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STATE RESPONSIBILITY AND THE LAW OF INTERNATIONAL WATERCOURSES

THOMAS O'CONNELL HOLSTEIN*

On December 8, 1970, the General Assembly of the United Nations adopted Finland's resolution requesting the International Law Commission to "take up the study of the law of the non-navigational uses of international watercourses with a view to its progressive development and codification."¹ The Commission agreed to undertake the investigation upon receipt of the Secretariat's supplementary report.² Due to its Agenda, several years may elapse before the Commission produces a draft convention on the subject.

In 1972 the Commission stressed the urgency and complexity of the pollution problem, and requested the Secretariat to make special reference to pollution in its report.³ The area of non-navigational uses, as generally defined, is rampant with problems similar to those encountered at the unsuccessful Hague Conference of 1930,⁴ since it includes state responsibility for extraterritorial injury caused by the pollution of international rivers.⁵ This observation leads to the main theme of this article—that the Commission should include state responsibility for pollution in its codification of general state responsibility, and limit its codification of international watercourses to specific non-navigational uses. Pollution is not a use, but the result of use. Dealing with both subjects under the same topic can only hamper the Commission's codification effort, and would lead to unnecessary duplication.

For twenty years the International Law Commission has sought elusively to codify the law of state responsibility.⁶ Its unsuccessful attempts concentrate on state responsibility for injuries to aliens within state territory.⁷ The work of the Commission from 1954-1962, does not render much help to determine the responsibility of a state for action within its territory which causes injury in another State.⁸ The Commission neglected

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this problem except in the area of guerrilla activities.⁹ It so emphasized the rights of aliens injured within state territory that the Commission's work during this period applies only remotely to extraterritorial effects of national activities. The Commission's Sub-Committee on State Responsibility under the chairmanship of Roberto Ago, Special Rapporteur, has abandoned this limited approach and is studying the general aspects of state responsibility, i.e., the situation resulting from a state's non-fulfillment of an international legal obligation, regardless of the obligation's nature and the matter to which it relates.¹⁰

According to the Commission's most recent draft, a state is responsible for internationally wrongful acts or omissions which breach its international obligations and are attributable to it.¹¹ Only international law may characterize an act as wrongful.¹²

An internationally wrongful act, as defined in Art. 3, contains a subjective and an objective element.¹³ The objective element concerns the act itself, i.e., what degree of pollution breaches the international obligation of a state.

Is there any customary international law which, in absence of treaty, would characterize a state's pollution of international watercourses as wrongful?

There is "extensive State practice, precedent, and doctrine," to use the language in Art. 15 of the Statute of the Commission. However, "there exists no multilateral treaty or convention defining in detail the rights and obligations of States in the prevention of the pollution of water. A study of the attitude adopted by international law must therefore rely on different sources, such as treaties concerned with boundary waters or other watercourses of common interest to several States, international legal practice, written opinions and views and recommendations adopted by international bodies."¹⁴

The Secretary General's earlier Report, Legal Problems Relating to the Utilization and Use of International Rivers,¹⁵ lists over 250 treaties applicable to the non-navigational uses of international rivers. On this basis, some publicists have declared moot the subject of extraterritorial injury caused by the pollution of international rivers.¹⁶ While this position is academically tenable, it is speculative.

Numerous treaties with pollution provisions, mostly involving European and North American states, merely evidence the general principle *sic utere tuo ut alienum non laedas*.¹⁷

No international commission established to administer an international watercourse possesses judicial power to enforce, police, or award compensation due to fault of a signatory. Compensation, usually obtained through the co-operative association of the international commission members, implies no admission of responsibility in a judicial sense. Although the state practice of many nations demonstrates a repeated pattern of compliance with commission recommendations, this does not change the "voluntarily adopted" action of states into acts of obligatory compliance. The numerous international commissions are confined to investigation and recommendation. Supranational Environmental Control Agencies¹⁸ and surrender of compulsory jurisdiction to any tribunal are not predictable,¹⁹ since states fear adjudication or compulsory arbitration of disputes arising out of the important use of water resources in the national interest.²⁰

Geographically, sixty states²¹ qualify as "basin" states.²² Many basins²³ are not subjects to any agreement. Existent treaties do not make pollution a recognized legal cause of action between signatories.²⁴ The customary law regulating the pollution of international watercourses is undeveloped.²⁵ There is no application of the law that some publicists and associations say exists. There are a few international cases in analogous situations²⁶ and a large number of multilateral treaties, but the principles embodied in them do not bind non-party states by operation of custom. They have no obligatory effect on non-signatories which Art. 2 of the Vienna Convention on the Law of Treaties defines as third states.²⁷

What is the legal effect of the relevant treaties which exist?

The role played by custom in sometimes extending the application of rules contained in a treaty beyond the contracting states is well recognized. A treaty concluded between certain states may formulate a rule, or establish a territorial, fluvial or maritime regime which afterwards comes to be generally accepted by other States as customary international law, as for example the Hague Conventions regarding the rules of land warfare.²⁸

This process is not restricted to law-making treaties. When it occurs, custom binds third states who are not parties to such treaties. The treaties themselves have no effect on third states. According to Art. 38 of the Vienna Convention on the law of treaties: "Nothing precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law, recognized as such."²⁹ However, the principles embodied in treaties relevant to the pollution of international watercourses are not so recognized at this time.

Is a third state required to refrain from activity within its territory which might result in pollution and cause territorial injury? The general rule is that parties to a treaty cannot impose an obligation on a third state without its consent, *pacta tertiis nec nocent ne prosunt*.³⁰ A treaty binds a third state only if the parties intend to apply it to third states, and if the third state expressly agrees.³¹ These rules may not answer the question if the treaties concerned have "objective" effects, or create an "objective regime."

The International Law Commission in its preparatory work on the Vienna Convention discussed extensively the effect of treaties on third states. The Commission did not include treaties which have "objective effects" and provide for "objective regimes" in their final draft. This is most unfortunate, since the treaties providing for the non-navigational uses of international watercourses may be in this category. If so, these treaties have greater authority to place obligations on third states than regular multilateral or bilateral treaties.³²

Every treaty establishes a contractual relationship between the parties. In this sense, all treaties establish a kind of "international regime." However, the question of "objective effects" truly arises only in regard to a special type of treaty.³³ Art. 23 of the Commission's preliminary draft on the Law of Treaties defines this class of treaty.³⁴

The parties must intend to create a regime for the general interest in a particular river or region. This river or region must be subject to the territorial competence of one or more of them, but need not include all such states.³⁵ Treaties on the non-navigational uses of international watercourses meet these criteria.

Treaties which create objective regimes differ from law-making treaties. No state has greater competence than any other in the subject matter of most law making treaties.³⁶ River treaties deal with states possessing special competence due to geographical position in a region where the subject matter is located. Are treaties which include pollution articles and which establish a regime for the non-navigational use of international watercourses in this category?

Sir Humphrey Waldoch, Special Rapporteur for the Commission on the Law of Treaties, asserts that "the mere fact that certain provisions of a treaty may constitute an objective regime does not mean that they are to be regarded as independent of the rest of the treaty."³⁷ If the corrol-

lary of this is true, then pollution provisions included in treaties on the navigation of international rivers have the same character as the general treaty.

According to the International Law Commission, treaties providing for the freedom of navigation in international rivers are treaties creating "objective regimes."³⁸ Treaties relevant to the pollution of international rivers have their inception in, and have evolved from, pollution articles in treaties on navigational use.

Many modern uses of international watercourses were unknown during the initial development of the law pertaining to the use of international rivers.³⁹ Since navigation was the principle use of such rivers, the riparian doctrine⁴⁰ and the doctrine of limited territorial sovereignty,⁴¹ which are fundamental to establish state responsibility for extraterritorial pollution injury, were first applied to states in the area of navigational use.⁴² Prior to World War I, navigational use was of such importance that international law did not recognize non-navigable rivers flowing through more than one state as subjects of international concern.

In referring to international watercourses, the Final Act of Congress of Vienna adopted the phrase "Navigable rivers or streams which separate or traverse several states."⁴³ The same phrase was used in the Treaty of Paris of 1856.⁴⁴ Navigation continued to be the dominant concern⁴⁵ through the middle and latter half of the nineteenth century.⁴⁶

The emergence of non-navigational uses began around 1890 when states enacted various treaties with specific provisions to protect fishing.⁴⁷ Such treaties had pollution provisions, but only as a secondary feature.

The term "International Rivers" appears initially in the 1919-1920 Peace Treaties. In this context the term applied only to the navigable sections of rivers which offered more than one state access to the sea.⁴⁸ In 1929, the Permanent Court of International Justice upheld this definition in the River Oder case.⁴⁹ The 1921 Barcelona Statute, although adopting the term "navigable waterways of international concern," emphasized the growing importance of uses other than navigation.⁵⁰ Two years later, the Convention Relating to the Development of Hydroelectric Power Affecting More Than One State further demonstrated the new importance of non-navigational uses.⁵¹

The treaties relevant to the pollution of international rivers and to non-navigational uses, because of their nature and evolution, are treaties

which create objective regimes. The question of local or particular custom is especially important if these treaties create "objective regimes."⁵² Such treaties by their nature attempt to create a regional custom which may differ from general custom.

The development of state responsibility for extraterritorial injury "depends on further inroads being made on some of the principles surrounding state sovereignty."⁵³ General principles embodied in treaties on the use of international rivers imply such inroads, but these principles are not generally accepted to the extent that they mandatorily bind third states according to the force of general custom.⁵⁴ Is this also true of local custom as regards third states sharing the same geographic region?

Although the Right of Passage case⁵⁵ and the Asylum case⁵⁶ hold differently, the International Law Commission has asserted that local custom binds third states in the same operational manner as general custom, and does not require express consent of the third state.⁵⁷

The pollution of international watercourses is uniquely suited to a local custom and objective regime approach. No uniform international pollution standard is possible, other than a vague one, because of the physical and climatic differences throughout the world.⁵⁸

If the Commission produces an acceptable convention on state responsibility, it will define an internationally wrongful act and its ramifications. Since such criteria would apply to pollution which causes extraterritorial injury, a special inquiry into this area under the topic of non-navigational uses is redundant. Extraterritorial injury, regardless of cause, is a subset of general state responsibility. Art. X and XI⁵⁹ of the Helsinki Rules deal specifically with extraterritorial pollution injury, but fail to define precisely a uniform international pollution standard.

The Helsinki Rules, and the Council of Europe Draft Convention of 1969 prohibit "pollution . . . causing or likely to cause *substantial injury* in the territory of any other contracting State."⁶⁰ What is a "substantial injury?"

According to the International Law Association's Comment to Art. X of the Helsinki Rules "an injury is considered substantial if it materially interferes with or prevents reasonable use of the water."⁶¹ The comment further defines material interference as action not in accord with equitable utilization. According to Art. IV of the Helsinki Rules, equitable utilization entitles a basin state to "a reasonable and equitable share in the beneficial uses of the waters of an international drainage basin."⁶² None

of this circuitous verbiage defines the degree of injury which renders a state responsible.⁶³ The Helsinki Rules merely restate the principle *sic utere tuo*.

This principle is too vacuous. It does not impose obligations on third states according to general international custom.⁶⁴ Thus, third state violation of the principle is not an internationally wrongful act. The possible exception is an objective regime treaty which may establish local custom for third states.

State practice, as reflected in treaties, demonstrates no obligatory compliance with the principle *sic utere tuo*.

There is a long history of treaties proscribing pollution of international watercourses. However, a study of them does not reveal a uniform international standard of pollution injury rendering another state responsible for such acts.⁶⁵ Some merely provide for mutual concern over resources or mention pollution as something the parties must take reasonable steps to avoid. Others prohibit certain effects of pollution. Most treaties refer conflicts to a non-judicial international commission.⁶⁶

In 1909, the United States enacted a treaty with Great Britain, representing Canada, concerning the boundary waters and Great Lakes between the United States and Canada. It typifies the treaties establishing international commissions and relating to the non-navigational use of international watercourses. According to Art. IV, "Waters flowing across the boundary *shall not be polluted on either side to the injury of health or property on the other.*" However, both countries disclaimed responsibility for extraterritorial injury.⁶⁷

The treaty established the International Joint Commission which has "come to be regarded with some degree of envy by other nations confronted by problems of international river development."⁶⁸ Such praise is suspect since the International Joint Commission is primarily involved in investigation and research. It must wait until one of the parties requests it to investigate a problem. In addition, according to Art. IX, the "reports of the Commission shall not be regarded as decisions of the question or matter so submitted, either on the facts or the law and shall in no way have the character of an arbitral award."⁶⁹

State practice between the United States and Canada during the last sixty years renders evidence of an opposite nature. Both countries have refrained from taking action without Commission authorization.⁷⁰ Their

compliance with recommendations indicates their unofficial judicial effect.⁷¹ This dichotomy between the lack of judicial power and the record of conformity with Commission recommendations testifies to the excellent cooperation between the states, but to nothing more. Despite contrary practice, the treaty is "opposed to the concept of an international body with administrative and enforcement functions."⁷² Because the parties officially deny responsibility for extraterritorial injury, adherence to the principle *sec utere tuo* is not obligatory.

The treaties on pollution and non-navigational uses of international watercourses inherently reflect the primary concerns of the geographic region where the resources are located. Thus, except for a general incorporation of *sec utere tuo*, there is little uniformity. This is the primary reason why local custom and regional agreements are more suitable than an international convention.

At least a study of the treaties reveals a similar approach among states of diverse political orientation and ideological differences.⁷³ Such unity would probably continue in the area of cooperative non-navigational use, but would certainly break down on the question of state responsibility, considering the disagreement between communist and western states in this area.⁷⁴

The situation surrounding the United States testing of a hydrogen bomb on Eniwetok Atoll in the Pacific in 1954 demonstrates the general practice of states in the area of state responsibilities for extraterritorial injury.

On March 1, 1954 the United States exploded a hydrogen bomb in the Marshall Islands. The test resulted in injuries to Japanese fishermen, and destroyed over 175 tons of fish, disrupting the Japanese market.⁷⁵

In January 1955, the United States gave monetary compensation to the Japanese government but stated that:

The Government of the United States of America has made clear that it is prepared to make monetary compensation as an additional expression of its concern and regret over the injuries sustained. . . . The United States of America hereby tenders, ex gratia, to the Government of Japan, without reference to the question of legal liability, the sum of two million dollars for purposes of compensation for the injuries or damages sustained as a result of nuclear tests in the Marshall Islands in 1954 . . .

It is the understanding of the Government of the United States of America that the Government of Japan, in accepting the tendered sum of two million dollars, does so in full settlement of any and all claims against the United States of America or its agents, nationals, or judicial entities on the part of Japan and its nationals and juridical entities for any and all injuries, losses, or damages arising out of the said nuclear tests.⁷⁶

The practice of the United States in this instance is representative of practice generally in this area, since the United States in making reparation, declared explicitly that it did so *ex gratia* and not as a matter of legal liability.

The Helsinki Rules adopt a broad scope, encompassing utilization of river basin resources as well as reparation for injury. This is too expansive for realistic codification. The Commission would avoid future problems if it restricted its inquiry to non-navigational uses and included extraterritorial injury caused by pollution of international rivers in its attempted codification of general state responsibility.

The codification of the law of international rivers, to interpret Art. 13 of the Charter and Statute of the Commission, includes both codification and development of the law.⁷⁷ The Commission must not confine itself to simple exposition of existing law. The question most relevant to the Helsinki Rules and to the Commission's task is: How far may developmental efforts go before such progressive activity becomes self-defeating? Also, at what point must the Commission stop to avoid sacrificing the potential agreement of states in the cause of development?

The Commission has already stated that the Helsinki Rules are too academic and Utopian.⁷⁸

Private codification is less complex and less restrictive than the Commission's official codification.⁷⁹ Commission codification is an international effort to secure eventual state acceptance in the form of an international convention. Thus, the Commission must exercise caution in developmental areas. Codification is intricate and time consuming. Art. 23 of the Statute of the Commission requires the following preliminary stages enroute to codification. First, the Commission must prepare a report and submit it to the General Assembly. Second, the General Assembly must pass a resolution adopting the report. Third, the General Assembly must recommend that its members adopt the report in the form of a Convention, or that the United Nations convene a conference to conclude a convention.

A draft convention on international watercourses would be more readily acceptable if the convention avoided the controversial area of state responsibility for extraterritorial injury caused by pollution.

The subjective element in Art. 3⁸⁰ of the Commission's latest draft on state responsibility asks whether a wrongful act is attributable to the state. Art. 5⁸¹ and 6⁸² provide that Acts and Commissions of state organs, whether executive, legislative, or administrative, are attributable to a state. However, most activities polluting international rivers and causing extraterritorial injury are private acts within a state. According to the general rule, acts by private parties do not result in state responsibility.⁸³

Art. X of the Helsinki Rules adopts the position of direct state responsibility for all pollution "originating within a territory of state" which would cause substantial injury. In this regard, the rules make no distinction between public and private activities.⁸⁴

Acts of omission are particularly important in attributing private polluting acts within state territory to the state. The Corfu Channel case, and the Trail Smelter Case are specially significant because they lay the foundation for such attribution.

In October 1946 two British naval vessels struck mines while sailing through the Corfu Channel resulting in serious personal injuries including loss of life to some personnel on board, destruction of one ship, and serious damage to the other. The incident occurred in Albanian territorial waters. Albania had not laid the minefield, but Albania had not warned the British ships of its existence. The state referred the case to the International Court of Justice. The court held that Albania was responsible for the injury because it is "every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States."⁸⁵ This statement by the Court is the major basis for asserting that a state is obliged to refrain from acts which may cause extraterritorial injury.⁸⁶

The main issue in the case which concerns us is the attribution of a wrongful act, resulting in state responsibility, to Albania. The crucial matter is the imputation of knowledge to Albania which the Court held as an adequate basis for state responsibility. This case establishes the tenet that insufficient efforts on the part of a state to keep informed of conditions which may result in injury to other states is sufficient basis for responsibility.

The British alleged that the injury had been caused by mines which formed part of a minefield laid in the Channel with the knowledge of Albania. Albania denied such knowledge. In finding that Albania did have knowledge, the Court held that the minefield's location within the Albanian territorial sea was not in itself sufficient to prove knowledge. "This fact by itself and apart from other circumstances neither involves *prima facie* responsibility nor shifts the burden of proof."⁸⁷ However, the Court found it difficult to believe that a mine field could have been laid in Albanian territorial waters without Albania's detection. Consequently Albania either had actual knowledge, founded on circumstantial evidence, or had failed to exercise proper vigilance within its territory.⁸⁸

There are elements of this case which weaken its invocation to support state responsibility for extraterritorial injury. The most glaring fault is that the injury occurred in Albanian territory. Therefore, it is in line with the scope of the Commission's earlier work on state responsibility regarding injuries to aliens. The case involved two governments. Therefore, it may not be as applicable to private parties suffering extraterritorial injury caused by a state's failure to exercise proper vigilance, and even less so in similar cases between two private parties of different states. However, the case does establish a basis to hold a state responsible for extraterritorial injury caused by the pollution of international rivers, if the injurious activity occurred within state territory due to insufficient supervision of such activity by the agencies of the state.

The Trail Smelter Case is the only case dealing with extraterritorial injury caused by pollution. An *ad hoc* tribunal composed of representatives from Belgium, United States and Canada rendered the judgement in 1941. The United States alleged that air pollution from a privately owned smelter plant located in Canada had caused damage in the state of Washington. The Tribunal held that:

. . . under the principle of international law, as well as the law of the United States no state has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties of persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.⁸⁹

This holding is of questionable importance, since the dispute was submitted to the tribunal on the basis of a special convention.⁹⁰ Under this convention, Canada voluntarily accepted state responsibility for private

conduct occurring within its territory. However, this case is still of special importance because the tribunal declared Canada responsible under international law and "[a]part from" the convention.⁹¹

This holding is opposed to the general rule that a state is not responsible for the acts of private individuals.⁹² In this case both states voluntarily assumed an entirely private claim. The United States espoused the injuries to its citizens as injuries to its territory, and Canada voluntarily assumed liability for private acts within its territory. Such voluntary assumption and the holding of the Tribunal does not change customary international law in the area of state responsibility. It does, however, supply evidence to support the position that a state is responsible for extraterritorial injury by pollution originating within its territory even if the activity is privately conducted.

It may be convenient, in conclusion, to summarize briefly the submissions of this article:

1. The area of non-navigational uses, as generally defined, is rampant with problems similar to those encountered at the unsuccessful Hague Conference of 1930, since it includes state responsibility for extraterritorial injury caused by the pollution of international rivers.

2. Numerous treaties with pollution provisions merely evidence the general principle *sic utere tuo ut alienum non laedas*.⁹³ They have no obligatory effect on non-signatories.

3. The treaties relevant to the pollution of international rivers and to non-navigational uses, because of their nature and evolution, are treaties which create objective regimes. They have greater authority to bind third states than most multilateral treaties.

4. The pollution of international watercourses is uniquely suited to a local custom and objective regime approach. No uniform international pollution standard is possible, other than a vague one, because of the physical and climatic differences throughout the world.

5. If the Commission produces an acceptable convention on state responsibility, it will define an internationally wrongful act and its ramifications. Since such criteria would apply to pollution which causes extra-territorial injury, a special inquiry into this area under the topic of non-navigational uses is redundant.

6. State practice demonstrates no obligatory compliance with the principle *sic utere tuo*.

7. The Helsinki Rules adopt a broad scope, encompassing utilization of river basin resources as well as reparation for injury. This is too expansive for realistic codification. The Commission would avoid future problems if it restricted its inquiry to non-navigational uses, and included extraterritorial injury caused by pollution of international rivers in its attempted codification of general state responsibility. Pollution is not a use, but a result of use. A draft convention on international watercourses would be more readily acceptable if the convention avoided the controversial area of state responsibility for extraterritorial injury caused by pollution.

NOTES

¹G.A. Res. 2669 (XXV), 26 G.A.O.R. Supp. 10, at 74, para. 119. (2 Y.B. Int'l L. Comm'n 350 (1971), U.N. Doc. A/8410/Rev. 1, para. 119.)

²1 Y.B. Int'l L. Comm'n 278 (1971). For list of treaties governing non-navigational uses see U.N. Doc. A/CN.4/274, 1 Y.B. Int'l L. Comm'n 78-183 (1974) Paragraph 2 of General Assembly resolution 2669 (XXV) requested the Secretary-General to continue a study of the "[l]egal problems relating to the utilization and use of international rivers" initiated in 1959, pursuant to General Assembly resolution 1401 (XIV). This report is contained in A/5409 (Mimeographed document, 15 April 1963.) Further information is printed in United Nations, Legislative Texts and Treaty Provisions Concerning the Utilization of International Rivers for Other Purposes than Navigation (United Nations publications, Sales No.: 63.V.4.).

³Int'l L. Comm'n Report, 28 G.A.O.R. Supp. 10, at 65, para. 148, U.N. Doc. A/9010/Rev.1 (1973). See, the Secretary-General's Advance Report, U.N. Doc. A/CN. 4/270.

⁴See Ago, (First) Report on State Responsibility, 2 Y.B. Int'l L. Comm'n 132, U.N. Doc. A/CN. 4/217, para. 39. (1969).

⁵The International Law Association is an organization of international lawyers without governmental participation. It is the most active group among private associations which have investigated international watercourses. The Association's Committee on the Uses of International Rivers began studying the area in 1954. Its work is closely associated with the New York University Rivers Project, since the chairmen of the Association's Committee between 1954 and 1966 were also connected with the project. The Association adopted the Helsinki Rules at their 52nd Conference in 1966. They are contained in Int'l L. Ass'n., Report of the Fifty-Second Conference Held at Helsinki 477 (1967); reprinted in Garretson, Hayton and Olmstead, The Law of International Drainage Basins 779 (1967).

⁶Ago, *supra* note 4, at 132-141.

⁷*Id.* at 133, para. 49 and 136 para 65.

⁸*Id.* at 137, para 79.

⁹See Moore, Legal Dimensions of the Decision to Intervene in Cambodia, 65 Am. J. Int'l L. 38, 45-48, 51-53 (1971); Falk, the Cambodian Operation and International Law, 65 Am. J. Int'l L. 1, 17-20 (1971).

¹⁰Ago, *supra* note 4, at 139, para. 90.

¹¹Art. 3 There is an internationally wrongful act of a State when: (a) Conduct consisting of an action or omission is attributable to the State under international law; and (b) That conduct constitutes a breach of an international obligation of the State. G.A.O.R., *supra* note 3, at 17.

¹²Art. 4. An act of a State may only be characterized as intentionally wrongful by international law. Such characterization cannot be affected by the characterization of the same act as lawful by internal law. *Id.* at 33.

¹³*Id.* at 17. See also, Ago, *supra* note 4, at 139. The objective element is closely related to the concept of abuse of rights.

The responsibility of a State may become involved as a result of an abuse of right enjoyed by virtue of International Law. This occurs when a state avails itself of its right in an arbitrary manner in such a way as to inflict upon another State an injury which cannot be justified by a legitimate consideration of its own advantage . . . it underlies a substantial part of the law of torts in English law and the corresponding branches of other systems of law; it is one of those general principles of law recognized by civilized States which the Permanent Court is bound to apply by virtue of Article 38 of its Statute.

Oppenheim, International Law 345 (8th ed., Lauterpacht, 1955) See *German Interests in Polish Silesia*, (1930), P.C.I.J., Ser. A. No. 24, p 12; *The Anglo-Norwegian Fisheries Case*, (1951) I.C.J. Rep. 142. Abuse of rights is not recognized rule of international law. It "must be wielded with studied restraint." Lauterpacht, *The Development of International Law by the International Court*, 162 (1958).

¹⁴Whiteman, Digest of International Law 1044 (1964).

¹⁵Report of the Secretary General, Legal Problems Relating to the Utilization and Use of International Rivers, U.N. Doc. (A/5409) (15 Apr. 1963).

¹⁶Bleicher, An Overview of International Environmental Regulation, 2 Ecology Law Quarterly 1, at 11 and 31 (1972).

¹⁷Use your own property in such a manner as not to injure that of another. . . . Various comments have been made on this maxim: "Mere verbiage"; El. B. & E. 643, "No help to decision"; L.R. 2 Q.B. 247. "Utterly useless as a legal maxim"; 9 N.Y. 445 It is a mere begging of the question; it assumes the very point in controversy. 13 Lea 507. See 2 Aust. Jurisp. 795, 829. BLACK'S LAW DICTIONARY 1551 (4th ed. 1951).

¹⁸Kennan, To Prevent a World Wasteland: A Proposal, 48 Foreign Affairs 401 (1970). Reprinted 1 Environmental Affairs 191 (1971). No express jurisdiction has ever been granted to an international commission. Report of the Fiftieth Conference of the International Law Association Held at Brussels 417-418 (1962).

¹⁹Jordan, Recent Developments in International Environmental Pollution. Control, 15 McGill L.J. 300; Garretson *et al.*, *supra* note 5, at 145.

²⁰Laylin and Bianchi, The Role of Adjudication in International River Disputes, 53 A. J. Int'l L. 30 (1950).

²¹Johnson, Effects of Existing Uses on Equitable Apportionment of International Rivers, 1 U. Brit. Columbia L.R. 389 at 391 (1960).

²²Art. III "A 'basin State' is a state the territory of which includes a portion of an international drainage basin." The Helsinki Rules Garretson *et al.*, *supra* note 5, at 781.

²³Art. III "An international drainage basin is a geographical area extending over two or more States determined by the watershed limits of the system of waters, including surface and underground waters, flowing into a common terminus." Helsinki Rules, reprinted in Garretson *et al.*, *supra* note 5, at 780. This treatment

parallels the physical structure of international watercourses. It is more functional than the traditional riparian doctrine, since it is better suited to non-navigational uses. The basin concept operates according to the principle of coherence which treats watercourses as an integral whole. See Report of the Forty-Eighth Conference of the International Law Association Held at New York ppv-ix (1958).

²⁴Cano, Preliminary Review of Questions Relating to the Development of International River Basins in Latin America, U.N. ECOSOC Council Report Economic Commission for Latin America, 8th Sess. (1959), U.N. Doc. E/CN.12/511 at p. 13 (1959); See also Kenworthy, Joint Development of International Rivers, 54 Am. J. Int'l L. 952 (1960); Goldie, International Law and the Development of International River Basins, 1 U. Brit. Columbia L.R. 763, 765 (1963).

²⁵Lester, Pollution, in Garretson *et al. supra* note 5, at 94.

²⁶In using these few cases note that "The decision of the Court has no binding force except between the parties and in respect of that particular case." Article 59, Statute of the International Court of Justice. There is no *Stare Decisis* in international law. Prior cases are only persuasive evidence. See Schwarzenberger, A Manual of International Law 37, 255 (1967).

²⁷Art. 2 "(h) 'third state' means a State not a party to the treaty" Vienna Convention on the Law of the Treaties, in Brownlie, Basic Documents in International Law 234 (1972).

²⁸Int'l L. Comm'n Report, The Law of Treaties, U.N. Doc. A/CN.4/L.116/Add. 4 pp. 25 (1966).

²⁹"Art. 38: Rules in a treaty becoming binding on third states through international custom." "Nothing . . . precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law, recognized as such." Vienna Convention, *supra* note 27, at 247.

³⁰Waldock, (Third) Report on the Law of Treaties, 2 Y.B. Int'l L. Comm'n 18, U.N. Doc. A/CN.4/167. (1964).

³¹*Id.* at 20.

³²*Id.* at 32.

³³*Id.* at 27.

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Article 63

TREATIES PROVIDING FOR OBJECTIVE REGIMES

1. A treaty establishes an objective regime when it appears from its terms and from the circumstances of its conclusion that the *intention* of the parties is to create in the *general interest* general obligations and rights relating to a particular region, State, territory, locality, river, waterway, or to a particular area of sea, sea-bed, or air-space; provided that the parties include among their number *any* State having territorial competence with reference to the subject-matter of the treaty, or that any such State has consented to the provision in question.
2. (a) A State not a party to the treaty, which expressly or impliedly consents to the creation or to the application of an objective regime, shall be considered to have accepted it.
(b) A State not a party to the treaty, which does not protest against, or otherwise manifest its opposition to the regime within a period of X years of the registration of the treaty with the Secretary-General of the United Nations, shall be considered to have impliedly accepted the regime.
3. A State which has accepted a regime of the kind referred to in paragraph 1 shall be—
 - (a) bound by any general obligations which it contains; and

(b) entitled to invoke the provisions of the regime and to exercise any general right which it may confer, subject to the terms and conditions of the treaty.

4. Unless the treaty otherwise provides, a regime of the kind referred to in paragraph 1 may be amended or revoked by the parties to the treaty only with the concurrence of those States which expressly or impliedly accepted the regime and have a substantial interest in its functioning.
Id. at 26. (emphasis added).

³⁵Waldock, (Third) Report on the Law of Treaties, U.N. Doc. A/CN.4/167 p. 71 (1964).

³⁶Waldock, *supra* note 31, at 33.

³⁷Waldock, *supra* note 35, at 78.

³⁸Int'l L. Comm'n, Report, *supra* note 28, at 25. However, no publicist has attempted to categorize treaties which deal with pollution and the non-navigation uses of international watercourses as those which create objective regimes. Thus, this approach has not been used to evaluate the effect of these treaties on third states.

³⁹See Glos, *International Rivers* 2 (1961); Garretson *et al.*, *supra* note 5, at 95.

⁴⁰The right of territorial sovereignty over an international river entitles a riparian state to use the river in any manner which will not result in a material alteration of the river or of its availability for use as it passes through the other riparian states.

Alstyre, *The Justiciability of International River Disputes: A Study in the Case Method*, 14 *Duke L.J.*, 307, 314 (1964). See also, 33 *Halsbury's Laws of England* 559 (1939).

⁴¹Just like independence territorial supremacy does not give a boundless liberty of action . . . a state is, in spite of its territorial supremacy, not allowed to alter the natural conditions of its own territory to the disadvantage of the natural conditions of the territory of a neighboring state . . . Oppenheim as cited by Sir Robert Borden, *House of Commons Debates, Canada*, IV, Session, 11th parliament, 1910-11, Vol. 1, at 903-904.

⁴²See O'Connell, 1 *International Law* 625-627 (1965).

⁴³Final Act of the Congress of Vienna of June 9, 1815, art. 108, *Martens, N.R.* II, p. 379.

⁴⁴Treaty of Paris of March 30, 1856, art. 15, *Martens, N.R.G.* 15, p. 782.

⁴⁵See U.N. Doc. E/ECE/136, p. 26-35 (1952).

⁴⁶Cutler, *The International Law of Navigable Rivers* 3-4 (1965).

⁴⁷Manner, *Water Pollution in International Law*, 13 *WHO Public Health Papers* 57 (1962).

⁴⁸The Peace Treaty of Versailles of June 28, 1919, art. 331, *Martens, N.R.G.* 3rd. ser. 11, p. 677.

⁴⁹The Territorial Jurisdiction of the International Commission of the River Oder, (1929) *P.C.I.J.*, Series A., No. 23.

⁵⁰Statute of the Regime of Navigable Waterways of International Concern annexed to the Convention signed at Barcelona on April 20, 1921, art. 1, 7 *L.N.T.S.* p. 51.

⁵¹Done at Geneva, December 9, 1923, 36 *L.N.T.S.* 77; *Hudson II International Legislation* 1182 (1931).

⁵²See Thirlway, *International Customary Law and Codification*, 134-142 (1972); D'Amato, *The Concept of Custom in International Law* 105-109, 233-264 (1971).

⁵³Waldock, *General Course on Public International Law*, 2 *Recueil des Cours* 1, at 69 (1962).

⁵⁴*Id.* at 50.

⁵⁵(1960) I.C.J. Rep. 6, at 34.

⁵⁶(1949) I.C.J. Rep. 266, at 276.

⁵⁷Waldock, *supra* note 30, at 32 and 33.

⁵⁸See the European Agreement on the Restriction of the Use of Certain Detergents in Washing and Cleaning Products for an example of a regional standard approach, 16 *European Y.B.* 335 (1968); Cf. Principles 10, 11, 12, 21 and 23 of the 1972 U.N. Conference on Human Environment, Report of the Conference, U.N. Doc. A/CONF. 48/14, 5-7; 11 *ILM* 1416 (1972); for general comment on Stockholm principles see Sohn, *The Stockholm Declaration on the Human Environment* 14 *Harvard Int'l L.J.* 423 (1973).

⁵⁹Art. X. 1. Consistent with the principle of equitable utilization of the waters of an international drainage basin, a state (a) Must prevent any new form of water pollution or an increase in the degree of existing water pollution of an international drainage basin, which would cause *substantial* injury in the territory of a co-basin State, and (b) Should take all reasonable measures to abate existing water pollution in an international drainage basin to such an extent that no *substantial* damage is caused in the territory of a co-basin state.

2. The rule stated in paragraph 1 of this Article applies to water pollution originating within (a) the territory of the state, or (b) outside the territory of the state, if it is caused by the state's conduct.

Helsinki Rules, *Int'l L. Ass'n*, *supra* note 5, at 496-497; Garretson, *supra* note 5, at 798. (emphasis added) The Committee on International Rivers of the International Law Association adopted Principle VII on state responsibility at the 1962 Brussels Conference.

Preventable pollution of water in one State which does *substantial* injury to another State renders the former State responsible for the damage done. Brussels Conference, *supra* note 18, Principle VII. (emphasis added) This principle was later expanded and became Art. XI of the Helsinki Rules.

Article XI

1. In the case of a violation of the rule stated in paragraph 1 (a) of Article X of this Chapter, the State responsible shall be required to cease the wrongful conduct and compensate the injured co-basin State for the injury that has been caused to it.

2. In a case falling under the rule stated in paragraph 1 (b) of Article X, if a State fails to take reasonable measures, it shall be required promptly to enter in negotiations with the injured State with a view toward reaching a settlement equitable under the circumstances.

Garretson, *supra* note 5, at 798.

⁶⁰*Id.* at 793.

⁶¹While there is no uniform international pollution standard or clear definition of degree of injury incurred to render a state responsible for extraterritorial injury, proof of material damage is required. See *United Kingdom v. Iceland*, (1974) ICJ Rep. 302, 310; see also *Legal Problems Relating to Non-navigational Uses of International Watercourses* U.N. Doc. A/CN. 4/274, *supra* note 2 at 229-30, and Handl, *Territorial Sovereignty and the Problem of Transnational Pollution*. 69 *Am. J. Int'l L.* 50 at 61 (1975).

62*Id.* at 782.

⁶³To define injury it might be best to refer to the 1961 Harvard Draft on the international responsibility of States for injuries to aliens. Art. 14: 1. An "injury" . . . is a loss or detriment caused to an alien by a wrongful act or omission which is attributable to a State.

2. Injuries with the meaning . . . include, but are not limited to

- (a) bodily or mental harm
- (b) loss sustained by an alien as the result of the death of another alien
- (c) deprivation of liberty
- (d) harm to reputation
- (e) destruction of, damage to, or loss of property
- (f) destruction of use or enjoyment of property
- (g) deprivation of means of livelihood
- (h) loss or deprivation of enjoyment of rights under a contract or concession; or
- (i) any loss or detriment against which an alien is specifically protected by a treaty.

3. An injury is "caused" . . . by an act or omission if the loss or detriment suffered by the injured alien is the direct consequence of that act or omission.

4. Any injury is not "caused" by an act or omission:

- (a) if there was no reasonable relation between the facts which made the act or omission wrongful and the loss or detriment suffered by the injured alien; or
- (b) if, in the case of an act or omission creating an unreasonable risk of injury, the loss or detriment suffered by the injured alien occurred outside the scope of the risk.

2 Y.B. Int'l L. Comm'n 148 (1969). See also García Amador, Responsibility of The State for Injuries Caused in its Territory to the Person or Property of Aliens—Reparation of the Injury, 2 Y.B. Int'l L. Comm'n 8-11 (1961), U.N. Doc. A/CN.4/134 para. 29-50 (1961). The International Joint Commission produced the best available general criteria in 1918. The I.J.C., when considering injury caused by pollution "regards the word injury when used in the reference or treaty as having as a special significance—one somewhat akin to the term 'injuria' in jurisprudence. It does not mean harm or damage but harm or damage which the sufferer, in view of all the circumstances of the case, and of all the co-existence rights and of the paramount importance of human health and life, should reasonably be called upon to bear." I.J.C. report of Sept. 10, 1918.

⁶⁴"The term 'practice' is used to indicate the aggregation of steps which are formative of law, whereas the term 'custom' is reserved for the law itself. . . . Only when a tradition of acting is followed under the conviction that it must be followed is it of significance in the evolution of international law; when the tradition is common to a large number of States it is described as the 'practice of nations.' In this sense the word 'practice' is descriptive of the fact of an aggregation of juridically significant acts. The word 'custom' stands for the proposition that the practice is actually productive of law. Admittedly there is only a shade of distinction between the two words, but they are not synonyms; the one is rather the obverse of the other, 'practice' being suggestive of the formative process, 'custom' of its completion. Perhaps it may be said that 'practice' is evidence of the act of creation, 'custom' is the result." O'Connell, *supra* note 42, at 9.

⁶⁵The 1922 Treaty between Germany and Denmark in Art. 45 provides that "If refuse or harmful substances are discharged into any watercourse . . . the persons who suffer damage thereby are entitled to appeal to the Frontier Water Commission." 10 L.N.T.S. 73, 187, 225 (1922).

In 1934 the agreement between the Belgian Government and Great Britain regarding the Water Rights on the Boundary between Tanganyika and Ruanda Urundi, signed at London, 22 Nov. 1934, 190 L.N.T.S. 103, 104 (1938), prohibits any industrial activity "which may pollute or cause the deposit of any poisonous, noxious or polluting substance in the water."

The 1952 Agreement between Poland and the German Democratic Republic Concerning Navigation on Frontier Waters and the Use and Maintenance of Fron-

tier Waters, Art. 17, Signed at Berlin, 6 Feb. 1952, 304 U.N.T.S. 131, prohibits introduction of effluents which might "*affect adversely* the use of water of said river for domestic requirements, water supply, industry and agriculture." (emphasis added)

The Agreement between the Czechoslovak Republic and Poland Concerning the Use of Water Resources in Frontier Waters Art. 3, signed at Prague 21 March 1958, 538 U.N.T.S. 108 at 110, obliges the parties to keep the waters "clean to such extent *as is specifically determined* in each particular case in accordance with the economic and technical possibilities and requirements of the contracting parties." (emphasis added)

Germany became a party to four agreements concerned with pollution between 1956 and 1960. The treaties require the parties "To prevent such excessive pollution of the boundary waters as may *substantially* impair the customary use of the waters by the neighboring states." Treaty between the Netherlands and Germany for the Settlement of Frontier Questions, Art. 58, signed at The Hague, 8 April 1960, 508 U.N.T.S. 14 at 190. (emphasis added)

Art. IV of the 1960 Indus Waters Treaty provides that

Each party declares its intention to prevent as far as practicable, *undue pollution* of the waters of the rivers *which might affect adversely* uses similar in nature to those to which the waters were put on the Effective Date and agrees to take all reasonable measures to ensure that, before any sewerage or industrial waste is allowed to flow into the Rivers, it will be treated, where necessary, in such manner as *not materially* to affect those uses. Provided that the criterion of reasonableness shall be the customary practice in similar situations on the Rivers. Indus Waters Treaty, Art. IV (10) 419 U.N.T.S. 125, 138-140. (emphasis added)

The Agreement between Finland and the U.S.S.R. Concerning Frontier Watercourses Art. 4, signed at Helsinki on 24 April 1964, 537 U.N.T.S. 255, prohibits pollution that "might cause . . . *harmful changes* in the composition of the water, damage to the fish-stock or substantial scenic deterioration, or might endanger public health or have similar harmful consequences for the population or the economy." (emphasis added)

The agreement between Poland and the U.S.S.R. Concerning the Use of Water Resources in Frontier Waters Art. 12, signed at Warsaw, 17 July 1964, 538 U.N.T.S. 194, requires the parties to "employ appropriate procedures for suitably purifying sewerage . . . which may cause *harmful pollution* of frontier waters." (emphasis added)

The Agreement Concerning the Niger River Commission and the Navigation and Transport on the River Niger, Art. 12, done at Niamey, 25 Nov. 1964, 587 U.N.T.S. 19, provides that riparian states will "abstain from carrying out any works likely to pollute the waters, or any modification likely to affect biological characteristics of its fauna and flora, without adequate notice to and prior consultation with the Commission." (emphasis added). See also Legal Problems Relating to the Utilization and Use of International Rivers, U.N. Doc. A/5409 pp. 83, 138, 234, 244, 245, 259, 266, 277, 281, 292, 425, 438, 461, 467, (15 April 1963).

The notice requirement in the Niger River Treaty is based upon the holding in the Lake Lanoux Arbitration.

The Lake Lanoux Arbitration is also of special importance because it refers to extraterritorial injury caused by pollution and indicates that such injury may be an internationally wrongful act.

It could have been argued that the works would bring about a definite pollution of the waters of the Carol or that the returned waters would have a chemical composition or a temperature or some other characteristic which would injure Spanish interests. Lake Lanoux Arbitration (France v. Spain), 24 Int'l L. Rep. 101, 123 (1957).

⁶⁶Glos, *supra* note 39, at 100.

⁶⁷Boundary Waters Treaty with Great Britain, "Jan. 1909, 36 Stat. 2448, T.S. No. 548 at 2450.

⁶⁸The International Joint Commission, 72 Can. Geog. 76, 79-80 (1966).

⁶⁹*Supra* note 67 at 2452.

⁷⁰*Id.* at 2450.

⁷¹*Id.* at 2452.

⁷²See Heeney, *Diplomacy With a Difference*, IMCO Mag., Oct. 1966, at 22.

⁷³Lester, *Pollution*, in Garretson *et al.*, *supra* note 5, at 108, 109; Compare Tunkin, *Das Volkerrecht Der Gegenwart* 125, 126-127 (Wolf Trans. 1963) with Waldock *supra* note 53, at 55, and Jenks, *The Common Law of Mankind* 106 (1958).

⁷⁴See generally Wortley, *Expropriation in Public International Law* 152-153 (Cambridge, 1959).

⁷⁵See Margolis, *The Hydrogen Bomb Experiments and International Law*, 64 Yale L.J. 629, 637-39 (1955), and McDougal and Shlei, *The Hydrogen Bomb Tests in Perspective: Lawful Measures for Security*, 64 Yale L.J. 648, 650-53 (1955).

⁷⁶32 Dep't State Bull. 90-91 (1955); On *ex gratia* reparation see generally Garcia Amador, *supra* note 63, at 4 and Goldie, *Liability for Damage and the Progressive Development of International Law*, 14 Int'l. and Comp. L.Q. 1189, 1231-1233 (1965).

⁷⁷E. Lauterpacht, *Law of Diplomatic Immunity*, 15 The Grotius Society 66 (1955).

⁷⁸Int'l L. Comm'n Y.B. *supra* note 2, at 279.

⁷⁹See Ago, *supra* note 4, at 135.

⁸⁰Art. 3, *supra* note 11.

⁸¹*Id.* at 29.

⁸²*Id.* at 32.

⁸³See Whiteman 8 Digest of International Law 808-819 (1967).

⁸⁴Int'l L. Ass'n, Comments on Art. X, in Garretson, *supra* note 5, at 797. See generally Manner, *Water Pollution in International Law, The Rights and Obligations of States Concerning Pollution of Inland Waters and Enclosed Seas*, United Nations Conference on Water Pollution Problems in Europe, Geneva, 1961, Documents Submitted to the Conference, Vol. II, pp. 446-450 (61. II E/m.m.24)

⁸⁵(1949) I.C.J. Rep. 4, 22.

⁸⁶According to the Namibia decision (1971) ICJ Rep 12, 54 para. 118, physical control of the territory is the basis of liability for extraterritorial injury.

⁸⁷Corfu, *supra* note 85, at 18.

⁸⁸*Id.* at 44.

⁸⁹Trial Smelter, 3 Int'l Arb. Awards, 1963 (1949); 35 Am. J. Int'l L. 716 (1941).

⁹⁰Convention with the Dominion of Canada relative to the establishment of a tribunal to decide questions of indemnity and future regime arising from the operation of smelter at Trail, British Columbia, 15 April 1935, 49 Stat. 3245 (1935), T.S. 893 (effective 3 Aug. 1935).

⁹¹Considering the circumstances of the case, the Tribunal holds that the Dominion of Canada is responsible in international law for the conduct of the Trial Smelter. *Apart from the undertakings in the Convention*; it 'is therefore a duty of the Government of the Dominion of Canada to see to it

that this conduct should be in conformity with the *obligation* of the Dominion under international law as herein determined.

Trial Smelter Arbitration, preamble, para. 3, 3 U.N.R.I.A.A. 1905, 1965-1966 (1941) 35 Am. J. Int'l L. 684, 716-717 (1941) (emphasis added)

⁹²See Bleicher, *supra* note 16, at 21.

⁹³"Use your own property in such a manner as not to injure that of another."
Supra note 17.