List of Annexes Accompanying the Written Comments of the United States of America

August 15, 2024

ANNEX	DESCRIPTION
1	RICHARD K. GARDINER, TREATY INTERPRETATION (2d. ed. 2015) [excerpt]
2	Susan Biniaz, Remarks, *Common but Differentiated Responsibility*, 96 AM. SOC'Y INT'L L. PROC. 359 (2002)
3	Thomas Leclerc, *The Notion of Common but Differentiated Responsibilities and Respective Capabilities: A Commendable but Failed Effort to Enhance Equity in Climate Law*, *in* DEBATING CLIMATE LAW 76 (Benoit Mayer & Alexander Zahar eds., 2021)
4	ANTONIO CASSESE, SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL (1995) [excerpt]
5	Jean Salmon, *Duration of the Breach*, *in* THE LAW OF INTERNATIONAL RESPONSIBILITY 390 (James Crawford et al. eds., 2010) [excerpt]
6	John Quigley, *Complicity in International Law: A New Direction in the Law of State Responsibility*, 57 BRIT. Y.B. INT'L L. 77 (1986) [excerpt]
7	Alexander Orakhelashvili, *Division of Reparation Between Responsible Entities*, *in* THE LAW OF INTERNATIONAL RESPONSIBILITY 647 (James Crawford et al. eds., 2010) [excerpt]
8	BRIAN D. SMITH, STATE RESPONSIBILITY AND THE MARINE ENVIRONMENT (1988) [excerpt]

ANNEX 1

Treaty Interpretation

Second Edition

RICHARD K GARDINER

OXFORD
UNIVERSITY PRESS

Annex 1

OXFORD
UNIVERSITY PRESS
Great Clarendon Street, Oxford, OX2 6DP,
United Kingdom

Oxford University Press is a department of the University of Oxford.
It furthers the University's objective of excellence in research, scholarship,
and education by publishing worldwide. Oxford is a registered trade mark of
Oxford University Press in the UK and in certain other countries

First Edition published in 2008
Second Edition published in 2015

Impression: 1

Published in the United States of America by Oxford University Press
198 Madison Avenue, New York, NY 10016, United States of America

British Library Cataloguing in Publication Data
Data available

Library of Congress Control Number: 2014959429

ISBN 978–0–19–966923–3

Printed and bound by
CPI Group (UK) Ltd, Croydon, CR0 4YY

Annex 1

of 1955.[107] Similarly in the 1999 river frontier case *Botswana/Namibia*, having specifically referred to the Vienna rules, the ICJ stated:

> In order to illuminate the meaning of words agreed upon in 1890, there is nothing that prevents the Court from taking into account the present-day state of scientific knowledge, as reflected in the documentary material submitted to it by the Parties....[108]

Probably the most useful conclusion that can be found at present on the issue of intertemporality in relation to treaty interpretation is that of the ILC in its 2006 Report:

> *Inter-temporality.* International law is a dynamic legal system. A treaty may convey whether in applying article 31 (3) (c) the interpreter should refer only to rules of international law in force at the time of the conclusion of the treaty or may also take into account subsequent changes in the law. Moreover, the meaning of a treaty provision may also be affected by subsequent developments, especially where there are subsequent developments in customary law and general principles of law.[109]

4.3 Clarifying meaning by reference to international law

Located in its immediate context of treaty interpretation, article 31(3)(c) implicitly invites the interpreter to draw a distinction between using rules of international law as part of the apparatus of treaty interpretation and applying the rules of international law directly to the facts in the context of which the treaty is being considered. The former is within the scope of the Vienna rules, the latter not.

However, there appears to be a prime example of conflation of these two ideas in the judgment of the ICJ in the *Oil Platforms* case.[110] That case concerned the destruction of Iranian oil platforms by the USA when the latter was defending shipping in the Gulf at a time of war between Iran and Iraq. The Court had concluded in the initial phase (1996) that the only dispute within its jurisdiction was over the interpretation and the application of article X(1) ('freedom of commerce') of a Treaty of Amity, Economic Relations, etc of 1955.[111] Iran argued that in destroying its oil platforms in the Gulf, the USA had violated this provision. In 1996 the Court had, however, also taken account of article XX(1)(d) of the same treaty, which stated that the treaty did not 'preclude the application of measures... necessary to fulfil the obligations of a High Contracting Party for the maintenance or restoration of international peace and security, or necessary to protect its essential security interests'. The Court took the view that article XX(1)(d)

[107] [1994] ICJ Reports 6.

[108] *Kasikili/Sedudu Island (Botswana/Namibia)* [1999] ICJ Reports 1045 at 1060, para 20.

[109] ILC Report on the work of its Fifty-eighth Session (2006), General Assembly, Official Records, Sixty-first Session, Supplement No 10 (A/61/10), 415, para (22) (footnotes omitted).

[110] *Oil Platforms (Islamic Republic of Iran v United States of America) (Merits)* [2003] ICJ Reports 161 and see section 4.5 below; for commentary, see F D Berman, 'Treaty "Interpretation" in a Judicial Context' (2004) 29 *Yale Journal of International Law* 315; D French, 'Treaty Interpretation and the Incorporation of Extraneous Legal Rules' (2006) 55 ICLQ 281.

[111] *Oil Platforms (Islamic Republic of Iran v United States of America) (Preliminary Objection)* [1996–II] ICJ Reports 820, para 53.

was 'confined to affording the Parties a possible defence on the merits to be used should the occasion arise'.[112]

At the stage of considering the merits, however, the reasoning in the majority judgment took the general international law of self-defence as the starting point, making reference to article 31(3)(c) of the Vienna Convention in support of this approach.[113] Using general international law, rather than starting with the treaty terms and applying the whole process of the Vienna rules systematically, the ICJ found that the USA could not justify its destruction of the platforms by reliance on article XX(1)(d). The Court nevertheless found that the USA had not violated article X(1). The absence of a finding of a violation prompts the question whether, given the Court's earlier view that article XX(1)(d) could afford a defence 'should the occasion arise', it was necessary to embark on a consideration of that article at all and whether the approach it took was in any way what article 31(3)(c) mandates.

Powerful criticism has been made of the judgment in *Oil Platforms,* including prominently that of two ICJ judges in their separate opinions (though concurring in the result). On the majority's approach to interpretation, Judge Higgins wrote:

> The Court has, however, not interpreted Article XX, paragraph 1 *(d),* by reference to the rules on treaty interpretation. It has rather invoked the concept of treaty interpretation to displace the applicable law. It has replaced the terms of Article XX, paragraph 1 *(d),* with those of international law on the use of force and all sight of the text of Article XX, paragraph 1 *(d),* is lost.[114]

Judge Kooijmans similarly took the view that the question was not whether the USA had acted in self-defence under general international law but whether it had violated a treaty. He considered that once the Court had concluded that the USA had not violated article X(1), article XX(1)(d) was not relevant to the decision on the claim made by Iran:

> ... the approach taken by the Court is putting the cart before the horse. The Court rightly starts by saying that it is its competence to interpret and apply Article XX, paragraph 1 *(d)* (Judgment, para. 33), but it does so by directly applying the criteria of self-defence under Charter law and customary law and continues to do so until it reaches its conclusion in paragraph 78.
>
> The proper approach in my view would have been to scrutinize the meaning of the words 'necessary to protect the essential security interests' in Article XX, paragraph 1 *(d).* ...[115]

The role of treaty interpretation is clearest when seen in the context of a particular treaty provision. When it is a matter of considering how a treaty contributes to the law applicable to a particular situation, interpretation of a treaty may become interwoven with issues of its application in the circumstances; but that is still a

[112] [1996–II] ICJ Reports 820, at para 20.
[113] [2003] ICJ Reports 161 at 182, para 41.
[114] [2003] ICJ Reports 225 at 238, Separate Opinion at para 49.
[115] [2003] ICJ Reports at 259, Separate Opinion at paras 42–43; and for Judge Kooijmans' explanation of using article 31(3)(c) to lead to supplementary means to provide standards in applying a treaty provision, see section 4.5 below.

different matter from the application of international law directly to the given facts. In the *US—Shrimp* case (whether US restrictions on shrimp imports could be justified as an environmental measure to protect turtles), the Appellate Body of the WTO specifically referred to article 31(3)(c) and identified its function.[116] The structure of the provision in issue was one in which permissible measures for environmental protection and other purposes were listed, the whole list being governed by the requirement in the provision's chapeau (the introductory words) that measures were to be such that they did not constitute 'arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade'.

The Appellate Body considered the role of good faith and stated that abuse of treaty rights amounted to a violation of the treaty conferring those rights.[117] However, it distinguished between abuse of rights as an aspect of the general principle requiring good faith in application of a treaty and stated that 'our task here is to interpret the language of the chapeau, seeking additional interpretative guidance, as appropriate, from the general principles of international law'.[118] Nevertheless, it remains difficult to separate out the general deployment of international law, its role as an interpretative guide, and the balancing of rights under the treaty in the part of the Appellate Body's Report which immediately followed its reference to article 31(3)(c):

> The task of interpreting and applying the chapeau is, hence, essentially the delicate one of locating and marking out a line of equilibrium between the right of a Member to invoke an exception under Article XX and the rights of the other Members under varying substantive provisions (e.g., Article XI) of the GATT 1994, so that neither of the competing rights will cancel out the other and thereby distort and nullify or impair the balance of rights and obligations constructed by the Members themselves in that Agreement. The location of the line of equilibrium, as expressed in the chapeau, is not fixed and unchanging; the line moves as the kind and the shape of the measures at stake vary and as the facts making up specific cases differ.[119]

It can be seen that the Appellate Body here elides the task of interpreting and that of applying the provision. In this case there seems more justification for this than in some others. The structure of the provision in issue rather dictated this. There was an issue of interpretation over the relationship of the list of excepted measures to the governing conditions in the chapeau, an interpretative issue resulting in a range of possible outcomes when applied to particular facts.

More difficult to explain is the invocation of article 31(3)(c) in the ECtHR judgment in *Loizidou v Turkey*.[120] In that case the applicant's complaints included one that Turkey was responsible for her being denied access to her property in Northern

[116] *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Report of Appellate Board AB-1998-4, WT/DS58/AB/R, 12 October 1998, para 158, footnote 157.
[117] For these aspects of the case see Chapter 5, section 2.4.4 above.
[118] *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, para 158.
[119] *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, para 159.
[120] [1996] ECHR 15318/89.

Cyprus before, during, and after a demonstration in 1989 by Greek Cypriot women when they crossed into Northern Cyprus where they were detained and returned across the buffer zone to Greek Cypriot territory by Turkish soldiers and Turkish Cypriot police. Turkey had limited its acceptance of the compulsory jurisdiction of the Court to matters raised in respect of facts which had occurred after that acceptance. Turkey argued that the applicant had lost title to her property in Northern Cyprus well before that acceptance and at the latest in 1985 by the promulgation of a constitutional provision by the Turkish Republic of Northern Cyprus (TRNC).

Invoking the Vienna Convention's article 31(3)(c), the Court asserted that 'the principles underlying the [Human Rights] Convention cannot be interpreted and applied in a vacuum'.[121] It then rejected the Turkish contention on the basis *(inter alia)* of resolutions of the UN refusing recognition of the TRNC, thus providing a ground for also rejecting the asserted consequence of the TRNC's constitution. The idea that the European Convention is not to be interpreted and applied in a vacuum seems unassailable; but while this means that assessing the Turkish argument in the context of the international legal position of the TRNC was a legitimate exercise, that does not make it an exercise of treaty interpretation. In contrast, had article 31(3)(c) been specifically invoked in the *Loizidou* judgment in the context of the issue whether the deprivation of property had been subject to 'conditions provided for by law' (Protocol 1 to the European Convention), it can be seen that the invalidity of the TRNC constitution under international law would have been relevant to the question whether the Protocol's wording was to be interpreted to cover law derived from the purported constitution.

4.4 Reference to other treaties

Courts and tribunals, national and international, appear to have no hesitation over using provisions in treaties other than the one being applied as aids to interpretation where the same, similar, or different term sheds light on the meaning under consideration. This is such an accepted and established practice that it is hard to find any situation in which justification in terms of the Vienna rules has been presented. The reason for this is not hard to see. In the context of 'the relentless rise in the use of treaties as a means for ordering international civil society'[122] what can be seen, particularly in connection with bilateral treaties but also more generally, is that reference is commonly made in interpretation of one treaty to others in the same subject area:

> Each state brings to the negotiating table a lexicon which is derived from prior treaties (bilateral or multilateral) into which it has entered with other states. The resulting text in each case may be different. It is, after all, the product of a specific negotiation. But it will inevitably share common elements with what has gone before.[123]

[121] [1996] ECHR 15318/89 at para 43.
[122] McLachlan, 'The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention' (2005) 54 ICLQ 279, at 283.
[123] McLachlan, at 283.

ANNEX 2

Proceedings of the 96th Annual Meeting

THE LEGALIZATION OF INTERNATIONAL RELATIONS/THE INTERNATIONALIZATION OF LEGAL RELATIONS

March 13–16, 2002
Washington, DC

Annex 2

THE AMERICAN SOCIETY OF INTERNATIONAL LAW

The Society is a professional association devoted to the study and use of law in international affairs. Membership is open to people of all nations, lawyers and nonlawyers, who are interested in the challenging problems of law and policy. Its large and diverse membership of some 4,400, drawn from more than one hundred countries, includes scholars, practitioners, government officials, international civil servants and students.

Founded in 1906, the Society serves as a meeting place, forum and collegial research center, hospitable to all viewpoints in its meetings, publications and other activities. Publications include the *American Journal of International Law, International Legal Materials, Studies in Transnational Legal Policy*, the *ASIL Newsletter*, and reports and books produced by its programs of research, study and outreach.

The Society is a nonpartisan, tax-exempt, nonprofit corporation headquartered at Tillar House on Sheridan Circle in Washington, DC.

It is the policy of the American Society of International Law not to take an official position, by resolution or otherwise, upon controversial questions. The views expressed in the addresses, remarks and discussions delivered at its Annual Meeting and appearing in its printed *Proceedings* are those of the individual speakers and are not to be taken as representing the views of the Society.

SUBSCRIPTION INFORMATION

ASIL members and nonmembers may order the *Proceedings of the 96th Annual Meeting* for $75; or $95 for delivery outside the United States. To place an order or to receive information on back issues, please contact The American Society of International Law, 2223 Massachusetts Avenue, NW, Washington, DC. 20008-2864; telephone (202) 939-6000, fax (202) 797-7133.

PROPER CITATION

The Proceedings should be cited according to following example:
96 ASIL PROC. 214 (2002).

Annex 2

Annex 2

it already emerged as a robust, acknowledged principle of international environmental law?[5] What is the attitude of the United States and other developed states toward this CDR notion? And what inference, if any, may be drawn from the attitude of the United States government toward global warming? What is the attitude of the developing countries toward this CDR concept? How do international lending institutions regard CDR, and does the notion carry normative weight as a legal rule when, e.g., World Bank lenders consider whether to make international loans for national development projects? Relatedly, to what extent can CDR be applied to other sectors of the global commons? Does it have legal relevance for efforts to deal with environmental threats to the oceans, polar regions, or even outer space? Finally, can this concept be linked to the notion of fairness to future generations? These are a few of the questions that I hope our panelists will address.

REMARKS BY SUSAN BINIAZ*

My remarks are divided into two parts. The first concerns types of differentiation that have appeared in international environmental agreements to date, and the second deals with the role of the principle of common but differentiated responsibilities (CDR) in that discussion. Differentiation of commitments in international environmental agreements can be perfectly appropriate, depending on the topic and the states involved. It is important to understand the varied purposes that differentiation can have, as well as the forms that it takes and the types of distinction that it makes between categories of states.

First, the purposes of differentiation can be summarized as follows: (1) to assign a greater obligation to those who have contributed more to a particular environmental problem, e.g., climate change; (2) to assign a greater obligation to those who have more resources or capacity to deal with a particular situation, even if they did not cause that problem; (3) to recognize the special situation of one or more countries—and that does not necessarily have to be only developing countries, it can be other countries as well; (4) to recognize that countries may have different priorities and that a particular environmental issue may not be their top priority; and (5) to promote broad participation in an agreement. This is a practical approach. Even though it may be inappropriate or illogical to make a distinction between parties, it is done because more parties may then join the agreement and then we all will be better off.

Commitments also vary. Or commitments may be the same, but the time frame is different. An example is the Montreal Protocol on Ozone. Everybody has the same commitments, but certain developing countries receive a ten-year grace period. Sometimes the commitments of categories of countries are actually different, as with the Kyoto Protocol, where there is no grace period for developing countries—they simply have no commitments to limit greenhouse gas emissions.

When commitments differ, they can be expressly different. An agreement might say that article X commits these countries to do something, while article Y commits other countries to do something else. Or the differentiation can be more subtle. Everybody might have the same obligation, but the language of that obligation might say something like "recognizing the different capabilities of countries, they shall all do the following. . . ." This is more an implicit, not express, differentiation.

[5] *See generally* the discussions in COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM (Dinah Shelton ed., 2000).

* Assistant Legal Adviser, U.S. Department of State.

Sometimes all but one of the commitments in an agreement are the same. If the exception were funding, all countries party to an agreement might have the same commitments but only those with adequate resources would actually be asked to make financial payments for particular reasons. And sometimes differentiation shows up through reservations: If an agreement permits reservations, or does not prohibit them, countries may take advantage of the reservations option for their own special situation. In these cases, the differentiation is not prescribed, but it is allowed to blossom.

Next, there are ways in which states are differentiated. Sometimes the categories are clear. In the original Framework Convention on Climate Change (FCCC), countries are actually named. These are the "Annex I Parties." There is no ambiguity. Sometimes, though, the categories in an agreement are totally unclear. The Biodiversity Convention says that "developed countries" shall make payments. Nobody really knows who the developed countries are, and in fact there is a debate about it.

Sometimes there are no categories per se but only language like "taking into account the capacity of countries . . . ." There is differentiation but no way to be sure how it plays out. Sometimes one agreement has different categories for different purposes. Everybody has to do something, but certain countries also have to do something else. Sometimes the categories are not based on stages of economic development but on something completely different. In the UN European Economic Commission, which covers North America and Europe, the United States and Canada have distinguished themselves from Europe on a number of occasions because there are no transboundary impacts on Europe from whatever the United States and Canada are doing. There has been a special North American carve-out. It has nothing to do with developing country status; rather it reflects a special situation of certain countries that has been recognized.

Sometimes a special base year is set for countries who take early action. Again, this is not related to economic development. But sometimes an agreement recognizes that if 1990 was a base year and certain countries had actually reduced their emissions before 1990. they will in effect be punished if that year is used. They should be able to pick an earlier year for differentiation.

The last concern is whether differentiation is designed to evolve or not. This incredibly important point is notably missing in the Kyoto Protocol. Sometimes differentiation is written so that it does not change unless everybody agrees. This is the case in the original FCCC. That list of Annex I parties appears immutable. Unless a country agrees to be added to the list, it does not happen. There is no automatic evolution of the differentiation.

Sometimes, though, the categories are written so that they automatically evolve. Two examples illustrate this point. The Montreal Protocol does not say that "these countries for all time have a ten-year grace period." Instead it says that a country can only take advantage of the ten-year grace period if its per capita consumption of ozone-depleting substances is below a certain level. Once a country reaches a certain stage of development, it is automatically out of the special category. The drafters who structured the Montreal Protocol had great foresight; the lack of evolution was probably a fatal flaw in the original FCCC. Learning from that mistake, countries took a different approach in the Basel Convention. Instead of listing countries, the latest amendment to the Basel Convention refers to "everyone who belongs to the Organization for Economic Cooperation and Development" (OECD). As countries join the OECD, they are automatically captured. One problem with the FCCC is that Mexico and Korea were not in the OECD in 1992 when the convention was negotiated, so they are not on the Annex I list. When they later joined the OECD, people started to ask whether they should be subject to the

obligation that applies to all OECD countries. Well, it is not written that way, they objected, so it did not happen. The Basel annex takes account of that issue.

Finally, sometimes agreements are written precisely to address the concerns of developing countries, even though they make no differentiation. The fundamental intent of the Basel Convention is to help protect developing countries from the imports of hazardous wastes that they could not handle and did not want. The main purpose of the recent Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade was to protect developing countries that thought they needed a legal belt as well as suspenders to protect themselves. Though the convention contains no differentiation, the main purpose of the agreement addresses that concern.

In my view the CDR principle is not necessary, and it is not helpful. While this may not be a U.S. government position, it is my opinion based on ten years of working on this issue.

Why is it not necessary? Because many agreements can and do differentiate between commitments without relying on a principle. The negotiators of those agreements rely on the underlying purposes, the underlying logic, of differentiation. Sometimes there are reasons for making a distinction, perhaps because some countries had contributed to a problem, or had extra capacity to deal with a problem, or have special situations. But before the principle was articulated, no one lamented the absence of a principle distinguishing between parties that could be an impediment to negotiation. Not at all. Agreements were drafted to address issues at hand, by the countries involved.

The Montreal Protocol (Protocol) is an excellent example of an instrument that came before the articulation of any principle, and it is the most sophisticated approach to differentiation that we find. For a party to take advantage of the ten-year grace period in the Protocol, it must meet two criteria. (1) parties to the Protocol must decide whether the country is a developing country. The decision is not based on some UN list. (2) It must have a certain per capita consumption of chlorofluorocarbons (CFCs). This is a living, breathing differentiation that changes over time. A later amendment to the Protocol calls upon certain developed countries to fund certain costs of developing countries. This is another recognition of differentiation that has been very successful in getting developing countries into the Protocol and actually taking steps to reduce ozone-depleting substances.

Another example is the protocol superseding the London Dumping Convention. That instrument contains an optional five-year grace period. This is not limited to developing countries, though it is probably intended more for them. There is no mention of a principle. The provision was simply seen as logical, one that would broaden participation in the protocol if countries had extra time. In sum, the absence of a principle has been no bar to differentiation.

Why has this so-called principle of CDR not been helpful? Four reasons can be cited: (1) There is no agreement on what it means; (2) there is no agreement on when it applies; (3) it is over-argued; and (4) it breeds laziness in the negotiating process.

First, it is not clear what the concept means. Consider Principle 7 in the Rio Declaration. The first sentence says that "states shall cooperate in a spirit of global partnership to conserve, protect and restore the earth's ecosystem." That obviously applies to all states. The next sentence asserts that "In view of the contributions to global environmental degradation"—in other words, because of something these countries have done to degrade the global environment—"states have common but differentiated responsibilities." The third sentence posits that "The developed countries acknowledge

the responsibility they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and the technological and financial resources they command." This is not only about the pressures they exert but also about the resources they command.

We might assume that we could all agree that Rio Principle 7 embodies the right and accurate formulation of the principle. But it is not at all clear that we can. The Climate Convention concluded a month later contains a different formulation of this principle that is purposely ambiguous. I know that from personally negotiating the provision for the United States. There was no agreement among developed countries whether the reason they were to take the first action is that they were historically responsible or that they had more resources. Some said, "Oh, we have been terrible, bad global citizens because we have been pumping greenhouse gases into the atmosphere." Others said, "But wait. Are we really responsible for something we did not know was harmful until the Intergovernmental Panel on Climate Change decided it was? The reason we are taking early steps is that we are the ones who have the capacity to do that." So the agreement was written so that it could be argued either way, which is not the case for Rio Principle 7.

Take Principle 7. Here are some of the issues that have cropped up in every negotiation: Why are there common but differentiated responsibilities? The second sentence in the principle makes it sound as though it is because of a country's contribution to global degradation, but the third sentence asserts that the developed countries have more responsibility because of the technologies and financial resources they command. Those are two different arguments. Even a state that has no responsibility at all might have the capacity to deal with the problem. This issue arises all the time, but there is no solution.

Are there many permutations of responsibilities? Are there 190 different sets of responsibilities, since countries obviously do not all make the same contributions to environmental degradation? Or are there only two categories of responsibilities? The second sentence suggests that every state probably has a different responsibility. The third sentence says that the developed countries will take the lead. If that is part of the principle—and who knows if it is?—then there is a reasonable argument that there are common but differentiated responsibilities but that there are only two categories: developed countries and developing countries. This is a huge issue in the negotiation of international environmental agreements.

Moreover, what is a developed country? Is it one that is in the OECD? If so, Mexico and Korea should have higher responsibilities under the Framework Convention for Climate Change. They do not. If the criterion is not OECD membership, what is it? In Basel, Israel attempted to get into the developed country category, arguing that for purposes of waste management, it had similar facilities to a developed country. The developing countries said, "Absolutely not!" So is a developed country defined in terms of an environmental situation, or is it defined politically? Even if Israel has the same facilities, it cannot go into the list because, politically, that would be blurring a clear line that developing countries want to maintain. Also, what about the countries of economies in transition—the former Soviet bloc countries? They argue that they are not developed countries. They argue that they are in a different situation from the rest of us. The developing countries, however, say, "No, you aren't. You are developed countries." This remains a major issue in several current negotiations—who is in which category.

It is also not clear what situations the principle applies to. The second sentence says "in view of their contribution to global environmental degradation." Does the principle apply to local or national issues as well? Developing countries often argue that it applies to everything. Others will counter that the sentence says it is about "global" issues. In

a negotiation two weeks ago on funding of the UN Environment Programme, the developing countries said, "The common, but differentiated responsibilities principle applies, therefore, we do not pay." The European Union replied, "That principle does not apply to the funding of an international organization. It has nothing to do with that. The principle applies to global environmental issues." These are just a few examples of the absence of agreement on how and when to apply the principle.

Moreover, the principle is over-argued. Sometimes developing countries will stress the third sentence of Rio Principle 7, which says that developed countries should take the lead. They will read that back into the second sentence and assert there are not several categories of countries, but only two. They read out the word "common" to focus on "differentiated" and conclude that "We have no commitments."

It often happens that, although the text of an agreement makes no distinction between parties (e.g., the Basel Convention), countries will later assert that the principle of common but differentiated responsibilities dictates that compliance regimes distinguish between developed and developing countries. This is a kind of ex post facto effort to change commitments that were *not* differentiated when they were negotiated into differentiated commitments by virtue of saying that it is permissible for developing countries to not implement these commitments, because of the principle. In the Desertification Convention, countries that had actually caused degradation to themselves initially argued that developed countries were responsible for that degradation and should therefore bear all the obligations. That view was seen as so preposterous that it did not prevail. The point is that over-arguing this principle distracts from the substance of international environmental agreements.

There is also the problem of laziness. When there was no Principle 7, each country attended a negotiation and made an individual contribution to how an agreement should work, or what length a grace period should be, or how the evolution should proceed. Now countries attending a negotiation say that the principle of common but differentiated responsibilities applies. Yet when asked what that assertion means for the negotiation, they have no idea. The upshot is a debate over whether the principle applies, rather than over the substance of the matter at hand.

My last point is that environmental principles, such as precaution and common but differentiated responsibilities, are likely to be of only limited utility—or worse. They are not specific enough to be useful. Even if we agree that they apply, they do not tell us how to structure an agreement. But they are invoked often enough that they are a huge distraction from the substance of what needs to be decided at a negotiation. States would be better served by focusing on the hard questions that need to be answered rather than be distracted by the application of a so-called principle. To me, this notion is nowhere close to being either hard or soft law. A precondition for a law is that there is a rule and everyone knows what it is. Common but differentiated responsibility is so far from that that I think it fails to rise even to the level of soft law.

Remarks by Charles E. Di Leva*

I understand Sue Biniaz's position given her task to negotiate agreements that her client, the U.S. government, is responsible for implementing, and her resulting view that principles such as common but differentiated responsibilities (CDR) are either difficult to implement or annoying distractions. However, these principles evolve because we need common ways of looking at challenging problems. In some ways, we might look at the CDR principle as a "good neighbor" principle like Rio Principle 2, in which

* Lead Counsel, Office of the General Counsel, World Bank.

ANNEX 3

DEBATING CLIMATE LAW

Edited by

BENOIT MAYER
The Chinese University of Hong Kong

ALEXANDER ZAHAR
Southwest University of Political Science and Law

Annex 3

CAMBRIDGE
UNIVERSITY PRESS

University Printing House, Cambridge CB2 8BS, United Kingdom

One Liberty Plaza, 20th Floor, New York, NY 10006, USA

477 Williamstown Road, Port Melbourne, VIC 3207, Australia

314–321, 3rd Floor, Plot 3, Splendor Forum, Jasola District Centre,
New Delhi – 110025, India

79 Anson Road, #06–04/06, Singapore 079906

Cambridge University Press is part of the University of Cambridge.

It furthers the University's mission by disseminating knowledge in the pursuit of education, learning, and research at the highest international levels of excellence.

www.cambridge.org
Information on this title: www.cambridge.org/9781108840156
DOI: 10.1017/9781108879064

First published 2021

Cover photo: Copyright © Hellenic Ministry of Culture and Sports – Archaeological Receipts Fund) (N. 3028/2002).

A catalogue record for this publication is available from the British Library.

ISBN 978-1-108-84015-6 Hardback

Annex 3

Debate 3: CBDR Principle

~ B ~

The Notion of Common but Differentiated Responsibilities and Respective Capabilities: A Commendable but Failed Effort to Enhance Equity in Climate Law

THOMAS LECLERC

If you aim to convince everyone, you risk convincing no-one. When analysing the story of the so-called 'common but differentiated responsibility and respective capabilities' (hereinafter CBDR-RC) principle, this warning alludes to the diplomatic, negotiating environment in which this notion has progressively evolved, and may help clarify its current status and relevance in the legal debate.

To qualify the expression CBDR-RC as a cornerstone principle of the climate change regime would be to misunderstand the legal origin of the notion. At the time that it emerged in the international debate, the notion was a political agreement, based on ethical considerations, to bind states together in common aims while acknowledging the unequal development and capacities of these states. Since then, the notion has remained politically tainted and it never managed to clarify or consolidate the legal obligation it was supposed, theoretically, to entail.

In other words, and this should not be underestimated, the CBDR-RC notion never was a *legal* principle and never had any *legal* value. In support of this position, two lines of argument will be presented.

First, when the Kyoto Protocol was adopted, CBDR-RC was meaningful in principle, but its legal incarnation in practice proved to be highly controversial. The United States rejected it entirely, while the majority grudgingly agreed to its incarnation without accepting its legal implications.

https://doi.org/10.1017/9781108879064.007 Published online by Cambridge University Press

Both positions led, at the time, to an absence of legal value in the so-called CBDR-RC principle. Today, the formulation of the notion in the Paris Agreement – 'common but differentiated responsibilities and respective capabilities, in the light of different national circumstances'[1] – hints at a pragmatic approach meant to overcome divisions between developed and developing countries. The formulation nevertheless thus became so vague and ambiguous that states agreed, essentially, on something meaningless and therefore irrelevant.

In other words, and this will be my second argument, the CBDR-RC notion is of no use today because of its progressive loss of specific meaning. And this conclusion will confirm the sole purpose of the notion: to strengthen ethical and political considerations – as a way to enable compromise – while negotiating the genuine legal rules of the climate change regime.

CBDR-RC in the 1990s: A Diplomatic Solution without Legal Significance

In the 1990s, the core meaning of the CBDR-RC notion was relatively clear. States described as 'developed' had to be at the forefront of the fight against climate change and its harmful effects. Following acceptance of this, the notion came to imply a top-down determination of a state's legal obligation, based on an objective assessment.

This seemed to be the case with the Kyoto Protocol,[2] which divided its parties into two groups – developed (Annex I) and developing – and created a set of new legal obligations for the former while reaffirming older obligations (from the UNFCCC) applicable to all. For this reason, the Protocol appeared as the implementation of the notion,[3] and it still represents today 'the high-water mark of differential treatment'[4] in climate

[1] Paris Agreement (adopted 12 December 2015, EIF 4 November 2016) (2016) 55 ILM 740, art. 2(2).

[2] Kyoto Protocol to the UNFCCC (adopted 11 December 1997, EIF 16 February 2005) 2303 UNTS 162.

[3] See Kristin Bartenstein, 'De Stockholm à Copenhague: Genèse et évolution des responsabilités communes mais différenciées dans le droit international de l'environnement' (2010) 56 *McGill LR* 177, 191, pointing out the strong association of the Kyoto Protocol with the concept of common but differentiated responsibilities and the technique of differential treatment.

[4] Lavanya Rajamani, 'The Changing Fortunes of Differential Treatment in the Evolution of International Environmental Law' (2012) 88 *Intl Affairs* 605, 606.

change law. The notion manifested itself in provisions that differentiate between developed and developing states with respect to the central obligations contained in that treaty, that is emission-reduction targets and timetables.[5] The positive and optimistic reading of the legal incarnation of the CBDR-RC principle in the Protocol was its supposedly clear legal basis: Principle 7 of the 1992 Rio Declaration[6] and Article 3(1) of the UNFCCC.[7]

That having been said, clarity in principle does not necessarily imply acceptance in practice. In reality, differential treatment in the main body of obligations on climate change mitigation has been disputed from the start. In other words, a top-down determination of a state's obligation based on an objective assessment turned out to be, from the very beginning, highly controversial.[8] There were two reasons.

First, in order to be legally significant and relevant, the CBDR-RC principle needed to be based on an accepted theory of differentiation. Reality proved the opposite.[9] As acknowledged by Scott and Rajamani: 'there are differing views on whether the basis for differentiation lies in differences in the level of economic development and capabilities, in contributions to GHGs in the atmosphere, or both'.[10] If there are 197

[5] See Bartenstein (n. 3) 197, stating that 'the expression "differentiated responsibilities" actually refers to "differentiated obligations"' (our translation).

[6] Rio Declaration on Environment and Development, UN Doc A/CONF.151/26 (vol. I) 31 ILM 874 (1992) Principle 7: 'In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command'.

[7] UN Framework Convention on Climate Change (adopted 9 May 1992, EIF 21 March 1994) 1771 UNTS 107, art. 3(1): 'The Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities. Accordingly, the developed country Parties should take the lead in combating climate change and the adverse effects thereof'.

[8] See Rajamani, 'Changing Fortunes' (n. 4) 612: 'The Kyoto Protocol bears tremendous significance for developing countries as it endorses a unique form of differentiation in their favour, and captures a model of developed country leadership yet to be seen elsewhere. But it is precisely this form of differential treatment and this model of developed country leadership that have proven contentious'.

[9] See, e.g., the Caracas Declaration of the Ministers of Foreign Affairs of the Group of 77 on the Occasion of the Twenty-Fifth Anniversary of the Group, 1989 <www.g77.org/doc/Caracas%20Declaration.html>.

[10] Joanne Scott and Lavanya Rajamani, 'EU Climate Change Unilateralism' (2012) 23 *EJIL* 469, 477.

Annex 3

https://doi.org/10.1017/9781108879064.007 Published online by Cambridge University Press

parties to the UNFCCC, then probably there are 197 versions of what differential treatment means for climate change regulation.

Second, and building on the disagreement regarding the theory of differentiation, the legal implications of the Kyoto Protocol proved to be deeply contested. The Protocol has been seen as a poor example of the CBDR-RC in action, as it gave obligations to a minority of states and no obligations at all to the majority. The Protocol as a matter of fact differentiates obligations only among Annex I parties, with each such party having a different quantified emission limitation or reduction commitment. There is no differentiation of obligations among non-Annex I parties, all of whom have the same (non-)obligations. This approach contrasts with that of the 1987 Montreal Protocol on ozone-depleting substances, which imposes obligations on developing countries, albeit delayed in time relative to those of developed countries.[11]

The United States' rejection of the Kyoto Protocol was clear evidence of resistance to the legal implications of that form of differential treatment. US resistance to the idea existed well before the negotiation of the Protocol. This is illustrated by the attitude of that country towards Principle 7 of the Rio Declaration. The United States issued an interpretative statement clarifying its view that the principle merely acknowledged 'the special leadership role of developed countries' due to their 'wealth, technical expertise and capabilities';[12] Principle 7 did not 'imply a recognition ... of any international obligations ... or any diminution in the responsibility of developing countries'.[13]

Other developed countries gradually distanced themselves from the Kyoto Protocol's approach of rigid bifurcation. Several Annex I parties did not to take part in the Protocol's second commitment period (2013–20).[14] The general lethargy on ratifying the Doha Amendment to the Protocol, which would legalize arrangements for the second commitment period, has prevented it from entering into force. Canada withdrew from the Kyoto Protocol before the end of the first

[11] Montreal Protocol on Substances that Deplete the Ozone Layer, 16 September 1986 (adopted 16 September 1987, EIF 1 January 1989) 1552 UNTS 3, art. 5.

[12] See Report of the UN Conference on Environment and Development, UN Doc A/CONF.151/26 (Vol. IV) (1992) 20 [16].

[13] Ibid.

[14] On the classification of states during the second commitment period, see Will Gerber, 'Defining "Developing Country" in the Second Commitment Period of the Kyoto Protocol' (2008) 31 *Boston College Intl & Comp L Rev* 327.

Annex 3

https://doi.org/10.1017/9781108879064.007 Published online by Cambridge University Press

commitment period. Japan, New Zealand, and Russia refused to join the second.[15] These states essentially objected to the legal implications of the CBDR-RC principle as enshrined in the Protocol, depriving it of practical legal significance.[16] The failure to reach a legal solution at the Copenhagen COP in 2009 provides a further illustration. The failure was due to 'deep disquiet over the nature and extent of differentiation in the climate regime, in particular the differentiation in central obligations embodied in the Kyoto Protocol'.[17]

All in all, 'the disagreements over this principle's content and the nature of the obligation it entails have spawned debates over its legal status'.[18] The diplomatic phrasing of CBDR-RC has proved helpful in keeping the climate negotiations on track, but that notion never bore characteristics of a legal rule – it had no legal certainty. One must conclude that the real objective of CBDR-RC at the time of its adoption was to supply a constructive ambiguity, allowing negotiations to continue, without signalling any substantive agreement.[19]

The United States' concerns about reading too much into CBDR-RC were raised again during the final drafting of Article 3 of the UNFCCC. As a result, the introductory sentence of the article indicates that CBDR-RC shall only 'guide' the parties 'in their actions to achieve the objective of the Convention and to implement its provisions'. The article uses 'inter alia' to indicate that parties may consider other notions or principles than the ones listed in Article 3. As explained by Bodansky, 'these . . . modifications were intended to forestall arguments that the

[15] Benoit Mayer, 'The Curious Fate of the Doha Amendment', *EJIL:Talk!* (2020) <www.ejiltalk.org/the-curious-fate-of-the-doha-amendment/>.

[16] Despite the uncertainty produced by the combined framing of the UNFCCC and the Kyoto Protocol, subsequent state practice could have given a legal relevance to the CBDR-RC notion. See Vienna Convention on the Law of Treaties (adopted 23 May 1969, EIF 27 January 1980) 1155 UNTS 331, art. 31(3)(b), according to which, in interpreting a treaty, 'There shall be taken into account, together with the context . . . any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation'. The opposite happened in the case of the CBDR-RC notion: state practice following the adoption of UNFCCC and the Kyoto Protocol managed to reinforce the controversies linked to the legal implications of the so-called principle.

[17] Rajamani, 'Changing Fortunes' (n. 4) 615.

[18] Ibid. 477. See also Lavanya Rajamani, 'The Principle of Common but Differentiated Responsibility and the Balance of Commitments under the Climate Regime' (2000) 9 *RECIEL* 120.

[19] See also Susan Biniaz, 'Comma but Differentiated Responsibilities: Punctuation and 30 Other Ways Negotiators Have Resolved Issues in the International Climate Change Regime' (2017) 6 *Michigan J Envtl & Admin L* 37, 40.

Annex 3

https://doi.org/10.1017/9781108879064.007 Published online by Cambridge University Press

principles in Article 3 are part of customary international law and bind states generally'.[20]

The agreement on the political meaning of CBDR-RC – that states described as 'developed' are to be at the forefront of the fight against climate change – was therefore only a façade standing in for an absence of agreement on legal consequences. To say this is not to question the importance of the notion, which provides constructive ambiguity for stakeholders in the climate change negotiations. By imparting an appearance of legal novelty without immediate legal implications for the concerned states, it gave a chance of success to the negotiation of an international legal framework. Undoubtedly, CBDR-RC has been a helpful instrument in achieving a minimum level of consensus among states to adopt the UNFCCC and the Kyoto Protocol and to move toward the progressive consolidation of the climate change regime.[21] Yet, its importance needs to be kept in perspective. My opponent in this debate claims that CBDR-RC was essential in attracting key developing countries, such as India and China, to participate in the climate negotiations. However, she also notes, correctly, that developing countries stand to suffer the most from the ravages of climate change. It follows that, if anything has guaranteed the presence of developing countries at the negotiating table, it is this fact, not any long-winded and vague equity principle.

Consolidation of the Climate Change Regime: A Gradual Loss of Meaning for the CBDR-RC Notion

After its difficult start in the UNFCCC and the Kyoto Protocol, the rest of the story of CBDR-RC could have provided a chance to clarify its legal

[20] Daniel Bodansky, 'The United Nations Framework Convention on Climate Change: A Commentary' (1993) 18 *YJIL* 451, 502. For arguments against the customary force of the CBDR-RC notion, see also Patricia Birnie, Alan Boyle, and Catherine Redgwell, *International Law and the Environment* (Oxford University Press 2009) 160; Christopher D Stone, 'Common but Differentiated Responsibilities in International Law' (2004) 98 *AJIL* 276, 281; Philippe Cullet, 'Differential Treatment in International Law: Towards a New Paradigm of Inter-state Relations' (1999) 10 *EJIL* 549, 579; Sophie Levallée, 'Le principe des responsabilités communes mais différenciées à Rio, Kyoto et Copenhague: Essai sur la responsabilité de protéger le climat' (2010) 41 *Etudes Internationales* 51, 61.

[21] When it comes to economic development, the Kyoto Protocol's progressive debacle demonstrates that, among developed states and beginning with the United States, the implications of the CBDR-RC notion – which may be interpreted as a permission to 'free-ride' on them – appears not to have been genuinely accepted.

Annex 3

relevance – but this proved otherwise. The notion never found its way into a clarified legal framework. As the climate regime entered the new century, CBDR-RC continued to be 'challenged, problematized and reinterpreted'.[22]

A progressive loss of meaning explains the notion's current lack of legal relevance. Starting out with a relatively clear meaning in principle (developed states should be at the forefront of the response to climate change), a gradual dilution in meaning occurs in the period following the adoption of the Kyoto Protocol. The idea's current formulation in the Paris Agreement is so vague and ambiguous ('common but differentiated responsibilities and respective capabilities, in the light of different national circumstances')[23] that it can only be described as legally entirely irrelevant.

Floating on this foreseen and intended ambiguity, CBDR-RC is more accurately conceived today as a diplomatic understanding that reinforces a general need for equity. This ambiguity, and conflation with the principle of equity, was a result that states intended, knowing that it could help in the notion's acceptance. But a notion that now offers nothing more than what equity already provides cannot be qualified as a general, guiding, *useful* principle of climate change law. Three arguments will be given in support of this contention.

First, diplomatic and academic discussion surrounding CBDR-RC reverted in recent years to a moral debate. For Bartenstein, CBDR-RC 'is primarily concerned with a *moral dimension* and constitutes a sui generis kind of responsibility, specific to international environmental law'.[24] The moral reversion happened in the course of a gradual exit of the CBDR-RC notion from the context of legal certainty around the existence and applicability of differentiation with regard to climate action.[25] Moral debate is, of course, only necessary where there is no agreed legal principle on which to focus the discussion. The International Court of Justice has referred to 'the primary necessity of interpreting an instrument in accordance with the intentions of the parties at the time of its conclusion', and that 'the Court is bound to take into account the fact that the concepts . . .

[22] See Rajamani, 'Changing Fortunes' (n. 4) 614.
[23] Paris Agreement (n. 1) art. 2 (2).
[24] See Bartenstein (n. 3) 194 (emphasis added).
[25] See Scott and Rajamani (n. 10) 478–9, noting that 'Parties have arrived at numerous agreements and decisions including the non-binding Copenhagen Accord, 2009, the Cancun Agreements, 2010, and the Durban Platform, 2011, that have sought to erode differentiation and achieve greater parallelism or symmetry across developed and developing countries, in particular in central obligations'.

Annex 3

https://doi.org/10.1017/9781108879064.007 Published online by Cambridge University Press

were not static, but were by definition evolutionary'.[26] An evolutionary interpretation of the presence of CBDR-RC in the UNFCCC provides a strong argument to disqualify the notion from the category of principles with undisputed legal value.

Second, the fact that an integral part of CBDR-RC – the 'respective capabilities' element[27] – is often (deliberately?) cut out of its formulation provides a second argument for the thesis that there has been a gradual dilution of the legal meaning of the notion. It demonstrates its malleability. For an illustration we may consider the notion's normative integration into the legal regime on international civil aviation.[28] A tension exists in that context between the principle of non-discrimination[29] and CBDR-RC.[30] It led the member states of the International Civil Aviation Organization (ICAO) to create a new notion: 'Special Circumstances and Respective Capabilities' (SCRC).

SCRC may be interpreted as being tantamount to CBDR-RC in the specific context of international aviation. It is a reference to the economic

[26] See *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion) [1971] ICJ Rep 16, 53. See also *Aegean Sea Continental Shelf (Greece* v. *Turkey)* (Judgment) [1978] ICJ Rep 3, 77: 'the presumption necessarily arises that its meaning was intended to follow the evolution of the law and to correspond with the meaning attached to the expression by the law in force at any given time'. And see Alejandro Piera, *Greenhouse Gas Emissions from International Aviation: Legal and Policy Challenges* (Eleven 2015) 45, stating that 'the principles should not be interpreted as static and immutable, but evolving and adaptable'.

[27] See Scott and Rajamani (n. 10) 477: 'If CBDRRC refers to differentiation based on capability alone the use of the term "respective capabilities" would be superfluous. It follows that UNFCCC Article 3 is intended to highlight differentiation based on two markers of differentiation – one based on capability, and the other, drawing from Rio Principle 7 which contains the authoritative definition of CBDR, based on contribution to global environmental harm'. To argue against this interpretation of the principle would inconsistent with Vienna Convention on the Law of Treaties (n. 16) art. 31(1).

[28] The integration of the CBDR principle into the aviation legal regime has raised important criticism and concerns among developed states. ICAO waited until its 36th Assembly in 2007 to explicitly introduce the principle in its resolutions. See ICAO Assembly Resolution A36-33 (2007) Appendixes J, K, and L. Nevertheless, this principle now occupies a central place in climate-change-related Assembly resolutions.

[29] This principle has been qualified as a cornerstone principle of international aviation law. See, e.g., Piera (n. 26) 51.

[30] The ongoing tension between the CBDR principle and the principle of non-discrimination has in that sense been qualified as a potential conflict of norms. For a detailed analysis of this potential conflict of norms, see Thomas Leclerc, *Les mesures correctives des émissions aériennes de gaz à effet de serre: Contributions à l'étude des interactions entre les ordres juridiques du droit international public* (Meijers Instituut 2017) 201.

Annex 3

https://doi.org/10.1017/9781108879064.007 Published online by Cambridge University Press

capacity of a group of states categorized as developing. Kyoto's classification of countries is inappropriate in the aviation legal context, as states classified as developing under the UNFCCC regime cannot be considered to be developing in the ICAO scheme. Qatar and the United Arab Emirates are examples. They are developing countries under the UNFCCC, yet they possess two of the world's richest airlines. The transformation of CBDR-RC into SCRC illustrates a tremendous ambivalence about the validity of the former.

Third, by adding the opaque expression of 'in the light of national circumstances' to the already vague notion of 'common but differentiated responsibilities and respective capabilities', the incarnation of CBDR-RC in the Paris Agreement signals the notion's arrival at the very bottom of the slippery slope to a complete loss of specific meaning in the climate change context. The progressive legal dilution of the so-called principle due to conflicting interpretations of its legal content and of the nature of the obligation it entails ensured this result. While the Agreement reflects a moral commitment of the international community to strengthen equity in the application of climate change rules, and reaffirms that every party must take action to address climate change as 'a common concern of humankind',[31] it also confirms a growing uncertainty about the practical differentiation of the legal obligations it entails.

The Paris Agreement does no more than invite each state to determine its own contribution to climate action, entirely free of any review. Its bifurcated provisions – for instance Article 4(4), or the flexibility allowed under Article 13[32] – are straightforward applications of equity. Parties no longer have to act 'in accordance with' CBDR-RC (as stated by Article 3 of the UNFCCC[33]), but should simply implement the Agreement '*to reflect* equity and the principle of [CBDR-RC], in the light of different national circumstances'.[34] No advance is made on the classical questions surrounding CBDR-RC: how do the different parts of the notion interact? How are they applied to a given dispute? What difference do they make, or could they make, to an outcome? We can well imagine that every party to the Paris Agreement asserts its full compliance with CBDR-RC as enshrined in the Agreement. With a notion so lacking in substance, it is impossible to tell who is right and who is wrong. The Paris

[31] Paris Agreement (n. 1) Preamble.
[32] See Paris Agreement (n. 1) art. 13(2).
[33] UNFCCC (n. 7) art. 3(1).
[34] Paris Agreement (n. 1) art. 2(2) (emphasis added). See also UNFCCC (n. 7) art. 4(3).

Agreement simply clarifies that CBDR-RC, as part of the climate change regime, should not be mistaken for a fully fledged legal principle.

In sum, from what could be seen to be at best an emerging legal principle at the time of the Kyoto Protocol, the notion of CBDR-RC has progressively lost its specificity and has progressively been absorbed by the general principle of equity. Today, one thing is certain: the CBDR-RC notion has no real-world applicability and does not qualify as legal obligation, or even as a guiding principle.

Conclusion

To be legally meaningful, a principle on differentiated responsibility would need a much clearer, stronger, legal basis. The lack of a consensual understanding of the legal implications of CBDR-RC from the outset, together with the progressive dilution of its legal meaning in the course of the consolidation of the UNFCCC regime, provide strong reasons to think that the notion never was a legal principle and never had any legal value. If states back in 1992 started out believing that a principled differentiation to their responsibilities was possible, they progressively abandoned the idea, as seen in their baroque over-qualification of CBDR-RC in the Paris Agreement; and if a need exists for a flexible yet objective differentiation principle, CBDR-RC is not it.

Annex 3

https://doi.org/10.1017/9781108879064.007 Published online by Cambridge University Press

ANNEX 4

Self-determination of peoples

A legal reappraisal

ANTONIO CASSESE

A GROTIUS PUBLICATION

CAMBRIDGE
UNIVERSITY PRESS

Annex 4

Published by the Press Syndicate of the University of Cambridge
The Pitt Building, Trumpington Street, Cambridge CB2 1RP
40 West 20th Street, New York, NY 10011-4211, USA
10 Stamford Road, Oakleigh, Melbourne 3166, Australia

First published 1995
Reprinted 1996, twice

Printed in Great Britain at the University Press, Cambridge

A catalogue record for this book is available from the British Library

Library of Congress cataloguing in publication data

Cassese, Antonio
Self-determination of peoples: a legal reappraisal/
Antonio Cassese
p. cm.
Includes bibliographical references and index.
ISBN 0 521 48187 2 (hc)
1. Self-determination, National. I. Title.
JX4054.C32 1995
341.26—dc20 94—32490 CIP

ISBN 0 521 48187 2 hardback

WD

Annex 4

in a statement he made in the 'Committee of the 24'. He pointed out that:

> The right to self-determination, as propounded by the international community, offers many small and powerless peoples a moral and legal safeguard against being overwhelmed, assimilated or conquered by ambitious and unscrupulous neighbours.[98]

It is thus reasonable to conclude that the term 'alien domination' or 'subjugation' does not contemplate economic exploitation or ideological domination. Rather, 'alien subjugation, domination and exploitation' covers those situations in which any one Power *dominates* the people of *a foreign territory* by recourse to *force*. If this is correct, self-determination is violated whenever there is a military invasion or belligerent occupation of a foreign territory, except where the occupation – although unlawful – is of a minimal duration or is solely intended as a means of repelling, under Article 51 of the UN Charter, an armed attack initiated by the vanquished Power and consequently is not protracted. The right to external self-determination is thus, in a sense, the counterpart of the prohibition on the use of force in international relations. In many cases, the breach of external self-determination is simply an unlawful use of force looked at from the perspective of the victimized *people* rather than from that of the besieged sovereign State or territory.

Economic self-determination[99]

As the achievement of political independence by colonial countries soon turned out to be only one step towards real independence, the problem arose within the United Nations of the claimed right of newly independent States freely to dispose of their natural resources. Given the historical setting, the problem was chiefly raised as a question affecting *sovereign States* rather than peoples as such. Indeed, the debate that ensued within the

[98] See BYIL, 1983, 404–5.

[99] On this matter, see in particular K. N. Gess, 'Permanent Sovereignty over Natural Resources – An Analytical Review of the UN Declaration and its Genesis', 13 ICLQ, 1964, 398–449; J.F. Guilhaudis, *Le droit des peuples à disposer d'eux-mêmes*, 126–36; M. Benchikh, 'Impact de la dépendance économique sur les violations des Droits des peuples', in *Droits de l'homme et droits des peuples, Textes du Séminaire de Saint-Marin*, San Marino 1983, 91–8; H. Reinhard, *Rechtsgleichheit und Selbstbestimmung in wirtschaftlicher Hinsicht*, Cologne 1980; Gayim, *The Principle of Self-Determination*, 62–4; P. Cahier, 'Changement et continuité du droit international – Cours général de droit international public', 195 HR, 1985-VI, 50 ff.; R. Dolzer, 'Permanent Sovereignty over Natural Resources and Economic Decolonization', 7 *Human Rights Law Journal*, 1986, 217–30.

Annex 4

United Nations revolved around the possibility of achieving a formula capable of safeguarding and reconciling two essential principles: respect for the national sovereignty of Third World countries needing to develop their natural resources, and the provision of adequate guarantees for potential foreign investors. The resolution the General Assembly eventually adopted on 14 December 1962 (Res. 1803(XVII), containing the Declaration on Permanent Sovereignty over Natural Resources), was passed by 87 votes to 2 (France, South Africa), with 12 abstentions (socialist countries, plus Burma and Ghana). This resolution,[100] it should be stressed, cannot be regarded *per se* as declaratory of customary international law, nor can it be argued that it has gradually turned into a corpus of customary rules.[101] The better view seems to be that only some of the general principles laid down in the Declaration have gradually led to the formation of corresponding legal rules or principles. Without entering into a subject that to a large extent is extraneous to our inquiry, it can be said that to the extent that it concerns the rights of peoples, the Declaration can now be regarded as sanctioning general international law. On this level, it entails that a people subjected to colonial rule or to foreign domination has the right freely to dispose of its natural wealth and resources. Clearly, this individual right is but a specification and corollary of the general right to self-determination belonging to the peoples at issue.

Since the specific right under discussion is to be exercised 'in the interest of the national development and of the well-being of the people' (ex operative paragraph 1 of the Declaration), any use or exploitation of natural resources of a territory under colonial or foreign domination, carried out by the colonial or foreign Power without acting in the exclusive interest of the people at issue, amounts to a gross infringement of the right of peoples to self-determination.[102]

[100] See text in UN Ybk, 1962, 503 ff.

[101] R.-J. Dupuy, as Arbitrator in *Texaco and Calasiatic v. Libya* took a different view. He stated that 'on the basis of the circumstances of

ANNEX 5

The Law of International Responsibility

Edited by

JAMES CRAWFORD
ALAIN PELLET
SIMON OLLESON

Assistant Editor

KATE PARLETT

OXFORD
UNIVERSITY PRESS

Annex 5

OXFORD
UNIVERSITY PRESS
Great Clarendon Street, Oxford ox2 6DP
Oxford University Press is a department of the University of Oxford.
It furthers the University's objective of excellence in research, scholarship,
and education by publishing worldwide in
Oxford New York
Auckland Cape Town Dar es Salaam Hong Kong Karachi
Kuala Lumpur Madrid Melbourne Mexico City Nairobi
New Delhi Shanghai Taipei Toronto
With offices in
Argentina Austria Brazil Chile Czech Republic France Greece
Guatemala Hungary Italy Japan Poland Portugal Singapore
South Korea Switzerland Thailand Turkey Ukraine Vietnam
Oxford is a registered trade mark of Oxford University Press
in the UK and in certain other countries
Published in the United States
by Oxford University Press Inc., New York

First published 2010

British Library Cataloguing in Publication Data
Data available
Library of Congress Cataloging in Publication Data
Data available
Typeset by MPS Limited, A Macmillan Company
Printed and bound by
CPIGroup (UK) Ltd, Croydon, CR04YY
ISBN 978–0–19929697–2
3 5 7 9 10 8 6 4

Annex 5

Chapter 27

DURATION OF THE BREACH

JEAN SALMON

Under article 2 of the ILC Articles on State Responsibility:

There is an internationally wrongful act of a State when conduct consisting of an action or omission:

(a) ...

(b) constitutes a breach of an international obligation of the State.

What is the moment when—all the constitutive elements of a wrongful act being assembled—the breach begins? When does the breach end? When these moments are determined, the duration of the breach can be defined, as can the time of the perpetration of the wrongful act.

The practical consequences of these questions on the implementation of responsibility are numerous. Indeed, the determination of the time of perpetration of the wrongful act may be relevant to determine:

- the moment when diplomatic protection can be exercised;
- the time when prejudice must be taken into consideration for reparation;
- the potential jurisdiction of a court when such jurisdiction is only established for disputes or acts previous or subsequent to a specific date, or which have occurred during a defined period;
- the existence or persistence of the national character of a claim at a given time;
- the possible application of a statutory limitation period to an action in relation to a determined wrongful act (for example, extinctive prescription); and
- the admissibility of an action, if it must be brought within a certain time after the occurrence of the wrongful act.

Moreover, what happens when the conduct that constitutes the wrongful act is prolonged and only occurs in part during the time that the obligation of the State is in force?

This text was only partially modified in the text as adopted:

Article 14

...

3. The breach of an international obligation requiring a State to prevent a given event occurs when the event occurs and extends over the entire period during which the event continues and remains not in conformity with that obligation.

4 The composite or global act of the State

In its 1976 report the ILC defined a composite act as 'an act made up of a series of separate actions or omissions which relate to separate situations but which, taken together, meet the conditions for a breach of a given international obligation'.[28] The composite act of the State is thus one which, although not consisting of a single conduct, continues in time: it is constituted of a series of individual acts of the State which follow each other, and which all contribute to the realization of the global act in question. The whole, even if it emanates from different organs, presents homogeneity and breaches a certain norm of international law. An example of this type of situation can be found where the wrongful act consists not so much of an isolated act but of a 'practice' or 'policy' which is systematic in character. These could be discriminatory practices or commercially restrictive practices. It is only after a whole series of acts that the composed or global act is constituted. It does not exist until that moment. The European Court of Human Rights has defined a practice which is incompatible with the Convention as 'consist[ing] of an accumulation of identical or analogous breaches which are sufficiently numerous and inter-connected to amount not merely to isolated incidents or exceptions but to a pattern or system'.[29]

The repetition of wrongful acts in the area that interests us can nevertheless be apprehended in two ways. In a first hypothesis, a wrongful act may repeat itself: there are distinct acts which succeed each other and are breaches of the same nature. *These are simple repeated acts.* These could be a series of violations of the rights of a civil population, or of combatants who are refused the status of prisoners of war, etc. In a second hypothesis, what is wrongful is the whole of the acts which have a global nature, the effect being, if not a change in the character of the breach, at least the conferral of its own identity because of its systematic character. *This is an act which is composed of a series of conducts which constitute a unit because of the pursued intention. This act is as such wrongful.* To determine the existence of a composite act, a second characteristic, other than the multiplicity of conducts, plays a fundamental role for some authors whose opinion we share: it is the element of intent implied by the notion of policy or plan. 'It is the intention to harm the victim State, which is brought up to date through the attack on the rights of its nationals, which provides the jurisdiction (ressort) of wrongfulness, and this intention existed at the beginning of the State conduct'.[30]

James Crawford, Special Rapporteur of the ILC, insisted on the fact that the composite act must be limited to breaches characterized by an aspect of systematic policy. This intentional element necessarily brings isolated cases together in a communal perspective. It is

[28] Commentary to draft art 18, para 22, Report of the ILC, 28th Session, *ILC Yearbook 1976*, Vol II(2), 93.
[29] *Ireland v United Kingdom* (App No 5310/71), *ECHR, Series A, No 25* (1978), para 159.
[30] E Wyler, *L'illicite et la condition des personnes privées* (Paris, Pedone, 1995), 57.

not enough that there be 'a series of actions or omissions in respect of separate cases'.[31] For this purpose he cites the example of water quotas which a State is authorized to take from a river. In a situation where the quota is exceeded by different takings which are not linked one to another, then the wrongful act would not be retroactive to the first withdrawal. This position appears to us to be correct. Apart from the case where it is shown that, in the cited example, the excessive withdrawals had a systematic character responding to a deliberate will to breach the treaty engagement, there is no reason to retain the hypothesis of the composed delict in the case of a simple excess of the quantitative limit. Thus, what characterizes the composed delict is, apart from a quantitative aspect, the existence of a motive which unites the whole of the criticized conducts in one determined wrongful act.

Once it is determined that the global character of the conduct constitutes a distinct breach, there are three alternatives:

- the single items of conduct are lawful: it could be imagined that an isolated act of xenophobia or discrimination could escape an international prohibition while a practice of the same act would be prohibited;
- the single items of conduct are lawful and of the same character as the global conduct: this seems to be the case for wrongful conducts that are *also incriminated* as practices, such as slavery, extermination, deportation, forced disappearances, persecution or conduct that is reprehensible in some other way if committed on a large scale;
- the single items of conduct are wrongful and of a different character than the global conduct: this is the case for *apartheid*, genocide, crimes against humanity, ethnic cleansing, etc—all breaches that treat globally delictual conduct (arbitrary arrests, murder, kidnapping, expulsion, etc) by reference to its aggregate or cumulative character.

This notion of 'globality' can have various consequences:

- the wrongful act falls under the classification of grave breach;
- opening up a recourse: UN ECOSOC Resolution 1503 (XLVIII) adopted on 27 May 1970 on Procedure for Dealing with Communications Relating to Violations of Human Rights and Fundamental Freedoms envisages the competence of the Human Rights Commission to study or conduct a survey on 'particular situations which appear to reveal a consistent pattern of gross and reliably attested violations of human rights requiring consideration by the Commission';[32]
- making a claim admissible despite a failure to exhaust local remedies, considering their inefficiency in such a situation.

The draft articles on first reading of 1996 contained two provisions relating to the composite act. On the one hand, draft article 18(4) provided:

> If an act of the State which is not in conformity with what is required of it by an international obligation is composed of a series of actions or omissions in respect of separate cases, there is a breach of that obligation if such an act may be considered to be constituted by the actions or omissions occurring within the period during which the obligation is in force for that State.[33]

[31] J Crawford, Second Report on State Responsibility, 1999, A/CN.4/498, para 121.

[32] United Nations Economic and Social Council, Procedure for Dealing with Communications Relating to Violations of Human Rights and Fundamental Freedoms, Resolution 1503 (XLVIII), 27 May 1970, para 5.

[33] Report of the ILC, 51st Session, *ILC Yearbook 1996*, Vol II(2), 60.

On the other hand, draft article 25(2) stated:

The breach of an international obligation by an act of the State, composed of a series of actions or omissions in respect of separate cases, occurs at the moment when that action or omission of the series is accomplished which establishes the existence of the composite act. Nevertheless, the time of commission of the breach extends over the entire period from the first of the actions or omissions constituting the composite act not in conformity with the international obligation and so long as such actions or omissions are repeated.[34]

As finally adopted, article 15, entitled 'Breach consisting of a composite act' provides:

1. The breach of an international obligation by a State through a series of actions or omissions defined in aggregate as wrongful, occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act.
2. In such a case, the breach extends over the entire period starting with the first of the actions or omissions of the series and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation.

5 The complex act of the State

The notion of a complex act or delict was introduced into the theory of responsibility by Ago in *Phosphates of Morocco* before the Permanent Court of International Justice. Italy, for whom Ago was counsel, had attempted to include all acts previous to the critical date in one whole, aiming to connect them to the acts subsequent to the critical date and thus to bring them within the compulsory jurisdiction of the Court.

This 'cornering of Moroccan phosphates' is a complex wrongful act, that is at the same time composed of several but different breaches of international law, but that have a more extended scope as a whole, distinct from that of all its constitutive elements . . . Every one of these single wrongful acts thus pursues the progressive attack of the same treaty rules . . . The whole of these acts, that are closely linked by a necessary connection, arising from the same resolution, aiming at the same purpose, represents, from a logical and teleological point of view, only one continuing and progressive internationally wrongful act as far as the practical and legal effects are concerned.[35]

As we have seen above, this argument was rejected by the PCIJ which considered that the decision of the Department of Mines of 1925 was an immediate act. Ago nevertheless maintained his point of view in his course at the Hague Academy in 1939[36] and as Special Rapporteur of the ILC on international responsibility; he succeeded at first in bringing the ILC to accept the concept of the complex act of the State.

From this point of view, a complex act of the State is constituted by a succession of conducts, State act, or omissions which emanate from one or more organs, adopted for a specific case and that, considered as a whole, represent the position of the State in the case in question. The concept of the complex act was linked to a distinction between two types of international obligations: those that a State may only fulfil by using specifically determined means and those that a State may fulfil by freely choosing among a plurality of means which it judges to be the most opportune to achieve a result.[37] The ILC saw a

[34] Ibid, 61.
[35] *Phosphates of Morocco*, Public Sittings and Pleadings, 1938, *PCIJ, Series C, No 85*, 1234.
[36] R Ago, 'Le délit international' (1939-II) 68 *Recueil des cours* 98. [37] See Chapter 26.

ANNEX 6

THE BRITISH YEAR BOOK OF INTERNATIONAL LAW

1986

FIFTY-SEVENTH YEAR OF ISSUE

OXFORD
AT THE CLARENDON PRESS

Annex 6

Oxford University Press, Walton Street, Oxford OX2 6DP
Oxford New York Toronto
Delhi Bombay Calcutta Madras Karachi
Kuala Lumpur Singapore Hong Kong Tokyo
Nairobi Dar es Salaam Cape Town
Melbourne Auckland Madrid
and associated companies in
Berlin Ibadan

Oxford is a trade mark of Oxford University Press

First published 1987
Reprinted 1993

The British Year Book of International Law is an annual publication, starting with Volume 52 (1981). Orders for subscriptions or for individual volumes can be placed through a bookseller or subscription agent. In case of difficulty please write to the Retail Services Dept., Oxford University Press Distribution Services, Saxon Way West, Corby, Northants NN18 9ES, UK

British Library Cataloguing in Publication Data
The British year book of international law.
1986: fifty-seventh year of international law
1. International law—Periodicals
341'.05 JX1
ISBN 0-19-825604-3

Printed in Great Britain
by Antony Rowe Ltd
Chippenham, Wilts.

Annex 6

COMPLICITY IN INTERNATIONAL LAW: A NEW DIRECTION IN THE LAW OF STATE RESPONSIBILITY*

By JOHN QUIGLEY[1]

I. INTRODUCTION

As international law matures, it regulates inter-State relations in an ever more sophisticated fashion. One area of increasing sophistication is complicity in the law of State responsibility. While it has long been recognized that a State is responsible for infringing internationally protected rights, only since the Second World War has a norm emerged to hold a State responsible for aiding another State to violate such rights. Appearing first in situations where one State permits another to use its territory to violate rights of a third State, the norm has gained acceptance across the full range of acts entailing State responsibility. The norm represents an international corollary to domestic norms that hold responsible in tort or criminal law one who aids another in committing a wrongful act. This article will examine the status of the complicity norm in international law. It will argue that such a norm has been accepted as customary law. Further, it will examine complicity in the specific situation of a State giving aid to another in an ongoing programme of foreign assistance. It will argue that a donor State is liable for complicity in internationally wrongful acts committed by the donee State utilizing contributed resources, where the donor State intends the contributed resources to be so used, or where it is aware that they will be so used.

The article will also examine a number of issues relevant to establishing a donor State's liability. Must the donee State use the specific funds contributed to carry out the international delict before the donor is liable, or is it sufficient if the donated resources free others that the donee State then uses to carry out the wrongful acts? Does it matter whether the illegal act serves the policy interests of the donor State? Must it appear that the donee State could not have obtained the aid from another source, thereby making the donor State's aid the only resource available to fund the illicit conduct? Must it appear that the donor State could not have carried out the illicit conduct but for the donated resources? Does it matter whether the donor State has objected to the illicit conduct being carried out by the donee State? Finally, the article will examine remedies available against a State liable for its complicity.

[1] AB, MA, LL B (Harvard); Professor, College of Law, Ohio State University. The author wishes to thank Professor Jules Lobel for his comments on a draft of this article.

Annex 6

2. *Monetary compensation*

If it is determined that monetary compensation is the appropriate remedy, the liability of the accessory and the principal, by analogy with domestic law, might be joint and several, that is, each would be liable for the entire amount. Thus far on this point 'the practice of states is almost completely non-existent', from which Brownlie concludes that the practice 'strongly suggests by its silence the absence of joint and several liability in delict in state relations'. Some State practice is provided by claims against Axis States following the Second World War:

> Practice in the matter of reparation payments for illegal invasion and occupation rests on the assumption that Axis countries were liable on the basis of individual causal contribution to damage and loss, unaffected by the existence of co-belligerency.[241]

This comment relates, however, only to a situation in which it is possible to identify the harm caused by the individual States. But if, in a case of co-principals, it is not possible to identify the harm caused by each of the co-principals, or in the case of an aider and a principal, where there is no separate harm caused by each, it would seem that joint and several liability would be appropriate.

This question was raised without being answered in the US Court of Claims in *Anglo-Chinese Shipping Co.* v. *United States*.[242] A vessel of a British shipping company was commandeered in 1946 by the Supreme Allied Commander in Japan, a US official, for use in the laying of submarine cables in Japan. The Commander returned the vessel to the company in 1950, whereupon the company sued in the US Court of Claims for the US Government's use of the vessel for the four years from 1946 to 1950. The US Government defended by arguing that since the Supreme Allied Commander had acted on behalf of all four occupying powers (UK, USSR, China and the US), the company must sue all four. It argued that it was not liable alone for an act that must be attributed to all four.

The Court of Claims decided that the act of commandeering the vessel should be attributed not to the US or the Allies but rather to Japan. It thus avoided the need to resolve the issue raised by the company's claim and the US defence. In an *obiter dictum*, however, it said on the joint liability issue:

> When private parties or private corporations or municipal corporations enter into a joint venture, the parties are jointly and severally liable for the acts of their agent, and their individual property may be levied upon to satisfy any judgment, at least after the assets of the joint venture have been exhausted. Whether this rule should be applied to sovereign nations engaged in a joint enterprise has never been decided, and we do not now decide it, because we do not think any of the Allied Powers are liable, for the reasons to be stated.[243]

[241] Brownlie, op. cit. above (p. 79 n. 11), at p. 189.

[242] 127 F Supp. 553 (1955). Also reported in 22 ILR 982 (1955).

[243] 127 F Supp. 556–7.

It then explained that Japan alone was liable, rather than the US or its allies.[244]

In such a situation, it would seem appropriate for joint and several liability to attach. Where the harm caused by co-principals cannot be identified, the only two possible resolutions are that each is responsible for the entire harm, or that each is responsible only for a portion, which could be established as equal portions or set in some other fashion, perhaps taking into account the ability to pay of the States involved. Joint and several liability would seem appropriate, since the plaintiff cannot prove what portion of the harm was caused by which of the co-principals.

Such is the result reached, at least in principle, by the British–US Arbitral Tribunal in the *Zafiro* case.[245] There a British-owned company in Manila was looted during the Spanish–American war by Chinese crew members of the *Zafiro*, a US public vessel. The Tribunal determined that the US should be responsible for the acts of the crew members but found that those crew members had not caused all the damage:

> We think it is clear that not all of the damage was done by the Chinese crew of the *Zafiro*. The evidence indicates that an unascertainable part was done by Filipino insurgents, and makes it likely that some part was done by the Chinese employees of the company. But we do not consider that the burden is on Great Britain to prove exactly what items of damage are chargeable to the *Zafiro*. As the Chinese crew of the *Zafiro* are shown to have participated to a substantial extent and the part chargeable unknown wrongdoers can not be identified, we are constrained to hold the United States liable for the whole.[246]

The Tribunal obscured this statement of principle, however, by deciding that 'in view . . . of our finding that a considerable, though unascertainable, part of the damage is not chargeable to the Chinese crew of the *Zafiro*, we hold that interest on the claims should not be allowed'.[247] Since the arbitration was conducted twenty-seven years after the event, the interest was substantial. Thus, the Tribunal did not require the US to compensate for the total amount of the harm caused.

In a situation of co-principals, one can oppose the notion of joint and several liability on a State sovereignty analysis—that a State should be responsible only for its own acts. In the situation of an aider State and a principal State, however, the two combine to cause precisely the same harm. It is difficult to argue that the aider should not be responsible for the whole of the harm inflicted by the principal. It has facilitated that very harm. In the interest of compensating the injured party, liability should be joint and several. If either the aider State or the principal State pays full compensation to the injured party, then it should have an action against the other for a contribution.

In some situations, however, it might be appropriate for the liability of the complicit State to differ from that of the principal State. The ILC's

[244] 127 F Supp. 557.
[245] *Reports of International Arbitral Awards*, vol. 6, p. 160 (1925).
[246] Ibid. at pp. 164–5.
[247] Ibid. at p. 165.

theory, it will be recalled, is that complicity is a delict separate from that of the principal wrongful act. It takes the view that in some situations the act of the complicit State is not as serious as that of the principal State. It cites as an example the act of a State that aids aggression or genocide.[248] The ILC posits that the act of the complicit State may be less serious than that of the State committing aggression or genocide. If a tribunal were to order reparation to a people that had been subjected to a regime of *apartheid*, would it consider the liability of the complicit State and the principal State to be joint and several? Let us suppose that the act of the complicit State had been to give monetary grants to a political party upholding a policy of *apartheid* in the State in question.

The ILC analysis suggests a negative answer. Presumably a tribunal would assess damages against the complicit State at a level lower than those it might assess against the principal State. Conversely, there might be situations in which higher damages should be assessed against a complicit State than against a principal State. If a developed State provides extensive monetary and military assistance to a developing State in order to facilitate the developing State's aggression against a neighbouring State, the developed State might be considered more culpable and therefore would merit a higher award of damages against it. The path to assessing higher or lower damages against a complicit State is left open by the concept that the act of a complicit State is a wrong separate from that of the principal State.

The ILC appears to follow this view—that responsibility of a State should correspond to the degree of its fault. It thus appears to reject joint and several liability, though no article yet drafted bears directly on the issue. The question of the consequences of complicity was raised in a report to the ILC by Special Rapporteur William Riphagen (who replaced Ago in 1980). Both the report and the ILC discussion of it proceeded from the principle that the responsibility of a complicit State should be in proportion to the seriousness of its wrongful act.[249]

(c) *Remedies involving Punitive Measures*

The ILC's distinction between crimes and delicts potentially complicates the type of remedy that might follow a finding of complicity. For delicts the principal State must make restitution or, if that is not possible,

[248] Report of the ILC to the General Assembly, *GAOR*, 33rd Session, Supplement 10, at p. 254, UN Doc. A/33/10 (1978), reprinted in *Yearbook of the ILC*, 1978, vol. 2, p. 103, UN Doc. A/CN.4/SER.A/1978/Add. 1 (pt. 2).

[249] Report of the ILC to the General Assembly, *GAOR*, 35th Session, Supplement 10, at pp. 133–5, UN Doc. A/35/10 (1980), reprinted in *Yearbook of the ILC*, 1980, vol. 2, pp. 62–3, UN Doc. A/CN.4/SER.A/Add. 1 (pt. 2); Summary Records of the 1666th meeting, *Yearbook of the ILC*, 1981, vol. 1, p. 127, para. 20 (statement of Special Rapporteur Riphagen), UN Doc. A/CN.4/SER.A/1981; Summary Records of the 1668th meeting, ibid., p. 133, para. 17 (statement of Sucharitkul), UN Doc. A/CN.4/SER.A/1981. Ushakov disputes use of proportionality, suggesting instead emphasis on the state of mind underlying the act: Summary Records of the 1668th meeting, ibid., p. 134, paras. 25–6 (statement of Ushakov), UN Doc. A/CN.4/SER.A/1981.

ANNEX 7

The Law of International Responsibility

Edited by

JAMES CRAWFORD
ALAIN PELLET
SIMON OLLESON

Assistant Editor

KATE PARLETT

OXFORD
UNIVERSITY PRESS

Annex 7

OXFORD
UNIVERSITY PRESS
Great Clarendon Street, Oxford ox2 6DP
Oxford University Press is a department of the University of Oxford.
It furthers the University's objective of excellence in research, scholarship,
and education by publishing worldwide in
Oxford New York
Auckland Cape Town Dar es Salaam Hong Kong Karachi
Kuala Lumpur Madrid Melbourne Mexico City Nairobi
New Delhi Shanghai Taipei Toronto
With offices in
Argentina Austria Brazil Chile Czech Republic France Greece
Guatemala Hungary Italy Japan Poland Portugal Singapore
South Korea Switzerland Thailand Turkey Ukraine Vietnam
Oxford is a registered trade mark of Oxford University Press
in the UK and in certain other countries
Published in the United States
by Oxford University Press Inc., New York

First published 2010

British Library Cataloguing in Publication Data
Data available
Library of Congress Cataloging in Publication Data
Data available
Typeset by MPS Limited, A Macmillan Company
Printed and bound by
CPI Group (UK) Ltd, Croydon, CR0 4YY
ISBN 978–0–19929697–2
3 5 7 9 10 8 6 4

Annex 7

Chapter 44

DIVISION OF REPARATION BETWEEN RESPONSIBLE ENTITIES

ALEXANDER ORAKHELASHVILI

1 Concepts, categories, and interests

Internationally wrongful acts can be (and often are) committed through the collaboration of two or more subjects of international law, which gives rise to what is sometimes referred to as joint and several responsibility. In such situations the allocation of the remedial duties to relevant entities may become an issue.

The law in this field is called on to find the proper balance between the two legitimate interests. The first is that of the injured entity in the effective redress for the wrongful act and its consequences. In the case of concurrent, combined or concerted action of two or more States, the efficiency of redress depends on the ability of the injured State or non-State entity to demand reparation from at least one of the responsible States. The question of general prevention is also relevant—the law of State responsibility should not be construed as taking note of the effective participation of the State in the wrongful act, especially in situations involving causal connection to the outcome of the breach, and yet as excluding that very same participation from the reach of the rules of attribution and redress, thereby allowing the State concerned to escape responsibility. The principal criterion should be the need to enable the injured party to ensure effective redress for wrongful acts; in other words to guarantee the effectiveness of the norms which have been breached.

The second interest, which is relevant both where the wrongful act is committed by two or more States and where two or more States are injured, is that of the responsible entity

not to provide more reparation than is necessary for the redress of the wrongful act. As the Permanent Court of International Justice noted in the *Chorzów Factory* case, tribunals must avoid awarding double damages.[1] Similarly, the International Court in the *Reparations* case noted that:

> international tribunals are already familiar with the problem of a claim in which two or more national States are interested, and they know how to protect the defendant State in such a case.[2]

This would, according to the Court, apply also to cases where one of the claimants is an international organization.

It seems generally agreed that the responsibility of international organizations is governed by the same general principles as State responsibility. As the ILC's Special Rapporteur on Responsibility of International Organisations has emphasized, the standards applicable to international organizations need not be different from the standards applicable in the law of State responsibility.[3] At the same time, the structural peculiarity of international organizations requires certain differentiations that potentially cover both the principles applicable to and the outcomes of responsibility. For instance, the 1969 Vienna Convention on the Law of Treaties served as an example for drafting and adopting the 1986 Vienna Convention applicable to treaties concluded with the involvement of international organizations. While most rules and principles in the two conventions are similar, the structural characteristics of international organizations have led to the adoption of specific rules applicable to organizations regarding the conclusion of treaties (article 7(3)), the validity of treaties (article 46), and dispute settlement (articles 65–66). It can be argued that similar structural differences can require different treatment in the law of responsibility as well. The ILA Final Report on the Accountability of International Organizations considered that the principles of responsibility applicable to both fields are similar though not identical: 'the principles of State responsibility are applicable by analogy, but with some variations, to the responsibility of international organizations'.[4]

In the field under consideration, the structural peculiarity of international organizations is apparent. While the situation raising the division of reparation between responsible States involves two or more States, actions by international organizations almost inherently raise the question of division of reparation with other entities, either because of the delegated character of the powers of international organizations, or because of their lack of a territorial basis, which means that, apart from staff cases, they can only breach international law either on the territory of some State or in collusion or collaboration with one or more States, eg when the decisions of the UN Security Council oblige States to adopt a certain course of conduct, most notably in the case of mandatory sanctions, or when the development programmes of the World Bank are implemented in the territory of a State with its consent and cooperation. At the same time, the specific case of territorial

[1] *Factory at Chorzów, Merits, 1928, PCIJ, Series A, No 17*, p 4, 49, 58–59.

[2] *Reparations for Injuries Suffered in the Service of the United Nations, Advisory Opinion, ICJ Reports 1949*, p 149, 185–186.

[3] G Gaja, First Report on Responsibility of International Organisations, 2003, A/CN.4/532, 8–9, 18–19; see also G Gaja, Second Report on Responsibility of International Organisations, 2004, A/CN.4/541, 3; see also C Amerasinghe, *Principles of the Institutional Law of International Organisations* (2nd edn, Cambridge, CUP, 2005), 401.

[4] M Shaw & K Wellens, *ILA Final Report on Accountability of International Organisations* (2004), 27.

governance presents a situation where the organizations can exercise territorial jurisdiction which can affect questions of responsibility and reparation.

First, it is necessary to examine the conceptual and normative preconditions of the division of reparation, that is, the areas in which the issue of the division of reparation arises. Second, the practical aspects and modalities of the division of reparation will be examined. Third and finally, the focus will be on the procedural prerequisites and obstacles to the recovery of reparation where it is to be divided between the two or more responsible entities.

Attempts to locate the applicable principles are not assisted by the fact that in practice cases involving the responsibility of multiple States for the same wrongful act have quite often been settled, rejected or discontinued before reaching the stage at which the reparation is determined;[5] or procedural obstacles have prevented the determination of the issues of joint responsibility and the division of reparation, as in the case of the International Court's application of the absent third party doctrine.

2 Areas in which the division of reparation is relevant

(a) Responsibility of States

(i) The types of wrongful conduct

The question of the plurality of responsible and injured States and hence the question of the division of reparation between the responsible entities comes into play either through the concerted action of States or in cases where the roles of States differ in terms of the kind and degree of their involvement in the wrongful act. These issues are logically prior to the issue of division of reparation. The construction of the rules regarding participation in the commission of an internationally wrongful act by another State is of crucial importance in terms of which State has to provide reparation for the relevant wrongful act. The rules on attribution serve the purpose of legal certainty in terms of allocation of the responsibility for a wrongful act in a way that makes the ensuing legal relations predictable both for the author State—in terms of knowing what it will be responsible for—and the injured State—in terms of knowing who it can claim reparation from.

The collaboration of States in the commission of a wrongful act is largely a matter of fact and can assume different forms. Article 6 of the ILC's Articles on State Responsibility provides that:

> The conduct of an organ placed at the disposal of a State by another State shall be considered an act of the former State under international law if the organ is acting in the exercise of elements of the governmental authority of the State at whose disposal it is placed.

[5] The US made a claim of joint and several responsibility against USSR and Hungary in the case of the *Treatment in Hungary of Aircraft and Crew of United States of America (United States of America v Union of Soviet Socialist Republic, Hungary), Order of 12 July 1954, ICJ Reports 1954*, p 103; however, findings as to responsibility were never made because the respondents refused to accept the Court's jurisdiction. See also the discontinuance order in the *Lockerbie* cases, *Order of 10 September 2003, ICJ Reports 2003*, p 1. In *Banković*, where the European Court was asked to determine the responsibility of 10 NATO member States for the bombing of the Belgrade television station which claimed the life of several persons, the Court refused to adjudicate because the matter was allegedly beyond the Convention's *espace juridique*, see *Banković v Belgium, Czech Republic, Denmark, France, Germany, Greece, Hungary, Iceland, Italy, Luxembourg, Netherlands, Norway, Poland, Portugal, Spain, Turkey and United Kingdom* (App No 52207/99), Decision on admissibility, *ECHR Reports 2001-XII* [GC]; for an analysis see A Orakhelashvili, 'Restrictive Interpretation of Human Rights Treaties in the Recent Jurisprudence of the European Court of Human Rights' (2003) 14 *EJIL* 529, 538–551.

ANNEX 8

State Responsibility and the Marine Environment

THE RULES OF DECISION

BRIAN D. SMITH

CLARENDON PRESS · OXFORD
1988

Annex 8

Oxford University Press, Walton Street, Oxford OX2 6DP
Oxford New York Toronto
Delhi Bombay Calcutta Madras Karachi
Petaling Jaya Singapore Hong Kong Tokyo
Nairobi Dar es Salaam Cape Town
Melbourne Auckland
and associated companies in
Beirut Berlin Ibadan Nicosia

Oxford is a trade mark of Oxford University Press

Published in the United States
by Oxford University Press, New York

British Library Cataloguing in Publication Data
Smith, Brian D.
State responsibility and the marine environment the rules of decision
1. Maritime Law
I. Title
341.4'5 JX4411
ISBN 0-19-825581-0

Library of Congress Cataloging in Publication Data
Smith, Brian D.
State responsibility and the marine environment: the rules of decision / Brian D. Smith.
Originally presented as the author's thesis (Ph.D.)—University of Cambridge, 1985.
Bibliography: p. Includes index.
1. Marine pollution—Law and legislation.
2. Environmental law, International.
3. Maritime law.
4. Government liability (International law)
I. Title.
K3590.4.S57 1988
341.7'62—dc19 87-22915 CIp
ISBN 0-19-825581-0

Set by The Alden Press, Oxford
Printed in Great Britain
at the Alden Press, Oxford

Annex 8

mitigated in this circumstance. It may be argued cogently that participation in an enterprise to achieve a common benefit renders the correlative costs or consequences of the enterprise equally common to all participants, *vis-à-vis* the rest of the community and particularly an injured state. Moreover, if such a regime were indeed established, states would expect and independently consent to the attendant risks and burdens by entry into the concerted activity. If the notion of independence has any effect, it is merely to suggest the propriety of the right of contribution; each state should ultimately bear only the consequences of its share of the common enterprise. The contribution process finds support, in any event, in the underlying policy objective of deterrence through channelling costs to all responsible states and, perhaps, simply in general considerations of fairness.[101]

The factors cited in support of joint and several liability for participants in common enterprises do not apply in the circumstance of independent actors producing a single harm. By definition, such wrongdoers have neither the prior opportunity to establish substantive or procedural rights with respect to the sharing of liability nor the communal benefits and expectations present in the concerted conduct situation.[102] The relationship of independent wrongdoers is established only by and upon the event of the injury; there is no pre-existing or even expected linkage between the states' conduct.[103] An exception, of course, exists when states may anticipate injury arising out of the conjunction of certain independent acts (for example, the placement and operation of space objects), and reach agreement as to the sharing of liability and rights of indemnity.[104] In such cases, the imposition of joint and several liability is supported by the same logic applicable to concerted conduct. To impose such liability as the general rule applicable to independent wrongdoers (as it is on the municipal plane), however, requires a policy decision that the problems of states in breach, i.e. uncertainty of contribution and qualified independence, are outweighed by the objective of securing adequate compensation for injured states. Fixing each state with the entire original compensation obligation to the injured state seems to present little difficulty in situations in which the acts of any one of the independent wrongdoers would have been sufficient to cause the harm.[105] Problems of policy are far greater

for all 'launching states' in the Space Objects Convention. See text at nn. 71–5 *supra*. For an example see Agreement of 6 May 1964 among Australia, United Kingdom and the European Organization for the Development and Construction of Space Vehicle Launchers, in Jenks, *supra* n. 72, at 368–74.

[101] At least one author appears to regard joint and several liability as the established rule with respect to joint enterprises. See Handl, *supra* ch. 2 n. 82, at 535 n. 47. For further support see Goldie, *supra* ch. 2 n. 92, at 1254.

[102] The situation of complicity would seem to represent a possible exception, suggesting perhaps that for these purposes complicity should be treated as a circumstance of 'concerted' activity. See discussion in text at ch. 2 nn. 19–24 and ch. 3 nn. 3–4 *supra*.

[103] To the extent this is not the case, the 'independent' character of the actor's conduct must be questioned.

[104] See text at nn. 76–8 *supra*.

[105] See Prosser, *supra* n. 2, at 316.

when harm is the consequence only of the combination of conduct essentially equivalent in terms of causation and blameworthiness.[106] Most troubling are situations in which joint and several liability might result in a state with a relatively minor degree of responsibility standing entirely liable without any effective means to achieve contribution.[107]

If one is persuaded that such results are unacceptable, the alternative to joint and several liability is suggested by municipal admiralty practice.[108] Following that model, the obligations of each state to compensate the injured state would be limited to a proportional share based on fault. This approach has two obvious merits: it avoids the perils of the contribution process; and it satisfies even aggressive notions of independence by limiting each state's liability to a share of the harm for which it alone is deemed responsible. Yet, there would seem to be a serious inequity in the adoption of such an 'apportioned liability' approach to protect the interests of breaching states. The central question is who is to bear the risk of loss arising out of injury: the injured state (though a failure of compensation) or the members of the set of wrongdoers (though a failure of contribution)? Such risks are certainly exacerbated by the procedural limitations in dispute settlement among states. On both the municipal and the international plans, however, as the injured party and *any* wrongdoer, it seems the burden of loss should fall upon the latter. Hence, it is submitted that a regime of joint and several liability with a right of contribution is also appropriately applied to independent wrongdoers producing a single harm.

Existing international judicial practice in apportioning damages in other contexts provides an adequate pattern for the division of compensation among wrongdoers through the contribution process.[109] As in municipal practice, of course, such apportionment may rarely be determined with mathematical precision.[110] The jurisprudence amply demonstrates, however, that international tribunals, in the exercise of vested discretion, are both equipped and willing to make such approximate and often intuitive judgments as to comparative fault. Decisions have focused on the same two criteria of relative fault evident in municipal practice: causation and blameworthiness.

[106] Consider the case of two acts of pollution harmless in themselves which combine through predictable chemical processes to cause damage. See *id.*, at 322–3. One author views apportionment of liability to the extent of contributory fault appropriate in this situation—*unless* the states were aware of each others' contributions or the activities were ultrahazardous, in which case joint and several liability is proper. See Rest, 'Convention On Compensation for Transfrontier Environmental Injuries', Project of the Institute of International and Comparative Law of the University of Cologne (1976), at 47–50.

[107] This situation might arise, for example, in the scenario described above in which one state attacks an embassy in the territory of another state which fails to exercise due diligence.

[108] See text at nn. 54–5 *supra*.

[109] See text at nn. 79–92 *supra*.

[110] See Williams, *supra* n. 2, at 158, who notes this fact but concludes '[w]e have to act more or less arbitrarily because the alternative is not to act at all.'

The choice between the two seems to reflect the facts in each specific case. In certain situations different degrees of causation may be identified; in others, the facts support only a comparative distinction in 'moral' blame.[111] Facts presenting elements of both perceptibly unequal causation and blameworthiness would likely merit and receive an analysis comprehending both factors.

In any event, the principal categories of facts relevant to a determination of comparative fault, whether denominated criteria of causation, blame or both, may be identified. In all cases, for example, it would seem that the character of each state's intent in committing a breach of its international obligations is relevant to the degree of fault attributed to it. Thus, a wrong of specific intent ought to be treated more harshly than one of simple negligence. Among states engaging in concerted wrongful conduct, the apportionment decision would logically reflect the character of each state's participation in the enterprise. Factors such as the source of financing, equipment, and personnel, the direction of benefits, and the vesting of decision-making authority should enter into a determination of the participating states' respective shares of the compensation burden.[112]

Among independent wrongdoers producing a single harm, the facts relevant to the apportionment of fault will vary even more with the specific circumstances. To illustrate, as between two states wrongfully depositing toxic waste in a third state's territory, the share of compensation for the undivided harm would logically reflect the relative measure and potency of the contributions of the states. Quite different factors, a comparison of the states' relative capacities and efforts to prevent, would apply in a situation in which two states fail to exercise due diligence to prevent an event. In most cases, the measure of each state's jurisdiction over the injury-producing conduct will represent a factor of paramount importance in distinguishing degrees of fault. The character of a state's legal authority over an event represents a shorthand definition of its effective control of that event. The inquiry into legal authority and control is perhaps best viewed as an expression of the criterion of causality; the state with the greater measure of jurisdiction to control conduct is appropriately defined as possessing a greater casual connection to the consequences of such conduct.[113] In any event, apportionment on the basis of authority to control directly furthers the objective of deterrence by imposing

[111] Admittedly, the cited decisions based on abstract blame have been limited to the context of apportionment between the injured party and the wrongdoer. There is every reason to assume, however, that the same analysis would apply to apportionment among wrongdoers. Decisions based on causation, of course, appear both in contexts of such injured party contributory causation and external causation. See text at nn. 89–90 *supra*.

[112] See Goldie, *supra* ch. 2 n. 92, at 1253–4. As to the criterion of benefit, see language of the *Anglo-Chinese Shipping Co.* Case quoted at n. 63 *supra*.

[113] See generally, Eagleton, *supra* ch. 1 n. 4, at 7 and 27; Friedmann, *supra* ch. 3 n. 59, *passim*. Garcia-Mora, *supra* ch. 2 n. 37, at 29; Hyde, *supra* ch. 3 n. 146, at 922; Handl, *supra* ch. 2 n. 92, at 531–4; Lenoble, *supra* ch. 3 n. 44, *passim*.

the burden of compensation in proportion to the relative capacities of the states to prevent repetition of the injurious event.

A state possesses maximum legal authority over conduct, of course, when it is the actor. When an organ of the state is the author of the conduct which directly inflicts injury, a mere exercise of self-control would suffice to prevent the injury. Hence, it would seem appropriate to view a state actor more at fault than a state whose responsibility arises out of its failure to prevent the state actor from inflicting the injury. The clearest illustration is, again, the circumstance of an attack by state *A* on a diplomatic mission in state *B* accomplished due to a failure of state *B* to exercise due diligence. Based on the foregoing logic, as between the two responsible states, state *A* would be assigned the greater degree of fault.

This same analysis logically extends to apportionment between states which are each responsible for other than the primary injuring conduct. In the event more than one state fails to exercise required due diligence to prevent an event, the nature of each state's legal authority over the injurious event should be a threshold concern. The greater the measure of such authority, the greater the relative degree of fault. Hence, the fault of a state with only extraterritorial prescriptive authority over conduct is likely less than that of a state vested with authority to prescribe and take immediate enforcement measures to prevent the conduct.[114] If two states in breach possess the same general order of authority, recourse may be made to distinctions such as the specific capacities of each state to exercise authority with respect to the injurious conduct.[115] In short, the scales of fault should tip in the direction of the state in a position to exercise jurisdiction more effecively to control the wrongful conduct.

[114] As to the possibility of responsibility arising out of a failure to exercise prescriptive authority over conduct see text at ch. 3, nn. 145–52 *supra*. In all but extraordinary circumstances, of course, such a failure would bear an insufficient causal connection to the harm to give rise to *any* obligation to compensate for the harm. The breach of obligation should, however, give rise to other consequences of responsibility. See text at n. 11 and following n. 36 *supra*.

[115] Capacity may, of course, be interpreted in either an objective or subjective sense. The hybrid approach now advocated with respect to due diligence generally would assume a minimum standard of administrative capacity and hold states which in fact possess a greater degree of administrative prowess to a high standard. See text at ch. 3 nn. 122–34 *supra*. Factors such as relative foreknowledge and opportunity are of similar relevance.