

Liability for Damage to the Global Commons

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Introduction

The 1992 United Nations Conference on Environment and Development (UNCED) held in Rio de Janeiro marked a major step in the growth of international concern about the world's environment. Since the 1972 United Nations Conference on the Human Environment held in Stockholm, international instruments seeking to protect the environment have multiplied. In the follow-up to UNCED, they are continuing to do so at an even faster rate. Amongst these instruments are a number of treaties on liability covering environmental damage.

All of the liability regimes covering environmental damage now in force, however, were developed with the aim of covering environmental damage to areas within the national jurisdiction of States.¹ None were designed for the purpose of protecting areas beyond national jurisdiction, that is, the global commons.² Customary international law on liability for damage to the global commons is also difficult to discern. This is in contrast to the clear interest in protecting these areas manifested in a number of international instruments.³ Negotiations which are currently underway or foreshadowed on liability in relation to subjects as diverse as nuclear and maritime matters, Antarctica and biodiversity, as well as the more general work on liability in progress in the International Law Commission, provide opportunities to address this issue.

This article examines current customary international law and treaty law on liability for damage to the global commons. It considers the growing international concern for the protection of the global commons and the development of this concern into customary international law. In this wider context, it then suggests possible and desirable future directions for customary

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1 See text accompanying nn 42-55 below.

2 The 1988 Convention on the Regulation of Antarctic Mineral Resource Activities (CRAMRA) does cover areas of global commons. It, however, is not yet in force and is unlikely ever to come into force: see n 46 below and accompanying text.

3 See text accompanying nn 88-111 below.

international law and treaty law on liability for damage to the global commons.

The Legal Status of the Global Commons

The term "global commons" encapsulates the concept of areas over which no one State has ownership but which are available for the use of the world community. Although their legal status is not identical, the high seas, the deep seabed, outer space and at least certain parts of Antarctica all come within this concept. By contrast with areas under the sovereignty of a State where jurisdiction is exercised primarily on the basis of location within the territory, jurisdiction in these areas is exercised primarily on the basis of nationality.

High seas

The high seas, that is the waters seaward of exclusive economic zones ("EEZs"), territorial seas, archipelagic waters and internal waters of States,⁴ unlike those areas, are not subject to the sovereignty or sovereign rights of any State. Moreover, international law forbids their appropriation.⁵ Rather, the high seas are "open" to all States and all States have the right to exercise the "freedom of the high seas".⁶ This freedom has long been recognised as including: freedom of navigation; freedom of fishing; freedom to lay submarine cables and pipelines; and freedom to fly over the high seas.⁷ More recently, freedom to construct artificial islands and other installations permitted under international law and freedom of scientific research have also been recognised.⁸ The freedom of the high seas is subject to certain conditions directed at specific freedoms and to the general condition that it be exercised with due regard for the interests of other States in their exercise of it.⁹ Unlike the sovereign rights which States may exercise in their own EEZs, these high seas rights are not exclusive to any one State and no State has priority over any other in their exercise. The status of the high seas is usually explained as encapsulated in the concept of "*res communis*" which encompasses the notion

4 1982 United Nations Convention on the Law of the Sea (UNCLOS), (1982) 21 *ILM* 1261, article 86. Although during the negotiation of UNCLOS, there was a view that the EEZ was merely part of the high seas where the coastal State had certain rights, it now seems accepted that the high seas do not include EEZs. While UNCLOS is not yet in force it is generally accepted that, apart from Part XI, it reflects current customary international law.

5 This is reflected in article 88 of UNCLOS which states that: "No State may validly purport to subject any part of the high seas to its sovereignty". This repeats the 1958 Geneva Convention on the High Seas, 450 *UNTS* 82, article 2.

6 UNCLOS, article 86.

7 1958 Geneva Convention on the High Seas, n 5 above, article 2.

8 UNCLOS, article 87.

9 *Ibid.*

that the high seas or parts thereof are: not owned by any one State; not *able* to be individually owned; and open to use by all.¹⁰

As no State has sovereignty or sovereign rights over the high seas or any part of it, nor has any State jurisdiction over the high seas as a geographical area. Rather, jurisdiction, in general, is determined on the basis of the nationality principle. Each State has jurisdiction over its nationals and vessels flying its flag.¹¹

Seabed beyond national jurisdiction

In 1967, the Ambassador of Malta to the United Nations, Arvid Pardo, put forward the view that the seabed beyond the limits of national jurisdiction was the "common heritage of mankind". This view implied that this seabed was not open to be exploited by individual States to their own exclusive benefit on a "first come, first served" basis, but was for the benefit of all. Pardo put this view in the context of expectations that manganese nodules, then believed to be of very high economic value, were likely, due to advances in technology, to be commercially exploitable in the near future. As these resources were finite, the concern was that they would be exhausted before developing countries had the technology to exploit them. The concept of the "common heritage of mankind" can thus be seen as elaborating the concept that each State's exercise of the freedom of the high seas is subject to the right of other States to exercise this freedom to address, not only the concurrent exercise of this freedom, but also the potential future exercise of this freedom.

The status of the seabed beyond the limits of national jurisdiction as the "common heritage of mankind" was recognised by the United Nations in a number of resolutions culminating in its inclusion in UNCLOS.¹² Article 136 of UNCLOS states that: "The Area and its resources are the "common heritage of mankind"". ¹³ Article 136 is located in Part XI of UNCLOS and the other articles of that Part elaborate this concept and provide for an international body to control exploitation of the resources of the Area. It is, of course, this

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- 10 For a description of the history of the theories of the status of the seas see O'Connell DP, *The International Law of the Sea*, vol I, Shearer IA (ed) (1984), pp 1-28, vol II, pp 168-76. Of course, while the freedom of the high seas continues to be recognised in international law, the area constituting the high seas has been significantly reduced, both by the recognition of a 12 nm territorial sea and of a 200 nm EEZ.
- 11 In addition, other States have jurisdiction in certain limited cases, for example piracy. See Churchill RR and Lowe AV, *The Law of the Sea*, 2nd ed (1988), pp 168-76.
- 12 See O'Connell, n 10 above, vol I, pp 459-66; see also Brown, "Freedom of the High Seas versus the Common Heritage of Mankind: Fundamental Principles in Conflict" (1982-83) 20 *San Diego L Rev* 521.
- 13 The term "the Area" refers to "the seabed and ocean floor and subsoil thereof" beyond the EEZs and continental shelves of States: UNCLOS, article 1.1(1). This is not necessarily coincident with the high seas: UNCLOS, articles 76 and 78.

Part which is the contentious section of UNCLOS. Objection to it by the United States, one of the States in a stronger position to exploit the deep seabed, led to the failure of the treaty to be adopted by consensus and has also led to the failure to date of the treaty to come into force. Nevertheless, while undoubtedly the mechanisms set down in Part XI have not become part of customary international law, the basic principle that the seabed beyond the limits of national jurisdiction is the "common heritage of mankind" arguably has done so.¹⁴

Jurisdiction, as in the case of the high seas, is based on the nationality principle.¹⁵

Outer space

The 1967 Outer Space Treaty¹⁶ establishes that, like the high seas, "outer space, including the moon and other celestial bodies, is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means".¹⁷ Furthermore, it is to be "free for exploration and use by all States" and there is to be "free access to all areas of celestial bodies".¹⁸ Such exploration and use is to be carried out "for the benefit and in the interests of all countries, irrespective of their degree of economic or scientific development".¹⁹ The 1979 Moon Treaty endorses and elaborates this approach and takes it one step further by expressly stating that the Moon and all other celestial bodies within the solar system are the "common heritage of mankind".²⁰ The concept of "common heritage of mankind" in this treaty is, as in the case of the deep seabed, linked to the exploitation of the natural resources.²¹ Again, jurisdiction is determined on the basis of the nationality principle, States having jurisdiction over their nationals and spacecraft on their registry.²²

14 Although the content of this principle is far from settled: see Zacher & McConnell, "Down to the Sea with Stakes: The Evolving Law of the Sea and the Future of the Deep Seabed Regime" (1990) 21 *Ocean Devel't & Int L* 71 esp at 86; Goldie, "A Note on Some Diverse Meanings of 'The Common Heritage of Mankind'" (1983) 10 *Syr J Int'l L and Com* 69; and Brennan, "Australia and the Law of the Sea - The International Seabed" in Ryan KW (ed), *International Law in Australia*, 2nd ed (1984), pp 417-38.

15 See article 139 UNCLOS.

16 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, 610 *UNTS* 205.

17 Article II.

18 Article I.

19 *Ibid.* This treaty has 92 parties and is the best evidence of the applicable principles for non-parties: Brownlie I, *Principles of Public International Law*, 4th ed (1990), p 267.

20 Agreement Governing the Activities of States on the Moon and Other Celestial Bodies (1979) 18 *ILM* 1434, articles 11.1 and 5.

21 *Ibid.*

22 Outer Space Treaty, article VIII; Moon Treaty, article 12.

Antarctica

The legal status of Antarctica is not agreed by all States. Seven States, including Australia, claim sovereignty over sectors of Antarctica. There also remain areas over which no State has advanced a claim. In addition, the entire area is governed by the 1959 Antarctic Treaty²³ and related treaties.²⁴ The Antarctic Treaty regime, to which all States claiming sovereignty and a number of other States are parties, imposes an additional layer of international supervision in relation to the area.²⁵ Some States have argued that the entire area is the "common heritage of mankind", but this is clearly not accepted by the States asserting sovereignty.²⁶

Leaving aside the issue of the status of the areas where States assert sovereignty, the unclaimed areas are clearly beyond the limits of national jurisdiction. These areas may be *res nullius*, that is areas susceptible of, but not yet subject to, appropriation. Alternatively, they may be *res communis*. The provisions in the Antarctic Treaty prohibiting further claims and, more importantly, the failure of any non-treaty State to make any such claim may indicate that States consider the remaining areas not to be available for appropriation. Clearly, if Antarctica had always been *res communis*, the existing claims of sovereignty could not be valid. It is possible, however, that, subsequent to sovereignty having been acquired by those States, the remaining areas of Antarctica became *res communis* or even the "common heritage of mankind". The Antarctic Treaty recognises the right of all States to conduct scientific research in Antarctica.²⁷ Tourism, subject to controls to protect the Antarctic environment, is also recognised as a legitimate use.²⁸ As in the case of the other global commons, jurisdiction is exercised primarily on the basis of nationality.

Atmosphere

Recent literature also categorises the atmosphere and climate as global commons.²⁹ As is indicated by the freedom to fly over the high seas, the status of the high seas applies also to the airspace above it and this airspace is thus likewise a global commons. On the other hand, international law recognises the sovereignty of States in the airspace over their territory. Thus, these areas

23 402 UNTS 71.

24 1972 Convention for the Conservation of Antarctic Seals, 1080 UNTS 175; 1980 Convention on the Conservation of Antarctic Marine Living Resources (1980) 19 ILM 841; 1991 Protocol on Environment Protection of the Antarctic Environment (1991) 30 ILM 1455.

25 While these treaties are, of course, only binding on the parties, in certain aspects they reflect customary international law: see Triggs G, *International Law and Australian Sovereignty in Antarctica*, (1986), pp 147-50.

26 Ibid, esp p 227ff.

27 Article II.

28 See for example, 1991 Protocol, n 24 above, article 3.4.

29 See "Developments in the Law - International Environmental Law" (1991) 104 *Harv L Rev* 1484 at 1536.

are not, in the strict sense, areas beyond national jurisdiction. Nevertheless, unlike land territory, the atmosphere within the airspace above a State is not capable of being physically separated from that above another State or that above the high seas by State boundaries. Nor, in contrast to the marine environment, is damage to it likely to be limited to a particular region. Rather, damage to the atmosphere spreads throughout the globe. The atmosphere is thus in this sense shared by all States and is akin to a shared resource.³⁰

Other types of global commons

There have also been moves to categorise certain resources located wholly in areas within the limits of national jurisdiction as global commons. Examples include the elephant and tropical rainforests.³¹ In these cases, it is argued that there exists a common interest in, and responsibility for, the protection of the resource. In so far as these cases raise issues of cooperation in relation to resources under the sovereignty of States and within the limits of national jurisdiction, they raise issues different from those relevant to areas beyond the limits of national jurisdiction and are not addressed in this paper.

Damage to the Global Commons

Damage may be suffered *in* the global commons by individuals or directly by States: individuals may suffer personal or property damage; State-owned property may also be damaged. A collision of ships on the high seas is one example of how such damage could occur. In addition, damage may be caused to the global commons itself, that is the living and non-living components of these areas – the environment of these areas. It is damage *to* the global commons in this sense with which this paper is concerned.

Current Legal Position

Customary international law

Principle 21 of the 1972 Stockholm Declaration states that:

States have ... the sovereign right to exploit their own resources pursuant to their own 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.³²

30 See statement of the Meeting of Legal and Policy Experts, Ottawa, 22 February 1989; see also generally International Law Association, 1992 Conference, Fourth Report of the Committee on Legal Aspects of Long-Distance Air Pollution.

31 See "Developments ...", n 29 above, pp 1534-35. See also: Glennon, "Has International Law Failed the Elephant?" (1990) 84 *AJIL* 1; and Smith BD, *State Responsibility and the Marine Environment* (1988), pp 100-10. The designation of particular resources, rather than areas, as commons moves away from the original concept of the "commons" as an area.

32 (1972) 11 *ILM* 1416.

This principle is generally recognised as reflecting customary international law. Since the Stockholm Conference, it has been endorsed by reference and repetition in many subsequent treaties and instruments of less than treaty status, including the recent Rio Declaration of the 1992 United Nations Conference on Environment and Development (UNCED).³³ Principle 21 significantly places damage to the environment of areas beyond national jurisdiction on the same footing as damage to the environment within a State.

Principle 21 sets down what might be described in general terms as an obligation to prevent damage to the environment. It is a basic rule of international law that breach of an obligation gives rise to an obligation to make reparation for the injury caused.³⁴ Accordingly, the existence of such an obligation would imply the existence of an obligation on the part of a State to make reparation when activities within its jurisdiction or control cause damage to the environment of the global commons. Where physical damage arises due to the breach, compensation to enable the restoration of the damage would normally be the appropriate remedy.³⁵

Nevertheless, the translation of Principle 21 into a customary international law liability³⁶ regime for damage to the environment, especially that of the global commons, is far from clear. The key international cases dealing with State liability for environmental damage, the *Trail Smelter*³⁷ and *Lac Lanoux*³⁸ cases, dealt with environmental damage within a State. The only

33 These include: 1982 World Charter for Nature, Principle 21(d), UNGA Res 37/7; 1972 International Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (London Dumping Convention), 1046 UNTS 120, preamble; 1979 Convention on Long-Range Transboundary Air Pollution (1987) 26 *ILM* 1529, preamble; 1985 Vienna Convention for the Protection of the Ozone Layer (1979) 18 *ILM* 1442, preamble; 1992 United Nations Framework Convention on Climate Change, A/AC.237/L.14, preamble; 1992 Convention on Biological Diversity, UNEP/Bio. Div./CONF/L.2, article 3; and 1992 Rio Declaration, A/CONF. 151/5, Principle 2. Principle 2 of the Rio Declaration repeats the exact text of Principle 21 of the Stockholm Declaration with one change: Principle 2 refers to "their own environmental *and developmental* policies" (my emphasis). This is consistent with the theme of UNCED and does not affect the statement of obligation in relation to areas beyond the limits of national jurisdiction.

34 *Chorzow Factory (Jurisdiction)* case, PCIJ Ser A No 9. As indicated by the ILC draft articles on State Responsibility, responsibility arises from the breach of an obligation *per se*, ie the injury may be constituted by the fact of the breach itself. In so far as an obligation was one not to cause physical damage, however, such damage would, of course, be a necessary element of a breach.

35 *Chorzow Factory (Jurisdiction)* case, n 34 above.

36 The term "liability" is used here to refer to an obligation on the part of a State to provide reparation for damage, whether as a consequence of breach of an obligation (State responsibility) or as a consequence of the mere fact that the damage was caused by an activity under its jurisdiction or control (sometimes referred to as State liability).

37 (1941) III *UNRIIA* 1905.

38 (1963) XII *URRIIA* 281.

relevant State practice involved *ex gratia* payments, so liability was never admitted. Of these, in any event only the *Cosmos 954* satellite crash³⁹ dealt with environmental damage within the territory of the State concerned. One *ex gratia* payment did involve environmental damage to the global commons. It concerned the conduct by the United States of nuclear tests at an atoll in the Marshall Islands.⁴⁰ As a result of the tests, in addition to the death of a Japanese fisherman and serious radiation injury being suffered by several others, large quantities of fish were contaminated. These included fish caught after the tests. As a consequence, the Japanese fish market was seriously disrupted. The Japanese government claimed compensation for, amongst other things, the disruption to the Japanese fishing industry. While the United States government did not accept liability, the *ex gratia* payment, at least on one account, did cover this damage.⁴¹ However, even leaving aside the fact that compensation was paid without liability being admitted, while the incident provides a clear example of damage to the global commons, the isolated nature of this case means that it does not provide a basis for any firm assertions about the beliefs of States as to their liability under international law for damage to global commons.

The fact that liability for environmental damage raises a number of issues requiring clarification was acknowledged in the Stockholm Declaration itself. Principle 22 recognises the need to "develop further" international law regarding liability for such damage. Twenty years later, however, there has been little progress, particularly in relation to the global commons.

Existing treaty regimes

The 1972 Convention on International Liability for Damage Caused by Space Objects, adopted shortly before the Stockholm Conference, remains the only treaty in force setting down a regime of direct State liability. This treaty, however, applies only to loss of life, personal injury, and loss of or damage to the property of States, individuals or international governmental organisations.⁴² While the reference to the property of States may be interpreted broadly to cover damage to the territory, including environment of a State,⁴³ it is very difficult to argue that it covers damage to the environment

39 (1979) 18 *ILM* 902.

40 See Margolis, "The Hydrogen Bomb Experiments and International Law" (1955) 64 *Yale LJ* 629; McDougal and Schlei, "The Hydrogen Bomb Tests in Perspective: Lawful Measures for Security" (1955) 64 *Yale LJ* 648; Bleicher, "An Overview of International Environmental Regulation" (1972) 2 *Ecol LQ* 1 at 29-30; Sands P, *Chernobyl: Law and Communication* (1988), pp 28-29; Brownlie, "A Survey of International Customary Rules of Environmental Protection" in Teclaff LA and Utton AE, *International Environmental Law*, (1974), p 1 at 2-4.

41 McDougal and Schlei, *ibid*, p 653.

42 961 *UNTS* 187, article I(a).

43 The claim of Canada against the USSR in relation to the *Cosmos 954* satellite crash was based on this view. For statement of claim see (1979) 18 *ILM* 902.

of the global commons which by their nature are not the property of any State.⁴⁴ It is quite clear, on any argument, that the treaty does not cover damage to the environment of outer space.⁴⁵ The 1988 Convention on the Regulation of Antarctic Mineral Resource Activities (CRAMRA)⁴⁶ which deals with mining activities in Antarctica provides a regime of State and civil liability. This treaty was superseded by the 1991 Protocol on Environmental Protection to the Antarctic Treaty⁴⁷ which bans mining activities in Antarctica and it is thus unlikely to come into force in the foreseeable future. Nevertheless, it does provide a useful source in examining the topic of this paper as it deals with damage to the environment of an area of global commons.⁴⁸

Other treaties provide for the parties to cooperate to further develop international law regarding liability in relation to environmental damage in the particular field covered by the treaty. The 1972 London Dumping Convention⁴⁹ and the 1982 UNCLOS⁵⁰ both make such provision. The 1989 Basel Convention,⁵¹ the 1991 Protocol on Environmental Protection to the Antarctic Treaty⁵² and the 1992 Convention on Biological Diversity⁵³ more ambiguously contain provisions for rules and procedures relating to liability to be elaborated or, in the last case, for the issue of liability to be examined. This wording leaves open the possibility that the issue might be dealt with on the basis of civil rather than State liability. In each case, the geographical scope of the relevant treaty suggests that such further developments would include the development of the law in relation to damage to the environment of the global commons.⁵⁴ In none of these cases, however, has a regime of liability yet been

44 One possible argument might be that this treaty refers to the "property of States" in the plural, and the global commons are the common property of all States. This would require an even broader interpretation of the word "property". The possibility of a common legal interest in the global commons is discussed below.

45 Articles II and III.

46 (1988) 27 *ILM* 859.

47 Note 24 above.

48 See article 1.15 and article 8 re damage covered. The Convention applies to the whole of Antarctica, including the unclaimed section and, in relation to impacts, includes impacts on dependent or associated ecosystems outside Antarctica and the Antarctic Treaty area: see article 1.3 and article 5.

49 Note 33 above, article X.

50 Note 4, article 235.3.

51 1989 Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (1989) 28 *ILM* 657, article 12.

52 Note 24 above, article 16.

53 Note 33 above, article 14.2.

54 The provisions of each Convention referring to liability apply as follows. The London dumping convention provision applies to "the environment of the other States or to any other area of the environment" and the Convention as a whole applies to dumping in "all marine waters" other than the internal waters of States: n 33 above, articles X and III.1 and 3 respectively. The UNCLOS provision applies to the "marine environment" and UNCLOS applies, *inter alia*, to the high seas: n 4 above, article 235.3 and Part XII, respectively. The Basel

developed. A number of treaties dealing with civil liability for environmental damage have been adopted in particular fields. Apart from the CRAMRA, however, none of these cover environmental damage to the global commons.⁵⁵

Current work and issues

The International Law Commission (ILC) is currently examining the issue of State liability in work under two topics on its agenda: "State Responsibility"⁵⁶ and "International Liability for Injurious Consequences Arising Out of Acts Not Prohibited by International Law".⁵⁷ The latter topic, which is of particular relevance to environmental damage, was included on the agenda in 1978, having been identified as a separate issue during consideration of the topic of State Responsibility. It has proved to be a controversial and difficult topic and remains some distance from resolution. The exact scope of the damage

Convention provision applies to damage resulting from "transboundary movement", defined to mean "any movement of hazardous wastes or other wastes from an area under the national jurisdiction of one State to or through an area under the national jurisdiction of any State, provided at least two States are involved in the movement": n 51 above, articles 12 and 2.3, respectively. The Protocol on Environmental Protection to the Antarctic Treaty refers to "The Antarctic environment and dependent associated ecosystems" (n 24 above, article 16); with respect to the status of Antarctica see text accompanying nn 23–28 above. The Convention on Biological Diversity provision applies to "damage to biological diversity, except where such liability is a purely internal matter" and the Convention as a whole applies "in relation to each Contracting Party ... in the case of processes and activities regardless of where their effects occur, carried out under its jurisdiction or control, within the area of its national jurisdiction or beyond the limits of national jurisdiction": n 33 above, articles 14.2 and 4, respectively.

- 55 The 1969 International Convention on Civil Liability for Oil Pollution Damage (1970) 9 *ILM* 45, applies only to damage to the territory, including the territorial sea, of a party. The 1984 Protocol to this Convention, IMO Doc LEG/CONF.6/66. 25 May 1984 would extend its coverage to damage in the EEZs of parties. Although this Protocol is unlikely to come into force, a replacement Protocol also extending the coverage of this Convention in this way is currently under consideration. The 1989 Convention on Civil Liability for Damage caused during Carriage of Dangerous Goods by Road, Rail and Inland Transport Vessels (CRTD) is limited to damage sustained in the territory of a party: UN Economic Commission for Europe, 16 October 1989. The 1963 Vienna Convention on Civil Liability for Nuclear Damage (1065 *UNTS* 265) and the 1960 Paris Convention (965 *UNTS* 251) do partly cover such damage in so far as they apply to personal and physical property damage due to radioactive contamination of the surrounding environment.
- 56 See Fourth Report on State Responsibility to the ILC of Mr Arrangio-Ruiz, Special Rapporteur, A/CN.4/444 and Addenda 1 and 2, 12 May, 25 May and 1 June 1992 respectively.
- 57 See Eighth Report to the ILC of Mr Barboza, Special Rapporteur, A/CN.4/443, 15 April 1992.

covered by this topic is still unsettled,⁵⁸ as is the question of whether the topic should cover damage to the global commons.⁵⁹

The general lack of progress in developing international law on liability for environmental damage is starkly acknowledged in the Rio Declaration which indicates, nevertheless, a determination to move forward. It provides in Principle 13 that: "States shall ... cooperate in an expeditious and more determined manner to develop further international law" for such damage.⁶⁰ Negotiations now underway or commencing in a number of international fora provide an opportunity to act upon this declaration in relation to damage to the environment of the global commons.

Work is currently in progress under the auspices of the International Atomic Energy Agency (IAEA) to revise the 1963 Vienna Convention.⁶¹ Among the issues being considered is coverage of damage to the environment and the role of the State in providing compensation. Australia has taken this opportunity to promote coverage by the Convention of damage to the global commons.⁶² The Organisation for Economic Cooperation and Development Nuclear Energy Agency Group of Governmental Experts on Third Party Liability in the Field of Nuclear Energy is participating actively in this work,⁶³ and it is likely that any express coverage of environmental damage in the Vienna Convention would be followed by changes to the 1960 Paris Convention on Liability in the Field of Nuclear Energy.⁶⁴ Australia has taken the same position in the Legal Committee of the International Maritime Organisation (IMO) in relation to the draft International Convention on Liability and Compensation for Damage Caused by the Carriage of Hazardous and Noxious Substances by Sea. Australia has proposed that the draft Convention, which currently applies only to damage to the environment within the 200 nm zone, be extended to also cover such damage beyond the 200 nm zone.⁶⁵

In addition, negotiations are now commencing on liability regimes pursuant to the 1989 Basel Convention and the 1991 Protocol on Environment Protection to the Antarctic Treaty.⁶⁶ As indicated above, the geographical scope of the 1989 Basel Convention would allow the liability regime to cover

58 Eighth Report of Mr Barboza, *ibid*, paras 41–51.

59 1991 Report of the ILC on the Work of its Forty-Third Session, A/CN.4/L.465 paras 74–79.

60 Note 33 above.

61 Note 55 above. The mandate of the Standing Committee includes both civil and State liability: Decision of the IAEA Board of Governors of 21 February 1990.

62 At the October 1990 meeting of the IAEA Standing Committee Australia presented a paper on "Nuclear Damage to the Global Commons": IMO Doc. LEG 66/4. IMO Doc. LEG 65/3/4.

63 NEA Newsletter, Spring 1992, vol 10 No 1.

64 Note 55 above. The Vienna and Paris Conventions are linked by a 1988 Joint Protocol: (1989) 12 UK Cmnd Misc 774.

65 IMO Doc LEG 65/3/4, 30 August 1991.

66 Notes 51 and 24 above, respectively.

damage to the global commons. Although the Convention itself focuses on movement between States, it covers movement "to or through an area not under the national jurisdiction of any State, provided at least two States are involved in the movement". To date an Ad Hoc Working Group has identified some possible elements of the proposed Protocol and the Interim Secretariat has prepared a draft Protocol reflecting these elements. The draft Protocol applies to damage occurring in the global commons, provided at least two Contracting Parties are involved in the movement.⁶⁷ The liability Annex to be negotiated pursuant to the 1991 Protocol on Environment Protection to the Antarctic Treaty will necessarily deal with damage to some global commons. The 1992 Convention on Biological Diversity is not yet in force and therefore no timetable has been set for the examination of the issues of liability which it envisages. Nevertheless, the pace of ratifications⁶⁸ suggests that it may enter into force in the near future.

These treaty negotiations cover both State and civil liability, with much of the current focus being on civil liability. The distinction between the two, however, in this writer's view, can be overstated. Civil liability regimes are obligations entered into by States with respect to persons under their jurisdiction. Civil liability can thus be one way of satisfying State liability. As a consequence, State liability is an important consideration in developing civil liability regimes.

Some of the issues concerning State liability for environmental damage which remain controversial arise equally in relation to environmental damage within and beyond national jurisdiction. Foremost of these is the issue of the nature of such liability under current customary international law – whether it arises only upon a breach of a primary obligation, or whether it arises directly as a consequence of damage being caused regardless of the existence or breach of any primary obligation.⁶⁹ In so far as the view is taken that breach of a primary obligation is required, the further issue arises of the nature of any obligation – whether it is an obligation of due diligence or an absolute obligation to prevent damage. Another issue which arises in relation to damage to the environment both within and beyond national jurisdiction is that of the scope of the concept of damage to the environment; that is, whether there is a minimum threshold. These issues have generated a large volume of literature.⁷⁰ As they do not raise any questions which are peculiar to the global commons, this paper will not present views on them.

67 UNEP/CHW.I/5, 7 July 1992.

68 The Convention requires 30 ratifications to enter into force. As at 1 July 1993, 21 countries had ratified this Convention.

69 On the validity of this distinction see: Brownlie I, *System of the Law of Nations: State Responsibility*, Pt I (1983), pp 49–50; and Boyle, "State Responsibility and International Liability for Injurious Consequences of Acts Not Prohibited by International Law: A Necessary Distinction?" (1990) 39 *ICLQ* 1.

70 For recent overviews of the issues see Pisillo-Mazzeschi, "Forms of International Responsibility for Environmental Harm" in Francioni F and

A number of other issues relate specifically to liability for damage to the global commons. First is that of the basis of such liability and thus the type of damage for which it will arise. This is related to the second issue, that of who can claim reparation for damage to the global commons. The third issue, again related to the first two, is that of the remedies which are appropriate for such damage. This paper will focus on these three issues.

Potential Developments

Basis of liability for damage to the global commons

Despite the paucity of international judicial and arbitral decisions and State practice on liability for damage to the global commons, what does exist provides some scope to elaborate upon Principle 21 and point to possible future directions of international law on this issue.

As indicated above, in the few cases and examples of State practice in relation to liability for environmental damage, the damage was suffered within the territory or exclusive economic zone of the claimant State. The ad hoc tribunal in the *Trail Smelter* case derived its view that "under the principles of international law ... no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or the persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence" from the general principle that "a State owes at all times a duty to protect other States against injurious acts by individuals from within its jurisdiction".⁷¹ Injury to the territory of another State by fumes which is of "serious consequence", in addition to such injury in the territory, was found to constitute such an injurious act against another State. Whether injury by fumes to the global commons would constitute an injurious act giving rise to State liability is, however, not answered by the *Trail Smelter* case. The case can be understood as a direct application of the maxim *sic utere tuo ut alienum non laedus* (use your property so as not to injure that of your neighbour) which Oppenheim identifies as a general principle of international law recognised by civilised States.⁷² It is notable that the claim of Canada in relation to the *Cosmos 954* satellite crash⁷³ and the Italian government in the *Patmos* case⁷⁴ were both, at least in part, based on the interpretation of a treaty obligation to pay compensation for damage to the *property* of the State. Any application of these cases to cover damage to the environment of the global commons thus

Scovazzi T (eds), *International Responsibility for Environmental Harm* (1991), p 15 and, with particular reference to nuclear damage, Boyle, "Nuclear Energy and International Law: An Environmental Perspective" (1990) 63 *BYIL* 257.

71 Note 37 above, p 1965. My emphasis. The Tribunal quoted Eagleton C, *Responsibility of States in International Law* (1928), p 80 on this point.

72 Oppenheim L, *International Law*, vol 1, 8th ed, Lauterpacht H (ed) (1955) p 408.

73 Note 39 above.

74 For a description see Maffei, "The Compensation for Ecological Damage in the 'Patmos' Case" in Francioni F and Scovazzi T (eds), n 70 above, p 381.

founders on the difficulty that the global commons are of their nature not the property of any individual State.

The discussion of State liability in the *Corfu Channel* and *Lac Lanoux* cases, on the other hand, focused on the *rights* of other States.⁷⁵ The judgment of the ICJ in the *Corfu Channel* case established the principle that a State has an "obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States".⁷⁶ The tribunal in the *Lac Lanoux* arbitration stated that "France can exercise its rights, it cannot ignore Spanish interests. Spain can demand that its rights be respected and that its interests be taken into consideration."⁷⁷ Thus, while most commentators on these cases have focused on damage within the territory of a State, the statements of principle in these cases are not so limited. Indeed, the facts of the *Corfu Channel* case concerned an injury suffered by the United Kingdom outside its own territory while exercising its right of innocent passage through Albanian territorial waters. The focus on rights in these cases is, of course, of particular relevance to the global commons. As indicated above, while no one State has ownership of any area of the global commons, all States have rights in relation to them.

It must also be noted that the *Trail Smelter*, *Corfu Channel* and *Lac Lanoux* cases all dealt with damage caused by activities carried out within the territory of the State against which the claim was made. However, in so far as the liability of the State for damage caused by activities within its territory is due to the State's exclusive authority over its territory,⁷⁸ any argument for liability would appear to equally apply to those activities outside its territory over which it has exclusive authority, such as the activities of its nationals, including vessels and other craft having its nationality, while they are in the global commons.⁷⁹ This is the approach taken in the 1972 Convention on International Liability for Damage Caused by Space Objects.⁸⁰ It is also consistent with Principles 21 and 22 of the Stockholm Declaration and

75 ICJ Rep 1949, p 4 at 22, esp pp 303 and 316.

76 ICJ Rep 1949, p 4 at 22.

77 (1963) VII *UNRIIA* 281 at 316. Although this case concerned interpretation of a treaty, general international law was relied upon to assist in its interpretation: p 301.

78 This is the basic explanation of the doctrine of State responsibility on which the decision of the tribunal in the *Trail Smelter* case was at least partly based (see n 37 above, p 1963), namely that, as a corollary of the exclusive rights inherent in territorial sovereignty, a State has a duty to protect within its territory, the rights of other States: *Island of Palmas* case, *UNRIIA* vol II, p 831, at 839.

79 See Tomushcat, "International Liability for Injurious Consequences Arising Out of Acts Not Prohibited by International Law: The Work of the International Law Commission" in Francioni F and Scovazzi T (eds), n 70 above, p 37 at 40-41, commenting on the various approaches taken by the ILC rapporteurs on this issue. It would not be appropriate to extend this liability of a State to the activities of nationals of that State carried out in the territory or exclusive economic zone of another State as here the activity causing the damage is not under the exclusive authority of the State of nationality.

80 Note 42 above.

Principles 3 and 13 of the Rio Declaration, all of which expressly refer to activities within the jurisdiction or control of States.⁸¹ Indeed, in so far as these cases are based on an obligation on the part of a State not to allow (or a lack of a right to use or permit) the use of its territory to harm another State, *a fortiori* a State must have an obligation (could not have such a right) in relation to use of an area where it has significantly less rights than in its own territory.

Looking at the high seas, as indicated above, the rights of States include the right to navigate, fish, lay submarine cables and pipelines, fly over the high seas, construct artificial islands and other installations permitted under international law and conduct scientific research. It would thus appear that adverse effects on the exercise by a particular State of these rights would constitute damage which could give rise to a claim against another State for reparation – whether on the basis that the State had breached an obligation (of due diligence or otherwise) not to permit individuals under its jurisdiction or control to act adversely to the rights of other States, nor to do so itself, or on the basis that it was strictly liable for injury to the rights of another State causally linked to it.

Environmental damage may constitute such an adverse effect on the rights of a State in a number of ways. It can cause personal injury or property damage to a national of a State or property damage to the State itself. For example, contamination of the air or water could cause damage to ships on the high seas and persons and cargo aboard. Environmental damage can also cause pure economic loss to a State or its nationals, as in the case of decreased fish takes due to contamination or reduction of fish stocks. Further, non-commercial loss can be caused to a State or its nationals. For example a person may be deprived of a recreational voyage in order to avoid personal injury or property damage being caused by contamination of the air or water, or suffer a reduction in the enjoyment of such a voyage because the environment of part of the ship's route was degraded.

Similar examples apply to other global commons: contamination of the environment of outer space could cause damage to a spacecraft or adversely affect the exploration and scientific investigation of outer space by other States; contamination of the seas could adversely affect mining of the deep seabed, including through damage to persons and property; and contamination of Antarctica could cause damage to persons or equipment or otherwise adversely affect scientific research or a tourist excursion.

Personal injury or property damage is a type of damage with which international law is very familiar. Its coverage presents no special difficulties where it is suffered in an area of global commons as a consequence of environmental damage. Indeed the Vienna and Paris Conventions already cover such damage where it is suffered on the high seas.⁸² Avoidance

81 Notes 32 and 33 above.

82 Note 55 above.

measures to prevent such damage similarly present no difficulties not equally arising where the damage is suffered within the national jurisdiction of a State. Pure economic loss to individuals has also been used in cases dealing with environmental damage within a State to calculate the appropriate amount of compensation for damage suffered by that State.⁸³ Similarly, deprivation of non-commercial uses, although not directly translatable into monetary loss, has been treated as a manifestation of environmental damage within the national jurisdiction of a State.⁸⁴ Where a State has a legal right to use a resource and the actual exercise of that right is adversely affected, there would seem to be no reason why the same approach should not be taken in addressing liability for damage to that resource.

Current international law thus provides a basis for dealing with liability for environmental damage adversely affecting the exercise of the rights of States in relation to the global commons on the same footing as environmental damage within a State. To focus narrowly on injury to the actual exercise of the rights of States, however, is to take a very limited view of States' interests in the global commons. This leaves unaccounted for the lost potential of other States to exercise these uses in the future, not to mention the lost potential of all States to benefit from particular uses of the global commons which have not yet been specifically identified. For example, the future marine scientific research possibilities of all States may be limited by pollution of the high seas today which destroys a particular organism whose properties are yet unknown. In addition, apart from current or future particular uses, the environment may be seen to have an intrinsic value.

In relation to the environment of areas within national jurisdiction, international law appears to protect such general, but nevertheless concrete, interests of States by providing for liability for damage to the environment per se.⁸⁵ In relation to the *Cosmos 954* claim, compensation was provided for clean-up operations without proof being required of any specific consequences of a failure to clean-up. Recent civil liability treaties similarly expressly provide for reimbursement of such costs without any requirement that potential damage apart from the damage to the environment itself be

83 *Trail Smelter*, n 37 above. It should be noted that such pure economic loss in relation to activities in the global commons has been recognised as appropriate for compensation in international law in other areas. For example, claims for probable or prospective profits in connection with the wrongful detention or forced deviation of fishing or whaling vessels: Whiteman M, *Damages in International Law*, vol 1 (1937), pp 1251-82.

84 In the *Patmos* case the court did not distinguish between commercial and non-commercial losses. Rather, it referred to types of benefits which the community gets from the sea including food and tourism. In addition, it recognised a "landscape" value in the environment: see Maffei, n 74 above, p 387.

85 Contrast infringement of sovereignty without any physical damage, in relation to which there is a division of views among jurists: Gray C, *Judicial Remedies in International Law* (1987), pp 85-92.

proved.⁸⁶ In the *Patmos* case, environmental damage was found to be actionable apart from any particular damage to persons or property or any economic loss and was not limited to clean-up costs.⁸⁷ This approach is consistent with a growing world community concern for the environment beyond its immediate use by particular individuals or States. This concern is not limited to areas within national jurisdiction. In the case of damage to areas within national jurisdiction such liability can, of course, be based upon the *sic utere* principle as outlined above. In the case of damage to the global commons, the question arises of whether there is any parallel basis for liability for damage to the environment per se.

In the case of the high seas, UNCLOS recognises an obligation to protect and preserve the marine environment.⁸⁸ It sets down specific obligations in relation to pollution prevention, reduction and control, elaborating these in relation to particular sources of pollution.⁸⁹ These include the release of harmful substances from land-based sources, including from or through the atmosphere,⁹⁰ and pollution from vessels.⁹¹ Pollution is defined to mean "the introduction by man, directly or indirectly, of substances or energy ... which results or is likely to result in such deleterious effects as harm to living resources and marine life, hazards to human health, hindrance to marine activities, including fishing and other legitimate uses of the seas, impairment of quality for use of sea water and reduction of amenities".⁹² The 1973/1978 MARPOL Convention also imposes obligations to prevent vessel-source pollution of the marine environment, including the high seas, by oil and other harmful substances.⁹³ The term "harmful substances" is defined as substances which 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".⁹⁴ These obligations concern the state of the environment of the high seas generally. They are not limited to protecting the specific uses of the high seas by particular States. Similar general obligations to protect the marine environment of the high seas also appear in various regional conventions. In Australia's region, the 1986 Convention for the Protection of the Natural Resources and the Environment of the South Pacific Region imposes on parties obligations to prevent, reduce and control pollution of those parts of the high seas which are enclosed by the exclusive economic zones of the States in

86 See text accompanying nn 135-139 below.

87 Maffei, n 74 above, p 387.

88 UNCLOS, n 4 above, article 192.

89 Articles 194 and 207-212.

90 Articles 194.3(a), 207 and 212.

91 Articles 194.3(b) and 211.

92 Article.1.1(4).

93 (1973) 12 *ILM* 1319; (1978) 17 *ILM* 546, article 1. Other treaties, such as the 1972 London Dumping Convention, n 33 above, impose obligations to prevent other causes of pollution damage to the high seas.

94 Article 2(2).

the region.⁹⁵ As noted above, UNCLOS, apart from Part XI dealing with the deep seabed, is generally recognised as representing customary international law. The inclusion of specific obligations to prevent pollution in the other treaties indicates, not a view that a basic obligation to protect the environment of the high seas does not exist under customary international law, but the recognition of the need to flesh out this basic obligation. Together these treaties provide a strong basis for the view that there exists under customary international law an obligation directed at protecting the environment of the high seas *per se*.⁹⁶

This obligation also applies to the deep seabed.⁹⁷ In so far as a different regime for the exploitation of the non-living resources of that area is recognised, it likewise includes obligations to protect the marine environment.⁹⁸ Turning to outer space, the 1967 Outer Space Treaty requires exploration of outer space, including the moon and other celestial bodies, to be conducted so as to avoid their harmful contamination.⁹⁹ The 1979 Moon Treaty similarly requires measures to be taken in exploring the moon and other celestial bodies, to prevent disruption of the existing balance of their environment by adverse changes in it, its harmful contamination or otherwise.¹⁰⁰ As indicated above, these treaties, particularly the Outer Space Treaty, are the best available indication of the general principles applicable to outer space under customary international law. The regime for the protection of the Antarctic environment is the most comprehensive of all the regimes for protection of the global commons, the recent 1991 Protocol on Environment Protection to the Antarctic Treaty reinforcing the provisions of the earlier Conventions. It recognises and aims to protect "the intrinsic value of Antarctica, including its wilderness and aesthetic values" as well as its value as an area for the conduct of scientific research.¹⁰¹ Again, although the detailed provisions of this treaty regime probably do not apply as customary international law, the practices of non-contracting States suggest that the general principles of environment protection set down in it do so apply.¹⁰² More generally, the 1992 Convention on Biological Diversity, which provides for the conservation and sustainable use of the world's biological diversity, recognises the "intrinsic value" of this biological diversity in addition to its "ecological, genetic, social, economic, scientific, cultural, recreational and aesthetic values".¹⁰³ This treaty was opened for signature at the United Nations Conference for Environment and Development and was signed by 155

95 Articles 5-9.

96 See further Smith, n 31 above.

97 See eg UNCLOS, n 4 above, article 209.

98 UNCLOS, n 4 above, article 145.

99 Note 16 above, article IX.

100 Note 20 above, article 7.

101 Note 24 above, article 3.

102 Triggs, n 25 above, p 148.

103 Note 33 above, preamble.

States during that Conference, an indication, at least, of the general acceptance by the world community of the worth its principles.

These treaties reflect a world community interest in the protection of the global commons per se. Such an interest in the protection of the environment of the global commons may also be seen in the concept of "common heritage of mankind" applied to certain global commons and in the concept of common concern which has emerged in recent years in international legal instruments dealing with the environment generally. The concept of "common heritage of mankind" can be seen as conceptualising the relevant global commons to which it applies as the common property of all States rather than as the property of no one open to use by all. Some writers take the concept further as indicating that these global commons are the common property, not of States, but of the community of humankind. While primarily aimed at protecting the interests of the developing countries from the competing interests of the developed countries, this concept, as indicated above, incorporates the notion of taking into account the future uses of global commons. The operation of this concept to found a legal interest of States in the environment of the global commons is, of course, limited by the fact that it probably only applies to the deep seabed and outer space. It is also limited by the fact that, although potentially of much wider application, it has to date been focused on non-living resources exploitation.¹⁰⁴

The concept of common concern, on the other hand, has been applied more generally to protection of the environment. The concept was first formally set down in the 1988 UNGA Resolution on the Protection of the Global Climate. Like the concept of "common heritage of mankind", it was first put forward by Malta.¹⁰⁵ It was subsequently adopted in a number of international instruments including the 1989 Hague Declaration,¹⁰⁶ the 1989 Belgrade Declaration of Non-Aligned Countries,¹⁰⁷ the 1990 Langkawi Declaration on the Environment,¹⁰⁸ and in the 1992 United Nations Framework Convention on Climate Change,¹⁰⁹ and the 1992 Convention on Biological Diversity.¹¹⁰ While initially directed at climate change, it was subsequently adopted to refer to the protection of the environment generally, including living resources, as the common concern of humankind.¹¹¹ This concept is very broad and applicable to the environment not only of the areas beyond national jurisdiction, but also those parts of the global environment, such as the atmosphere, which cannot be physically segregated into areas. The concept has been identified as encompassing the notion of involvement of all States

104 See text accompanying nn 12-13 and 21.

105 UNGA Res 43/53.

106 (1989) 28 *ILM* 1308.

107 UN Doc A/44/551 S/20870, 29 September 1989.

108 Commonwealth Heads of Government Meeting, 21 October 1989.

109 Note 33 above, preamble.

110 Note 33 above, preamble.

111 For example, Langkawi Declaration and Convention on Biological Diversity.

and also all people within States and also of present and future generations.¹¹² The theme of intergenerational equity is not new in international law. It can be traced back to the Stockholm Declaration¹¹³ and has been adopted in many subsequent instruments.¹¹⁴

The acknowledgment that the protection of the environment is the common concern of humankind, taken together with the numerous treaty regimes and other international instruments to protect the environment, can be seen as indicating the emergence of a recognition in international law of a legal interest in the environment of the global commons, beyond that of individual States in their current particular uses of these areas, which is vested in the international community as a whole. Damage to the environment of the global commons can thus be seen as an injurious act against the international community as a whole. Taking this approach, liability for such damage would arise on the same basis as liability for damage to the environment of another State. If breach of a primary obligation was required, it would arise from breach of an obligation owed to the international community – of due diligence or otherwise – to prevent damage to the global commons. If liability arose directly as a consequence of damage being caused, it would arise as a direct obligation to the world community to provide reparation for damage to the global commons. The possibility under international law of an obligation owed to the international community as a whole, that is an *erga omnes* obligation, was recognised in the 1970 *Barcelona Traction* case.¹¹⁵ In that case, the majority judgment drew a distinction between obligations owed to the international community as a whole and obligations owed by one State to another. It stated: "By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*."¹¹⁶

The application of this approach to liability for damage to the environment outside, as well as within, States is clearly desirable. As indicated above, the world community today has a concrete interest in protecting the environment of the global commons. The role which liability regimes can play in protecting the community from activities which can cause damage has long been recognised. In addition to providing compensation for damage caused in a particular case, this protection operates through the deterrence of future damage. The imposition of liability can provide an incentive to a person

112 Attard D (ed), *The Meeting of the Group of Legal Experts to Examine the Concept of the Common Concern of Mankind in Relation to Global Environmental Issues* (1990), UNEP, p 21.

113 Note 32 above, Principle 2.

114 1974 UN Charter on Economic Rights and Duties, UNGA Res 3201, 1974, article 30; 1982 World Charter for Nature, n 33 above, preamble, UNGA Res 37/7 1982; 1992 Rio Declaration, n 33 above, Principle 3; 1992 United Nations Convention on Climate Change, n 33 above, preamble; 1992 Convention on Biological Diversity, n 33 above, preamble.

115 ICJ Rep 1970, p 2.

116 *Ibid*, p 33.

carrying out an activity to minimise the risks of causing damage. It also internalises the cost of any damage in the activity causing it. With the full costs of an activity reflected in its price, the market will operate to determine the true desirability of that activity, thus balancing the competing interests.¹¹⁷ The operation of liability regimes to provide protection in this way does not differ on the basis of whether the damage is inside or outside States. It is limited, not by the location of the damage, but by the ability to identify the person or State which caused the damage. In cases where it is not possible to identify the cause of particular damage, other means of remedying and preventing such damage, including through other ways of internalising the costs, will have to be relied upon. Cases of gradual or continuing pollution will often fall into this category. A number of cases of such pollution concern damage to the atmosphere, for example ozone depletion, climate change and acid rain. In each of these cases the international community has recently taken non-liability measures to prevent such damage.¹¹⁸ Where identification of the cause does not present such difficulties, however, a liability regime provides an effective means of addressing the issue of damage to the environment wherever it occurs.

Such a broad approach to liability for damage to the environment of the global commons has already been adopted in one treaty, CRAMRA.¹¹⁹ It provides for liability for personal and property damage and loss or impairment of uses of Antarctica, such as scientific investigation, tourism or aviation, caused by damage to the Antarctic environment. In addition, it provides for liability for damage to the environment without any requirement that such damage would cause the loss or impairment of any particular use of the environment.¹²⁰ CRAMRA provides a useful model in developing other treaty regimes to address the issue of liability for damage to the global commons.

Who could claim?

Where specific damage is suffered by a particular State or its nationals as a consequence of environmental damage, such as personal injury, property damage, or other economic or non-commercial loss, it is clear that claims of liability would be brought by that State or by or on behalf of those nationals, and that reparation would be directed to the claimant. In the case of damage to the environment not directly assessable in terms of loss to a particular individual or State, however, it is less obvious who should make a claim of liability. To date, even in so far as obligations *erga omnes* are recognised, a

117 See generally Calabresi G, *The Costs of Accidents: A Legal and Economic Analysis* (1970).

118 1985 Vienna Convention on the Protection of the Ozone Layer, n 33 above; 1987 Montreal Protocol on Substances that Deplete the Ozone Layer (1987) 26 *ILM* 1541; 1992 United Nations Convention on Climate Change, n 33 above; 1979 Long-Range Transboundary Air Pollution, n 33 above.

119 Notes 2 and 46 above.

120 *Ibid*, article 8.2.

very restricted view has been taken of the standing of any one State to enforce such an obligation. In the *South West Africa (Second Phase)* case, the International Court of Justice rejected the view that international law recognised an *actio popularis*, that is a right of any one State to take action to vindicate a public interest.¹²¹

The ICJ in the *South West Africa (Second Phase)* case did recognise that a State might have an individual legal interest, providing a basis for standing, in an obligation owed to all States and that a material interest was not a prerequisite to establishing such an interest. It did not, however, elaborate upon what would constitute such an interest, except by stating that human rights obligations would not.¹²² One writer suggests that *erga omnes* obligations might, in fact, be divided between those owed bilaterally to all other States and those which by their nature can only be understood as owed to the whole community.¹²³ That writer argues that obligations for the protection of the high seas environment are of the first type. To do so, he relies upon the fact that each State possesses individual substantive rights with respect to the use of the high seas. A similar argument could be put to provide a basis for standing in the case of other global commons. This argument, however, appears to contradict the very concept of obligations *erga omnes* as obligations owed to the community as a whole. In so far as one aims to cover damage to the global commons which cannot be identified as suffered by any one State, even as prospective damage, there appear to be difficulties with this distinction. Why should the interest of any one State in, for example, contamination of an area of the high seas where it carries out no particular activity be more "substantive" than the interest of any one State in the observance of human rights in a particular country?

Rather, in considering the protection of the global commons, it would seem more logical to pursue the recognition of an *actio popularis* under international law.¹²⁴ Judicial consideration of the issue by the ICJ and its predecessor does provide some indications on which future recognition of such a right could be built. In the *Nuclear Tests* cases, the issue was addressed by seven of the judges. Although an *actio popularis* in international law was not found to positively exist in customary international law by any of them, the joint dissenting judgment of four found that while controversial, the question of its existence was one that may be considered as "capable of rational legal argument".¹²⁵ Judge Petren, a member of the majority, noted the

121 ICJ Rep 1966, p 6 at 47.

122 Brownlie, n 19, above, pp 466-73.

123 Smith, n 31 above, pp 96-98.

124 Brownlie has called for a liberal approach to *locus standi* to assist in addressing cases of damage to the environment in areas beyond national jurisdiction: "A Survey of International Customary rules of Environmental Protection", n 40 above, p 5. As to the current state of international law on recognition of an *actio popularis*, see Gray, n 85 above, pp 211-15, and Smith, n 31 above, pp 94-99.

125 ICJ Rep 1974, p 253 at 370. See Smith, n 31 above.

"contradiction" of finding that an obligation could exist which could not be enforced through dispute settlement procedures.¹²⁶ The *SS Wimbledon* case,¹²⁷ which concerned the refusal of Germany to allow the transit through the Kiel Canal of a ship registered in France, provides a much earlier example of a broad interpretation of a legal interest particularly relevant to the global commons. The Permanent Court of International Justice found that two States had standing in this case merely on the basis of having merchant ships and being parties to the treaty setting down the relevant obligations in relation to navigation, whose breach was alleged. No connection with the particular ship whose transit had been refused nor any specific use of the relevant canal was relied upon. More recently, Judge Schwebel in his dissenting opinion in the *Nicaragua (Provisional Measures)* case also took a broad view of the concept of "legal interest" in identifying a right on the part of the United States to seek to enforce Nicaragua's observance of its international obligations.¹²⁸

The ILC work on State Responsibility envisages individual States bringing claims for the provision of remedies for breach of *erga omnes* obligations. Cases of damage to the environment in general and in areas not falling within the jurisdiction of any State are specifically identified by the rapporteur as relevant in this regard. In his most recent report, the rapporteur has proposed the extension of the draft articles to cover not only *erga omnes* obligations under treaties but also under customary international law.¹²⁹ While this work of the ILC is limited to the issue of the consequences of breach of an obligation, it is also pertinent to the issue of enforcement of any obligation to provide reparation for damage based on a strict liability approach.

A cogent argument has been put by one writer that States should have standing to seek a remedy for a violation of international law without having suffered a special injury to their rights when the normal bilateral enforcement mechanisms of international law are likely to be ineffective and when community interests demand that an alternative and effective enforcement mechanism be available.¹³⁰ Protection of the global commons is specifically identified by that writer as an appropriate case for standing on this basis.

While the existence of an *actio popularis* under customary international law is at the moment uncertain, it is clear that such a right can be created by treaty.¹³¹ Any treaty regime addressing the issue of liability for damage to the global commons could thus provide for any party or any State to have a right to bring an action in relation to such damage. In developing such a mechanism for a treaty some issues relating to the concept of one State bringing an action

126 ICJ Rep 1974, at 303. See Smith, n 31 above.

127 PCIJ, Ser A, No 1.

128 ICJ Rep 1984, p 169 at 196-198.

129 Note 56 above, Addendum of 25 May 1992, para 95 and Addendum of 1 June 1992.

130 Charney, "Third State Remedies for Environmental Damage to the World's Common Spaces" in Francioni and Scovazzi, n 70 above, p 149 at 157.

131 *South West Africa (Second Phase)* case, n 121 above.

to vindicate a community interest would need to be addressed. First, the interest of the individual State may not be identical to that of the world community. There is a possibility therefore that the world community interest would not be properly represented by the claim. Even the decision about whether to bring such a claim may be finally determined by the individual interests of the State concerned. In addition, it would be possible for more than one State to bring such a claim. These issues can be addressed by limiting the nature of the remedies which can be sought by a State bringing a claim on the basis of an *actio popularis*.¹³² Alternatively, rather than allowing claims to be brought by an individual State, they could be brought by a body representative of the international community. An existing international organisation might be designated for this purpose or a new body created. CRAMRA provides a clear model here. It establishes an international body and requires parties to ensure that the body has the right to bring claims in their courts for compensation for damage to the Antarctic environment where it is not fully restored to its previous condition.¹³³ A related idea has been put forward by Malta in a broader context. It has proposed that a "guardian" be created to represent future generations. In any national or international forum where it was likely that a decision would be taken affecting the interests of future generations, access would be given to a person appointed as the "guardian" of future generations to appear and make submissions on their behalf.¹³⁴ This proposal highlights the fact that, in addition to the need to ensure that claims represent the interests of all States, it is necessary to ensure that they take into account future consequences of environmental damage. Any international body charged with bringing claims on behalf of the international community could have this specified in its mandate. The option of empowering an international body to bring liability claims may be particularly appropriate in relation to certain types of remedies.

Remedies

Liability regimes traditionally focus on compensation. Where the damage concerned is suffered by a particular individual or State no difficulty arises with such an approach. In the case of damage to the global commons which is not specifically suffered by any particular State, however, the question arises as to who would receive any compensation.

One approach to providing compensation for environmental damage taken in a number of recent treaties dealing with civil liability for damage within the national jurisdiction of States, and also in the CRAMRA, goes some way to providing a solution to this problem. This is to focus on the aim of repairing the environment, that is to say preventing or minimising future damage. The

132 Fourth Report of Mr Arrangio Ruiz to the ILC, Addendum of 1 June 1992, n 56 above. See below under "Remedies".

133 Note 46 above, article 8.10.

134 International Conference on Responsibilities towards Future Generations and their Environment, Malta, 27–29 April 1992.

1984 Protocol to the 1969 Convention on Civil Liability for Oil Pollution Damage provides for compensation for the "costs of reasonable measures of reinstatement [of the environment] actually undertaken or to be undertaken".¹³⁵ The 1989 Convention on Civil Liability for Damage caused during Carriage of Dangerous Goods by Road, Rail and Inland Transport Vessels (CRTD) makes identical provision.¹³⁶ CRAMRA similarly provides for reimbursement of reasonable costs of action to restore the *status quo ante*.¹³⁷ Recent work by the Council of Europe on a Draft Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment¹³⁸ elaborates the concept of reinstatement to include the introduction of the equivalent of damaged components of the environment into the environment. Similarly, the work of the United Nations Economic Commission for Europe on Draft Guidelines on Responsibility and Liability regarding Transboundary Water Pollution envisages measures for replacement of habitats of particular conservation concern.¹³⁹ Pursuant to such a provision in a Convention applying to damage suffered in the global commons, individuals or States incurring clean-up costs could claim compensation for those costs. By so doing, the benefit of liability is enjoyed by all who use that environment, now and in the future, rather than only going to the claimant. This, of course, would not guarantee that such clean-up measures would be undertaken. It would, however, mean that individuals, or more probably States, would not be discouraged from undertaking remedial measures by the prospect of having to bear the costs themselves.

A more comprehensive approach to ensuring that measures are taken to reinstate the environment when damage does occur would include an express obligation on the part of the individual causing the damage to carry out (or have carried out on their behalf) preventive and remedial measures. This would ensure that the fundamental aim of reparation, to restore the situation which would have existed if the damage had not occurred, would be achieved. The 1972 Convention on International Liability for Damage Caused by Space Objects imposes an obligation on the parties and, in particular, the State having launched the space object to "examine the possibility of rendering appropriate and rapid assistance" to a State which has suffered damage caused by the space object.¹⁴⁰ This Convention makes clear that no such assistance is to be provided without the request of the State suffering damage, thus ensuring that there is no interference with the sovereignty of another State. While such

135 Note 55 above, article 2.

136 Note 55 above, article 1.10. See also the draft Council Directive on Civil Liability for Damage Caused by Waste: Carr J (ed), *International Financial Law Review Special Supplement: A Legal Guide to EC Regulation* (June 1992), pp 20-22.

137 Note 46 above, article 8.2(d).

138 Council of Europe Paper DIR/JUR (91) 3 reprinted in (1991) 21 *Environmental and Policy Law* 270.

139 *Ibid*, p 135.

140 Note 42 above, article XXI.

an obligation in relation to areas within the national jurisdiction of a State may raise concerns about the possibility of interference with the sovereignty of the State, in the case of the global commons, no such concern arises. The direct imposition of such an obligation is thus appropriate. CRAMRA provides a clear model in a parallel case. It requires an operator carrying out a resource activity which "results in or threatens to result in" damage to the Antarctic environment to "take necessary and timely response action; including prevention, containment, clean up and remedial measures".¹⁴¹ The same remedy is also envisaged by the work of the European Communities on a draft Council Directive on Civil Liability for Damage Caused by Waste.¹⁴² In so far as the benefit of any action to enforce this obligation would flow, not to the individual or State bringing the action, but to the world community as a whole, the creation by treaty of a right to bring such an action would present no particular difficulties.¹⁴³ Again, however, no State might be willing to take on the burden of bringing such enforcement action.

Further alternatives to overcome this difficulty would be to impose such clean-up obligations on the liable operator or State but empower an international organisation to bring enforcement actions or to charge an international organisation with the task of cleaning up the environment itself. In the latter case, it could be empowered to bring a claim for reimbursement against the liable operator or State. In either case, an existing organisation having the relevant expertise could be chosen or a new organisation established. The involvement of an international body in this way would ensure that the interests of the world community were fully reflected in the decision to take enforcement action or clean up as the case may be, and in the manner in which that enforcement action or clean-up operation was conducted.

In so far as it is not possible to totally clean up damage, however, compensation should be payable in order to internalise the cost into the activity which caused the damage. CRAMRA again provides a model. It provides for compensation to be payable for damage to the Antarctic environment where there has been no restoration to the *status quo ante*.¹⁴⁴ Compensation was also recognised as payable for damage to the environment without limitation to clean-up costs in relation to damage within the national jurisdiction of a State in the *Patmos* case.¹⁴⁵ In this case, the court found that equitable criteria applied to its calculation. Such an approach is equally adaptable to assessing compensation where the damage to the environment is beyond national jurisdiction. Such compensation could be applied to balance the damage suffered jointly by the world community. A fund to be used to

141 Note 46 above, article 8(1).

142 Carr, note 136 above.

143 See Fourth Report of Mr Arrangin-Ruiz to the ILC, Addendum 1 June 1992, n 56 above, para 146.

144 Note 46 above, article 8.2(a).

145 See Maffei, n 74 above, p 387.

promote the protection of the environment of the global commons is one possibility. Such a fund could be used for reinstatement of the environment of the global commons in cases where the cause of damage cannot be identified. It could also be used for research into the impacts of contamination on the global commons and for public education and awareness programs on this issue. Such reinstatement and research work could, of course, be limited to damage of the type dealt with by the particular treaty. Again an international organisation could be established or an existing one nominated to manage the fund. The International Oil Pollution Compensation Fund provides one model as to how the resources of such a fund could be managed.¹⁴⁶ Again, as the compensation would benefit the whole world community, the difficulties involved in allowing one State to bring a claim for such compensation are largely absent although the possibility that no State would be willing to do so would arise. Such concerns could be removed completely by providing for an international organisation, possibly the body managing the fund, to bring such claims.

In so far as individual States are to be relied upon to bring actions representing the interest of the world community, any fund along the above lines might also be used to reimburse the costs of bringing an unsuccessful action. This would have the advantage that a State would not be deterred from bringing an action which, if successful, would benefit the whole world community by the risk that, if unsuccessful, it would bear the burden alone. On the other hand, it would mean that the cost of bringing an action would not operate as it usually would to deter unwarranted claims. Again, this consideration points to the advantages of empowering an international organisation to bring claims.

Conclusion

Damage to the global commons can be divided into damage which particularly affects one or a number of States and damage which affects the world community as a whole. The protection of the global commons from the latter type of damage is in the mutual interests of all States and the present and future generations of the world community and this interest is reflected in current international law. The imposition of liability for damage to the global commons where the specific cause of that damage can be identified is, as in the case of damage to the environment within the national jurisdiction of States, an efficient means of providing such protection.

146 This fund is established by the 1971 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage: 1110 *UNTS* 57. It differs from that proposed here in that it supplements the compensation provided by the operator causing the relevant damage and is funded by contributions from all participants in the relevant industry on the basis of the risk posed, rather than being funded as a result of liability for any actual damage caused.

While customary international law does not yet provide a clear picture of how such liability could operate, rules can be provided by treaty. In particular, any treaty regime dealing with liability for damage to the environment within national jurisdiction can and should equally address liability for damage to the environment beyond national jurisdiction. The fact that no one State suffers particular damage beyond that of any other raises special issues in developing such a regime. Clearly, the remedy must flow to the world community and not merely a State which brings a claim. On the other hand, no State may be willing to bear the burden of bringing a claim alone where the benefits of such a claim will be shared by the entire world community. These issues can, to a large extent, be dealt with by broadening the scope of the types and operation of applicable remedies. Obligations to reinstate the environment or reimbursement of the costs of reinstatement carried out by others can usefully be applied in such cases. Where reinstatement is not possible, compensation could be paid into a general fund to be applied to promote the interests of the world community in relation to the global commons. Such a fund might also be used to support future claims on behalf of the world community. The particular considerations flowing from the global nature of the interest can also be addressed by providing for international organisations to play a role in bringing claims on behalf of the international community.

The work about to commence on development of a Liability Annex to the 1991 Protocol on Environment Protection to the Antarctic Treaty will necessarily tackle these issues. The work now underway in the IAEA to revise the Vienna Convention on nuclear liability and in the IMO to develop an International Convention on Liability for Damage Caused by Carriage of Hazardous and Noxious Substances by Sea provides clear opportunities to extend the protection of liability regimes to other global commons, as do the work now commencing on a Liability Protocol to the 1989 Basel Convention and the examination of liability envisaged by the 1992 Convention on Biological Diversity.