EUROPEAN COMMUNITIES
COMMISSION

Protection of the Environment in Times of Armed Conflict

Report established by a study group constituted by

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ENVIRONMENTAL PROTECTION IN TIMES OF ARMED CONFLICT

SUMMARY

REPORT

Summary

Modern technology has in two ways augmented the destructive potential of warfare. Firstly, it "offers" destructive forces of tremendous power. In addition, activities using or related to modern technology which are already hazardous in peacetime become even more dangerous if exposed to the effects of warfare. Both these risks threaten not only the parties to a conflict, but also third States and their environment. The purpose of this report is to analyse the international legal rules which are designed to limit this threat to the environment of States not parties to a conflict (third States).

The first set of rules which are relevant in this respect are the general rules of international law relating to the protection of the environment. It is a well-established rule of general international law that States are under a duty not to cause damage to the environment of other States or situated beyond the limits of national jurisdiction. This implies a duty on all State organs to abstain from acts which might cause such damage, but also a duty on the State to prevent such damage being caused from any source situated in its territory or being placed under its control. In addition, numerous legal and political instruments confirm a more general obligation on States to protect the natural environment - wherever situated.

These rules for the protection of the environment are supplemented and rendered effective by the duty on States to co-operate with a view to preventing, containing or reducing damage to the environment. Under general international law, there exists a duty to cooperate the exact content of which, however, is not easy to ascertain. In the field of international environmental law, a number of specific duties of co-operation have been developped in international treaties according to a pattern which has become rather uniform. In the case of sudden damage or risk of damage caused by accidents or similar events, there is first of all a duty on the State in the territory of which the source of the

damage or risk is situated to warn other States which might be affected. There is also a duty to co-operate with a view to abating pollution caused by the accident. States are under a duty to assist a State requesting help for that purpose. The authors of this report submit that a correct interpretation of this duty of co-operation also implies a duty on the State where the source of pollution is situated to accept offers of assistance from other States and /or international institutions and to facilitate such assistance, where it appears that the State cannot efficiently cope with this problem.

In the case of an international armed conflict, these rules continue to be applicable at least in so far as non-belligerents are concerned. States thus must refrain from military activities which cause damage to the environment of States not parties to the conflict. The same holds true for non-international armed conflicts. Only in exceptional cases may States engaged in an armed conflict free themselves of certain treaty obligations relating to the protection of the environment.

In the relationship between belligerent and neutral States, these duties of co-operation are also unaffected by war. It must be stressed, in addition, that even the laws of war contain certain duties of co-operation for the protection of victims of armed conflicts. However, it must be recognized that the necessary co-operation is more difficult to establish in times of armed conflict.

An additional source of legal rights of States not parties to an international armed conflict is the law of neutrality. State practice relating to the Second World War confirms that the principle of inviolability of neutral territory implies a prohibition on the causing of damage on neutral territory, be it directly, be it indirectly, provided that, in the latter case, there is an adequate causal link between the belligerent act and the damage.

The laws of war, in particular the 1977 Protocols additional to the Geneva Conventions for the protection of the victims of armed conflicts, also contain certain rules restraining the freedom of States to cause damage to the environment. These are both the general rules concerning the protection of the civilian population in times of armed conflict and certain specific provisions relating to the protection of the environment. These rules apply in the relations between the parties to a conflict, but third States may have an interest of their own observance of these rules. They can in any case, by joint or individual diplomatic action, demand that these rules be observed.

The duty not to cause or to prevent damage to the territory of neutral States is not diminished by virtue of the general rules relating to State responsibility. The existence of an armed conflict does not constitute a case of force majeure or necessity excluding responsibility. Nor can the notion of legitimate counter-measures or self-defence justify the violation of neutral rights.

If, however, damage is not caused in a given instance by the organs of the State where that damage originates (e.g. where a nuclear power plant is blown up by a group of saboteurs), then that State is not responsible for it unless one accepts an objective responsibility in such cases (which would probably go to far) and unless the damage is attributable to that State for reasons other than the mere fact that the damage originated in its territory (for example, if the obligation of the State to do everything in its power to contain and reduce the damage is violated). If one belligerent causes a damage to a third State by attacking an object situated on the territory of the other belligerent - a frequent case in the situation envisaged by this report - the damage is attributable to the first belligerent.

In any case, the responsibility of a belligerent State is engaged only if the damage sustained by the neutral State is related to the act or omission of the belligerent by an unbroken and clear chain of causality (doctrine of proximate cause).

If the international responsibility of a belligerent State for damage in a given instance is thus established, that State has to pay compensation.

Furthermore, there is the question of possible unilateral action by the State threatened by pollution against the source. Action within the territory or territorial waters of the State of origin without that State's consent would amount to an illegal use of force. On the high seas, however, there exists a right of intervention pursuant to the 1969 Brussels Convention concluded after the Torrey Canyon accident, and the 1973 London Protocol which extended its application to all polluting substances.

International co-operation, which is the clue to the problems under review, can be greatly facilitated by international institutions. The function of institutions can be threefold:
(a) verification and evaluation of the environmental problem;
(b) actual measures to combat pollution or to reduce or eliminate the damage to the environment;
(c) mediation between the parties to the conflict and/or third parties in order to facilitate functions a) and b).

Regional organizations which have been created for dealing with the pollution of certain sea areas are probably best equipped to perform function a) and b), with the help if necessary of UNEP. Function c) is a genuine task for the International Committee of the Red Cross.

The conclusions of the group of experts concerning the existing law, with the necessary clarifications, are laid down in a set of eight principles.

PRINCIPLES CONCERNING THE PROTECTION OF THE ENVIRONMENT IN TIMES OF ARMED CONFLICT

1. Under the general rules of international law, States are obliged not to use their territory or carry on their activities outside their territory in a manner prejudicial to the rights of other States. They must, in particular, take care to ensure that the integrity and inviolability of the territory of other States are respected. They must also observe the principle of the peaceful use of outer space, the sea-bed and ocean floor and the high seas.

2. States are under a duty to ensure that activities carried on within their jurisdiction or control do not cause any environmental damage in areas under the jurisdiction of other States or beyond the limits of national jurisdiction.

3. In the event of armed conflict, treaty rules protecting territorial integrity and the environment remain applicable to States not parties to a conflict. Their violation may bring into play the rules of international law on the responsibility of States, regardless of where the damage arose.

4. The parties to a conflict are obliged not to cause damage to the environment of third States or of areas not subject to any national jurisdiction.

5. In relations between States parties to the conflict, the mere occurrence of the conflict does not put an end ipso facto to their treaty obligations in regard to the protection of the environment. It is at all events forbidden to employ methods or means of warfare which are intended, or may be expected to cause widespread, long-lasting and severe damage to the neutral environment.

6. Each State individually and, in consequence, all States parties to a convention are under an obligation to ensure that the norms governing the international protection of the environment are applied as far as possible by the states engaged in a conflict.

7. If environmental damage is likely to occur or does occur, each State, including each party to the conflict, must do everything in its power to prevent it or bring it to an end and must give favourable and bona fide consideration to any offer of assistance from third States or international organizations and facilitate work done in pursuance of that offer. For those purposes, the parties to the conflict must endeavour to cooperate with one another.

8. The International Committee of the Red Cross or any other impartial humanitarian body may offer its services to the States or parties concerned in order to facilitate any action designed to protect the environment.

Report

I. Introduction

The threat posed to the environment during armed conflicts gives rise to the question of whether adequate rules of public international law and adequate international organisations exist to deal with the problems of the prevention and reparation of environmental damage caused by belligerent actions.

The delicate state of the environment and the increased possibilities of causing enormous damages make it imperative to look carefully for ways and means to reduce, if not eliminate, the risks. Problems of this nature may, unfortunately, arise in almost any region of the world. They are, therefore, of the highest concern to the European Community and its Member States.

Deep concern about the ecological damage resulting from acts of war was in particular expressed during several debates within the European Parliament. Mr Karl-Heinz Narjes, Member of the Commission of the European Communities, raised on 19 May 1983 in the European Parliament, during an emergency debate on the problems in the Gulf area, the question of whether thought should not be given to the possibilities of developing humanitarian law and of creating a legally binding framework and an appropriate organisation in order to prevent ecological catastrophes. Mr Narjes mentioned the possibility of creating a "Green Cross" by analogy with the Red Cross Conventions. The important thing in his view was to take the present case as an occasion to consider ways and means of how to make existing humanitarian law more operative.

As a consequence Commissioner Narjes invited a group of specialists on humanitarian and environmental law to study the problems and make appropriate recommandations. Accordingly the Group was convened by the Commission to a first meeting in Brussels on 23 and 24 September 1983. The Group was composed of Professor Michael Bothe of the University of Frankfurt, acting as chairman, Professor Antonio Cassese of the University of Florence, Professor Frits Kalshoven of the University of Leiden, Professor Alexandre Kiss, Director of the Environmental Law Center of the University of Strasbourg, Professor Jean Salmon, Director of the Centre de Droit International of the Universite libre de Bruxelles and Professor Kenneth R. Simmonds of the University of London. Mr Christoph Bail, member of the Legal Service of the Commission, acted as secretary of the Group.

The mandate of the Group was expressed in loose terms in order to ensure sufficient freedom and flexibility to consider all relevant issues. The Group was asked to study existing rules and principles related to the prevention of and responsibility for environmental damage to non-belligerent or neutral states caused by belligerent actions in an armed conflict. It was furthermore asked to consider the necessity and the different options for the creation of a new legal framework, the formulation of adequate rules or principles and the question of the appropriate organisation or body to carry out certain tasks of furthering co-operation and of giving technical assistance.

The Group met four times in Brussels to establish the structure of the report, distribute work on the different chapters, discuss the various contributions and review the final content of the report, which was put together by the Chairman on the basis of the individual contributions and the results of the discussion.

The following report therefore is the result of individual reseach, which has been reviewed by the whole Group, and can now be considered as adopted by the Group. It is intended to assist in the consideration of possible initiatives at the international level. Although the Commission initiated the report, it expresses the views of the Group, and does not in any way commit the Commission.

II. The problem

Modern technology has profoundly changed the nature of war. The reasons for this are twofold.

The first element is the use of that technology for destruction purposes. Modern technology has made possible destruction on a scale which had been unimaginable for centuries. Even where destruction is aimed, as it must be under the laws of war, against military targets, its side effects are often considerable and uncontrollable. But, secondly, even peaceful uses of technology may also have an impact on the nature of war. The possibilities of modern technology have led to many activities which are hazardous and even ultra-hazardous. In times of peace, such activites are subject to safety measures which constitute an essential element of national and international environmental law. But when and where violence breaks out, these safety measures, which very often are based on "normal" working conditions, are rendered ineffective. Examples for this are manifold. Destruction of dams and dykes may cause the flooding of vast areas. If nuclear power plants are blown up, dangerous radioactivity will be released. If chemical plants are hit by bombs, toxic materials which are used in them may pollute the surrounding areas. Handling of dangerous goods can result in disasters, where the means of transportation are attacked and can no longer contain their dangerous freight. Disposal sites for dangerous waste also may leak if the barriers which prevent the poison from entering the environment are destroyed. Last but not least, one has to recall that oil is a major and very dangerous pollutant. Oil drilling and handling facilities, tankers and pipelines, if damaged by military activities, become a source of pollution which may have disastrous consequences.

The written laws of war have been rather slow to take into account these new developments. As far as the rules which limit the right of the parties to a conflict to inflict harm on each other are concerned, one sees a few elements of these modern developments in the so called Petersburg Declaration of 1868 and the Conventions and Declarations adopted at the Hague Peace Conferences of 1899 and 1907. The First World War was the first war where all the terrible effects of the use of modern technology in warfare became apparent. The international community reacted by trying to develop rules which took these developments into account and limit their consequences. However, these reactions did not lead to many positive results between the wars. The Hague Rules on Air Warfare drafted by a committee of experts never became a treaty, although they have influenced State practice. An important achievement was the Geneva Protocol of 1925 forbidding the use of chemical and biological weapons. But it took some important powers some decades to ratify it.

After the Second World War, the great codification which attempted to transform the traumatic experiences of the War into a revision of the laws of war, the Geneva Conventions of 1949, does not really cope with the problem of the effect of technology on war. This was only done later by the ICRC in the so called Delhi rules, which dealt with weapons of mass destruction. These rules, however, became the victim of the cold war. It was only in the sixties that attempts to make the laws of war address themselves to modern questions made progress. The results are the two Protocols additional to the Geneva Conventions which were signed in 1977 and which contain a number of important provisions dealing with our subject. Mention should also be made of the Convention on the Prohibition of Environmental Modification Techniques for Hostile Purposes, which is one of the few results of the UN disarmament negotiations also signed in 1977.

As far as the relations between the parties to a conflict and third States are concerned, written law has been slow to recognize the developments just described, although States which are not engaged in the conflict are quite often as much threatened as are the parties to the conflict. The side effects of modern weaponry do not respect national boundaries, do the dangerous forces which may be unleashed if peaceful activities become the object of military attacks.

One of the reasons for the slowness of this development is the fact that the traditional law relating to the position of third States, the law of neutrality has become a controversial subject matter. Neutrality has been thrown into question in the system of the United Nations. Different kinds of conflict have emerged, where it is no longer appropriate to speak of neutrality in traditional terms. But the fundamental dilemma of the law of neutrality remains, both for new types of conflict and where neutrality in the traditional sense may no longer exist. The relations between the parties to a conflict and those States which are not engaged in that conflict are essentially peaceful relations, governed by the international law of peace. On the other hand, it is impossible to ignore the fact that a war is going on. This fact has an impact, both in practical and in legal terms, on international relations as a whole.

It is in this general perspective that this report attempts to deal with the problem described. It starts with the general duty to protect the environment in times of peace, (III. 1) and the duty of States to co-operate with a view to protecting the environment (III. 2). It analyses how far the existence of an armed conflict affects the functioning and applicability of these rules (III 3). It then turns to the traditional rules concerning the position of third States in times of war, that is the law of neutrality (III. 4). It

analyses further the law relating to the relations between belligerents, and whether it has any bearing on the position of third States (III.5). The report then deals with the consequences of violations of such rules, the question of State responsibility. The important problem is whether the existence of an armed conflict exonerates the belligerents from their responsibility towards neutral States (III 6). The report also examines the question of possible unilateral measures of self-help (III 7). Finally, it addresses the question of institutional arrangements to put the necessary co-operation on a firmer basis (IV).

III. ANALYSIS OF THE LEGAL POSITION

1. The general rules on the protection of the environment

The acts of warfare described in the preceding chapter may cause damage to the environment of third States. The first question must therefore be: what are the rules of contemporary international law which settle the question whether it is lawful or not to cause such damage?

Although the international law of the environment is still in its infancy, a number of principles can be deduced from certain traditional rules of international law, namely the duty of each State not to cause damage to the environment of other States. This prohibition also applies to areas beyond the limits of any established territorial jurisdiction. Moreover, one can note the emergence of a more general rule, a duty to respect the environment in general, irrespective of its geographical situation and legal regime.

1.1. The obligation not to cause damage to the environment beyond the limits of the territorial jurisdiction of a State.

The duty of States not to cause damage to the environment outside the limits of their territorial jurisdiction stems from traditional, deeply rooted principles of public international law. The principle of the non-injurious use of territory was established by a number of judicial and arbitral decisions concerning the general duty not to infringe the rights, and in particular the territorial rights, of other States.

Thus the award by Max Huber of 4 April 1928 in the Palmas Island arbitration case states:

> "Territorial sovereignty (...) involves the exclusive right to display the activities of a State. This right has as corollary a duty: the obligation to protect within the territory the rights of other States, in particular their right to integrity and inviolability in peace and in war, together with the rights which each State may claim for its nationals in foreign territory." (1)

The judgment of the International Court of Justice in the Corfu Channel case also draws attention to:

> "every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States." (2)

This obligation is also the essential basis of the award in the Trail Smelter arbitration case. In its award of 11 March 1940, the tribunal hearing the case declared that:

> "under the principles of international law, as well as of the law of the United States, no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another State or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence." (3)

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(1) 1 RIAA, p. 839.

(2) (1949) ICJ Rep. 22.

(3) 3 RIAA, p. 1907.

This obligation can also be derived from a more general principle, that of the prohibition of the abuse of rights. This principle is in turn reaffirmed in Article 300 of the Convention of 10 December 1982 on the Law of the Sea,[4] according to which States Parties to the Convention:

> "undertake to discharge in good faith the obligations entered into in conformity with this Convention, and to exercise the rights, jurisdictions and freedoms recognized in this Convention in a manner which would not constitute an abuse of right."

Conceived in this general way, the principle not only prohibits violations of the territorial rights of other States, but also protects generally areas not subject to the territorial jurisdiction of the State in which the pollution originates. It is therefore forbidden to cause damage to the environment beyond the limits of the territorial jurisdiction of States. The principle is reaffirmed in quite specific terms by a number of international conventions. Thus, Article 194 (2) of the Convention on the Law of the Sea provides:

> "States shall take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment, and that pollution arising from incidents or activities under their jurisdiction or control does not spread beyond the areas where they exercise sovereign rights in accordance with this Convention."

The preamble to the European Convention on Long-range Transboundary Air Pollution of 13 November 1979[5] reproduces the same principle.

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(4) ILM 1982, p. 1309.

(5) ILM 1979, p. 1442.

However, a number of provisions in conventions enlarge this obligation to cover zones subject to the sovereignty of the State itself. The most important of these, in terms of geographical scope and number of signatories, is no doubt the Convention on the Law of the Sea. Article 192 of that Convention reads :

> "States have the obligation to protect and preserve the marine environment."

The other provisions of Part XII of the Convention furnish numerous details as to the substance of this general obligation.

The obligation not to pollute the marine environment was also laid down systematically by multilateral treaties preceding the Convention on the Law of the Sea. Thus, according to Article 1 of the Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matter of 29 December 1972,(6) Contracting Parties shall individually and collectively promote the effective control of all sources of pollution of the marine environment. The Oslo (regional) Convention of 15 February 1972(7) provides in Article 1 for the same obligation in terms both wider and more specific.

> "The Contracting Parties pledge themselves to take all possible steps to prevent the pollution of the sea by substances that are liable to create hazards to human health, to harm living resources and marine life, to damage amenities or to interfere with other legitimate uses of the sea."

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(6) ILM 1972, p. 1293; A.C. Kiss (ed.), Selected Multilateral Treaties in the Field of the Environment, UNEP, 1982, p. 280.

(7) ILM 1972, p. 262; Kiss, op. cit. p. 416.

The Paris Convention of 4 June 1974 for the Prevention of Marine Pollution from Land-based Sources[8] contains in Article 1(1) a similar, but even more detailed, obligation:

> "The contracting parties pledge themselves to take all possible steps to prevent pollution of the sea, by which is meant the introduction by man, directly or indirectly, of substances or energy into the marine environment (including estuaries) resulting in such deleterious effects as hazards to human health, harm to living resources and to marine ecosystems, damage to amenities or interference with other legitimate uses of the sea."

Partly under the stimulus of the United Nations Environment Programme (UNEP), a whole series of regional conventional schemes, comprising for the most part an action plan, a general convention and additional protocols, have seen the light of day. Under each of these schemes the general obligation is laid down not to damage the marine environment by pollution. The earliest of these conventions, concluded before the days of the UNEP, has as its purpose the protection of the marine environment in the Baltic Sea Area (Helsinki Convention of 20 March 1974).[9] It states in Article 3 that Contracting Parties shall individually or jointly take all appropriate legislative, administrative or other relevant measures in order to prevent and abate pollution and to protect and enhance the marine environment of the Baltic Sea Area.

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(8) ILM, 1974, p. 352; Kiss, op. cit. p. 446.

(9) ILM, 1974, p. 544, Kiss, op. cit., p. 416.

Among the regional conventions drawn up under the auspices of the UNEP, that of Kuwait, signed on 24 April 1978,[10] "for co-operation on the protection of the marine environment from pollution" contains a particularly significant obligation from the point of view of this enquiry. Article 3(a) reads:

> "The Contracting States shall, individually and/or jointly, take all appropriate measures in accordance with the present Convention and those protocols in force to which they are party to prevent, abate and combat pollution of the marine environment in the Sea Area;"

General obligations of a similar nature, although worded differently, are to be found in the Barcelona Convention of 16 February 1976 for the Protection of the Mediterranean Sea against Pollution[11] (Article 4), the Abidjan Convention of 23 March 1981 for Co-operation in the Protection and Development of the Marine and Coastal Environment of the West and Central African Region[12] (Article 4), the Jeddah Regional Convention of 14 February 1982 for the Conservation of the Red Sea and Gulf of Aden Environment[13] (Article 4) and the Convention of Cartagena of 24 March 1983 for the Protection and the Development of the Marine Environment of the Wider Caribbean Region[14] (Article 4).

This principle is also reaffirmed in a number of non-conventional instruments. The basic text on the subject is principle 21 of the Stockholm Declaration:[15]

> "States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction."

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(10) ILM 1978, p. 501; Kiss, op. cit., p. 486.

(11) ILM 1976, p. 290; Kiss, op. cit., p. 466.

(12) ILM 1981, p. 746.

(13) W.E. Burhenne (ed.), International Environmental Law, Multilateral Agreements, Beiträge zur Umweltgestaltung B 7 no. 982: 13/1.

(14) ILM 1983, p. 221.

(15) ILM 1972, p. 1416.

It is repeated word for word, moreover, in the international conventions just mentioned. It is also incorporated in the Charter of the Economic Rights and Duties of States, adopted by the United Nations General Assembly on 12 December 1974,[16] the introductory Declaration to the successive programmes of action of the European Communities on the environment, and the Final Act of the Conference on Security and Co-operation in Europe, adopted in Helsinki on 1 August 1975.[17] One might add to this list numerous texts adopted on a regional basis (European Communities, OECD, Council of Europe). Lastly, Article II of the Resolution of the Institute of International Law on the pollution of rivers and lakes adopted in Athens in September 1979 [18] repeats word for word principle 21 of the Stockholm Declaration.

These rules have also been applied by judgments delivered by domestic courts. Here are two recent examples concerning pollution of the Rhine by chlorides. Firstly, the Strasbourg Administrative Court [19] declared unlawful, in its judgment of 27 July 1983, the Prefectoral Decree authorizing Mines domaniales de Potasse d'Alsace to discharge residual salts into the Rhine, on the ground that the French authorities must take care not to authorize activities having potentially harmful, serious and abnormal consequences outside the national territory. In the case in point, the authorities should, before granting the authorization requested, have carried out a detailed investigation of the effects abroad of the discharges in question and have assessed the consequences thereof. Secondly, the Rotterdam court held, in an action brought against

(16) ILM 1975, p. 251.

(17) ILM 1975, p. 1292

(18) Annuaire, Institute of International Law, Vol. 58, II, 1979, p. 198.

(19) RJE 1983, p. 343.

Mines de Potasse d'Alsace by Dutch horticulturists who considered they had suffered damage as a result of the salinification of the waters of the Rhine, that none of the users of the waters of the Rhine was entitled to use its waters without respect for the rights of other users (20).

The practice we have just described also leads us to draw the conclusion that the obligation not to cause damage to the environment beyond the limits of the territorial jurisdiction of a State is a rule of customary international law. For the purposes of this enquiry, it is important to stress three consequences flowing therefrom:

- a duty of abstention, that is a duty of States to abstain from causing, by their official activities, damage to the environment beyond the territorial limits of the State;

- a duty of prevention, that is the duty of States to ensure that damage to the environment beyond the limits of their territorial jurisdiction is not caused by sources under their control. This obligation implies a duty to supervise private activities, but it also involves, in a very general manner, a duty to prevent damage from whatever source;

- a duty to have due regard to the extra-territorial effects which a governmental decision (for example an authorization) might have.

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(20) Arrondissementsrechtbank, Rotterdam, Handelswerkerij G.J. Bier and Others v Mines de Potasse d'Alsace, 16 December 1983. For an analysis of the judgment, see Rest, Environmental Policy and Law 12 (1984), pp. 37 et seq., idem, Umwelt- und Planungsrecht 1984, pp. 148 et seq.

As we shall see (see 6 below), according to the general rules of international responsibility, the existence of an armed conflict does not relieve the parties to the conflict from these duties.

1.2 The duty of States to respect the environment in general

A more general rule must be considered in this context, namely the obligation of States to respect the environment in general, irrespective of the legal regime to which it is subject; that of the State itself, another State or no State. This rule goes further than the rule we have just analysed, namely the prohibition on causing damage to the environment beyond the limits of national jurisdiction.

This general rule is implicit in the rules on the protection of the marine environment mentioned at 1.1. These rules not only provide for an obligation not to cause damage to the environment beyond the limits of the territorial waters and the exclusive economic zone, but they also concern the marine environment in areas within the jurisdiction of States.

The general obligation to respect the environment is also laid down in treaties concerning other sectors of the environment. As regards watercourses and lakes, numerous treaties, for the most part bilateral, provide for an obligation on the part of the contracting parties not to damage the quality of the waters referred to (21).

(21) V.A. Kiss, Survey of Current Developemnts in International Environmental Law, IUCN, 1976 pp. 73-74 and J. G. Lammers, Pollution of International Watercourses, Nijhoff, 1984, pp. 98-147.

As regards pollution of the atmosphere, Article 2 of the Geneva Convention of 13 November 1979 on Long-range Transboundary Air Pollution[22] states:

> "The Contracting Parties, taking due account of the facts and problems involved, are determined to protect man and his environment against air pollution and shall endeavour to limit and, as far as possible, gradually reduce and prevent air pollution including long-range transboundary air pollution."

Special mention must be made of the protection of the environment in areas which may be considered as forming the "common heritage of mankind." Although this concept was formulated only recently[23], its appearance was immediately accompanied by the obligation to protect the environment. This obligation is implicit in the first major treaty relating to this concept, the UNESCO Convention of 23 November 1972 for the Protection of the World Cultural and Natural Heritage.[24] The "natural heritage" which, under Article 4, each of the States Parties pledges itself to protect, conserve, present and transmit to future generations, may include natural features, geological and physiographical formations, natural sites or delineated areas which constitute the habitat of threatened animal and plant species. The Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, which has been open for signature since 5 December 1979,[25] devotes a special article to the protection of the lunar environment (Article 7). Lastly, the most comprehensive and explicit text in this respect, the Convention on the Law of the Sea, provides in Part XI, which declares the sea-bed and ocean floor, the "Area", to be the common heritage of mankind, that the necessary measures shall be taken

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(22) ILM 1979, p. 1442.

(23) V.A. Kiss, La notion de patrimoine commun de l'humanité, RCADI. Vol. 175, pp. 103-256;

(24) ILM 1972, p. 1358.

(25) ILM 1979, p. 1434.

to ensure effective protection for the environment from harmful effects which may arise from activities in the Area (Article 145). The same article entrusts specific tasks in connection with the international organization set up to administer the Area, the "Authority".

In addition to this conventional practice, which has created, if not identical, at least converging rules, there is a large number of non-binding instruments dating back to the beginning of the 1970's. Several resolutions and recommendations adopted by international organizations are based on the idea that States have duties in this field. We shall merely outline the main ones here.

The Declaration of the Stockholm Conference on the human environment, adopted in June 1972, states that the earth's natural resources must be safeguarded for the benefit of present and future generations (principle 2), the capacity of the earth to produce vital renewable resources must be maintained (principle 3), non-renewable resources must be employed in such a way as to guard against the danger of their future exhaustion (principle 5) and discharges damaging to the environment must be halted (principle 6). It is expressly stated that States must take all possible steps to prevent pollution of the seas (principle 7). In the same connection, the United Nations General Assembly proclaimed, by a Resolution dated 30 October 1980, the historical responsibility of States for the preservation of nature for present and future generations and called upon States to demonstrate due concern and take the measures necessary for preserving nature and also to co-operate to that end. Two years later on 28 October 1982, the General Assembly adopted and solemnly proclaimed the World Charter for

Nature[26], which states inter alia that nature shall be respected and its essential processes shall not be impaired, that the genetic viability of the earth shall not be compromised and that ecosystems and organisms, as well as natural resources, shall be managed to achieve and maintain optimum sustainable productivity. Activities which might have an impact on nature shall be controlled and the best available technologies that minimise significant risks to nature or other adverse effects shall be used. Discharge of pollutants into natural systems shall be avoided. Each State shall give effect to the provisions of the Charter through its competent organs and in co-operation with other States.

Lastly, the domestic practice of States confirms the recognition of their duty to protect the environment. All legislation to protect the environment stems from the conviction that such a duty exists, although the precise nature of the duty is not always defined. A number of states have, however, sanctioned and reinforced the duty by means of constitutional instruments. At present some 20 national constitutions contain provisions declaring that the State must protect the environment, and it is interesting to note that virtually no constitution enacted since the beginning of the 1970's disregards this task, the fulfilment of which is stated to be one of the general objectives of the various nations concerned. By way of example, we shall mention here only Article 24(1) of the Greek Constitution, which entered into force on 11 June 1975:

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(26) GAOR, 37th Session, Suppl. no. 51, 1982/83, p. 117.

"The protection of the natural and cultural environment constitutes a duty of the State. The State is bound to adopt special preventive or repressive measures for the preservation of the environment."

Lastly the question arises whether this established practice of adopting conventions, international resolutions and constitutional provisions has already led to the creation of a rule of customary international law. Is there a general obligation on the part of States to respect and protect the environment? The elements of conventional practice which we have described in order to establish the existence of customary rules may lead to conflicting conclusions as regards the effect of accumulated treaty provisions. On the one hand, the inter alios acta rule confirmed by Article 34 of the Vienna Convention of 29 May 1969 on the Law of Treaties prohibits in principle extrapolations. Likewise, one can be of the opinion that the adoption of a treaty rule is a clear indication that the contracting States are of the opinion that the rule does not otherwise exist. On the other hand, the proliferation of comparable clauses in numerous treaties can be said to be a manifestation of "a general practice accepted as law", that is to say, it is tantamount to the creation of a customary rule within the meaning of Article 38(1)(b) of the Statute of the International Court of Justice. Such a wide-ranging question cannot be settled within the confines of this enquiry. Suffice it to say that the proliferation of treaty rules and the international resolutions and constitutional provisions laying down the obligation of the State to protect the environment may be considered as demonstrating the general recognition of a necessity. It will be recalled, therefore, that one of the elements of international custom is opinio juris sive necessitatis,

One may therefore be inclined to ask whether the general rule prescribing the protection of, and respect for, the environment, if it is not yet a rule of positive customary law, cannot be considered at the very least a customary rule in the making.

2. Duty to co-operate

2.1 Forms of co-operation

In the situations which are the object of this report, it is very important that States work together to prevent harm being done to the environment of other States or to areas beyond national jurisdiction. This co-operation may take various forms: a first element is warning. A State which knows about a danger to the environment of other States, in particular the State under jurisdiction of which the source of the danger is situated, should warn such other States. A second element is a duty of prevention. The State under the jurisdiction of which the source is situated should prevent the danger from materializing. Any other State which is in a position to mitigate the consequences of an incident should do so. There is the element of concerted action. An incident may require action (parallel or complementary) by different States. In order to make these different actions effective as a whole, concertation is necessary. There is an element of help. States should help another State which is not in a position to prevent or mitigate the damage to do so. There is an element of facilitating action. States which are somehow affected by

preventive action should abstain from any act which could impede that action, or, in a more positive form, facilitate that action in various ways. There is, last but not least, the possibility of joint action, taken by the States concerned or by an international body established by them. This co-operation may not only involve States, but also various international organizations.

2.2 The legal problem

The ensuing legal question is whether and to what extent there is a legal obligation on States to undertake all this desirable co-operation, whether there exists a right of the State the environment of which is in danger to require other States to cooperate in the way just described.

The first question we have to ask is thus whether there exist legal obligations of co-operation under international law. But the more important and more difficult question is what are the scope and content of such obligations. In our context, a general statement that there is a duty of co-operation is perhaps not very helpful. What we have in mind and what we need are the specific forms of co-operation just described, including a duty to accept and facilitate help offered by third States to abate pollution caused by the conduct of armed conflicts. Such duties can be derived, as will be shown, from two sources, from two fundamental principles: the duty to prevent damage to the environment of third States and beyond national jurisdiction (Principle 21 of the Stockholm Declaration)[27] and a general duty to co-operate (Principle 23 of the same Declaration).

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(27) See supra 1.2.

2.3 The general duty to co-operate

The principle that States have a duty to co-operate with one another in accordance with the Charter of the United Nations is one of the fundamental principles of modern international law as formulated in the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations (Resolution 2625/XXV) ("Friendly Relations Declaration"). In the said Declaration the principle is formulated as follows:

> "States have a duty to co-operate with one another irrespective of the differences in their political, economic and social systems, in the various spheres of international relations, in order to maintain international peace and security and to promote international economic stability and progress, the general welfare of nations and international co-operation free from discrimination based on such differences."

This general duty covers without any doubt the field of the environment. But apart from that general statement, the concept of co-operation, its specific content is not spelled out in the Declaration.

The general duty to co-operate gains more substance and profile if one considers it in conjunction with the principle of peaceful settlement of disputes. What can be derived from both priniples is a general duty to negotiate, which was clearly recognized by the International Court of Justice in the North Sea Continental Shelf case. As the Court puts it:

> "The obligation to negotiate ... constitutes a special application of a principle which underlies all international relations, and which is moreover recognized in Article 33 of the Charter of the United Nations as one of the methods for the peaceful settlement of international disputes".(28)

This obligation is not fulfilled if States just talk to each other, negotiations must be meaningful. According to the Court, States

> "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." (29)

It would follow from this statement of the law that in the case of oil pollution, where the State operating the polluting installation is not doing all that is necessary to abate that particular pollution, this may lead to a dispute, and the polluting State is then under a duty to negotiate with the affected State in order to reach a solution. In conducting such negotiations, the polluting State, or the State where the pollution originates, must bona fide take into account the interests of the affected State. It would thus be illegal and a violation of the said principle if a State adamantly refused reasonable requests from a victim State to do something about a pollution incident.

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(28) ICJ Reports 1969, p. 47

(29) Loc. cit.

2.4 The duty of co-operation in the field of the preservation of the environment

In the field of the protection of the environment, one is, however, not limited to these general propositions. There are numerous international instruments in the field of environmental protection which contain a general duty to co-operate, resolutions of international organisations and conferences as well as treaties relating to particular fields of environmental protection, be they universal or regional. First, the content and scope of these instruments have to be analysed. Secondly, one has to ask whether some rules of customary international law can be derived from these instruments and /or other elements of State practice.

In the field of the protection of the environment, two major difficulties have to be taken into account. The first is the tension, underlying the whole body of international environmental law, between what is called the principle of territorial sovereignty and that of territorial integrity. In our context, the principle of territorial sovereignty, even if that sovereignty is limited by the duty not to cause prejudice to the environment of other States, means that it is the primary responsiblity of a State under the jurisdiction of which a polluting activity takes place, to see to it that this activity does not cause harm to other States or in areas beyond national jurisdiction. It is this State, in principle this State alone, which has to take the relevant measures. Joint action taking place within an area of territorial jurisdiction of the polluting State, or even action by another State would thus be the exception, not the rule.

Another problem concerning the scope of co-operation is related to the freedom of action or "sovereignty" of States. In the field of co-operation with respect to environmental protection, we can distinguish between forms of co-operation which are designed to establish the basic data of a given problem (problem oriented) and those which involve the taking of measures to intervene in a situation once it has been defined and analysed (policy oriented). If one analyses the provisions of international treaties calling for co-operation among States and the powers given to international bodies created by such treaties, it is striking how far these duties and powers are limited to the first of the two forms of co-operation. Co-operation involving intervention is only envisaged as a second step. A good example of this two-step approach is the River Plate agreement, dated 23 April 1969, the relevant parts of Article 1 reading :

> "(The Contracting Parties) shall promote within the scope of the basin, the identification of areas of common interest and the undertaking of surveys, programmes and works, as well as the drafting of operating agreements and legal instruments they deem necessary ..." (30)

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(30) ILM 1969, p. 905.

Another example is the European Convention on Long Range transboundary Air Pollution [31] where the emphasis also lies on research and development, exchange of information, monitoring and evaluation of a problem. What is more policy oriented is the duty of consultation contained in Article 5 of the Convention and an obligation to "develop the best policies and strategies" which is a unilateral, not a co-operative obligation.

What is striking here is the tendency of international instruments not to formulate far-reaching obligations in the field which would really limit the freedom of State action (or rather inaction), a reluctance to create policy oriented obligations to co-operate. This cautious approach taken by international instruments regarding the question of co-operation in the field of environmental protection suggests that one has to be very careful in deducing too much from the general principle of co-operation in the field we are interested in. It is more advisable to look into a number of instruments dealing with the more limited problem of environmental incidents or emergency situations.

2.5 Duty to co-operate in cases of emergency

The relevant texts to be considered here are the following: Articles 138 and 139 of the Law of the Sea Convention [32], the Agreement concerning Pollution of the North Sea by Oil, 1969 [33], the Convention on the Protection of the Marine Environment of the Baltic Sea Area, 1974 [34], and in

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(31) ILM 1979, p. 1442; Kiss, op. cit. (note 6), p. 536.

(32) ILM 1982, p. 1309

(33) ILM 1970, p. 359; Kiss op. cit. , p. 216.

(34) ILM 1974, p. 544 ; Kiss, op. cit., p. 416.

particular Annex VI/2 concerning co-operation in combatting marine pollution, the Convention for the Protection of Mediterranean Sea against Pollution, 1976,[35] and in particular the Protocol Additional thereto, concerning co-operation in combatting pollution of the Mediterranean Sea by oil and other harmful substances in cases of emergency, the Kuweit Regional Convention for Co-operation on the Protection of the Marine Environment from Pollution, 1978[36], and in particular the Protocol Additional thereto concerning regional co-operation in combatting pollution by oil and other harmful substances in cases of emergency, the Agreement on Co-operation regarding pollution of the Marine Environment between the United States and Mexico 1980[37], the Convention for Co-operation in the Protection and Development of the Marine and Coastal Environment of the West and Central African Region, 1981[38], and the Protocol Additional thereto concerning co-operation in combatting pollution in cases of emergency. The said texts are obviously related to each-other, the recent ones being based on or even copied from the earlier ones.

As to instruments not in the form of treaties, the draft Principles of conduct in the field of the environment for the guidance of States in the conservation and harmonious utilisation of natural resources shared by two or more States[39] also contain a provision on emergency situations. As to the work of private scientific organizations on the matters under review, one must mentioned

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(35) ILM 1976, p. 290 ; Kiss, op. cit., p. 466.

(36) ILM 1978, p. 501 ; Kiss, op. cit., p. 502.

(37) ILM 1981, p. 696

(38) ILM 1981, p. 746

(39) ILM 1978, p. 1097

the work of the European Council of Environmental Law. In its resolution No . 4 on Marine Pollution from off-shore drilling platforms, the Council addresses the question of emergency situations.[40] In 1983, the Council adopted Resolution no. 13 on Principles concerning international cooperation in environmental emergencies linked to technological development.[41]

Certain general principles can be derived from these instruments.[42] The first of these general principles is a duty of information or warning. This is expressed in Article 198 of the Law of the Sea Convention and in the relevant provisions of the other instruments:

> "When a state becomes aware of cases in which the marine environment is in imminent danger of being damaged or has been damaged by pollution, it shall immediately notify other States it deems likely to be affected by such damage, as well as the competent international organisations."

The second element is the duty to take action. This is, as has been stated, primarily the duty of the State under the jurisdiction of which the pollution incident is happening or has happened. But all the instruments quoted stress the obligation to co-operate. This is spelled out in general terms in Article 199 of the Law of the Sea Convention :

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(40) European Council of Environmental Law, Resolutions 1975-1981, pp. 26 et seq.

(41) Environmental Policy and Law 1984 , no. 3, pp. 79-81.

(42) Cfr. the more detailed analysis of international practice by Bruha, Internationale Regelungen zum Schutz vor technisch-industriellen Umweltnotfällen, Zeitschrift für ausländisches Recht und Völkerrecht, 44, 1984, pp. 1 et seq.

"In the cases referred to in Article 198, States in the area affected, in accordance with their capabilities, and the competent international organizations shall co-operate, to the extent possible, in eliminating the effects of pollution and preventing or minimizing the damage. To this end, States shall jointly develop and promote contingency plans for responding to pollution incidents in the marine environment."

The relevant provision of the Kuweit Convention reads as follows (Article IX):

"The contacting States shall, individually and/or jointly, take all necessary measures ... to deal with pollution emergencies in the sea area, whatever the cause of such emergencies, and to reduce or eliminate damage resulting therefrom."

This individual or joint action is further specified in the Additional Protocol. In particular, a Marine Emergency Mutual Aid Center is created. It is interesting to note the provision concerning the obligations of the State faced with the marine emergency situation. That State shall (Article X of the Protocol):

"a) take every appropriate measure to combat pollution and/or to rectify the situation;

b) immediately inform all other contracting States, either directly or through the Center, of any action which it has taken or intends to take to combat the pollution. The Center shall promptly transmit any such information to all other contracting States;

c) make an assessment of the nature and the extent of the marine emergency either directly or with the assistance of the Center;

d) determine the necessary and appropriate action to be taken with respect to the marine emergency, in consultation, where appropriate, with other contracting States, affected States and the Center."

It is thus the State "faced with a marine emergency situation" which decides, in the first place at least, what action is to be taken. It goes without saying that this power to determine the necessary action is limited by the territorial scope of jurisdiction of that State. Thus, no State can determine the action to be taken within the territorial scope of jurisdiction of other States.

In addition, any contracting State "requiring assistance" may call for it. Other contracting States are under an obligation to "use their best endeavours within their capabilities to render the assistance requested". What is clearly envisaged in the context of this provision is assistance in form of personnel and equipment for action taking place within the jurisdiction of the requesting State. However, it seems worth-while considering that an affected State may also request another State to take particular action within its sphere of jurisdiction or allow certain activities of other States. This possibility, which is the one we are interested in, is not clearly mentioned in any of the texts we have quoted. However, it is not expressly excluded in any of them, and it may well be a reasonable interpretation of the concept of joint action to include it. It is thus possible to

conclude that, at least under some of the existing instruments concerning co-operation in case of pollution incidents, there exists a duty to permit and facilitate action by third States and/or competent international organizations to abate the pollution. Some clarifications on this point, however, seem to be desirable.

2.6 Customary law

There remains the question, already discussed in relation to the general duty to protect the environment (1.1.1), whether the frequency of the clauses just discussed constitutes a proof that here has evolved a corresponding general rule of customary international law. It is difficult to ascertain whether these rules have been formulated because the States wanted to re-affirm what the law was anyway or because they wanted to go beyond the state of existing customary law. Two elements, however, suggest that those instruments, even if they were not an expression of customary law in the beginning, have consolidated State practice and opinio juris to the extent that by now such a rule has indeed emerged. The first element is the striking similarity of those provisions. They seem to respond to a genuine need of the international community. The second element is the consistency between rules contained in instruments not in the form of a treaty (resolutions) and treaties. This suggests that there is an underlying general principle of which the treaties are an expression. The treaty provisions thus accelerate and confirm the recognition of this principle.

On the other hand, it would be difficult to say that the scope of this general customary norm of international law goes beyond the scope of the instruments discussed. Thus, the important question of what precisely States are obliged to do also remains open to a certain extent under general international law.

2.7 The duty of co-operation in the field of the laws of war

One could think that in times of war and armed conflict, co-operation ends. However, the laws of war require, in certain cases, co-operation even among parties to the conflict for the sake of humanitarian purposes. In a general way, this is spelled out in Article 89 of Protocol I Additional to the Geneva Conventions:

> "In situations of serious violations of the Conventions or of this Protocol, the High Contracting Parties undertake to act, jointly or individually, in co-operation with the United Nations and in conformity with the United Nations' Charter."

What is perhaps more important are certain provisions calling for the co-operation of the parties to a conflict to take measures for the protection of certain victims. Thus, Article 15 of the First Geneva Convention of 1949 provides:

> "Whenever circumstances permit, an armistice or suspension of fire shall be arranged, or local arrangements made, to permit the removal, exchange and transport of the wounded left on the battlefield.

> Likewise, local arrangements may be concluded between the parties to the conflict for the removal or exchange of wounded and sick from a besieged or encircled area, and for the passage of medical and religious personnel and equipment on their way to that area."

A duty of co-operation is also implicit in the duty to "protect" medical units and personnel as well as civil defence functions. This duty to protect includes a duty to facilitate the performance of their tasks.(43)

Under Article 33 of Protocol I,

> "each Party to the conflict shall search for the persons who have been reported missing by an adverse party."

Furthermore,

> "the Parties to the conflict shall endeavour to agree on arrangements for teams to search for, identify and recover the dead from battlefield areas..."

These are examples of provisions calling for co-operation among the parties. It is submitted that, although armed conflict in principle is a situation of non-co-operation, certain basic values require the continuation of a minimum of co-operation even in these times. Thus applies a fortiori between the Parties to a conflict and neutral States.

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(43) See Bothe, in: Bothe/Partsch/Solf, New Rules for Victims of Armed Conflicts, Martinus Nijhoff Publishers, The Hague, 1982, p. 118.

2.8 Conclusions

Some conclusions can be drawn from the forgoing concerning duties to cooperate in situations which are the object of the present report. Certain duties of co-operation exist even between the parties to a conflict in times of war. As to the position of States not parties to the conflict, it is shown below that the obligations to respect the environment beyond the limits of national jurisdiction is, as a matter of principle, not affected by the armed conflict. This principle also holds true for the duty to co-operate resulting from international treaties. If an effective co-operation between the belligerents on the one hand and neutral States on the other requires also a certain degree of cooperation among belligerents, it is submitted that this latter kind of co-operation is also implicit in the duty incumbent on belligerent States severally to co-operate with the neutral States for the sake of protecting the environment of the latter. Thus if a pollution incident has occurred in the territorial waters of one belligerent, resulting from an attack, it is the duty of that belligerent State to co-operate with the neutral State in order to prevent damage being done to neutral territory or waters. But as the other belligerent, the one which has destroyed the particular installation, is also bound to co-operate with the neutral State, this obligation implies at least an obligation not to prevent the other belligerent from taking effective action for the abatement of pollution. If an arrangement between the belligerents is necessary for that purpose, the neutral States have a right to the belligerents making such an arrangement.

There is no denying the fact, however, that such arrangements are not easy to bring about in times of armed conflict. As we have shown, there are cases in the law of war which require such arrangements to be made. Those provisions could be applied by analogy. In this case, the rights of neutral States require such arrangements to be made among the belligerents. If the normal procedures of regional co-operation do not work between the belligerents, it is of course appropriate that the procedures of the laws of war designed to facilitate such arrangements are applied. This question will be dealt with in more detail in the Chapter concerning the institutional arrangements.

3. Application of the rules on the protection of the environment and on co-operation in times of armed conflict

Having outlined the general rules concerning respect for the environment and the prohibition on causing damage to the environment beyond the limits of the territorial jurisdiction of States, it is necessary to examine whether and, if so, to what extent those rules also apply in times of armed conflict. A distinction must be made in this respect between two hypotheses, that of a non-international armed conflict and that of an international armed conflict. In the latter case, it is also necessary to distinguish between, on the one hand, relations between belligerents and, on the other, relations between a belligerent and States, not parties to the conflict.

As far as non-international armed conflict is concerned, it is clear that the occurrence of such a conflict in the territory of a contracting party to a treaty on the protection of the environment does not authorize that party to suspend or terminate the operation of that threaty. This situation is not provided for in the Vienna convention on the law of Treaties as being a ground justifying the suspension or termination of a treaty. One might, however, question whether the rebus sic stantibus clause (Article 62 of the Convention) can be invoked in this case. The trend in international practice is rather towards restricting application of the clause. Moreover, in view of the subject matter of the obligations in question, namely the environment, which must be preserved not only for the benefit of a particular State but also for the good of the whole of mankind, it is difficult to imagine that the clause can be invoked in the event of non-international armed conflicts except in the exceptional circumstances envisaged by Article 62 of the Vienna Convention.

International conflict is likewise not provided for in the Vienna Convention, in accordance with the traditional doctrine and practice of international law. As regards relations between belligerents; the bilateral treaties existing between them at the beginning of the war are, as a rule, terminated or suspended by the outbreak of war unless they were concluded with the war in mind. The effects of multilateral treaties are suspended between adversaries, unless they were concluded specifically with a view to the state of war. A modern trend of opinion, however, favours the non-supension of certain categories of obligations, even between belligerents (44).

(44) See B. Broms, Provisional Report, Annuaire of the Institute of International Law, vol. 59, I, 1981, pp. 201 et seq.

as to treaty obligations between the parties to a conflict and States not involved therein, those obligations which stem from bilateral treaties are not affected by the state of war, unless that state of war renders performance of such obligations impossible. This general rule can of course be modified by the content of the treaty, which must be established by looking at its text and by interpreting it in the light of the intent of the contracting parties. If need be, the contracting parties may rely upon a right of denunciation, where this is provided for in the treaty, the rebus sic stantibus clause or the non adimpleti contractus clause. It must be emphasized, however, that, as a rule, the validity of treaties on the protection of the environment between belligerent States and States not parties to a conflict is not affected by the conflict.

This rule is confirmed by certain provisions of regional conventions concerning the protection of the marine environment. Thus Article IX of the Kuwait Convention obliges the contracting States;

> "to deal with pollution emergencies in the sea area, whatever the cause of such emergencies (...)".

An identical obligation is to be found in Article XIX of the Barcelona Convention for the Protection of the Mediterranean Sea. If such a clause is inserted in a treaty which is to be applicable in a region where tensions are known to exist, it must be deduced from this that the contracting parties intended the provision to apply in all circumstances, including armed conflicts.

This rule is also confirmed by Article 19 of the International Convention for the Prevention of Pollution of the Sea by Oil, signed in London on 12 May 1954, which provides:

"1. In case of war or other hostilities, a Contracting Government which considers that it is affected, whether as a belligerent or as a neutral, may suspend the operation of the whole or any part of the present Convention in respect of all or any of its territories. The suspending Government shall immediately give notice of any such suspension to the Bureau.

2. The suspending Government may at any time terminate such suspension and shall in any event terminate it as soon as it ceases to be justified under paragraph (1) of this Article Notice of such termination shall be given immediately to the Bureau by the Government concerned.

3. The Bureau shall notify all Contracting Governments of any suspension or termination of suspension under this Article."

The very fact that such a clause was inserted in only one of the international treaties relating to the protection of the environment lends weight to the argument that it is an exception which the Contracting Parties intended to highlight and that the general rule is that of non-suspension of such treaties in time of war or hostilities. Consequently, the general obligations of States, outlined at 1.1, remain in force despite the commencement of hostilities.

As regards customary law, similar considerations apply. At least in relations between belligerent States and third States, the existence of an armed conflict does not dispense them from applying customary rules, including the rules on the protection of the environment.

However, relations between belligerent States and States not parties to a conflict are governed in their entirety by a specific area of international law, namely the law of neutrality. But this law, which we are going to examine more closely, does not preclude the continued application of other rules of the international law of peace. Even where it is due to an act of war committed under the responsibility of a belligerent, damage caused to the environment of a neutral State is governed by the general rules of the law of the environment. There are no preferential rights or exceptions for the military activities of belligerents. This is confirmed, as we shall see, by the general rules on international responsibility, according to which the existence of an armed conflict is not a ground for exemption.

The areas of territorial jurisdiction of neutral States which are thus protected against the effects of hostilities will be examined in greater detail in the next chapter (4.3.).

4. Neutrality law

4.1 Introductory remarks

Having analysed the general rules relating to the protection of the environment, we now have to examine the question whether neutrality corroborates or contradicts the conclusions reached so far.

Neutrality with respect to a given armed conflict, taken in its broadest sense, simply signifies that a State is not a party to the conflict. This fact of non-participation implies for the neutral State a continuation of its peace-time relations, both with other non-participating States and, in principle, with the parties to the conflict. It is only in certain well-defined respects that neutral States have had to suffer an impact of the armed conflict on these relations and on their rights and duties and those of their nationals, as e.g. with respect to belligerent rights of visit and search of neutral merchant vessels on the high seas, or the effects of a naval blockade.

Besides being under a duty not to take part in the armed conflict, the neutral State is also required to maintain an attitude of impartiality with respect to the parties to the conflict, i.e., it must treat them on a footing of strict equality. In traditional neutrality law as it was codified at the Second Hague Peace Conference of 1907, a number of precise rules deal in particular with this aspect of neutrality in its stricter sense. Application of these rules has always been dependent on the circumstances of the situation; thus, a State which does not export weapons does not run the risk of being accused by one party to the conflict of favouring the other by providing it with more or better weapons than the complainant received itself. Generally speaking, geographical nearness and intensity of trade relations have often proved to be factors entailing for non-participating States the need to demonstrate their impartiality.

Doubts about the viability of neutrality in the context of present-day international relations arose in the first place as a consequence of events connected with the Second World War: it is obvious that in the course of that armed conflict a number of States, although technically non-parties to the conflict or perhaps even declared neutrals, disregarded the traditional obligations of impartiality to a considerable degree. It may be argued, though, that this practice has not of itself affected the institution of neutrality. The duty of impartiality was owed to the disadvantaged belligerent party, and it was up to that party to decide how to react to any less-than-completely impartial behaviour: if it lacked the means to make the neutral State comply strictly with its obligations, it could always choose to treat it as a party to the conflict. As long as it did not take this step, it evidently preferred for the time being to continue regarding it as a non-party, i.e. as a State with which it was at peace, or a neutral State.

Further difficulties came to threaten the concept of neutrality with the adoption and entry into force of the Charter of the United Nations, with its system

of collective security. According to the ideas expressed in the Charter, the outbreak of an international armed conflict would of necessity imply that one party to the conflict was guilty of a breach of the peace, and the entire organized international community would then turn against the culprit to restore the peace. Neutrality, even in its broad sense of mere non-participation, appeared difficult to reconcile with these ideas. In practice, however, a decision that this or the other side broke the peace has only rarely been taken by the Security Council, as the competent organ of the United Nations for these matters. Accordingly, neutrality has continued to operate in the international community as a device to limit armed conflicts at least as far as participating States are concerned.

It should be emphasized that the duty of a neutral State not to take part in the armed conflict is of course without prejudice to its rights of self-defence and protection of its legitimate interests and those of its nationals under general international law.

4.2 Violations of neutrality

The basic obligation of parties to an armed conflict with respect to a neutral State is not to violate its neutrality. A violation of neutrality can consist of:

1. an act of war which affects the impartiality of the neutral State, or
2. an act of war which affects the neutral State as a non-participant to the armed conflict.

4.2.1 Impartiality

An act of the first type, e.g. a military activity making use of the territory of the neutral State, will if unchecked by that State, provide the acting belligerent State with an advantage over its adversery. Therefore, an obligation arises in such cases for the neutral State to defend its neutrality - i.e. its impartiality - with the means at its disposal. If it fails in this duty and simply tolerates the infringement of its neutral status, it

becomes itself guilty of a violation of its neutrality vis-à-vis the other party to the conflict. The act of the first-mentioned party to the conflict may be indicated as a violation of neutrality in the strict or narrow sense.

4.2.2 Non-participation

Acts of the second type are those most relevant for the purpose of this inquiry. Such acts, e.g. the bombardment by one belligerent of an object in neutral territory that is in no way connected with the war effort of its adversary, or the bombardment of a military objective situated in enemy territory causing incidental damage to property located in neutral territory, do not entail the consequence of creating an inequality between the parties to the conflict for which the neutral State can be held responsible by the other belligerent party. In such cases, the impartiality of the neutral State is not at stake and it is therefore under no duty to check the act. Obviously, it is entitled to take such measures as it deems necessary to avert or limit the damage. It may, moreover, bring a claim against the acting belligerent party for a violation of its neutrality in the sense of non-participation: whether such a claim will succeed depends on the extent to which the freedom of belligerents to perform such acts of war is curbed by a rule of neutrality law providing that a belligerent may not cause damage to neutral rights. If so, the act in question can be said to amount to a violation of neutrality in a broad sense.

The following points should be made with respect to claims of a neutral State under this second heading:

a) while a neutral State has the right to bring such a claim, it is under no duty to do so;

b) the claim may concern the violation of the legitimate interests of the neutral State as well as those of its nationals;

c) the act of war underlying the claim may have been performed within or outside the territory of the neutral State;

d) the act of war may or may not have been an unlawful act under the law of war, as distinct from the law of neutrality.

4.3 Environmental damage to the territory of a neutral State

By definition, environmental damage is damage occurring within the territory of the State concerned. "Territory" indubitably includes the territorial waters of the neutral State. The situation with regard to the exclusive economic zone and installations for the exploitation of the continental shelf situated outside territorial waters is not so clear[45]. While the 1982 United Nations Convention on the Law of the Sea (not yet in force) has given the coastal State sovereign rights for the purpose of exploring and exploiting the natural resources of the exclusive economic zone (Art. 56) and the primary competence to protect the marine environment in that zone, it is not intended to restrict in that zone certain freedoms traditionally exercised on the high seas (Art. 58). Article 87, to which Article 58 refers, does not mention, nor does the comparable Article 2 of the 1958

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(45) Bryde, Militärische und sicherheitspolitische Implikationen der neuen Seerechtskonvention, in: Delbrück (ed.), Das neue Seerecht, Kiel 1984, pp. 151 et seq (161 et seq).

Convention on the High Seas, the traditional right of belligerent States to perform acts of war on the high seas as one of the freedoms of the high seas. But the list of freedoms in Article 87 is not exhaustive. It appears that neither the 1958 nor the 1982 Conventions were ever intended to deal with matters of naval warfare. It should, moreover, be stressed that Article 88 ("the high seas shall be reserved for peaceful purposes") has nothing to do with the laws of war and does not affect military operations and combat activity on the high seas which are permissible under the ius in bello. We have thus to conclude that combat activities in the exclusive economic zone are not illegal per se. On the other hand, the parties to a conflict must also respect the rights of the neutral coastal State in the economic zone and over the continental shelf. It may thus be concluded that damage to the environment of the coastal State also comprises damage to the environment in the exclusive economic zone which adversely affects the rights of this State to the natural resources of the same.

4.4 Environmental damage, impartiality and non-participation

Environmental damage can be a side effect of an act of war of the first type mentioned above, i.e., an infringement of neutrality stricto sensu. It seems hardly profitable, however, to go into this possiblity at any length, as in such a case the main violation of neutrality, with the resultant duty of the neutral State to maintain its neutrality, will absorb all interest. The damage to the environment will probably figure as not much more than a footnote in the diplomatic correspondence following the incident.

Of greater interest for present purposes appears the other possibility, viz., the act of war causing environmental damage to a neutral State's territory and thereby affecting that State's neutrality lato sensu. An examination of the law relating to such a case should start out with the existing treaty law on the subject.

4.4.1 The Hague Convention V of 1907

The most general provision is found in Article 1 of the 1907 Hague Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land:

"The territory of neutral Powers is inviolable."

This language may appear sufficiently sweeping to cover all conceivable infringements of a neutral State's territory by warlike activities of belligerent parties. However, both the remaining portions of the Convention and the drafting history might suggest that the purpose of the Convention, including Article 1, was the narrower one of defining the territorial consequences of a neutral State's impartiality.

The discussions in the Second Hague Peace Conference on this matter started out from a French project, which approached the question of territorial neutrality exclusively from the point of view of a neutral State's duties.(46) A set of Belgian amendments (47) changed this orientation, bringing the point home that neutral States not only have duties, but rights as well. Introducing the amendments, the Belgian delegate described their aim as follows (48):

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(46) Annex 24 to the records of the Second Commission.

(47) Annex 30 loc. cit.

(48) 4th session of the 2nd sub-commission of the Second Commission, 19 July 1907

"Etrangers aux hostilités (les neutres) ont le droit primordial d'exiger qu'on ne les y mèle ni directement, ni indirectement.
Leur territoire est inviolable et il est bon de le dire en tête des dispositions qui règlent leur situation.
Plusieurs de leurs devoirs ont pour objet de leur défendre la tolérance sur leur territoire d'agissements auxquels les belligérants ne peuvent pas se livrer.
Il convient dès lors de ne pas se borner à dire que les neutres sont tenus d'empêcher de pareils actes, il importe de déclarer que les obligations des neutres à l'égard de ces faits dérivent d'une interdiction générale qui en bonne logique concerne d'abord les belligérants avant de produire des conséquences pour les neutres."

While most of the Belgian amendments were subsequently accepted after more or less extended debate, the proposed rule on the inviolability of a neutral State's territory did not draw so much as a single word in comment. Both the scant words offered in explanation by the Belgian respresentative and the ensuing utter silence make it very difficult to determine the meaning the negotiators gave to the words they chose. It is possible to understand Article 1 just as an introduction to the following articles which deal with impartiality, but the explanation given by the Belgian delegate at least does not exclude the possibility of understanding this introductory article in a more sweeping way as including also a violation of non-participation.

4.4.2 Hague Convention XIII of 1907

The Second Peace Conference yielded yet another result relevant to the present enquiry, viz., the 1907 Hague Convention (XIII) concerning the Rights and Duties of Neutral Powers in War. Article 1 reads:

> "Belligerents are bound to respect the sovereign rights of neutral Powers and to abstain, in neutral territory or neutral waters, from any act which would, if knowingly permitted by any Power, constitute a violation of neutrality."

Article 2 provides:

> "Any act of hostility, including capture and the exercise of the right of search, committed by belligerent war-ships in the territorial waters of a neutral Power, constitutes a violation of neutrality and is strictly forbidden."

The language used in these provisions, and in particular the phrase "if knowingly permitted by any Power" in Article 1, strongly suggests that respect for the impartiality of a neutral State, rather than its non-participation, is what the Convention is about. Yet, the opening phrase of Article 1 gives rise to the question what was in effect the intention of the drafters in including such a statement of principle in an otherwise fairly sober text.

The point is somewhat clarified by the debates of the sub-commission of the third commission, which make it clear that the sovereign rights of the neutrals referred to in Article 1 are their legislative powers. The report of the third commission places the opening phrase of Article 1, and indeed the entire convention, in a somewhat broader perspective. In discussing the principles which are to govern the treatment of belligerent warships in neutral waters, the Report notes[49]

(49) Annexe C to the records of the 8th plenary session of the Conference.

"Ce qui doit être le point de départ d'une réglementation c'est la souveraineté de l'Etat neutre, qui ne peut être altérée par le seul fait d'une guerre à laquelle il entend demeurer étranger. Cette souveraineté doit être respectée par les belligérants qui ne peuvent l'impliquer dans la guerre ou le troubler par des actes d'hostilité.
Toutefois, les neutres ne peuvent pas user de leur liberté comme en temps de guerre; ils ne doivent pas faire abstraction de l'état de guerre. Aucun acte ou aucune tolérance de leur part ne peuvent licitement constituer une immixtion dans les opérations de guerre; ils doivent, de plus, être impartiaux."

Of present interest are also the following paragraphs of the report commenting on Article 1 in particular:

"Le principe qu'il convient d'affirmer tout d'abord c'est l'obligation pour les belligérants de respecter les droits souverains des Etats neutres. Cette obligation ne résulte pas de la guerre, pas plus que le droit d'un Etat à l'inviolabilité de son territoire ne résulte de sa neutralité. C'est une obligation et c'est un droit qui sont inhérents à l'existence même des Etats, mais qu'il est bon de rappeler expressément dans des circonstances où ils sont plus exposés à être méconnus... Le principe est applicable à la guerre continentale comme à la guerre maritime, et il ne faut pas s'étonner que le Règlement élaboré par la Deuxième Commission au sujet des droits et des devoirs des Etats neutres sur terre commence par cette disposition: "Le territoire des Etats neutres est inviolable." "

Although the entire debate and the Convention which eventually became its result centred around the rights and duties of belligerent and neutral States relating to the presence of belligerent warships in neutral waters, the above quotations make it clear that there was an awareness among the participants of certain broad principles underlying the text they were drafting, notably the principle that the sovereignty of the neutral State implies that its territory may not be affected by the military operations.

4.4.3. Hague Rules of Air Warfare of 1923

In 1923 a commission of jurists from France, Great Britain, Italy, Japan, the Netherlands and the United States produced at the instigation of the Washington Conference on the Limitation of Armaments (1922) a set of rules for air warfare. Although the Rules were never adopted as a formal instrument, they exerted a certain influence on account of the prestige of their authors. Article 39 of the Rules provides as follows:

> "Belligerent aircraft are bound to respect the rights of neutral powers and to abstain within the jurisdiction of a neutral state from the commission of any act which it is the duty of that State to prevent."

While the first part of this sentence can well be understood as implying a prohibition to violate a neutral State's non-participation, the second part evidently deals with impartiality.

4.4.4. Writers

Virtually all writers who deal with the territorial aspect of neutrality make a brief reference to the rule of inviolability of neutral territory and then hasten to embark on an enthusiastic discussion of the duties of neutral States arising from a violation of their territorial sovereignty. The question of whether a belligerent State is entitled to perform acts of war infringing the

territorial integrity of a neutral State in its capacity as a non-participant to the conflict generally appears to escape their attention.

An interesting exception to this general tendency is found in the Harvard Law School Research in International Law. The Research published in 1939 the text of a Draft Convention on Rights and Duties of Neutral States in Naval and Aerial Warfare (50). Article 15 of the Draft Convention repeats the well-known rule:

> "A belligerent shall not commit within neutral jurisdiction any act the toleration of which by a neutral State would constitute a nonfulfilment of its neutral duty."

Article 18, however, strikes a different note:

> "A belligerent shall not engage in hostile operations on, under or over the high seas so near to the territory of a neutral State as to endanger life or property therein."

The comment which the Research attached to the draft text is worth quoting at some length:

> "This article seems to be sound in principle although there is little express authority for it ... The history of this subject, particularly in connection with the fruitless efforts to reach agreement at the first Conference for the Progressive Codification of International Law at The Hague in 1930, suggests the futility of including in this Draft Convention a specific provision regarding the extent of the belt of marginal waters which are subjected to national authority for the purposes of neutrality. It may be noted that neutral duties as well as neutral rights would be greatly affected by a general extension of territorial waters. Combat in the air raises another

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(50) AJIL, 1939, Special Supplement pp. 175 et seq.

problem of great importance to neutrals whose land frontiers coincide with those of a belligerent. A belligerent is, in principle, justified in engaging in hostile operations over the territory of its adversary. If, however, the result of such operations is to cause missiles to fall upon neutral territory, the belligerent may expose itself to neutral claims for damages. It is equally true that a belligerent is justified in engaging in hostile operations over the high seas, but the same liability might be imposed upon the belligerent if, in attempting to bomb an enemy warship close to neutral territorial waters, it dropped bombs within the three-mile limit and destroyed life or property therein. The case is perhaps one for an international application of the doctrine of abus de droit ...

While it does not seem possible to insert here an article containing a more precise obligation than that stated in the text, it is believed that the principle may properly be set forth. In any particular factual situation it would remain a question for determination whether the belligerent had shown an improper disregard of the rights of the sovereign of the adjacent neutral territory."

The following points may be highlighted from this interesting exposé. First, the authors themselves regarded the proposed rule as a novelty, for which there was "little express authority".

Then, they confined the scope of the rule to warlike acts which cause direct damage within neutral territory, territorial waters included: shells or bombs which, although aimed elsewhere, inadvertently fall within those territorial limits. They apparently did not contemplate the case of indirect damage to life or property situated

within neutral territorial limits, caused by an act of war done completely beyond those limits. This, however, does not detract from the general principle.

4.4.5 State practice: violations of neutrality in the course of the Second World War

Incidents such as those predicted in the Research occurred in the course of the Second World War owing to the geographical situation of Switzerland "whose land frontiers coincide with those of a belligerent". A glance at the map suffices to show that Switzerland was surrounded on all sides by belligerent States. This led to occasional damage on Swiss territory caused by incidents such as the crashing of aircraft, the downing of barrage balloons or the dropping of fuel tanks or bombs.

A specific factor of particular interest is that the boundary line between Switzerland and Germany does not entirely follow the Rhine. In places, Swiss territory extends to the right-hand side of the Rhine. This particular configuration of the boundary led to occasional misunderstandings on the part of Allied bombers, who assuming that they were over German territory, dropped their bombs on objects which were actually situated within Swiss territory.

Then, damage resulted in some cases from Allied bombardments on objects on German territory but so close to the border that the shock-wave attained - and damaged - objects at the other side. One particular incident in this category was the bombardment of the German town Friedrichshafen on the northern shore of Lake Constanz, with the blast effect of the bombs allegedly doing damage on the Swiss side of the lake.

The incidents gave rise to negotiations between Switzerland and the ex-belligerents. According to Maurice Jaccard, a Swiss lawyer and diplomat who at the time was involved in the settlement of the Swiss claims, the States which had caused the damage did not on principle contest their obligation to make reparation for the violations of Swiss neutrality. In some instances, opinions differed over the facts and the evidence presented by the Swiss authorities, with a denial of responsibility as a result. In the article he wrote on the subject [51], Jaccard does not pursue these questions as they were of a purely factual nature.

He does pay particular attention, though, to the question of so called "Fernschäden": i.e., damage done to objects at some distance from the impact of an attack, and specifically to objects on Swiss soil as a result of attacks on objects situated within belligerent territory. He states that the belligerents' responsibility for such "Fernschäden" was answered in the affirmative ("Die Frage wurde bejaht."). He argues that the locus acti is irrelevant to the question of international responsibility for damage resulting from the act, and, quoting Charles Calvo, that ".. le territoire neutre doit être à l'abri de toutes les entreprises des belligérants de quelque nature qu'elles soient". [52] He also quotes a more recent author, Eduard von Waldkirch, according to whom direct effects on neutral territory arising out of combat activities are impermissible [53]. The point is not only whether the fighting

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(51) Jaccard, Uber Neutralitätsverletzungsschäden in der Schweiz während des Zweiten Weltkrieges, 87 Zeitschrift des Bernischen Juristenverbandes 1951, pp. 225-251.

(52) Charles Calvo, Dictionnnaire de droit international public et prive, Paris/Berlin 1885, II p. 24.

(53) Eduard von Waldkirch, Die Neutralität im Landkriege, Stuttgart 1936, p. 41

troops are located within neutral territory, but in addition any effect caused by means of combat is relevant. In particular shooting at or over the neutral territory is prohibited. (54)

Jaccard then continues his argument as follows:

" Apart from that, one has to state that there must be a relationship of proximate cause (in einem adäquaten Kausalzusammenhang) between the "Fernschäden" and the bombardments on non-Swiss territory. The casualties are necessarily related to the power of the bombs used. Those who drop bombs close to neutral territory must take into account that not only the belligerent attacked, but also the neutral state will suffer damages. Consequently, none of the states causing "Fernschäden" denied a responsibility to pay compensation. This obligation is derived from the fact that there is a violation of Swiss territorial sovereignty."

It may be added that the Swiss claims based on incidents involving the United States were ultimately settled in an (unpublished) exchange of notes of 21 October 1949. The United States agreed to pay 62 million Swiss francs, in full and final settlement for "all claims asserted by (the Swiss) Government for compensation for losses and damages inflicted on persons and property in Switzerland during the Second World War by units of the United States Armed Forces in violation of neutral rights." According to the information obtained, not all Swiss claims were honoured. In a few instances of actions over Swiss territory, the

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(54) " ...unmittelbare Einwirkungen auf das neutrale Gebiet, die sich aus Kampfhandlungen ergeben. Es kommt somit nicht bloss darauf an, ob die kämpfenden Truppen ihren Standort im neutralen Gebiet haben, sondern außerdem fällt jede Beeinträchtigung durch Kampfmittel ins Gewicht. Nicht statthaft ist demnach namentlich das Beschießen oder Überschießen neutralen Gebietes... "

damage allegedly caused was considered too remote. Also the Friedrichshafen incident remained outside the agreement, on the ground that the bombardment had at most indirectly caused the damage which was claimed to have arisen on Swiss soil.

The above leads to the following conclusions. First, and not surprisingly, damage directly caused by actions over or against neutral territory qualifies in principle for compensation, provided a causal link is sufficiently established (55). This, indeed, appears to have been the situation envisaged by von Waldkirch in the text quoted above. The same rule holds true for attacks against neutral ships, at best on the high sea. (56) Secondly, and of more direct interest to the issue under consideration in this report, is the settlement of Swiss claims for compensation of damage resulting from actions over belligerent territory but the effects of which were felt on the Swiss side of the boundary, a rule was apparently accepted to the effect that such damage qualified for compensation too, provided an adequate causal link could be shown (57).

4.5 The present state of neutrality law

The above survey of treaty law, writers and the very limited state practice available, leads to the following twofold conclusion.

First, a belligerent is doubtless responsible for damage arising within neutral territory (and certain sea areas) as a direct result of acts of war carried out over or within that territory. This responsibility extends to situations where the actor performs the act (e.g., fires his gun) outside that territory but the direct effect of the act (impact of the shell) occurs within that territory.

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(55) There is ample evidence in State practice for this rule. See Whiteman, Digest of International Law, vol. 8, pp. 974 et seq. and vol. 11, pp. 207 et seq. (violations of Swedish, Swiss, Portuguese and Vatican territory during World War II); Répertoire suisse de droit international public IV, p. 2357 (violation of Swiss territory during World War I).

(56) See the case of the American ship Liberty attacked by Israel in 1968, RGDIP 1968, p. 199; 1981, p. 56.

(57) See also 6.4.

Seconaly, the enquiry into the state of positive neutrality law has also yielded some authority supporting the assertion that damage arising within neutral territory as a consequence of an act of war having its direct impact on a target outside that territory would entail the responsibility of the belligerent State. Admittedly, the drafting history of the neutrality conventions of 1907 provides no positive indication to that effect. In a post-war settlement between Switzerland and some of the belligerents of the Second World War, however, the latter parties apparently did accept responsibility for such occurrences, provided the facts of the case showed the existence of an adequate causal link.

4.6 Future development of neutrality law

An attempt to introduce into the body of positive neutrality law a rule expressly providing for the responsibility of a belligerent for damage, environmental or otherwise, arising within neutral territory or waters under neutral jurisdiction as a result of acts of war against targets outside that territory or those waters, could start out from the generally accepted principle that a neutral State's sovereign rights as a non-participant must not be adversely affected by warlike acts of the belligerents. It should be pointed out that among these sovereign rights is the inviolability of the neutral State's territorial rights, including life and property of inhabitants. A further point would be that the locus of the damaging act is immaterial. As long as the act can be said to have "caused" the damage, the acting State is liable. A proposal for a rule could probably be drafted along these lines.

5. The importance of the rules concerning the conduct of hostilities

5.1 Introduction

In the event of armed conflict, the law of war likewise contains a number of rules concerning the protection of the environment (58) It is primarily the rules on the protection of the civilian population that are pertinent here. However, recent treaty law has produced certain rules relating specifically to the protection of the environment. These apply of course, to the relationship between belligerents. It is open to question, however, whether they also have an affect vis-à-vis third States. We are therefore going to review briefly the content of these rules and then analyse their possible impact on third States.

2 Rules relating to the conduct of hostilities and the protection of the environment

2.1 The protection of the civilian population

The "environment" may include civilian property and military objectives. In so far as the elements of the environment constitute civilian property, the general rules on the protection of the civilian population and civilian objects apply. These rules form part of customary international law, but they were reaffirmed and somewhat amplified by the Protocols Additional to the Geneva Conventions adopted on 10 June 1977. Of these rules, the following deserve special mention:

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(58) See Kiss, les Protocoles additionnels aux Conventions de Genève et la protection de biens de l'environnement, Mélanges Pictet, 1984, pp. 181 et seq.: Bothe, War and Environment, in: Berhardt (ed.); Encyclopaedia of Public International Law, Instalment 4, pp. 290 et seq.; Solf, in Bothe/Partsch/Solf, New Rules for Victims of Armed Conflicts, Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949, 1982, in particular pp. 192 et seq., 343 et seq.

- the prohibition on attacks against civilian objects;
- the prohibition on attacks against certain specific objects, namely structures and installations containing dangerous forces and objects indispensable to the survival of the civilian population;
- the prohibition on indiscriminate attacks and attacks against military objectives where the damage caused by such attacks to civilian objects is excessive in relation to the practical, direct military advantage anticipated.

As regards the first rule, the main question as far as the cases covered by this enquiry are concerned is whether or not certain installations (e.g. chemical plant) or oil tankers are civilian objects. Article 52 of Protocol I defines civilian objects in negative terms, that is to say everything which is not "military" is "civilian". A military objective is in turn defined by reference to its "effective contribution to military action" and the fact that its destruction "offers a definite military advantage". Industrial installations must be of fundamental importance to the conduct of the armed conflict,(59) producing armaments for example, this having to be determined in each case. Oil installations may generally be considered to make an effective contribution to military action, fuel being indispensable in modern warfare. It is hard to imagine oil installations or storage depots being reserved exclusively for civilian requirements. But if stocks are intended exclusively for export (and this is all the more true of oil tankers bound for foreign parts) their destruction no longer offers a definite military advantage. The reduction in the enemy's export revenues and the weakening of his economy due to the destruction of such objects do not constitute a military advantage in the above sense.

Objects which must not be attacked even if they constitute military objectives are defined very stricly. The list set out in Article 56 is exhaustive: such immunity is enjoyed only by dams, dykes and nuclear electricity generating stations. Oil installations are not mentioned: the omission is deliberate.

(59) Solf, loc. cit, p. 324.

The third rule, the principle of proportionality, is also important from the point of view of the protection of the environment. The adverse effects that an attack may have on the environment (long-term effects or effects on distant places) must be taken into consideration in determining whether civilian damage is "excessive" in relation to the military advantages anticipated. This rule is not easy to apply, however, since determining what is "excessive" sometimes means having to compare advantages and damage, which are, in fact, incomparable.

5.2.2. Provisions referring expressly to the environment

In addition, Protocol I to the Geneva Conventions contains two provisions devoted to the protection of the environment. Article 35(2) provides:

> "It is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment."

Article 55 reads:

> "1. Care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This protection includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population.
>
> 2. Attacks against the natural environment by way of reprisals are prohibited."

These provisions supplement the proportionality rule already discussed. Even if damage caused to the (civilan) environment by an attack is not excessive in relation to the military advantage, the attack is nevertheless prohibited if it is "widespread, long-term and severe". These three concepts, (they are concurrent conditions) are also difficult to interpret The preparatory instruments suggest that the damage must be catastrophic.

The above provisions of Protocol I apply to all sorts of attacks. A special convention governs, however, a specific question, namely the manipulation of the environment for military purposes. This is the Convention on the Prohibition of Military or any other hostile use of Environmental Modification Techniques, opened for signature in Geneva on 18 May 1977. Although this Convention is of only limited relevance to the situations referred to in the present report, its basic provisions should be cited:

"Article I

1. Each State Party to this Convention undertakes not to engage in military or any other hostile use of environmental modification techniques having widespread, long-lasting or severe effects as the means of destruction, damage or injury to any other State Party.

2. Each State Party to this Convention undertakes not to assist, encourage or induce any State, group of States or international organization to engage in activities contrary to the provisions of paragraph 1 of this article."

"Article II

As used in article I, the term "environmental modification techniques" refers to any technique for changing - through the deliberate manipulation of natural processes - the dynamics, composition or structure of the earth, including its biota, lithosphere, hydrosphere and atmosphere, or of outer space."

It is then stated that the provisions of the convention shall not hinder the use of environmental modification techniques for peaceful purposes. Responsibility for implementing the Convention lies with States Parties, which must cooperate in solving any problems which may arise in relation to the objectives of the Convention. Complaints based on alleged breaches of obligations deriving from the Convention may be lodged with the UN Security Council.

The protection of the environment in times of armed conflict is also covered by a number of instruments not couched in the form of a treaty. Mention may be made first of all of the World Charter for Nature, adopted by the United Nations General Assembly on 28 October 1982 (Res. 37/7). According to principle 5 of the Charter:

"Nature shall be secured against degradation caused by warfare or other hostile activities".

Principle 20 adds :

"Military activities damaging to nature shall be avoided".

Among the work of private organizations, mention must be made of the Resolution on the Protection of Water Resources and Water Installations in Times of Armed Conflict, adopted by the International Law Association at its conference held in Madrid in 1976 (60).

5.3 The relevance of the 1977 Geneva Protocols for the protection of the environment of third States

The first question which has to be considered is whether the rules contained in Protocol I might constitute, through an application by analogy or otherwise, a standard of behaviour between belligerents and third States. It must be stressed, however, that the rules relating to the conduct of hostilities apply between the parties to an armed conflict, and only between them. There is no room for an application by analogy in the relationship between the belligerents and third States. Analogies in international law have to be considered with great caution. If at all, they can only apply in comparable situations. The relationship between belligerents, on the one hand, and that between belligerent and third States, on the other, are different. Any conclusion by analogy from the first relationship to the latter would be against the interests of third States, because, as we have already seen, the rules relating to the protection of the environment in times of peace remain applicable between the belligerent and third States and provide a much better protection for the environment of those States. This does not exclude however, that a strict application of the rules of the law of the war just quoted de facto benefits third States as well. The environment of third States may not be adversely affected by the conduct of military operations between the parties to the conflict, but if belligerents do not

(60) International Law Association, Report of the Fifty-Seventh Conference, Madrid 1976, pp. 237 et seq.

respect this rule, neutral States have a certain interest that the belligerents at least apply the rules of laws of war and thus limit the effects of hostilities on the environment at least to a certain extent.

5.3.1 Protocol I as a standard of behaviour vis-à-vis third States?

In the light of these interests of third States, two kinds of provisions of the laws of war can be distinguished as to their de facto effects. There are, firstly, those rules which allow a certain damage being caused as between belligerants, viz. damage to civilian objects which is not excessive in relation to the military advantage anticipated, or damage to the environment which is not widespread, longlasting and severe. In theses cases, the rule is insufficient for the interests of third States. In relation to third States, even that damage is not permissible.

There are other rules of the laws of war which completely prohibit certain attacks or the causation of certain damages. Thus, it is prohibited to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and so on (Article 54, Protocol 1). It is also prohibited to attack works or installations containing dangerous forces, namely dams, dikes and nuclear electrical generating stations, even if these objects are military objectives, if such attack may cause the release of dangerous forces and consequent civil loss among the civilian population. It is of course in the interest also of a neutral State which might be affected by the destruction of crops or by the dangerous forces released by an attack against the said installations that this prohibition is strictly observed. A neutral State

could not claim more under the law of peace. In this case, the de facto advantage accruing from the application of the rules applicable between belligerent States to neutral states becomes relevant.

5.3.2 The right of third States to claim respect for Protocol I

In the light of the interests that third States have in the respect and application of Protocol I, one has also to ask what are the procedural rights of the contracting parties not involved in an international armed conflict to claim respect for those provisions.

Article 1 para.1 Protocol 1 provides:

"The High Contracting Parties undertake to respect and to ensure respect for this Protocol in all circumstances".

The proper interpretation of this provision is the clue to the right of States not parties to a conflict to claim respect for Protocol I.

It might be argued that Article 1 para.1 merely intends to provide that each Contracting State undertakes to respect the Protocol's provisions and to take all the measures necessary for ensuring that its armed forces adhere to the rules of the Protocol. Under this interpretation, the measures envisaged in Article 1 para 1 should be taken both in time of war and (and above all) in times of peace, and they should be designed to create the conditions necessary for effective implementation of the Protocol. This interpretation, however is not correct, it is contrary to the practice and usage of the States, to the opinion of the ICRC and to scholarly authorities. What is clear from the negotiating history is that Article 1, para. 1 Protocol 1, taken as it was from Article 1 common

to the Geneva Conventions of 1949, was not meant to change the meaning that the similar wording had in common Article 1. In other words, the drafters of the Protocol simply meant to reiterate in Protocol I the identical provision contained already in the 1949 Conventions. Article 1, para. 1 Protocol 1 was neither to have a lesser nor a greater scope than that of common Article 1 of 1949. It follows that in order to identify the proper purport of Article 1, para. 1 Protocol 1, one must of necessity go back to Common Art. 1 and try to pinpoint its meaning. In order to do so, we shall analyse views of States parties to the Geneva Conventions, the opinion of the ICRC and scholarly authorities.

5.3.2.1 The Views of States

In 1972, the ICRC sent out to States parties to the 1949 Geneva Conventions a "Questionnaire concerning measures intended to reinforce the implementation of the Geneva Conventions of August 12, 1949". Question no.2 was framed as follows: "Can and should the States Parties to the Geneva Conventions exercise supervision collectively, pursuant to Article 1 common to those Conventions? If so, what procedure might be envisaged?" Out of 31 States that replied, only two States contended that Article 1 does not authorize contracting parties to intervene in cases of violations of the Conventions committed by belligerents: Argentina, which argued that such a right would be contrary to the ban on intervention, and Tunisia, which affirmed that the assent of belligerents was necessary for third States to intervene. 21 States admitted that third States could request belligerents to comply with the Conventions either jointly or individually. Other States did not take any definite stand on the issue, for they confined themselves to stating that no collective action was in their view admissible, without pronouncing on the

possiblity of individual action. Thus, the majority of States clearly affirmed a right of States not parties to a conflict to demand respect for the Conventions by belligerents. Three particularly clear statements may be quoted. Belgium observed that:

> "Le Gouvernement belge est d'avis que l'article , commun aux quatre conventions, oblige et par consequent habilite les Hautes Parties contractantes à faire respecter les dispositions de ces conventions, alors même qu'elles ne se trouvent pas elles-mêmes impliquees dans un conflit armé."

The Federal Republic of Germany stated that:

> "The obligation in Article 1 of the Geneva Conventions includes not only the observance of their provisions but also their implementation, i.e. all appropriate measures to ensure their observance by the parties to the conflict. This obligation applies to all Contracting Parties - irrespective of their position in the conflict."

Italy pointed out:

> "L'article ler des Conventions confère aux Etats, à côté de l'obligation de respecter les Conventions, le droit de prétendre (sic!) des autres Etats le respect de ces mêmes Conventions. Il n'est pas exclu qu'un tel droit puisse être exercé au moyen d'une action individuelle ou collective. Une action de ce genre pourrait s'avérer utile, chaque fois que les circonstances politiques le permettent, surtout en considération de son retentissement dans l'opinion publique internationale."

5.3.2.2 The Opinion of the ICRC

The ICRC has consistently held that four Geneva Conventions confers on the contracting parties the right to request compliance with the Conventions by belligerents. Suffice it to mention the public appeal made by the ICRC on May 7, 1983 with regard to the Iran-Iraq war. The ICRC statement included the following:

"The ICRC makes this solemn Appeal to all States parties to the Geneva Conventions to ask them - pursuant to the commitment they have undertaken according to Article 1 of the Conventions to ensure respect of the Conventions - to make every effort so that ... international humanitarian law is respected, with the cessation of these violations".

The same reference to Article 1 was contained in the second appeal concerning the Iran-Iraq war, made by the ICRC on February 10, 1984.

5.3.2.3 Writers

It is well known that the interpretation advocated above was first propounded by the ICRC semi-official Commentary on the Geneva Conventions. In the Commentary to Article 1 of the Ist Convention it was stated that:(61)

"The Contracting Parties do not undertake merely to respect the Convention, but also to ensure respect for it. The wording may seem redundant. When a State

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(61) Pictet, Commentary, Ist Geneva Convention, 1952, pp. 25-26.

contracts an engagement, the engagement extend eo ipso to all those over whom it has authority, as well as to the representatives of its authority; and it is under an obligation to issue the necessary orders. The use of the words "and to ensure respect" was, however, deliberate: they were intended to emphasize and strengthen the responsiblity of the Contracting Parties. It would not, for example, be enough for a State to give orders or directives to a few civilian or military authorities, leaving it to them to arrange as they pleased for the details of their execution. It is for the State to supervise their execution. Furthermore, if it is to keep its solemn engagements, the State must of necessity prepare in advance, that is to say in peacetime, the legal material, or other means of loyal enforcement of the Convention as and when the occasion arises. It follows, therefore, that in the event of a Power failing to fulfil its obligations, the other Contracting Parties (neutral, allied or enemy) may, and should, endeavour to bring it back to an attitude of respect for the Convention."

5.3.2.4 Individual versus Collective Action

We shall now turn to the question whether Article 1, para. 1 Protocol 1 and common Article 1 authorizes individual action only, collective action only or both.

If one looks at the answers to the ICRC questionnaire quoted above, it appears that the majority of States take the view that both classes of action are possible. This view is indeed the more consonant with the literal text of the provisions under consideration. Some States unambigously stated that both categories of action are permitted. Other countries merely stated that collect-

ive demarches are permissible, without however answering the question of whether action by individual States is also authorized by the rules in question. A limited number of States insisted that only an individual action is envisaged by Article 1 common to the Conventions. It seems, however, that this view is rather based on grounds of expediency than on legal grounds. Finally, a group of States excluded the admissibility of collective action, again primarily on grounds of practical feasibility and on the basis of a realistic assessment of the present international situation, rather than on legal grounds.

Altnough the views were divided, it seems that the majority of States was favourable to both classes of action. In addition, this interpretation is more in keeping with the tenor of the provisions under discussion. They do not place any restriction on the sort of activity that contracting parties can carry out in order to demand respect for the Conventions and the Protocol by other contracting parties.

5.3.2.5 Permissible Kinds of Action

It seems that a wide spectrum of actions is available to States wishing to act individually or jointly for the purpose of ensuring respect for the Geneva Conventions and the Protocol. The only limitation is that they cannot resort to forcible measures; otherwise they can take political or other steps, both bilaterally and in international fora or jointly. To give an illustration of the various measures possible, it seems appropriate to quote the opinion of a few States which answered the aforementioned ICRC Questionnaire.

Belgium stated the following:

"Ce principe posé, il en découle que chaque Etat individuellement et, par voie de conséquence, la collectivite des Etats, parties aux Conventions, ont pour obligation de veiller, autant qu'il est en leur pouvoir, à ce que les dispositions des Conventions soient appliquées indistinctement par toutes les Parties au conflit. La procédure qui vient ici tout naturellement à l'esprit est celle du recours éventuel à des représentations par la voie diplomatique auprès des deux Parties engagées au conflit ou auprès de l'une d'elles s'il y a lieu de supposer qu'elle ne respecte pas certaines dispositions de la Convention. Ces représentations peuvent être le fruit d'une initiative propre à un seul Etat. Elles peuvent être également accomplies - et sans doute avec plus de chances de succès, par plusieurs Etats conjointement. Enfin, l'Organisation des Nations-Unies, saisie de la question à la requête d'un ou de plusieurs Etats participant aux Conventions de Genève, est certainement habilitée à rappeler, comme elle l'a déjà fait, aux Parties belligérantes l'obligation qui leur incombe de respecter les dispositions desdites Conventions. En tout état de cause, il y a lieu de constater que les dispositions de l'article 1 ne sont guère explicites quant aux moyens que les Etats, tierces-puissances par rapport à un conflit armé, ont à mettre en oeuvre en vue de faire respecter les conventions par les Parties belligérantes."

Denmark pointed out:

"The only supervisory mechanism that with any certainty can be inferred from this basic obligation is the right of the contracting parties to protest, individually or collectively, against non-compliance by another contracting party. Each contracting party is free to decide whether and in what form it wants to protest against violations."

Italy said:

" La procédure à envisager pourrait être constituée par une action diplomatique secrète ou publique auprès des Etats en conflit et même, le cas échéant, auprès des Puissances protectrices."

By contrast, the U.K. took a more restrictive view:

" If States Parties determine upon collective action during or after hostilities, they would presumably be unable to go beyond exhortation and statement of general principles. It would be inappropriate for them to conduct anything in the nature of an enquiry into the actions of particular States. Any collective effort to enforce respect for the Conventions would be outside the scope of the Conventions and would be a proper matter for discussion by the Security Council."

Such collective or individual action requesting respect for the Conventions indeed occurs from time to time. In 1984, Switzerland and Austria made public appeals to Iraq and Iran to abide by the Conventions. Regional action was taken by the "Contadora Group" in the case of El Salvador. Both the UN General Assembly and the Commission on Human Rights have adopted several resolutions calling upon the belligerent parties or the occupying Power to respect international humanitarian law (e.g. in the case of Israel, Lebanon, Kampuchea, Iran-Iraq, South Africa and El Salvador).

6. The general rules of international responsibility

International responsibility may be considered a consequence either of a wrongful act or of a non-wrongful act. This dichotomy is clearly apparent in the current work of the International Law Commission. A draft adopted by the Commission on first reading deals with the responsibility of a State for its internationally wrongful acts (Rapporteur Mr R. Ago). A second draft is being prepared (Rapporteur Mr Quentin Baxter) on international liability for injurious consequences arising out of acts not prohibited by international law.

We deal below first of all with responsibility for wrongful acts (6.1.). After a brief discussion of wrongful acts (6.1.1) we shall consider to what extent grounds for preclusion may be invoked (6.1.2). We shall then examine responsibility for non-wrongful acts (6.2). Lastly, we shall discuss problems common to both types of responsibility: attribution (6.3), the causal link (6.4.) and the consequences of international responsibility (6.5).

6.1 Responsibility for wrongful acts

6.1.1. The wrongful act

In the preceding pages we have isolated various cases of wrongful acts in the positive form of obligations to respect. We shall not hark back to them, but shall confine ourselves to a few general remarks on the structure of the obligation the breach of which constitutes the wrongfulness.

(1) It should be pointed out first of all - as this may have diverse consequences - that the relationship between the wrongful act and the damage caused to the environment may take various forms.

On the one hand, the damage may be the consequence of the wrongful act.

Thus, international law prohibits attacks against civilian object or non-belligerent shipping. Supposing the

civilian object is a chemical plant of a purely civilian nature the destruction of which results in pollution of the atmosphere, the latter is a consequence of the wrongful act. The same holds true if the attack is directed at a non-belligerent oil tanker, the destruction of which causes pollution of the sea.

On the other hand, the damage may be a condition of the wrongful act. The obligation is in the nature of a prohibition of conduct the consequences of which are injurious. In this instance there is wrongfulness only if the damage exists. The cases covered are those where the obligation is either not to damage the environment or not to damage neutral territory.

(2) The structure of the obligation which must be complied with may take various forms. It may be an obligation as to the result to be achieved or an obligation as to the means to be employed, within the meaning of that distiction in domestic law.

The obligation will be one as to the result to be achieved if it prohibits a given result. Such seems to be the case with the obligation of belligerents to ensure the inviolability of the territory of neutrals.

The obligation will, on the other hand, be merely one as to the means to be employed where the State is only under a duty of care, being only obliged to do what it can with the means at its disposal.

Example: Article 25 of the Hague Convention No XIII

> "A neutral power is bound to exercise such surveillance as the means at its disposal allow to prevent any violation of the provisions of the above articles occurring in its ports or roadsteads or in its waters".

There has been much discussion about whether obligations in respect of the protection of the environment are obligations as to the results to be achieved or obligations as to the means to be employed. This depends on the case in question. The instrument providing for the obligation has to be examined in each instance.

In the opinion of the authors of the present enquiry, the obligation of the parties to a conflict not to damage the environment of third States or of areas not subject to any national jurisdiction is in the nature of an obligation as to the result to be achieved. The obligation is breached if the damage arises.

(3) The obligation in question is that of the parties to a conflict, that is to say of the organs belonging to those parties. The obligation will have a different content where the conduct of individuals not acting on behalf of a party to the conflict is concerned. The obligation in this second case will be no more than a duty of care.

The parties to a conflict must take reasonable care to prevent third parties from committing wrongful acts. If they do not do so, they fail in their duty of exerting due diligence. One then speaks of the delict of event, that is to say the delict where the wrongful act consists in a breach of an obligation of prevention. This occurs where the person who adopts the injurious conduct is not an organ of the State, but a private individual. The responsibility of the State is nevertheless engaged if its organs, being able to foresee the conduct in question, did not prevent its occurrence. A delict of omission of this nature presupposes that the criminal action of the individuals could reasonably be foreseen by the state. This would be the case where a terrorist group blows up an oil tanker or lays mines for that purpose. The coastal State having jurisdiction over the waters concerned could be held responsible only if it was aware of these deeds or should have foreseen them (Corfu Channel case).

This case is quite distinct from that of foreseeable damage, which we shall examine below (at point 6.4).

6.1.2 Grounds for precluding wrongfulness

We must now analyse certain grounds for precluding responsibility which might be invoked by the State adopting the allegedly wrongful conduct.

Our analysis is based largely on the work of the International Law Commission, which has prepared a draft on international responsibility. This draft provides first of all for certain circumstances precluding wrongfulness. One may ask whether some of them might apply to the questions covered by this enquiry, notably force majeure and fortuitous event (Article 31), state of necessity (Article 33), countermeasures in respect of an internationally wrongful act (Article 30) and self-defence (Article 34).

As with the wrongful act, the various grounds for preclusion may come into play either vis-à-vis the adversary or vis-à-vis the third State. A ground for preclusion holding good for one does not necessarily hold good for the other.

The second question one may ask is whether the lawfulness, if any, of the recourse to force by one of the belligerents has an influence on the grounds for preclusion. To rephrase the question: can a State which has committed a crime of agression in a given conflict still invoke grounds for preclusion? Clearly not self-defence, nor countermeasures nor a state of necessity. But what of force majeure? Can it not be maintained that, having been the cause of the whole conflict, the agressor must suffer all the consequences thereof? Is therefore a State which - on the contrary - acts in self-defence, save where there is, for example, a specific violation of ius in bello, better placed? (62)

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(62) "In the ordinary way, a State is not responsible for damage legitimately caused in the ordinary conduct of the war, but if a State is in the position of a wrongdoer in being at war at all, if it has gone to war in a manner involving a breach of international law and constituting an international crime, it might well be argued that it has legal responsibility, for all the ensuing damage even if it would otherwise rank as damage legitimately caused in the normal conduct of operations". (G.G. Fitzmaurice, "The juridical clauses of the Peace Treaties", Hague Recueil, vol 73, 1948 (II), p. 325).

The practice of war reparations sometimes imposed by treaties concluded at the end of a war seems to be in keeping with this view.

A third aspect is this:

A ground for preclusion comes into play only if the act of the State would be wrongful in its absence. We shall therefore take for granted here, in order to consider the independent operation of the grounds for preclusion, the wrongful nature of the act giving rise to the responsibility: direct attack against non-belligerent shipping, attack against sites protected by the law of war, wrongful damage to the marine environment, etc. In the light of these few general remarks, we are going to examine the various grounds for preclusion upon which reliance might be placed.

6.1.2.1 *Force majeure* and fortuitous events

Article 31(1) of the ILC draft provides:

> "The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act was due to an irrisistible force or to an unforeseen external event beyond its control which made it materially impossible for the State to act in conformity with that obligation or to know that its conduct was not in conformity with that obligation."

The outstanding feature of these two concepts is that the subject is induced to act against his will involuntarily or unintentionally in breach of his international obligations. The action is the outcome of an irresistible force or an unforeseen external event. In relation to the consequences of a voluntary and deliberate act of warfare by a belligerent against a specific objective, it can scarcely be maintained that the circumstances outlined obtain.

One can, however, visualize circumstances in which the destruction of installations releasing forces or substances dangerous to the environment is carried out, not by organs engaging the responsibility of the belligerents, but by private individuals. Take the case of acts committed by groups of anarchists. Would the concepts of force majeure or fortuitous event relieve the State of its responsibility? In cases involving internal conflicts, international arbitrators have often found that the State is not responsible for damage resulting from the combat itself (acts of legitimate warfare) provided it is not the consequence of a violation of the law of war by State organs. Thus, in his award in the British claims in Spanish Morocco arbitration case, Max Huber stated;

> "That the State is not responsible for the fact that there is a rising, a revolt, or a civil or international war, nor for the fact that these events involve losses on its territory ... Such occurrences must be considered as cases of force majeure". (63)

It will have been noted that Max Huber had in mind the case of damage caused within the territory of the State in which the internal conflict is taking place. This rule does not mean that the responsibility of the State cannot be based on other considerations where the damage affects the territory of States not involved in the internal conflict. The obligation as to the result to be achieved with regard to third parties remains that of the organs of the States. Moreover, the State must do everything in its power (obligation as to the means to be employed) to prevent the insurgents from causing damage to the territory of other States. If, for example, the insurgents blow up an oil installation in territory controlled by the government, the State remains obliged to combat the pollution thus caused in order to prevent any damage which might ensue outside its territory.

In the case of international conflicts, it would appear that in practice a distinction is made between a number of eventualities: war damage proper, requisitions levied by a belligerent power in its own territory and

(63) Annual Digest of Public International Law Cases, 1923-4, vol. 2, p. 159. Original French, 2 RIAA, 642, see also p. 645.

military acts of belligerents causing damage in neutral territory. Although non-responsibility is often invoked in the first two cases, save where a specific wrongful act has been committed, it would appear on the contrary that responsibility is acknowledged in the third. No argument based on force majeure is then adduced. As regards damage caused to neutral territory, we can cite practice during the Second World War (see 4.4.5 above). On the high seas, attacks against neutral shipping also give entitlement to reparation. The scope of the primary obligations in this case is, however, much debated. What matters in our context is that the argument of force majeure or fortuitous event is not raised (64).

Conversely, where the incident takes place in the waters of the belligerents, reparation is less frequent as neutral shipping must be aware of the risk it is running. Thus, the French authorities pointed out in connection with French warships in Chinese ports during the Sino-Japanese conflict:

> "naturellement si le port où ils (les navires) se trouvent est attaqué par les force japonaises, ils seront exposés à être atteints par le contre-coup de la bataille. Nous pouvons exiger seulement qu'on ne tire pas intentionnellement sur eux." (65)

One might also ask whether force majeure or extraneous act may be invoked in the case of bombardement by mistake of neutral territory. The answer is in the negative where the act is committed by State organs. The intentional nature of the act is of little importance, the obligation being an obligation not to encroach on neutral territory (obligation as to the result to be achieved). Intention plays a part, on the other hand, where the harmful act is committed by private individuals. The State will be responsible for such acts only if it was able to prevent or punish them.

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(64) For the famous case of The Lusitania, see Madders, The Lusitania, in: Bernhardt (ed), Encyclopedia of International Law, Instalment 2, pp. 177 et seq for the case of the Liberty (American ship attacked by Israel in 1967), see RGDIP 1968, pp 199 et seq., 1981, pp. 562 et seq.

(65) Kiss, Répertoire de la pratique française en matière de droit international, vol. VI, No. 1086. See, however, the case of The Panay (an American ship sunk by Japan off Nanking). See also the many claims by "neutral" states against the United States after the bombing of North Vietnamese ports by the American air force, RGDIP 1968, pp. 207 et seq.

6.1.2.2 State of necessity

According to Article 33 of the International Law Commission's draft, a state of necessity may be invoked as a ground for preclusion in the following circumstances:

"1. A state of necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act of that State not in conformity with an international obligation of the State unless:

a) the act was the only means of safeguarding an essential interest of the State against a grave and imminent peril; and

b) the act did not seriously impair an essential interest of the State towards which the obligation existed.

2. In any case, a state of necessity may not be invoked by a State as a ground for precluding wrongfulness:

a) if the international obligation with which the act of the State is not in conformity arises out of a peremptory norm of general international law; or

b) if the international obligation with which the act of the State is not in conformity is laid down by a treaty which, explicitly or implicitly, excludes the possibility of invoking the state of necessity with respect to that obligation; or

c) if the State in question has contributed to the occurrence of the state of necessity."

The application of this article must be considered in relation to specific wrongful acts.

In the case of a violation of a rule of the law of war, we know that that law does not make provision for the state of necessity in circumstancs other than those for which it provides expressly since the whole of the law of war takes account by definition of the necessities of war, which must give precedence to it. Pursuant to paragraph 2(b) of Article 33 cited above, the invoking in such circumstances of a state of necessity is therefore ruled out.

In the case of the infringement of rights of third States in their property or relative to the protection of their environment, doubts may be expressed as to whether he who breaches international obligations can invoke a state of necesssity. It is improbable that the harmful act (the causing of damage to a third state) will be the only means of safeguarding an essential interest threatened by a gave and imminent peril. Thus, it is difficult to see how a neutral oil tanker could constitute a grave and imminent peril.

Lastly, the contribution by the author of the wrongful act to the occurrence of an alleged state of necessity may be invoked almost automatically in the case of an armed conflict.

6.1.3 Countermeasures in respect of a wrongful act

Article 30 of the Internatioanl Law Commission's draft provides:

"The wrongfulness of an act of a State not in conformity with an obligation of that State towards another State is precluded if the act constitutes a measure legitimate under international law against that other State, in consequence of an internationally wrongful act of that other State."

Between belligerents, it is the whole vexed question of reprisals that is thus raised (66) . It is difficult to see, however, how the concept of countermeasure could apply to non-parties to the conflict which have committed no act contrary to the law. Thus, in the Cysne case between Portugal and Germany, the arbitration tribunal reasoned as follows: (67)

> "(...) la thèse allemande (...) néglige une question essentielle qui se pose dans les termes suivants: la mesure que le gouvernement allemand était en droit de prendre, à titre de représailles, vis-à-vis de l'Angleterre et de ses alliés, pourrait-elle être appliquée aux navires neutres et en particulier aux navires portugais?
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> La négative doit être admise, conformément à la doctrine allemande elle-même. Cette solution est la conséquence logique de la règle suivant laquelle les représailles, consistant en un acte en principe contraire au droit des gens, ne peuvent se justifier qu'autant qu'elles ont été provoquées par un autre acte également contraire à ce droit. Les représailles ne sont admises que contre l'Etat provocateur."

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(66) See F. Kalshoven, Belligerent Reprisals, 1971.

(67) Responsibility of Germany for acts committed after 31 July 1914 and before Portugal entered the war, 2 RIAA, 1056-1057.
A brief summary of this case can be found in the Annual Digest of International Law Cases, 1929, 1930, vol. V, p. 490.

In its resolution on reprisals of 1934, the Institute of International Law also declared that a State which exercises reprisals must

> "limiter les effets des représailles à l'Etat contre qui elles sont dirigées en respectant, dans toute la mesure du possible, tant les droits des particuliers que ceux des Etats tiers". (68)

Moreover, the prohibition of reprisals involving the use of force, which stems from the general prohibition of recourse to force, applies a fortiori to non-parties to the conflict (69).

6.1.4 Self-defence

Article 34 of the International Law Commission's draft provides:

> "The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act constitutes a lawful measure of self-defence taken in conformity with the Charter of the United Nations".

One of the major difficulties in applying this notion is that of knowing, in the absence of a ruling by the Security Council, who in a given conflict is the aggressor. Another difficulty in applying the concept of self-defence concerns the extension of the concept. While most writers agree that under Article 51 of the Charter, self-defence may be invoked only in response to armed agression or attack, others consider that the Charter would not

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(68) See Annuaire 1934, p. 708.

(69) Resolution 2625 (XXV) of the United Nations General Assembly.

rule out the maintenance of a wider view of self-defence. Hence the circumspect wording of Article 34 of the International Law Commission's draft.

At all events, it must be stressed that self-defence is a concept which justifies recourse to war (or to force), which is often called ius ad bellum, and has nothing to do with the means of waging war or the conduct of hostilities by belligerents in the event of armed conflict (ius in bello), which is the only thing we are concerned with here. Moreover, while self-defence justifies, vis-à-vis an adversary, an act which would otherwise be wrongful, it does not permit violations of the rights of third parties. As Rodick wrote (70):

> "It is difficult to see how one can find a legal justification and excuse for a belligerent violation of neutral rights in a case where the neutral has not failed in any duty it owes to the particular belligerent."

6.2 Responsibility in the absence of a wrongful act

If it had to be concluded that the facts used as working hypothesis for this enquiry do not show any wrongful act attributable to a State and are the expression of a lawful activity, one should ask oneself whether the case in point is not one involving international responsibility for the injurious consequences of activities which are not prohibited by international law,

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(70)The doctrine of necessity in International Law, 1928, p. 117.

in other words, whether circumstances involving responsibility without a wrongful act, or strict liability, do not obtain.

Discussion of this topic has largely been motivated by the fact that modern technology makes possible a number of activities which the law cannot proscribe, but which involve a high degree of risk for potential victims who are unconnected with those activities and who derive no benefit therefrom.(71) The response of a large number of national legal systems to this phenomenon has been the acceptance of strict or no-fault liability on the part of the person carrying on such activities, quite often combined with a system of compulsory insurance. One might therefore ask whether strict liability for damage caused by activities carried on in the territory or under the control of a state to persons or things in the territory or under the control of another State is already established, in public international law, as a general principle within the meaning of Article 38(c) of the International Court of Justice. International treaties endorsing or confirming this principle are admittedly still few in number.(72) There is, however, a certain trend of opinion in favour of accepting this concept of strict liability outside the subjects covered by specific treaties. Such is also the opinion of the Special Rapporteur of the Internatioanl Law Commission, Mr Quentin-Baxter, who submitted to the

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(71) See in this connection Handl, State Liability for Accidental Transnational Environmental Damage by Private Persons, 74 AJIL 1980, pp. 525-565; idem., The Environment: International Rights and Responsibilities, ASIL Proceedings, 74th Meeting 1980, pp. 223-234.

(72) See Article VII of the treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies of 27 January 1967 and the Convention on International Liability for Damage Caused by Space Objects of 29 March 1972.

Commission a schematic outline on the work entrusted to the Commission on the subject. Section 4(2) of the outline provides :

> "Reparation shall be made by the acting State to the affected State in respect of any such loss or injury, unless it is established that the making of reparation for a loss or injury of that kind or character is not in accordance with the shared expectations of those States."

Similarly, Section 5(3) provides:

> "(...) an innocent victim should not be left to bear his loss or injury; the costs of adequate protection should be distributed with due regard to the distribution of the benefits of the activity (...)".

It is true that the cases referred to by the Rapporteur of the International Law Commission (73) and in academic discussions on the subject involve above all damage caused to the environment by private activities, and not war damage. One is nevertheless inclined to ask whether the reasoning outlined does not apply a fortiori to damage caused to neutral States by acts of warfare. War is, by definition, an activity involving the risk of severe loss. There is no valid reason why neutrals who suffer such losses should also bear the cost thereof.

Responsibility without a wrongful act was also envisaged by the ILC where the wrongful act is erased by certain grounds for preclusion. Article 35 of the draft provides that :

> "Preclusion of the wrongfulness of an act of a State by virtue of the provisions of Articles 29, 31, 32 or 33 does not prejudge any question that may arise in regard to compensation for damage caused by that act".

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(73) Report of the International Law Commission 1982, GAOR, 37th Session, Suppl. No 10, pp. 188 et seq.

It follows from this that, where a specific case cannot be regarded as a wrongful act or where, if it is one, it is nevertheless erased by a ground for preclusion mentioned above, the opportunities open to the injured party to seek reparation for the damage caused remain undiminished in the context of liability for injurious consequences arising out of acts not prohibited by international law.

6.3 Problems of attribution

Where the wrongful act is committed by the armed forces of one of the belligerents, it is clearly an act of an organ attributable to the State.

The situation is more complicated if the act is committed, not by State organs, but by groups or individuals not subject to the jurisdiction of State any State: groups of revolutionaries or anarchists carrying out sabotage, for example. In such cases, in the absence of proof that such individuals were acting on behalf of a given State and unless they succeed in seizing power, there can be no attribution to a State. Several articles of the International Law Commission draft - unquestionably declaratory of customary law in this respect - reiterate these principles:

"Article 11(1):

The conduct of a person or a group of persons not acting on behalf of the State shall not be considered as an act of the State under international law".

Article 14(1):

"The conduct of an organ of an insurrectional movement which is established in the territory of a State or in any other territory under its administration shall not be considered as an act of that State under international law."

The preceding paragraphs concern the responsibility of States. It is entirely feasible that international responsibility is imputable to parties to an international conflict who do not, or do not yet, have the status of States within the meaning of Article 1(4) of Protocol I to the Geneva Conventions of 12 August 1949.

Moreover, Article 91 of that Protocol refers, not to "States", but to the "parties to the conflict":

> "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."

It is also feasible that a State not involved in an internal conflict might bring into play the international responsibility of the insurgents. This implies, of course, that limited legal personality is conferred on them.

Examples given in the report submitted by Professor Ago to the ILC are invoking:

- by the United States of the responsibility of the insurgent government of General Huerta in Mexico in 1914;
- by the United Kingdom of the responsibility of the nationalist government of Burgos in 1937 (74).

Thus, Article 14(3) of the ILC draft provides:

> "Similarly, paragraph 1 is without prejudice to the attribution of the conduct of the organ of the insurrectional movement to that movement in any case in which such attribution may be made under international law."

While a State is responsible for the acts of its own organs, it is clearly not responsible for the acts of organs or individuals belonging to other States who, by their own conduct, place themselves in a situation in which they sustain loss or injury (referred to as the problem of the fault of the injured party, or "contributory negligence" as it is called in common law jurisdictions).

It should be pointed out, lastly, that cases of joint responsibility or of shared responsibility following a dual attribution may be encountered. While the parties to an armed conflict must not attack the civilian population, civilians or civilian property (Article 57(5) of Protocol I to the Geneva Conventions of 12 August 1949), they must also avoid placing military objectives in or near densely populated areas (Article 58(b) of the same Protocol). An attack against a military objective within a densely populated area may therefore give rise to dual responsibility.

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(74) ILC Yearbook, 1972 II, p. 152.

6.4 Questions of causality

The damage which must be repaired by virtue of the international responsibility of the State is that which has been "caused" by the wrongful act or by the activity involving the strict liability of the State. This "causation" is at the same time the basis of and the limit to the obligation of reparation. According to well-established international case law, the author of the wrongful act must make good the loss only where the cause and effect relationship between the act of the State and the loss is firmly established. This problem is sometimes called the question of indirect damage. As we have seen, it played a part in international practice in connection with the damage suffered by Switzerland during the Second World War (see 4.4.5). In this respect, US-Germany Mixed Claims Commission Administrative Decision No 2 (The Lusitania) is an authoritative exposition of customary law on the subject (75):

> "The proximate cause of the loss must have been in legal contemplation the act of Germany. The proximate result or consequence of that act must have been the loss, damage, or injury suffered. The capacity in which the American national suffered - whether the act operated directly on him, or indirectly as a stockholder or otherwise, whether the subjective nature of the loss was direct or indirect - is immaterial, but the cause of his suffering must have been the act of Germany or its agents. This is but an application of the familiar rule of proximate cause - a rule of general application both in private and public law - which clearly the parties to the Treaty

(75) 7 RIAA, pp. 29-30.

> (of Berlin) had no intention of abrogating. It matters not whether the loss be directly or indirectly sustained so long as there is a clear, unbroken connection between Germany's act and the loss complained of. It matters not how many links there may have been in the chain of causation connecting Germany's act with the loss sustained, provided there is no break in the chain and the loss can be clearly, unmistakably, and definitely traced, link by link, to Germany's act. But the law cannot consider, the Congress of the United States in adopting its resolution did not consider, the parties in negotiating the Treaty of Berlin did not consider or expect this tribunal to consider, the "causes of causes and their impulsion one on another". Where the loss is far removed in causal sequence from the act complained of, it is not competent for this tribunal to seek to unravel a tangled network of causes and of effects, or follow, through a baffling labyrinth of confused thought, numerous disconnected and collateral chains, in order to link Germany with a particular loss. All indirect losses are covered, provided only that in legal contemplation Germany's act was the efficient and proximate cause and source from which they flowed."

As we have seen, the same principles underlie the settlement of the "indirect" damage caused to property situated in Switzerland by American bombs dropped on Germany. In the case of the Soviet statellite Cosmos 954, which disintegrated over Canadian territory, Canada's claim against the USSR was based on the same principles (76).

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(76) Statement of Claims 23, 18 ILM 1979, p. 907.

> "In calculating the compensation claimed, Canada has applied the relevant criteria established by general principles of international law according to which fair compensation is to be paid, by including in its claim only those costs that are reasonable, proximately caused by the intrusion of the satellite and deposit of debris and capable of being calculated with a reasonable degree of certainty."

The bill came to over 6 million Canadian dollars. In the end, Canada and the USSR agreed on lump-sum compensation amounting to 3 million Canadian dollars. (77)

In the circumstances dealt with in this enquiry, namely pollution resulting from bombing or shelling of oil tankers, oil terminals, chemical plant, nuclear power stations or other installations containing dangerous forces, the damage to the environment of the third State will be deemed to arise from the wrongful act whenever an extraneous cause happens to break the chain of cause and effect.

The direction of the wind or of a current, which may be one of the reasons why the coast of a given third State is polluted, is not an extraneous cause breaking the chain of cause and effect. The wind or the current were insufficient in themselves to cause the damage. The wrongful act is the necessary pre-condition for the damage.

In the case of the John, the shipwreck of an American vessel which was unlawfully diverted by the United Kingdom and was then caught in a storm was considered entirely the responsibility of the United Kingdom (78).

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(77) 20 ILM 1981, p. 689.

(78) La Pradelle and Politis, Rec. des arbitrages internationaux, I. p. 751.

The foreseeability of the damage is, in this respect, a factor of presumption which facilitates proof. Any State which orders the bombarding of an oil tanker must be aware of the risk that the resulting oil slick might pollute the surrounding area. Foreseeability is, however, not a factor essential to the providing of reparation. A State is responsible for all injurious consequences, whether or not they are foreseeable, provided the causal link is certain.

Lastly, the physical distance between the wrongful act and the damage matters little, provided always that the link of necessity is clearly apparent[79] Causal remoteness is unimportant all the consequences must be repaired, e.g. measures to prevent and combat pollution, clean-up operations, etc.

6.5 The consequences of international responsibility

If international responsibility is established pursuant to the rules we have just analyzed, its consequences are as follows:

1. obligation on the part of the State responsible to bring the unlawful situation immediately to an end.

2. obligation on the part of the State responsible to repair the damage.

3. possibility for the State suffering the damage to take lawful counter-measures.

In this connection, self-help measures must be examined in particular.

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(79) On the question of causality, see B. Bollecker-Stern, Le préjudice dans la théorie de la responsabilité internationale, Paris, Pédone, 1973, pp. 270 et seq.

7. Measures of self-protection

7.1 Introduction

If the duties to co-operate described in chapter III.2 are not fulfilled, the question arises whether unilateral measures of self-help are permissible. Abatement of pollution resulting from acts of war, in particular the destruction of certain installations or tankers, is of course most effective if done at the source. Measures of protection at the place where the damage occurs are most often not enough. Unilateral measures or self-help would therefore mean action by the threatened States against the source of pollution. The legal questions raised by such unilateral measures are of course very different according to where the source is situated, whether the source is situated in the territory or territorial waters of a State, in the exclusive economic zone or on the high seas.

We shall therefore first deal with the general questions of self-help and then with particular issues of the protection of the environment at sea.

7.2 Self-help involving the use of force

If a source of pollution is situated in the territory or territorial waters of a belligerent and if that belligerent does not co-operate, does not give its consent to action taken by the threatened neutral State, a unilateral measure or self-help by the neutral State would amount to a use of force. Thus, the general question of forcibles measures of self-help is posed. To what extent

and in what ways may a State, in order to save itself from an actual or imminent danger to its environment, take remedial or preventive action? Is there a general doctrine of self-defence of self-help, or a general defence of necessity. In the Corfu-Channel case[80] the International Court of Justice rejected the plea of necessity as justifying forcible intervention:

> "The Court can only regard the alleged right of intervention as the manifestation of a policy of force, such as has in the past given rise to most serious abuses and such as cannot, whatever be the present defects in international organization, find a place in international law. Intervention is perhaps still less admissible in the particular form it would take here; for, from the nature of things, it would be reserved for the most powerful States, and might easily lead to perverting the administration of international justice itself."

As to the plea of self-help, the Court said:

> "The Court cannot accept this defence either. Between independent States respect for territorial sovereignty is an essential foundation of international relations. The Court recognizes that the Albanian government's complete failure to carry out its duties after the explosions and the dilatory nature of its diplomatic notes are extenuating circumstances for the action of the United Kingdom government. But to ensure respect for international law, of which it is the organ, the Court must declare the action of the British Navy constituted a violation of Albanian sovereignty."

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(80) ICJ Reports 1949, p. 35.

The Court thus takes a very strict view on the legality of measures of self-help involving the use of force. Yet it is often argued, usually by analogy from principles and rules adopted in major municipal legal systems, that self-defence and self-help may, in certain defined sets of circumstances, have a role to play in international law if they can serve to preserve the international legal system itself. Against such arguments, it must be stressed that the impact of the Law of the United Nations Charter, the sweeping prohibition of the use of force, on alleged rights of individual or collective self-help has been profound. A broad interpretation of the fundamental Article 2 § 4 is required. The prohibition of the use of force in Article 2 § 4 is subject only to the specific exceptions contained in other provisions of the Charter only. These are self-defence against an armed attack as provided in Article 51 in the Charter and actions authorized by the compentent organ of the United Nations. It is of course theoretically possible that this sweeping regime of the prohibition of the use of force established by the Charter has been modified by subsequent customary law permitting certain additional exceptions to the principle. But in our view such exceptions cannot be proved with the necessary degree of certainty.

7.3 Unilateral action under the Law of the Sea

Under the traditional Law of the Sea, enforcement of relevant rules, including the rules relating to the protection of the environment, rested squarely upon the flag-State. This is in particular the case under the 1954 London Convention for the Prevention of Pollution of the Sea by Oil.[81] The new United Nations' Convention on the

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(81) 327 UNTS 4.

Law of the Sea strikes a new balance between the flag State, the port State and the coastal State with respect to their rights and duties and also with respect to enforcement jurisdiction. The Convention strenghtens the obligation on flag States to ensure compliance by their vessels with applicable pollutions standards (Article 217). Port State jurisdiction is also strengthened (Articles 220 § 1, 218 § 2). Coastal State's jurisdiction is extended according to the degree of harm threatened where the vessel is within a port or at an offshore terminal of the coastal State, or is navigating in the territorial sea or the exclusive economic zone of the coastal State (Article 220). In certain major cases, action by the coastal State may go as far as the detention of the vessel. However, the traditional primacy of jurisdiction of the flag State has only been partly reduced by the new convention provisions.

This traditional primacy of the flag State has proved to be particularly inadequate where events on the high seas produce a dramatic threat to a coastal State. This was highlighted by the stranding of the Liberian registered tanker Torrey Canyon off the Southwest coast of England in 1967, which resulted in the discharge of some 60.000 tons of oil. The British Government, after the failure of salvage attempts, ordered the bombing of the vessel in order to reduce pollution. This was categorised variously as an act of "last resort" and as an act of "self-preservation". The Torrey Canyon incident provoked a widespread controversy over the justification of remedial action in such circumstances (although the Liberian Government did not protest) on grounds of a state of necessity rather than on grounds of self-defence. It also led directly to a multiplicity of conventions which, in the main, were directed to specific perceived loopholes in existing international law. One of

these is the 1969 Brussels Convention relating to Intervention on the High Seas in Cases of Oil Pollution Casualties (82). The essential provisions of this Convention read as follows:

"Article I

1. Parties to the present Convention may take such measures on the high seas as may be necessary to prevent, mitigate or eliminate grave and imminent danger to the coast line or related interests from pollution or threat of pollution of the sea by oil, following upon a maritime casualty or acts related to such a casualty, which may reasonably be expected to result in major harmful consequences.

2. However, no measure shall be taken under the present Convention against any warship or other ship owned or operated by a State and used for the time being only on government non-commercial service.

Article V

1. Measures taken by the coastal State in accordance with Article I shall be proportionate to the damage actual or threatened to it.

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(82) 9 I.L.M. (1970), p. 25

2. Such measures shall not go beyond what is reasonably necessary to achieve the end mentioned in Article 1 and shall cease as soon as that end has been achieved; they shall not unnecessarily interfere with the rights and interests of the flag State, third States or of any persons, physical or corporate, concerned.

3. In considering whether the measures are porportionate to the damage, account shall be taken of:

a) the extent and probability of imminent damage if those measures are not taken; and

b) the likelihood of those measures being effective; and

c) the extent of the damage which may be caused by such measures."

This convention has been supplemented by the 1973 Protocol relating to Intervention on the High Seas in Cases of Marine Pollution by Substances other than Oil, which takes into account the growing threat to coasts caused by other substances, especially chemicals. Substantially, the provisions of the 1969 Convention apply to those other agents as well. The law of intervention on the high seas has not been further developped by the 1982 Law of the Sea Convention. Article 221 just reserves the legal situation existing under other rules:

1. Nothing in this part shall prejudice the rights of States, pursuant to international law, both customary and conventional, to take and enforce measures beyond the territorial sea proportionate to the actual or threatended damage to protect their coastline or related interests, including fishing, from pollution or threat of pollution following upon a maritime casualty or acts relating to such a casualty, which may reasonably expected to result in major harmful consequences.

2. ..."

Attempts by the USSR and France to extend the right of intervention were not successful at the Law of the Sea Conference. This leaves a number of questions as to the exacts scope of this right of intervention outside territorial waters open.(83) Whether the right of intervention stems only from the 1969, 1973 and 1982 Conventions or whether the treaty provisions should be considered as merely establishing the conditions and procedures for taking measures of intervention which are already open to States by virtue of customary international law is an open question. Can the right of intervention be conceived as a general rule to take action to prevent serious damage to the recognized interests of a State (in which case that right could be exercised even in cases other than a maritime casualty) or, alternatively, does the right exist only by virtue of, and under the conditions described in, the Conventions?

(83) See Bardonnet/Virally, le nouveau droit international de la mer 1983, pp. 244 et seq., 255 et seq; R. R. Churchill/Lowe; The Law of the Sea, 1983, p. 225 et seq; Van Reenen, XII Netherlands Yearbook of International Law, pp. 3 et seq; Third UN Conference on the Law of the Sea, Document vol. VIII, p. 152 et seq, vol. X, pp. 100 et seq.

IV. The role of international institutions

1 Introduction

In the preceding chapters, the role of international institutions has been mentioned in a number of contexts. International organizations are the most important element of institutionalized co-operation among States. We have now to look into the question how far existing international institutions respond to the need of co-operation which exists in relation to the situation which are the object of the present report and, if necessary, how far institutional arrangements could or should be developed.

In the case of military activities causing damage to the environment, there are at least three possible functions for international institutions:

a) verification and evaluation of the environmental problem;

b) actual measures to combat pollution or to reduce or eliminate the damage to the environment;

c) mediation between the parties to the conflict and /or third parties in order to facilitate fulfilling functions a) and b).

In addition, one could think of planning and preparing activities listed under a), b) and c).
Functions a) and b) are essentially technical functions. They require technical skills and expertise. In terms of international humanitarian law, they are in part civil defence functions as defined in Article 61 (a) nos. ix

and xix of the 1977 Geneva Protocol I. One could ask whether the functions envisaged under b) could be called measures similar to decontamination under number iv of the said article. The protection of desalination plants against all pollution would probably be a "preservation of objects essential for survival" under number xiv of the same article.

The major obstacle to the said technical functions being performed is the fact that, as a rule, they cannot be performed while the actual fighting is going on. Thus, mediating cease-fires in order to permit the necessary measures to be taken is essential. This mediation function has to be distinguished from the other two. It is by no means necessary that the three functions are performed by the same institution. The third function is rather a diplomatic, not a technical one.

2 The choice of appropriate institutions

It is now necessary to determine whether existing international institutions could adequately perform the functions just described. Given the fact that there exists already a great variety of international organizations, one should be cautious to create new ones. It would seem to be much more advisable to use existing ones, and to broaden, if necessary, their mandate. Four different types of organizations have to be considered: non-governmental organizations working in the field of the preservation of the environment, certain agencies of the United Nations, existing regional organizations having general powers or specific functions in the field of the preservation of the environment, and, last but not least, the ICRC.

The following criteria should be considered in answering the question whether a particular function can or should be performed by a particular organization: statutory powers of the organization, human and financial resources, specific experience.

3 Analysis of existing organizations

3.1 Non-governmental organizations

There are a number of non-governmental organizations active in the field of the preservation of the environment. It is not possible to consider all of them. One organization, however, plays a central role in this field and has gained a certain degree of official status. This is the International Union for the Conservation of Nature and Natural Resources (IUCN). The objects of IUCN are defined in Article 1 of its Statutes, which reads:

"1. The International Union for Conservation of Nature and Natural Resources shall have the following objects:

i) to encourage and facilitate co-operation between governments, national and international organizations and persons concerned with the conservation of nature and natural resources;

ii) to promote in all parts of the world national and international action in respect of the conservation of nature and natural ressources;

iii) to encourage scientific research related to the conservation of nature and natural resources and to disseminate information about such research;

iv) to promote education in and disseminate widely information on the conservation of nature and natural resources and in other ways to increase public awareness of the conservation of nature and natural resources;

v) to prepare draft international agreements relating to the conservation of nature and natural resources and to encourage governments to adhere to agreements once concluded;

vi) to assist governments to improve their legislation relating to the conservation of nature and natural resources; and

vii) to take any other action which will promote the conservation of nature and natural resources.

2. In order to give effect to these objects IUCN shall undertake necessary and appropriate measures and, in particular, may:

i) give support to governmental and non-governmental activities;

ii) form commissions, committees, working groups, task forces and the like;

iii) hold conferences and other meetings and publish the proceedings thereof;

iv) co-operate with other bodies;

v) collect, analyse, interpret and disseminate information;

vi) prepare, publish and distribute documents, legislative texts, scientific studies and other information;

vii) formulate and disseminate policy statements; and

viii) make representations to governments and international agencies."

It appears fair to state that functions like those described above would not, or only marginally, fall under this definition of IUCN functions. Functions of IUCN are advice, research, drafting, lobbying, not the kind of field action required to solve the problems of actual environmental incidents. Some supporting measures for performing the functions described above could, however, be undertaken by IUCN, for example the training of personnel performing such functions, advice on contingency planning and the like.

3.2 UN agencies

The UN agencies which have to be considered in our context are those concerned with the protection of the environment and disaster relief. There are at least two precedents for UN agencies or so called specialized agencies having statutory powers in a particular domain also taking action concerning this same domain in times of armed conflict. These examples are the United Nations High Commissioner for Refugees who has taken action for the protection of refugees in times of armed conflicts, and UNESCO which has certain tasks under the 1954 Convention on the Protection of Cultural Property. Certain countries have not accepted the United Nations for political reasons. It is not the purpose of this report to evaluate the action of UN agencies in the field of protection of

victims of armed conflicts. The work of the High Commissioner for Refugees, despite the difficulties encountered, has to be considered a positive achievement. But this is outside the purview of this report. The same holds true for the role of UNESCO. There are reports of successful UNESCO activities for the protection of cultural property in times of armed conflict (84). It seems, however, doubtful whether it is possible to draw any general conclusions on UNESCO activity in this field on the basis of available published reports. Certain other UN agencies, however, must be considered in more detail.

3.2.1 UNDRO

The mandate of the United Nations Disaster Relief Co-ordinator has been defined by General Assembly Resolution 2816 (XXVI). It is difficult to determine however, whether this mandate covers the man-made disaster which may result from armed conflict. In our view, action in times of armed conflict is at least not excluded. The function of UNDRO is mainly one of co-ordination, but it also provides technical assistance. It may thus, for example, recruit experts who could perform some of the functions described above. It would, however, be hard to envisage a major role for UNDRO with respect to environmental incidents in times of armed conflict without a further clarification of the mandate by a General Assembly resolution. Whether such a resolution could be obtained, is an open question.

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(84) Toman, UNESCO's mandate for implementation of the Hague Convention for the Protection of Cultural Property in Case of Armed Conflict, mimeographed UNESCO paper, 1983, p. 23 et seq.

3.2.2 UNEP

The mandate of the United Nations Environment Programme has been defined by General Assembly Resolution 2997 (XXVII). It seems quite clear that the mandate of the UNEP Secretariat would not permit action of the kind described without a mandate from the Governing Council. The mandate of the Governing Council is defined in rather general terms. It might be possible to bring action of the kind described under the power

> "to promote international co-operation in the field of the environment and to recommend, as appropriate, policies to this end".

Such an interpretation, however, would be rather bold. As in the case of UNDRO, clarification of the mandate by the General Assembly would probably be necessary.

From the point of view of knowhow and expertise, some UNEP involvement in functions a) and b) could be envisaged. UNEP could for instance be used as a kind of clearing house for expertise, UNEP experts could work in these functions in the same way as UNEP experts do in the field of a technical assistance. For the actual operation of co-operative schemes, regional organizations or institutions for the protection of the environment might be better equipped and prepared to play this role. As to function c), this would be completely new and out of the scope of UNEP experience.

3.3 Regional mechanisms

In the Chapter on duties to co-operate (2.2.5), it has been pointed out that there exist a number of regional conventions providing for co-operation in case of environmental incidents. All these instruments provide for some kind of institutional setup to organize individual and joint action to combat and abate the consequences of environmental incidents. At least in areas where such mechanisms exist, they are probably best equipped to perform functions a) and b) described above. Whether these mechanisms are sufficiently strong and stable to function also in the context of an armed conflict, remains an open question. But this is to a greater extent a problem related to function c). Regional mechanisms for the protection of the environment are as a rule institutions which function in times of peace, despite of the fact that such institutions have been created in areas where there has existed and continues to exist a high degree of political tension. These institutions have no experience related to the task of creating conditions in which the technical work can be done even in times of armed conflict.

3.3.4 The ICRC

The International Committee of the Red Cross is an impartial humanitarian organization which has a certain number of functions in the field of the laws of war, in particular the function to mitigate the sufferings of the victims of armed conflicts. It has certainly no expertise or experience to perform functions a) and b) described above. It is, on the other hand, the only organization we have so far analysed here, which has the necessary experience and international standing to perform function c). In the past, the ICRC has assumed

the role of establishing co-operation and contact between the parties to a conflict in a number of questions as the problems arose. The activities of the ICRC have by no means been limited to questions of relief and treatment of prisoners.

As to the legal basis of the kind of action envisaged here, two kinds of norms must be distinguished:

a) the Geneva Conventions and the Protocols additional thereto,

b) the statutes of the Red Cross and Red Crescent movement.

As to the first category of norms, the first element to be considered is the right of initiative pursuant to Article 10 of the Fourth Geneva Convention of 1949 (85):

> "The provisions of the present Convention constitute no obstacle to the humanitarian activities which the International Committee of the Red Cross or any other impartial humanitarian organization may, subject to the consent of the parties to the conflict concerned, undertake for the protection of civilian persons and for their relief."

Action to protect the environment means, as a rule, at the same time action for the protection of the civilian population. It is also a "humanitarian" activity because, at least on the basis of Articles 31 § 3 and 55 Protocol I additional to the Geneva Conventions, the legal duty to protect the natural environment is part of international humanitarian law. This right of initiative is strenghtened by Article 81 Protocol I :

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(85) See Sandoz, Le droit d'initiative du Comite International de la Croix-Rouge, 22 German Yearbook of International Law (1979), pp. 352 et seq.

"The Parties to the conflict shall grant to the International Committee of the Red Cross all facilities within their power so as to enable it to carry out the humanitarian functions assigned to it by the Conventions and this Protocol in order to enable the protection and assistance to the victims of conflicts; the International Committee of the Red Cross may also carry out any other humanitarian activities in favour of these victims, subject to the consent of the Parties to the conflict concerned."

An activity to protect the environment would at least constitute an "other humanitarian activity" within the meaning of the article just quoted.

The action of the International Committee of the Red Cross could find a corresponding basis in Article VI § 4 of the Statutes of the International Red Cross:

"(The ICRC) undertakes the tasks incumbent on it under the Geneva Conventions, works for the faithful application of these Conventions and takes cognizance of complaints regarding alleged breaches of the humanitarian Conventions."

In so far as the duty to protect the environment is a duty under the Protocol additional to the Geneva Conventions, the work for the "faithful application" of this norm is a genuine task of the ICRC. But even if the question of the threat to the environment is not one of faithful application of the Conventions and the Protocol because in the specific case, the damage to the environment might not be due to a violation, action by the ICRC could be based on Article VI § 6 of the Statute:

"(The ICRC) takes any humanitarian initiative which comes within its role as a specifically neutral and independent institution and intermediary and considers any question requiring examination by such an institution."

It has been pointed out above that what is required in the situation envisaged here is exactly that neutral intermediary which has the function to bring about a situation in which the technical experts can work on the elimination of the environmental damage.

Under Article VI § 8,

> "(the ICRC) accepts the mandates entrusted to it by the International Conference of the Red Cross."

This provision makes it possible also to consider resolutions of the International Red Cross Conferences as the basis for ICRC activities. Under Resolution X of the 20th International Red Cross Conference (Vienna 1965), the ICRC is encouraged to undertake all efforts likely to contribute to the prevention or settlement of possible armed conflicts and to associate itself to appropriate measures taken for this end. As an action to prevent or eliminate environmental damage, and the fact that the parties are co-operating for that purpose, in itself could be a contribution to the reestablishment of peace, this would be an additonal basis for ICRC activities in the field of the protection of the environment.

It should also be noted that the activities of the ICRC are not limited to the problems of the relations between the parties to the conflict. The humanitarian activities of the ICRC may also benefit neutral countries and their populations.

4. Conclusions

The different functions which have to be fulfilled in the case of environmental incidents threatening neutral States in the course of an armed conflict will have to be performed by different institutions. For the more technical problems of evaluation of the incident and actual measures to abate pollution, existing regional institutions, if necessary with the help of such agencies as UNEP, are probably best equipped to fulfil these responsibilities. It is, however, not the purpose of this report to go into the question of the general ability of such institutions to cope with environmental incidents. It may well be that in an actual case, help offered by third States might do the job equally well. What is necessary in any case is an institution prepared and able to bring about the necessary co-operation between the parties to the conflict without which the work of the said environmental organizations or experts and technicians provided by third States is not possible. It is suggested that the ICRC is the appropriate agency to fulfil this particular function. It is true that there have been conflicts where the ICRC, for one reason or another, was not able to fulfil similar functions. But the role of the ICRC is not necessarily monopolistic. The conventions often speak of the ICRC and other impartial humanitarian organizations. While the ICRC should be the primary agent to undertake the functions described, other institutions might come in to do the mediating work where the ICRC is unable or unwilling to undertake it.

V. Conclusion

The survey of existing substantive rules, procedures and institutions that we have conducted enables us to draw a number of conclusions. The currently applicable law, as we have found, embodies a number of fundamental principles which provide positive and satisfactory answers to the questions raised by the situations which form the subject of this study.

It is, however, important that the States concerned cooperate with one another on the basis of these principles with a view to promoting measures to protect the environment and to prevent damage being caused to the environment by military operations. Despite the fact that the States are bound to co-operate by reason of the rules of law that apply, despite the fact that institutions exist whose task it is and which also possess the resources to facilitate such co-operation, experience show that such co-operation frequently encounters considerable difficulties. This duty to co-operate must, accordingly, be reaffirmed and strengthened and means must be sought to develop and facilitate the work in existing institutions.

This group of experts was not asked to propose specific initiatives in this regard. We believe, however, that we are duty bound to summarize our discussions in the form of certain fundamental principles which could serve as a basis for initiatives to be taken in the appropriate framework or frameworks.

PRINCIPLES CONCERNING THE PROTECTION OF THE ENVIRONMENT IN TIMES OF ARMED CONFLICT

1. Under the general rules of international law, States are obliged not to use their territory or carry on their activities outside their territory in a manner prejudicial to the rights of other States. They must, in particular, take care to ensure that the integrity and inviolability of the territory of other States are respected. They must also observe the principle of the peaceful use of outer space, the sea-bed and ocean floor and the high seas.

2. States are under a duty to ensure that activities carried on within their jurisdiction or control do not cause any environmental damage in areas under the jurisdiction of other States or beyond the limits of national jurisdiction.

3. In the event of armed conflict, treaty rules protecting territorial integrity and the environment remain applicable to States not parties to a conflict. Their violation may bring into play the rules of international law on the responsibility of States regardless of where the damage arose.

4. The parties to a conflict are obliged not to cause damage to the environment of third States or of areas not subject to any national jurisdiction.

5. In relations between States parties to the conflict, the mere occurrence of the conflict does not put an end ipso facto to their treaty obligations in regard to the protection of the environment. It is at all events forbidden to employ methods or means of warfare which are intended, or may be expected to cause widespread, long-lasting and severe damage to the neutral environment.

6. Each State individually and, in consequence, all States parties to a convention are under an obligation to ensure that the norms governing the international protection of the environment are applied as far as possible by the States engaged in a conflict.

7. If environmental damage is likely to occur or does occur, each State, and in particular to the conflict, must do everything in its power to prevent it or bing it to an end and must give favourable and bona fide consideration to any offer of assistance from third States or international organizations and facilitate work done in pursuance of that offer. For those purposes, the parties to the conflict must endeavour to cooperate with one another.

8. The International Committee of the Red Cross or any other impartial humanitarian body may offer its services to the States or parties concerned in order to facilitate any action designed to protect the environment.