

Chapter XXIII

State Responsibility and Civil Liability for Environmental Damage Caused by Military Operations

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I. Introduction

The principal purpose of this paper is to consider the extent to which a State incurs responsibility under international law for acts of its armed forces which cause environmental damage, and to examine whether State responsibility provides a sufficiently effective means for enforcing the law regarding protection of the environment in armed conflict. The emphasis will be upon international armed conflicts, although there will also be a brief discussion of the position in internal armed conflicts and in certain types of United Nations operations. As a secondary concern, the paper will also consider the possibility of a State, or individuals or agencies acting on behalf of a State, being held liable in domestic law for damage to the environment caused by military operations.

Part II of this paper will review the principles of State responsibility for environmental damage in the context of the law of armed conflict. Part III will then examine the application of those principles by the United Nations Compensation Commission in the case of Iraq. The possibility of State responsibility for environmental damage occurring in internal armed conflicts and United Nations operations will be discussed in Part IV. Part V will consider certain issues of civil liability under domestic law. Finally, Part VI will advance certain conclusions regarding the effectiveness of State responsibility and civil liability in protecting the environment.

II. The Principles of State Responsibility for Environmental Damage in International Armed Conflict

A. State Responsibility and International Environmental Obligations

The starting point for this inquiry is that where the agents of a State cause environmental damage by conduct which is contrary to a rule of international law binding upon that State, the State incurs international responsibility. It is a long established principle of international law that 'every internationally wrongful act

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of a State entails the international responsibility of that State'.¹ According to the International Law Commission,

There is an internationally wrongful act of a State when:

- (a) conduct consisting of an act or omission is attributable to the State under international law; and
- (b) that conduct constitutes a breach of an international obligation of the State.²

This principle applies to breaches by a State of its international obligations relating to the environment, just as much as it does to breaches of other international obligations.³ Indeed, the International Law Commission has categorized 'a serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment' as conduct which may give rise to an international crime.⁴ Whether the Commission's attempt to create a concept of State crimes separate from other breaches by States of their international obligations will prove acceptable, and whether it will actually make any difference to the substantive law (as opposed to such issues as the standing to bring a claim), is debatable. What matters for present purposes is the clear recognition that a State incurs responsibility under international law for the breach of its environmental obligations.

It is, however, widely recognized that as a means of ensuring protection of the environment, State responsibility is subject to severe limitations.⁵ While there have been cases in which a State has brought a claim for environmental damage caused to its own territory or interests, it is unclear which State, if any, has standing to maintain an international claim regarding damage to the global commons.⁶ The concept of an *actio popularis* has not yet gained sufficient acceptance in international law. Moreover, although this problem may be eased if the concept of causing serious pollution as an international crime comes to be accepted (since every State could then claim to be entitled to enforce the obligations concerned), this effect has yet to be felt and may be outweighed by other problems inherent in the concept of State crimes. In addition, proof of causation is often particularly difficult in environmental cases. Finally, there is considerable argument about the standard of responsibility (strict, absolute or fault based) in many of the treaties on the environment. The result is that State responsibility, while not to be dismissed, is not regarded as the most important means of enforcing international environmental law. Instead, attention has tended to shift towards preventive measures, such as the requirement to conduct an environmental impact assessment, and supervisory action by international organizations.

It should also be mentioned that the International Law Commission has adopted a series of articles, distinct from those on State responsibility, which deal with the notion that a State may incur liability for the injurious consequences of lawful acts.⁷ Whereas State responsibility is based upon the thesis that a State

incurs certain obligations because it has done something unlawful, liability under the new articles will not be dependent upon the act which gives rise to the injurious consequences being characterized as unlawful. The new concept is likely to be of particular significance in the environmental field but has proved controversial.⁸

B. State Responsibility and Obligations under the Law of Armed Conflict

The armed forces of a State are clearly one of the 'organs' of the State and when members of the armed forces of the State act in their official capacity, their conduct is attributable to the State. If, therefore, that conduct is contrary to an international obligation of the State, then the responsibility of the State is engaged. It was never contested, for example, that France incurred international responsibility as a result of the actions of French special forces in destroying the vessel *Rainbow Warrior* in New Zealand in July 1985.⁹

The fact that the State is engaged in an armed conflict and that the obligation which is violated is one derived from the law of armed conflict, rather than the law of peace, does not in any way prevent the State from being held responsible. Although the law of armed conflict is unusual in international law in holding individuals criminally responsible for violations of its rules, 'individual responsibility is additional to, and not exclusive of, the responsibility of the governments concerned.'¹⁰ The responsibility of the State for violations of the laws of armed conflict committed by its armed forces is expressly provided for in Article 3 of Hague Convention No. IV, 1907, and Article 91 of Additional Protocol I, 1977, which are discussed below.

There are several rules of the law of armed conflict which expressly concern the environment and the violation of which will entail international responsibility on the part of the State concerned:¹¹

(1) the Environmental Modification Treaty, 1977, (ENMOD)¹² prohibits the use of environmental modification techniques having widespread, long-lasting or severe effects as a means of warfare;

(2) Articles 35(3) and 55 of Additional Protocol I,¹³ prohibit the use of methods and means of warfare which are intended or may be expected to cause widespread, long-term and severe damage to the environment;

(3) customary international law is widely considered to include a prohibition on unnecessary and wanton destruction of the environment and a requirement that a belligerent show due regard for the protection of the environment.¹⁴ Some commentators also maintain that the proportionality principle applies in this context, so that a military operation is prohibited if it is probable that it will result in damage to the environment which is excessive in relation to the military gain which the operation is expected to produce.¹⁵

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In addition, a number of rules which are not specifically directed towards environmental protection have important repercussions for the environment. Chief among these are the following:

(4) the prohibition on wanton destruction of property, that is to say, destruction not demanded by the necessities of war;¹⁶

(5) the prohibition on the use of chemical and biological weapons, both of which are capable of devastating environmental effects;¹⁷

(6) the restrictions placed on the use of mines, booby-traps and incendiary weapons;¹⁸

(7) the prohibition of attacks on objects indispensable to the survival of the civilian population, such as foodstuffs and drinking water;¹⁹ and

(8) the prohibition (except in certain narrowly defined circumstances) of attacks upon works and installations containing hazardous forces, such as nuclear electrical generating stations.²⁰

Conduct which is imputable to a State engaged in an international armed conflict and which is contrary to any of these rules will engage the international responsibility of that State, provided, of course, that that rule is applicable to that State in the conflict in question.²¹ In addition, it is open to argument that some of the provisions of environmental agreements not specifically concerned with armed conflict remain applicable in armed conflict and thus impose further restraints, the disregard of which by the armed forces of a State may engage that State's international responsibility. A belligerent may incur international responsibility for damage to the environmental rights of another belligerent or a neutral State. The same difficulties exist here regarding standing to claim in respect of damage to global commons.

C. Special Features of State Responsibility in the Context of International Armed Conflict

In one respect, the concept of responsibility for violations of the law of armed conflict goes beyond the normal principles of State responsibility. Article 3 of Hague Convention IV states:

A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by members of its armed forces.²²

Similarly, Article 91 of Additional Protocol I provides:

A Party to the conflict which violates the provisions of the Conventions or of this Protocol shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.²³

In each case, the first sentence merely states the well established principle that a State is internationally responsible for the acts of its officials, members of its armed forces and other 'organs' of the State which are imputable to it. The actions of an organ of the State are imputable to that State if the organ in question was acting in its capacity as an organ of the State but not otherwise.²⁴ This principle has generally been given a broad interpretation, so that arbitral tribunals have held a State responsible for acts which were *ultra vires* provided that the soldiers in question acted, at least apparently, as organs of the State. Thus, the United States-Mexican Mixed Claims Commission held in the *Youmans* claim that:

Soldiers inflicting personal injuries or committing wanton destruction or looting always act in disobedience to some rules laid down by superior authority. There could be no liability whatever for such misdeeds if the view were taken that any acts committed by soldiers in contravention of instructions must always be considered as personal acts.²⁵

Nevertheless, the prevailing view is that, under the general rules of State responsibility, a State is not internationally responsible for wholly unofficial, private acts which it was not negligent in failing to prevent.

The second sentence of Article 3 of Hague Convention IV and Article 91 of Additional Protocol I thus go beyond this general rule by providing that, in the context of armed conflict, a belligerent State is responsible for 'all acts committed by persons forming part of its armed forces'. The use of the word 'all' suggests that responsibility under this provision extends to that category of wholly unofficial, unauthorized acts of members of the armed forces for which the State would not otherwise be internationally responsible. That interpretation is confirmed by the *travaux préparatoires* of the Hague Convention, the records of the Second Hague Peace Conference of 1907. The second sentence of Article 3 was the result of an amendment proposed by the German delegation to the Conference. Introducing the amendment, the German delegate, Major General von Gundell, identified the problem with which the amendment was designed to deal:

The case most frequently occurring will be that in which no negligence is chargeable to the Government itself. If in this case persons injured as a consequence of violation of the Regulations could not demand reparation from the Government and were obliged to look to the officer or soldier at fault, they would fail in the majority of cases to obtain the indemnification due them. We think, therefore, that the responsibility for every unlawful act committed in violation of the Regulations by persons forming part of the armed forces should rest with the Governments to which they belong.²⁶

It seems clear, therefore, both from the text and the drafting history, that the second sentence of Article 3 was intended to make a State responsible for all violations of the Hague Regulations committed by members of its armed forces,

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even where those violations were completely unauthorized private acts. That has been the interpretation placed upon Article 3 by most commentators. Thus, Judge Freeman wrote that:

... Article 3, as I read it, declares that a State shall be responsible for all the acts of its soldiers which violate the provisions of the Regulations. No distinction is made between acts committed within the exercise of military duties and non-official acts.²⁷

Professor Kalshoven has taken the same view:

... Article 3 is broader [than the general law] in that it encompasses all violations of the Regulations committed by persons belonging to the armed forces irrespective of whether these were done in that capacity or otherwise. The point is relevant because members of an armed force at war stand a greater chance than do other State organs of becoming entangled in ambiguous situations where it may be unclear whether they were acting in their capacity as an organ of the State. What, for instance, of the incidents that allegedly happened in the course of the invasion and occupation of Kuwait: can all acts of wanton brutality or savagery done by members of the Iraqi army be regarded as committed in that capacity?²⁸

Article 91 of Additional Protocol I is in the same terms as Article 3 of the Hague Convention and was clearly intended to have the same broad scope. Where it may, perhaps, differ is that the draftsmen of Article 3 seem to have contemplated mainly direct claims by individuals, rather than State to State claims, for wrongs done by identifiable servicemen, rather than injuries caused by, for example, long range bombardment.²⁹ These limitations were clearly not envisaged when Article 91 of Additional Protocol I was adopted. Both provisions were drafted with claims by neutral States, as well as by belligerents, in mind. While the basic principle that a State is responsible for violations of the law of armed conflict committed by members of its armed forces is undoubtedly part of customary law, and thus applicable to violation of all rules of the law of armed conflict irrespective of their source, it is open to debate whether the extended concept of responsibility for wholly private acts recognized in Article 3 of Hague Convention IV and Article 91 of Additional Protocol I applies to breaches of rules not contained in those two treaties.

It follows, therefore, that a State which is a party to an international armed conflict will incur international responsibility for damage to the environment caused by acts of members of its armed forces if those acts are in breach of one of the rules set out in the preceding section of this paper. If the rule is contained in the Hague Regulations or Additional Protocol I, responsibility will be engaged even if the servicemen in question were acting wholly outside the scope of their official duties and this was obvious to all concerned. If, therefore, fleeing soldiers from an army in which all discipline had collapsed set fire to oil installations in

the course of looting and thus caused damage to the environment, this act would engage the responsibility of their State as a result of Article 3 of Hague Convention IV and, if applicable, Article 91 of Additional Protocol I, even if the State would not have been held responsible under the normal principles set out in the International Law Commission's draft.

Although there have been cases in which one belligerent has paid compensation to another (or to its nationals) for damage caused by violations of the laws of armed conflict—usually as a result of the treaties concluded at the end of the Second World War—effective reliance on the principles of State responsibility in this area have been rare since then. There have been a number of occasions on which a belligerent has paid compensation, usually without admission of liability, to a neutral State for damage caused by its armed forces. The United States, for example, received compensation from Israel for the attack on the *USS Liberty* in 1967 and from Iraq for the attack on the *USS Stark* in 1987. The United States also offered an *ex gratia* payment to the families of those killed when the *USS Vincennes* shot down a civil airliner in 1988 at a time when United States forces were engaged in fighting with Iranian forces.³⁰ On the whole, however, State responsibility has not proved a particularly effective means of enforcing the law of armed conflict.

D. State Responsibility for Aggression

It is important to bear in mind that State responsibility is also incurred when a State violates those rules of international law which prohibit recourse to force against another State, in particular Article 2(4) of the United Nations Charter. As a result, a State is liable, in principle, to pay compensation for damage, including environmental damage, caused by an unlawful resort to force. That is so even if the act which was the immediate cause of the damage was not itself a violation of the laws of armed conflict.

Suppose, for example, that a State invades its neighbor in circumstances which could not possibly justify a plea of self-defense, so that there is a clear violation of Article 2(4) of the Charter. In the course of the fighting which ensues, the armed forces of the invader destroy an installation which is a military objective (and thus a lawful target under the laws of armed conflict). This action causes extensive pollution but does not violate Articles 35(3) or 55 of Additional Protocol I, because the damage to the environment is not 'long-term', and does not violate any of the other principles considered in Part II.B, above, because the destruction of the installation was militarily necessary. In such a case, those individuals who carried out the attack would not be guilty of a war crime or grave breach of the Geneva Conventions; but the State could be held responsible for the damage because it was a direct consequence of the illegal invasion. State responsibility here flows from a breach not of the *jus in bello* but of the *jus ad bellum*. International claims on this basis have been very rare since 1945. The United Kingdom and Argentina,

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for example, agreed in 1989 to make no claims against each other in respect of the 1982 Falklands Conflict, notwithstanding the clear illegality of Argentina's invasion and the scale of the damage to the Falklands environment caused by Argentine mining.³¹ The outstanding exception is the response of the international community to the damage resulting from Iraq's invasion of Kuwait, which will be the subject of the following section.

III. The Responsibility of Iraq for Damage Resulting from the Invasion of Kuwait

Iraq's invasion of Kuwait was perhaps the clearest violation of Article 2(4) of the Charter between 1945 and 1990 and was condemned as such by the Security Council.³² Although some of the more apocalyptic predictions regarding the effects of the Kuwait Conflict of 1990-91 on the environment proved to be exaggerated, there is no doubt that the conflict caused extensive damage to the environment in and around the Gulf.³³ These consequences are considered in greater detail in some of the other papers.³⁴ It is sufficient here to note that attention has tended to focus on three types of environmental damage:

(1) damage to the marine environment caused by the release of large quantities of oil by Iraq from the Sea Island Terminal in Kuwait;

(2) damage to the environment over a wide area resulting from the burning by Iraqi forces of over 500 oil wells in Kuwait; and

(3) land degradation caused by the aerial bombardment, the creation of minefields, the construction of other defensive fortifications such as trenches, and the land campaign. The conduct of both Iraqi and Coalition forces contributed to this category of damage.

A. The Jurisdiction of the Compensation Commission

The Security Council took an early position on the responsibility of Iraq for damage caused by violations of international law. Paragraph 8 of Security Council Resolution 674 (1990) reminded Iraq:

that under international law it 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

and invited States to collect information about potential claims. Resolution 687 (1991), adopted after the end of the fighting, 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 Iraq's unlawful invasion and occupation of Kuwait.

Resolution 687 went on to provide for the establishment of a compensation commission to administer a fund from which claims against Iraq would be paid. The money to pay compensation was to come from a levy on Iraqi oil sales. Following a report from the Secretary-General on the implementation of this part of Resolution 687,³⁵ the Security Council established the United Nations Compensation Commission by Resolution 692 (1991).³⁶

The Commission is not a court but a subsidiary organ of the Security Council, operating 'an essentially administrative mass claims system'.³⁷ In many respects it departs—sometimes radically—from the classical principles of State responsibility. Nevertheless, it is based, as paragraph 16 of Resolution 687 makes clear, on the principle that Iraq is internationally responsible for the damage caused by its unlawful acts. Its work, therefore, gives a rare and valuable insight into State responsibility for military operations. Moreover, the express provision in Resolution 687 for claims regarding environmental damage makes the Commission of particular interest in the context of this paper.

In view of the volume of claims—2.6 million claims for a total of approximately U.S. \$174 billion had been filed by April 1995 and there are more to come—and the very limited funds so far available to it,³⁸ the Commission has given priority to claims by individuals. It has, however, given an indication of how it intends to proceed with the environmental claims. The overwhelming majority of the environmental claims are likely to be submitted by governments and international organizations. In Decision No. 7 (Revision 1) of March 1992, the Governing Council of the Commission held that payments were in principle available:

with respect to any direct loss, damage, or injury to governments or international organizations as a result of Iraq's unlawful invasion and occupation of Kuwait. This will include any loss suffered as a result of:

- (a) military operations or threat of military action by either side during the period 2 August 1990 to 2 March 1991;
- (b) departure of persons from, or their inability to leave, Iraq or Kuwait (or a decision not to return) during that period;
- (c) actions by officials, employees or agents of the Government of Iraq or its controlled entities during that period in connection with the invasion or occupation;
- (d) the breakdown of civil order in Kuwait or Iraq during that period; or
- (e) hostage-taking or other illegal detention.³⁹

With regard to environmental claims, the the Governing Council decided:

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These payments are available with respect to direct environmental damage and the depletion of natural resources as a result of Iraq's unlawful invasion and occupation of Kuwait. This will include 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 combatting increased health risks as a result of environmental damage; and
- (e) depletion of or damage to natural resources.⁴⁰

The Commission has set a deadline of 1 February 1997 for filing claims for environmental damage.⁴¹ It is impossible, therefore, to assess the size of these claims, although it has been suggested that Kuwait's claim in respect of the oil well fires may reach U.S. \$170 billion on its own.⁴² The Governing Council has adopted the following provision on the law to be applied by the Commissioners in dealing with claims:

In considering the claims, Commissioners will apply Security Council Resolution 687 (1991) and other relevant Security Council Resolutions, the criteria established by the Governing Council for particular categories of claims, and any pertinent decisions of the Governing Council. In addition, where necessary, Commissioners shall apply other relevant rules of international law.⁴³

B. The Basis of Iraq's Responsibility

Although the Commission has yet to deal with any of the environmental claims, a number of features of the system which has been established merit attention at this stage. First, the central principle in Resolution 687 and Decision No. 7 of the Governing Council is that the wrongful act which has engaged Iraq's State responsibility under international law is the illegal invasion and subsequent occupation of Kuwait, *i.e.*, the violation of Article 2(4) of the Charter and other norms prohibiting international aggression, not violations of the law of armed conflict. As one commentator has put it:

. . . the key causal factor giving rise to liability is the unlawful invasion and occupation of Kuwait. Liability thus exists even in cases where the individual act of an Iraqi agent, taken in isolation, would not constitute a violation of international law.⁴⁴

If, therefore, damage was caused by Iraqi soldiers in circumstances which did not amount to a violation of the law of armed conflict, Iraq would still bear international responsibility because the damage was a direct result of the illegal invasion and occupation of Kuwait. The responsibility of Iraq is thus considerably more extensive than the criminal responsibility of individual Iraqi servicemen, who were guilty of war crimes only if they acted contrary to the laws of armed conflict and who are not penalized merely because their State was guilty of aggression.⁴⁵ There is, however, an exception to the principle that Iraq is liable for the consequences of aggression irrespective of whether the laws of armed conflict were also violated in the case of claims by members of the Coalition armed forces. The Governing Council has decided that Coalition servicemen are entitled to compensation only if they were prisoners of war and suffered treatment contrary to international humanitarian law.⁴⁶ Claims by Coalition servicemen for injuries sustained as a result of the pollution caused by the oil well fires are therefore excluded.

The fact that Iraq's responsibility is based upon its violation of the *jus ad bellum* rather than the *jus in bello* may prove to be of considerable importance in respect of the claims for environmental damage. If claimants were required to show that the environmental damage was caused by acts which violated the law of armed conflict, they would have faced a difficult task. Iraq was not a party to ENMOD or Additional Protocol I. Since the provisions of ENMOD and the environmental provisions of Additional Protocol I are probably not yet declaratory of customary international law,⁴⁷ those provisions were not applicable. While a good case can nevertheless be made that much of the destruction committed by Iraq in the oil fields and the release of the oil slick from the Sea Island terminal were contrary to the prohibition on wanton destruction, it is far from clear that all of those acts of destruction lacked a justification in military necessity. If it was decided that even some of those acts were not contrary to the law of armed conflict, it would have become necessary to show that any damage in respect of which a claim was made was caused by those acts which were unlawful, rather than by those which were not, or to have persuaded the Commissioners that they could apply some concept of apportioning liability. The decision that Iraq is to be held responsible for environmental damage directly resulting from the invasion and occupation (particularly when one considers the implementation of that decision in paragraphs 34 and 35 of Decision No. 7) avoids the need to decide those questions.

C. The Requirement of 'Direct' Loss

Secondly, the requirement that damage or loss be a direct consequence of the invasion or occupation may prove a fertile field for legal argument and has already attracted controversy.⁴⁸ Although the reference to direct loss or damage is not a novelty, it has often given rise to difficulty in the past. The Arbitrator in a 1923 case, for example, said that "the distinction sought to be made between damages which are direct and those which are indirect is frequently illusory and fanciful and should have no place in international law."⁴⁹ Since proof of causation is frequently problematic in cases involving claims for environmental damage, it is likely that the requirement that damage be 'direct' will create particular difficulties for governments presenting environmental claims to the Commission.

The decisions of the Governing Council have, however, gone some way to clarifying the concept of directness in relation to such claims. Thus, paragraph 35 of Decision No. 7, which is quoted above, gives a clear indication of the types of loss and damage which are likely to be treated as direct consequences of the oil spill and the burning of the oil wells, both of which actions are clearly imputable to Iraq and were undeniably consequences of the invasion and occupation. The emphasis on recovery of the reasonable costs of the operations to clean and restore the environment, and of monitoring environmental damage and effects upon health, is particularly welcome.

So far as the damage caused by land degradation is concerned, the decision in paragraph 34 that Iraq is responsible for the direct loss and damage caused by the military operations of both Iraqi and coalition forces is particularly relevant. Although most of the damage done by the Coalition occurred in Iraq itself, and neither Iraq nor its nationals can present claims in respect thereof, some of the damage in Kuwait was caused by the Coalition or cannot readily be attributed to one side rather than the other. The decision to treat the Coalition's military operations as a direct result of the Iraqi invasion and occupation of Kuwait and thus to hold Iraq responsible for the damage which those operations caused is one of the more important consequences of the Security Council's initial decision that the basis of Iraqi responsibility was its violation of Article 2(4) of the Charter, rather than the laws of armed conflict.

D. Conclusion

It is clear that if it deals with the environmental claims, the Commission is likely to hold that Iraq is responsible for most of the environmental damage which occurred as a result of the events in the Gulf in 1990-91. Some claims will undoubtedly fail the 'directness' requirement. That will be so where, for example, it is not sufficiently established that atmospheric pollution some distance from Kuwait was in fact caused by the burning of the oil wells. Where causation is established, the position would seem to be as follows:

(1) Iraq is responsible for damage to the environment caused by the acts of Iraqi agents, irrespective of whether that damage involved a violation of the laws of armed conflict;

(2) 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. Such damage would still be covered by paragraph 34 (c) or (d) of Decision No. 7, as well as by Article 3 of Hague Convention IV if the destruction was contrary to the rules stated in the Hague Regulations;

(3) Iraq is responsible for damage to the environment the proximate cause of which was Coalition military operations which were lawfully directed against Iraq in order to end its illegal occupation of Kuwait, *e.g.*, a lawful air attack against a military objective in Kuwait which resulted in air or marine pollution;

(4) It is less clear whether Iraq can be held responsible for environmental damage caused by Coalition operations if the act which was the immediate cause of the damage was itself a violation of the laws of armed conflict, *e.g.*, if pollution was caused by a Coalition attack which did not observe the customary law requirements of protection of the environment or which involved wanton destruction contrary to Article 23(g) of the Hague Regulations. While there may not (and should not) have been any cases in this category, it is suggested that, as a matter of principle, an aggressor should not be held internationally responsible for unlawful conduct on the part of its adversaries, not least because that would actually be contrary to the objective of ensuring that State responsibility operated to ensure compliance with the law, rather than simply to provide compensation for the consequences of its violation. Unlawful Coalition conduct should not, in other words, be treated as a direct result of the Iraqi invasion or occupation of Kuwait.

Finally, while it is to be hoped that the Commission will eventually resolve the environmental claims and have the funds to ensure that its awards are paid, it must be questioned whether that will actually be the case. By April 1995, the Commission had approved awards of U.S. \$870 million but had been able to arrange payments totalling only U.S. \$2.75 million. As governmental claims with a late filing date, the environmental claims will, in any event, come towards the end of a very long queue. Moreover, the size and complexity of these claims suggests that many of them may not be resolved by the Commission until well into the Twenty-First Century. Even then, there may not be the money to pay any awards which are approved. If Iraq were to resume oil sales at the pre-war level, the Commission might have some U.S. \$6 billion a year with which to meet claims. It seems likely that the total amounts claimed may well come to some U.S. \$400 billion. Even if the Commission awards only half that amount, it would still take over thirty years to honor all those awards. It seems probable, therefore, that a

compromise settlement will be negotiated at some stage, if the environmental claims are not to fall by the wayside in their entirety.

IV. State Responsibility for Environmental Damage in Internal Armed Conflicts and United Nations Operations

A. Internal Armed Conflicts

Internal armed conflicts raise rather different questions. International law regarding internal armed conflicts contains fewer rules regarding the environment.⁵⁰ Common Article 3 of the Geneva Conventions does not mention the environment or destruction of property. Additional Protocol II, 1977, contains no provisions comparable to Articles 35(3) and 55 of Additional Protocol I, although Articles 14 and 15 of Additional Protocol II deal with attacks on articles indispensable to the survival of the civilian population and works containing hazardous forces, and thus have environmental implications.⁵¹ The Hague Regulations, 1907, and the Conventional Weapons Convention, 1980,⁵² are applicable only to international armed conflicts. It is far from clear whether there is any customary law principle regarding the environment which applies to the parties in an internal armed conflict.

It is probable, therefore, that claims that a State was internationally responsible for damage to the environment occasioned in an internal armed conflict would be brought by other States which had suffered as a result of that conflict and would be based on general environmental treaties and principles of customary law, rather than the laws of armed conflict. It is also possible that a State which wantonly damaged the environment within its own jurisdiction to the detriment of its population might face action under one of the human rights treaties.⁵³ Environmental damage caused by an insurgent movement would engage State responsibility only if the movement went on to become the government of that State.⁵⁴

B. United Nations Operations

When United Nations forces engage as combatants in an armed conflict, they are subject to the laws of armed conflict, as are national forces operating, as in the Gulf, under a mandate from the Security Council but under national command and control. In the latter case, no special questions of State responsibility arise. If Coalition forces in the Gulf had caused environmental damage by acts which were contrary to the laws of armed conflict, they would have engaged the responsibility of their own States. Whether the conduct of forces from one Coalition State would have engaged the responsibility of its allies in addition must be regarded as unsettled.⁵⁵ There is no history of allied powers being held jointly responsible in this way but in principle joint responsibility should not be excluded where, for

example, aircraft from one State carry out an unlawful attack at the behest of a commander from an allied State.

A more difficult situation arises where unlawful acts are committed by forces under United Nations command. The nature of many modern United Nations operations, such as those in Somalia and the former-Yugoslavia, which are neither traditional peacekeeping nor straightforward enforcement actions, further complicates the picture. Two problems may briefly be mentioned:

(1) what law applies to military operations by United Nations forces when it is denied that those forces are a party to a conflict but they are nevertheless involved in fighting? Although the International Committee of the Red Cross (ICRC) has argued that once such forces become involved in fighting, the laws of armed conflict become applicable to them, it is far from clear that State practice supports this view. It does not appear, for example, to have been the view taken by States in respect of the fighting by UNPROFOR in Bosnia. The 1994 Convention on the Protection of United Nations Personnel⁵⁶ also seems to envisage that United Nations forces and associated personnel may become involved in hostilities at a level below the threshold for application to them of the laws of armed conflict.

(2) is a State internationally responsible for the acts of its servicemen when they form part of a United Nations force? Both the United Nations and the State may be lawful claimants in respect of wrongs done to such servicemen.⁵⁷ The general view has been, however, that it is the United Nations, not the contributing State, which is the appropriate defendant in cases where U.N. forces have violated the law in the course of their official duties.⁵⁸ Had it proceeded with the action which it threatened to bring against the United Kingdom in 1993, Bosnia might have attempted to argue otherwise. One problem in this respect is that the boundary line between troops under U.N. command and troops engaged in a U.N. operation but under national or alliance command and control has become blurred in recent years. If a national contingent which is part of a United Nations force conducts a particular attack because of national, rather than U.N. orders, international responsibility for any violation of the law would appear to rest with the State rather than the United Nations.

V. Civil Liability Under National Law

Civil actions by individuals against individual polluters have in some respects become more important than State responsibility in enforcing general environmental law. The possibility of a civil action in a national court for environmental damage in time of armed conflict has not, however, received much attention. It is not difficult to see why. Unlike most polluting activities, the military operations which cause environmental or other damage in wartime are performed by agents of the State. If that State or its agents were sued in the courts of another State, they would normally be entitled to sovereign immunity.⁵⁹ Even

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if the defendant were not immune, the act of State doctrine would bar consideration of the merits of the claim in some jurisdictions.

Nevertheless, the possibility of a civil action should not be altogether excluded. Many States now make an exception to sovereign immunity for torts committed outside their jurisdiction but which cause damage within the jurisdiction.⁶⁰ If, therefore, the release of oil into the sea off the coast of State A caused damage to beaches in State B, the courts of State B might well hold that the exception to immunity was applicable. The recent decision of the House of Lords in *Kuwait Air Corporation v. Iraq Airways Co.*,⁶¹ though not concerning environmental damage, also suggests that the English courts may be readier than in the past to separate the act which was the proximate cause of damage from the context of armed conflict in which it took place. The act of State doctrine, the possible application of which in the *Kuwait Airways Case* has yet to be decided, is construed more broadly by courts in the United States, where it reflects constitutional concerns, than in many other States. It is possible, therefore, that civil actions may come to play a more important part.

VI. Conclusion

The principle that if the armed forces of a State cause damage to the environment of other States by acts which are a violation of the laws of armed conflict, then the State incurs responsibility under international law is clear. Such a State is thus exposed to claims for compensation which may involve enormous amounts of money, as well as claims for other remedies and the possibility of retaliatory action. In theory, this possibility should operate as a significant deterrent. State responsibility is listed first amongst the methods of ensuring compliance with the rules of the law of armed conflict on the environment in the 1993 Report submitted by the Secretary-General but prepared by the ICRC.⁶² So far, however, there is little sign that it has had such an effect. As with the protection of the environment in peacetime, State responsibility has a role to play but that role has hitherto been peripheral. It is possible that the work of the United Nations Compensation Commission may change all that. If the Commission succeeds in forcing Iraq to pay a substantial sum for the damage which Iraq wrought upon the environment, States may take their environmental obligations in time of armed conflict more seriously. The odds are, however, heavily stacked against such a result and the longer that the process takes, the less its deterrent value is likely to be. Civil liability for environmental damage in armed conflict is still in its infancy. While we should not, therefore, ignore the role that these concepts may have to play, it would be unwise to place much reliance upon them.

On the other hand, the precautionary measures, such as the conduct of environmental impact assessments, which have become so important in protecting the environment in time of peace, are ill-suited to conditions of armed conflict.

The most that might be expected here is that the obligation under Article 36 of Additional Protocol I to review new weapons in order to determine whether their use would comply with the law of armed conflict will come to embrace the environmental dimension of that law. In practice, it is in the field of education and training and the application of political pressure upon belligerents that the best hope lies. As one of the leading textbooks states, what needs to be emphasized is the importance of making environmental consequences a serious concern in military decisions.⁶³ It is unlikely that this will be achieved through the application of the principles of State responsibility.

Notes

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1. International Law Commission (I.L.C.), Draft Articles on State Responsibility, Part I, Art. 1 [hereinafter Draft Articles]. For discussion, see I OPPENHEIM'S INTERNATIONAL LAW, (Jennings & Watts, ed., 9th ed. 1992) 500; and BROWNLEE, SYSTEM OF THE LAW OF NATIONS: STATE RESPONSIBILITY, Vol. I (1983).

2. *Supra*, n. 1, Art. 3.

3. See the arbitration award in the *Trail Smelter Case*, 3 Reps. Int'l. Arb. Awards 1905 (1939-41). For discussion, see BIRNIE & BOYLE, INTERNATIONAL LAW AND THE ENVIRONMENT (1992) at 139, and Mazzeschi, *Forms of International Responsibility for Environmental Harm*, in INTERNATIONAL RESPONSIBILITY FOR ENVIRONMENTAL HARM (Francioni & Scovazzi, eds. 1991) at 15.

4. Draft Articles, *supra* n. 1, Art. 19.

5. BIRNIE & BOYLE, *supra* n. 3 at 158.; Kiss, *Present Limits to the Enforcement of State Responsibility for Environmental Damage*, in Francioni & Scovazzi, *supra* n.3 at 3.

6. New Zealand's claim regarding the 1995 French nuclear tests, in which New Zealand has sought to reopen the 1974 judgment of the International Court of Justice in the *Nuclear Tests Case*, I.C.J. 1974, 477, does, however, refer both to the potential damage to New Zealand's interests and those of other States. The emphasis, nevertheless, is on the former.

7. For a discussion of the work of I.L.C., see Tomuschat, *International Liability for Injurious Consequences Arising out of Acts not Prohibited by International Law*, in Francioni & Scovazzi, *supra* n.3 at 37.

8. See, e.g., BIRNIE & BOYLE, *supra* n. 3 at 149.

9. 74 I.L.R. 256. See the decision of the International Court of Justice in *Case Concerning Military and Paramilitary Acts in and Against Nicaragua* (Nicaragua v. USA), 1986 I.C.J. 3. See also, Jennings and Watts, *supra* n. 1 at 546-7, especially nn. 5 and 7.

10. United Kingdom, *Manual of Military Law*, Part III, 173 (1958). See also U.S. Department of the Navy, *Annotated Supplement to the Commander's Handbook on the Law of Naval Operations*, NWP 9 (Rev. A)/FMFM 1-10 (1989), Chapter 6, n. 19; Germany, *Humanitarian Law in Armed Conflicts Manual*, para. 12M (1992); and II OPPENHEIM'S INTERNATIONAL LAW, at 592-95 (Lauterpacht ed., 7th ed.) 1952.

11. These rules are discussed in detail in several of the other papers delivered at the Symposium. A useful summary of the rules is to be found in the material provided by the International Committee of the Red Cross (ICRC) in the *Report of the Secretary-General on the Protection of the Environment in times of Armed Conflict*, submitted to the General Assembly on 29 July 1993, U.N. Doc. A/48/269. See also, ENVIRONMENTAL PROTECTION AND THE LAW OF WAR (Plant ed. 1992).

12. 1108 U.N.T.S. 151 (1978); 16 I.L.M. 88 (1977).

13. 1125 U.N.T.S. 3 (1979); 16 I.L.M. 1391 (1977).

14. See U.S. Department of the Navy, *The Commander's Handbook on the Law of Naval Operations*, NWP 1-14M (1995), para. 8.1.3. This paragraph was added in this edition of the *Handbook*.

15. See, e.g., the I.C.R.C. paper cited in n. 11 *supra*, U.N. Doc. A/48/269, at 25.

16. See Hague Convention No. IV, Respecting the Laws and Customs of War on Land, 1907, Art. 23(g) of the Regulations annexed thereto. See also Art. 55 of those Regulations and Geneva Convention No. IV, Relative to the Protection of Civilian Persons in Time of War, 1949, Art. 53 on the destruction of property in occupied territory.

17. Geneva Gas Protocol, 1925, 26 U.S.T. 571; T.I.A.S. 8061; 94 L.N.T.S. 65; and Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons, 1972, 26 U.S.T.

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583; T.I.A.S. 8062, and the Convention on the Prohibition of the Development, Production, Stockpiling, and Use of Chemical Weapons and on their Destruction, 1993, *reprinted in* 32 I.L.M. 804 (1993).

18. Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which may be deemed to be Excessively Injurious or to have Indiscriminate Effects, with annexed Protocols, 1980, *reprinted in* 19 I.L.M. 1524 (1984) Protocols II and III.

19. Protocol I Additional to the Geneva Conventions Relating to the Protection of Victims of International Armed Conflicts, with Annexes, (1977), Art. 54.

20. *Id.*, Art. 56.

21. This qualification, though obvious, is important because many States have not become party to some of the treaties listed above. The United States is not, for example, party to Additional Protocol I. Neither Additional Protocol I nor ENMOD was applicable to the Kuwait conflict of 1990-91.

22. *Supra*, n. 16, Art. 3.

23. *Supra*, n. 19, Art. 91.

24. Draft Articles, *supra* n. 1, Art. 5.

25. 4 Repts. Int'l. Arb. Awards 110, 116.

26. *III Proceedings of the Hague Peace Conferences* 140 (Carnegie Endowment, trans.).

27. 88 *Rec. des Cours* 65, 71 (1955).

28. Kalshoven, *State Responsibility for Warlike Acts of the Armed Forces*, 40 Int'l & Comp. L.Q. 827, 837 (1991).

29. *Id.*

30. Brief details of these three incidents are given in NWP-9, Rev. A, Annotated Edition at chap. 6, 19, *supra* n. 10.

31. Joint Statement of British and Argentine Delegations, Madrid, 19 Oct. 1989, para. 3.

32. Security Council Resolutions 660 (1990), 662 (1990) and subsequent Resolutions. These Resolutions and other pertinent documents are contained in IRAQ AND KUWAIT: THE HOSTILITIES AND THEIR AFTERMATH (Weller ed. 1993).

33. *See*, in particular, the Report of the Executive Director, United Nations Environment Programme, 10 May 1991, *Environmental Consequences of the Armed Conflict between Iraq and Kuwait*, UNEP/GC.16/4/Add.1, and the Report of the U.N. Secretary General, 19 June 1992, *International Co-operation to Mitigate the Environmental Consequences on Kuwait and other Countries in the Region resulting from the Situation between Iraq and Kuwait*, U.N. Doc. A/47/265. *See also* ARKIN, et al, ON IMPACT (1991).

34. *See* especially, the papers by Rear Admiral Schriefer, Lt. General Williams, and Mr Arkin, *supra*.

35. U.N. Doc. S/22559, 2 May 1991.

36. For discussion of the Commission and its work to date, *see* THE UNITED NATIONS COMPENSATION COMMISSION: PROCEEDINGS OF THE 13TH SOKOL COLLOQUIUM (Lillich ed. 1995); Crook, *The United Nations Compensation Commission - A New Structure to Enforce State Responsibility*, 87 A.J.I.L. 144 (1993); Bettauer, *The UN Compensation Commission - Developments since 1992*, 89 A.J.I.L. 416-23 (1995); and Fox, *Reparations and State Responsibility, in THE GULF WAR 1990-91 IN INTERNATIONAL AND ENGLISH LAW* 261 (Rowe ed. 1993).

37. Crook, *supra* n. 36 at 154.

38. Bettauer, *supra* n. 36 and Rovine & Hanessian, *Making Iraq Pay for Gulf War Losses*, 10 Int'l. Arb. Rep. 22 (June 1995), at 22. Since Iraq has so far refused to sell oil, the only funds available to the Commission have come from the partial liquidation of Iraq's overseas assets.

39. Paragraph 34; U.N. Doc. S/AC.26/1991/7/Rev. 1 (17 March 1992); Weller ed., *supra* n. 32 at 550.

40. *Id.*, para. 35.

41. Decision No. 12, U.N. Doc. S/AC.26/1992/12; Weller ed., *supra* n. 32 at 561.

42. Rovine & Hanessian, *supra* n. 38 at 23.

43. Art. 31 of the Provisional Rules for Claims Procedure, annexed to Decision No. 10, 26 June 1992; UN Doc. S/AC.26/1992/10; Weller ed., n. 32 at 553.

44. Crook, *supra* n. 36 at 147.

45. It is a well established principle of the law of armed conflict that the law of armed conflict applies equally to both parties to a conflict and that the fact that the occupation of one State by another is illegal does not make individual members of the armed forces criminally responsible for acts which are not breaches of the law of armed conflict; *United States v. List*, 15 Ann. Dig. 632 at 1637 (1948).

46. Decision No. 11, 26 June 1992, U.N. Doc. S/AC.26/1992/11; *supra* Weller ed., *op. cit.*, n. 32 at 560.

47. *See* Greenwood, *Customary International Law and the First Geneva Protocol of 1977 in the Gulf Conflict, in THE GULF WAR 1990-91 IN INTERNATIONAL AND ENGLISH LAW* 63, 86-7 (Rowe ed., 1993), and Roberts, *Failures in Protecting the Environment in the 1990-91 Gulf War, in id.*, at 111.

48. *See, e.g.*, Rovine & Hanessian, *supra* n. 38.

49. Arbitrator Parker, *The War Risks Insurance Premium Claims*, 7 Repts. Int'l. Arb. Awards (1923), at 44, *quoted in* Fox, *supra* n. 36.

50. *See* the Report of the Secretary-General, U.N. Doc. A/48/269, at 8-9.

51. Protocol II Additional to the Geneva Conventions Relating to the Protection of Victims of Non-International Armed Conflicts (1977), 16 I.L.M. 1442 (1977).
52. *Supra*, nn. 16 & 18, respectively.
53. *See*, arguments discussed in Desgagne, *Integrating Environmental Values into the European Convention on Human Rights*, 89 A.J.I.L.L. 263 (1995).
54. Draft Articles, *supra* n. 1, Art. 15.
55. *See* BROWNLIE, *supra* n. 1, at 189.
56. *See* Bloom, *Protecting Peacekeepers: The Convention on the Safety of United Nations and Associate Personnel*, 89 A.J.I.L.L. 621 (1995).
57. Both Sweden and the United Nations made claims against Israel concerning the killing of Count Bernadotte in 1948. *See also* the *Reparations Case*, 1949 I.C.J. 182.
58. *See* BOWETT, UNITED NATIONS FORCES 245 (1964). *See also*, the decision of the Austrian Provincial Court in *N.K. v. Austria*, 77 I.L.R. 470.
59. *See* the decision of the U.S. Supreme Court in *Argentine Republic v. Amerada Hess Corp.*, 102 L. Ed. 2d 818 (1989); 81 I.L.R. 658.
60. *See, e.g.*, United States Foreign Sovereign Immunities Act 1976, Section 1605(a)(5) and the United Kingdom State Immunity Act 1978, Section 5.
61. 3 All ER 694 (1995).
62. U.N. Doc. A/48/269, at 9.
63. BIRNIE & BOYLE, *supra* n. 3, at 130.