

The International Law Commission and State Responsibility: Application of a Comparative Paradigm on Oil and Watercourses

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Abstract

This article covers transboundary issues relating to the aggregate of legal norms derived from international law to determine the extent to which States within the international community may be held responsible under international law for acts that breach international obligations concerning oil production: risk of harm, or harm to the environment within State jurisdiction. Examples which show the emergence of transnational normative development in relation to state responsibility¹ are provided.

This is achieved by creating a paradigm by applying the United Nations International Law Commission Report on State Responsibility². The Report includes provisions for: state responsibility for internationally wrongful acts; new legal relationships; new rights; corresponding obligations and duty; and duty incurring state responsibility. International situations have resulted in new legal consequences found in the Unocal Case³ and in the Chevron Case.⁴ Also, the Spratly Islands⁵ dispute brings to light all aspects of liability for injurious consequences arising from obligations, pinning regional States to become antagonistic units.

¹ It includes reference to the Spratly Islands, the UNOCAL Case, and the Chevron Case: by applying the United Nations International Law Commissions draft articles on State Responsibility

² This Report has been under draft as articles since 1953.

³ Amnesty International. The US company UNOCAL and French company Total initiated offshore oil exploration, then constructed the billion dollar Yadana pipeline from Burma to Thailand. Within days, thousands of men, women and children from villages were forced by the Burmese military into horrifying slave labour. The law used to bring about the trial was the 1789 Alien Tort Claims Act first used against piracy in the high seas. This permits foreigners in this case, fifteen villagers living in the United States, to sue persons for human rights violations and crimes against humanity committed abroad. The parent company UNOCAL was accused of aiding and abetting the abuses, and was held responsible for crimes perpetrated upon Burmese villagers, by Judge Victoria Chaney.

⁴ In 1999, victims of human rights violations due to Chevron's oil production activities in the Niger Delta region of Nigeria filed suit against Chevron in a Federal Court in San Francisco. The case is based on two incidents: the 1998 shooting of peaceful protestors at Chevron's Parabe offshore platform and the 1999 destruction of the villages of Opia and Ikenyan. In both incidents, Chevron was complicit in abuses committed by Nigerian military and police who were paid by Chevron and were using Chevron helicopters and boats. The case was filed under the Alien Tort Claims Act, which permits suits in U.S. courts against individuals or corporations that commit international human rights violations anywhere in the world, if that person or corporation resides in or has ties to the United States. The suit was also brought under several other laws. The Bowoto Case was filed by a coalition of human rights lawyers, along with non-governmental organizations, such as Earth Rights International. In a major victory for the plaintiffs, on August 14, 2007, United States District Court Judge Susan Illston rejected Chevron Corporation's final attempts to avoid trial for its involvement in these brutal attacks on Nigerian villagers. Judge Illston found evidence that Chevron Nigeria Limited personnel were directly involved in the attacks by transporting the Nigerian Government Security Forces, while Chevron knew that Security Forces were prone to use excessive force. Also, Chevron had actually agreed to the military's plan. The federal court's denial of Chevron's attempt to prevent trial is only the latest in a series of legal victories for the plaintiffs, in which the court rejected several earlier attempts by Chevron to have the case dismissed. In contrast to Chevron and its military cronies' violent repression, the Court has granted the plaintiffs an opportunity to seek justice before a neutral forum. A jury trial in the case, *Bowoto v. Chevron Corp.*, No. 99-2506, is expected in 2008.

⁵ The surrounding Continental Shelves of the Spratly and Paracel Islands hold hydrocarbons, specifically oil deposits.

Examples of Possible Regional Conflict Areas

There has been recent evidence of confrontation between China and Vietnam with demands that the other cancel its contract. China and Vietnam both grant exploration contracts to United States Oil Companies: 1992 China National Offshore Oil Corporation with Crestone Energy for exploration of Wan'an Bei Block 21= 25, a 155 km² section of the south western South China Sea that includes the Spratly Islands. Crestone's contract includes Vietnam's Block 133 and Block 134, where Petro Vietnam and Conoco Phillips Vietnam Exploration & Production, which is a section of Conoco Phillips, agreed to evaluate prospects in April 1992.⁶

The South China Seas area is another example of conflict arising in one of the major shipping lanes on the high seas, where it is estimated one trillion dollars value of oil, gas and fish can be found.⁷ Natural gas is located in the littoral States in the area such as Brunei; Indonesia; Malaysia; Thailand; Vietnam; and the Philippines. There have been suggestions to create pipelines to link the gas producing regions of the Pacific Rim, with the South China Seas as central in scope. Malaysia has been the most active in oil and natural gas production, and is the largest producer in this region. Cambodia has claimed territorial jurisdiction in areas of the Gulf of Thailand and has signed exploration contracts with several companies. Thailand has also begun to follow suit. China has developments in the offshore oil fields of Yacheng. Indonesia is in the Natuna gas fields. Malaysia has escalated production since 1997 from the Malaysian Lawit field. Vietnam is interested in the Nam Con Son Basin.⁸

Obligation Incurred by the State Whose Act is Internationally Held Wrongful: International Law Commission Report⁹ on State Responsibility

The objective of this aspect of the paradigm is to determine the extent to which a State may be held responsible under the sources of international law for acts that breach international obligations concerning the use of a shared contiguous territory. Existing norms and developing norms of general international law are examined to find which legal rules would bind States in terms of rights, duties and obligations. This exercise will serve to indicate whether a State can be held responsible for acts constituting utilization of territorial jurisdiction under international law where there may be risk of damage to other States. This will be done by concentrating on the fact that 'an obligation' is a mirror reflection of a 'right' of another State, and that the term 'norm' implies the idea of an obligation *erga omnes*.¹⁰

States currently enjoying the use of their own territory, or other jurisdiction, for purposes of oil production have been: i) using armed measures to protect oil exploration; ii) in violation of

⁶ Information and statistics for the South China Seas is derived from several sources including www.globalsecurity.org

⁷ Id. Government of China

⁸ Id.

⁹ The ILC Report is now complete with all the articles finalized.

¹⁰ UN ILC Yearbook A/CN.4/SER.A/1981/Add.1 Part 1 p.75

This is clearly relevant for the determination of the content, forms, and degrees of State responsibility, as well as for the implementation of international responsibility.

*jus cogens*¹¹ crimes against humanity; and iii) involved in civil disputes, causing unrest on foreign grounds.

Since current international armed conflict situations have not been of benefit to any western hegemonic power any new conflict involving oil will only serve to weaken western economies. This seems to have become clear since the New International Economic Order movement in the seventies.

State sovereignty is defined in international law through terms of jurisdiction. It enables oil producing States in the New World Order regimes to negotiate effectively about resources such as oil and water within their jurisdiction as defined by the International Law Commission. State Responsibility forces States to look at law which may be beneficial for protection of oil production. That is protection over their territorial jurisdiction, without heading into greater armed conflict.

This Draft Report includes legal provisions that would allow States to use a wide range of international law in a feasible manner. It creates legal methods by which States with oil interests may shield themselves from liability and injurious consequences to another States' property, or multinational corporations or populations by incorporating legal norms found in the Draft Report on State Responsibility, into their own domestic legal systems.

Article 19¹² of the Draft Articles on State Responsibility¹³ provides:

“International crimes and international delicts are 1. An act of a State which constitutes a breach of an international obligation is an internationally wrongful act, regardless of the subject-matter of the obligation breached, and 2. An internationally wrongful act which results from the breach by a State of an international obligation so essential for the protection of fundamental interests of international community that its breach is recognized as a crime by that community as a whole, constitutes an international crime.”

At this stage of their draft, the International Law Commission has found it necessary to limit its wording to avoid any association with international crimes or a delict. “The distinction between crimes and delicts might, however, find its justification in the treatment of legal consequences. It is indeed a generally held concept that the gravity of a breach of an obligation shall determine the gravity of the legal consequence. Returning...to the criteria of international delicts and international crimes, it has to be asked whether it is in the interest of the progressive development of international law to introduce a third category of international crimes beyond the existing

¹¹ *Jus cogens* is the term for norms that have peremptory force, and from which no derogation may be made except by another norm of equal weight. Treaties that conflict with such a *jus cogens* norm terminates. If another norm of this nature develops, then any other existing norm, or existing treaty which conflicts with the new norm becomes null and void. The principle of self-determination, crimes against humanity *erga omnes*, war crimes, torture, genocide, trafficking persons, child soldiers, are some examples of *jus cogens* norms.

¹² Id. p.75

¹³ Draft Articles on State Responsibility formulated in 1976 International Law Commission, Yearbook of the International Law Commission, United Nations New York (1977) V. II p. 75 See also ILC Report 1996, 51st.Session, GAOR Supplement No.10

categories of normal rules of international law and *jus cogens*.”¹⁴ Independently of how the norms, the breach of which, constitute an international crime are defined...the notion of safeguarding and preserving the human environment as a legal duty is a comparatively new one. It comprises a legal system of rules and obligations.

As a comparative, this analysis will extend to States sharing a contiguous zone or territory containing categories of hydrocarbons; fossil fuels, oil resources, or watercourses. This is to explain the position of States which have caused significant harm to the territorial jurisdiction of other States through environmental damage due to contractual agreements, but not because of actual works undertaken. The utilization of territory for oil production conducted in the territory of one State may produce harmful effects to those States sharing the same jurisdiction, especially in water, under water, and during transportation over water. The extent to which a State is responsible under international law for utilizing its rivers in such a way that it causes general harm to the environment and subsequently to the international community as a whole, is examined. This is to arrive at a stage where there may be sufficient evidence to indicate that there is an obligation under international law to not cause harm to other jurisdictions, based on state responsibility under international law.¹⁵

First, it is necessary to ascertain whether a State could be held responsible and incur liability under rules of customary international law. Second is the relation of treaty rules to the evolution of general principles. This examines whether general principles are the next step in the evolution and normative growth of international legal norms. In the development of a treaty, there is often the growth of customary law that may be incorporated by States into their legal systems, later to be adopted as a part of internationally recognized general principles.

The aim is to analyse whether the State in violation of offending the rights of other States can be held responsible *erga omnes*, that is to the international community as a whole. A State's responsibility to the populations in its jurisdiction according to customary international law will be examined. Also analyzed is a State's responsibility to care for the environment in its own territorial jurisdiction so as to not infringe upon the rights of other States and other populations. The deduction in the method of this inquiry will be an assessment of whether the State violating the rights of other States can be held accountable to the international community as a whole.

In other words, a State government is responsible to the international community as a whole, to prevent use of territory for oil or water, which causes damage or injury to other States later, instead of being solely responsible to the specific State(s) suffering immediate effects of the damage incurred while enjoying use of oil or water in one's own State. The approach taken follows from the axiom of co-operation among members of the international community. The essence is that established norms governing co-existence between States that gave rise to the development of the principle of permanent sovereignty over natural resources, are giving way to unparalleled norms of co-operation between States to protect, preserve and conserve natural resources *res communis*, and also territory within the realm of State sovereignty.¹⁶ Equitable use of a shared contiguous territory,

¹⁴ Jus cogens norms of international law do not allow for derogation from these norms, by governments.

¹⁵ UN ILC Yearbook A/CN.4/SER.A/1981/Add.1 Part 1 p.71

¹⁶This unprecedented growth of norms of co-operation were seen to develop during the fourteen year process in drafting the United Nations Law of the Sea Convention and the unprecedented growth of multilateral agreements in

including water, is subject to agreements between the States concerned. Harm caused through utilisation of territorial jurisdiction is subject to international law. However, international norms establishing rights, duties and obligations, show evidence that damage to any territory anywhere, is an injury to the entire globe.

In other words, obligation and responsibility of a State would not remain as the onus resting squarely upon one State but will be subject to responsibility shared by the international community of States providing, for example, regulatory inspection through an international agency, mandated with the task required. This does not mean a loss of sovereignty, or negation of due responsibility upon the State where the incident occurs. It would mean that a regulatory agency is able by virtue of its mandate, to accept and handle a portion of the responsibility and reparation for damages. An example of this is the United Nations Convention on the Law of the Sea¹⁷ which provides an arbitration structure, a distribution mechanism for sea-bed mining, as well as shared responsibility for damages to the *res communis*.

Comparative Example: the extent to which a State may be held responsible for induced earthquakes from construction of a dam

An induced earthquake by a private or public company¹⁸ may attach responsibility to the State which has contracted a public or private company to carry out the initial assessment and subsequent works, if the works have affected harm upon another State. For example, there have been a few municipal cases involving negative environmental impacts from dams in the United States, although liability was not established in the Courts.¹⁹ The issue here is whether the seismic tremors that are induced by human activity, with risk of harm to populations, cause liability for damages, and if the damages would be incurred by the State or by a private agent such as the engineers.²⁰ “Where a defendants wrongful acts co-operate with, augment, or

the years immediately following the Stockholm Conference of 1972. Negotiation amongst 160 States to protect national sovereignty and interests in the accomplishment of UNCLOS 1982 demonstrates the interest of all members of the international community in working together towards the greater interest of protecting the globe. States demonstrated willingness to work together as caretakers of the global environment. This appears to indicate that the idea which created and sustains international law called ‘state sovereignty’ is no longer seen by individuals, groups and governments as an insurmountable obstacle.

¹⁷Official Text of the United Nations Convention on the Law of the Sea, United Nations, NY 1983

¹⁸ Cypser D. and Davis. S. Liability for Induced Earthquakes, Journal of Environmental Law and Litigation Vol.9 p.551

¹⁹ Id.p.552 See North Anna Environmental Coalition v. Nuclear Regulatory Commission 553 F.2d 655 DC Circuit 1976, State of Ohio v.Nuclear Regulatory Commission814 F.2d.258 6th Circuit 1987, Perry Nuclear Power Plant: Hearing before the Sub Commission on Energy and the Environment House Committee on Interior and Insular Affairs 99th Congress2d Session 1986.

²⁰ Id.p.554-157 Earthquakes have been associated with filling reservoirs since the 1930’s. Prior to the 1960’s some scientific theories predicted the possibility of earthquakes being ‘triggered’ by other human activities, but these theories were not confirmed until quakes began rocking Denver, Colorado, in the Spring of 1962...A United States Geological Survey investigation concluded that the pumping of fluids into the well at the Rocky Mountain Arsenal was ‘a significant cause’ of the earthquakes. (See also: Hsieh P. and Bredehoft J. A Reservoir Analysis of the Denver Earthquakes: A Case of Induced Seismicity in 86 Journal of Geophysical Research 1891; Evans D. Man Made Earthquakes in Denver, Geotimes May-June 1966).

In April 1967...Denver was struck by a quake of greater magnitude...in August and November quakes over magnitude 5 and their aftershocks rocked the metro area...The tremors were felt over22,000 square miles of Colorado and Wyoming...Most seismologists who have studied the earthquake series that high-pressured injection of fluids into a fault triggered the quakes...It is now well-established that certain human activities can induce earthquakes.

accelerate, the forces of nature, known as an act of god, to the injury of another, he is liable in damages”.²¹ It is argued, “that scientific research has established a cause and effect relation between the earthquake’s induced and human activity, and that there may exist a cause and effect relation between the defendants’ activity and the plaintiffs’ injuries. From a scientific viewpoint, the ‘cause’ is the tectonic strain released by the inducing activity. From a legal standpoint, however, the activity that triggers the release of tectonic energy as an earthquake is itself a significant ‘cause’ of the resulting damage.”²²

According to Hans Kelsen, “in a purely ‘voluntarist’ approach to international law, a conduct of a State amounting to a breach of an international obligation of that State might be considered as a ‘repudiation’ of that obligation, creating a new situation, which surely may give rise to new legal relationships under international law, but then to new relationships which, as it were ‘start from scratch’ and have no direct and necessary link with the old legal relationship as expressed in the primary rule which the State breached by such conduct.”²³ Furthermore, the growth of customary international legal norms is independent from later application of the rule and later practice of States with respect to treaties. The breach of a new obligation and the legal consequences as such are not subject to the scrutiny of the existing international regime, but rather to all details and spheres of normative advancement in the process of international customary law formation.

“Obviously, any ‘new legal relationship’ created by the breach of an international obligation involves, as does the original primary obligation, a limitation of the author State, taken in the sense of its complete freedom of action. ‘Sovereignty’ in this primitive, unlimited, sense, is clearly not a ‘right’ of the State under international law.”²⁴ Principally, “in view of the tendencies in modern international law to recognize and protect interests which are ‘extra-State’ interests in the sense that their ultimate beneficiaries are entities which are not States, but

²¹ Id.p.560-563 See also *Minor v. Zidell* 618 P.2d 392 Oklahoma 1980.

²² Id.p.563 –565 Analogies to induced earthquakes can also be found in cases involving floodwaters, lightning and fire.

See also *The Salto Sea Cases* 172 F.792 9th Circuit 1909. Other scientists point out that though induced earthquakes may shift a future earthquake into the present, that shift does not change the rate at which the strain accumulates, and thus has the effect of shifting all future earthquakes closer to the present. This could result in a net increase in the number of quakes over the lifetime of a given human made structure. See also, Bowler S. article entitled *Did Reservoir Trigger Indian Earthquake* in *New Scientist: The earthquake which was recorded at 6.2 on the Richter scale by seismologists of the British Geological Survey in Edinburgh, took place far from regions known to be seismically active. Most earthquakes happen at the edges of the Earth’s tectonic plates. But this quake hit a stable part of the Indian continent, 450 kilometres east of Bombay and thousands of kilometres from the Himalayan mountain chain, the nearest active plate boundary. “You would not expect an earthquake in such a stable part of the Indian craton”, says Roger Clark, a seismologist at the University of Leeds. “This was one of the largest known interplate quakes.” Clark explains that such earthquakes can be especially destructive.” “We do not know why interplate earthquakes happen. . .But when they do, they are often the most damaging sort, because the solid rock of the continents transmits the vibrations over very long distances.”*

²³ *Op.Cit.* Yearbook 1976 Vol.II (Part Two) p.111 Para.38

²⁴ Id.p.87 See also p.85 Actually in international practice we find various examples of ‘instruments’, possibly even common oral statements which, though perhaps formulated in a way which does resemble a statement of rights and obligations, are meant by their authors not to create an independent ‘rule’, but rather a formulation of a conclusion as to what each of them intends to do, it being understood that non-performance by one of the authors simply invalidates the conclusion, earlier arrived at, itself, thereby at the same time releasing the other authors from performance of their part of the conclusion. Thus, no ‘true legal obligations’ are created by such an instrument.

individual human beings, peoples or even humanity as a whole.” Since those entities are not normally, at least in general international law, given a status separate from but similar to that of a State, the rules of international law protecting their interests are still not rules creating rights for imposing obligations on States. “Consequently, such rights and obligations must generally ‘survive’ a breach of an international obligation by a State to which those rights and obligations are given, so to speak ‘in trust’, for the benefit of these extra-State entities.”²⁵

Duty which rises as a consequence of the general international law and duty arising from the new obligations of repercussions from building a dam on a watercourse may be varied. The rules of international law which would be applied to the duty in question would have to be distinguished according to the nature of the rights of adjacent States experiencing negative effects from seismic tremors. The duty therefore, would arise as a result of the consequence of the new breach. Illustrated in the International Court of Justice Advisory Opinion on the Namibia Case, was the point that, physical control of a territory, and not sovereignty or legitimacy or title, is the basis of State liability for acts affecting other States.²⁶ This is supported by the Trail Smelter Arbitration.²⁷

What is becoming difficult to distinguish in international law today, particularly in the area of the law of the sea, is “the distinction made between the infringement of a right ‘directly’ belonging to a foreign State and the infringement of a right belonging to a foreign State ‘through’ its nationals, to the effect that, while in both cases there would exist an obligation of the author State to stop the breach, a *restitutio in integrum strictu sensu*, would be only in the former case, as in the latter case reparation would be sufficient”.²⁸

Article 235²⁹ of the United Nations Convention on the Law of the Sea³⁰ deals specifically with responsibility and liability. It refers to State responsibility and international obligations in sub-section (1) and sub-section (2) refers directly to natural or juridical persons under the jurisdiction of States. Prompt and adequate compensation in respect of damages rests with States. Thus it would follow that States, other juridical persons under international law, as well as natural persons, commit acts which may generate responsibility and liability. Therefore, the duty to make reparation would rest within the ambit of domestic legal systems to facilitate compensation for damages. Historically, this has been the legal recourse in most cases.

This does not mean, however, that international responsibility would transfer to grounds establishing injury under domestic legal systems. International responsibility derived from international law rests as a breach with the State, but the remedy sought may require action in municipal courts. If private parties acting as agents of States, are involved in the act and have played a role in causing the harm or injury, then those acts are attributable to the State. The degree of proportionality of the category of a breach therefore, may be determined by the extent to which the breach may be reduced by *nullem crimen, nulla poena sine lege*, to municipal legal

²⁵ Id.p.86

²⁶ Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Advisory Opinion, ICJ Reports 1971 p. 15-20

²⁷ Op.Cit. Footnote 165 Dissertation

²⁸ Op.Cit. Yearbook 1981 p.88 See also Barcelona Traction ICJ Reports 1970 p.32

²⁹ Section 9 Responsibility and Liability

³⁰ Op.Cit. United Nations, New York, 1983

principles and punitive measures. In the case of seismic damages across terrain to the territorial jurisdiction of other States would:

- i. create international obligations for the State whose act is internationally wrongful;
- ii. create rights for the injured State and its population;
- iii. create a duty within the scope of the new breach under international law;
- iv. and establish international responsibility for initial acts leading to transboundary harm.³¹

The extent to which a State would be held responsible under the Convention on the Law of the Non-Navigational Uses of International Watercourses would be assessed outside of the realm of rights and duties belonging to watercourse States specifically, and rather through general international law. The duty of care therefore, or the duty to not injure, is a part of the international obligation “essential for the protection of the fundamental interests of the international community ... as a whole.”³² The International Law Commission,³³ discovered that “it seems impossible to cover all situations which may arise in practice by hard and fast, quasi-automatic rules. Furthermore, they would be examples of normal implications of proportionality. The rapid development of rules of international law in bilateral, regional and world-wide international relations seems to preclude a more abstract approach.”³⁴ It is difficult to not accept the fact that, “it could be otherwise, taking into account the realities of transboundary dangers and relations between States, and the existing elements of a developing chapter of international law.”³⁵ According to the Commission, it is a matter of co-operation amongst States to accept specific conduct carried out by an agent, through agency, where there is harm caused. “If, for example, a convulsion of nature leaves an unstable crater lake impending over the territory of another State, and that other State is unwilling to shoulder the financial burden of activities to avert the danger, it is not unreasonable to place upon the first State a duty of co-operation.”³⁶

Khao Laem

Reservoir Triggered Seismicity of Khao Laem³⁷ is an example of how a watercourse dam reservoir can have extenuating contiguous effects across one State’s jurisdiction into the territory

³¹ Carder D. Reservoir and Local Earthquakes in Proceedings of the 6th Annual Engineering Geology and Soils Engineering Symposium AGU 29(6) 1948 p.767-771

³² Op.Cit. Yearbook.1982 p.46

³³ Yearbook 1961 Vol.II p.2 Document A/Cn.4/134 and Add.1.pp.1 and pp.128-129

³⁴ Id. See also: Report of the United Nations Conference on the Human Environment, Stockholm, 5-6 June 1972 UN Publications No.E.73.II.A.14) p.5 Principle 21 States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their own jurisdiction or control do not cause damage to the environment of other States or as areas beyond the limits of national jurisdiction.

³⁵ Id.

³⁶ Op.Cit. Yearbook 1982 p.60 The Commission has noted that the third Report of Convention on the Law of the Non-Navigational Uses of International Watercourses, in particular the draft article provided in paragraph 379³⁶ encapsulates that which has been examined under transboundary harm from dams in this dissertation, mainly that paragraph 379 has crystallized a suspicion that even this broad meaning should be cautiously extended to cover situations in which a danger is created by the human failure to act.

³⁷ Second International Conference on Recent Advances in Geotechnical Earthquake Engineering and Soil Dynamics, 1991 St. Louis Missouri, Paper No. 9.20 N.Hetrakul, R. Sittipod, B. Tanittiraporn, P.Vivattananon.

of one or more States. The Khao Laem project is a dam with a reservoir of 385 square kilometers and a total capacity of 8,860 million cubic meters at full supply level.³⁸ Each time after impoundment took effect, earthquake events and patterns recorded showed that the earthquakes were triggered by impoundment. “Results obtained from investigation clearly differentiate the reservoir induced earthquakes phenomena from natural tectonic earthquakes.”³⁹ As the project is located in the transition zone between the active Himalayan continental collision belts to the northwest the seismicity continued along a north-south extension into the Andaman Sea, in the counter-clockwise rotation of India and then in a lateral movement along major faults in Burma.⁴⁰

In 1989, long before Hong Kong was handed back to China, there was an earthquake that shook it, although the epicentre of the earthquakes were located to a reservoir on the outskirts of Heyuan⁴¹ China, one hundred and sixty kilometres north-east of Hong Kong.⁴² According to geologist, Maurice Atherton, when asked if China were aware of the possibility of transboundary effects or threat of risk when the work began, said that the fault had not moved since 1806.⁴³ This example of transboundary seismic tremors:⁴⁴ an earthquake of 4.6 on the Richter scale

³⁸ Id.

³⁹ Id.

⁴⁰ Op.cit. p.12

⁴¹ The Sunday Standard Newspaper December 3, 1989 p.6 The fault known as the Heyuan Great Rift, is a ridge on one bank of the Xinfeng River Reservoir and a valley on the other side. Water seeped into the fractures and pushed the sides apart, this allowed the fault to move more easily.

⁴² Id.

⁴³ The unpredictability and prevention of earthquakes was noted in the example of the Hsinfengkiang Dam in China was modified twice from fear of the occurrence of induced earthquakes, one of which happened in 1962 registering 6.1 on the Richter scale. Also, the Aswan Dam on the Nile registered an earthquake of 5.6 in 1981 near Lake Nasser where earthquakes had never occurred in this very region of world.

⁴⁴ Rothe J. Summary: Geophysics Report, University of Strasbourg, Strasbourg France. See also: Carder D. Reservoir and Local Earthquakes in Proceedings of the 6th Annual Engineering Geology and Soils Engineering Symposium, Boise Idaho 1968 and Small Level Divergences, Seismic Activity, and Reservoir Loading in the Lake Mead area, Nevada and Arizona, Eos Trans. AGU 29(6) 1948 p.767-771 The association of seismic activity and artificial lakes was first noted in research on Lake Mead USA, where thousands of earthquakes occurred after the reservoir was filled with water. Another example is the Monteynard Dam where shocks occurred in April 1963 after the dam was filled with water to an altitude of 490 meters. Violent tremors caused light damage in villages near the dam. Other examples are: the Oued Fodda in Algeria 1952; Canelles in Catalon 1970; Piave di Cadore in Italy 1964; Contra-Vagorno in Switzerland 1967; Marathon in Greece 1967; El Grado in Spain 1969; Flathead Lake and Kerr Dam in Montana 1969-70. The conclusions Rothe provides are as follows. “In contrast to what takes place in natural seismic activity, the most violent shocks are most often produced after numerous foreshocks. The frequency of these shocks increases progressively during a more or less long period. The more tectonically quiescent the region (ancient shields) the longer this period will be. The seismic activity increases at the time of the first filling and after maximum filling has been attained during the course of several years. In one case, Vogorno, the complete emptying of the reservoir after a first filling has resulted in a cessation of shocks. The collected examples contain a share of old terrains where the orogeny is ancient and the natural seismicity is weak (the African shield at Kariba and the Decan plateau at Koyna), as well as regions of recent orogeny and notable seismicity in (Greece, the Alps, the Pyrenees, North Africa, and the Rocky Mountains). In numerous cases the creation of deep storage reservoirs has not entrained notable seismicity; particular geologic conditions are necessary for the triggering of shocks. Diaclastic formations where great water losses occur (Monteynard and Oued Fodda) networks of faults (Hoover Dam, Kariba, Kremasta, Vogorno, and Montenyard), and heterogeneity of the underlying strata, (Koyna and Vaoint), all of which facilitate the circulation of water under pressure, favour the triggering of shocks. In reference to Gupta, Narain, Rastogi and Mohar 1967, Rothe provides the following. By studying the frequency-magnitude relations using the formula $\log N = a - bM$ where N is the the cumulative frequency of shocks of a magnitude equal to or exceeding

allegedly caused by a reservoir; traveling into another territorial jurisdiction brings up the possibility of an international dispute. If there had been harm or damage caused and compensation required, the dispute would have had international legal implications.⁴⁵

The resolve of the International Law Commission is to enable norms of state responsibility to gain universal acceptance about the serious magnitude of environmental damage on populations, and to strengthen the newly emerging norms to a status of a possible criminal law that comprises international criminal responsibility.⁴⁶

The generality of the norm is derived from the broad scope of the wording. For example, natural environment encompasses the earth from which humans, plants and vegetation have evolved and where the high seas, the sky and the air exist. It refers to the natural arena that nurtures all of life and all life forms. In this context, the reality of environmental damage becomes starkly clear.⁴⁷ Although, the scope of the norm is wide, the norm itself seems to be emerging into a rule that bears a narrower meaning that may polish it into a positive law form. The words ‘severe damage’ places the status of the norm into the criminal legal realm and further emphasized by the word willfully, thus implying *mens rea in culpa*. Hence, a breach of the obligation would render the individuals and companies who have been found to willfully commit environmental damage, to fall within the range of international crimes and delicts.

The Draft Articles on State Responsibility,⁴⁸ which relate solely to the responsibility of States for internationally wrongful acts, offer Article 3 and Article 16, discussed next.

“Article 3: Elements of an internationally wrongful act of a State. 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.”⁴⁹

“Article 16: Existence of a breach of an international obligation. There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation.”⁵⁰

M, the determined value of the coefficient b for the shocks of Kariba, Kremasta, and Koyna for the foreshocks as well as for the aftershocks. Contrary to what is found in natural seisms, the value of b is analogous for both foreshocks and aftershocks. The regions where seismic phenomena have accompanied the filling of reservoirs are characterized by old volcanic activity and by the existence of beds of limestone or reddish clay that are easily affected by water. The authors believe that these criteria also lead to a better understanding of the dynamics of the source mechanism.”

⁴⁵ In 1970 the United Nations Economic Social and Cultural Organization created a Working Group on Seismic Phenomena Associated With Large Reservoirs to examine the socio-economic importance of the phenomena of reservoir-induced seismicity.

⁴⁶ Draft Code of Crimes Against the Peace and Security of Mankind and the Rome Statute of the International Criminal Court 2001.

⁴⁷ See also the 1976 UN *Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Techniques* prohibiting ways to deliberately change the composition of the earth and its atmosphere.

⁴⁸ Op.Cit. Footnote 211

⁴⁹ Id.

⁵⁰ Id.

In relation to Article 3, a State would be in breach of an international obligation if there was the existence of an act or omission attributable to the State as a subject of international law; that is if there was evidence of specific conduct which could be related to a possible breach. It is the international legal personality of the State which allows it to inherit and experience ramifications of the breach. The State, then, becomes responsible for that breach and acquires duty under international law to make reparation. An act of a State which is not in conformity with an international obligation would constitute a breach only if the act was committed at a time while the obligation was applicable to the State, meaning that it is in force for that State.⁵¹ It may be possible to justify the existence of an obligation based on an emerged international customary rule that creates a duty whether the State is or is not affected by an actual treaty obligation, in force for that State.

The Commission found it necessary to determine types of conduct which may be regarded as acts of State to establish existence of an internationally wrongful act: called the objective element.⁵² This entire category is based on conduct that is a breach of an international obligation.⁵³ It was believed that this was the most accurate terminology for the subject. It stated its reasons for discerning the objective element of an internationally wrongful act in the breach of an international obligation, by distinguishing between breach of a rule and norm of international law. The Commission found that their term was the most commonly used in international judicial decisions and in State practice, thereby making it correct for analytical purposes. The interpretation of this was, “a rule is an objective expression of the law, whereas an obligation is a subjective legal situation by reference to which the conduct of the subject is judged, whether it is in compliance with the obligation or in breach of it”.⁵⁴ The explanation of this was based on the following line of reasoning. Moreover, an obligation does not necessarily and in all cases have its immediate origin in a rule, in the true sense of the term: it may have been imposed on a State by a unilateral legal act of that State, or by the decision of an international tribunal or an organ of an international organization authorized to do so.”⁵⁵

In one sense it may be true that an obligation may have been imposed by a unilateral act of State or by the decision of a tribunal. However, it would appear more exact that the unilateral act of State or a decision of a tribunal imposes a duty rather than an obligation and that particular duty carries with it an obligation. Therefore it would seem that an obligation does, always, follow from a rule and that rule is derived from a norm. An international rule formulates and stipulates who would be the obligated parties to a rule. In general a norm which is meant to be legally binding will for that very reason be formulated with greater precision. Hence, the detailed and specific character of the norm has been mentioned above as one of the factors which strengthen the legitimacy and thus the normative effect of the norm.⁵⁶ What is most important is the source of the law, then the obligation giving rise to the duty. The obligation or “obligatory behaviour would be negated if the provision...leaves too many open ends, to the point of rendering such prescribed behaviour unidentifiable.”⁵⁷ In the Convention on the Law of the Non-navigational Uses of International

⁵¹ Op.Cit. ILC Yearbook 1973 V.II p.179

⁵² Id. p.75 paragraph 1

⁵³ Id. P.75 paragraph 3

⁵⁴ Id.

⁵⁵ id.

⁵⁶ Op.Cit. Van Dijk at p. 20 See also George Abi-Saab UN Doc. A/39/504/Add.1 1984

⁵⁷ Id.p.34

Watercourses, Article 20 on protection and preservation of ecosystems provides, “Watercourse States shall, individually and where appropriate, jointly, protect and preserve the ecosystems of international watercourses.”⁵⁸

Article 20 places an obligation of a general nature upon watercourse States to protect and preserve the ecosystems of international watercourses. It is very similar to Article 192 entitled General Obligation in the United Nations Convention on the Law of the Sea which provides that, “States have the obligation to protect and preserve the marine environment.”⁵⁹

Article 20 has adopted a newly emerged norm constituting State practice which holds that there is an international legal obligation to protect and preserve ecosystems. There may be sufficient practice of international customary law on environmental protection to legally bind States not party to the Convention on the Law of the Non-Navigational Uses of International Watercourses to experience *opinio juris* thereby resulting in a change in behaviour for watercourse States.

This article contains the most important component of an environmental treaty. It is general in nature as it includes a wide principle of international environmental responsibility, but it is also specific in law because it implements the most essential psychological component required for *opinio juris* in customary law. Although there is the question of a time element and duration of practice for a customary rule to be created, it may be possible that other factors such as risk of extreme environmental damage may assist in the development of *opinio juris* in the behaviour of watercourse States. That could lead to new normative content for a customary rule through specific State practice in relation to protecting ecosystems, for the intent of preserving a watercourse. Although the essence of the obligation in the article is protect ecosystems, there is a direct duty created from the need to protect ecosystems, resulting in the requirement that States adapt their conduct towards watercourse based ecosystems. Although territorial conduct remains within the privacy and sovereignty of State jurisdiction, any activity taken individually or jointly by private industry and the State must be cognizant of this obligation.

The International Law Commission has preferred to relate the obligation upon States to protect and preserve watercourse ‘ecosystems’ rather than watercourse ‘environments’ in order to add greater precision.⁶⁰ The scope of the term ‘environment’, at this point, would be too broad. It could be interpreted to encompass areas surrounding the watercourse system and therefore have minimal bearing on the watercourse system itself.⁶¹ The Commission thought that the term environment may be construed to refer to areas outside of the watercourse. The Commission therefore maintained a narrow application of the obligation to protect watercourse ecosystems as a specific application of the requirement in Article 6. This creates a normative duty upon States to protect watercourse ecosystems from harm and from a significant threat of harm.⁶² The obligation to preserve watercourse ecosystems, applies mainly to freshwater ecosystems that are pristine. Massive numbers of aquatic

⁵⁸ United Nations Convention on the Law of the Non-navigational Uses of International Watercourses Adopted in the UN General Assembly by Resolution 51/229:Open to Signature 21 May 1997 to 20 May 2000 see UN Document A/51/869 April 11 1997. See also 36 ILM 700 (1997).

⁵⁹ The Law of the Sea Convention, United Nations, New York (1983) p.71

⁶⁰ Report of the ILC 1990, UNGA 45th Session, Supplement No.10,(A/45/10) p.147

⁶¹ Id. ILC Report 1990, p.147

⁶² Id.ILC Report 1990, p.149

ecosystems are deteriorating from acidification and human eutrophication. Rivers continue to be used to dump industrial waste and agricultural waste, while aquifers are being contaminated by pesticides, gasoline and other chemicals.⁶³

In addition, Article 20 incorporates and accepts progressive development of State responsibility that is based on a background of State liability. “The international community has more recently focused on preventive measures. This is in contrast to the traditional approach whereby responsibility was attributed to the State deemed to have caused the harm.”⁶⁴ “The International Law Commission has identified massive pollution of the atmosphere or the seas as an international crime.”⁶⁵ Hence, it may be possible to assess whether there is a new emerging norm of customary law and whether the norm has begun to crystallize into a rule of positive law. However, where does the newly emerging norm incorporating the law of cooperation place liability?

If Article 20⁶⁶ is put to *Abi-Saab*'s intrinsic test⁶⁷ to see if it has validity as a normative proposition in isolation, or in relation to the rest of the articles in the Convention, and to assess the possibility of its integration into general international law, it would uphold its position. The question that remains is whether its acceptance could be safely derived from the legal character of *res communis* in application to conservation of living resources and watercourses. Although States have permanent sovereignty over natural resources within their territorial jurisdiction, it is not an absolute power and may be subject to limitations imposed by international law⁶⁸. The reason for this is that exclusivity entails State responsibility over any conduct within State territory where the jurisdiction is international. Watercourses are within the ambit of international law. Hence, any watercourse violation that falls under the reach of international law would incur international obligations and assume a duty upon a watercourse State.

Protection and preservation is a general principle of the environment that has evolved from a general norm and has the position of a fundamental norm in international law. A general principle of this nature describes the general legal status of a subject, in this case environmental protection. It is derived from a firmly established and axiomatic norm.⁶⁹ This principle evolved from normative values surrounding the central tenet of international diplomatic relations: sovereign equality of States. When viewed alongside the duty to cooperate, the essence of international law of watercourses becomes the substance for international relations for watercourse States: international environmental rules can be a part of international economic relations.⁷⁰ The rule to not pollute and damage waters is well established in international customary law and in treaty law and may be linked to protection of natural resources, an area that has been difficult to regulate for States. The reason for this may be due to the principle of sovereign equality itself. The construction of the rule is dependent on cooperation by States to be environmentally astute and allow transfer of scientific knowledge while safeguarding their right to sovereignty. In a rather unique and progressive manner watercourse law seems to transcend traditional barriers of the territorial boundary as is the case for air pollution. International

⁶³ The State of Canada's Environment, Government of Canada, (Friesen and Sons Ltd.) Ottawa, Ontario 1991 p. 3-25

⁶⁴ Op.Cit. Wallace p.195

⁶⁵ Id.

⁶⁶ UN Document A/51/869 April 11 1997

⁶⁷ Id.p.39

⁶⁸ Id.p.45

⁶⁹ Id.p.34

⁷⁰ Id. *Abi-Saab*

relations between watercourse States closely relates to other aspects of international law such as trade and economics.

However, the rule becomes difficult to frame in terms of punitive measures because liability under Article 21(1)⁷¹ has been narrowed solely to human conduct. Where would liability be applicable? Would liability rest with the individual, the private company, or would the burden of liability fall upon the State? The individual or private company may be accountable for an environmental crime, but it is the State who would still be responsible under international law as the primary subject of international law. The individual while endowed with certain elements of *locus standi* under international criminal law, still would not have subjectivity under international law without State acquiescence or ratification of a respective instrument.

Article 21 Prevention, reduction and control of pollution

1. For the purposes of this article, ‘pollution of an international watercourse’ means any detrimental alteration in the composition or quality of the waters of an international watercourse which results directly or indirectly from human conduct.

“2. Watercourse States shall, individually and, where appropriate, jointly, prevent, reduce, and control pollution of an international watercourse that may cause significant harm to other watercourse States or to their environment, including harm to human health and safety, to the use of the waters for any beneficial purpose or to the living resources of the watercourse. Watercourse States shall take steps to harmonise their policies in this connection.

3. Watercourse States shall, at the request of any of them, consult with a view to arriving at mutually agreeable measures and methods to prevent, reduce and control pollution of an international watercourse, such as:

- a) setting joint water quality objectives and criteria;
- b) establishing techniques and practices to address pollution from point and non point sources; and
- c) establishing lists of substances the introduction of which into the waters of an international watercourse is to be prohibited, limited, investigated or monitored.”⁷²

In essence, Article 21 contains obligations for States towards prevention, reduction and control of pollution which may have adverse negative effects or cause harm to a watercourse system. Paragraph 21(1) defines pollution to be any ‘detrimental alteration in the composition or quality of the waters of a watercourse. The damage by pollution would be due to direct or indirect human activity. Paragraph 21(2) establishes that watercourse States shall ‘individually or jointly, prevent, reduce and control pollution...’ of an international watercourse. In particular, if the pollution causes appreciable harm to human health, the environment, or to the living resources of the watercourse. Paragraph 21(3) requires watercourse States to consult with each other to formulate a list of dangerous substances that may adversely affect the waters of an international watercourse system. The term pollution in paragraph

⁷¹ UN Document A/51/869 April 11 1997

⁷² UN Document A/51/869 April 11 1997 Report of the ILC 1990, UNGA 45th Session, Supplement No.10 (A/45/10)

21(1) is very broad in scope as it does not mention any particular type of pollution or polluting agents but encompasses all pollution. Furthermore, the general term ‘detrimental alteration’ which implies detrimental effects in paragraph 21(1) acquires greater weight by the term ‘significant harm’ in paragraph 21(2).⁷³

Paragraph 21(2) is a specific application of the general obligation contained in Article 7 ‘not to cause significant harm to other watercourse States’. In order to apply Article 7 to pollution the International Law Commission took into consideration that some watercourses are polluted to varying degrees and others are still pristine. It is for this reason that the Commission used the wording ‘prevent, reduce and control’.⁷⁴ This particular formulation was also employed in Article 194(1) of United Nations Convention on the Law of the Sea which provides for measures to prevent, reduce and control pollution of the marine environment.⁷⁵ Within Article 21, there seems to be an implicit duty upon States to prevent new types of pollution and try to reduce and control any existing pollution of an international watercourse.

Whereas the content of Article 194(2) on the United Nations Convention on the Law of the Sea, is far more direct within its wording:

“States shall take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment, and that pollution arising beyond the areas where they exercise sovereign rights in accordance with this Convention.”⁷⁶

However, the rule becomes difficult to frame in terms of punitive measures because liability under Article 21(1) has been narrowed to apply solely to human conduct. Where would liability be applicable? Would liability rest with the individual, the private company, or would the burden of liability fall upon the State? The individual or private company may be accountable for an environmental crime, but it is the State who would be responsible under international law as the primary subject of international law. The individual while endowed with certain elements of *locus standi* under international criminal law, yet would not have subjectivity under international law without State acquiescence or ratification of a respective instrument.

Article 3 of the Convention on the Protection of the Environment between Denmark, Finland, Norway, and Sweden provides:⁷⁷ “Any person who is affected or may be affected by a nuisance

⁷³ Id. ILC Report 1990, p.160

⁷⁴ ILC Report 1990 p.161

⁷⁵ United Nations Convention on the Law of the Sea, Article 194 para.1, United Nations (New York),1983

⁷⁶ Id. UNCLOS p.170 Article 194 para.2 The rule to not pollute and damage waters is well established in international customary law and in treaty law and may be linked to protection of natural resources, an area that has been difficult to regulate for States. The reason for this may be due to the principle of sovereign equality itself. The construction of the rule is dependent on the cooperation of States to be environmentally astute and allow transfer of scientific knowledge while safeguarding their right to sovereignty. In a rather unique and progressive manner watercourse law seems to transcend traditional barriers of the territorial boundary as is the case for air pollution. International relations between watercourse States closely relates to other aspects of international law such as trade and economics

⁷⁷ Article 3 of the Convention on the Protection of the Environment between Denmark, Finland, Norway, and Sweden of 19 February 1974, art.3, UN Treaty Series, vol.1092, p.279 or International Legal Materials , vol.13,p.591 (1974) The reason for the view taken by the majority of the Members of the Commission is that States and watercourse States, in this case, should not discriminate against others, regardless of where the harm may have occurred. This view finds

caused by environmentally harmful activities in another Contracting State shall have the right to bring before the appropriate Court or Administrative Authority of that State the question of the permissibility of such activities, including the question of measures to prevent damage, and to appeal against the decision of the Court or the Administrative Authority to the same extent and on the same terms as a legal entity of the State in which the activities are being carried out. The provisions of the first paragraph of this article shall be equally applicable in the case of proceedings concerning compensation for damage caused by environmentally harmful activities. The question of compensation shall not be judged by rules which are less favourable to the injured party than the rules of compensation of the State in which the activities are being carried out.”⁷⁸

Duty to Cooperate

It would seem that until a specific subject with general application receives international recognition international legal norms remain latent. An international concern having transnational or transboundary content, connected to an international law subject will release and allow crystallization of the legal norm only when international community is ready to receive it. In relation to this, the legal paradigm and the concept of a watercourse system, embodied in the Convention on the Law of the Non-Navigational Uses of International Watercourses is perfect as a treaty in that it allows the development of new transnational norms. Customary international law is developing as general principles in international law are positioned to become applicable in international matters resulting in new obligations in international law.

Furthermore, during this development and growth in the body of international law a prohibition may customarily arise due to the transnational and transboundary nature of the environment: in particular watercourse activity; regulation of rivers that cross international boundaries; production of oil from underwater exploration; scientific and technological advancement where human life may be at risk; hence the finding of a new breach as in the UNOCAL and Chevron Cases.

This breach, and the ensuing duty that would result for a State, is based on the nature of international law itself. That is, the principle of sovereignty and equality of States in concurrence with the customary international law of duty is based on international cooperation. When one State is affected by another State for harmful conduct upon and within its territory, the latter State becomes responsible for the new obligation and incurs a duty to cooperate for the transboundary activity which infringes the sovereignty and territorial jurisdiction of the former State.

support in the Convention on the Protection on the Environment between Denmark, Finland, Norway, and Sweden of 19 February 1974

⁷⁸ Id. See also, Article 2 paragraph 6 of Convention on Environmental Impact Assessment in a Transboundary Context, Document E/ECE/1250 (1991) Part II.B.8. Document ENVWA/R.45 Annex I (20 November,1990) and Paragraph 6 of the Draft ECE Charter on Environmental Rights and Obligations, Document ENVWA/R.38 (1 March 1991) This norm is found in the ECE Task Force guidelines on responsibility and liability regarding transboundary water pollution. It is also supported by the OECD in its Recommendation on Implementation of a regime of equal right of access and non-discrimination in relation to transfrontier pollution. Paragraph 4(a) of the OECD Recommendation in OECD Document C(77)28 (Final) in OECD and the Environment provides: “Countries of origin should ensure that any person who has suffered transfrontier pollution damage or is exposed to a significant risk of transfrontier pollution, shall at least receive equivalent treatment to that afforded in the country of origin in cases of domestic pollution and in comparable circumstances, to persons of equivalent condition or status...” See also, Principle 14 of the Principles of Conduct in the field of the environment for the guidance of States in the conservation and harmonious utilization of natural resources shared by two or more States, approved in decision 6/14 of the Governing Council of the United Nations Environment Programme (19 May 1978).

The idea that accepted approaches to international law may be adjusting to new scientific developments can be determined by examining the sources of transnational norms. According to Abi-Saab, sovereign equality is a structural general principle.⁷⁹ It provides and determines the structure of the present legal system as it develops to incorporate transnational normative activity.⁸⁰

The New World Order and the Post-New International Economic Order⁸¹

The New International Economic Order was a radical restructuring of the rules and procedures of the global economic system. It was initiated by Africa, Asia and Latin America, to gain more influence in international relations. The New International Economic Order was a set of policy and economic measures that later became a formulation that will be adapted to explain an aspect of transnational normative development that shall be referred to as post-New International Economic Order. It dealt with international relations after new States rose out of colonial domination through self-determination efforts.⁸²

In a separate United Nations Report, the question of whether international legal principles and norms related to the New International Economic Order was discussed. In this part, general principles and norms of international law relating to the New International Economic Order will be assessed in light of post- New International Economic Order normative developments. This will be done by relating general principles to transnational normative development. The premise of this study is that general principles of legal systems contain transnational norms. Furthermore, since all States are sovereign⁸³ and equal, all legal systems are legitimate means of accessing general principles which then become universal norms. The legal principle of sovereign equality is the right of States to freely choose an economic system is based on the United Nations Declaration on Principles of International Law Concerning Friendly Relations and the Charter on the Economic Rights and Duties of States.⁸⁴ It also reaffirms the general principle of non-intervention in the exercise of Statehood.

Sovereign equality includes the right to enjoy permanent sovereignty over natural wealth and environmental resources. It protects the general principles of territorial jurisdiction in relation to natural resources. Another component to this, is equal participation of all States in international economic relations through independent regulation of foreign investment in compliance with the

⁷⁹ Op.Cit. Abi-Saab in UNGA A/39/504/ Add.1 p.56

⁸⁰ www.CPDTN.org

⁸¹ From a study written by Abi-Saab G. a/39/504/add.1 UNGA The ideas on this section of the book are expounded from a UNGA study done by G.Abi-Saab.

⁸² The concept was initiated by Lenin and implemented by Woodrow Wilson. It refers to the right of peoples to govern themselves.

⁸³ Sovereign equality is a concept is derived from the most important general principle which emanated from the 1648 Treaty of Westphalia, that each State is sovereign and equal in the international community.

⁸⁴ Op.Cit. A/39/504/Add.1 UNGA p.12 This principle covers the right of every State to choose its method of development; independently structure its economic relations; economic regional organizations; participate in co-operation with other States on matters of international law such as piracy on the high seas or intellectual property crimes; and organize to participation and co-operate in primary commodity areas.

principle of *pacta sunt servanda*.⁸⁵ Along with this factor is the duty of States to ensure compliance by implementing agreements in good faith, while regulating transnational activities guided by the Charter on the Economic Rights and Duties of States.⁸⁶

The Post-New International Economic Order is a reflection of participatory equality of all States in transnational activities and international economic relations. Visibility of the appearance of transnational actors on the international scene has resulted in dissemination of norms that cannot be controlled by domestic legal systems. Moreover, in the life cycle of a legal norm there is a noted element of indeterminacy and continuous legal elaboration.⁸⁷ The New International Economic Order created the pre-conditions for the establishment of an environment conducive to transnational activity and the development of transnational norms. “The principles here discussed, and the New International Economic Order to which they gave legal expression, are generally considered as necessary pre-conditions for the creation of an international economic environment favourable to the development of the less developed countries, and thus can be viewed as collectively constituting for these countries a ‘right to development’ parallel on the economic level, to self-determination on the political plane.”⁸⁸ The positive effect of the development of such a right is necessary for harmonious global development and fulfilment of the ideals of justice and equality of the Charter of the United Nations. More concretely, it is a condition *sine qua non* for full recognition of the economic, social, and cultural rights of groups and for full recognition of human rights for individuals.⁸⁹

According to Abi-Saab, the New International Economic Order brought about a strategy that can be analyzed by using terms such as transnational. This is because transnational activity became the international economic agent for a multitude of negotiations. These negotiations involving many actors, inevitably constructed international relations based on existing legal principles and legal norms. The principles and norms of international law that serve in the realm of transnational normative development are an extension of those which began under the New International Economic Order, are now post- New International Economic Order. Transnational norms include new principles and new norms of international law required to complete the legal system. Laws begin from legal norms, as a response to new social needs. Transnational legal norms build on the general principles of international law. Post-New International Economic Order is an accumulation of principles and norms that began to develop during the New International Economic Order period and are ready to be received recognition as international customary law, international legal norms, or transnational norms.

Paradigm to test the evolution of New International Economic Order to Post- New International Economic Order relevance

⁸⁵ The principle that agreements are binding and are to be implemented in good faith.

⁸⁶ United Nations Charter on the Rights and Duties of States 1974. The normative rule is that States must cooperate to maintain good relations with other States while continuing activities with transnational actors.

⁸⁷ Op.Cit.Abi-Saab p.103

⁸⁸ Id.p103

⁸⁹ Id.

The principles and norms of international law relating to the New International Economic Order endorsed by the United Nations General Assembly⁹⁰ now serve as the basis of a testing ground to identify the status of the norms. They are:

- i. Preferential treatment for developing States;
- ii. Stabilization of export earnings within the World Trade Organization for developing States;
- iii. Permanent sovereignty over natural resources such as oil and water;
- iv. Right of every State to benefit from science and technology;
- v. Entitlement of developing nations to receive development assistance;
- vi. Participatory equality of developing States in international economic relations;
- vii. Participatory equality of developing States in the global commons.”

In relation to transnational norms, all of the principles and norms derive from the most fundamental general principles that all States have sovereign equality, and the duty of all States to cooperate under international law.

Sources of International Law and Reservations to a Treaty Codification of International Law

International bilateral, or multipartite treaties, contain express consent of States, to accede, sign, ratify to implement rules of conduct in international relations created by States themselves. Multilateral or multipartite treaties are referred to as law-making treaties.⁹¹ International conventions such as the United Nations Convention on the Law of the Sea 1982, is a body of work which was undertaken by the UN International Law Commission. It is a part of codification of international law in the form of International Law Association Reports, and encouragement of international normative legal growth by institutes such as the American Society of International Law, the International Law Association, and the International Commission of Jurists for the progressive development of international law.

The League of Nations Permanent Court of International Justice, the precursor to the International Court of Justice established a permanent method of arbitration.⁹² This was an opportunity for governments to seek peaceful settlement through direct dialogue and negotiation resulting in the establishment of a peace treaty. Statehood as defined in the Montevideo Convention 1933, provides that governments have the capacity to enter into international relations, which would include the capacity to make treaties. States and international organizations make treaties also. This activity and the ensuing international agreements are an important element of transnational law.⁹³

⁹⁰ Id.p.40

⁹¹ Charles Fenwick, *Cases on International Law* (Callaghan, Chicago) 1951 p.22 The treaty of Westphalia 1648, laid the foundations of the modern system of sovereign states. The Congress of Vienna of 1815 assumed the role of a great law-making body. The nineteenth century witnessed the adoption of numerous international conventions which laid down new rules of law for contracting parties. With the twentieth century came the conclusion of a vast array of multipartite treaties: Covenant of the League of Nations 1919-1920, Charter of the United Nations 1945, Charter of the Organization of the Organization of American States 1948.

⁹² Peaceful settlement of disputes is also found in the following: Final Act of the Second International Peace Conference 1907; Convention for the Pacific Settlement of International Disputes 1907; Statute of the International Court of Justice 1945.

⁹³ Op.Cit. Richard Swift p.451 See: www.cpdtn.org

Multilateral treaties, conventions and agreements cover many subject areas in international law and transnational developments. Treaties enter into effect in municipal legal systems once a State government has ratified the document by implementing it into their municipal law. Treaties do include the years for which it will be valid, or it may arrive at an end due to a new treaty with provisions on the same subject matter. The doctrine *rebus sic stantibus* is a general principle indicating that a treaty will continue as long as the conditions which led to its existence remain the same. However, most treaties usually provide a dispute resolution system to solve issues that may arise between parties over the meaning of clauses in the treaty.

Validity of a Treaty: Reservations

During ratification of a treaty a State may include reservations to specific articles in the treaty. A reservation is a formal statement indicating determination by a State party to modify the legal circumstances that the treaty would ordinarily create. International law relating to multilateral treaties is now at the stage where the validity of the treaty may be questioned on the basis of reservations, during domestic legislative process. If a State has made a reservation, an assessment is done to ascertain whether there has been a change in the normative content of the legal effect of the provisions of a treaty.

The Vienna Convention on the Law of Treaties contains Article 20 which covers non-restricted multilateral treaties by Article 20(4). The emphasis here is on Article 20(2) which provides that the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound. A State makes a reservation in a unilateral statement, when signing, accepting, approving, or acceding to a treaty, in order to modify the legal effect of certain provisions of the treaty which will become a part of legal in that particular State.⁹⁴ For example, the USSR made a reservation to Article 11(1) of the Vienna Convention on Diplomatic Relations 1961, which allows the receiving State to modify the size of a mission in the absence of a written agreement. This was considered valid, since the reservation concerning the size of a diplomatic mission should be settled by agreement between the sending State and the receiving State.

Article 19⁹⁵ of the Vienna Convention on the Law of Treaties specifies the elaboration of a general principle providing individual States the right to formulate a reservation to the duty and the obligation provided by an international treaty. It states:

- a. The reservation is prohibited by the treaty;
- b. The treaty provides that only specified reservations, which do not include the reservation in question, may be made; or
- c. In cases not falling under sub-paragraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.”

It would follow from Article 19, that if and when a State⁹⁶ decides to file a reservation, they may not be abiding by the basic tenets of international law, its duties and obligations. The signing of the treaty in question must be compatible with *pacta sunt servanda*. A reservation automatically

⁹⁴ A/CONF.39/UN (A/CONF.39/4) UN Secretariat NY

⁹⁵ Id.

⁹⁶ In other words, the government in power.

renders a junction in the nature of normative development. This is true when States party to an agreement spoil the object and purpose of a treaty, by impeding and obstructing complete ratification.

A Reservation to the 1958 Convention on the Continental Shelf

Article 12 of the Continental Shelf Convention expressly permits reservations other than to Articles 1, 2, and 3. Article 12 does not specify authorized reservations, nor does it include permissibility of reservations in agreements of Parties.

France made a reservation to Article 6 of the Continental Shelf Convention:

“In the absence of a specific agreement, the Government of the French Republic will not accept that any boundary of the Continental Shelf determined by application of the principle of equidistance shall be invoked against it: If such boundary is calculated from baselines; If it extends beyond the 200 meter isobath; If it lies in areas where, in the Government’s opinion, there are special circumstances within the meaning of Article 6(1) and 6(2). That is, the Bay of Biscay, the Bay of Granville, sea areas of the Straits of Dover, and the North Sea off the French Coast.”⁹⁷

The question here is whether it is relevant to give importance to the desire of a Government to secure a reservation when the entire treaty itself is of a legal nature to render reservations non-permissible *erga omnes*. A entire treaty may require itself to remain whole, therefore in a form which resembles norms *jus cogens*. In the North Sea Continental Shelf Cases, the International Court made a point based on reservations using customary international law to say that general or customary rules of nature have equal force for all members of the international community.⁹⁸ Reservations are allowed, only to purely conventional rules, thereby making obligations of general international law, and customary international law, binding by virtue of equal force. If the entire treaty, except for conventional rules, is closed to reservations, then the content of the treaty has *jus cogens* value.

Deflecting progress by stopping to assess whether a reservation is valid is not only time consuming, but it testifies to the fact that there is no possibility for a reservation to be made. For example, since there was no accessibility to modify the rule concerning continental shelf boundaries in Article 6, France relied on the a narrow term in Article 6 that refers to special circumstances concerning contiguity, geomorphology, and geographical specifics, to apply Article 6 to its territorial waters. The example of Article 1 of the Convention, viewed in light of France’s desire to circumscribe the definition of the outer limit of the continental shelf, would be an invalid attempt at manufacturing a reservation.

In the Treaty on the Prohibition of the Emplacement of Nuclear Weapons of Mass Destruction on the Seabed and Ocean Floor and in the Subsoil,⁹⁹ India emphasized that a foreign State

⁹⁷ ICJ Reports 1969 p.38

⁹⁸ Id. p.38

⁹⁹ The 1971 Treaty on the Prohibition of the Emplacement of Nuclear Weapons of Mass Destruction on the Seabed and Ocean Floor and in the Subsoil thereof: UK Treaty Series Number 13 1973 (CMND 5266) p.5

could not use the Continental Shelf of another State for military reasons.¹⁰⁰ “The 1971 Treaty did not cover that proposition, so that the Indian declaration raised in issue the degree of exclusiveness of coastal State jurisdiction which was a matter governed by the 1958 Geneva Convention, a treaty expressly safeguarded by Article IV of the 1971 Treaty¹⁰¹.” Hence, the statement by India was irrelevant to the 1971 Treaty. “Not surprisingly, therefore, the US Government replied by disagreeing with this Indian statement as a proposition of law, emphasizing that any and all rights existing under international law prior to the conclusion of the 1971 Treaty, and not falling within its prohibitions remain unaffected.”¹⁰² “Or if one reverts to the first attempts of France towards making a reservation, to the 1958 Continental Shelf Convention, concerning base-lines established after 29 April 1958, it may be argued that the validity of baselines is governed not by the Continental Shelf Convention but by either the rules contained in the 1958 Convention on the Territorial Sea and Contiguous Zone or customary international law. It would follow, on this argument that France cannot make a reservation about such rules, under the guise of a reservation to Article 6 of the Continental Shelf Convention.”¹⁰³

Bowett mentions that it would be acceptable for France to challenge the legality of particular baselines, on grounds that they do not conform to existing international law. However, Bowett holds that there was no justifiable legal reason for France to claim a need of a reservation to preserve its right of challenge.¹⁰⁴ States do not always specify the grounds for their objections to a reservation, as no rule of international law requires this action. He provides examples of objections based on grounds of incompatibility, as the reason given by the Parties.¹⁰⁵ “In refusing to accept the Spanish reservations of the Convention on the Political rights of Women, the Czechoslovak Government stated specifically that they consider the reservations on Article I, II, III of the 1953 Convention, by the Government of Spain incompatible with the objectives of the Convention.”¹⁰⁶

Another example is the reservation formulated by the German Democratic Republic on Section 30 of the Convention on the Privileges and Immunities of the United Nations, since the first Convention did not contain a reservation clause. The United Kingdom objected by stating that the reservation is unacceptable because it is not of a kind which intending Parties to the Convention have a right to make.¹⁰⁷ Although the examples given are specific to the subject discussed, the expression of will to be bound by a treaty is the general principle evidenced in the act of accession, signature, or ratification. The expression of a will to impose a condition on an agreement, in the form of a reservation is in contradiction with the intention to be bound by the treaty, especially when the reservation is not permissible under the treaty.¹⁰⁸ Therefore, a general principle that ought to prevail is the will to accept the treaty in its entirety. Furthermore, the primary intention of the State must parallel the principles within *pacta sunt servanda*.

¹⁰⁰ Id. Number 23 1973 (CMND 5266) p.8

¹⁰¹ Id. p.8

¹⁰² D. Bowett, Reservations to Non-Restricted Multilateral Treaties in the British Yearbook of International Law Vol.48 1976 p.67

¹⁰³ Id. p.67

¹⁰⁴ Id.p.74

¹⁰⁵ Id.75

¹⁰⁶ United Kingdom Treaty Series No.50 1974 p.13

¹⁰⁷ Id.No.102 (Cmnd. 6174) p.16

¹⁰⁸ Op.Cit. Bowett p.76

Although the French reservations¹⁰⁹ to the 1958 Geneva Conventions on the Continental Shelf were not in contradiction with the object and purpose of the treaty, it was not particularly necessary to make a reservation. The point remains that it is fundamentally incompatible with treaty law in principle, to allow for reservations by individual States, unless the reservation is of very little concern to the international community, and without consequence to the effect of the treaty *per se*.

Rebus Sic Stantibus

The doctrinal discussion of the right of a State party to limit or derogate from treaty obligations according to Lissitzyn follows from his framework which identifies certain important factors.

“The basis of much of the law of treaties, as that of the law of contracts in municipal legal systems, is the community policy of protecting and giving effect to reasonable expectations, and in particular to those stemming from agreements. This policy underlies the primary function of interpretation which is to decide whether the application of an agreement to a particular situation is or is not in accordance with the shared intentions, expectations, and objectives of the parties. Therefore a treaty should not be applied in circumstances which are so different from those for which the parties sought to provide that its application would be contrary to the parties shared expectations and would defeat their apparent objectives. 110 Thus viewed, the problem of the effect of a change of circumstances on treaty relationships becomes in principle one of interpretation, of establishing the shared intentions and expectations of the parties. This approach is consistent with the goal of stability in treaty relations and with the principle of *pacta sunt servanda*. A treaty is not breached if it is not applied in circumstances in which the parties did not intend or expect it to be applied.”¹¹¹

According to Lissitzyn, some scholars regard the doctrine *rebus sic stantibus* as justifying the repudiation of excessive treaty obligations which often results in termination of a treaty. The argument is posited for analysis in following manner. The doctrine as understood by States is based juridically upon the intention of the parties at the time of the conclusion of the treaty. The same reference to the intention of the parties at the time of the conclusion of the treaty appears in the idea that the circumstances must be of a nature to take away the *raison d’etre*, or cause of the treaty.¹¹² A change of circumstances becomes relevant to the obligatory force of a treaty at the time of the conclusion of the treaty. It is not an objective rule of international law which is imposed upon the parties, but is a rule for carrying the intention of the parties into effect.¹¹³

In the Draft Convention on the Law of Treaties, Article 28 states:

“Rebus Sic Stantibus, (a) A treaty entered into with reference to the existence of a state of facts the continued existence of which was envisaged by the parties as a

¹⁰⁹ ICJ reports 1969 p.38

¹¹⁰ Lissitzyn Olivier *Treaties and Changed Circumstances* AJIL V. 61 1967 p. 895-922

¹¹¹ Id. p.896

¹¹² Chesney Hill, *The Doctrine of Rebus Sic Stantibus in International Law*, University of Missouri Studies 3 (1934) p. 8-9

¹¹³ Id. p. 75-77 See also: Law of Treaties, Harvard Research in International Law, 29 AJIL 653 (1935) p. 1097

determining factor moving them to undertake the obligations stipulated, may be declared by a competent international tribunal or authority to have ceased to be binding, in the sense of calling for further performance, when that state has been essentially changed.”¹¹⁴

This piece was to reflect a substantive norm as prescribed in the Draft Convention on the Law of Treaties. The norm was not defined as *de lege ferenda*, but as approximating existing law. McNair, views the issue as indicative of the intention of the parties. He refers to it as implied conditions, along with the disappearance of the *raison d’être* of the treaty, explaining that the entire subject matter must be placed under the interpretation and application of treaties.¹¹⁵

Conditions should be implied only with great circumspection; for if they are implied too readily, they would become a serious threat to the sanctity of a treaty. Nevertheless, the main object of interpretation of a treaty is to give effect to the intention of the parties in using the language employed by them, and it is reasonable to expect that circumstances should arise as they do in private law contracts, in which it is necessary to imply a condition in order to give effect to this intention. A test that is sometimes useful is to ask whether it is clear that, if the parties engaged in negotiating a treaty had adverted to some contingency, for example the occurrence of a situation *grave majeure*, would they have agreed to provide for it expressly and specifically. Then it would be reasonable to impute to them an intention to contract on the basis of such a provision, to imply it as a condition in the treaty.¹¹⁶

Brierly, referring to the judgment of the Permanent Court of International Justice in the Free Zones Case provides the following excerpt:¹¹⁷

“Despite the caution of the language of the Court it seems to define clearly the scope of the doctrine. The *clausula* is not a principle enabling law to relieve from obligations merely because new and unforeseen circumstances have made them unexpectedly burdensome to the party bound, or because some consideration of equity suggests that it would be fair and reasonable to give such relief. What puts an end to the treaty is the disappearance of the foundation upon which it rests; or if we prefer to put the matter subjectively, the treaty is ended because we can infer from its terms that the parties, though they have not said expressly what was to happen in the event which has occurred, would, if they had foreseen it, have said that the treaty ought to lapse. In short, the *clausula* is a rule of construction which secures that a reasonable effect shall be given to the treaty rather than the unreasonable one which would result from a literal adherence to its expressed terms only.”¹¹⁸ “On this view, the similarity between the doctrine of *rebus sic stantibus* and that of the ‘implied term’ in contract law is similar. Both doctrines attempt not to defeat but to fulfil the intention, the ‘presumed intention’ of the parties.”¹¹⁹ “As defined by the Permanent Court the doctrine of *rebus sic*

¹¹⁴ Op.Cit. p. 1096 Harvard Research in International Law (Substantive Norm)

¹¹⁵ Op.Cit. McNair in Lissitzyn p. 899

¹¹⁶ Id.. McNair in Lissitzyn p.900

¹¹⁷ Brierly, The Law of Nations (Waldock Press) 1963 p. 336-337

¹¹⁸ Id. p. 388

¹¹⁹ Id. p.388

stantibus is clearly a reasonable doctrine which it is right that international law should recognize.”¹²⁰

International Law Commission: Question of Treaties

“In treaties between States, the question of reservations has always been a thorny and controversial issue, and even the provisions of the Vienna Convention have not eliminated all these difficulties”.¹²¹ “The fundamental difficulty is to be found in the right to formulate reservations, since the question of objections to reservations or acceptance of reservations is dependent on that right”.¹²² According to the International Law Commission, the acceptance of reservations was presented in international practice, at the time when numbers of parties to multilateral treaties increased.¹²³ During the discussions, it became essential to choose a general rule of principle: freedom to formulate reservations, or no reservations permitted.¹²⁴ Once this choice has been made, it must be admitted that there are exceptions to the rule chosen. These exceptions may in turn be stated in general terms, or listed in detail. The original first version of the draft articles opted for the freedom to formulate reservations. The second choice is the exception stated in general terms.

At that time scholars of international law and certain States such as France, and the United States objected to such a principle. In the first report¹²⁵ on the law of treaties, Waldock wrote on a possible machinery for a tacit acceptance on reservations. Due to the reluctance of Australia, the United Kingdom and the United States, the wording of the article was amended without changes to the substance of the principle itself.¹²⁶

General Principles as a Concluding Solution

In contemporary international law, general principles¹²⁷ contain great importance as a source of rule making. General principles are found in all legal systems, hence their function in international relations is to provide a theoretical analytical foundation for international jurisprudence. Jurisprudence which originates from general principles can be used for legal decision making at the international level.

General principles are particularly relevant today, in the field of international human rights law and international environmental law.

In summary, the progressive development of human rights law requires giving attention to the relation between customary international law and general principles. In finding general principles

¹²⁰ Id. p.388

¹²¹ Yearbook of the International Law Commission 1977 Vol. II p.109-110 Difficulties attended the Commission’s discussion with regard to treaties to which international organizations are parties; and the text finally adopted did not receive unanimous support within the Commission. The question was discussed extensively in the Sixth Committee with widely diverging points emerging in 1977. Written comments on this topic were submitted by Canada, Federal Republic of Germany, USSR, the European Economic Commission, and the International Labour Organization.

¹²² Id.

¹²³ Yearbook of the International Law Commission 1981 Vol. II Part One p.61 (UN Publications NY)

¹²⁴ Id. 59

¹²⁵ Yearbook of the International Law Commission 1965 Vol. II p.61 (UN Publications NY)

¹²⁶ Id. Yearbook 1965 Vol. II p. 53-54

¹²⁷ Wolfgang Friedmann *The Uses of General principles in the Development of International Law* American Journal of International Law Vol. 57 AJIL 1963

in all of the legal systems in every region of the world, a new category for the rule is created, that has gained general acceptance. The rule, in the paradigm presented in this study, would derive from the principle of state responsibility.

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