Government protested against the violation of its territorial waters by two United States warships.[227]

109. A protest was transmitted to the Soviet Union by Japan as a consequence of the violation of its airspace by a Soviet bomber aircraft. This was the twentieth incursion by a Soviet aircraft into Japanese airspace in the course of 1987. On 27 August 1987 Moscow had made excuses, promising that there would be no more violations of Japan's airspace in future.[228]

110. A protest was issued by the United States in consequence of the destruction by Cuban aircraft, on 24 February 1996, of two civilian planes (belonging to Brothers to the Rescue) which carried United States registration. The following day, the United States Permanent Representative to the United Nations convened an emergency session of the Security Council, and the President immediately decided "to condemn the Cuban action and to present the case for sanctions on Cuba until it agrees to abide by its obligation to respect civilian aircraft and until it compensates the families of the [four] victims".[229]

111. There were also protests against the attacks carried out by the United States against Afghanistan and the Sudan, in response to the bombing of the United States embassies in Dar es Salaam and Nairobi on 7 August 1998. According to the protest by the Sudan, the attacks were an "iniquitous act of aggression which is a clear and blatant violation of the sovereignty and territorial integrity of a Member State of the United Nations, and is contrary to international law and practice, the Charter of the United Nations and civilized human behaviour".[230]

112. Protests by States followed almost immediately upon the attacks carried out on Yugoslavia in 1999 by NATO. Austria closed its airspace to NATO military flights. The Russian Federation recalled its Ambassador to NATO and condemned the attacks, arguing that regional organizations should take action to restore peace and security only under the express authority of the Security Council; for the same reason, Belarus, China, Cuba, India and Ukraine joined with the Russian Federation in condemning the attacks.[231]

113. Also in connection with actions in the former Yugoslavia, China protested against the attack by NATO forces on the Chinese Embassy in Belgrade on 7 May 1999, which caused the death of three Chinese nationals and injured about 20 others.[232]

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[221] *Ibid*., pp. 866–867.

[222] Marston, "United Kingdom … 1981", p. 467. On 4 December 1981, the United Kingdom delegate, speaking in the Special Political Committee of the General Assembly, echoed the position of the Community partners on this question:

> "The proposed canal can in no way be considered an act of mere administration. In addition the Ten believe that the project as planned could serve to prejudice the future of Gaza which should be determined as part of a general peace settlement. In the circumstances the Ten wish to reiterate their opposition to the project."

(*Ibid*., p. 516).

[223] See Rousseau, *loc. cit*. (1982), p. 120.

[224] *Ibid*., p. 598.

[225] *Ibid.* (1983), p. 900.

[226] *Ibid*. (1984), pp. 669–670.

[227] *Ibid*. (1986), pp. 657–658.

[228] *Ibid.* (1988), p. 402.

[229] Nash Leich, *loc. cit*. (1996), p. 449.

[230] S/1998/786, annex, para. 2. See also S/1998/792, S/1998/793 and S/1998/801, letters from the Permanent Representative of the Sudan to the United Nations addressed to the President of the Security Council on 22–24 August 1998. A spokesman for the Taliban also protested against the missile attacks, as did the Islamic Republic of Iran, Iraq, the Libyan Arab Jamahiriya, Pakistan, the Russian Federation and Yemen, Palestinian officials and certain Islamic militant groups. The secretariat of the League of Arab States condemned the attack on the Sudan as a violation of international law, but was silent as to the attack on Afghanistan. Other States, however, expressed support, or at least understanding, of the attacks: these included Australia, France, Germany, Japan, Spain and the United Kingdom (see Murphy, *loc. cit*. (1999), pp. 164–165).

[231] Murphy, *loc. cit*. (1999), p. 633, and (2000), p. 127.

[232] *Ibid*. (2000), p. 127.

114. A note verbale of protest was transmitted by Spain through its Embassy as a consequence of an incident on 4 September 1988 involving a Spanish citizen on a tourist visit to Cuba, who was expelled from the country without being allowed by the Cuban authorities to make contact with the Spanish Embassy.[233]

115. A protest was conveyed to Mexico by Spain as a result of the detention of Angeles Maestro Martín, a Spanish member of Parliament, by the Mexican police on 9–10 October 1994.[234]

116. The events following upon the invasion of Kuwait by Iraq sparked off numerous protest actions by Spain, relating to various situations. It is interesting to consider these protests and the manner in which each of them is expressed, depending on the addressee. For example, the Office of Diplomatic Information registered a protest on 22 January 1991 against the treatment by the Iraqi Government of soldiers taken prisoner who were nationals of the States which had deployed military contingents in the zone since 16 January 1991. In this missive, the Spanish Government

> vigorously condemns the inhumane treatment meted out by Iraq to prisoners of war from the multinational forces, and the manipulative way in which they have been displayed to the media while threatening to use them as human shields in military installations, all such conduct being a flagrant violation of international law and of elementary rules of humane conduct.[235]

117. The Spanish Government expressed its condemnation of the bombing of civilian targets in Baghdad by the States cooperating with Kuwait, which had resulted in many civilian deaths. For this purpose, the President of the Spanish Government transmitted a personal letter to the President of the United States, explaining the Spanish position:

> [T]he Executive is convinced of the firm determination of the international coalition to avoid causing human victims and casualties among the civilian population, and therefore suggests that an investigation should be opened to elucidate the facts concerning the bombardment of the Iraqi shelter.
>
> …
>
> The Spanish Government takes the view that aerial actions by the international coalition against Baghdad and other cities should be brought to an end, and military efforts should be focused on the operational zones around Kuwait.[236]

118. In fact, in this latter example the protest is somewhat muted by comparison with the forceful language in which protests are usually expressed, this being a direct consequence of the particular stance taken by Spain in this case. This stance is in stark contrast with the language used in Spain's severe condemnation of the treatment by Iraq of nationals of Western States, including Spanish nationals, who were on its territory or on that of Kuwait:

> Spain reiterates its continuing concern at the fact that the Iraqi authorities continue to refuse permission for citizens of Spain and nationals of other countries who are in Kuwait and Iraq to leave.
>
> The Government rejects the Iraqi practice of isolating nationals of certain countries and requests that the confinement of these innocent persons be immediately brought to an end.[237]

119. A statement was issued on 3 May 1991 by the 12 European Community partners, in the context of European political cooperation, to clarify their position on the policy of new Israeli settlements in the occupied Arab territories (this, being a protest, also implies a refusal by the Community partners to recognize this policy as lawful). In this statement, the Community and its member States deplored the fact that Israel had allowed the new settlements, considering that the establishment of any new Israeli colony in the occupied territories was unlawful in any event, and was especially harmful at a time when all parties should be displaying flexibility and realism in order to create a climate of confidence which would enable negotiations to begin. The Community and its member States urged Israel not to allow or encourage the establishment of settlements in the occupied territories.[238]

120. A formal protest was transmitted by the Spanish Minister for Foreign Affairs to the French Ambassador on 21 November 1996, because of the damage caused by the French lorry drivers' strike. The Office of Diplomatic Information issued a communiqué on this subject on 28 November, and a draft law was prepared and approved by the Committee on Foreign Relations of the Congress on 8 May 1997.[239]

121. Numerous protests have been made by various States over the past years with regard to the actions that Israel is taking against Palestine. One example is the statement in which the Ministry for Foreign Affairs of Cuba expressed extremely strong condemnation of the aggressive action by the army and the Government of Israel against the Palestinian population and demanded an immediate cessation of the violence, which had turned the Occupied Palestinian Territory illegally occupied by Israel into nothing more nor less than a theatre of war, where not even the most basic rules of international humanitarian law were respected (12 April 2001).

(b) *Protests to prevent the consolidation of an existing situation*

122. A statement by France, issued to the press on 10 June 1917, contained a strong protest against the disposal of French private property by Germany in the occupied countries and Alsace Lorraine.[240]

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[233] *Boletín Oficial de las Cortes Generales*, Senate, series I (1988), Third Legislature, No. 253, p. 10594, and REDI, vol. XLI, No. 1 (1989), p. 189.

[234] Spain protested both against the detention itself and against the fact that the member of Parliament was not allowed to contact the Spanish Embassy in spite of requesting permission to do so (Cortes Generales, *Diario de Sesiones del Congreso de los Diputados* (1994), Fifth Legislature, No. 396, p. 12224, and REDI, vol. XLVII, No. 2 (1995), p. 142).

[235] REDI, vol. XLIII, No. 1 (1991), p. 139.

[236] *Ibid*., p. 139.

[237] *Ibid*., p. 140.

[238] See *Bulletin of the European Communities*, vol. 24, No. 5 (1991), p. 83.

[239] See *Boletín Oficial de las Cortes Generales*, Congress, Sixth Legislature, series D (1997), No. 144, p. 3, and REDI, vol. XLIX, No. 2 (1997), p. 83.

[240] "The Government of the Republic states that it considers null and void the disposal measures ordered by the German authorities in respect of French private property in Germany, the occupied countries and Alsace Lorraine.

123. On 2 October 1979, the Japanese Government sent a protest to the Soviet Government, deploring the installation of a Soviet military base on the islands of Etorofu, Kunashiri and Shikotan, off the Japanese island of Hokkaido (Kuril Islands). The Soviet Ambassador in Tokyo spoke out against the protest, calling it interference in his country's internal affairs.[241] Similarly, following a statement by Japan, on 7 February 1981, claiming the return of the Kuril Islands, the Soviet Government issued a protest of its own, on 16 February 1981, having previously summoned the Japanese Ambassador in Moscow to inform him that it was going to do so.[242]

124. An official protest was directed by China at Japan, on 23 July 1981, concerning the dispatch of a Japanese scientific mission to the Senkaku Islands (Diaoyu Islands), north-east of Taiwan Province of China, which were claimed by Japan and the People's Republic of China. The protest took the form of a statement by the Chinese Minister for Foreign Affairs urging on Japan that the activities concerned should cease once and for all.[243]

125. Protests were lodged by Australia and New Zealand following the nuclear tests conducted by France in the Pacific on 19 April, 25 May and 28 June 1983. The Australian Prime Minister expressed his displeasure to the President of France during his visit to Paris on 9 June and the Australian Government decided to suspend its deliveries of uranium to France until the end of 1984.[244]

126. Official letters of protest were sent to the Governments of Belgium and the Netherlands by Spain, which had taken exception to the dumping in the Atlantic of nuclear waste from those States (August-September 1982).[245]

127. A protest was lodged by the United States when the Soviet Union resumed its ballistic missile tests above the Pacific near United States territory on 29–30 September 1987.[246]

128. In February 1988, there occurred an incident involving United States and Soviet warships in the Black Sea. At that time, the aim of the Soviet regulations was to prevent the innocent passage of warships in maritime areas over which the Soviet Union exercised control and to restrict them to certain routes, none of which ran through the Black Sea.[247] In protest, the United States warships acted in defiance of this rule and exercised their right of innocent passage through those areas, without accepting the restrictions unilaterally imposed by the Soviet Union.[248]

129. A protest was issued in 1992, in the form of a note verbale, to the British Government by the Spanish Government when military manoeuvres were conducted by a group of military personnel from Gibraltar in Sierra Nevada without Spain having being notified. The Spanish Minister for Foreign Affairs called for the immediate suspension of the activities concerned (which, according to the British response, were not official) and also reminded the British that manoeuvres could not take place without prior notification and authorization by the Spanish authorities.[249]

130. A protest was lodged by Spain against Portugal over an incident that occurred on 10 September 1996 between a fishing boat from Huelva and a Portuguese patrol boat that fired on the fishing boat when it found the latter allegedly fishing in Portuguese waters, in the Guadiana estuary. Spain sent a letter of protest direct to the Portuguese authorities through the Spanish consul and the Spanish Ministry of Foreign Affairs subsequently summoned the Portuguese Ambassador to inform him of the protest by the Spanish Government, since it considered the Portuguese action unjustified. A communiqué was issued by the Portuguese authorities expressing regret for the incident. A proposal was made which was, in fact, adopted: that the two authorities should work together in a manner similar to the collaboration already existing with other European countries to avoid incidents between coastguard patrols and ships from neighbouring countries.[250]

131. In order to give protests greater force, Governments issue them with ever greater frequency, sometimes in the form of joint statements, at international forums. One case, albeit somewhat marginal, featured the small island of Palmyra, in the South Pacific, which the United States hoped to turn into a nuclear waste depository. The proposal was condemned, in July 1979, in a resolution adopted by the South Pacific Forum, which comprised Australia, New Zealand and ten small islands in the region. A similar protest was subsequently made by Japan, the Philippines and Taiwan Province of China. The Governments of four neighbouring archipelagos—Guam, Hawaii, the Northern Mariana Islands and Samoa—also issued a joint statement at the beginning of October 1980,

"...

"This statement will be communicated to all Allied and neutral Governments. It is necessary that foreigners who might acquire property disposed of by the German authorities should understand that France considers such disposals void; the invalidity of the disposal necessarily applies also to all subsequent alienations."

(Kiss, *op. cit.*, vol. I, p. 24)

[241] See Rousseau, *loc. cit.* (1980), p. 657.

[242] *Ibid.* (1981), pp. 584–585.

[243] *Ibid.* (1982), p. 130.

[244] *Ibid.* (1983), p. 861.

[245] *Ibid.*, pp. 391–392.

[246] *Ibid.* (1988), p. 389.

[247] Rules for navigation and sojourn of foreign warships in the territorial waters (territorial sea) of the USSR and the internal waters and ports of the USSR, art. 12, ILM, vol. XXIV, No. 6 (November 1985), p. 1717.

[248] The Soviet regulations were amended in order to comply with the so-called Uniform Interpretation of 23 September 1989, which recognized no such restriction. The press release accompanying the text of the Uniform Interpretation, signed by the Soviet Union and the United States, stated that:

"Since the Soviet border regulations have been brought into conformity with the 1982 Convention on the Law of the Sea, we have assured the Soviet side that the United States has no reason to exercise in the Soviet territorial sea in the Black Sea its right of innocent passage under the U.S. Freedom of Navigation Program."

(Nash Leich, *loc. cit.* (1990), p. 241)

[249] *Spanish Yearbook of International Law*, vol. II, 1992, p. 175.

[250] *Diario de Sesiones del Congreso de los Diputados* (1996), Sixth Legislature, No. 24, pp. 992–993, and REDI, vol. XLIX, No. 1 (1997), p. 153.

in which they condemned the action and expressed their total opposition to the plan.[251]

132. The Heads of Government of the 16 countries of the South Pacific Forum, meeting in Madang, Papua New Guinea, issued a unanimous statement on 14 September 1995, expressing their indignation at the continuation of nuclear tests by France.[252]

133. On 19 October 2003, a dispute between the Russian Federation and Ukraine caused considerable tension following the construction by the Russian Federation of a dam in the Kerch Strait near the Ukrainian island of Tuzla. This provoked protests by Ukraine, until the Russian authorities finally suspended work on the dam.[253]

(c) *Protests to prevent the consolidation of the legal situation in a given territory*

(i) *Territory* sensu stricto

134. In the *Island of Bulama* case, in which sovereignty over the island was a cause of dispute between Portugal and the United Kingdom, persistent protests by Portugal about British activities, including the specific actions on which its claims were based, led the arbitrator to decide, on 21 April 1870, "that none of the acts done in support of the British title have been acquiesced in by Portugal"; it was decided that "the claims of the Government of His Most Faithful Majesty the King of Portugal to the Island of Bulama on the Western Coast of Africa, and to a certain portion of territory opposite to this Island on the mainland are proved and established".[254]

135. In the *Chamizal* case between Mexico and the United States, which related to the delimitation of the border in the Rio Grande region between El Paso, Texas, and Ciudad Juárez, the International Boundary Commission, in its ruling of 15 June 1911, drew attention to the way in which the Mexican protest had prevented due consideration being given to the United States' claim.[255] The Commission stated that:

> In the present case, the Mexican claim was asserted before the International Boundary Commission within a reasonable time after it commenced to exercise its functions, and prior to that date the Mexican Government had done all that could be reasonably required of it by way of protest against the alleged encroachment.[256]

136. On 26 September 1979, the Chinese Minister for Foreign Affairs issued a statement formally asserting China's ownership of the archipelago of the Spratly (Nansha) Islands. The statement was issued by way of a protest against a communiqué by the Philippines, which claimed that the archipelago had come to form part of Filipino territory.[257]

137. In a speech delivered at the University of Georgetown, Washington, D.C., on 10 October 1978, the Moroccan Minister for Foreign Affairs reaffirmed his country's position with regard to the Spanish enclaves of Ceuta and Melilla. He said that Morocco had not fully regained its territorial integrity, inasmuch as it had not re-established its sovereignty over the two outposts. These remarks prompted a reply by the Spanish Minister for Foreign Affairs, who declared that Spain once again reaffirmed in the strongest terms that the two territories were Spanish and totally rejected the inadmissible claims expressed by the Moroccan Minister. At the same time, the Spanish Ambassador in Rabat lodged a strong protest against the Moroccan authorities. Meanwhile, King Juan Carlos postponed indefinitely a visit to Morocco that had been due to take place in December 1978.[258]

138. On 31 January 1980, the Vietnamese Ambassador in Beijing rejected a Chinese document explicitly claiming the Paracel and Spratly Islands for China and repeating the assertion that the two archipelagos had formed an integral part of Chinese territory since time immemorial.[259]

139. On 23 May 1981, the Bangladesh Parliament unanimously adopted "a resolution protesting against

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[251] See Rousseau. *loc. cit.* (1980), pp. 378 and 616, and (1981), p. 406.

[252] See RGDIP (1995), vol. IC, p. 983.

[253] In his speeches, the Ukrainian President repeatedly warned of a military response if the disputed boundary lines were crossed. Specifically, he said that his country would consider itself under attack if the boundary was crossed, and that would lead to the adoption of the appropriate response measures. The continuation of the work would, in any case, be considered an unfriendly act. Ukraine's reaction was not restricted to words: in a unilateral act that could be characterized as conduct producing a legal effect, it deployed a number of army units on the island that it considered belonged to it and maintained a constant presence there. The Ukrainian President also warned that in the event that the Russian dam crossed the demarcation line, Ukraine would suspend its participation in the common economic space set up by Belarus, Kazakhstan and the Russian Federation. A request by the Russian Federation, several days after the beginning of the dispute, that Ukraine should submit documents in support of Ukrainian territorial claims to the island of Tuzla prompted renewed Ukrainian protests; the spokesman for the Ukrainian Government said that his Government was unhappy about the request for copies of documents confirming Ukrainian ownership of the small island of Tuzla in the Strait. It was unacceptable that Kyiv should have to confirm the indisputable fact that the island was part of Ukrainian territory. The dispute ended with a meeting between the two Ministers for Foreign Affairs who issued the following statement, which also appeared on the website of the Russian Ministry of Foreign Affairs (www. mid.ru). The joint statement, dated 31 October 2003, reads as follows:

> "It has been decided to establish appropriate working groups which will engage in the preparation of bilateral agreements on cooperation in the Sea of Azov and the Kerch Strait in the fields of navigation, fishing, nature management, seabed exploration, ecology, and so forth.
>
> "Agreement has been reached to accelerate a joint ecological examination with regard to the situation in the Kerch Strait.
>
> "The Ministers have declared their firm intention to develop relations between the Russian Federation and Ukraine, states strategic partners, based on the Treaty on Friendship, Cooperation and Partnership of May 31, 1997, whose provisions stipulate, in particular, mutual respect, sovereign equality, territorial integrity and the inviolability of the borders existing between them, in accordance with the rules of international law and on the basis of observance of the bilateral treaty obligations."

[254] Moore, *History and Digest …*, vol. II, p. 1921. See also Coussirat-Coustère and Eisemann, *op. cit.*, p. 78.

[255] The United States maintained that the prescription of rights and uninterrupted possession since 1848 could be considered justification for the Commission to rule that the disputed area belonged to the United States (Suy, *op. cit.*, p. 72).

[256] UNRIAA, vol. XI (Sales No. 61.V.4), p. 309. See also AJIL, vol. 5 (1911), p. 807.

[257] See Rousseau, *loc. cit.* (1980), p. 603.

[258] *Ibid.* (1979), p. 770; *Le Monde* and *Journal de Genève*, 12 October 1978.

[259] *Ibid.* (1980), pp. 605–606.

the unjustified military occupation of New Moore Island by the Indian authorities and calling on the New Delhi Government to withdraw its troops immediately and seek a peaceful solution to the conflict".[260]

140. On 28 June 1984, the United States Government lodged a protest against the landing on 18 June of a number of Canadian officials on Machias Seal Island, in the Gulf of Maine, which was claimed by both States. Canada replied that the island formed part of its territory and that a Royal Canadian Mounted Police patrol was simply carrying out routine checks.[261]

141. Chile formulated a protest, through its Minister for Foreign Affairs, following the issue by France of a postage stamp in April 1991, featuring Easter Island in French Polynesia. Chile strongly objected to this.[262]

142. A letter of protest was sent by the Estonian Government on 22 June 1994 to the Russian Ambassador in Tallinn in response to a decree by the Russian President unilaterally setting the boundary between Estonia and the Russian Federation. The former claimed border territories that had belonged to it before the Soviet annexation in 1940. On 15 August 1994, the Estonian Prime Minister again requested the Russian Federation to suspend work on the demarcation of the Estonian-Russian border.[263]

143. Protests have been formulated in relation to still unresolved territorial or colonial disputes. For example, a note was sent on 3 September 1980 by Argentina to the Netherlands, as the depositary of several treaties to which the United Kingdom was party and which established its relationship with the Falkland Islands (Malvinas). On 6 January 1981, the British Government responded in kind, sending a letter to the Government of the Netherlands, which stated:

> The United Kingdom therefore cannot accept the Argentine declaration referred to above in so far as it purports to question the right of the United Kingdom to extend the said Conventions to the Falkland Islands and their Dependencies nor can it accept that the Government of the Argentine Republic has any right in this regard.[264]

144. The British Minister of State stated, with regard to the South Sandwich Islands, over which the United Kingdom was also in dispute with Argentina:

> Her Majesty's Government have repeatedly protested to the Argentine Government, most recently at the Anglo-Argentine talks in New York in February 1982, about their illegal scientific station in Southern Thule. We have adhered to international law and the United Nations charter which requires disputes to be settled by peaceful means. Britain's legal position is fully protected.[265]

145. In June 1999, India rejected statements by the Pakistani Minister for Foreign Affairs that the boundary separating India and Pakistan in the Kashmir region was incorrectly drawn and should be discussed further.[266]

146. The Western Sahara conflict, which is still unresolved, prompted Morocco to issue statements in which it rejected the Peace plan for self-determination of the people of Western Sahara prepared by the Personal Envoy of the Secretary-General of the United Nations.[267]

147. With regard to the territorial dispute between British Guiana and Venezuela, an interesting opinion is expressed on the official website of the Venezuelan Ministry of Foreign Affairs concerning the significance of a bilateral agreement relating to a previous legal situation, namely the Arbitral Award of 1899.[268] According to this website, the Geneva Agreement of 17 February 1966[269] does not, strictly speaking, "invalidate the Award of 1899, but discusses and then accepts Venezuela's non-compliance, noting its contention that the Arbitral Award of 1899 concerning the border between Venezuela and British Guiana is null and void".[270] The conclusion may be drawn from the opinion of Venezuela cited above that an agreement of this kind could amount to a protest concerning a legal situation relating to a territorial issue and, at the same time, its acceptance by the other party.

(ii) *Maritime areas*[271]

148. A very large category of protests relates to unilateral declarations by States of various forms of domestic legislation (laws, decrees, declarations, etc.) the intention of which is to extend unilaterally the maritime area over which they exercise sovereign rights or, at least, are in a position to exercise some control (for the purposes of marine conservation, customs controls or operations for the conservation of resources on the continental shelf and its subsoil).[272]

149. One such protest is that contained in a letter addressed by France to the Soviet Minister for Foreign Affairs on 11 October 1957, expressing France's rejection

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[260] *Ibid.* (1981), p. 854.

[261] *Ibid.* (1985), p. 123.

[262] *Ibid.* (1992), p. 120.

[263] See RGDIP, vol. XCVIII (1994), pp. 732–733 and 973.

[264] Marston, "United Kingdom … 1981", pp. 446–447.

[265] *Ibid.*, "United Kingdom … 1982", p. 430.

[266] Poulain, *loc. cit.* (1999), p. 952.

[267] S/2003/565 and Corr.1, annex II. In a communiqué, the Moroccan Ministry of Foreign Affairs had stated that Morocco wished to reaffirm, in the strongest terms, its rejection of the plan submitted by James Baker, in terms both of its general structure and of the specific measures proposed, on the basis of principle, for operational reasons and in the interests of regional security.

[268] Award regarding the Boundary between the Colony of British Guiana and the United States of Venezuela, decision of 3 October 1899, *British and Foreign State Papers, 1899–1900*, vol. XCII, p. 160.

[269] See footnote 53 above.

[270] Website http://esequibo.mppre.gob.ve, documents on the claim to the territory of Essequibo.

[271] The Special Rapporteur would like to express his gratitude for information concerning practice in this section, which was provided by Ruiloba García, author of the book *Circunstancias especiales y equidad en la delimitación de los espacios marítimos*. The information is contained in the author's personal archives.

[272] A considerable number of unilateral acts of this kind, ensuing from various protests, may be found in MacGibbon, "Some observations ...", p. 303. See, for example, the practice adopted by the United Kingdom, where the Hydrographic Office publishes an annual list of various States and their claims to territorial seas, contiguous zones, exclusive economic zones or other areas, such as fisheries, to which they lay claim. The text makes it clear that the "claims are published for information only. Her Majesty's Government does not recognise claims to territorial seas exceeding twelve nautical miles, to contiguous zones exceeding twenty four nautical miles or to exclusive economic zones and fisheries zones exceeding two hundred nautical miles" (Marston, "United Kingdom … 2000", pp. 594–600). An identical list was drawn up at the beginning of 2002 (*ibid.*, "United Kingdom … 2001", pp. 634–639).

of the boundary drawn by the Soviet Union in the Bay of Vladivostok, which it considered excessive and contrary to the prevailing rules of customary law.[273]

150. The decision by the Indonesian Government on 13 December 1957 to extend its territorial waters to 12 miles around the archipelago gave rise to a number of protests.[274]

151. Venezuela directed a number of official protests at Colombia for its entry into Venezuelan territorial waters, particularly maritime areas that were the subject of bilateral talks on establishing the boundary. Such a protest appears in the letter from Venezuela of 3 September 1970, which stated that Venezuela had never, on any occasion, recognized the right of Colombian vessels, or those of any other nationality, to fish in the waters of the Gulf of Venezuela without authorization from the Venezuelan authorities. Since time immemorial, Venezuela has been the country that has had exclusive fishery rights in the internal waters of the Gulf of Venezuela.

152. Venezuela also protested on numerous occasions at the presence of Colombian ships, including the Colombian Navy (the *Caldas* incident) in the Gulf of Venezuela. The protests, which took the form of statements by the President and the Minister for Foreign Affairs of Venezuela, or of official communiqués, reaffirmed Venezuela's sovereignty over certain maritime areas in the Gulf.[275]

153. The Irish Government lodged a protest, on 9 September 1974, against the British Government's announcement of 6 September 1974 claiming the United Kingdom's rights over the continental shelf adjacent to Rockall Island.[276]

154. One case of a protest that was clearly repeated over a period of time was the series of notes verbales from the Japanese Government to the Ministry of Foreign Affairs of the Soviet Union, in which Japan opposed the extension of Soviet territorial waters in Peter the Great Bay. The first was sent on 26 July 1957 and two subsequent ones repeated the same message.[277]

155. The Chinese Government repeatedly rejected (23 April, 28 May and 13 June 1977) the effectiveness for China of the boundary of the continental shelf agreed between Japan and the Republic of Korea in a treaty of 30 January 1974.[278]

156. Norway issued a protest, in October 1974, against experimental drilling operations by the United States in the Lofoten Islands.[279]

157. Protests were made by the United States against Ecuador's plan to extend its territorial sea to 220 miles (1967) and its subsequent reaffirmation of its claim. In addition, the United States protested in 1986 against Ecuador's establishment of straight baselines.

158. The United States also protested against the maritime claims contained in legislation adopted by the Islamic Republic of Iran in 1993. The protest took the form of a note from the United States Permanent Mission to the United Nations, dated 11 January 1994 and addressed to the United Nations, for circulation through the *Law of the Sea Bulletin*.[280]

159. On 4 January 1990, a note was sent to the United Nations by the United States Mission protesting against the army command announcement of 1 August 1977 issued by the Democratic People's Republic of Korea, which purported to establish a 50-nautical-mile military maritime boundary, measured from a claimed straight baseline from which the territorial sea is drawn in the Sea of Japan, and a military maritime boundary coincident with the claimed exclusive economic zone limit in the Yellow Sea.[281]

160. The United States expressed strong opposition to the extension by the Federal Republic of Germany of its territorial sea when, in November 1984, the latter unilaterally decided to extend its territorial waters in the North Sea from 3 to 16 miles, to the south and west of Heligoland Island, for the purpose of controlling maritime traffic in what were extremely polluted waters. President Reagan wrote a personal letter to Chancellor Kohl.[282]

161. A protest was made by the Soviet Union on 21 May 1987 over two violations of its territorial waters on 17 and

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[273] The text of the protest is as follows:

"In these circumstances, the Government of the Republic considers that the Soviet Government's attempted appropriation is contrary to international law and should therefore not be effective for itself or its nationals or for French ships or aircraft. The French Government expresses the hope that the Government of the Union of Soviet Socialist Republics will reconsider its attitude."

(Kiss, *op. cit*., vol. I, p. 21)

[274] See RGDIP, vol. LXII (1958), p. 163 (see the relevant note from the French Government, *ibid*., pp. 163–164), and *Japanese Annual of International Law*, No. 2 (1958), pp. 218–219 (see also the communication by the Japanese Government rejecting recognition of the extension, *ibid*., pp. 219–220).

[275] See the *Libro Amarillo del Ministerio de Relaciones Exteriores de Venezuela* since 1985.

[276] See Rousseau, *loc. cit.* (1975), pp. 503–504.

[277] See *Japanese Annual of International Law* (footnote 274 above), pp. 213–214. For the second note verbale from the Japanese Government to the Soviet Ministry of Foreign Affairs, dated 6 August 1957, see page 215. The third note verbale, dated 17 January 1958, from the Japanese Embassy to the Soviet Minister for Foreign Affairs, in reply to his note verbale of 7 January 1958, reaffirming the Japanese Government's position, appears in *ibid.*, pp. 217–218 (unofficial translation).

[278] Agreement between Japan and the Republic of Korea concerning the establishment of boundary in the northern part of the continental shelf adjacent to the two countries (Seoul, 30 January 1974), United Nations, *Treaty Series*, vol. 1225, No. 19777, p. 103. See also Rousseau, *loc. cit.* (1978), pp. 243–245. A further Chinese rejection was issued on 26 June 1978 (*ibid.* (1979), pp. 143–144).

[279] See Rousseau, *loc. cit.* (1975), p. 812.

[280] See *The Law of the Sea: Current Developments in State Practice*, No. IV (United Nations publication, Sales No. E.95.V.10), pp. 147–149.

[281] The letter states:

"The Government of the United States therefore objects to the claims made by the Government of the Democratic People's Republic of Korea contained in the Army Command Announcement of August 1, 1977, which is inconsistent with international law, and reserves its rights and those of its nationals in this regard.

"The objection in this note is made without prejudice to the legal position of the Government of the United States of America which has not recognized the Government of the Democratic People's Republic of Korea."

(*Law of the Sea Bulletin*, No. 15 (May 1990), p. 9)

[282] See Rousseau, *loc. cit.* (1985), pp. 389–390.

21 May by the United States nuclear submarine *Arkansas*, off Kamchatka. The United States Embassy in Moscow expressed its opposition to the Soviet protest on the grounds that the *Arkansas* was in international waters: the United States did not recognize the Soviet Union's unilaterally declared 30-mile extension of its territorial sea along the whole length of its far-east coast, arguing that Soviet waters extended only to the three-mile limit.[283]

162. In a note addressed to the Canadian Embassy in Washington, D.C., on 20 September 1978, the United States Government rejected Canada's extension of its jurisdiction over the continental shelf and fisheries in the Gulf of Maine area.[284]

163. Spain's adoption of Royal Decree 1315/1997, of 1 August 1997,[285] establishing a fisheries protection zone in the Mediterranean, between Cabo de Gata and the French coast, with a view to preventing the uncontrolled exploitation of fisheries resources in the Mediterranean as a result of factory fishing by third States, prompted protests by France. These protests were based on France's disagreement with the application of the equidistance principle enshrined in the Royal Decree in fixing boundaries with neighbouring States with which no delimitation agreement existed.[286]

164. The case of Gibraltar, disputed between Spain and the United Kingdom, is equally important in relation to the formulation and projection of protests.[287] Thus it may be seen that the United Kingdom lodged a protest against Spain on 2 April 1986 following an incident that occurred on 20 March 1986, when a Spanish navy vessel entered Gibraltar's territorial waters without authorization or notification. The protest was rejected by Spain, which argued that, under the Treaty of Utrecht,[288] art. 10, Spain had ceded to the United Kingdom no more than the internal waters of the Port of Gibraltar, so all other waters were to be considered Spanish.[289] This position emerged clearly from the words of the Spanish Minister of Defence, who made the following statement:

> Spain has always maintained the position that there can be no recognition of British waters in the Bay of Algeciras, with the sole exception, restrictively interpreted, of the waters within the Port of Gibraltar. The British Government is attempting to impose the application of the 1958 Geneva Convention, art. 12, its interpretation of which is not accepted by Spain.[290]

165. The profound differences that have long existed between Spain and the United Kingdom with regard to Gibraltar are thrown into sharp relief by the reply made by the Minister of State, British Foreign and Commonwealth Office, who, on 19 May 1997, issued the following statement: "The territorial sea adjacent to the coast of Gibraltar is under British sovereignty. The territorial sea extends for three nautical miles from the coast, except where it abuts Spanish territorial waters, in which case the boundary follows a median line." According to a statement of 2 June 1997: "We are clear that the territorial sea adjacent to the coast of Gibraltar is under British sovereignty. The Government of Spain disagrees." [291]

166. Numerous statements concerning the dispute over Gibraltar have been exchanged. For example, the controls placed by Spain at the Gibraltar border from the end of October 1994 showed and brought into the open the tension between Spain and the United Kingdom. The Spanish Ambassador in London was notified of an official protest launched by the British Government; but at the same time, the meetings aimed at resolving the differences between the two countries, which had been suspended since March 1993, were resumed.[292]

167. As for the United Kingdom's position with regard to the United Nations Convention on the Law of the Sea, the Secretary of State for Foreign and Commonwealth Affairs wrote the Secretary-General of the United Nations the following letter for clarification:

> With regard to point 2 of the declaration made upon ratification of the Convention by the Government of Spain, the Government of the United Kingdom has no doubt about the sovereignty of the United Kingdom over Gibraltar, including its territorial waters. The Government of the United Kingdom, as the administering authority of Gibraltar, has extended the United Kingdom's accession to the Convention and ratification of the Agreement to Gibraltar. The Government of the United Kingdom, therefore, rejects as unfounded point 2 of the Spanish declaration."[293]

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[283] *Ibid.* (1987), pp. 1341–1342.

[284] The letter reads, in part, as follows:

> "The United States Government considers the new Canadian claim to be without merit. The United States believes that Georges Bank is a natural prolongation of United States territory and that, in view of the special circumstances existing in the Gulf of Maine area, the maritime boundary published by Canada on November 1, 1976, based on the principle of equidistance, is not in accord with equitable principles. *A fortiori*, a delimitation allocating an even larger area of the United States continental shelf to Canada is not in accord with equitable principles.
>
> "...
>
> "[T]he United States rejects the expanded claim of Canadian jurisdiction. The United States will continue to exercise fisheries jurisdiction in the area of the expanded claim in accordance with United States law.
>
> "The United States is nonetheless prepared to continue negotiations toward a settlement of maritime boundary issues, or an agreement to submit unresolved maritime boundary issues to international adjudication."

(Nash Leich, *loc. cit*. (1979), pp. 132–133).

[285] *Boletín Oficial del Estado*, No. 204 (26 August 1997).

[286] Jiménez Piernas, "La ratificación por España de la Convención de 1982 sobre el Derecho del mar y del Acuerdo de 1994 sobre la aplicación de la Parte XI : nuevos riesgos de la codificación del derecho international", p. 120, footnote 55.

[287] Only a few instances of international practice are given here, by way of example; for a follow-up to this dispute, the reader is recommended to consult, among others, the website of the Spanish Ministry of Foreign Affairs, which gives a far fuller list of statements on that topic (www.mae.es), or the articles appearing on the official Gibraltar website (www.gibraltar.gov.gi), as well as the *British Year Book of International Law*, REDI and the *Spanish Yearbook of International Law*.

[288] Treaty of Peace and Friendship between Great Britain and Spain (Utrecht, 13 July 1713), *British and Foreign State Papers, 1812–1814*, vol. I, part I, p. 611.

[289] See Rousseau, *loc. cit.* (1986), p. 975.

[290] REDI, vol. XLIV, No. 2 (1992), p. 529, and *Diario de Sesiones del Congreso de los Diputados* (1992), Fourth Legislature, No. 477, p. 14064.

[291] Marston, "United Kingdom … 1997", p. 593.

[292] See RGDIP, vol. IC (1995), p. 428.

[293] Marston, "United Kingdom … 1997", p. 495.

(iii) *Protest as a sign of support for an entity that will subsequently be recognized*

168. At the time that the process of disintegration of the Soviet Union was taking place, Belgium formulated a protest regarding the actions taken by Soviet troops in what subsequently became the Baltic States. It was thus showing, albeit indirectly, that it supported the independence of Estonia, Latvia and Lithuania and that diplomatic relations would later be re-established.[294]

169. It may be concluded from these examples of the practice, which reflects just one part of States' acts, that the concept of protest is of enormous importance in the international sphere: it takes numerous forms and is used in the most varied situations. As shown in a number of the instances cited—which form no more than a sample indicating the hundreds of protests that are made in situations of every kind that are considered unacceptable—in many cases, no obligation on the part of the State formulating the protest is involved. The protest most frequently entails non-acceptance of something or simply an expression of condemnation of a third party's previous conduct. In such cases, clearly, the definition of the autonomous unilateral act, in the sense in which it has been used throughout this report, comes up against certain difficulties of application, as though protests always took the same form. That is why various authors have chosen not to consider protests under the same category as other unilateral acts, such as promise or recognition, for example, whose nature as unilateral acts, and the effects associated with them at the international level, is more evident.

2. Notification

170. This concept has been defined as an "act by virtue of which a State makes known to another State or other States certain specific facts to which legal relevance attaches".[295] Its exact nature is highly controversial, since, in the view of some authors, it does not constitute a unilateral act *per se* but is simply a mechanism enabling a legal act to become known.[296] In this context, however, the really important element is the situation that gives rise to the notification rather than the notification itself. By the same token, the view has also been put forward that notification, although of a unilateral nature from the formal point of view, produces no effects in itself, since it is the result of a pre-existing action, and is therefore not an autonomous act.[297] In fact, it may be seen as the formula used to communicate or make known a situation, acting as the medium through which such a statement is expressed.[298]

171. In this context, a distinction should be drawn between two categories of notification, on the basis of their addressees: Miaja de la Muela states, in this regard, that, "by their nature, some have one or few addressees, while others are addressed to all States with which the notifier has regular diplomatic relations".[299] In fact, notification is frequently linked with a range of international treaties, the provisions of which state that other States parties must be notified of given situations relating to the international treaty concerned;[300] this is the familiar concept of the unilateral act—which it is—but associated with a specific treaty regime from which it arises.[301] The effects created by discretionary notifications would be different, since

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[294] The joint communiqué issued by Belgium and Latvia on 5 September 1991 states: "Recalling the firm Belgian protests against the violent actions of the soviet armed forces in the Balticum, Latvia thanks Belgium for its efforts to support the Latvian cause in the previous difficult period" (Klabbers and others, *op. cit*., p. 177).

[295] Definition by Venturini, *loc. cit*., p. 429.

[296] As Miaja de la Muela has noted, in "Los actos unilaterales en las relaciones internacionales", p. 434, "rather than being a particular type of unilateral act, notification is an integral element of the most important unilateral acts, that is, acts arising out of an express statement, which may take the form of either the expression of will, feelings and beliefs—although only expressions of will constitute an international legal transaction—or the commission of an act".

[297] See *Yearbook ... 1998*, vol. II (Part One), document A/CN.4/486, p. 326, para. 52.

[298] One example will serve to show that notification has a variety of uses: in notifying the French Government that the person appointed ambassador did not seem appropriate to the receiving State, the Iranian Government informed the French Government, on 2 November 1982, of its refusal to accept or receive Mr. José Paoli as ambassador in the following terms:

> "In view of the French Government's support for counter-revolutionaries and terrorists who commit terrible crimes in Iran and kill its most upright citizens, the Iranian State cannot receive the Ambassador of France at this time. As long as this hostile attitude on the part of the French Government to the Muslim Iranian nation persists and French territory remains a refuge for hypocritical terrorists, there will be no progress in political relations between the two countries."

(Rousseau, *loc. cit.* (1983), p. 416)

[299] *Loc. cit*., p. 437; although what would be really interesting in this connection would be the effects produced with regard to States that had not been recipients of the notification concerned, or in the event that the notification was presented in a defective or incomplete form. A case-by-case assessment and interpretation would be the best way to judge the actual significance of each notification and its practical effects.

[300] It is also often customary to issue a notification, in the procedural sense of the word, to inform a jurisdictional body of a State's position in dealing with particular proceedings. For example, on 18 January 1985, the United States Department of State announced President Reagan's decision that the United States would not participate in the case brought by Nicaragua against the United States before ICJ on 9 April 1984 (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 392). A formal notification that the United States had abandoned the case was sent to the Registrar of the Court the same day by the representative of the United States, the State Department Legal Adviser, the wording being as follows:

> "The United States has given the deepest and most careful consideration to the aforementioned judgment, to the findings reached by the Court, and to the reasons given by the Court in support of those findings. On the basis of that examination, the United States is constrained to conclude that the judgment of the Court was clearly and manifestly erroneous as to both fact and law ... Accordingly, it is my duty to inform you that the United States intends not to participate in any further proceedings in connection with this case, and reserves its rights in respect of any decision by the Court regarding Nicaragua's claims."

(Nash Leich, *loc. cit.* (1985), p. 439)

Although the content will be different, notification of acceptance of the jurisdiction of ICJ is, of course, of a similar nature. In this case, the connection between the notification and an international treaty would be beyond question.

[301] See Suy, *op. cit*., pp. 91–93. Suy (p. 107) emphasizes that "[n]otification provided for under a rule of international treaty law is thus not an expression of will exercised under a right or power. It is a formal act. It remains possible, however, that a rule of international treaty law may take a notification into consideration so that it may be given legal effect".

essentially they simply provide information about a situation, even though there is no legal obligation to do so.[302]

172. In some cases in recent practice, the notification of action to be taken is also directly related to judicial proceedings and the question of whether or not they should continue, as is the case with regard to applications for extradition;[303] a fundamental change in circumstances may, on occasion, prompt the issue of a notification announcing the cessation of a given State measure that had been operative until then.[304]

173. In its reply to the questionnaire drawn up by the Commission, the Netherlands presented some examples of relevant practice, most specifically with regard to the notification of domestic legislation adopted in 1985 concerning the country's territorial waters;[305] State practice contains a wealth of examples of the way in which States have given notification or have issued statements concerning the extension of their maritime areas.[306]

174. There is a direct connection between the emergence of new States on the world stage—that is, the products of State succession—and the frequent notifications of acceptance of such succession, which would, for example, involve consideration of a State as party to international treaties to which its predecessor State was party.[307] Further, reference may be made to a recent case in which Bosnia and Herzegovina and Spain established, by means of an exchange of letters between their respective Ministries of Foreign Affairs (a notification followed by a reply), a bilateral international agreement that provided for the succession by the two States to a number of bilateral agreements concluded between Spain and the former Yugoslavia. These agreements were listed in both documents. The termination of an agreement on air transport was also agreed on.[308]

175. The conflicts that have arisen over recent years provide examples of notifications the aim of which is to justify the adoption of anti-terrorism measures motivated by the need to respond to the events of 11 September 2001.[309]

176. There is one category of unilateral acts that could be termed "imperfect", since, if they receive no response or are not accepted, they are lacking in full effect. This category involves a specific form of notification whereby third parties are informed of the adoption of permanent neutrality status. To enjoy its full effect at the international level, it usually requires a positive response from third States, which will corroborate and accept the situation.

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[302] This type of notification is used in a multitude of situations of varied kinds. An analysis of the practice has yielded several cases such as the following, among others: (*a*) commitments to give notification of a specific activity; this would apply to the action taken by France concerning new nuclear tests that it was considering conducting (12 and 16 May and 17 and 23 June 1988); specifically, France announced, at the beginning of June 1988, that "in the interests of transparency" France would give notification of the number of tests conducted during the preceding 12 months (Rousseau, *loc. cit.* (1988), p. 992); (*b*) notification of a fact or situation arising out of the termination of an international agreement, such as the notification addressed by Greece to the United States, in which the latter was informed of the closure of the United States airbase in Hellenikon on 21 December 1988, which was the expiry date of the defence and economic cooperation treaty between the two countries signed on 8 September 1983 (*ibid.* (1989), p. 127).

[303] This applied in the Pinochet case. The British Secretary of State for the Home Department sent the following letter to the Spanish Ambassador (and identical ones to the Belgian, French and Swiss Ambassadors): " I am writing to inform you that the Secretary of State has this morning decided pursuant to section 12 of the Extradition Act 1989, to make no order for the return of Senator Pinochet to Spain. This letter sets out the Secretary of State's reasons" (Marston, "United Kingdom … 2000", p. 558).

[304] A case in point was the notification involving a change in the previous arrangements between France and Spain concerning the granting of refugee status to Spanish nationals living in France: the abolition of such status by virtue of an administrative decision of 30 January 1979. The French Ministry of Foreign Affairs announced in a communiqué on 30 January 1979:

> "The democratization of the Spanish Government, the general amnesty law, the adoption of the Constitution and the country's accession to the Geneva Convention relating to the Status of Refugees have led the Ministry of Foreign Affairs to decide that, in accordance with the Convention, which was adopted on 28 July 1951, the circumstances in which Spanish refugees could claim such status are no longer relevant.
>
> "When their documents expire, therefore, they will not be renewed. Persons to whom such status has already been granted will shortly receive notification of its withdrawal."

(Rousseau, *loc. cit.* (1979), p. 767)

[305] See *Yearbook … 2000*, vol. II (Part One), document A/CN.4/511, pp. 267–268. Specifically, the United Nations Convention on the Law of the Sea, art. 16, para. 2, states: "The coastal State shall give due publicity to such charts or lists of geographical co-ordinates and shall deposit a copy of each such chart or list with the Secretary-General of the United Nations."

[306] Reference may again be made to the Netherlands, which, even before the domestic legislation referred to above was drawn up, gave notification, on 26 October 1979, of the extension of its territorial sea from 3 to 12 miles. The Prime Minister stated that wide-ranging talks would be held with Belgium, the Federal Republic of Germany and the United Kingdom before the amendment entered into force. The procedure would be adopted in the Dutch Antilles with a view to preventing marine pollution (Rousseau, *loc. cit.* (1980), p. 664). Since the usual course of action is that the extension of maritime areas is established by internal legislation, it is normal that, once publicized, such action prompts both positive reactions and also strong protests, when a boundary is not accepted by third States. Information on State practice in respect of maritime boundaries may be found on the web page of the Division for Ocean Affairs and the Law of the Sea of the United Nations (www.un.org/Depts/los).

[307] A case in point is a letter dated 31 December 1991 in which the British Prime Minister wrote to the President of Ukraine as follows: "I can confirm that, as appropriate, we regard treaties and agreements in force to which the United Kingdom and the Union of Soviet Socialist Republics were parties as remaining in force between the United Kingdom and Ukraine" (Marston, "United Kingdom … 1998", p. 482).

[308] The agreements that remain in force relate to educational and cultural, scientific and technical, and economic and industrial cooperation, cooperation on tourism, legal aid with regard to criminal matters and extradition, and passenger and freight road transport (*Boletín Oficial Del Estado*, No. 68 (19 March 2004) and No. 97 (21 April 2004)).

[309] See, for example, the letter dated 7 October 2001 addressed to the President of the Security Council by the Chargé d'affaires a.i. of the Permanent Mission of the United Kingdom to the United Nations, in which he writes:

> "In accordance with Article 51 of the Charter of the United Nations, I wish on behalf of my Government to report the United Kingdom of Great Britain and Northern Ireland has military assets engaged in operations against targets that we know to be involved in the operation of terror against the United States of America, the United Kingdom and other countries around the world, as part of a wider international effort.
>
> "These forces have now been employed in exercise of the inherent right of individual and collective self-defence, recognized in Article 51 ... these operations are not directed against the Afghan population, or against Islam."

(S/2001/947). See also Marson, "United Kingdom … 2001", pp. 682–683.

A similar statement was made by the British Foreign Secretary to the General Assembly on 11 November 2001 (*ibid*., p. 690). See also *Official Records of the General Assembly, Fifty-sixth Session, Plenary Meetings*, 46th meeting.

That is what gives it its specific nature. Austria's neutrality, adopted in 1955, is a case in point, among others.[310]

177. The purely unilateral nature of this act may be called into question, for various reasons, beginning with the way in which it was formulated: known as the Moscow Memorandum of 15 April 1955, it was originally concluded with the Soviet authorities and subsequently accepted by France, the United Kingdom and the United States.[311] It should, however, be pointed out that Austria's neutrality had already been set out in its Constitutional Law of 26 October 1955 and communicated through the diplomatic channel to all States with which Austria had diplomatic relations. In Degan's opinion, this constitutional rule really amounted to an offer, which would have real effects only once it was accepted by other States, whether implicitly or explicitly.[312] As Zemanek maintains, however, various actions have been taken in this regard, each with its own independent legal connotation. Thus, if an acceptance of Austria's permanent neutrality status turns out to be invalid, it will not have the same effect as the statements made by third States, whereas a defect in the Austrian declaration could have the effect of invalidating all the acceptances formulated by third States.[313] What is certain is that, as Rousseau indicates, the basic question is whether the status of permanent neutrality, as such, has full effects or whether acceptance by third States is required for the full effects.[314]

178. International practice over the past 20 years offers other examples of the adoption of permanent neutrality status: one example is Malta, which unilaterally declared its neutrality on 15 May 1980,[315] and another is Costa Rica, which made its declaration on 17 November 1983.[316]

D. Some forms of State conduct which may produce legal effects similar to those of unilateral acts

179. This section offers a preliminary introduction to the attempt to list the forms of State conduct that may produce legal effects, with the understanding that these are just a few examples of approaches that have been embarked upon but are not at all conclusive.

180. In the context of territorial disputes and in relation to the delimitation of maritime boundaries, some interesting forms of conduct have been observed, and these are reflected in the way certain areas are used. The term "usage", which has been defined in various ways in international texts,[317] although it remains ambiguous, may mean a generalized pattern of conduct involving a certain behaviour and its repetition. In the case of the delimitation of marine and submarine waters in the Gulf of Venezuela (Colombia/Venezuela), usage was considered to reflect a form of conduct on which historic title was based.[318]

181. Although a State might not recognize a given entity, certain forms of conduct may reveal its support of that entity. During a parliamentary debate concerning Tibet, the British Minister of State noted that:

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[310] Austrian neutrality is a question which still has an effect, even now: on 8 February 2001, speaking during an official visit to Austria, the Russian President said in that regard: "During the cold war, Austrian neutrality proved its usefulness, for Austria, Europe and the whole world. Today, although we face fewer difficulties and opposing blocs no longer exist ... Austrian neutrality remains a precious achievement" (RGDIP, vol. CV (2001), p. 415).

[311] Verdross, "La neutralité dans le cadre de l'O.N.U. particulièrement celle de la République d'Autriche", especially pp. 186–188.

[312] Degan, *op. cit*., pp. 299–300. However, in reply to a question concerning the United Kingdom's obligations in the event of any breach of Austria's neutrality, the British Lord Privy Seal replied: "The legal basis of Austria's neutrality is the constitutional law on neutrality passed by the Austrian Parliament on 26 October 1955. Her Majesty's Government have no specific obligations in international law relating to a breach of this neutrality" (Marston, "United Kingdom … 1980", p. 484). This emphasizes the unilateral nature of the decision.

[313] "The legal foundations of the international system: general course on public international law", p. 197.

[314] Rousseau states his position with confidence: "It is, however, doubtful from the legal point of view whether such a procedure is sufficient to establish permanent neutrality status enforceable against third States in the absence of a subsequent treaty and unequivocal recognition by such States" (*loc. cit.* (1984), p. 449). The problem may lie in the fact that the consequences of permanent neutrality are different from those of other unilateral acts, in which the will of third parties has no impact and does not affect the effectiveness of the act. A declaration whereby it is decided unilaterally to adopt such a position at the international level would be valid, although having very limited effects, or none, if third States declined to recognize the new state of affairs. The question would be different if the declaration of neutrality was made by an entity lacking the competence to implement it, as occurred in the case of the Cook Islands on 29 January 1986. The Prime Minister of the Cook Islands announced that the archipelago was declaring its neutrality, owing to the termination of the effects of the Security Treaty between Australia, New Zealand and the United States (ANZUS Treaty), and New Zealand's incapacity to defend the islands. The islands would therefore not have any military relations with foreign States or authorize further visits from United States warships. It seems that this declaration aroused no reaction on the part of either London or Wellington, since, according to Rousseau's theory, it lacked legal validity in view of the archipelago's lack of international competence (*ibid.* (1986), pp. 676–677).

[315] The first State to accept Malta's status was Italy, by virtue of an exchange of notes between Italy and Malta on 15 September 1980 concerning the island's neutrality, in which Italy committed itself to guaranteeing that neutrality; Malta, meanwhile, made the commitment to maintain its status, which excluded participation in military alliances and the stationing of foreign forces and bases on Maltese soil (Rousseau, *loc. cit.* (1981), p. 411; *Keesing's Contemporary Archives,* vol. XXVII (1981), p. 31076). Most relevant of all, the matter does not end there, since, during the course of 1981, Malta actively sought recognition and guarantees for the island's neutrality from third States. Such an acceptance was officially announced by France, on 18 December 1981, in the following terms:

> "Gives its full support, in accordance with the Charter of the United Nations, to the independence of the Republic of Malta and its status of neutrality, based on the principles of non-alignment;
>
> "Undertakes to respect that neutrality;
>
> "Calls on all other States to recognize and respect the status of neutrality chosen by the Republic of Malta and to refrain from any activity incompatible with such recognition and respect."

(Rousseau, *loc. cit.* (1982), p. 167)

[316] The President of Costa Rica formally announced his country's permanent, active and unarmed neutrality in a speech delivered at the National Theatre of the capital, San José, on 17 November 1983. He declared that the statement would be communicated to all States having diplomatic relations with Costa Rica and that the country's political groups would have to be consulted concerning the constitutional amendment that would be required (see Gros Espiell, *La Neutralidad de Costa Rica*, p. 75).

[317] "Continued usage of long standing" (Institute of International Law, 1894); "international usage" (*ibid*., 1928); "established usage" (Harvard draft of convention on territorial waters, *Supplement to* AJIL, vol. 23, special number (April 1929)); "continuous and immemorial usage" (draft convention amended by Mr. Schücking, *ibid*., vol. 20 (July and October 1926), p. 142); and in the work of codification done in preparation for the Conference for the Codification of International Law (The Hague, 1930). See *Yearbook ... 1962*, vol. II, document A/CN.4/143, p. 15, para. 101).

[318] See Lara Peña, *Las tesis excluyentes de soberanía colombiana en el Golfo de Venezuela*.

Tibet has never been internationally recognised as independent. This Government and our predecessors have not recognised the Dalai Lama's government in exile.

...

We do not recognise the Dalai Lama as the head of the Tibetan Government-in-exile, but we do acknowledge him as a highly respected spiritual leader, the winner of the Nobel peace prize and an important and influential force.[319]

182. The severing of diplomatic relations may be equivalent to the non-recognition of governments: on 24 September 2001, following the events of 11 September, the United Arab Emirates, one of the three countries that had recognized the Taliban regime as the Government of Afghanistan and had established diplomatic ties with it, decided to break them off. Saudi Arabia followed suit one week later.[320]

183. In a case where diplomatic relations were severed in response to declarations by another country that were considered inadmissible, the President of Ecuador stated on 8 October 1985 that "until a legitimate popular election is held, in which all Nicaraguans have the right to self-determination and to choose their own destiny, without resorting to the club or stick or other form of violence, the Central American drama will continue".[321] Daniel Ortega, President of Nicaragua, responded to this statement on 10 October, accusing his Ecuadorian counterpart of being "a tool of the United States, which is trying to divide the Latin American community and block the peace efforts in Central America".[322] As a result of this exchange of statements, Ecuador, through an official communiqué dated 11 October 1985, declared that "the Government of Ecuador categorically rejects the statements of Commander Ortega and, in the interest of protecting the dignity and sovereignty of the nation, has decided to sever diplomatic and consular relations with the Government of Nicaragua".[323]

184. A "friendly" attitude towards a separatist group may lead to protests. For instance, on 11 November 1999, the visit by a representative of Chechnya to Paris and a press conference given at the French National Assembly elicited protests from the Russian Federation, which accused France of collaborating with terrorism. The Ambassador of France in Moscow was reportedly warned of the potential impact of this unfriendly gesture on bilateral relations between the two countries.[324]

185. Certain forms of conduct may resemble protests, and are intended to prevent the consolidation of a given claim: the establishment of the exclusive economic zone (200-mile limit) has led to many tense situations, as shown by the following example. In 1975 Mexico warned the relevant regional body at the time, the Inter-American Tropical Tuna Commission, that it needed to create a regional conservation system that would be better adapted to the new legal reality emerging from the United Nations Conference on the Law of the Sea, that is, the 200-mile exclusive economic zone. At the opening of the negotiations to which Mexico had been invited for this purpose, the legal dispute with the United States became more obvious, and an unfortunate chain of events was set in motion, resulting in United States ships infringing the 200-mile Mexican zone and fishing for tuna illegally. This disagreement with respect to the new situation led Mexico to resign from the Commission and to begin detaining United States fishing vessels. In response, the United States imposed an embargo on exports of Mexican tuna to the United States. Meanwhile, Mexico had adopted provisional legislation aimed at concluding a regional agreement to conserve and administer tuna in the Eastern Pacific. Since then, the two countries have been holding a series of talks, both formally and informally, aimed at settling this dispute.[325]

186. The existence of tense relations between countries may in turn lead to incidents: those having to do with fishing, for example, sometimes result in protests, as noted above.[326] This tension may also take the form of impediments to official visits.[327]

E. Silence and estoppel as principles modifying some State acts

1. Silence and its potential international effects

187. In his first report on unilateral acts of States, the Special Rapporteur had considered silence, according to much of the literature, to be "a reactive behaviour and a unilateral form of expression of will", but he had added that "it certainly cannot constitute a formal unilateral legal act".[328] Moreover, it bears a close relationship to

[319] Marston, "United Kingdom … 1999", p. 425.

[320] See Remiro Brotóns, "Terrorismo, mantenimiento de la paz y nuevo orden", p. 151.

[321] Lira B., *loc. cit.*, p. 243.

[322] *Ibid.*

[323] *Ibid.*

[324] See Poulain, *loc. cit.* (1999), p. 991. Moreover, on 29 January 2002, the French Ambassador in Moscow was reportedly summoned to the Ministry of Foreign Affairs of the Russian Federation and was told that France had shown an unfriendly attitude towards the Russian Federation. The United Kingdom and the United States had been subjected to the same measure as had France with respect to Chechnya. The meeting in Paris of the former Chechen "Minister of Culture" with the French Minister of Education apparently resulted in the following note: "Moscow wonders what could have been behind the meeting of French officials with a representative of the Chechen extremists, whose direct ties with O. bin Laden have been irrefutably confirmed" (RGDIP, vol. CVI (2002), p. 413).

[325] See Szekely, "Aplicación en Latinoamérica de la Convención de las Naciones Unidas sobre el Derecho del Mar", p. 52.

[326] In late November 1967, a Chilean gunboat, the *Quidora*, entered Argentine territorial waters at Ushuaia without prior authorization. This incursion provoked a note of protest from the Chilean Minister for Foreign Affairs to the Argentine Ambassador. For more on these boundary incidents, see "Límites. El bloqueo de Ushuaia", *Primera Plana* (Buenos Aires), year V, No. 245 (5–11 September 1967), p. 13, and *Clarín* (Buenos Aires), 1 December 1967, p. 18.

[327] When German Minister of State, Ludger Volmer's visit to Cuba was cancelled, he issued a statement on 16 February 2001 that said that the Cuban Government had asked him to forego his visit to Cuba scheduled for 19 February 2001 (at the invitation of Cuba). That situation was a result of statements he was alleged to have made that were critical of Cuba. He failed to understand that interpretation. But it demonstrated that for the time being Cuba was not sufficiently willing to engage in a political dialogue in the fullest sense of the word. In such circumstances his visit to Cuba would not make much sense. His scheduled visit to the Dominican Republic would not be affected by the cancellation of his visit to Cuba.

[328] *Yearbook … 1998*, vol. II (Part One), document A/CN.4/486, p. 326, para. 50. As Rodríguez Carrión notes, in *Lecciones de Derecho Internacional Público*, p. 171, "*silence* is more than just a different type of unilateral act: it is a means of expressing the unilateral will of the State".

estoppel, in the sense that a given situation could make a State liable to exception if its consent to that situation, which could produce legal effects, might be inferred from its silence.

188. Strictly speaking and delineated in precise terms, silence cannot be considered a unilateral act; at times it may even produce legal effects by a "non-existent unilateral act", where, for example, faced with a given situation, a State could have issued a protest but refrained from doing so. In one way or another, this silence, along with other aspects that may well reveal the will of the State in question, may make a retraction impossible if the conduct continues.

189. Silence as such usually has legal consequences if it is related to a prior act on the part of another subject;[329] the Special Rapporteur therefore inclines towards the position held for some time by Sicault, whereby silence, since it cannot produce legal effects independently and requires another act in order to do so, does not come under the definition of unilateral engagement given at the beginning of his study.[330] Its effects are therefore relative, as French and German doctrine and jurisprudence, in particular, have traditionally suggested;[331] in contrast, however, the Anglo-Saxon school has defended the fiction of so-called "tacit will", in the understanding that it facilitates the passage from facts to law and allows for the maintenance of a certain vitality in international law so that the obstacles created by the negligence of some States can be overcome.[332]

190. In the Commission, for example, the views expressed in this regard have been very diverse; thus, it has been noted that while some types of silence definitely do not and cannot constitute a unilateral act, others may be described as intentional "eloquent silence", expressing acquiescence, and therefore do constitute such an act.[333] Moreover, it must be noted that silence produces important legal effects in some multilateral conventions.[334]

191. It has even been affirmed that acquiescence,[335] which may be (but is not always) derived from silence, is probably one of the most difficult issues and one of great practical importance, in view of its consequences. As MacGibbon has pointed out, "[a]cquiescence ... takes the form of silence or absence of protest in circumstances which generally call for a positive reaction signifying an objection".[336] What is indeed significant is that an opposable situation created by acquiescence is of particular importance for a State which enjoys a right on the basis of a customary rule which has not yet been fully consolidated, or when all aspects of its application on individual situations are still a matter of dispute.[337] Moreover, as Carrillo Salcedo has observed:

> It may be said that acquiescence is an admission or acknowledgement of the legality of a controversial practice, or that it even serves to consolidate an originally illegal practice. The State that has admitted or consented cannot raise future objections to the claim, by virtue of the principle of estoppel or "contrary act". Acquiescence thus becomes an essential element in the formation of custom or prescription.[338]

192. In order for acquiescence to produce legal effects, however, it is necessary for the party whose implicit consent is involved, first of all, to have had knowledge of the facts against which it refrained from making a protest; the facts must be generally known, if they have not been officially communicated. Each of these aspects was duly taken into account, in one way or another, by ICJ in the *Fisheries* case, based on the idea that the notoriety of the facts, the general toleration of the international community, the United Kingdom's position in the North Sea, her own interest in the question, and her prolonged abstention would in any case warrant Norway's enforcement of her system against the United Kingdom;[339] however, in reality, as Carrillo Salcedo points out, in this case:

> The valid legal effects of the situation derive, then, not from the tacit or express consent of third States, but from the notoriety of the facts. The opposable *erga omnes* character of these legal situations is ultimately based on their compatibility and non-contradiction with the international legal order which recognizes the coastal State as the only one competent to establish the baseline of its territorial sea.[340]

193. Shortly thereafter, ICJ made a similar decision in the *Temple of Preah Vihear* case.[341] What is more, arbi-

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[329] The enormous number of protests that occur in international practice is, in the view of the Special Rapporteur, an important indicator that silence may have significant effects; therefore, each time there is a risk that a given situation with which a State disagrees might become more acute, the affected State or States will protest forcefully. The following is just one example (see Rousseau, *loc. cit*. (1979), pp. 143–144): upon the exchange of the instruments of ratification of the treaty between Japan and the Republic of Korea on 5 February 1974 on the joint delimitation and exploitation of the continental shelf situated in the eastern part of the China Sea, China reaffirmed its opposition to this treaty, which it had already reiterated three times, on 23 April, 28 May and 13 June 1977 (*ibid*. (1978), pp. 243–245). In a note issued on 26 June 1978, the Chinese Minister for Foreign Affairs stated that China expressed its deep indignation and raised a strong protest against the treaty, which it said undermined the sovereignty of China, and that any division of the continental shelf between different countries could be decided only after consultations between China and the countries concerned.

[330] *Loc. cit*., p. 673.

[331] As Bentz has pointed out, French jurisprudence has highlighted that "the silence of one party cannot bind it in the absence of any other circumstance" (*loc. cit*., p. 46).

[332] Idea taken from Bentz, *loc. cit*., pp. 52–53.

[333] *Yearbook … 2000*, vol. II (Part Two), p. 96, para. 585. That silence has very different aspects is also affirmed by Suy, who notes that "the formula '*qui tacet consentire videtur*' has no absolute value in law. Silence may, indeed, mean that an offer, a violation or a threat leaves the recipient totally indifferent … It may also express opposition" (Suy, *op. cit*. p. 61).

[334] See the Vienna Convention on the Law of Treaties, art. 65, para. 2, or the United Nations Convention on the Law of the Sea, art. 252.

[335] As affirmed by Salmon, "[a]cquiescence is a consent imputed to a State by reason of its conduct, whether active or passive, towards a given situation. Acquiescence is liable to occur in many circumstances" ("Les accords non formalisés ou '*solo consensu*'", p. 15).

[336] "The scope of acquiescence ...", p. 143.

[337] See Degan, *op. cit*., p. 353.

[338] "Funciones del acto unilateral en el régimen jurídico de los espacios marítimos", pp. 21–22. The author rightly adds that:

> "Acquiescence thus acts as a corrective to the rigidity of the dogmas of sovereignty and voluntaristic positivism in international law. Acquiescence represents an important factor in the development and formation of customary law, like that of '*opinio juris*' in the formation of customary obligation. '*Opinio juris*' differs from acquiescence, but it becomes its logical consequence."

[339] *I.C.J. Reports 1951*, p. 138 (see footnote 208 above).

[340] *Loc. cit*., p. 12.

[341] *I.C.J. Reports 1962* (see footnote 191 above). After considering the role of acquiescence when it results from an absence of protest

tral tribunals[342] and domestic courts[343] have more recently handed down decisions with respect to the effects and conditions of acquiescence.

194. To some extent, the conclusion might be drawn, in view of the above-mentioned legal precedents, that acquiescence is generally the result of the concomitance of various signs pointing to an overall conduct; the signs demonstrating acquiescence, that is agreement with a given situation, may be of many types, stemming from both active and passive State conduct.[344]

195. As shown by some arbitral decisions, acquiescence seems to have served as a means of clarifying certain doubtful aspects in need of interpretation. Thus, in a case concerning the boundary agreement of 1858 between Costa Rica and Nicaragua,[345] settled on 22 March 1888, the arbitrator stressed that, despite the fact that acquiescence could not replace the necessary ratification of the agreement by Nicaragua, 10 or 12 years of apparently favourable conduct "is strong evidence of that contemporaneous exposition which has ever been thought valuable as a guide in determining doubtful questions of interpretation".[346]

2. The principle of preclusion or estoppel

196. As noted by a member of the Commission with respect to the principle of preclusion or estoppel:

> Admittedly, a unilateral act could give rise to an estoppel, but it was a consequence of the act and, contrary to what had been stated by the Special Rapporteur in his oral introduction, no category of acts which would constitute "estoppel acts" seemed to exist. The only thing that could be said was that, in certain circumstances, a unilateral act could form the basis for an estoppel ... In international law, estoppel was a consequence of the principle of good faith which, as Mr. Lukashuk had pointed out (2593rd meeting), governed the rules on the legal effects of unilateral acts.[347]

197. It seems that Anglo-Saxon doctrine was the origin of the principle of estoppel, as a mechanism applicable in the international sphere which primarily deals with creating a certain amount of legal security, preventing States from acting against their own acts.[348] As Miaja de la Muela[349] has pointed out, this principle comes within the purview of the maxim *adversus factus suum quis venire non potest*, thereby identifying the origins of this Anglo-Saxon institution, which has been described in great detail by Díez-Picazo.[350]

198. Spanish doctrine has also given attention to the estoppel principle; specifically, Pecourt García starts with two basic premises that shape its essence: he assumes that:

> The first prerequisite for building the notion of "estoppel" is the existence of an "attitude" taken by one of the parties.
>
> …
>
> The second prerequisite for the applicability of *estoppel* is the existence of what we have called "secondary attitude", which must have been adopted by the party opposing the principle.[351]

The author continues:

> [T]he principle of *estoppel* may be related to certain types of expressions of will that are generically referred to as "acquiescence". Under such an assumption, *estoppel* works by integrating—in part or in full—the corresponding form of acquiescence, either deriving the latter from silence or omission (*estoppel by silence*), or by proving such acquiescence by means of certain courses of conduct or attitudes (*estoppel by conduct*), etc.[352]

This attitude must be clear and unequivocal, as PCIJ pointed out in the *Serbian Loans* case, of 12 July 1929:

> [W]hen the requirements of the principle of estoppel to establish a loss of right are considered, it is quite clear that no sufficient basis has been shown for applying the principle in this case. There has been no clear and unequivocal representation by the bondholders upon which the debtor State was entitled to rely and has relied.[353]

199. Of course, there is some doctrinal confusion about the basis and scope of estoppel, together with some of the

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against a circumstance that should have provoked such protest, the Court decided as follows:

> "It has been contended on behalf of Thailand that this communication of the maps by the French authorities was, so to speak, *ex parte*, and that no formal acknowledgment of it was either requested of, or given by, Thailand. In fact, as will be seen presently, an acknowledgment by conduct was undoubtedly made in a very definite way; but even if it were otherwise, it is clear that the circumstances were such as called for some reaction, within a reasonable period, on the part of the Siamese authorities, if they wished to disagree with the map or had any serious question to raise in regard to it. They did not do so, either then or for many years, and thereby must be held to have acquiesced. *Qui tacet consentire videtur si loqui debuisset ac potuisset.*"

(*Ibid*., p. 23)

[342] For example, in the Dubai-Sharjah Border Arbitration of 19 October 1981 concerning a territorial dispute (ILR, vol. 91 (1993), pp. 612 *et seq*.) or in the *Laguna del Desierto* case of 21 October 1994 (Case concerning a boundary dispute between Argentiina and Chile concerning the delimitation of the frontier line between boundary post 62 and Mount Fitzroy, UNRIAA, vol. XXII (Sales No. E/F.00.V.7), p. 1; see also ILR, vol. 113 (1999), p. 1).

[343] The United States Supreme Court has done so in a number of decisions, including the *Georgia* v. *South Carolina* case of 25 June 1990, or in *United States* v. *Louisiana and Others* of 26 February 1985 (both reproduced in ILR , vol. 91 (1993), p. 411 and 439). In both cases, silence was considered the equivalent of acquiescence.

[344] See Barale, "L'acquiescement dans la jurisprudence internationale", p. 393, and the jurisprudential references on pp. 394–400.

[345] Treaty of Territorial Limits between Costa Rica and Nicaragua (San José, 15 April 1858), *British and Foreign State Papers, 1857–1858*, vol. XLVIII, p. 1049.

[346] Moore, *History and Digest …*, vol. II, p. 1959. See also Coussirat-Coustère and Eisemann, *op. cit*., p. 5.

[347] *Yearbook … 1999*, vol. I, 2594th meeting, p. 194, para. 12.

[348] For a detailed analysis of this notion, and especially its more distant origins, see Martin, *L'estoppel en droit international public précédé d'un aperçu de la théorie de l'estoppel en droit anglais*, pp. 10–14, in particular.

[349] *Loc. cit*., p. 440, also citing Díez-Picazo Ponce de León, *La doctrina de los propios actos: un estudio crítico sobre la jurisprudencia del Tribunal Supremo*, pp. 63–65.

[350] In the *Dictionnaire de la Terminologie du Droit International* (Paris, Sirey, 1960), p. 263, Judge Basdevant formulated the following definition of estoppel: a term of procedure, taking from English, which designates the peremptory objection which prevents one party to a proceeding from adopting a position which contradicts the one that had already been admitted, either expressly or tacitly, as well as the one which the party claims to hold in the current proceeding.

[351] "El principio del 'estoppel' en derecho internacional público", pp. 104 and 106.

[352] "El principio del 'estoppel' y la sentencia del Tribunal Internacional de Justicia en el caso del templo de Preah Vihear", pp. 158–159. For a detailed and more recent treatment of this issue, see Jiménez García, *Los comportamientos recíprocos en derecho internacional a propósito de la aquiescencia, el estoppel y la confianza legítima*.

[353] *Serbian Loans*, *Judgment No. 14, 1929, P.C.I.J., Series A, No. 20*, p. 39.

other principles mentioned. Perhaps the very diversity of effects which unilateral acts may produce, as well as their disparity, are circumstances that may explain, although not necessarily justify, all the doubts that arise on this issue. It seems reasonable to affirm that the basis of this principle essentially lies in good faith, which is common to various legal systems.[354]

200. Similarly, and directly related to the categories of unilateral acts and, specifically, to the place occupied by the principle of estoppel, the debates that have taken place in the Commission are highly illustrative.[355] The doubts that have arisen with respect to whether or not to consider estoppel as a unilateral act were already evident in 1971, however, when it was noted that: "Estoppel may perhaps more accurately be regarded as not in itself a unilateral act but as the consequence of such an act or acts."[356] Moreover, the most characteristic element of estoppel is not the conduct of the State, but rather the confidence that is created in the other State. It might even be said, as pointed out in the *Temple of Preah Vihear* case,[357] that the principle of estoppel serves as a mechanism that eventually validates given circumstances which otherwise would have permitted the nullification of the legal act in question. Although in this decision ICJ referred to the role that estoppel might play in respect of the validation of treaties, the Special Rapporteur believes that the same idea would be applicable to unilateral acts.

201. Of course, the attitude adopted by a State with regard to a specific situation to some extent forces it to continue behaving consistently,[358] especially if it creates a certain expectation in third parties of good faith that this activity will continue and will adjust to the same parameters.[359] This conduct, acknowledging as valid a given state of affairs for a certain time, led ICJ to its judgment against Nicaragua in the case concerning the *Arbitral Award Made by the King of Spain on 23 December 1906*.[360] There have even been relatively recent arbitrations in which express mention has been made of estoppel and its significance.[361] It is not only the case law of international tribunals that has stressed the importance of estoppel; the issue has also arisen in domestic courts.[362]

Chapter II

Conclusions

202. In accordance with the Commission's request to the Special Rapporteur in 2003 (para. 1 above), this report has presented, merely as an illustration, examples of State practice, in particular a series of acts and declarations, including some equally unilateral forms of conduct which may produce legal effects similar to those of acts and declarations. Admittedly, not all of these constitute unilateral acts in the sense that interests the Commission. Some of them may not be juridical; others, although juridical, may perhaps be better categorized in the context of a treaty relationship, and therefore are not of direct interest to the consideration of the acts in question.

203. This presentation has attempted to facilitate the study of the topic and the drawing of conclusions about the possible existence of rules and principles applicable to the functioning of these acts. In some cases it might be concluded that these rules and principles are generally applicable to all unilateral expressions of will, of course being limited to juridical expressions, or, on the contrary, to only one category of such expressions, although they

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[354] See Venturini, *loc. cit*., p. 372; and also Pecourt García, "El principio del 'estoppel' en derecho ...", p. 117.

[355] In this regard, see Mr. Tammes's opinion in *Yearbook ... 1967*, vol. I, 928th meeting, p. 179, para. 6, where, referring to the need for systematization of this topic, and in particular making reference to the classification that must unavoidably be carried out, he said that:

> "The topic covered recognition as a positive act acknowledging a given situation to be a legal situation and, conversely, protests rejecting changes in a legal situation. It also included the principle of estoppel applied by the International Court of Justice. Other unilateral acts which might possibly be dealt with in a systematic draft were proclamations, waivers and renunciations."

[356] *Yearbook ... 1971*, vol. II (Part Two), pp. 60, footnote 333.

[357] *I.C.J. Reports 1962* (see footnote 191 above), p. 32, where the Court affirms that:

> "Even if there were any doubt as to Siam's acceptance of the map in 1908, and hence of the frontier indicated thereon, the Court would consider, in the light of the subsequent course of events, that Thailand is now precluded by her conduct for asserting that she did not accept it. She has, for fifty years, enjoyed such benefits as the Treaty of 1904 conferred on her, if only the benefit of a stable frontier. France, and through her Cambodia, relied on Thailand's acceptance of the map."

[358] See *Right of Passage over Indian Territory, Merits, Judgment, I.C.J. Reports 1960*, p. 6; under this assumption, the position maintained by a State for a certain amount of time is an indication of the consolidation of practice, leading to a perfect combination of acquiescence and the doctrine of estoppel:

> "For the purpose of determining whether Portugal has established the right of passage claimed by it, the Court must have regard to what happened during the British and post-British periods. During these periods, there had developed between the Portuguese and the territorial sovereign with regard to passage to the enclaves a practice upon which Portugal relies for the purpose of establishing the right of passage claimed by it."

(*Ibid*., p. 39)

[359] That repeated non-recognition of a form of government creates an obligation was noted in the *Charles J. Jansen* v. *Mexico* (Mexico/United States) case, decided on 20 November 1876 (Coussirat-Coustère and Eisemann, *op. cit*., p. 476) when it states: "It further results that the United States, at least, is not now at liberty to claim a government *de facto* for the Prince Maximilian, having always during the contest in Mexico recognized the republic and repudiated the empire." (*Ibid*., pp. 107–108)

[360] *Arbitral Award Made by the King of Spain on 23 December 1906, Judgment, I.C.J. Reports 1960*, p. 192. As the Court points out, referring to actions taken by Nicaragua:

> "In the judgment of the Court, Nicaragua, by express declaration and by conduct, recognized the Award as valid and it is no longer open to Nicaragua to go back upon that recognition and to challenge the validity of the Award. Nicaragua's failure to raise any question with regard to the validity of the Award for several years after the full terms of the Award had become known to it further confirms the conclusion at which the Court has arrived."

(*Ibid.*, p. 213).

[361] See the Arbitration Tribunal which decided the *Pope and Talbot Inc.* v. *Government of Canada* case, in its decision of 26 June 2000 (reproduced in ILR , vol. 122 (2002), p. 294, especially p. 338). It refers to the characteristics of estoppel, in a way similar to that described earlier.

[362] See the judgement of 21 March 1986, in the case *Mission intérieure des catholiques suisses* v. *Canton de Nidwald et Tribunal administratif du canton de Nidwald*, whose most relevant paragraphs for current purposes appear in Caflisch, *loc. cit*. (1986), p. 140. In this case, the Court stated that there was an obligation, at both the international and domestic levels, to be consistent with one's own conduct, i.e. estoppel (a prohibition of *venire contra factum proprium*). "This principle was applied in international jurisprudence even in cases not involving a treaty, but rather simple unilateral declarations issued, for example, by a minister for foreign affairs (see the *Eastern Greenland* case …)."

may not easily be qualified or classified when, as has been noted, there are no definitive criteria involved.

204. The Working Group on unilateral acts of States that met during the 2003 session considered some issues which have inspired this attempt to draw some conclusions.

205. For practical and methodological reasons, declarations are divided into various categories of acts which doctrine and practice show as being expressions of the unilateral will of States, irrespective of whether other acts exist which are classified and qualified differently. By examining these acts, and noting once again that those selected are merely a sample of the range of variations of these expressions, the Special Rapporteur has observed that those related to the recognition of States, Governments and *de facto* and *de jure* situations are the most frequent, although other cases, such as those consisting of promises, waivers and protests, are also formulated on various occasions.

206. Generally speaking, in the great majority of cases, unilateral acts and declarations of States are addressed to other States. On some occasions, however, the addressees of such acts and declarations are subjects other than the State, such as international organizations.

207. In most cases, these acts and declarations have been formulated individually, although at times they have been issued by groups of States, including States members of an international body (whether an international organization or in the context of a conference).

208. Most of these declarations are formulated without full formal powers by persons authorized to act at the international level and make commitments on behalf of the State, such as the Head of State or Government, the minister for foreign affairs, ambassadors, heads of delegation and representatives of the State to international organizations and bodies.

209. Although these declarations are often made in writing, in some cases they may be expressed orally. These are frequently transmitted through notes and communiqués, and at times even through an exchange of notes verbales.

210. In declarations of recognition, those relating to recognition of States are the most common; a considerable increase has been noted since the events of the 1990s in Central and Eastern Europe, which led to the creation of new, independent States.

211. In this latter context, it has also been observed that most of these declarations, at least those to which the Special Rapporteur has had access, come from European countries as part of common policies aimed at adjusting to the changes that have occurred in this region, although many States from other geographical regions have also expressly or implicitly recognized these new republics.

212. It has also been noted, in the context of declarations and acts of recognition, that they are linked with other situations, such as those having to do with boundaries, disarmament, state of war and neutrality, or an international treaty.

213. In most cases, declarations are made outside the context of negotiations, which gives them greater autonomy, as is appropriate for unilateral acts *sensu stricto*. It is true, however, that some are made as part of the processes relating to the recognition of a State or government.

214. In some cases the Special Rapporteur found that declarations were intended to recognize a State, provided that the State complied with a series of conditions; this pattern was observed in particular in the European context.

215. Generally speaking, not all acts of recognition correspond to express acts; some are implicit in other acts such as the conclusion of agreements, or in existing situations such as the exchange of diplomatic or other representations.

216. Acts of express non-recognition may also be observed, especially in cases where statehood is controversial; such non-recognition is repeatedly underlined, for example in parliamentary debates, by a State which does not recognize the given situation.

217. It is easier to determine the result of acts of recognition, although it is not clear in all cases, than of the formulation of other unilateral acts and declarations. In the case of recognition of States, formal diplomatic relations and relations in general have been established between the recognizing State and the recognized State.

218. Many declarations have been formulated that contain promises relating to boundaries, disarmament, forgiveness of debt, pending monetary issues, granting of permits for the use of certain spaces and adoption of moratoriums, among others.

219. In general, declarations containing promises are also formulated by persons who are recognized as being authorized to represent the State in its external relations, i.e., the Head of State or Government or the minister for foreign affairs. Some of these declarations are made orally, while others are in writing, through notes and acts of the competent State bodies.

220. In most cases, no reaction on the part of the addressee States has been observed, although at times more clear reactions have been seen in the case of boundary issues.

221. The situation is more complex in the specific case of disarmament, where reactions have not been clear. States possessing nuclear arms have not reacted positively in the sense of recognizing that the declarations under consideration contain a promise and are therefore legally binding on them. Instead, in the negotiations within the Conference on Disarmament, these declarations have been imprecise, particularly with respect to their scope and nature, although some participating countries have stressed their importance and the need for them to be considered as declarations containing a promise, having legal effects for the declaring States.

222. In practice, declarations and conduct have also been observed which signify protest in various areas, particularly in the context of boundary issues and the application of treaties. Protests have been made by States against acts or declarations, including conduct related to the recognition of an entity as a State.

223. Declarations or acts containing protests are generally expressed by governments through explicit notes from foreign ministers or ministries. Moreover, the protest may sometimes be reiterated when the situation against which the protest is made continues for some time.

224. Some protests are made by States through forms of conduct that do not constitute legal acts, but that have or may have significant legal effects. This conduct is most visible in the context of territorial disputes and the recognition or non-recognition of States and governments, among others.

225. The same could be said of acts or declarations, including forms of conduct that contain or signify a waiver of a right or a legal claim, although it is true that these are less frequent. Renunciations involving abdication and transfer may be contained in these declarations and acts.

226. Certain courses of conduct sometimes lead to express acts by a State entity, acts which are substantially different from unilateral acts *sensu stricto*, and which are formulated with a given intention.

227. It is not easy to compare conduct with acts in the strict sense of the term; however, it is extremely useful to consider conduct in dealing with the topic of unilateral acts and in arriving at the definition which the Commission will adopt in 2004, in accordance with the characteristics of the topic. Of course, it is not easy to determine these characteristics. Thus, for example, certain active types of conduct on the part of State bodies may differ from those usually seen in the conduct of foreign affairs.

228. In the case of non-active forms of conduct, such as silence understood as acquiescence, it is extremely difficult to determine which body should have formulated the act but refrained from doing so.

229. After considering the topic from the standpoint of practice, a draft definition could be elaborated on the basis of the draft adopted in 2003 by the Working Group on unilateral acts of States during the session,[363] for which forms of conduct that differ from the unilateral act *sensu stricto* would have to be considered. The term "act" would have to be defined in relation to its legal effects rather than in terms of its formal aspects.

230. In accordance with the consideration of unilateral acts, declarations and forms of conduct of States in the present report and the attempt to draw some conclusions, it would seem possible to affirm that some rules exist that are generally applicable to all unilateral acts and forms of conduct relevant to the Commission's purposes.

231. In addition to the definition that might be adopted on the above-mentioned basis, the possibility could be considered of elaborating a provision that would reflect a State's capacity to formulate such acts and conduct and the authorization of given persons to act on behalf of the State and commit it, at this level, without the need for formal powers.

[363] *Yearbook … 2003*, vol. I, 2789th meeting, p. 262, para. 58.

RESERVATIONS TO TREATIES

[Agenda item 6]

DOCUMENT A/CN.4/544

Ninth report on reservations to treaties,* by Mr. Alain Pellet, Special Rapporteur

[*Original: French*]
[*24 June 2004*]

CONTENTS

Multilateral instruments cited in the present report

Vienna Convention on the Law of Treaties (Vienna, 23 May 1969)	United Nations, *Treaty Series*, vol. 1155, No. 18232, p. 331.
Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (Vienna, 21 March 1986)	A/CONF.129/15.

"Generic" object of objections to reservations (revision): additional note

1. At its fifty-fifth session, the Commission considered chapter II of the eighth report on reservations to treaties concerning the definition of objections to reservations.[1] During that consideration, the definition of objections to reservations elicited some rather sharp criticism on the part of several members of the Commission. The Special Rapporteur was sympathetic to that criticism, suggesting that he should change fairly radically the definition of objections proposed initially and undertaking to submit a modified version of the definition. The Commission therefore decided to postpone the discussion of draft guidelines 2.6.1, 2.6.1 *bis* and 2.6.1 *ter* on the definition of objections until its fifty-sixth session in 2004.[2] This additional note is submitted in the light of that decision.

A. Initial proposals of the Special Rapporteur

2. Following a somewhat detailed presentation of State practice with respect to objections to reservations, the Special Rapporteur proposed the following definition:

2.6.1 *Definition of objections to reservations*

"Objection" means a unilateral statement, however phrased or named, made by a State or an international organization in response to a reservation to a treaty formulated by another State or international organization, whereby the State or organization purports to prevent the application of the provisions of the treaty to which the reservation relates, or of the treaty as a whole with respect to certain specific aspects, between the author of the reservation and the State or organization which formulated the objection, to the extent of the reservation, or

* *Note*: For technical reasons it was necessary to submit this document as the ninth report on reservations to treaties; in reality, it is a corrigendum to the second part of the eighth report (*Yearbook … 2003*, vol. II (Part One), document A/CN.4/535 and Add.1), whose plan was as follows:

[1] *Yearbook … 2003*, vol. I, 2780th–2783rd meetings (on 25 and 29–31 July 2003); for the eighth report, see *Yearbook … 2003*, vol. II (Part One), document A/CN.4/535 and Add.1.

[2] *Ibid.*, vol. I, 2783rd meeting, p. 230, para. 49.

to prevent the treaty from entering into force in the relations between the author of the reservation and the author of the objection.[3]

3. This definition seemed to him justified by the following considerations, which were set forth in the eighth report:[4]

(*a*) For reasons of legal security, it seems essential to determine whether a response to a reservation is an objection or a mere comment; as the French-British court of arbitration stated in the *English Channel* case concerning the delimitation of the continental shelf:

> Whether any such reaction amounts to a mere comment, a mere reserving of position, a rejection merely of the particular reservation or a wholesale rejection of any mutual relations with the reserving State under the treaty consequently depends on the intention of the State concerned;[5]

(*b*) States often use vague terms whose ambiguity veils their true intentions,[6] which would seem to indicate that the definition of objections should be treated in the same way as the definition of the reservations themselves and that an objection may be regarded as such even if it is not expressly presented as an objection by the author of a unilateral statement reacting to a reservation;

(*c*) Continuing in this direction, the Special Rapporteur saw fit to define objections to reservations according to the effects intended by their author, just as reservations are defined according to the aim of the formulating State or international organization.

4. Moreover, in view of the terminology chosen for draft guidelines 2.3.1 and 2.3.2 concerning reactions to the late formulation of a reservation,[7] the Special Rapporteur suggested the adoption, as appropriate, of a draft guideline 2.6.1 *bis* worded as follows:

> 2.6.1 *bis Objection to late formulation of a reservation*
>
> "Objection" may also mean a unilateral statement whereby a State or an international organization opposes the late formulation of a reservation.[8]

5. Lastly, while stating that there could be no question, in this section of the Guide to Practice, of anticipating problems relating to the validity of reservations, the Special Rapporteur considered that it might be useful to have a draft guideline 2.6.1 *ter* which would spell out the object of objections:

> 2.6.1 *ter Object of objections*
>
> When it does not seek to prevent the treaty from entering into force in the relations between the author of the reservation and the author of the objection, an objection purports to prevent the application of the provisions of the treaty to which the reservation relates or of the treaty as a whole with respect to certain specific aspects, between the author of the reservation and the State or organization which has formulated the objection, to the extent of the reservation.[9]

B. Discussion of the definition of objections to reservations

6. During the discussion in the plenary Commission, the proposals summarized above concerning the definition of objections elicited some fairly sharp criticism on the part of several members of the Commission.[10] Similar positions were adopted during the discussion in the Sixth Committee;[11] what is more, Poland sent to the Office of Legal Affairs a communication regarding, among other things, draft guideline 2.6.1 which reflects some of these concerns.[12]

7. In general, speakers supported the idea that the intention of the objecting States or international organizations must be determined.[13] But the appropriateness of bringing the definition of objections into line with the definition of the reservations themselves was challenged, at least to the extent that it resulted in the effect (or effects) intended by the objecting State or international organization being limited to those envisaged in article 20, paragraph 4 (*b*), and article 21, paragraph 3, of the Vienna Convention on the Law of Treaties (hereinafter the 1969 Vienna Convention) and the Vienna Convention on the Law of

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[3] *Ibid*., vol. II (Part One), document A/CN.4/535 and Add.1, para. 105.

[4] *Ibid.*, paras. 82–100.

[5] *Case concerning the delimitation of the continental shelf between the United Kingdom of Great Britain and Northern Ireland and the French Republic*, decision of 30 June 1977, UNRIAA, vol. XVIII (Sales No. E/F.80.V.7), p. 33, para. 39.

[6] See the examples given in *Yearbook … 2003*, vol. II (Part One), document A/CN.4/535 and Add.1, p. 44–46, paras. 84–90.

[7] Both draft guidelines use (improperly, in the opinion of the Special Rapporteur) the word "objection" to designate the opposition of a State to such a formulation.

[8] *Yearbook … 2003*, vol. II (Part One), document A/CN.4/535 and Add.1, para. 101.

[9] *Ibid*., para. 104. Another possibility would have been to include this information in the definition of the objections themselves; draft guideline 2.6.1 would then have read as follows:

> "'Objection' means a unilateral statement, however phrased or named, made by a State or an international organization in response to a reservation to a treaty formulated by another State or international organization, whereby the State or organization purports to prevent the application of the provisions of the treaty to which the reservation relates, or of the treaty as a whole with respect to certain specific aspects, between the author of the reservation and the State or organization which formulated the objection, to the extent of the reservation, or to prevent the treaty from entering into force in the relations between the author of the reservation and the author of the objection".

(*Ibid*., para. 105)

[10] Other members, however, approved the definition proposed by the Special Rapporteur; see, for example, *Yearbook … 2003*, vol. I, 2781st meeting, p. 214, para. 46, Ms. Xue (see also 2783rd meeting, p. 230, para. 44); 2782nd meeting, p. 221, para. 34, Mr. Pambou-Tchivounda; p. 223, para. 46, Mr. Kemicha (see also 2783rd meeting, p. 230, para. 46); see further 2782nd meeting, p. 217, para. 8, Mr. Fomba; p. 222, para. 37, Mr. Rodríguez Cedeño; p. 225, para. 53, Mr. Daoudi; see also the statements of Slovenia, *Official Records of the General Assembly, Fifty-eighth Session, Sixth Committee,* 19th meeting (A/C.6/58/SR.19), para. 4; China (*ibid*., para. 45); and Malaysia, *ibid*., 20th meeting (A/C.6/58/SR.20), para. 20.

[11] See the topical summary of the discussion held in the Sixth Committee of the General Assembly during its fifty-eighth session (A/CN.4/537), paras. 177–192.

[12] Note of 21 April 2004 from the Permanent Representative of Poland to the United Nations addressed to the Director a.i., Office of Legal Affairs.

[13] See, in particular, *Yearbook … 2003*, vol. I, 2781st meeting, p. 212, para. 34, Mr. Melescanu; p. 214, para. 46, Ms. Xue; and the statements of France, *Official Records of the General Assembly, Fifty-eighth Session, Sixth Committee*, 19th meeting (A/C.6/58/SR.19), para. 40, Japan (*ibid*., paras. 48–49), Argentina (*ibid*., para. 89), Sweden on behalf of the Nordic countries (*ibid*., para. 27), Greece (*ibid*., 20th meeting (A/C.6/58/SR.20), para. 51, and Australia, *ibid*., para. 16; see, however, *Yearbook … 2003*, vol. I, 2782nd meeting, p. 221, para. 33, Mr. Pambou-Tchivounda, who distinguishes between the intention of the author of the unilateral statement and its objective.

Treaties between States and International Organizations or between International Organizations (hereinafter the 1986 Vienna Convention), by emphasizing (correctly, in the view of the Special Rapporteur) the fact that the definition of objections should be distinguished from the question of their validity.[14]

8. It was pointed out in this respect that the legal effects attributed to objections by the 1969 and 1986 Vienna Conventions were uncertain[15] and were at times difficult to distinguish from those of an acceptance.[16] Moreover, "the aim pursued by [the objecting State] and the legal effects attributed by the [Vienna] Convention … did not have to be identical".[17] As was apparent from the report itself,[18] the author of an objection might intend to produce effects that were different from those envisaged in the Conventions,[19] in particular the applicability of the treaty as a whole without account being taken of the reservation ("super-maximum" effect).[20] It would therefore be appropriate to have a less restrictive and more flexible definition than the one contemplated in the report.[21]

9. On the other hand, the position of the Special Rapporteur, who considered that the potential authors of an objection could not be limited to the contracting States or international organizations alone,[22] was generally supported by members who spoke on this point;[23] but it was suggested that the wording should be based on article 23, paragraph 1, of the 1969 and 1986 Vienna Conventions, where mention is also made of "other States and international organizations entitled to become parties to the treaty",[24] or to include the signatories.[25]

10. Draft guideline 2.6.1 *bis* met with general approval,[26] although it was observed that "objections" to the late formulation of a reservation could be included in the general category if a broad definition was adopted.[27]

11. Likewise, members who spoke on draft guideline 2.6.1 *ter* were in favour of its inclusion in the Guide to Practice,[28] on the understanding that its wording would necessarily be adapted to changes made in draft guideline 2.6.1.

C. Proposed new definition

12. As he indicated in the discussion in the plenary Commission in 2003,[29] the Special Rapporteur was sympathetic to some of the criticism of the wording of draft guideline 2.6.1 as initially proposed.[30]

13. It seemed to him that two principles must be accepted and taken as starting points for the definition of objections:

(*a*) The necessity of not calling into question the rules in the 1969 and 1986 Vienna Conventions, in keeping with the Commission's constant position, which from the outset of its work on the topic had firmly followed this course,[31] to the consistent approval of the vast majority of the States in the Sixth Committee of the General Assembly;

(*b*) The need to take into consideration the intention of the objecting State or international organization, whose unilateral statement in reaction to a reservation must purport "to oppose" (to use a neutral and general term) the reservation's having the full effects sought by its author.

14. On the other hand—and this is no doubt the crux of the matter—the Special Rapporteur willingly agrees that he lacked rigour in his choice of wording, which does not include in the *definition* of objections the unilateral statements purporting to produce effects not provided for in the 1969 and 1986 Vienna Conventions. This amounts to prejudging their (in)validity, although, in keeping with his consistent position (a position which some members of the Commission have often been reluctant to support),

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[14] See, in particular, *Yearbook … 2003*, vol. I, 2781st meeting, p. 211, para. 22, Mr. Koskenniemi.

[15] *Ibid*., 2780th meeting, p. 207, para. 16, Mr. Gaja; and 2781st meeting, p. 211, paras. 22–23, Mr. Koskenniemi.

[16] *Ibid*., 2780th meeting, p. 207, para. 17, Mr. Gaja.

[17] *Ibid*., p. 207, para. 19, Mr. Gaja.

[18] *Ibid*., vol. II (Part One), document A/CN.4/535 and Add.1, pp. 47–48, paras. 95–96.

[19] *Ibid*., vol. I, 2780th meeting, p. 207, para. 17, Mr. Gaja; 2781st meeting, p. 208, para. 3, Mr. Kolodkin; 2782nd meeting, p. 224, para. 48, Mr. Mansfield; see also the aforementioned communication of Poland (footnote 12 above) and the statements of Israel, *Official Records of the General Assembly, Fifty-eighth Session, Sixth Committee* (A/C.6/58/SR.17), para. 45; Greece, *ibid*., 20th meeting (A/C.6/58/SR.20), para. 52; the Netherlands, *ibid*., 19th meeting (A/C.6/58/SR.19), para. 21; and Sweden (*ibid*., para. 25).

[20] *Yearbook … 2003*, vol. I, 2781st meeting, p. 213, para. 36, Mr. Koskenniemi; see also paragraph 38, Mr. Momtaz. In its aforementioned communication (footnote 12 above), Poland pointed out that the treaty itself can cause an objection to have a "super-maximum" effect and that such is the case when it provides that reservations must be accepted unanimously by the Contracting Parties. In the opinion of the Special Rapporteur, this is merely an instance of the "maximum" effect, as envisaged in article 20, paragraph 4 (*b*), of the 1969 Vienna Convention, and article 21, paragraph 3, of the 1986 Vienna Convention.

[21] *Yearbook … 2003*, vol. I, 2781st meeting, p. 209, para. 9, Mr. Kolodkin; p. 210, para. 15, Ms. Escarameia; *ibid*., para. 16, Mr. Koskenniemi; 2782nd meeting, p. 224, para. 50, Mr. Kateka; see also the aforementioned communication of Poland (footnote 12 above) and the statements supporting this view by the Netherlands, *Official Records of the General Assembly, Fifty-eighth Session, Sixth Committee* (A/C.6/58/SR.19), para. 21; the United States of America, 20th meeting (A/C.6/58/SR.20), para. 9; Bulgaria (*ibid*., para. 63); see, however, the caveats regarding too broad a definition from Mr. Galicki, *Yearbook … 2003*, vol. I, 2782nd meeting, p. 217, para. 7; and France, *Official Records of the General Assembly, Fifty-eighth Session, Sixth Committee*, 19th meeting (A/C.6/58/SR.19), para. 41.

[22] *Yearbook … 2003*, vol. II (Part One), document A/CN.4/535 and Add.1, p. 48, para. 100.

[23] *Ibid*., vol. I, 2782nd meeting, p. 219, para. 16, Mr. Fomba.

[24] *Ibid*., 2780th meeting, p. 207, para. 21, Mr. Gaja; see also the aforementioned communication of Poland (footnote 12 above).

[25] *Yearbook … 2003*, vol. I, 2781st meeting, p. 213, para. 38, Mr. Momtaz; and p. 214, para. 46, Ms. Xue.

[26] *Ibid.*, p. 210, para. 15, Ms. Escarameia; p. 214, para. 46, Ms. Xue; 2782nd meeting, p. 217, para. 5, Mr. Galicki; pp. 219–220, para. 20, Mr. Fomba; see, however, page 223, para. 40, Mr. Chee.

[27] *Ibid*., 2781st meeting, p. 211, para. 26, Mr. Koskenniemi; see also *Official Records of the General Assembly, Fifty-eighth Session, Sixth Committee*, 19th meeting (A/C.6/58/SR.19), para. 31 (Italy).

[28] See *Yearbook … 2003*, vol. I, 2780th meeting, p. 207, paras. 19–20, Mr. Gaja; and 2782nd meeting, p. 219, para. 20, Mr. Fomba.

[29] *Ibid*., 2783rd meeting, p. 230, para. 48.

[30] See paragraph 2 above.

[31] See *Yearbook ... 1995*, vol. II (Part Two), p. 108, para. 487.

the definitions (of reservations or objections) should not anticipate problems of "validity" (or "permissibility").

15. Following the extremely interesting discussion in 2003, the Special Rapporteur proposed an alternative wording for draft guideline 2.6.1, which read:

2.6.1 *Definition of objections to reservations*

"Objection" means a unilateral statement, however phrased or named, made by a State or an international organization in response to a reservation to a treaty formulated by another State or international organization, whereby the State or organization purports to prevent the reservation having any or some of its effects.[32]

16. This wording met with general approval.[33] However,

(*a*) Some members wondered whether it would not be preferable to postpone consideration of the wording until the Commission had adopted the draft guidelines on the effects of objections;

(*b*) One member stressed that no formal link should be established between the definition of objections to reservations and the effects provided for in the 1969 and 1986 Vienna Conventions;[34]

(*c*) Another member expressed concern that the proposed wording would benefit the unilateral will of the objecting State to the detriment of the contractual character of treaty commitments.[35]

17. As to the first point, the Special Rapporteur is firmly persuaded that a wait-and-see attitude is not the right way to proceed. He finds it illogical to consider the effects of a legal institution without first having defined it, since to do so is a true case of "putting the cart before the horse".[36] Moreover, there can surely be little justification for treating objections differently from reservations: the Commission adopted a definition for reservations (based on the effects which the reserving State intends its unilateral statement to produce)[37] without feeling the need to delay such adoption until it had taken a position on such effects. The important point is not to prejudge the effects in question in the definition.

18. In this respect, the second objection related above is only partly convincing: the words "prevent the reservation having any or some of its effects" does not prejudge what the effects of a reservation are, nor does it refer back to the 1969 and 1986 Vienna Conventions; it leaves open the question of knowing what they are, as well as the effects which the objection itself may produce. On the other hand, it is true that it does not cover every case that may occur. It is possible that the author of the objection intends to oppose the application, in its relations with the author of the reservation, not only of "the provisions to which the reservation relates",[38] but of a whole part of the treaty—although not of the treaty in its entirety—[39] even though the reservation relates only to a particular provision of that part.

19. To cover such circumstances, which correspond to actual cases,[40] it is no doubt desirable to modify the end of the proposed definition as follows: instead of providing that the objection "purports to prevent the reservation having any or some of its effects", it should be stated that it "purports to modify the effects expected of the reservation [by the author of the reservation]". The words between square brackets make the text cumbersome, and it would perhaps suffice to include this detail in the commentary.

20. As to the third critical remark on the proposed wording reproduced above,[41] the Special Rapporteur is particularly attached to the "contractual" character of treaties and to the voluntary nature of treaty commitments. This explains, incidentally, why he has consistently been reluctant to recognize any rule which would result in allowing a State to be bound against its will by any treaty provision whatever[42] and has expressed doubts about the possibility for an objecting State of maintaining that the treaty as a whole is binding upon the author of a reservation despite its reservation.[43] Here, too, the proposed wording does not prejudge in any way the effects which a reservation or an

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[32] *Yearbook … 2003*, vol. II (Part Two), p. 64, para. 363.

[33] *Ibid*., vol. I, 2783rd meeting, p. 230, para. 48; see also, for example, the statements by Guatemala, *Official Records of the General Assembly, Fifty-eighth Session, Sixth Committee* (A/C.6/58/SR.19), para. 9; Japan (*ibid*., para. 50); Romania (*ibid*., para. 63); Greece, *ibid*., 20th meeting (A/C.6/58/SR.20), para. 51; and the Islamic Republic of Iran (*ibid*., para. 70).

[34] *Yearbook … 2003*, vol. I, 2783rd meeting, p. 228, para. 25, Mr. Gaja.

[35] *Ibid*., p. 229, para. 30, Ms. Xue.

[36] *Ibid*., p. 229, para. 31, Mr. Mansfield. The Special Rapporteur is even more firmly persuaded that it would be inappropriate or impossible to omit a definition of the word "objection" in the Guide to Practice on the ground that article 20, paragraphs 4 (*b*) and 5, and article 21 of the 1969 and 1986 Vienna Conventions suffice in that regard (cf. *Official Records of the General Assembly, Fifty-eighth Session, Sixth Committee*, 19th meeting (A/C.6/58. SR.19), para. 14, Portugal; *ibid*., 20th meeting (A/C.6/58/SR.20), para. 9; United States; para. 67, Pakistan; against: *ibid*., 19th meeting (A/C.6/58/SR.19), para. 70, Cyprus). For one thing, the provisions in question are not definitions and, for another, the Commission has consistently held that the Guide to Practice should reproduce all the elements of the Vienna Conventions, which should be further elaborated and amplified.

[37] See article 2, paragraph 1 (*d*), of the 1969 and 1986 Vienna Conventions and draft guideline 1.1 (*Yearbook ... 2003,* vol. II (Part Two), p. 65, para. 367).

[38] As provided in article 21, paragraph 3, of the 1969 and 1986 Vienna Conventions.

[39] As provided in article 20, paragraph 4 (*b*), and article 21, paragraph 3, of the 1969 and 1986 Vienna Conventions when the author has expressly expressed such intention.

[40] See *Yearbook … 2003*, vol. II (Part One), document A/CN.4/535 and Add.1, p. 47, para. 95, in particular footnote 157; see also, for example, the objections of Japan, the Netherlands, Sweden, the United Kingdom of Great Britain and Northern Ireland, and the United States to the reservation of the Syrian Arab Republic to the compulsory conciliation procedure provided for in the 1969 Vienna Convention, and of Tunisia and the Union of Soviet Socialist Republics to article 66 of the Convention (*Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 2003* (United Nations publication, Sales No. E.04.V.2), vol. II, chap. XXIII.1, pp. 331–335).

[41] Para. 15; for the remark in question, see paragraph 16 (*c*) above.

[42] See, for example, the second report on reservations to treaties (*Yearbook ... 1996*, vol. II (Part One), document A/CN.4/477 and Add.1, p. 78, paras. 226–230); this position has, moreover, been endorsed by the Commission in paragraph 10 of the preliminary conclusions of the International Law Commission on reservations to normative multilateral treaties including human rights treaties (*ibid.* (Part Two), p. 57, para. 157).

[43] See *Yearbook … 2003*, vol. II (Part One), document A/CN.4/535 and Add.1, p. 48, paras. 96–97.

objection may produce; it is limited to taking note of the effects which the author of the objection (and, by the same token, the author of the reservation) *intend* the objection (and the reservation) to produce.[44]

21. Accordingly, these points could (and should, in the view of the Special Rapporteur) be spelled out in the commentary to draft guideline 2.6.1.

22. In the light of these observations, the guideline might be drafted as follows:

"2.6.1 *Definition of objections to reservations*

"'Objection' means a unilateral statement, however phrased or named, made by a State or an international organization in response to a reservation to a treaty formulated by another State or international organization, whereby the State or organization purports to modify the effects expected of the reservation [by the author of the reservation]."

23. As is indicated in the eighth report, there seems to be no point in including *in the definition* itself any mention of the categories of States or international organizations able to formulate an objection.[45] In this matter, it is sufficient to draw on the definition of the reservations themselves, which is without particulars as to the category of State or international organization which is entitled to formulate a reservation. This does not, of course, mean that the question should not be settled in the Guide to Practice; but it would be appropriate to address it in a separate guideline.

24. The Special Rapporteur is, moreover, aware that the word "made" in the definition ("a unilateral statement ... made by a State or an international organization") is open to discussion: taken literally, it might be understood as meaning that the objection produces effects *per se* without any other condition having to be met; yet, it must at least be permissible. The word "made" was chosen for reasons of symmetry, because it appears in the definition of reservations.

25. As to the other elements of the definition, they are dealt with in the eighth report on reservations to treaties.[46]

26. Draft guideline 2.6.1 *ter*, which was proposed in the same document,[47] was justified only because of the reminder, in the text of draft guideline 2.6.1, of the effects of objections to reservations as stated in the 1969 and 1986 Vienna Conventions. Once the reference to those provisions is dropped, the elaboration in draft guideline 2.6.1 *ter* is unnecessary.

27. Such is not the case with draft guideline 2.6.1 *bis*.[48] It was justified because of the risk of confusion arising out of the use of the word "objection" to designate the opposition of a State or an international organization to the late formulation of a reservation in draft guidelines 2.3.1 to 2.3.3.[49] In fact, these operations are intellectually distinct: the absence of *opposition* to such a formulation by no means prevents contracting States or international organizations from *objecting* to the new reservation even if this is rare in practice.

28. The only doubt entertained by the Special Rapporteur concerned the need for the formal inclusion of such a guideline in the Guide to Practice.[50] A consensus seemed to have emerged in the Commission in favour of such inclusion;[51] the draft guideline should be numbered 2.6.2. The Special Rapporteur sees no reason to modify the proposed wording, except in one respect.

29. Since the Commission adopted, at the current session, draft guideline 2.3.5 on widening of the scope of a reservation, which refers back to the question of late formulation of reservations,[52] it seems logical, in draft guideline 2.6.2, to address "objections" to the late widening of the scope of a reservation:

"2.6.2 *Objection to the late formulation or widening of the scope of a reservation*

"'Objection' may also mean the unilateral statement whereby a State or an international organization opposes the late formulation or widening of the scope of a reservation."

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[44] This last point is already included in the definition of reservations given in the 1969 and 1986 Vienna Conventions and reflected in draft guideline 1.1 (see footnote 37 above).

[45] *Yearbook … 2003*, vol. II (Part One), document A/CN.4/535 and Add.1, p. 48, para. 100.

[46] *Ibid*., pp. 43–44, paras. 76–79. In its aforementioned communication (see footnote 12 above), Poland is of the view that the time at which an objection can be made should be specified in this definition. For the reasons indicated (*ibid*., para. 76), the Special Rapporteur thinks not; but, clearly, this information should be given in another draft guideline.

[47] See paragraph 5 above.

[48] See paragraph 4 above.

[49] *Yearbook … 2003*, vol. II (Part One), document A/CN.4/535 and Add.1, pp. 48–49, para. 101.

[50] *Ibid*.

[51] See paragraph 10 above.

[52] The text of this draft guideline reads:

"2.3.5 *Widening of the scope of a reservation*:

"The modification of an existing reservation for the purpose of widening its scope shall be subject to the rules applicable to the late formulation of a reservation. However, if an objection is made to that modification, the initial reservation remains unchanged."

(*Yearbook ... 2004*, vol. II (Part Two))

SHARED NATURAL RESOURCES

[Agenda item 7]

DOCUMENT A/CN.4/539 and Add.1

Second report on shared natural resources: transboundary groundwaters, by Mr. Chusei Yamada, Special Rapporteur

[*Original: English*]
[*9 March and 12 April 2004*]

CONTENTS

Introduction

1. At the fifty-fifth session of the International Law Commission, in 2003, the Special Rapporteur presented his first report on the topic of shared natural resources.[1] The report sought to provide the background to the topic. The Special Rapporteur, while envisaging covering groundwaters, oil and natural gas under the topic, proposed to begin with confined transboundary groundwaters, which had not been covered by the Convention on the Law of the Non-navigational Uses of International Watercourses (hereinafter the 1997 Convention).[2] He emphasized the vital importance of groundwaters for mankind, their distinct differences from surface waters and the need to acquire sufficient knowledge of those groundwaters. A technical briefing for members of the

[1] *Yearbook … 2003*, vol. II (Part One), document A/CN.4/533 and Add.1, p. 117.

[2] Convention on the Law of the Non-navigational Uses of International Watercourses (New York, 21 May 1997), *Official Records of the General Assembly, Fifty-first Session, Supplement No. 49*, vol. III, resolution 51/229, annex.

Commission by experts on the subject of the report was arranged by UNESCO.[3]

2. The members of the Commission commented on the various aspects of the report and gave general support to the Special Rapporteur's approach to focus on groundwaters for the time being.[4] Some serious doubt was expressed on the concept of "shared" in relation to transboundary groundwaters.

3. The discussions in the Sixth Committee of the General Assembly in 2003 indicated general support by the delegations for the Special Rapporteur's approach in his first report.[5] In most of their comments and responses, Governments encouraged the Commission to proceed with the project. However, some delegations voiced apprehension that the term "shared resources" might refer to a shared heritage of mankind or to notions of shared ownership.

4. In view of the sensitivity expressed both in the Commission and in the Sixth Committee on the term "shared" in the title of the topic, the Special Rapporteur intends to focus on the sub-topic of "transboundary groundwaters" in the present report during the time that the Commission deals exclusively with groundwaters.

5. The Special Rapporteur fully recognizes that further efforts for data collection, research and study on groundwaters are required before any definitive proposal can be formulated. Such efforts must be strenuously pursued. However, he has decided to present several draft articles in this report. He feels that the members of the Commission, who are lawyers, might find it easier to react concretely if they are presented with proposals in the form of draft articles. This is meant to provoke substantive discussions, to identify the areas to be addressed and to promote better understanding of the problems of groundwaters. He is by no means suggesting any premature formulation of draft articles. He bears in mind that the mandate of the Commission is codification and that any draft article must be substantiated by the existing international regulations, customary rules and practices of States.

6. In preparing for the present report, the Special Rapporteur has continued to receive valuable assistance from experts under the auspices of UNESCO.[6] The annexes to this report, which will provide hydrogeological and other technical background, including a review of existing relevant treaties, a world groundwater map and case studies, will be based on the inputs from those experts. He is also supported by expert members of the Study Group on Shared Natural Resources established by the Ministry of Foreign Affairs of Japan.[7] The Special Rapporteur wishes to record his most sincere appreciation for their significant contributions.

[3] The briefing was conducted at an informal meeting of the Commission by a group of experts from UNESCO, FAO and the International Association of Hydrogeologists (IAH).

[4] See *Yearbook … 2003*, vol. I, 2778th–2779th meetings, pp. 188–202.

[5] See Topical summary of the discussion held in the Sixth Committee of the General Assembly during its fifty-eighth session (A/CN.4/537), paras. 201–217.

[6] UNESCO organized an Expert Group Meeting on Shared Groundwater Resources for the Special Rapporteur in Paris on 2 and 3 October 2003, with the contribution of FAO and IAH. Alice Aureli (UNESCO) also arranged to send Shammy Puri (IAH), Gabriel Eckstein (Texas Tech University) and Kerstin Mechlem (FAO) to Tokyo to advise the Special Rapporteur from 8 to 11 December 2003.

[7] The members of the Study Group are Naoko Saiki, Yasuyoshi Komizo and Miwa Yasuda of the Ministry of Foreign Affairs, Kazuhiro Nakatani and Hum Tsuruta of the University of Tokyo, Mariko Kawano of Waseda University, Hiroyuki Banzai of Surugadai University and Naoki Iwatsuki of Rikkyo University. The Group is also assisted by Makoto Minagawa of the Graduate School of Waseda University.

Chapter I

General framework

7. There is no doubt that the most relevant existing general treaty is the 1997 Convention. In his first report, the Special Rapporteur, recalling the Commission's resolution in 1994 recommending *mutatis mutandis* application of the principles of international watercourses to groundwaters, stated that "[i]t is obvious that almost all the principles embodied in the Convention ... are also applicable to confined transboundary groundwaters".[8] This statement met with some criticism, both in the Commission and in the Sixth Committee. It was also carefully reconsidered at the UNESCO/FAO/IAH Expert Group Meeting in Paris. Some of those principles could not be transposed automatically to the management of fundamentally non-renewable and finite resources, such as transboundary groundwaters and non-renewable groundwaters. This was, for example, the case of article 5 of the 1997 Convention, which dealt with the principle of equitable and reasonable utilization. In other cases, the provisions of the Convention were too weak or required modification, given the vulnerability of groundwaters to pollution.[9] The Special Rapporteur accepts these criticisms and recognizes the need to adjust those principles. However, he still feels that the 1997 Convention offers the basis upon which to build a regime for groundwaters.

8. It is therefore proposed to consider draft articles within the following general framework, which more or less reflects that of the 1997 Convention.

Part I. Introduction

Scope of the Convention

Use of terms (definition)

[8] *Yearbook … 2003*, vol. II (Part One), document A/CN.4/533 and Add.1, p. 123, para. 20.

[9] Statements by Messrs Economides, Niehaus and Opertti Badan (*Yearbook … 2003*, vol. I, 2779th meeting, pp. 196–197 and 199) and by Brazil, India and Norway (*Official Records of the General Assembly, Fifty-eighth Session, Sixth Committee*, 20th and 21st meetings (A/C.6/58/SR.20–21)).

PART II. GENERAL PRINCIPLES

Principles governing uses of transboundary groundwaters

Obligation not to cause harm

General obligation to cooperate

Regular exchange of data and information

Relationship between different kinds of uses

PART III. ACTIVITIES AFFECTING OTHER STATES

Impact assessment

Exchange of information

Consultation and negotiation

PART IV. PROTECTION, PRESERVATION AND MANAGEMENT

Monitoring

Prevention (Precautionary principle)

PART V. MISCELLANEOUS PROVISIONS

PART VI. SETTLEMENT OF DISPUTES

PART VII. FINAL CLAUSES

9. This framework is still preliminary and would be subject to substantial modifications. It is also noted that the draft articles on prevention of transboundary harm from hazardous activities, which were adopted by the Commission at its fifty-third session, in 2001,[10] provide a useful guide to this exercise. In this present report, the Special Rapporteur presents several draft articles for parts I and II. For the benefit of the readers, the compilation of the proposed draft articles is given in annex I to the present report.

[10] *Yearbook ...2001*, vol. II (Part Two), pp. 146–148, para. 97.

CHAPTER II

Scope of the Convention

10. The proposed draft article reads as follows:

"*Article 1*

"*Scope of the present Convention*

"The present Convention applies to uses of transboundary aquifer systems and other activities which have or are likely to have an impact on those systems and to measures of protection, preservation and management of those systems."

11. In his first report on shared natural resources,[11] the Special Rapporteur suggested using the term "confined transboundary groundwaters" to denote the body of water that was not covered by article 2 (*a*) of the 1997 Convention and that was to be the subject of the sub-topic. Upon reflection and after consultation with hydrogeologists, he now proposes to employ the term "transboundary aquifer system" in the draft articles.

12. The term "groundwaters", which has been consistently used in the Commission, should not mean all the underground waters, but a body of underground waters constituting a unitary whole which could be extracted. Although it is perfectly adequate to use the term in normal writing, it lacks precision as a legal term. It would be more appropriate to opt for the technical term "aquifer", which leaves no ambiguity. The definition of "aquifer" and the need to have reference to "aquifer system" will be studied in draft article 2 (Use of terms).

13. The term "confined" has been used in the Commission to mean "unrelated" or "not connected" to surface waters. For hydrogeologists, however, "confined" means a hydraulic state where waters are stored under pressure and does not refer to the lack of connection to a body of surface waters. Therefore, it would be advisable not to use the term "confined".

14. Furthermore, the assumption under which the Special Rapporteur started to cover only those groundwaters not covered by article 2 (*a*) of the 1997 Convention might need reconsideration. Take the case of the Nubian sandstone aquifer system.[12] It is a huge aquifer system being shared by Chad, Egypt, the Libyan Arab Jamahiriya and the Sudan. The present recharge of the aquifer is very low. It happens to be connected with the Nile south of Khartoum, although that connection is negligible. The small portion of the aquifer system around the connecting point may have similar characteristics to those of the River Nile and could be governed by the 1997 Convention. However, the greatest part of the aquifer system has the distinct characteristics of groundwaters and should be governed by the new groundwater convention. Accordingly, the Special Rapporteur decided to discard the concept of "confined", "unrelated" or "not connected". This may result in the dual applicability of the 1997 Convention and the new convention to certain groundwaters. Should a problem arise as a result of this dual applicability, an article could subsequently be drafted to set out a rule for addressing such situations.

15. The activities regulated by article 1 of the 1997 Convention are (*a*) uses of the resources and (*b*) measures of protection, preservation and management related

[11] *Yearbook … 2003*, vol. II (Part One), document A/CN.4/533 and Add.1.

[12] *Ibid*., annex II B.

to the uses of those resources. In addition to these two categories of activities, in the case of groundwaters it would also be necessary to regulate activities other than uses of the resources. Such activities would include those related to industry, agriculture and forestation carried out on the ground that adversely affect groundwaters.[13] The phrase "which have or are likely to have" could be replaced by "which involve a risk of causing". The Special Rapporteur adopted the term "impact" over "adverse effect" or "harm" as he felt that the term "impact" is more appropriate in an environmental treaty.

[13] *Ibid*., paras. 20 and 40–48, respectively.

Chapter III

Use of terms (definition)

16. The proposed draft article reads as follows:

"*Article 2*

"*Use of terms*

"For the purposes of the present Convention:

"(*a*) "Aquifer" means a permeable water-bearing rock formation capable of yielding exploitable quantities of water;[14]

"(*b*) "Aquifer system" means an aquifer or a series of aquifers, each associated with specific rock formations, that are hydraulically connected;

"(*c*) "Transboundary aquifer system" means an aquifer system, parts of which are situated in different States;

"(*d*) "Aquifer system State" means a State Party to the present Convention in whose territory any part of a transboundary aquifer system is situated.

17. An aquifer is a geological formation capable of yielding useful groundwater supplies to wells and springs. All aquifers have two fundamental characteristics: a capacity for groundwater storage and a capacity for groundwater flow. Nonetheless, different geological formations vary widely in the degree to which they exhibit these properties and their area can vary widely with a geological structure from a few square kilometres to many thousands of square kilometres.[15] Article 1 of the 1997 Convention refers to uses of both "international watercourses" and "their waters". There is no need to follow the example of the 1997 Convention, as the term "aquifer" covers both the rock formation and the waters contained in it. Recharge and discharge zones are outside aquifers.

18. Aquifers exist independently from and can also be linked with other aquifers. There are many cases where two or more adjacent aquifers have hydraulic consistency between them. In such cases, these aquifers must be treated as a single system for proper management. For example, if aquifer A is located entirely within a State, then it is a domestic aquifer and would not be subject to international regulations. However, if aquifer A has a hydraulic link with underlying aquifers B and C, one of which is transboundary, then aquifer A must be treated as part of a transboundary aquifer system consisting of aquifers A, B and C.

19. Some groundwater experts hold the view that all categories of aquifers, regardless of whether they are domestic or transboundary, must be subject to international regulations. The Special Rapporteur feels that this view of emphasizing environmental protection would not be readily accepted by Governments. Only transboundary aquifer systems will therefore be regulated for some time to come.

20. The definition of terms needs to be revisited after the context of the uses of these terms in the substantive provisions has been determined. The definition of additional terms may also be required.

[14] UNESCO-WMO, *International Glossary of Hydrology*, 2nd rev. ed. (Paris/Geneva, 1992).

[15] World Bank, Groundwater Management Advisory Team (GW-MATE) Core Group, "Characterization of groundwater systems: key concepts and frequent misconceptions", *Sustainable Groundwater Management: Concepts and Tools*, Briefing Note 2 (Washington, D.C., World Bank).

Chapter IV

Principles governing uses of aquifer systems

21. The Special Rapporteur is not yet ready to submit a draft article on principles governing uses of aquifer systems because it is first necessary to conduct further research. The problems here are manifold. The basic principles embodied in article 5 of the 1997 Convention are "equitable" use, "reasonable utilization" and participation by States "in an equitable and reasonable manner". These principles may not be automatically transposed to the case of groundwaters.

22. The principle of equitable use by the watercourse States is relevant to shared resources. The waters of international watercourses flow from the zone under the jurisdiction of an upstream State to that under the jurisdiction

of a downstream State. They are like fish stocks migrating from the zone of exclusive jurisdiction of one State to that of another. They are shared resources in the true sense of the term. In the case of a transboundary aquifer system, the waters in the system also flow naturally across borders. However, such flow is slow compared with the flow of surface waters. On the other hand, extraction of waters in a transboundary aquifer system by State A would certainly have the effect of lowering the water level of that aquifer system in State B. In this sense, the waters are shared by two States. In any event, the concept of equitable use may call for some modification *vis-à-vis* groundwaters.

23. The principle of "reasonable utilization" or "optimal" use is viable for renewable resources such as a river system and marine living resources. Scientific criteria for the optimal use of renewable resources require that the level of such resources be kept at the maximum sustainable yield. However, groundwaters may be either renewable or non-renewable. Non-renewable groundwaters can be compared to mineral resources. There would of course be political, social, economic and ecological constraints to the exploitation of such groundwaters. Several scientific criteria and tools point to and recommend the most appropriate exploitation regimes. The principle of participation by States "in an equitable and reasonable manner" also requires detailed study. It is obvious that States should have the right to participate in the management of transboundary aquifer systems. However, what other kinds of rights of participation are to be accorded to States? Does there exist any principle governing the use of groundwaters ready for codification?

Chapter V

Obligation not to cause harm

24. The proposed draft article reads as follows:

"*Article 4*

"*Obligation not to cause harm*

"1. Aquifer system States shall, in utilizing a transboundary aquifer system in their territories, take all appropriate measures to prevent the causing of significant harm to other aquifer system States.

"2. Aquifer system States shall, in undertaking other activities in their territories which have or are likely to have an impact on a transboundary aquifer system, take all appropriate measures to prevent the causing of significant harm through that system to other aquifer system States.

"3. Aquifer system States shall not impair the natural functioning of transboundary aquifer systems.

"4. Where significant harm nevertheless is caused to another aquifer system State, the State whose activity causes such harm shall, in the absence of agreement to such activity, take all appropriate measures in consultation with the affected State to eliminate or mitigate such harm and, where appropriate, to discuss the question of compensation."

25. *Sic utere tuo ut alienum non laedas* is the established principle of international liability. The draft is designed to implement this principle for activities related to groundwaters. Paragraph 1 refers to the use of a transboundary aquifer system and paragraph 2 refers to activities other than use which have a risk of causing harm. In the debates in the Commission and in the Sixth Committee, the view has been expressed that a lower threshold than "significant" harm is required for groundwaters, which are more fragile and, once polluted, take longer to purify than surface waters. Human activities at the ground surface, e.g. landfill of waste, can result in aquifer pollution. The polluted groundwater from one side of an international boundary can travel to the other. Once polluted, aquifer clean-up is slow and expensive. The detection of its sub-surface distribution can also be costly. One of the differences between surface water and groundwater resources is that, in the case of the latter, sometimes more time is needed to detect pollution. In the aquifer systems an impact generated by the present generation may be detected by future generations.[16] The Special Rapporteur, however, did not feel it necessary to find an alternative term for "significant". The threshold of "significant" harm is a flexible and relative concept. Even when groundwaters are contaminated by only small amounts of pollutants, the harm they may suffer could be evaluated as significant if the contamination has an irreversible or lasting effect.

26. The time element is also important. It might take years, decades or even more before the physical harm caused by a certain activity related to groundwaters manifests itself. This point was made by one delegation, which stated that the Commission should take a practical approach by focusing on solving current issues or those which will arise in the near future.[17]

27. Paragraph 3 deals with the situation where a transboundary aquifer system is permanently destroyed. Hydrogeologists tend to place importance on the obligation contained in the provision. What would be the justification for this principle? Is it that such destruction causes significant harm to another aquifer system State? If the retention of the principle is warranted, it might be preferable to place the paragraph in part IV of the draft articles, which deals with preservation.

28. Paragraph 4 still focuses on the aspect of prevention, as do the other paragraphs of the draft article. It does not deal with the question of international liability,

[16] Shammi Puri, ed., *Internationally Shared (Transboundary) Aquifer Resources Management—their Significance and Sustainable Management: a Framework Document*, Series on Groundwater No. 1 (Paris, UNESCO, November 2001), p. 17.

[17] *Official Records of the General Assembly, Fifty-eighth Session, Sixth Committee*, 20th meeting, statement by China (A/C.6/58/SR.20), para. 48.

though reference is made to the discussion of the question of compensation. The Special Rapporteur intends to propose at a later stage draft articles on procedures that would lead to and expedite the solution of international liability involving aquifer systems. However, he feels that the substantive question of international liability should be left to the exercise which the Commission is undertaking under the topic of "International liability for injurious consequences arising out of acts not prohibited by international law".

Chapter VI

General obligation to cooperate

29. The proposed draft article reads as follows:

"*Article 5*

"*General obligation to cooperate*

"1. Aquifer system States shall cooperate on the basis of sovereign equality, territorial integrity, mutual benefit and good faith in order to attain appropriate utilization and adequate protection of a transboundary aquifer system.

"2. In determining the manner of such cooperation, aquifer system States are encouraged to establish joint mechanisms or commissions, as deemed necessary by them, to facilitate cooperation on relevant measures and procedures in the light of experience gained through cooperation in existing joint mechanisms and commissions in various regions."

30. This draft article sets out the principle of a general obligation to cooperate among aquifer system States and the procedures for such cooperation. The draft is self-explanatory. Article 8 of the 1997 Convention referred to "optimal utilization" in its paragraph 1. For the reasons noted in paragraph 23 above, "optimal" is replaced by "appropriate" in this draft.

Chapter VII

Regular exchange of data and information

31. The proposed draft article reads as follows:

"*Article 6*

"*Regular exchange of data and information*

"1. Pursuant to article 5, aquifer system States shall, on a regular basis, exchange readily available data and information on the condition of the transboundary aquifer system, in particular that of a geological, hydrogeological, hydrological, meteorological and ecological nature and related to the hydrochemistry of the aquifer system, as well as related forecasts.

"2. In the light of uncertainty about the nature and extent of some transboundary aquifer systems, aquifer system States shall employ their best efforts to collect and generate, in accordance with currently available practice and standards, individually or jointly and, where appropriate, together with or through international organizations, new data and information to more completely define the aquifer systems.

"3. If an aquifer system State is requested by another aquifer system State to provide data and information that is not readily available, it shall employ its best efforts to comply with the request, but may condition its compliance upon payment by the requesting State of the reasonable costs of collecting and, where appropriate, processing such data or information.

"4. Aquifer system States shall employ their best efforts to collect and, where appropriate, to process data and information in a manner which facilitates its utilization by the other aquifer system States to which it is communicated."

32. Regular exchange of data and information is the first step in cooperation between transboundary aquifer system States. Article 9 of the 1997 Convention is adjusted to meet the special characteristics of groundwaters. In particular, paragraph 2 is newly drafted in view of the insufficient status of scientific findings of some aquifer systems. Data and information in this draft article are limited to those concerning the condition of aquifer systems. Data and information related to uses and other activities of transboundary aquifer systems and their impact will be dealt with later in part III of the draft articles (Activities affecting other States).

Chapter VIII

Different kinds of uses

33. The proposed draft article reads as follows:

"*Article 7*

"*Relationship between different kinds of uses*

"1. In the absence of agreement or custom to the contrary, no use of a transboundary aquifer system enjoys inherent priority over other uses.

"2. In the event of a conflict between uses of a transboundary aquifer system, it shall be resolved with special regard being given to the requirements of vital human needs."

34. Like uses of international watercourses and of their waters, uses of transboundary aquifer systems are numerous, especially in arid and semi-arid countries, where they often constitute the only source of water. Even in wetter regions, groundwaters are often the only source of drinking water since they are of better quality. Groundwaters are a source of freshwater in agriculture (irrigation), industrial development, human domestic needs and support terrestrial and aquatic ecosystems. The need for this draft article would also depend on the final formulation of the principles governing uses of aquifer systems and the factors to be taken into account in implementing such principles.

Chapter IX

Aquifer models

35. Annexes III–V of the present report on shared natural resources have been prepared in order to provide some technical and factual data on transboundary groundwaters. They include aquifer models, case studies on selected regional aquifers and a selected bibliography.[18]

36. Annex III to the present report contains models of various aquifers. Case 1 shows a domestic aquifer that is outside the scope of the proposed convention. Case 2 shows a single transboundary aquifer. Case 3 shows a domestic aquifer hydrologically connected to an international watercourse, which would be covered both by the 1997 Convention and the proposed convention. Case 4 shows a transboundary aquifer system, consisting of a series of aquifers hydrologically connected. Case 5 shows a domestic aquifer whose recharge area is located in another State. In the instance of case 5, such an area might need to be subject to certain international regulations for proper management of the aquifer.

[18] UNESCO arranged to send three experts to Tokyo in March 2004 to work together with the Special Rapporteur to prepare these annexes. Those experts are Alice Aureli and Raya Stephan of UNESCO and Jaroslav Vrba, Chairman of the IAH Commission on Groundwater Protection. Materials have been contributed by the members of the Internationally Shared Aquifer Resources Management Initiative.

Annex I

DRAFT CONVENTION ON THE LAW OF TRANSBOUNDARY AQUIFER SYSTEMS

PART I. INTRODUCTION

Article 1. Scope of the present Convention

The present Convention applies to uses of transboundary aquifer systems and other activities which have or are likely to have an impact on those systems and to measures of protection, preservation and management of those systems.

Article 2. Use of terms

For the purposes of the present Convention:

(*a*) "Aquifer" means a permeable water-bearing rock formation capable of yielding exploitable quantities of water;[a]

(*b*) "Aquifer system" means an aquifer or a series of aquifers, each associated with specific rock formations, that are hydraulically connected;

(*c*) "Transboundary aquifer system" means an aquifer system, parts of which are situated in different States;

(*d*) "Aquifer system State" means a State Party to the present Convention in whose territory any part of a transboundary aquifer system is situated.

PART II. GENERAL PRINCIPLES

Article 3. Principles governing uses of aquifer systems

[Draft to be proposed later]

Article 4. Obligation not to cause harm

1. Aquifer system States shall, in utilizing a transboundary aquifer system in their territories, take all appropriate measures to prevent the causing of significant harm to other aquifer system States.

2. Aquifer system States shall, in undertaking other activities in their territories which have or are likely to have an impact on a transboundary aquifer system, take all appropriate measures to prevent the causing of significant harm through that system to other aquifer system States.

3. Aquifer system States shall not impair the natural functioning of transboundary aquifer systems.

4. Where significant harm nevertheless is caused to another aquifer system State, the State whose activity causes such harm shall, in the absence of agreement to such activity, take all appropriate measures in consultation with the affected State to eliminate or mitigate such harm and, where appropriate, to discuss the question of compensation.

Article 5. General obligation to cooperate

1. Aquifer system States shall cooperate on the basis of sovereign equality, territorial integrity, mutual benefit and good faith in order to attain appropriate utilization and adequate protection of a transboundary aquifer system.

2. In determining the manner of such cooperation, aquifer system States are encouraged to establish joint mechanisms or commissions, as deemed necessary by them, to facilitate cooperation on relevant measures and procedures in the light of experience gained through cooperation in existing joint mechanisms and commissions in various regions.

Article 6. Regular exchange of data and information

1. Pursuant to article 5, aquifer system States shall, on a regular basis, exchange readily available data and information on the condition of the transboundary aquifer system, in particular that of a geological, hydrogeological, hydrological, meteorological and ecological nature and related to the hydrochemistry of the aquifer system, as well as related forecasts.

2. In the light of uncertainty about the nature and extent of some transboundary aquifer systems, aquifer system States shall employ their best efforts to collect and generate, in accordance with currently available practice and standards, individually or jointly and, where appropriate, together with or through international organizations, new data and information to more completely define the aquifer systems.

3. If an aquifer system State is requested by another aquifer system State to provide data and information that is not readily available, it shall employ its best efforts to comply with the request, but may condition its compliance upon payment by the requesting State of the reasonable costs of collecting and, where appropriate, processing such data or information.

4. Aquifer system States shall employ their best efforts to collect and, where appropriate, to process data and information in a manner which facilitates its utilization by the other aquifer system States to which it is communicated.

[a] See footnote 14 of the report, above.

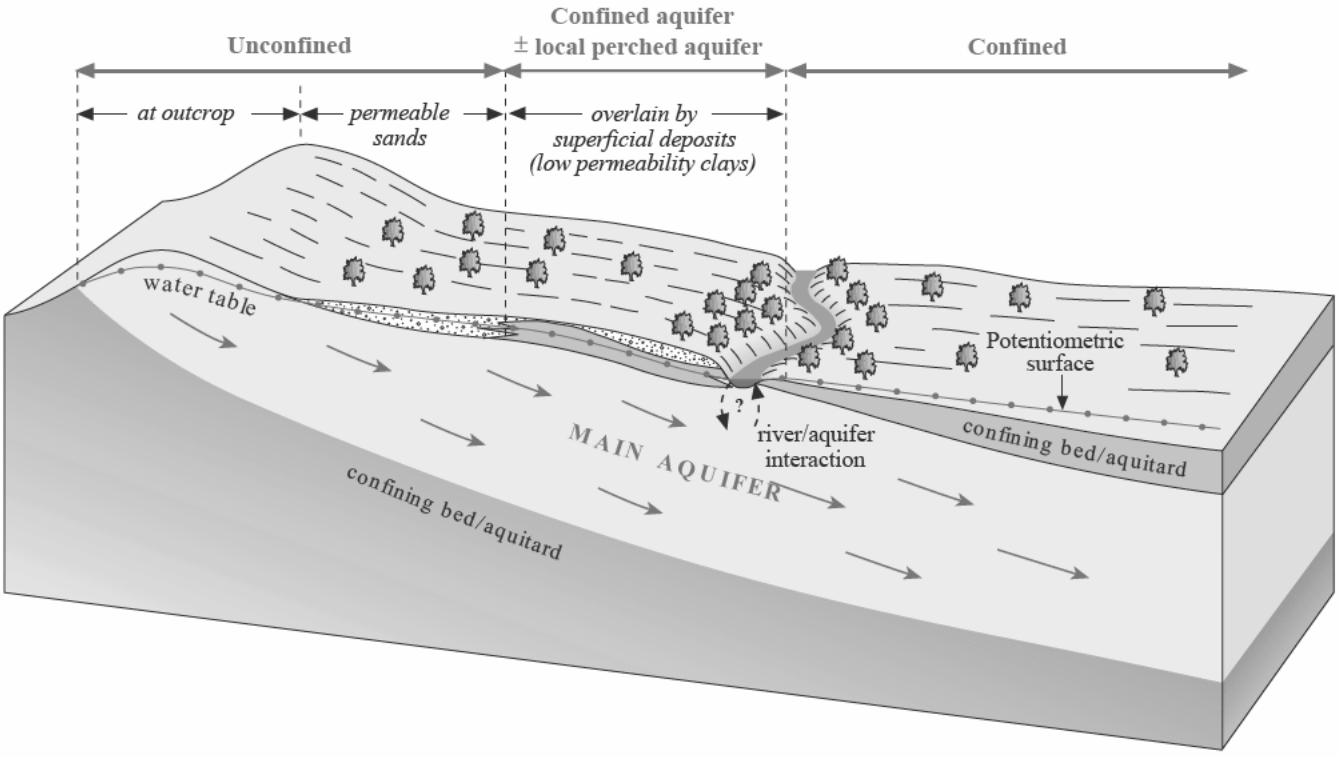
Article 7. Relationship between different kinds of uses

1. In the absence of agreement or custom to the contrary, no use of a transboundary aquifer system enjoys inherent priority over other uses.

2. In the event of a conflict between uses of a transboundary aquifer system, it shall be resolved with special regard being given to the requirements of vital human needs.

Annex II

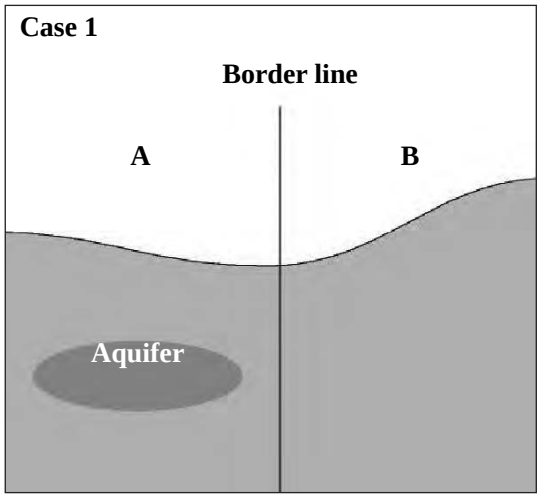
SCHEMATIC REPRESENTATION OF AN AQUIFER SYSTEM



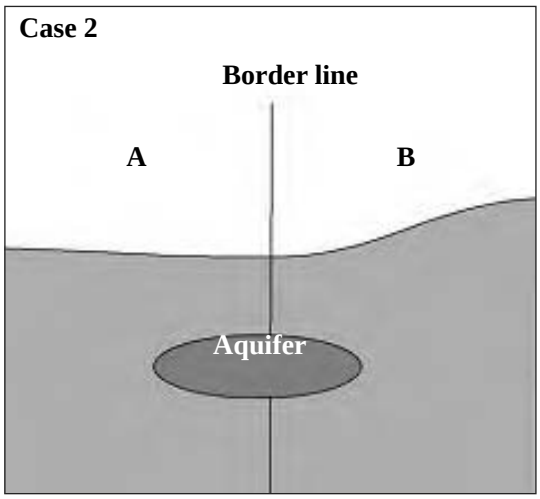
Source: B. L. Morris and others, *Groundwater and its Susceptibility to Degradation: a Global Assessment of the Problem and Options for Management*, Early Warning and Assessment Report Series, RS. 03–3 (Nairobi, UNEP, 2003).

Annex III

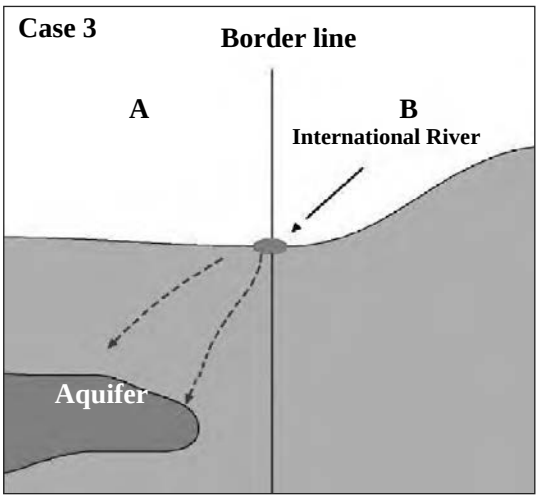
AQUIFER MODELS [a]



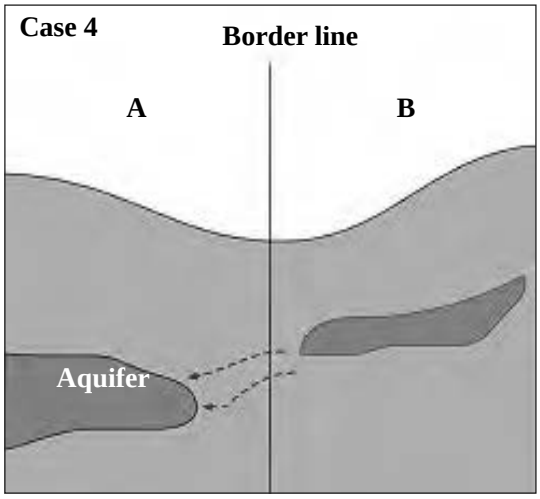
A domestic aquifer



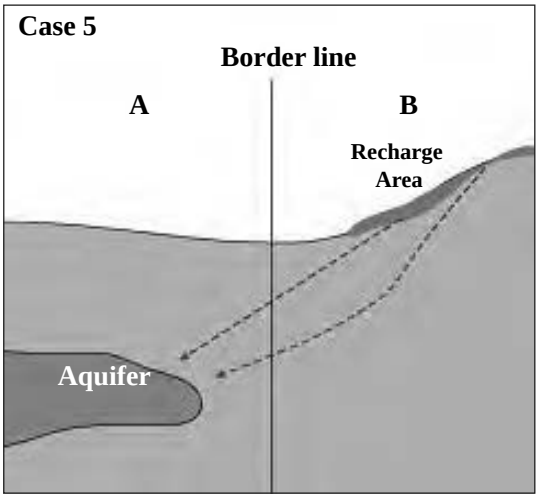
A transboundary aquifer unrelated hydrologically with surface water



An aquifer that is entirely in the territory of a State linked hydrologically with an international river



An aquifer that is entirely in the territory of a State but is hydrologically linked with another aquifer in a neighbouring State



An aquifer that is entirely in the territory of one State but whose area of recharge is in a neighbouring State. The recharge could be any body of surface water

[a] Based on the presentation by Shammy Puri, Chairman of the IAH Transboundary Aquifer Resource Management Commission and Coordinator of the International Shared Aquifer Resource Management Initiative, during the meeting held at UNESCO headquarters in Paris on 2 and 3 October 2003.

Annex IV

CASE STUDIES

A. Nubian sandstone aquifer system[a]

1. Geographical location

1. The Nubian sandstone aquifer system is one of the largest regional aquifer resources in Africa and in the world. It consists of a number of aquifers laterally and/or vertically connected, extending over more than 2 million km^2 in the eastern part of the Libyan Arab Jamahiriya, Egypt, north-eastern Chad and the northern part of the Sudan. The Nubian aquifer is a strategically crucial regional resource in this arid region, which has only a few alternative freshwater resources, a low and irregular rainfall and persistent drought and is subject to land degradation and desertification. Under current climatic conditions, the Nubian aquifer represents a finite, non-renewable and unrelated groundwater resource (the connection with the River Nile is negligible). Its filling process, that is when the recharge and discharge balance each other, is considered to have ended 8,000 years ago.

2. The aquifer system

2. The Nubian sandstone aquifer system can be differentiated into two major systems:

(*a*) The Nubian aquifer system

This part of the system occurs all over the area and constitutes an enormous reservoir of water of excellent quality in its southern part and of hyper-saline water in the north. The system is under unconfined conditions south of the 25th parallel, and under confined conditions north of it. Its thickness ranges from less than 500 metres to more than 5,000. The calculated storage capacity of the Nubian aquifer system in both its unconfined and confined parts, within the four sharing countries, exceeds 520,000. The total volume of fresh groundwater in storage is approximately 373,000 km^3. The economically exploitable volume, estimated at 150,000 km^3, represents the largest freshwater mass and one of the most important groundwater basins in the world.

(*b*) Post-Nubian aquifer system

This part of the system is located to the north of the 26th parallel in the western desert of Egypt and the north-eastern part of the Libyan Arab Jamahiriya, and is under unconfined conditions. Its cumulative thickness is about 5,000 metres. The total volume of groundwater in storage in the post-Nubian aquifer system is 845,000 km^3, while the amount of fresh groundwater is 73,000 km^3. Low permeability layers separate the two systems.

3. Groundwater extraction

3. Groundwater from the Nubian sandstone aquifer system has been utilized for centuries from the oases all over the area through springs and shallow wells. However, as a result of population growth, food demand and economic development, pressure on the supply of groundwater in the region has increased rapidly over the past decades. It is estimated that 40 billion m^3 of water were extracted from the aquifer over the past 40 years, in Egypt and the Libyan Arab Jamahiriya alone. No historical data is available for Chad and the Sudan where the present extractions and socio-economic uses are limited. Most of the present water extracted from the system is used for agriculture. Data collected shows that the present extraction represents only some 0.01 per cent of the estimated total recoverable freshwater volume stored in the system. However, this has already caused a drop of the water table, which reaches 60 metres in some places. Ninety-seven per cent of the free flowing wells and springs have already been replaced by deep wells. This has led to a rise in extraction costs as the water level falls and raises the issue of equity and affordable access to this unique water source for indigenous, low-income populations. In the arid, scarcely populated Chad section of the aquifer, concerns are focused on the protection of vulnerable ecological values, including humid zones with oases and desert lakes that depend on seepage and springs from the Nubian aquifer. It is generally accepted that the huge but non-renewable Nubian storage will be sufficient for many centuries of planned mining. It is also understood that as extractions grow with the socio-economic demands, the entire shared[b] aquifer will be affected.

4. Water quality

4. In the unconfined part of the Nubian aquifer system, water quality is good to excellent all over the area. In its confined part (to the north, in Egypt and in the Libyan Arab Jamahiriya), the water quality changes laterally and vertically; the upper part of the aquifer system contains freshwater while the lower part of the aquifer system becomes saline very rapidly.

5. The groundwater of the post-Nubian aquifer system shows a wide variation in chemical quality. In areas of intensive development, the good quality of the water is endangered by the upcoming and/or the lateral flow of saline water. There is lack of detailed information to make a synthesis of this problem, even at the regional level. Increased groundwater extraction, where it is close to the freshwater/saline water interface, may augment the risk of deterioration of the water quality by the intrusion of saline water into the freshwater.

5. International cooperation

6. Since the early 1970s, Egypt, the Libyan Arab Jamahiriya and the Sudan have expressed their interest in regional cooperation in studying and developing their shared resource. In July 1992, a joint authority was

[a] Contributed by Raya Stephan and Bo Appelgren (UNESCO).

[b] Experts use the term "shared" in this annex in the geographical sense that the aquifer is located across borders.

established between Egypt and the Libyan Arab Jamahiriya, subsequently joined by Chad and the Sudan. Among other things, the Authority is responsible for collecting and updating data, conducting studies, formulating plans and programmes for water resources development and utilization, implementing common groundwater management policies, training technical personnel, rationing the aquifer waters and studying the environmental aspects of water resources development. An integrated regional information system was developed with the support of the Center for Environment and Development for the Arab Region and Europe. On 5 October 2000, the four Member States signed two agreements on procedures for data collection, sharing and access to the system, as well as for updating the information.

B. Guarani aquifer system[c]

1. General description and beneficial uses

7. The Guarani aquifer system, also called the Mercosul aquifer, includes areas of Argentina, Brazil, Paraguay and Uruguay. It is contained in aeolian and fluvial sands, usually covered by thick basalt flows (Serra Geral Formation), which provide a high confinement. Its thickness ranges from a few metres to 800. Water of very good quality is exploited for urban supply, industry, irrigation and for thermal, mineral and tourist purposes. A project for the environmental protection and integrated sustainable management of the Guarani aquifer is being elaborated with the support of the Global Environmental Fund, the World Bank, OAS and the universities of the four abovementioned States.

2. Mathematical model and database

8. The mathematical model assists in introducing improvements in the conceptual model and better identifying the uncertainties. Data needs to be consistent and comparable. It would be necessary to create, arrange and disseminate a full database, to be shared by all stakeholders of the Guarani aquifer system. A *Consejo Superior*, drawn from the four States, has been established to coordinate the work programme for the management of a study of the aquifer resources. Guarani consultative meetings were held in August 2001 to discuss the international shared aquifer resource management programme and its scope.

3. Essential data

9. Surface area: 1,200,000 km^2.

Population: 15 million inhabitants, 6 million living where the aquifer outcrops.

Resources in storage: 40,000 km^3.

Current production: More than 700 wells draw 1,000 m^3 per hour by pumping or 100 to 500 m^3 per hour using surge wells.

[c] Contributed by Emilia Bocanegra and Carlos Fernandez-Jáuregui in case studies from *Internationally Shared (Transboundary) Aquifer Resources Management* (see footnote 16 of the report, above).

C. Franco-Swiss Genevese aquifer[d]

1. Geographical location

10. The Franco-Swiss transboundary Genevese aquifer extends between the southern extremity of Lake Geneva and its effluent the Rhone River. The aquifer is located partly on the southern border of the Canton of Geneva with the French Department of Haute Savoie. The aquifer is crossed over from east to west by the Arve River, a tributary of the Rhone originating in France, and thus benefits from natural recharges averaging 7.5 million m^3 per annum. The average water level is between 15 and 80 metres deep.

2. Groundwater extraction

11. The Genevese aquifer is exploited for drinking water supply by 10 wells on the Swiss side and 5 on the French side. The total extracted volume of water averages 15 to 17 million m^3 per annum, out of which the French withdrawals represent some 2 million m^3. Between 1940 and 1960, water extractions from the Genevese aquifer were very close to the average natural recharge. Between 1960 and 1980, the aquifer was overdrafted, with extractions reaching up to 14 million m^3 in 1971, almost twice its potential yield. Such an overpumping has lowered the water table by more than 7 metres in 20 years, reducing the total groundwater storage by about one third. For this reason, the Canton of Geneva initiated negotiations with the French Department of Haute Savoie to consider the implementation of a recharge installation for the joint management of the transboundary aquifer.

3. International cooperation

12. The negotiations between the Canton of Geneva and the French Department of Haute Savoie were concluded in 1977 with the signature of an arrangement on the protection, utilization and recharge of the Franco-Swiss Genevese aquifer. The agreement entered into force on 1 January 1978.

13. The essential provisions of the arrangement cover the following matters:

(*a*) *The Commission*

The arrangement created a Genevese Aquifer Management Commission, composed of three members from each party, with the stipulation that two members of each delegation must be water specialists (art. 1). The mandate of the Commission is to propose a yearly aquifer utilization programme, taking into account, as far as possible, the needs of various users on each side of the border, to formulate any proposals required to ensure the protection of the resource and to remedy possible causes of pollution (art. 2, para. 1). The Commission gives its technical opinion on new water extraction works and utilization, as well as on the modification of existing ones and audits the construction and operation costs of the groundwater recharge installation (art. 2, paras. 2–3). The Commission has the duty to take an inventory of all exist-

[d] Contributed by Raya Stephan (UNESCO).

ing waterworks allowing the utilization of the resources of the aquifer, whether public or private (art. 4). All waterworks must be equipped with a device for the recording of the volume of water extracted from the aquifer. Such a device shall be gauged and sealed at the initiative of the Commission. Water extractions shall be read and registered periodically (art. 6).

(*b*) *The groundwater recharge installation*

The arrangement provides (art. 8) for the Republic and Canton of Geneva to construct and to operate the required groundwater recharge installation of which it is and remains the sole owner. The Canton is liable for any damages caused to the quality of the waters of the aquifer resulting from failure to maintain the recharge installation (art. 18, para. 1).

(*c*) *Water rights*

Article 9, paragraph 1, provides that, based on the dimensions and capacity of the artificial recharge installation, the French authorities shall ensure that the aggregate of water extractions by the users located within French territory shall not exceed 5 million m^3, inclusive of a free allocation of 2 million m^3. Exceptionally, the Swiss party may request the French party to forfeit part or all of its free allocation.

(*d*) *Water pricing*

The Canton of Geneva has proceeded with the computation of the corresponding construction costs of the groundwater recharge installation. The operational costs are reconciled yearly. The French share is then computed yearly, including the French contribution to the construction of the groundwater recharge installation (amortization annuity) and the operational costs in proportion to the total volume extracted by French users.

(*e*) *Water quality*

Water extracted from the aquifer shall be analysed by both sides on the basis of standard qualitative analysis criteria established by the Genevese Aquifer Management Commission; such analyses shall be made at regular intervals (art. 16). A warning system shall be maintained in the case of accidental pollution likely to affect the water quality of the aquifer (art. 17). The French and Swiss collectivities are liable for acts of pollution occurring within their national territories.

14. The arrangement has been concluded for a period of 30 years (art. 19). It is automatically renewable for periods of five years unless terminated by either party serving the other a one year prior notice. The 1978 arrangement between the Canton of Geneva and the French Department of Haute Savoie has adopted a pragmatic approach, and now represents more than 25 years of practical success.

D. Mexico-United States of America border[e]

15. Along their common border, Mexico and the United States share surface water, mainly in the Rio Grande (Rio Bravo in Mexico) and Colorado rivers as well as groundwater in at least 15 aquifers. The fact that most of the common border lies within water-scarce regions has resulted in intense competition over the water resources of the two major rivers and also of the aquifers. This is illustrated in the two examples below: the El Paso-Juárez case and the Upper San Pedro River Basin case.

1. Bilateral cooperation

16. Mexico and the United States have concluded several treaties since the nineteenth century related to their common border. The table below lists some recent agreements related to the environment and water resources. No agreement related to groundwater management exists,

Date	Agreement	Purpose
14 November 1944	"Water treaty"[f]	To regulate the utilization of the Colorado and Tijuana Rivers, and of the Rio Grande (Rio Bravo). Creates the International Boundary and Water Commission with one section in the United States and one in Mexico
30 August 1973	Minute 242: Permanent and definitive solution to the international problem of the salinity of the Colorado River	The Minute incorporates the decisions adopted to definitely solve the salinity problem of the Colorado River. The Minute limits groundwater pumping in the immediate vicinity of the Arizona-Sonora Boundary (concerns the Yuma Mesa aquifer) "*[p]ending the conclusion by the Governments of the United States and Mexico of a comprehensive agreement on groundwater in the border areas*"*
14 August 1983	Agreement on co-operation for the protection and improvement of the environment in the border area[g]	Establish the basis for cooperation between the parties for the protection, improvement and conservation of the environment
13 November 1992	Minute 289 of the International Boundary and Water Commission—observation of the quality of the waters along the United States and Mexico border	The International Boundary and Water Commission will develop an appropriate monitoring programme and database for the observation of the quality of the surface and groundwaters under the Integrated Border Environment Plan (25 February 1992)

[e] Contributed by Raya Stephan (UNESCO).

[f] Treaty relating to the utilization of the waters of the Colorado and Tijuana Rivers, and of the Rio Grande (Rio Bravo) from Fort Quitman, Texas, to the Gulf of Mexico (Washington, D.C., 3 February 1944), and Supplementary Protocol (Washington, D.C., 14 November 1944), United Nations, *Treaty Series*, vol. 3, No. 25, p. 313.

[g] Signed at La Paz, Baja California (United Nations, *Treaty Series*, vol. 1352, No. 22805, p. 67).

despite the recommendation made in Minute 242 of the International Boundary and Water Commission.[h]

2. The El Paso-Juárez case

17. The two adjacent border cities of El Paso, Texas, United States, and Ciudad Juárez, Chihuahua, Mexico, face a severe water crisis. The region, which is home to close to 2 million people, has a climate typical of arid to semi-arid regions (the annual rainfall is less than 17 mm). The main sources of water are the Rio Grande and two aquifers, the Hueco Bolson and the Mesilla Bolson.

18. The Hueco Bolson, the primary source of water, extends northwards into New Mexico (United States) and southwards into Mexico. El Paso currently depends on groundwater from the Hueco Bolson for about 45 per cent of its water needs. The rest is provided from the Rio Grande (40 per cent) and the Mesilla Bolson (15 per cent). Ciudad Juárez, which has roughly double the population of El Paso, depends entirely on water from the Hueco Bolson to meet its demand.[i] It is estimated that the aquifer will be depleted of all freshwater that can be economically retrieved by 2025, or even earlier. Since 1940, the level has dropped by as much as 45 metres.

19. The Mesilla Bolson is located primarily in New Mexico, with small portions in Mexico and Texas. The Rio Grande is considered its main source of recharge. Water levels in the aquifer remain relatively constant.

20. Water quality in the Hueco Bolson has been degraded over time as a result of groundwater withdrawals and other human activities. The water quality pumped from the Mesilla Bolson improves with the depth of wells. While the aquifer is showing some level of water quality deterioration, the overall quality is better than in the Hueco Bolson. Generally, historical large-scale groundwater withdrawals, especially from municipal well fields in the downtown areas of El Paso and Ciudad Juárez, have caused major water-level declines. These declines, in turn, have significantly changed the direction of flow, rate of flow and chemical quality of groundwater in the aquifers.

21. The region has experienced a very high growth rate, especially on the Mexican side. As the population growth is expected to continue, so is the demand for water. Through strict conservation efforts, the city of El Paso has reduced its per capita water use. However its per capita consumption (around 600 litres per person per day) is double that of Ciudad Juárez where hundreds of thousands of residents live without direct water supply in their households. Beyond the specific issue of groundwater depletion, the case underlines the wider issue of cross-border economic issues of wealth and affordability.

3. The Upper San Pedro River Basin case

22. The San Pedro River is one of only two rivers that originate in Mexico and flow northwards into the United States. One of the most outstanding features of the basin is its native biodiversity. More than 400 bird species, as well as many other species, live in or migrate through the basin.

23. Groundwater in the basin has two main sources, the regional and the flood-plain aquifer, which are interconnected. The recharge of the regional aquifer comes mainly from the mountain fronts. The aquifer is mostly unconfined, although it is confined in some of its parts. The flood-plain aquifer is recharged mainly by run-off and regional aquifer contribution. The flood-plain aquifer is unconfined.

24. In the United States, the Upper San Pedro River Basin area has experienced rapid population growth, which has increased water demand and put pressure on the groundwater supply. Most hydrologists agree that excessive pumping from the regional aquifer has produced a cone of depression that dewaters the flood-plain aquifer by lowering the water table. As a result, the San Pedro River has become ephemeral in some locations. This could have serious effects on the international bird flyway and could also impact the economy of neighbouring communities. At issue is not only the availability of water, but also the threat of excessive lowering of the water table, which puts riparian vegetation and biodiversity at risk.

[h] Exchange of notes constituting an agreement confirming minute No. 242 of the International Boundary and Water Commission, United States and Mexico, relating to Colorado River salinity (Mexico City and Tlatelolco, 30 August 1973), United Nations, *Treaty Series*, vol. 915, No. 13055, p. 203.

[i] Octavio E. Chávez, "Mining of internationally shared aquifers: the El Paso-Juárez case", *Natural Resources Journal* (New Mexico), vol. 40, No. 2 (spring 2000), p. 237.

Annex V

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[a] Compiled by Raya Stephan (UNESCO).

CHECKLIST OF DOCUMENTS OF THE FIFTY-SIXTH SESSION

Document	*Title*	*Observations and references*
A/CN.4/536	Provisional agenda	Mimeographed. For agenda as adopted, see *Yearbook ... 2004*, vol. II (Part Two).
A/CN.4/537	Topical summary, prepared by the Secretariat, of the discussion in the Sixth Committee on the report of the Commission during the fifty-eighth session of the General Assembly	Mimeographed.
A/CN.4/538	Fifth report on diplomatic protection, by Mr. John Dugard, Special Rapporteur	Reproduced in the present volume.
A/CN.4/539 and Add.1	Second report on shared natural resources: transboundary groundwaters, by Mr. Chusei Yamada, Special Rapporteur	*Idem*.
A/CN.4/540	Second report (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), by Mr. Pemmaraju Sreenivasa Rao, Special Rapporteur	*Idem*.
A/CN.4/541	Second report on responsibility of international organizations, by Mr. Giorgio Gaja, Special Rapporteur	*Idem*.
A/CN.4/542 [and Corrs. 2–3]	Seventh report on unilateral acts of States, by Mr. Víctor Rodríguez Cedeño, Special Rapporteur	*Idem*.
A/CN.4/543	Survey of liability regimes relevant to the topic of 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): prepared by the Secretariat	*Idem*.
A/CN.4/544	Ninth report on reservations to treaties, by Mr. Alain Pellet, Special Rapporteur	*Idem*.
A/CN.4/545	Responsibility of international organizations: comments and observations received from international organizations	*Idem*.
A/CN.4/L.647 and Add.1	Report of the Drafting Committee on diplomatic protection	Mimeographed.
A/CN.4/L.648 [and Corr.1]	Report of the Drafting Committee on responsibility of international organizations	*Idem*.
A/CN.4/L.649 [and Corr.1]	Report of the Drafting Committee on reservations to treaties	*Idem*.
A/CN.4/L.661 [and Corr.1]	Report of the Working Group on 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)	*Idem*.

Document	*Title*	*Observations and references*
A/CN.4/L.662	Report of the Drafting Committee on 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)	*Idem*.
A/CN.4/L.663/Rev.1	Report or the Study Group on fragmentation of international law: difficulties arising from the diversification and expansion of international law	*Idem*.
A/CN.4/L.664/Rev.1	Report of the Planning Group	*Idem*.
A/CN.4/L.650	Draft report of the International Law Commission on the work of its fifty-sixth session: chapter I (Organization of the session)	Mimeographed. For the adopted text, see *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 10* (A/59/10). The final text appears in *Yearbook ... 2004,* vol. II (Part Two).
A/CN.4/L.651	*Idem*: chapter II (Summary of the work of the Commission at its fifty-sixth session)	*Idem*.
A/CN.4/L.652	*Idem*: chapter III (Specific issues on which comments would be of particular interest to the Commission)	*Idem*.
A/CN.4/L.653 and Add.1	*Idem*: chapter IV (Diplomatic protection)	*Idem*.
A/CN.4/L.654	*Idem*: chapter V (Responsibility of international organizations)	*Idem*.
A/CN.4/L.655	*Idem*: chapter VI (Shared natural resources)	*Idem*.
A/CN.4/L.656 and Add.1-3	*Idem*: chapter VII (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)	*Idem*.
A/CN.4/L.657 and Add.1	*Idem*: chapter VIII (Unilateral acts of States)	*Idem*.
A/CN.4/L.658 and Add.1–2 [and Corr.1]	*Idem*: chapter IX (Reservations to treaties)	*Idem*.
A/CN.4/L.659	*Idem*: chapter X (Fragmentation of international law: difficulties arising from the diversification of international law)	*Idem*.
A/CN.4/L.660	*Idem*: chapter XI (Other decisions and conclusions of the Commission)	*Idem*.
A/CN.4/SR.2791–A/CN.4/SR.2830	Provisional summary records of the 2791st to 2830th meetings	Mimeographed. The final text appears in *Yearbook... 2004*, vol. I.

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