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Essays in Memory of Oscar Schachter

edited by

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CHAPTER NINETEEN

SOME REMARKS ON INTERNATIONAL RESPONSIBILITY IN THE FIELD OF ENVIRONMENTAL PROTECTION

Tullio Scovazzi

1. Introduction

In principle, the rules of international law governing responsibility, as set forth in the draft articles on responsibility of States for internationally wrongful acts adopted in 2001 by the International Law Commission,[1] do apply also to the field of protection of the environment. This is also the position taken in the resolution on responsibility and liability under international law for environmental damage, adopted by the *Institut de Droit International* on 4 September 1997.[2]

The subject involves a number of specific questions. Some of them are addressed in this essay.[3]

2. Content of the Rules on the Protection of the Environment

The International Law Commission based its work on the distinction between the obligation which is breached (primary obligation) and the obligation arising from the breach (secondary obligation). A wrongful act of a State occurs

[1] The text of the draft articles and the Commission's commentary on them are in 'Report of the International Law Commission on the Work of its Fifty-third Session', *Gen. Ass. Off. Recs., Fifty-sixth Session*, Supp. No. 10 (Doc.A/56/10). The General Assembly took note of the draft at the end of 2001: 'Resolution of the United Nations General Assembly on the Responsibility of States for Internationally Wrongful Acts (adopted on 12 December 2001)' (A/RES/56/83). See Crawford, 'The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect', 96 *AJIL* (2002), 874–90.

[2] The text of the 'Resolution on Responsibility and Liability under International Law for Environmental Damage' is in 67 *Annuaire* (1998), ii, 486–513. See Orrego Vicuña, 'Final Report on Responsibility and Liability under International Law for Environmental Damage (December 1996)', ibid., i, 312–46.

[3] This essay does not consider the so-called non-compliance procedure set forth in several environmental treaties with the objective of preventing potential disputes.

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if a conduct attributable to a State and consisting of an action or omission 'constitutes a breach of an international obligation of the State' (the so-called objective element of an internationally wrongful act, Article 2(b) of the Commission's draft), irrespective of the substantive content of the obligation which is breached.

However, a number of complexities linked to international responsibility in the field of environmental protection derive from the fact that the very content of some primary obligations is far from being clear. Several environmental treaty rules are drafted in such a soft manner that it is questionable whether they are capable to entail any obligations at all. For example, Article 5 of the Convention on Biological Diversity (Rio de Janeiro, 1992) provides for an obligation of cooperation drafted in very vague terms:

> Each Contracting Party shall, as far as possible and as appropriate, cooperate with other Contracting Parties, directly or, where appropriate, through competent international organizations, in respect of areas beyond national jurisdiction and on other matters of mutual interest, for the conservation and sustainable use of biological diversity.[4]

However, the doubts on some environmental rules go beyond a mere question of the wording of treaty provisions and also relate to the content of well known customary rules. Some instances are presented below.

A. *Transboundary Damage*

The customary rule of international law which prohibits States from causing transboundary damage to the environment of other States is confirmed by many elements of international practice, such as the award of 11 March 1941 in the *Trail Smelter* case (*United States* v. *Canada*)[5] and the advisory opinion given on 8 July 1996 by the International Court of Justice on the *Legality of the Threat or Use of Nuclear Weapons*.[6]

But what is the precise content of the rule? Does it relate to the damage itself or to certain activities that can determine injurious consequences? If the transboundary damage is itself prohibited, the nature of the activity that causes it becomes irrelevant. Damage from whatever source must be compensated under the (secondary) rule that 'the State responsible for an international wrongful act is under an obligation to compensate the damage caused thereby' (Article 36(1) of the Commission's draft). If, on the contrary, emphasis is put on whether a specific activity is allowed or prohibited, the question of how to ensure compensation for harm arising out of activities not prohibited by international law

[4] Note should be taken of the formula 'as far as possible and as appropriate', immediately followed by another 'where appropriate', which seems a masterpiece of hortatory wording.

[5] *RIAA*, iii, 1905.

[6] ICJ Reports 1996, 226, at para. 29.

needs to be further addressed, leading to complex discussions on the theoretical basis on which this should be founded.[7]

The first alternative seems preferable as it is simpler and more in conformity with the growing need to ensure adequate protection to the environment.[8] Many activities are neither prohibited nor specifically regulated by international law. Other activities, such as the transboundary movement of hazardous wastes or mining in Antarctica, are restricted or prohibited for a variety of reasons by specific rules of international law. But the regime of an activity has little to do with the rule on transboundary damage which has a different scope and focuses on the damage, from whatever activity it may originate. While damage determined by a wrongful activity is necessarily also wrongful, a wrongful damage may also derive from a lawful activity.

If the rule applies to the damage, rather than to the activity, then the fact that a specific activity is hazardous or ultra-hazardous has no bearing on the existence of an obligation to provide reparation. But the character of the activity becomes important in the process of evaluating the conduct that a State is bound to take in fulfilling its obligation to prevent damage.[9] Almost by definition, ultra-hazardous activities require to be carried out through the adoption of measures of 'ultra-prevention' of damage.

The issue of prevention leads to another interesting question with respect to the content of the general rule prohibiting transboundary damage to the environment. Is the relevant obligation breached only if the prohibited damage results (so-called obligation of result) or is it breached for the mere fact that a

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[7] In 1997, the Commission decided to proceed with its work on the topic 'International liability for injurious consequences arising out of acts not prohibited by international law' dealing first with the issue of 'prevention of transboundary damage from hazardous activities' (see the draft articles adopted by the Commission in 'Report of the International Law Commission on the Work of its Fifty-third Session', *Gen. Ass. Off. Recs., Fifty-sixth Session*, Supp. No. 10 (Doc.A/56/10), 370). At the end of 2001, the General Assembly requested the Commission to resume its consideration of the liability aspects of the topic: 'Resolution of the United Nations General Assembly on the Report of the International Law Commission on the Work of its Fifty-third Session (adopted on 12 December 2001)' (A/RES/56/82). For the most recent developments, see Rao, 'Second Report 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)' (Doc.A/CN.4/540).

[8] 'Nous sommes, je crois, unanimes à penser que, vu l'accroissement des atteintes à notre environnement, et étant donné la prise de conscience des dangers progressifs qu'ils répresentent, il est devenu indispensable de multiplier les garde-fous. A mon avis, la tâche principale à remplir consiste, à cette fin, à transférer grand nombre de situations du domaine vague de la responsabilité dite pour dommages causés par des faits demeurés licites au domaine plus précis de la responsabilité pour des préjudices causés par des faits internationalement illicites'. (Ago, 'Conclusions du Colloque "Responsabilité des Etats pour les dommages à l'environnement"', Francioni and Scovazzi (eds.), *International Responsibility for Environmental Harm* (1991), 493–9, at 496.)

[9] In this regard, the concept of due diligence is often evoked as a test to evaluate the conduct required. Article 3(1) of the resolution of the *Institut de Droit International* provides that 'when due diligence is utilized as a test for engaging responsibility it is appropriate that it be measured in accordance with objective standards relating to the conduct to be expected from a good government and detached from subjectivity'.

State fails to take the required conduct, irrespective of whether damage results (so-called obligation of conduct)? Does the word 'damage' have a broad meaning[10] that includes the 'risk of damage'? If, for example, an ultra-hazardous activity is carried out without any precaution by a State in a locality close to the boundary with another State, does the latter need to wait for the occurrence of a serious accident and the suffering of the consequent damage before it may invoke the responsibility of the former?

The preferable solution is based on the consideration that the proper objective of the international rules on the environment is to prevent damage rather than merely provide the victim with an entitlement to receive compensation.[11] As the idea of prevention is itself integrated in the primary rule on the prohibition of transboundary damage, this rule is breached merely by the occurrence of a conduct that creates a serious risk of damage. Of course, if damage does not occur, the responsible State is under no obligation to pay compensation. It however incurs other consequences of an internationally wrongful act, such as the obligations to cease the wrongful conduct (Article 30(a) of the Commission's draft), to offer appropriate assurances and guarantees of non-repetition (Article 30(b)), to re-establish the situation that existed before the wrongful act was committed (Article 35), to give satisfaction in the form of acknowledgment of the breach, expression of regret, formal apology or other appropriate modality (Article 37).

In this regard, the Convention on the Law of Non-navigational Uses of International Watercourses (New York, 1997) is quite clear in distinguishing between the obligation to take all appropriate measures to prevent the causing of significant harm to other watercourse States (Article 7(1)) and the obligation, if harm has nevertheless occurred, to take appropriate measures to eliminate or mitigate it and discuss the question of compensation (Article 7(2)). Both obligations fall under the provision on the 'obligation not to cause significant harm' (Article 7).[12]

[10] The concept of 'damage' itself needs some clarification. Almost every human activity entails an alteration of natural elements. As legal provisions on the environment do not aim at stopping the progress of mankind or reverting human society to a pre-industrial stage, a threshold of gravity must be assumed. While the precise threshold is difficult to assess, impacts which are minor, sporadic or transitory should not determine international responsibility. Several treaties make use of the notion of 'serious' or 'significant' damage or harm.

[11] 'Regulation should be directed to action to avert or minimize risks before harms occurs. "Risk" is a probabilistic concept that takes account of the uncertainties of future events as well as the variations in severity of effects. A duty to prevent and minimize risk is legally distinct from a duty to act to contain and minimize harmful effects that have already occurred'. (Schachter, *International Law in Theory and Practice* (1991), 367.)

[12] Doc.A/51/869. The text of the Convention is electronically available at <http://www.un.org/law/ilc/texts/nonnav.htm>.

B. *Global Concerns*

Today, international environmental law is not limited to traditional instances of transboundary harm where a polluting substance crosses the border between two or more States. As explained in 1987 in the report *Our Common Future* by the World Commission on Environment and Development,[13] present international law must also address global risks which threaten the maintenance of equilibria indispensable for the survival of life on earth. The concept of pollution must be broadly understood. It also includes possible damage to interests that are fundamental to humankind and can originate from unsustainable patterns of increasing production and consumption (so-called global concerns, such as the depletion of the ozone layer, global warming, desertification, extinction of species of fauna and flora, destruction of ecosystems). The Brundtland report also highlights the vicious circle that exists between questions of economic development and political stability, on the one hand, and environmental questions, on the other. Not only is it true that development beyond natural limits impairs the environment, but it is also true that a polluted environment prevents development. Not only is it true that conflicts, be they internal or international, destroy the environment, but it is also true that a destroyed environment generates conflicts.

With respect to global concerns, the usual schemes of State responsibility prove to be of little use, if any. These new kinds of harm entail multiplication of, and confusion between, 'wrong-doers' and 'victims'. To a certain extent, every State contributes to the potential harm and every State would be affected by it. Here, the very idea of compensation becomes meaningless, as the damage, if it really occurred, would exceed any capacity to provide remedies. In the case of global concerns, the obligation to co-operate for the prevention of damage, which applies also in ordinary cases of transboundary harm, becomes the only sensible way to face the risk.

Several of the principles embodied in the 1992 Rio Declaration on Environment and Development and re-stated in subsequent environmental instruments relating to global concerns have such a broad content that they can be considered as guidelines which should inspire co-operation among States for the drawing up of more specific regimes (this can be said of the principles of sustainable development, intergenerational equity, precautionary approach, common but differentiated responsibilities). It may be difficult to determine in what cases the duty to co-operate for the implementation of such broad principles has been fulfilled and, if the answer is negative, whether this entails responsibility for an internationally wrongful act.

[13] Also known as the 'Brundtland report' (Doc.A/42/427).

For instance, the crucial principle of common but differentiated responsibilities[14] has been understood by some as implying a true legal obligation of developed countries to provide to developing countries additional financial resources and environmentally sound technologies on preferential terms. This obligation would be based upon the main historical and current responsibility of the former for global environmental degradation and their capability to address common concerns.[15] Yet others have understood the same principle as not implying any new legal obligations of developed countries and any diminution in the responsibility of developing countries.[16]

Both positions, however radical they are, are tenable. In this field of international law, where broad principles have not yet been sufficiently specified through more precise legal provisions, definite conclusions based on the schemes of international responsibility for wrongful acts would be premature. What is important, at this stage, is that States representing different positions pursue their co-operation with the aim to achieving reasonable solutions adapted to the specific instances.[17]

If this is the case, the position of a State basing its conduct on the sole objective to pursue its own interest seems hardly compatible with the obligation to co-operate in facing environmental concerns.[18] A notable instance in this respect is the negative attitude taken by the United States towards the 1997 Kyoto Protocol to the United Nations Framework Convention on Climate

[14] 'States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem. In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command' (Principle 7 of the Rio Declaration). The text of the Rio Declaration on Environment and Development (Doc.A/Conf.151/5/Rev.1) is reproduced in 31 *ILM* (1992), 874.

[15] See the position taken at the Rio Conference by the Group of 77 and China: Mickelson, 'South, North, International Environmental Law, and International Environmental Lawyers', 11 *Yearbook of International Environmental Law* (2000), 52–81, at 70.

[16] 'The United States does not accept any interpretation of principle 7 that would imply a recognition or acceptance by the United States of any international obligations or liabilities, or any diminution in the responsibilities of developing countries' ('Report of the United Nations Conference of Environment and Development' (United Nations, 1993), ii, 18).

[17] For example, the Amendment to the Montreal Protocol on Substances that Deplete the Ozone Layer (London, 1990) (30 *ILM* (1991), 537) established a link between the capacity of developing countries to fulfil their obligations to turn to substitutes for controlled substances and the effective implementation of the provision on financial co-operation by industrialized countries. The text of the Montreal Protocol, as either adjusted and/or amended, is electronically available at <http://www.unep.org/ozone/pdf/Montreal-Protocol2000.pdf>.

[18] As regards the content of the obligation to co-operate, the International Court of Justice remarked that 'the parties are under an obligation to enter into negotiations with a view to arriving at an agreement, and not merely to go through a formal process of negotiation . . . they are under an obligation so to conduct themselves that the negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification of it' (*North Sea Continental Shelf, Judgment*, ICJ Reports 1969, 3, at para. 85.)

Change.[19] Is this attitude selfishly rooted in the protection of 'legitimate U.S. interests' and the fact that 'the treaty is not workable for the United States'?[20] Or is the attitude in question based on other and broader considerations which can support the statement that the United States Administration 'takes the issue of climate change very seriously' and will not abdicate its responsibilities?[21] Time will tell.

3. Reluctance of States to Challenge Each Other

It is a matter of fact that States are rather reluctant to challenge each other in the field of international responsibility for environmental harm. This attitude is so rooted that it sometimes happens that States affected by environmental harm refrain from making claims of international responsibility because of the doubts about the success of such a step and, perhaps, because of the concern to establish a precedent that could play against them in future cases. The States affected by the accident of Chernobyl, where transboundary harm was produced as a consequence of an activity carried out by a State economic entity, abstained from asking for compensation from the Soviet Union. They preferred to negotiate and conclude new multilateral treaties that are expected to prevent the occurrence of similar events or reduce the damage if it occurs.[22]

It may be added that in several cases, although not in all cases, transboundary harm to the environment is caused by activities carried out by private entities. A conduct can be attributed to a State under international law and leads to the international responsibility of that State if it is carried out by a State organ, whatever position it holds in the organization of the State (so-called subjective element of an internationally wrongful act; Article 2(a) of the Commission's draft).[23] This rule implies *a contrario* that a conduct carried out by private individuals or corporations does not determine the responsibility of a State, unless

[19] Under the Kyoto Protocol, industrialized countries have a legally binding commitment to reduce their collective greenhouse gas emissions by at least 5% compared to 1990 levels by the period 2008–2012. (Kyoto Protocol to the United Nations Framework Convention on Climate Change (FCCC/CP/1997/L.7/Add.1), 37 *ILM* (1998), 22.)

[20] See the statement made by the United States at the 2001 resumed session of the Fifth Conference of the Parties to the Convention: Murphy (ed.), 'Contemporary Practice of the United States Relating to International Law. Environmental, Science, and Health Affairs. *U.S. Rejection of Kyoto Protocol Process*', 95 *AJIL* (2001), 647–50, at 649.

[21] Ibid., 650.

[22] Namely the Convention on Early Notification of a Nuclear Accident (Vienna, 1986), 1439 *UNTS* 275, and the Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency (Vienna, 1986), 1457 *UNTS* 133. The text of both Conventions is electronically available at the site of the International Atomic Energy Agency: <http://www.iaea.or.at/index.html>.

[23] Unless a special regime applies, the attribution to a State of responsibility for wrongful acts is generally based on fault, that is on the assumption that the conduct of a State organ is carried out intentionally (*dolus*) or negligently (*culpa*) in violation of international rules. While rare,

an organ of that State was under an obligation to prevent the conduct and failed to abide by this obligation.[24] It follows that, once it has been determined that a private entity has failed to exercise due diligence in carrying out a harmful activity, it still needs to be determined whether a State organ omitted to exercise due diligence in controlling that private entity.

Again, States are rather reluctant to claim or to accept international responsibility for a conduct which is not taken directly by their organs. A few examples are sufficient in this regard.

The 1982 United Nations Convention on the Law of the Sea provides that there must be a genuine link between a State and a ship entitled to fly its flag (Article 91(1)). It also provides that every State must take such measures for ships flying its flag as are necessary to ensure safety at sea with regard, *inter alia*, to construction, equipment, seaworthiness and manning of ships, labour conditions and training of crews, use of signals, maintenance of communications and prevention of collisions (Article 94(3) and (4)).[25] Today, the globalization of shipping increases the use of flags of open registry (or flags of convenience), which are granted without the exercise of effective control by the nominal flag State. Although the flag State could be considered responsible for ensuring that a ship is navigated safely, no coastal State which suffered environmental damage has ever made a direct claim against a flag State based on the latter State's failure to exercise substantial control on a privately-owned ship that has caused an accident.[26]

The States of origin of transnational corporations have hardly accepted any international responsibility for serious harm caused to human health and the natural environment arising from activities carried out by corporate subsidiaries in foreign countries.

The reluctance of States in applying in the field of environmental harm the traditional schemes of State responsibility has resulted in the conclusion of a

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cases of intentional damage to the environment sometimes occur. During the invasion and occupation by Iraq of Kuwait, the fires resulting from the ignition of hundreds of oil wells by Iraqi forces caused serious environmental damage and destruction of natural resources.

[24] For instance, the wrongful conduct in the *Trail Smelter* case lies in the fact that the organs of a State (Canada) permitted a private corporation to use the Canadian territory in such a manner as to cause injury by fumes to the territory of another State (the United States).

[25] The concept of genuine link tends to be related more to ensuring the requirements of safety of navigation and protection of the marine environment than to promoting clarity as regards the ownership or economic control of a ship.

[26] 'States parties to UNCLOS dissatisfied with the performance of a flag State that appears not to have fulfilled its obligations under UNCLOS could make use of Part XV to seek compulsory and binding third-party settlement before the International Tribunal for the Law of the Sea, the International Court of Justice, or general or specialized ad hoc tribunals. Yet despite a fairly high level of dissatisfaction among States at the deficiencies in the performance of some other States, there has been no rush to litigation to rectify the problems adumbrated in the various contributions to the present report . . . The most likely reason for the lack of litigation is an extreme reluctance of States to challenge each other in adversial cases in court, coupled with the high cost of doing so'. (Consultative Group on Flag State Implementation, 'Report to the Secretary-General' (Doc.A/59/63), para. 219.)

number of treaties establishing special regimes on liability and compensation for damage resulting from certain activities,[27] such as the exploitation of atomic energy, shipping and carriage of dangerous goods or the transboundary trade of hazardous wastes.

These treaties provide for the establishment of uniform civil liability regimes that apply in the relationship between the operator of the activity (who can be either private subjects or States) and the victims of damage (who can also be either private subjects or States).[28] They show the willingness of States parties to ensure that compensation is effectively paid to the victims, irrespective of any questions of public international law involved in the case. The practical result is that the existence of a special treaty regime of uniform civil law on liability and compensation very often prevents the raising of the issue of responsibility to the level of general international law.

However, the special treaty regimes may exclude the application of general international law only to the extent that they exist and are in fact applicable to the specific case (see Article 55 of the Commission's draft).[29] Even in the case of existing treaty regimes, the fact that compensation has already been paid to the victims does not wipe out the general obligation of the responsible State to offer appropriate assurances and guarantees of non-repetition of the wrongful act (Article 30(b) of the Commission's draft).

4. Determination of the Responsible State

According to the International Law Commission's draft, 'where several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act' (Article 47(1)).[30] It is however doubtful whether this provision is adequate to address cases of gradual

[27] See Churchill, 'Facilitating (Transnational) Civil Liability Litigation for Environmental Damage by Means of Treaties: Progress, Problems, Prospects', 12 *Yearbook of International Environmental Law* (2001), 3–41.

[28] For instance, the International Convention on Civil Liability for Oil Pollution Damage (Brussels, 1969), 973 *UNTS* 3 (electronically available at <http://www.oup.co.uk/pdf/bt/cassese/cases/part3/ch17/1107.pdf>), amended by subsequent protocols, and the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (Brussels, 1971), 1110 *UNTS* 57 (electronically available at <http://sedac.ciesin.org/entri/texts/intl.fund.oil.pollution.damage.protocol.1976.html>), amended by subsequent protocols), establish a special regime based on strict liability (instead of fault-based liability), the channeling of liability on the shipowner, the shipowner's right to limit liability to a predetermined amount, the shipowner's obligation to maintain an insurance or other financial security, the creation of a international fund to provide compensation if the protection already afforded is inadequate.

[29] For instance, no treaty regime exists as regards transboundary damage produced by industrial accidents, including those involving chemical plants.

[30] Under para. 2 of Article 47, 'paragraph 1: (a) does not permit any injured State to recover, by way of compensation, more than the damage it has suffered; (b) is without prejudice to any right of recourse against the other responsible States'.

and cumulative pollution arising from numerous sources that are located in different States. This kind of pollution happens if natural elements, such as the sea, international rivers or the atmosphere are polluted by land-based sources.

As the contribution of every single source of pollution is extremely difficult to assess, it would be inequitable to require that the injured party prove a causal nexus between a specific activity undertaken and the ensuing damage. It is also reasonable to think that certain polluters (such as industrialized countries or, in the case of marine pollution, States where the basins of major rivers are located) carry a wider 'share' of responsibility than others.

According to the resolution of the *Institut de Droit International* that has already been mentioned, presumptions of causality that exclude the burden of proving a causal nexus can be established in the case of 'hazardous activities or cumulative damage or long-standing damages not attributable to a single entity but to a sector or type of activity' (Article 7). It follows that 'apportionment of liability under environmental regimes should include all entities that legitimately may be required to participate in the payment of compensation so as to ensure full reparation of damage. To this end, in addition to primary and subsidiary liability, forms of several and joint liability should also be considered' (Article 11(1)).

The resolution provides useful suggestions in dealing with the problem of the assessment and apportionment of responsibility or liability among a number of gradual polluters. However, this problem still needs to be tackled under both the general rules on State responsibility and the special treaty regimes.

5. Determination of the Injured State

The customary rule on the prohibition of transboundary harm also applies if spaces beyond the limit of national jurisdiction, such as the high seas, outer space or Antarctica,[31] are polluted. In these cases, as no State is directly affected, the question of the determination of the injured State, if any, has to be addressed.

The International Law Commission's draft starts from the premise that the obligations of the responsible State may be owed to another State, to several States (*erga omnes partes*) or to the international community as a whole (*erga omnes*),[32] depending on the character and content of the international obligation

[31] At least for those countries that do not recognize the claims of sovereignty made by seven States with regard to portions of the Antarctic continent and the relevant coastal waters. But there is still an Antarctic sector which is not claimed by any State (*terra nullius*).

[32] 'In some cases, environmental obligations are regarded as *erga omnes*, owed to all States. In consequence, any State whether or not directly injured, would have the right to take countermeasures, including reprisals otherwise illegal. It is generally considered that such *erga omnes* obligations would apply to protection of the global commons, such as the high seas and very probably the ozone layer. It may be extended as a concept to the global climate but probably this would only come about if the obligations of States were clarified by international agreement'. (Schachter,

and on the circumstances of the breach (Article 33(1)). Where no State can be singled out as the State directly injured, several States or all States in general are entitled to invoke the international responsibility, depending on whether the obligation breached is owed to a group of States and is established for the protection of the collective interest of the group or is owed to the international community as a whole (Article 48(1)). States entitled to invoke responsibility may demand that the responsible State cease the internationally wrongful act and guarantee non-repetition, as well as other forms of reparation, such as restitution, compensation and satisfaction, 'in the interest of the injured State or of the beneficiaries of the obligation breached' (Article 48(2)).

The rules elaborated by the International Law Commission are sufficient to cover almost all the problems posed by harm to spaces beyond the limits of national juridisdiction. If, for example, a transboundary accident affects an area of high seas and leads to the depletion of a commercially exploited species of fish, responsibility may be invoked by a State which is directly injured because ships flying its flag used to fish in the area. This State is entitled to receive reparation in the form of compensation for the damage it has suffered (loss of profits, increased costs to move fishing vessels to other areas). Furthermore, as the obligation breached is owed to the international community as a whole, responsibility may also be invoked by States which are not directly injured, since they did not fish in the area, and also with respect to depletion of species which are devoid of any commercial interest. In this case, reparation by the responsible State cannot consist in compensation, since no damage was directly suffered by a State that is not directly injured. Instead, it will primarily take the form of restitution, that is the re-establishment of the situation which existed before the wrongful act was committed. The only instance where the ordinary scheme of State responsibility for wrongful acts present a flaw occurs if restitution is materially impossible and reparation necessarily takes the form of compensation (sadly enough, not only has a certain species devoid of commercial interest disappeared from a high seas area, but it has become extinct altogether). Given the fact that no State is directly injured, which State or other subject should be compensated?[33]

A way to get out of the deadlock is that suggested by the resolution of the *Institut de Droit International* mentioned above, which calls for the establishment or identification of entities entrusted with the right to receive compensation for environmental harm to spaces beyond the limits of national jurisdiction: 'environmental regimes should identify entities that would be entitled to make claims and to receive compensation in the absence of a direct legal interest if appropriate. Institutions established under such regimes, including ombudsmen and

International Law, 381). See, in general, Ragazzi, *The Concept of International Obligations* Erga Omnes (1997).

[33] It should also be considered that the responsible State cannot be asked to pay double or multiple compensations.

funds, might be empowered to this end. A High Commissioner for the Environment might also be envisaged to act on behalf or in the interests of the international community' (Article 28). No such institutions have yet been established.

6. Assessment of Damage

Under the rules on responsibility for internationally wrongful acts, 'compensation shall cover any financially assessable damage including loss of profits insofar as it is established' (Article 36 of the Commission's draft).

The assumption that compensation is limited to what affects health or property and is financially or economically assessable can also be found in a number of special treaty regimes. For example, under Article 22 of Annex III to the Convention on the Law of the Sea, liability of a contractor 'in every case shall be for the actual amount of damage'. The already quoted convention on civil liability for oil pollution damage, as amended in 1984, defines pollution damage as '(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' (Article 1(6)). Under the Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and their Disposal (Basel, 1999), the concept of damage includes loss of life or personal injury, loss or damage to property, loss of income deriving from an economic interest in any use of the environment, the costs of measures of reinstatement of the impaired environment, the costs of preventive measures (see Article 2(2)(c)).[34]

A broader approach can be found in Decision 7, adopted by the Governing Council of the United Nations Compensation Commission for Iraq in 1991, that provides detailed guidance on what constitutes 'direct environmental damage and depletion of natural resources'.[35] This includes losses or expenses resulting from:

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[34] The text of the Protocol is electronically available at <http://www.basel.int/meetings/cop/cop5/docs/prot-e.pdf>.

[35] By Resolution 687 of 3 April 1991, the United Nations Security Council affirmed *inter alia* that Iraq 'is liable under international law for any direct loss, damage—including environmental damage and the depletion of natural resources—. . . as a result of its unlawful invasion and occupation of Kuwait' (para. 16), and established an *ad hoc* compensation Commission. For the report and recommendations on claims for direct environmental damage and depletion of natural resources see 'United Nations Compensation Commission Governing Council, Report and

(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 the environmental damage; and
(e) Depletion of or damage to natural resources.

However, rules of customary international do not address the problems posed by the so-called ecological damage, that is the damage which affects the quality of the environment in itself (*per se*) and cannot be precisely assessed and quantified in financial terms. This kind of damage is taken into account, although to a varying extent, by the legislation of some States and has been granted by some national decisions. However, other domestic legal systems and decisions take a contrary view. In this field it would be difficult to think that some general principles of law, in the sense of Article 38(1)(c), of the Statute of the International Court of Justice, have already developed.

The resolution of the *Institut de Droit International* takes a rather advanced position in assuming that 'environmental regimes should provide for reparation of damage to the environment as such separately from or in addition to the reparation of damage relating to death, personal injury or loss of property or economic value. The specific type of damage envisaged shall depend on the purpose and nature of the regime' (Article 23). As it is inequitable to exempt from compensation irreparable or unquantifiable damage, 'an entity which causes environmental damage of an irreparable nature must not end up in a possibly more favorable condition than other entities causing damage that allows for quantification' (Article 25(1)). This implies that 'where damage is irreparable for physical, technical or economic reasons, additional criteria should be made available for the assessment of damage. Impairment of use, aesthetic and other non-use value, domestic or international guidelines, intergenerational equity, and generally equitable assessment should be considered as alternative criteria for establishing a measure of compensation' (Article 25(2)).[36] The innovative

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Recommendations Made by the Panel of Commissioners Concerning the Third Instalment of "F4" Claims' (Doc.S/AC.26/2003/31), 43 *ILM* (2004), 704.

[36] While advocating compensation for environmental damage, the resolution rightly remarks that 'full reparation of environmental damage should not result in the assessment of excessive, exemplary or punitive damages' (Article 25(3)).

approach of the resolution could pave the way to further steps in the progressive development of general rules applying to ecological damage.[37]

7. Environmental Harm and Peremptory Norms of International Law

The present International Law Commssion's draft does not make use of the concept of the international crime of a State as being something different from, and more serious than, an ordinary wrongful act. Nor does it point out that an international crime may be consist in, *inter alia*, 'a serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment, such as those prohibiting massive pollution of the atmosphere or of the seas', as it had been provided for in the draft adopted on first reading by the Commission in 1976.

While avoiding the highly controversial notion of international crime, the present draft has retained the category of 'serious breaches of obligations under peremptory norms of general international law' (Articles 40 and 41 of the Commission's draft). These kinds of breaches can also implicitly include gross or systematic failures to fulfil the obligations arising from the rules on the protection of the environment, especially if global concerns are at stake.

The Commission's draft also provides that countermeasures cannot affect, *inter alia*, obligations under peremptory norms of general international law (Article 50(1)). Forms of countermeasures involving a serious pollution of the environment, or a corresponding risk, are to be considered unlawful.

8. Conclusion

Only some of the questions linked to international responsibility for environmental harm have been examined in this essay, as it would have been impossible to deal with all the peculiarities of the subject. A very general conclusion can however be drawn. The mere fact that States rarely invoke international responsibility in cases of environmental harm is not a sufficient reason to prevent the elaboration and development of the relevant rules of international law. Also as a consequence of the present process of codification, the regime applying to responsibility for environmental harm needs to be further clarified and strengthened. It is up to the States themselves to develop this body of international law to cope with the demands arising from current environmental concerns.

[37] 'The rules of international law relating to reparation for environmental damage remain undeveloped, as evidenced by the lack of precedents'. (Sands, *Principles of International Environmental Law* (2nd edn. 2003), 884.)