Chapter II

Forms of Liability for Environmental Damage

I. Introduction

International practice shows that the States have now accepted a general principle of liability for environmental harm. According to this principle, States must answer for environmental harm caused by activities they have carried out or allowed within their own territory or by activities that are under their control. Moreover, many states also seem to accept the principle that, as far as the environment concerned, there exist obligations of such fundamental importance that their breach may even constitute an international crime.

Previously, environmental damage was regarded as merely incidental to armed conflicts, but now it has become a fundamental part of military strategies in armed conflicts. To prevent or mitigate environmental damage international liability regime is established. International liability is triggered when there is an act imputable to a State or other international persons, whether a legal act or act in violation of an international obligation, which causes damage to the environment.

In this chapter different forms of liability for environmental damage and their consequences will be identified.

II. Forms of Liability for Environmental Damage

We can basically identify different regimes of liability for environmental damage: fault liability and liability without fault.

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1 Trail Smelter Case (United States v. Canada), See American Journal of International Law, vol. 35 (1941), pp. 684-736.
1. Fault Liability

The international liability that results from a wrongful act imputable to a State or other international person is “fault Liability”. To establish such liability the victim state has to show that the accused state has committed an act in breach of an international obligation. The plaintiff state also has to prove the link between the alleged action and the damage that was suffered (causation). Fault liability is based on a state failure to use due diligence to avoid causing damage.5

Fault liability was recognized by the ILC when it provided that “there is an internationally wrongful act of a State when: (a) conduct consisting of an act or omission is attributable to the State under international law; and (b) that conduct constitutes a breach of an international obligation of the State.”6 Under that definition, fault is a violation of any international rule. The violation of an international obligation, whether derived from customary or conventional sources, is a wrongful act that can result in the imposition of responsibility on a State or other international person for damage caused by such an activity.

The Secretary General of the United Nations, as a “Commander in Chief” of the United Nations armed forces, issued a binding7 Bulletin that prohibits his forces from “using methods of warfare intended to cause widespread, long lasting and sever damage to the natural environment.”8 According to this provision, United Nations armed forces, or any U.N. operations conducted under U.N. command or control are responsible for any environmental damage that identified as “widespread, long-lasting, and sever damage”.

Armed conflict may cause transboundary environmental harm in neutral states, which will held the source states liable whether the armed conflict took place in accordance to the rules of law or not. For example, when Iraqi military operation caused

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6 Article 3 of the Draft Articles on State Responsibility, note 2.
pollution that contaminated Iran, Pakistan, and India, those countries held Iraq liable, even if it raised the legal issue of self defense.\(^9\)

The state obligation to protect other states from transboundary pollution, including those resulting from armed conflicts, was first elaborated in the Trail Smelter Case.\(^10\) The Trail Smelter rule, as "a framework for the analysis of interstate dispute with environmental dimensions," has been widely accepted as a statement of customary international law generally applicable to cases of pollution. The Court stated that under the principles of international law "no state has the right to use or permit the use of territory in such a manner as to cause injury by fumes in or to the territory of another or the property or persons therein." Thus, as a result of emission of sulphur dioxide by the Smelters of the Consolidated Mining and Smelting company activities, Canada was held liable for the damages produced in the state of Washington by pollution, engendered by the discharge of sulphur dioxide into the atmosphere.

The International Court of Justice (ICJ) reaffirmed the same obligation in the Corfu Channel Case.\(^11\) The case was concerned with the right of passage of British warships through the Corfu Channel. In 1946, Albania tried to prevent the British warships from passing through the Channel by military forces, including laying anti-vessels mines, to prevent their passage. In this case, the Court concluded that it is "every state obligation not to knowingly allow its territory to be used for acts contrary to the rights of other States". Accordingly, Albania was held liable for damages caused to the British warship.

In 1972, the Stockholm Declaration incorporated the Corfu Channel standard in Principle 21, which prohibited States from allowing their territory to be used for acts contrary to the rights of other nations.\(^12\) Principle 2 of the Rio Declaration\(^13\), relevant to transboundary environmental damage, is almost identical to principle 21 of the Stockholm Declaration: "States have [...] the responsibility to ensure that activities


\(^10\) Trail Smelter Case, note 1.


within their jurisdiction or control do not cause damage to the environment of other States.” These legal provisions hold any source state responsible and liable for environmental damage crossing its borders and harming any neighboring state.

According to these cases, there may be four situations in some of which a state can be held liable when acts committed in its territory causes harm to other states:

First, a private entity uses the territory to harm others without the state's permission or against its will. In this case, the state will not be internationally liable if it cooperates for the purpose of arresting or defeating the pirates.

Second, the state knows that there are terrorists groups in its territory, but is passive, and looks the other way. For example, some other countries provide money to certain charitable organizations in their territory, knowing that some of the charitable money is going to help terrorists. Here, the state can be held liable for its passivity, since it turns other way in order to avoid internal problems on its territory. The state provides, indirectly, a good soil for the terrorists to operate. However, the state could avoid being internationally liable by cooperating with other states to arrest the perpetrators and bring them to justice.

Third, the cases of negligence, when a state knows that there are some actions going on in its territory and foreseeably can cause damage and she fails to take reasonable care to avoid damage. For example, in the transportation of oil by tankers which is a function of great social utility, when the oil tanker owner fails to provide competent care in the international waters and the incompetent care results in a collision and oil spill, he is liable for his negligence. Or when a country knows that there are terrorists on its land and it could arrest them, but it does not do so because it does not take the threat seriously. As with the previous scenario, the state can be held liable for its negligence, since it could have arrested the terrorists but it did not before the terrorists committed their crimes. Here also the state could avoid international liability by cooperating other countries to fight terrorism. Much war caused damage could be avoided by exercising reasonable care to avoid unnecessary damage when choosing targets, choosing weapons for the targets, and delivering weapons to those targets. Although the intensity of the factual determination in deciding whether reasonable care
was taken under all circumstances makes negligence an incompatible tool on addressing the liability issue in the context of war.

And fourth, when the state is harboring terrorists, and is actively helping terrorists and hiding them. An obvious example of this situation involves the Taliban Government, in Afghanistan (1995-2001). In this situation, the Government is internationally liable, since without Taliban’s help, the Al Qaeda terrorist groups would have had no place to train their personnel or to plan their crimes. The same responsibility can be imposed against Pakistan Government, as it was alleged that Pakistan Government had given sanctuary to Taliban and Al Qaeda to launch attacks in Afghanistan.

Some national systems, besides establishing different kinds of liability, reinforce the international liability system. For example, the Restatement third of the Foreign Relation Law of the United States provides that:

(1) A State is obligated to take [. . .] measures as may be necessary, to the extent practicable under the circumstances, to ensure that activities within its jurisdiction or control (a) conform to generally accepted international rules and standards for the prevention, reduction, and control of injury to the environment of another State or of areas beyond the limits of national jurisdiction; (b) are conducted so as not to cause significant injury to the environment of another States or of areas beyond the limits of national jurisdiction. (2) A state is responsible to all other States (a) for any violation of its obligations under Subsection (1) (a), and (b) for any significant injury, resulting from such violation, to the environment of areas beyond the limits of national jurisdiction. (3) A State is responsible for any significant injury, resulting from a violation of its obligations under Subsection (1), to the environment of another State or to its property, or to persons or property within that State's territory or under its jurisdiction or control. 14

In general, international law as well as international practice shows that a customary rule on environmental protection is now established. This customary rule places a general obligation on states to prevent damaging environment, an obligation breach of which brings about international fault liability.

The establishment of the objective element of the internationally wrongful act, i.e. the violation of an international obligation, brings into play the secondary norms. It is

however, the content of primary rules that determines whether an international obligation has been violated and, thus, an internationally wrongful act has been omitted.

The following factors may affect the establishment of a violation of international obligations relating to the protection of the environment: (i) absolute obligations and due diligence obligations; (ii) obligations of conduct and obligation of result; and (iii) the existence of circumstances precluding wrongfulness.\footnote{Rene Lefeber (1996), \textit{Transboundary Environmental Interference and the Origin of State Liability}, Kluwer Law International, p. 60-75.}

(i) Absolute Obligations and Due Diligence Obligations

Establishment of the violation of an international obligation by a state may depend on its efforts to comply with that obligation. Such an obligation is a due diligence obligation, which is different from an absolute obligation, the violation of which is independent from the efforts of a state to comply with. A due diligence obligation requires states to arrange all necessary measures of legislative, administrative, or juridical nature that are needed for the protection of interests of other state from being harmed by public or private conduct.

The due diligence concept is accepted in various fields of international law, e.g. maritime neutrality,\footnote{The 1982 Convention on the Law of the Sea, Dec. 10, 1982, U.N. Doc. A/CONF.62/122, \textit{Art. 194}, available also (Online: Web), accessed on 28 July 2009, URL: \url{http://www.un.org/depts/los/convention_agreements/convention_overview_convention.htm}. The Convention adopted in 1982. It is comprised of 320 articles and nine annexes.} the protection of aliens,\footnote{The Case Concerning United States Consular and Diplomatic Staff in Tehran is an Example. In an analyses as to whether Iran had taken “appropriate steps” to prevent the attacks on the United States Embassy and Consulates, the International Court of Justice concluded that the Iranian authorities “had the means at their disposal to perform their obligations” and that they “completely failed to comply with these obligations” (ICJ Reports, 1980, para. 68).} and the prevention and abatement of transboundary environmental interference.\footnote{See e. g. 1992 UN/ECE Convention on the Protection and the Use of Transboundary Watercourses and International lakes (Art. 2); 1992 UN/ECE Convention on the Transboundary Effects of Industrial Accidents (Art. 6); 1991 UN/ECE Convention on Environmental Impact Assessment in a Transboundary Context (Art. 2(1); 1985 Vienna Convention for the Protection of the Ozone Layer (Art. 2 (1); 1979 Moon Treaty (Art. 7 (1); 1979 UN/ECE Convention on Long Range Transboundary Air pollution (Art. 2); 1967 Outer Space Treaty (Art. IX); 1976 Bonn Convention for the protection of the Rhine Against Chemical Pollution (Art. 1).} The concept has proved particularly suitable to describe the degree of supervision which a state must exercise to prevent private
persons within its jurisdiction or control from harming legally protected interests of other state. 19

Whether an obligation is a due diligence obligation depends on the content, the object, and the purpose of that obligation. If an obligation calls on states to take appropriate measures, it only requires states to act diligently in order to prevent environmental harm to others. Obligations formulated focus on the result of an action rather than the action itself, requires the actual prevention of harm to the environment. Thus, in each and every case, the substance of the obligation must be reviewed to find a breach of the applicable norm.

In order to establish a due diligence obligation, it is necessary to determine the degree of diligence which should be observed by states. The standard of diligence depends on the circumstances in which the specific case happened, in particular (a) the degree of control, and (b) the object of control. States are only required to exercise due diligence with respect to activities within their jurisdiction or control. Second, the standard of diligence varies with the degree of hazardousness of the object of regulation and control. Abnormally dangerous activities, such as nuclear activities, should have a relatively strict standard of regulation and control. As activities are more dangerous more restrict standard of regulation and control is required. 20 Even it is argued that the abnormally dangerous activities are subject to strict liability, i.e. the operator is liable for damage resulting from that activity regardless of how much care he has taken to avoid the damage. 21 Thus, as the warfare is an extremely dangerous activity and the likelihood that it will cause damage is very high, the damage resulting from war is subject to strict liability. 22

Notwithstanding the predominance of due diligence obligations, absolute obligations are also accepted in international law. Numerous treaty obligations are phrased in absolute terms. 23 If it is proved that an obligation is absolute, the failure to

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20 Ibid, p. 67-68.
22 Ibid.
23 For example, Article III (1) of the International Convention on Civil Liability for Oil Pollution Damage provides that “the owner of a ship at the time an incident or, where the incident consists
comply with automatically entails breach of an international obligation. In order to establish the violation of an absolute international obligation, a state’s efforts to comply with the obligation are not relevant.

It is argued that generally phrased conventional obligation to prevent international environmental harm as well as obligations phrased by terms like “shall endeavor”, are due diligence obligations.\textsuperscript{24} An opposing view maintains that these obligations if not phrased by terms like “shall endeavor” are absolute.\textsuperscript{25} Some scholars are in this view that the obligations preventing damages resulting from abnormally dangerous activities are absolute.\textsuperscript{26} According to this view, the materialization of such damage entails fault liability of the international person, which can not be exempted by demonstrating that it has acted diligently in minimizing the damage.

(ii) Obligation of Conduct and Obligation of Result

Another subdivision of international environmental obligations can be found in the ILC’s Draft Articles on State Responsibility. Two types of obligations are identified in the Articles: obligations of conduct (Art. 20) and obligation of result, i.e. an obligation to prevent a given event (Art. 23).

The essential difference between these two types of obligations is that obligations of conduct require states to adopt a particular course of conduct, whereas obligations of result leave states free to select the means of their own choice to achieve result desired and they have to ensure the prevention of specific occurrences.\textsuperscript{27} Procedural environmental obligations can be classified as obligation of conduct. This \textit{inter alia} includes obligations in planning phase, e.g. obligation to assess, to notify, to inform, to

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consult, and to negotiate (in the context of transboundary environmental harm); in the operational phase, e.g. obligations to monitor and to control activities that are carried on; in the termination phase, e.g. the obligations to safeguard the sites of abandoned activities. All these obligations require specific action of states rather than a specific result to be achieved. Breach of this kind of obligations is established upon proof that a state has not adopted the course of conduct required. Obligations of results include, for example, obligations to reduce emissions of a certain substance with a certain percentage within a limited time. If such reductions have not been achieved within the time limit set, it amounts to a violation of an obligation, unless it can be proved that the obligation is a due diligence obligation and efforts were made to achieve the result desired.

(iii) Circumstances Precluding Wrongfulness

The ILC's Draft Articles on State Responsibility contain a list of circumstances which preclude wrongfulness: (1) consent; (2) legitimate counter measures; (3) Force majeure and fortuitous event; (4) distress; (5) state of necessity; and (6) distress. The existence of these circumstances may be invoked by states to defend them against accusation that they failed to observe their obligations relating to the protection of environment.

2. Absolute Liability

There is possibility of a regime of liability without a wrongful act. A State and other international person can be held liable in international law for activities not prohibited by international rules, but harm another country's environment. Such regime is characterized by the fact that the obligation to pay compensation, or more generally, liability arises from lawful activities, on the basis of the mere causal link between these activities and the harm done. For this reason such regime of liability is absolute. The idea is that due

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diligence affords no exemption from liability to compensate and accordingly, liability can no longer be linked to the lack of effort of the source state to prevent harm to the environment. Absolute liability has several elements by which it differs from fault liability. Some of them are as follow:

First and foremost, absolute liability may arise without the violation of an international obligation. It gives full effect to polluter-pay principle and the reparative function of liability. Accordingly, the efforts of the source state to prevent environmental interference causing harm to the environment are irrelevant.

Second, the functional scope of absolute liability is usually limited to the category that is called ultra-hazardous activities, also referred to as abnormally dangerous or activities which possess significant risk.

Third, absolute liability only arises *ex post facto*, and thus actual occurrence of harm is a necessary condition for this form of liability to arise.

Fourth element of absolute liability is the requirement of a causal link between the activity and the harm caused. The cause must be established by clear, direct and convincing evidence. Some international instruments that address international liability explicitly require a link between state's actions and the damage. Proof of causation is often difficult particularly in the environmental cases related to military activities, as the environmental effects of military activities may be difficult to trace, particularly when

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32 In the Gulf War II, the United Nations Compensation Commission (UNCC) declared that “the two essential elements of admissible losses are (a) that such losses must be the result of Iraq’s unlawful invasion and occupation of Kuwait and (b) that the causal link must be direct. Since the UN trade embargo was imposed in response to Iraq’s invasion and occupation of Kuwait, losses suffered solely as a result of that embargo are not considered eligible for compensation because the causal link between the invasion and the loss is not sufficiently direct (Decision No.15 of the Governing Council of the UNCC, UNCC Dec. 18, 1992, No. 15, para. 3.
34 For example, Article II (I) (3.4) of the Vienna Convention on Civil Liability for Nuclear Damage provides that “the operator of a nuclear installation shall be liable for nuclear damage upon proof that such damage has been caused by a nuclear incident in his nuclear installation.”
more than one international actor is involved. Modern technology and science can be helpful in identifying the sources of the environmental effects.

Fifth, absolute liability extends, in principle, to all damages caused by activities carried on within a state’s jurisdiction or control.\(^{36}\) A state may be held liable when any of its representatives cause damage, even if the representative acts with out authority. If military personnel use available arms, such as nuclear, biological or chemical weapons, to harm human health and the environment, the state’s failure to prevent that action can result in state’s liability. Activities are covered regardless of the fact that they are carried out by private or public entity.

Absolute liability or liability without fault has been adopted by the International Law Commission (ILC) in the “International Liability for Injurious Consequences Arising out of Acts not Prohibited by International Law” topic.\(^{37}\) The World Commission on Environment and Development (WCED) also has suggested absolute liability to work as a legal base for international transboundary harm.\(^{38}\)

Absolute liability has been adopted in a number of conventions. A clear example of absolute liability is found in Article II of the Convention on International Liability for Damage Caused by Space Objects (Space Liability Convention)\(^{39}\), which provides that “a State which launches a space object is liable to pay compensation for damage caused by its space object on the surface of the Earth or to aircraft in flight.”\(^{40}\) This convention has been invoked in the case of Soviet Cosmos 954.\(^{41}\)

The other treaty which provides the source of absolute liability is the 1987 CMEA Convention on Liability for Damage Caused by Radiological Accidents in International


\(^{38}\) WCED, “Our common Future” (Oxford: Oxford University, 1972), 349.

\(^{39}\) *Convention on International Liability for Damage Caused by Space Objects*, note 36.

\(^{40}\) *Ibid*, Article II.

\(^{41}\) The Soviet Cosmos Satellite, which had a nuclear power source on board, malfunctioned and crash- landed in a thinly populated area of Canada in 1978. The damage caused to Canada consisted of cost connected to with the search and rescue operation and the clean up operation. Canada submitted a claim for reparation invoking the 1972 Space Liability Convention and the 1967 Outer Space Treaty, as well as on general principles of international law. For the study of the legal aspect of the case see Rene Lefeber, *note* 15, p. 163-165.
Carriage of Irradiated Nuclear Fuel from Nuclear Power Plants.\(^{42}\) Like the 1972 Space Liability Convention, the CMEA Convention imposes absolute liability on states.\(^{43}\)

Another example is the International Convention on Civil Liability for Oil Pollution Damage\(^{44}\), which provides that “the owner of a ship at the time of an incident or, where the incident consist of a series of occurrence, at the time of the first such occurrences, shall be liable for any pollution damage caused by oil which has escaped or been discharged from the ship as a result of the incident.”\(^{45}\) The Convention, however, excludes the owner from liability if he can prove that such pollution resulted from an act of war, hostilities, civil war, insurrection, or a natural phenomenon of an exceptional, inevitable and irresistible character.\(^{46}\) Vienna Convention on Civil Liability for Nuclear Damage has also adopted liability and recognized an operator of a nuclear installation, including a military installation, liable for nuclear damage upon proof that such damage has been caused by a nuclear incident.\(^{47}\)

Similarly, the Convention on Third Party Liability in the Field of Nuclear Energy imposes absolute liability in an operator of a nuclear installation when any incident at the facility causes damage or loss of life or property.\(^{48}\)

Other example of absolute liability is the agreement between Canada and United States concerning construction of the Gut Dam part of which was located on United States territory. The construction of the dam by Canada was subjected to the condition that:

> "if the construction and operation of the said dam shall cause damage or detriment to the property owners of Les Galops Island, or to the property of any other citizens of the United States, the Government of Canada hall pay such amount of


\(^{44}\) International Convention on Civil Liability for Oil Pollution Damage, 29 Nov. 1969, 9 ILM 45.

\(^{45}\) Ibid, Article III (I).

\(^{46}\) Ibid.


compensation as may be agreed upon between the said government and the parties damaged, or as may be awarded the said parties in proper court of the United States before which claims for damage may be brought."

From the wording of the condition appears that liability in this agreement was meant to be strict.

UNSCOM\textsuperscript{50} and UNMOVIC\textsuperscript{51} activities in Iraq are considered as examples of absolute liability.\textsuperscript{52} UNSCOM destroyed some Iraqi arms of mass destruction, and so did UNMOVIC. Their work caused environmental damage in Iraq, without violation of any international rules.\textsuperscript{53} The Iraqi representative to the UN raised the issue of environmental damage caused by the destruction of arms of mass destruction in Iraq, during the UN Security Council’s meeting of April 22, 2003. The UN was held to be internationally liable for all environmental damage resulting from the Iraqi disarmament program.\textsuperscript{54}

Absolute liability for abnormally dangerous activities would best serve the purpose of remediation and deterrence of war time environmental damage. Since war is an abnormally dangerous activity, application of this cause of action would provide remediation for all environmental damage caused by war and would deter conducting war by environmentally harmful means when there are less damaging means available. It

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\item \textsuperscript{50} By its resolution 687 of 3 April 1991, the United Nations Security Council established the terms and conditions for the formal cease-fire between Iraq and the coalition of Member States cooperating with Kuwait. Section C of this resolution called for the elimination, under international supervision, of Iraq's weapons of mass destruction and ballistic missiles with a range greater than 150 kilometres (km), together with related items and production facilities. It also called for measures to ensure that the acquisition and production of prohibited items were not resumed. The United Nations Special Commission (UNSCOM) was set up to implement the non-nuclear provisions of the resolution and to assist the International Atomic Energy Agency (IAEA) in the nuclear areas. For more information visit (Online: Web), URL: http://www.un.org/Depts/unscom/General/basicfacts.html.
\item \textsuperscript{51} The United Nations Monitoring, Verification and Inspection Commission (UNMOVIC) was established after the adoption of Security Council resolution 1284 of 17 December 1999. UNMOVIC replaced the former UN Special Commission (UNSCOM) and continued with the mandate to verify Iraq's compliance with its obligation to be rid of its weapons of mass destruction (chemical, biological weapons and missiles with a range of more than 150 km), and to operate a system of ongoing monitoring and verification to ascertain that Iraq did not reacquire the same weapons prohibited to it by the Security Council. For more information visit (Online: Web), URL: http://www.unmovic.org.
\item \textsuperscript{52} See Nada Al-Duaij, note 4, p. 349-50.
\item \textsuperscript{53} Ibid.
\item \textsuperscript{54} Ibid.
\end{itemize}
would be relatively easy to apply. Its application would not depend upon determining that a wrongful or aggressive action has conducted by state concerned.\(^{55}\)

Absolute liability is proved to be a controversial issue,\(^{56}\) since the environmental damage is caused by a lawful activity, without breach of any treaty obligation. Thus, further research is required to reach in any concrete conclusion.

III. General Review of Conventional International Law

As it was shown, conventional international law on the protection of the environment, contains some agreements that include precise rule on liability, which indicate forms of liability applicable in case of violation of due diligence or in case of damage. For example, the 1972 Convention on International Liability for Damage Caused by Space Objects\(^{57}\) provides two different forms of liability: absolute liability without a wrongful act for damage caused on the surface of the Earth or to aircraft in flight\(^{58}\) and fault liability for other kinds of damage.\(^{59}\)

In reality, however, the existence of precise treaty rules on liability for environmental damage is very rare. Most agreements on environmental protection either have no rules at all on liability, or they have only general and vague rules. In such a situation, in order to know whether liability for violation of conventional rules exists, and what form does this liability have, the exact nature of the primary obligations laid down by the concerned treaty must be identified.

If the environmental treaties are being studied from this point of view, different categories of primary obligations and as a result various forms of liability, can be found.

First of all, the treaty may consider very general commitments concerning its implementation. The vagueness and the uncertainty of such commitments raises doubts as to their binding nature and therefore also doubts as to the possibility of enforcing international liability for their breach. Commitments of this kind are, for example, laid

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55 Jeffrey G. Miller (200), note 20, p. 290.
58 Ibid, Article II.
59 Ibid, Article III.
down in the 1979 Geneva Convention on Long Range Transboundary Air Pollution\textsuperscript{60} (see, especially, Arts. 2, 3, 4, 5). Confirmation that they are non-binding commitments is given by the fact that the Convention excludes the applicability of international responsibility in the event of their breach. Indeed, the Convention expressly states in a footnote that it does not contain rules on State responsibility.

There are some other conventions which, after establishing commitments among the States Parties to co-operate, only lay down an abstract principle of liability and provide that the States Parties pledge themselves to adopt in the future precise rules regarding liability. For example, the 1976 Barcelona Convention for the Protection of the Mediterranean Sea against Pollution\textsuperscript{61} provides:

"The Contracting Parties undertake to cooperate as soon as possible in the formulation and adoption of appropriate procedures for the determination of liability and compensation for damage resulting from the pollution of marine environment deriving from violations of the provisions of the Convention and applicable protocols".\textsuperscript{62}

Secondly, the treaty may establish concrete obligations to prevent environmental damage. Actually, the great majority of existing treaties, in laying down general obligations binding on the States, contain obligations of this kind. Indeed, many agreements, particularly those that are relevant to the environment pollution, contain a special clause, in which the States pledge themselves to take "all appropriate measures" or to make "appropriate efforts" to control and reduce sources of pollution in the air or in the space. This is to be done both by establishing technical and administrative procedures in their own territory or regarding activities under their control and sometimes by organizing procedures for informing other States in the event of pollution. It is clear that such agreements do not establish the strict obligation not to pollute (obligation of result), but only the obligation to "endeavor" under the due diligence rule to prevent, control, and reduce pollution. For this reason the breach of such obligation involves liability for fault.


\textsuperscript{62} Ibid, Article 12.
Obligations of this kind can be seen in every sector of environmental protection. With regard to marine pollution, for example, the Convention on the Law of the Sea in its Article 194 establishes typical due diligence obligations, both "directly" binding on State organs and binding on such organs with regard to the activities of private persons. This Article clearly provides that:

"States shall take . . . all measures . . . that are necessary to prevent, reduce and control pollution of the marine environment from any source, using for this purpose the best practicable means at their disposal and in accordance with their capabilities...".

Similar obligations are established by Article 195, 196, 204, 206, and 207-12 of the Convention.

Due diligence obligations of prevention are also established by the 1972 London Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matter. For example, in Article I, the Contracting States undertake: "to take all practicable steps to prevent the pollution of the sea... by the dumping of waste and other matter...".

The conventional international law also contemplates due diligence obligations with regard to prevention in the area of pollution of common spaces and resources. The 1985 Vienna Convention for the Protection of the Ozone Layer, for example, provides that:

"The Parties shall take appropriate measures... to protect human health and the environment... against adverse effects resulting...from human activities which modify or are likely to modify the ozone layer".

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65 See, also Articles II, and VII (2).


67 Ibid, Article 2.
It may happen that a treaty, in order further to specify and substantiate the States obligations concerning the environment, contains rules which expressly prohibit certain activities, and therefore places on the States real and strict obligations not to harm environment. For example, the UN Convention on the Prohibition of Military and any other Hostile Use of Environmental Modification Techniques\(^{68}\) lays down an obligation of this kind in Art. I (1), under which:

"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".

Lastly, it is possible that a treaty on environmental protection establishes liability without a wrongful act. In this respect, the most well-known multilateral treaty is the already-cited one on international liability for damage caused by space objects. However, there are also several bilateral agreements which establish international liability for extra-territorial damage suffered by a Contracting Party and resulting from whatever type of activity carried out in the territory of the other Contracting Party. For example, in an agreement of 24 April 1964 between Finland and USSR, on common waterways, the Parties agreed in Article 5 that each Contracting Party that causes damage in the territory of the other Contracting Party through activities carried out in its own territory shall be liable and shall pay compensation.\(^{69}\) Similarly, in an agreement between Uruguay and Argentina concerning the La Plata River, it is provided in Article 51 that:

"Each Party shall be liable to the other for detriment suffered as a consequence of pollutions caused by their operations, or by those of physical or corporate persons dummied in their soil".\(^{70}\)

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Thus, an overall evaluation of conventional international law of the protection of the environment shows that various categories of obligations can be found to whose breach there correspond all the possible forms of international liability. In reality, the weight of the practice adopts due diligence obligations regarding prevention, to whose breach there corresponds liability for fault (or for lack of due diligence). Nevertheless, one should not exclude the possibility that the States might be taken liable without a wrongful act.

C. An Assessment of International Liability System

In selection between these two systems of fault liability and absolute liability international law experts have ignored the realities that surrounded both systems.\(^{71}\) They have raised abstract questions and discussed around, as such whether principle 21 of the Stockholm Declaration\(^ {72}\) supports absolute liability? Could Trail Smelter Case\(^ {73}\) be accounted as a supportive background for the fault liability system? Hence, instead of using structural framework based on balance between goals and interests of states, international law experts have laid down their systems on the basis of some limited and scattered instances of international tribunals' decisions, international declarations and charters. A practical review of the “fault” and “absolute liability” standards manifests the problems that the international law scholars faced.

In International traditional law, state liability has been stipulated to fault and negligence. This approach, however, has many problems. First of all it is a subjective concept and lacks specificity, and thus, it would correspond this meaning that an international liability system is laid down on the bases of a subjective concept. Second, existence of such a concept would prevent to establish an internationally common concept, which is necessary for a competent international system. Differences in culture, politics and economy may prevent a common understanding of negligence. In addition, this approach is suffering from the problem of “proving”, particularly in an international case, investigation on which would be treated as foreign intervention in to national affairs.


\(^{73}\) Trail Smelter Case (United States v. Canada), note 1.
and against the principle of state sovereignty. These problems accompanying the fault liability approach have led most of the new scholars to be supporting a new approach on state liability; i.e. absolute liability.

Preference between absolute liability and states' interest, however, is appeared as an obstacle against establishing a common concept among the members of international community. This absolute right is much attractive for environmental victims. Most of the industrialized countries, however, would not trust this framework. In addition, in this approach geographical conditions of some countries are not considered. For example, on the base of this approach, upper riparian countries would be compelled to continuously pay compensation on the interest of down stream countries.

Absolute liability has also been unpleasant for developing countries. These countries are mostly lacking necessary information required to predict the extent of damage that would caused by national activities, particularly those activities that developing countries depend on for their economic grows. Absolute liability may also hinder their abilities for competition at the international level and as a result it would prevent their economic development.

In addition, absolute liability is also suffering somewhat from the problem of subjectivity and lack of specificity. It is believed that imposing absolute liability against transboundary harm will be resulting in establishing an inefficient and a very complex system. Definition and quality of such activities that cause absolute liability, i.e. "ultrahazardous" activities or "significant" environmental harm in itself propound the problem of none specificity and subjectivity. It is said that almost all human activities may have some affect on environment. Thus, this question would always arise that which activities are "hazardous" and cause "significant" harm and which are not.

Further more, there exist the political issue of whether states would willingly subscribe to a regime that subject them to enormous cost of unavoidable damage in wars that they view as necessary for their own survival, the survival of a political or economic system, or the survival of a religious or ethnic group. Another problem, in the context of

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74 Ibid, p. 81.
war, is that warring nations may be too impoverished as a result of their conflict to pay the actual costs of remediation. This is particularly a problem for losing parties.

Considering the obstacles in establishing a common concept on environmental liability at international level, the members of international community has generally preferred to encourage states to address liability at national level.\textsuperscript{77}

IV. Consequences of International Civil Liability

If a state’s international civil liability for environmental damage is established, one or more of four consequences can be expected: (a) stopping the violation; (b) satisfaction; (c) restitution; or (d) compensation.\textsuperscript{78}

A. Stopping the Violation

The first and immediate response to a violation of international environmental rules is to stop the violation.

A State whose conduct constitutes an internationally wrongful act having a continuing character is under the obligation to cease that conduct, without prejudice to the responsibility it has already incurred. The injured State is entitled, where appropriate, to obtain from the State which has committed an internationally wrongful act assurances or guarantees of non-repetition of the wrongful act.\textsuperscript{79}

For example, if belligerents are spilling oil into the water bodies of the enemy, such as the Iraqi military did in 1991 in the Gulf, they can be required to stop such act immediately. When local authorities cannot stop violations committed against the environment, the controlling authority should do so. For example, during Iraq war, the first thing the occupied forces did was to assure the safety of petroleum richness of Iraq in Kirkuk.\textsuperscript{80}

\textsuperscript{79} Draft Articles on State Responsibility, note 1, Arts. 41-46.
This approach, however, is not applicable in most environmental damages that result from armed conflicts, because harmful techniques are typically used once rather than repeated. For example, atomic bombs were used against Japan once, and Iraq used chemical weapons against the Northern Iraqi Kurds once. Thus, asking the cessation of such acts is not helpful since they will not be repeated, and have already caused their effects on environment. However, it is still a positive sign when a nation agrees to stop causing unlawful damage to the environmental. For example, after the dropping of the atomic bombs on Japan, in 1945, the United States undertook not to use these weapons against any other nation in the future. Other nations could promise similarly, and thereby help to protect the environment.

B. Satisfaction

The second response to violation of an international environmental rule is satisfaction. Satisfaction for an international environmental violation entails an acknowledgment of the violation and some action to offset the damage. The ILC Report of 1996 on State Responsibility provides:

1. The injured State is entitled to obtain from the State which has committed an internationally wrongful act satisfaction for the damage, in particular moral damage, caused by that act, if and to the extent necessary to provide full reparation.

2. Satisfaction may take the form of one or more of the following:
   a. an apology;
   b. nominal damages;
   c. in cases of gross infringement of the rights of the injured States, damages reflecting the gravity of the infringement;
   d. in case where the internationally wrongful act arose from the serious misconduct of officials or from criminal conduct of officials or private parties, disciplinary action against, or punishment of, those responsible.

3. The right of the injured State to obtain satisfaction does not justify demands which would impair the dignity of the State which has committed the internationally wrongful act.

Satisfaction is an act undertaken by a State that violated the international rules, to satisfy another State that was affected by such violation. The nature of the satisfaction

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81 Nada Al-Duaij, note 4, p. 357.
82 The 1996 ILC Report on State Responsibility, note 76, art. 45.
varies with the nature of the violation. Satisfaction may be taken the form of an apology, the replacement of diplomatic or consular personnel, or an increase in the level of diplomatic relations. Any of these actions may amount to satisfaction of an environmental violation or other violation of international law.

There are different examples of this kind of response to the violation of an international environmental rule. The Japanese government apologized for damage caused during World War II, during diplomatic dealings with specific countries, and during UN human rights session in Geneva. A more recent example occurred in 2001, when an American airplane violated the air space of China, Beijing refused to hand over the crew or the airplane unless the United States apologized for its violation of China's air space.

Satisfaction could be considered as a response in the cases where damage to the environment involve both dignity or symbolic harm and ecological harm, for example, destruction of historic sites, or the destruction of a holy shrine or a national monument. In these cases damage is not just ecological, but also damage to the pride of the nation and thus, satisfaction could be considered as a response. Satisfaction, however, does not rehabilitate the environmental effects caused by wrongful military actions. Since future generations will be affected by environmental damage, the present generation has no right to accept apology for the sake of future generations. That view does not mean that nations should retaliate for environmental violations, but it does mean that environmental damage can be ameliorated only by restitution and compensation.

C. Restitution

According to Article 43 of the ILC Report;

The injured State is entitled to obtain from the State which has committed an internationally wrongful act restitution in kind, that is, the reestablishment of the

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85 Nada Al-Duaij, note 4, p. 360.
86 The 1996 ILC Report on State Responsibility, note 76, art. 43.
situation which existed before the wrongful act was committed, provided and to the extent that restitution in kind:

a. is not materially impossible;
b. would not involve a breach of an obligation arising from a peremptory norm of general international law;
c. would not involved a burden out of all proportion to the benefit which the injured stated would gain from obtaining restitution in kind instead of compensation; or
d. would not seriously jeopardize the political impendence or economic stability of the state which has committed the internationally wrongful act, whereas the injured state would not be similarly affected if it did not obtain restitution in kind.

Restitution is considered the best way to rehabilitate the environment, so that the environmental status can be restored to its situation before harmful activities. However, in some cases of environmental damage, such as the extinction of fauna or flora species, or the destruction of a historical site of a cultural monument, where damage is irreparable, restitution is not an applicable solution.

In a non-environmental case, the International Court of Justice (ICJ) highlighted the fundamental uncertainties as to the availability of restitution in international law. In Paraguay v. USA it was argued by Paraguay that the U.S. violated its obligations under the 1963 Vienna Convention on Consular Relations, in not informing Breard, a Paraguay national convicted of murder in the U.S and due to be executed, of his rights of access to the Paraguayan consular office and in not notifying the consulate of his detention. Paraguay sought restitution for being prevented from exercising its consular rights and ensuring the protection of its interested and those of its nationals. Paraguay also submitted an urgent request for immediate measures to prevent the execution, in order to protect the life of Breard and the ability of the ICJ to order restitution to Paraguay. Paraguay argued that if the U.S executed Breard before the Court could consider the merits of the case, Paraguay would be deprived of the opportunity to restore the status quo ante. The U.S admitted the breach of the Vienna Convention, but argued that an

apology was a sufficient response. The U.S. also claimed that the invalidation of the proceedings and a return to the status quo ante as penalties for the failure to notify was without legal support and was unworkable. The U.S. argued that restitution could not be ordered by the court. The ICJ left open the question of the availability of restitution, and found that the dispute as to whether restitution was available under the Vienna Convention could be determined only as part of a ruling on the merits of Paraguay’s claim.\(^{88}\)

In environmental cases, the availability of restitution as a remedy should be given particular attention for several reasons: the environment is not owned by the present generation only, but by future generations also; the risk of environmental harm might cross state borders and harm neighboring nations; and the fact that the environment cannot defend itself.

According to the Permanent Court of International Justice (PCIJ) in the Chorzow Factory case, restitution in an environmental disaster requires cleanup and rehabilitation efforts. PCIJ provided that “[r]eparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed.”\(^{89}\) Wiping out all the consequences of an illegal act against the environment requires cleanup and rehabilitation. Rehabilitation without cleanup may threaten the environment more than help it, since rehabilitation by normal construction work on an affected area can actually create additional unacceptable health hazards.\(^{90}\)

United Nations Compensation Commission (UNCC)\(^{91}\) under the Criteria of Climes took cleanup costs under consideration and provided that environmental damage includes losses or expenses resulting from “(a) abatement and prevention of environmental damage, including expenses directly relating to fighting oil fires and stemming the flow of oil and coastal and international waters; and (b) reasonable

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88 Ibid.
89 Chorzow Factory case, 1928 PCIJ, at 29, 47.
91 The UN Compensation Commission (UNCC) was established by the 692 Security Council Resolution in 1991 to process claims and pay compensation for losses resulting from Iraq’s invasion of Kuwait in Gulf War I.
measures already taken to clean and restore the environment of future measures which can be documented as reasonable necessary to clean and restore the environment[...].

Obtaining the necessary funds for clean up may not be an easy task. It would be a lengthy process, especially when the liable state tries to avoid, escape, or minimize due compensation.

One of the major obstacles to environmental restoration is the availability of expertise, since cleanup requires a sophisticated level of environmental talent that is available only in some developed countries, such as the United States and the United Kingdom, and some specialized international organization, such as UNEP and IUCN. For instance, after the defeat of the Iraqi Army in Kuwait in 1991, UNEP created a task force, which included experts from UNEP, the World Health Organization (WHO), and various regional governments, to conduct a detailed 90-day study of the environmental cleanup needed.

The shortage of both money and highly trained specialists would necessarily affect the cleanup process. To avoid such shortages, an international mechanism for funding could be established to promote, along with the cooperation of the specialized international organizations, a source of money and expertise. An example of such a fund to support the environmental cleanup is the one which was created by the International Maritime Organization (IMO) in the aftermath of the Gulf War II, and received pledges totaling $5 million from three undisclosed nations. The other model for such a plan is the European Community Commission’s formation of a $20 million plan for Iraq to combat oil well fires and protect wildlife on April 10, 1991. Twelve million dollars of the money was directed to support fire-fighting operation. This plan includes the creation of model sanctuary, which involves cleaning a heavily polluted zone, then creating a buffer zone around it.

93 The Spoils of War, 28 U.N. CHRON. 17 (June, 1991).
94 Jan G. S. Curtis, note 78.
97 Ibid, p. 223.
Other problems of restitution can be arising in the rehabilitation of sites that severely damaged during armed conflict. Damaged happened on the infrastructure could delay the response. Furthermore, despite efforts for cleanup, environmental damage often persists for a long time. It is said that the effects of the Kuwaiti oil fire during the Iraqi invasion could take centuries to rehabilitate. It was also predicted that recovery of the marine life from pollution in the Gulf will take decades. However, cultural and historical properties destroyed or burned during war would never be restituted.

D. Compensation

According to Article 36 of the Draft Articles on State Responsibility:

1. The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.
2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established.

Among the various forms of reparation, compensation is perhaps the most commonly response in international practice against an international wrongful act. In the Gabcikovo-Nagymaros case, the Court declared that “it is a well established rule of international law that an injured State is entitled to obtain compensation from the State which has committed an internationally wrongful act for the damage caused by it.”

Compensation is based on “polluter - pays principle”. Indeed, compensation defines the essence of the classic tort case, in which the injured party sues the allegedly responsible party for monetary damage to recover direct expenses or losses such as medical expenses, lost wages, diminished property values, or no-monetary reparation such as oil cleanup or a revegetation areas. In the Trail Smelter case, compensation

100 Draft Articles on State Responsibility, note 2, art. 36.
awarded to the United States was assessed on the basis of the reduction in value of the affected land, in which damage caused by sulphur dioxide emission from a smelter across the border in Canada. 103

In accordance with the Article 36(2) of the ILC Report on State Responsibility, compensation shall cover any financially assessable damage including loss of profits so far. The Qualification “financially assessable” excludes compensation for what is sometimes referred to as “moral damage”, i.e. the violation of rights not associated with actual damage to property or persons. This case would be the subject matter of satisfaction. Thus compensation is generally made through monetary payment. Though monetary payments may be call for as a means of satisfaction, but its function would be different from that of compensation. Monetary compensation is intended to offset the damage caused to the injured State as a result of the breach.104

As compared with restitution, compensation is considered for damage that is not covered by restitution, as it is clarified by the final phrase of Article 36 (“insofar as such damage is not made good by restitution”). Restitution may be insufficient to ensure full reparation. Restitution, is sometimes unavailable, where the property to be restored has been permanently lost or destroyed, or has deteriorated to such an extent as to be valueless. In these cases the compensation would be the only remedy for damage suffered by the State. Thus, compensation is always secondary to restoration.105

Article 44 of the 1960 ILC Report provides:

1. the injured state is entitled to obtain from the State which has committed an internationally wrongful act compensation for the damage caused by that act, if and to the extent that the damage is not made good by restitution in kind.
2. For the purpose of the present article, compensation covers any economically assessable damage sustained by the injured State, and may include interest and, where appropriate, loss of profits.

Article 3 of The Hague Convention IV provides that “[a] belligerent party which violates the provisions of the said regulations shall [...] be liable to pay

105 Nada Al-Duaij, note 4, p. 364.
compensation." Similarly, Article 91 of the Additional Protocol I to the Geneva Conventions provides that "[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." An example in which States may seek compensation for damage suffered by the State is where costs are incurred in responding to pollution damage. Compensation claims for pollution costs were brought before the United Nations Compensation Commission in the context of assessing Iraq's liability under international law "for any direct loss, damage-including environmental damage and the depletion of natural resources...as a result of its unlawful invasion and occupation of Kuwait." Compensation has also been required under international law in many other situations involved irreparable harm. For example, Germany paid billions of dollars in direct compensation to its World War II victims. On the base of the Luxembourg Treaty, signed in 1952 between West Germany and Israel, the latter still receive compensation for the victimize of Jewish people by the Third Reich. Similarly, United States paid $2 million to Japan in ex gratia compensation for disruption to its fishing industry, and $950,000 to the Marshall Islands, for damages resulting from nuclear tests of 1954 on Eniwetok Atoll and Bikini Islands. Compensation can be required regardless of whether the environmental effect occurred in times of armed conflict or in peacetime. The Kuwaiti environmental requests presented to the UNCC against Iraq as a sort of compensation for environmental damage occurred during times of armed conflict. However, the compensation requested by the Sibir Airlines for damages resulting from the October 4, 2001, accidental missile attack

110 Ibid, p. 529.
during an Ukrainian military exercise is an example of compensation for damage during peacetime military activities. Another example of peacetime military activities that is subject to compensation is the Canadian request of the former Soviet Union for over $6 million for damage from the Cosmos 945 Soviet nuclear power satellite that fell over Canada’s territory.

The U.N Security Council has also imposed liability in the form of compensation. For instance, Security Council Resolution 387/1976 of March 31, 1976, called upon the government of South Africa to “meet the just claims of the People’s Republic of Angola for a full compensation for the damage and destruction inflicted on its State.” A stronger language was used by the Security Council Resolution 290/1970 of December 8, 1970, which demanded that “full compensation by the Government of Portugal be paid to the Republic of Guinea for the extensive damage to life and property caused by the armed attack and invasion.” Both resolutions, apparently, include compensation for environmental damage. Security Council used similar language in its Resolution 674/1990:

[Reminded] Iraq that under international law it is liable for any loss, damage or injury arising in regard to Kuwait and third States, and their nationals and corporations, as a result of the invasion and illegal occupation of Kuwait by Iraq; [invited] States to collect relevant information regarding their claims, and those of their nationals and corporations, for restitution of financial compensation by Iraq with a view to such arrangements as may be established in accordance with international law [..]

In the other instance, the Security Council used very strong language in imposing liability for environmental damage and depletion of natural recourses, and held Iraq liable for such damage. The Security Council in its Resolution 687 reaffirmed that:

Iraq, without prejudice to the debts and obligations of Iraq arising prior to 2 August 1990, which will be addressed through the normal mechanisms, is liable under international law for any direct loss, damage, including environmental damage and the depletion of natural recourses, or injury to foreign governments,

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112 Ibid, p.393.
113 Ibid.
national and corporations, as a result of Iraq’s unlawful invasion and occupation of Kuwait.\textsuperscript{114}

This Resolution imposed responsibility for environmental damages on Iraq for warfare damage caused in Kuwait, including environmental damage. It was the first time that international law recognized that environmental damage caused by armed conflict is compensable.\textsuperscript{115} On the base of the Security Council Resolution Iraq had to pay for environmental damage and the loss of natural resources caused by its role in the Persian Gulf War, whether in Kuwait or other countries.

The U.N. Security Council, under Article 29 of the Charter,\textsuperscript{116} established the United Nations Compensation Committee (UNCC).\textsuperscript{117} The UNCC as a subsidiary organ of the United Nations, processes claims, including environmental claims, and pay compensation for losses resulting from the Iraqi invasion of Kuwait.\textsuperscript{118} The Security Council decided to create a fund to pay compensation for claims and to establish a commission to administer the fund.\textsuperscript{119}

To facilitate the evaluation of damages caused by the Iraqi invasion, the UNCC classified claims into three categories: (1) claims of individuals, categories A through D, (2) claims of corporations and other private entities, category E, and (3) claims of governments and other international organizations, category F which includes environmental claims.\textsuperscript{120}

According to the UNCC, compensation for environmental damage should include the amount of direct ecological damage, cleanup costs, and the value of the depletion and damage to the natural resources. The UNCC decided that

\textsuperscript{118} Ibid.
\textsuperscript{119} Ibid.
\textsuperscript{120} Category “F” has four levels; the environmental claims are classified under “F4”. See [Online: web], accessed on 29 June 2010, http://www.un.org/charter/
[the] environmental damage [should include] losses or expenses damage,
including expenses directly relating to fighting oil fires and stemming the flow of
oil and coastal and international waters; (b) Reasonable measures already taken to
clean and restore the environment or future measure which can be documented as
reasonably necessary to clean and restore the environment; (c) Reasonable
monitoring and assessment of the environmental damage for the purpose of
evaluating and abating the harm and restoring the environment; (d) Reasonable
monitoring of public health and performing medical screenings for the purposes
of investigation and combating increased health risks as a result of the
environmental damage; and (e) Depletion of or damage to natural resources.121

Deadlines were established for the filing of the various categories of claims, the
deadline of January 1st, 1995, was set for category “A,” “B,” “C” and “D” claims,
January 1st, 1996, for category “E” and “F” claims, and February 1, 1997, for the
environmental claims, in category “F.” All of the deadlines have now expired with the
exception of claims of missing persons and claims for damage and losses resulting from
landmine or ordnance explosions since they cannot be easily found or detected. The
UNCC extended the deadline for presenting such claims.122

According to Security Council Resolution 687/1991, the Secretary General created
a fund to pay the compensation to victims approved by the UNCC.123 This fund was
financed by no more than 30 percent of Iraqi oil sale revenues.124 To assure these
revenues, the oil buyers must deal with the United Nations, not with Iraqi oil companies.

Despite considering the environmental damage resulting from the Iraqi invasion of
Kuwait, the Resolution 687/1991, however, did not define environmental damage or the
depletion of natural resources, and did not provide any guidance to the UNCC as to how
the environmental claims should be assessed for purposes of reparation or
compensation.125

121 Decision of the Governing Council of the United Nations Compensation Commission, 3rd session,
vol. 31, p. 1045-1046.
123 U.N Secretary General Report concerning the “creation of the United Nations Compensation Fund
and the United Nations Compensation Commission” according to the provision of S.C. Res.
125 United Nations Environmental Programme, Report of the Working Group of Experts on Liability
and Compensation for Environmental Damage arising from Military Activities, October, 15, 1996,
UNEP/ENV.Law/3/Inf.1, at 1.
Therefore, different kinds of problems may arise in calculating the amount of compensation: those related to assessment, and those related to evaluation. Assessment can be a problem because modern technology still lacks the methods and techniques necessary to precisely assess environmental damage particularly those of long-term environmental consequences. Moreover, a nation facing liability may be very reluctant to allow an assessment team to enter the area to be assessed.

Even if the environmental damage can be assessed, evaluation of the damage may be difficult. First, evaluation of wartime environmental damage may be difficult to determine, because war often imposes severe and simultaneous damages. In addition, the damage amount is affected by the length of time over which the disaster occurs, with longer exposures creating more severe damage.

Furthermore, after the armed conflict come to an end, the victorious states may put pressure on the defeated belligerents to abandon any request for compensation resulting from the armed conflict. For example, despite the substantial human and environmental effects caused by World War II, including the disasters of Hiroshima and Nagasaki, when Japan signed the peace treaty, it abandoned the right to claim compensation against the United States. Article 19 of the Treaty of Peace with Japan provides that

[Japan] waives all claims of Japan and its nationals against the Allied Powers and their nationals arising out of the war or out of actions taken because of existence of a state of war, and waives all claims arising from the presence, operations or actions of forces or authorities of any of the Allied Powers in Japanese territory prior to the coming into force of the present Treaty.

Once compensation is due, the responsible nation must pay it to the injured international person. In May 2003, Libya compensated relatives of the victims of the

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129 Ibid.
 Lockerbie case. Compensation may reach $10 million per family or $2.7 billion in total. Refusing to pay due compensation may form a legal basis for a new kind of international responsibility, and may result in further charges.

Some scholars tend to distinguish between the violation of international obligations that afford direct protection and those that afford indirect protection to the environment in times of armed conflicts. According to them only the direct ones are compensable. This approach, however, would eliminate the possibility of compensation for much of the environmental destruction that take place during war. There is no way to separate the direct and indirect environmental effect of armed conflict. Moreover, in environmental matters there should be always someone responsible for the environmental damages, whether directly or indirectly.

V. Conclusion

Two different forms of liability for environmental damage were identified in this chapter: fault liability and liability without fault. In International traditional law, state liability has been stipulated to fault and negligence. This approach, however, is a subjective concept and lacks specificity. Second, existence of such a concept would prevent to establish an internationally common concept, which is necessary for a competent international system. Differences in culture, politics and economy may prevent a common understanding of negligence. Third, this approach is suffering from the problem of “proving”, particularly in an international case, investigation on which would be treated as foreign intervention in to national affairs and against the principle of state sovereignty.

These problems accompanying the fault liability approach have led most of the new scholars to be supporting a new approach on state liability; i.e. absolute liability. This form of liability is much attractive for environmental victims. Most of the industrialized countries, however, would not trust this framework. In addition, in this approach

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132 Gregg Anthony Cervi, note 109, p. 382.
133 Ibid, p.449.
134 Nada Al-Duaij, note 4, p.449.
geographical conditions of some countries are not considered. For example, on the base of this approach, upper riparian countries would be compelled to continuously pay compensation on the interest of downstream countries.

Considering the obstacles in establishing a common concept on environmental liability at international level, the members of international community has generally preferred to encourage states to address liability at national level.

At any way, whenever a state’s international liability for environmental damage is established one or more of four consequences can be expected: (a) stopping the violation; (b) satisfaction; (c) restitution; or (d) compensation. Among the various forms of reparation, compensation is perhaps the most commonly response in international practice against an international wrongful act. Calculating the amount of compensation, however, is not an easy task. Modern technology still lacks the methods and techniques necessary to precisely assess environmental damage particularly those of long-term environmental consequences. In addition, after the armed conflict come to an end, the victorious states may put pressure on the defeated belligerents to abandon any request for compensation resulting from the armed conflict.

Once compensation is due, the responsible nation must pay it to the injured international person. Refusing to pay due compensation may form a legal basis for a new kind of international responsibility, and may result in further charges.