THE STATE'S ROLE IN BUILDING OF A LEGAL SYSTEM OF LIABILITY AND COMPENSATION FOR TRANSBOUNDARY DAMAGE IN THE GULF OF MEXICO

LESTER DELGADO SÁNCHEZ

The United Nations Nippon Foundat(C)-2.-e5(I)4l Uwath9(u)1ind UFouII A

Disclaimer

The views expressed herein are those of the author and do not necessarily reflect the views of the Government of Cuba, the United Nations, the Nippon Foundation of Japan or the University of Tulane.

Copyright Statement

Contact Information

Lester Delgado Sánchez. lesteronu@gmail.com

Suggested citation:

Delgado, Lester. The State's Role in Building of a Legal System of Liability and Compensation for Transboundary Damage in the Gulf of Mexico. United Nations- Nippon Foundation of Japan Fellowship Program, 2015.

Abstract

Concerning international State responsibility and liability, States rarely face the situation or reach substantial agreements. Therefore, this research addresses the legal issue of the existence of an international legal regime of responsibility and liability for transboundary damage resulting from offshore drilling activities on the Continental Shelf.

The research begins by determining the nature and scope of the legal relationships involved in these events, from which different rights and obligations emerge due to the subjects' condition or the legal system they come from. An analysis on the state of development of various international law sources and on the most relevant cases and practices affirms the need to develop conventional legal frameworks. A critical approach to several positions on strict liability held by legal writers is adopted, especially on the so-called liability for risk and its serious implications for a coherent theory on international State responsibility and liability.

From this holistic approach, political consensus elements and conventional State practices in developing specific responsibility y liability regimes are reviewed. Consequently, proposals are made for the bases on which an international agreement for the Gulf of Mexico should be negotiated and adopted. Such an agreement should establish the rules governing the existence

Supervisors

Dr. Francois Bailet, Division for Ocean Affairs and the Law of the Sea. United Nations.

Ms. Valentina Germani, Division for Ocean Affairs and the Law of the Sea. United Nations.

Prof. Günther Handl, Eberhard Deutsch Professor of Public International Law, Tulane University Law School, U.S.

Acknowledgements

To the United Nations Division of Ocean Affairs and the Law of the Sea; the Nippon Foundation of Japan Fellowship; the Ministry of Foreign Affairs of the Republic of Cuba; and the Tulane University, for supporting the development of this research.

My deepest appreciation to Professor Günther Handl, Ms. Valentina Germani, Dr. François Bailet and Ms. Simone Dempsey, for their kind support and constant guidance throughout this research.

My profound gratitude to my friends Elier and Yudelkis, whose contribution was essential to this work.

Last, and most importantly, I thank and dedicate this work to my family, my beloved wife and, especially, to my life's joy, my little Susana.

Introduction

traditional tort theory of negligence in this area. The need for international rules to determine liability and compensation following such an incident is clear."[6]

In the case of Deepwater Horizon (April 22, 2010), an estimated 206 million gallons was spilled into the Gulf of Mexico, being the largest accident of this type in U.S. history. After five years of law suits in U.S. courts, the federal government and Gulf Coast states announced a record-setting $18.7 billion

Juridical problems

Legally speaking, a general question arises: Is it necessary to establish an international responsibility and liability regime in the Gulf of Mexico to ensure compensation to the victims of transboundary damage resulting from oil prospecting and drilling activities on the Continental Shelf?

In order to answer this question, the following specific objectives are set: (1) To determine the nature and scope of the rights and obligations contained in the international legal relationships established in relation to this matter and the subjects involved; (2) To analyze the state of development of the various sources of international law and their applicability to an event of this nature; (3) To characterize the different international State responsibility and liability regimes and to assess the legal elements on which they are based, according to existing legal writings; (4) To establish the need to develop a conventional legal framework specifically for offshore activities, as well as the legal basis of an eventual international agreement on responsibility and liability in the Gulf of Mexico.

To achieve these objectives, this research has been divided into four Chapters. Chapter 1 is aimed at clarifying the actual scope of the legal relationships established in an event of this type and their content. This will enable us to navigate the cloudy waters of the discussions held by legal writers, in which different rights and obligations are often confused due to the subjects' condition or the legal system they come from. In Chapter 2, a critical analysis will be conducted on the state of development of international law sources and the differing views held by legal writers on the scope of related international decisions will be reviewed.

In Chapter 3, a critical assessment will be made of the various elements used by legal writers to justify or argue in favor of certain types of international State responsibility and liability regimes. To conclude, Chapter 4 aims to determine political consensus elements and some conventional practices in the development of responsibility and liability regimes for certain activities at the international level. Taking into consideration the future conclusions of this research, the last heading will propose

negotiations on a responsibility and liability regime for the Gulf of Mexico should be held.

Given the limited space typical of this type of research, some related matters will not be addressed. Nevertheless, this research has the objective of going as deeply as possible into existing controversial debates among legal writers. Efforts will be made to maintain a holistic approach to fragmentary analyses, by upholding the integrity of international law as a coherent whole. The above is in keeping with the efforts to increase the protection of our oceans and develop a growingly responsible attitude towards our planet and the human race.

Part I. -

legal relationship between a State and a person to exist, an international

regime.[21] Likewise, due to the complexity of these operations, the operator will

of Origin and are established between the alleged responsible and the victims with legal standing.

These four legal relationship systems are applied to a reality: the event; but each one of them has their own content. Regardless of the effectiveness of the recourse, a non-State victim shall not have the right to compensation, but several rights according to the relevant legal relationship system. In case of environmental damage, local courts would likely impose a strict liability to the responsible. Similarly, the non-State victim would probably lack locus standi to demand compensation in the courts of the State of Origin. Likewise, the victim may appeal to its State of nationality, for it to either exercise or not its right to diplomatic protection against the State of Origin.[24]

Similarly, there will be not a single obligation to compensate for the damage, but different obligations to compensate for different types of damages. This will be determined according to the different subjects and the content of the national or international legal relationships.[25] Although everything is interconnected by the event as a whole, this part of the research will focus on determining the scope and content of international legal relationships resulting from transboundary damage.

Unless otherwise provided by States by means of a treaty, it may be affirmed that there is no international legal relationship between the State of Origin and the private victims of the transboundary damage or between the Affected State and the operator. First of all, in order to determine the existence of an international State liability regime for transboundary damage, the rights and obligations of States, as subjects of international law, must not be confused with

---

otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to pecuniary compensation for death or injury to the person, or damage to or loss of tangible property, caused by an act or omission which is alleged to be

the rights and obligations of victims, operators and subcontractors, as subjects of national law.

Let us review at this point the content of the primary international legal relationships, so as to determine the origin and scope of the rights and obligations of States.

1.2.- Origin and nature of the primary general rights and obligations of States.

To disregard the existence of international law as an integrated whole is a serious methodological mistake if the intention is to discuss the content of its legal relationships. Therefore, this section is aimed at analyzing the content of some international legal relationships relevant to this topic as a whole. A thorough analysis of this topic will be conducted in Chapter 2. According to Boyle "[n]either conflict nor fragmentation are necessary consequences of the interaction of international environmental law with other branches of international law. In practice, international tribunals have usually found various ways of applying international law as an integrated whole, except where the parties themselves have made this difficult through the balkanization of dispute settlement and the selective choice of applicable law."[26]

In our analysis, the successive approximations method will be used on the object of study, being understood in this research as a set of international legal relationships which arise from transboundary damage resulting from the exploitation of natural resources on the Continental Shelf. Through a holistic approach, the question of the more general rights and their dynamic counterpart, the obligations, will be immediately addressed.

1.2.1.- The right of States over their natural resources under permanent sovereignty.

When examining the content of legal relationships resulting from transboundary damage caused by offshore activities, it is understood that the primary origin of the rights involved lies on the self-determination over the natural resources

[26] Boyle, Alan. "Relationship between International Environmental Law and Other Branches of International Law." at The Oxford Handbook of International Environmental Law. Oxford University Press, 2006, p.145.

under the sovereignty of a State. This international rule of customary law has a general and undisputed character. This right enjoys a wide conventional support and is one of the pillars of the contemporary international legal system. Just to mention an example, "the right of peoples to freely use their wealth and natural resources"[27] is recognized in the first article of every International Covenant on Human Rights.[28]

Regardless of the validity of Resolution 1803 (XVII) on Permanent Sovereignty over Natural Resources,[29] it reflects that, as part of the right to use the natural resources, States shall be able to affect the property of private persons. For instance, nationalization is a lawful act by its sovereign nature; nevertheless, it generates an obligation to compensate[30] whenever a property right is considered to be affected. As well noted by Fleming, the nations of the international community, virtually without exception, have fully recognized the right of any State to nationalize, since, in his view, it is axiomatic that no State may interfere in the sovereign right of another State.[31]

Two important conclusions to our research are drawn from this reflection. Firstly, the exercise of the rights related to the exploitation of natural resources is a matter of sovereignty of States, even when private persons take part in their exploitation. Secondly, despite the lawfulness of freely using these natural resources, under permanent sovereignty, if property rights are affected, then the ofthe

demand responsibility from another State.[46] Nevertheless, the road to diplomatic claims is tortuous for States and unsafe for private victims, whose interests may become less salient due to a greater political interest. Let us not forget the Swahili proverb “When the elephants fight, it´s the grass that gets trampled.”[47]

Additionally, the international regime for the protection of foreign investments is

The international investment law and the environmental law may be two different branches, but they must be consistent with the main tree: international law. Regardless of all legal-theoretical argument, it is a fact that in foreign investment, underdeveloped States are, as a general rule, the responsible parties.[50] However, concerning hazardous activities likes use of nuclear energy or deep-water oil prospecting, those responsible will generally be developed States. The only common element is that in both international systems the interests of major transnational corporations prevail.

Let us conclude this general review with an approach to the obligations of States not to harm the marine environment and the interest of other States. Subject to a subsequent analysis on UNCLOS, at this point it would be interesting to compare articles 139[51], 235[52] and 263[53] of the Convention.

---

[50] See, Olivet, Cecilia., and Eberhardt, Pia., "Profiting from injustice. How law firms, arbitrators and financiers are fuelling an investment arbitration boom." Published by Corporate Europe Observatory and Transnational Institute. Brussels/Amsterdam. 2012. https://www.tni.org/es/publicacion/cuando-la-injusticia-es-negocio?content_language=en

[51] Part XI. The Area. Article 139 Responsibility to ensure compliance and liability for damage.

1. States Parties shall have the responsibility to ensure that activities in the Area, whether carried out by States Parties, or state enterprises or natural or juridical persons which possess the nationality of States Parties or are effectively controlled by them or their nationals, shall be carried out in conformity with this Part. The same responsibility applies to international organizations for activities in the Area carried out by such organizations.

2. Without prejudice to the rules of international law and Annex III, article 22, damage caused by the failure of a State Party or international organization to carry out its responsibilities under this Part shall entail liability; States Parties or international organizations acting together shall bear joint and several liability. A State Party shall not however be liable for damage caused by any failure to comply with this Part by a person whom it has sponsored under article 153, paragraph 2(b), if the State Party has taken all necessary and appropriate measures to secure effective compliance under article 153, paragraph 4, and Annex III, article 4, paragraph 4.

3. States Parties that are members of international organizations shall take appropriate measures to ensure the

From the above, it may be concluded that besides the obligation to monitor the activities of private persons under their control or jurisdiction, States have other direct obligations. Failure of States to comply with any of these obligations entails responsibility and liability.

Two specific and direct obligations for States arise from articles 194.1 and 194.2. On one hand, it establishes that states shall take all measures consistent with this Convention that are necessary to prevent, reduce and control pollution of the marine environment from any source[65] and, on the other hand, the States shall take all measures necessary to ensure that activities under their jus s 6

our view, instead of confirming the scope of these denigrated principles, through its proposals, the Commission has further diluted the content of the obligations of States in case of transboundary damage. Under this standard, “to ensure” is to prevent and minimize the risk of transboundary damage, which will also have to be significant.

By reviewing again the content of the remaining relevant direct obligations established at UNCLOS, we find the obligations to cooperate and to notify imminent or actual damage in case of transboundary harm.[73] Likewise, States shall keep under surveillance the effects of any activities, especially those they permit or in which they engage and are likely to have a negative impact on the environment.[74] They also have the obligation to produce and publish reports to assess the potential environmental effects of such activities.[75]

The obligations to assess, notify and collaborate among States were developed and codified by the Commission in its drafts articles on prevention and the draft principles on allocation of loss. The obligation to notify a risk is part of the international law,[76] but its exercise raises interesting questions when studying the responsibility and liability of States. On the basis of the good neighbor principle, States must obviously notify neighboring States in case of imminent danger. Nonetheless, consequences resulting from failure to notify dangerous activities and the potential effects of the neighboring State's response are not that clear.

In terms of obligations, one last question emerges from analyzing paragraphs 2 and 3 of UNCLOS Article 235. Paragraph 2 compels States to ensure that their legal systems contain recourse against persons under their jurisdiction in order to guarantee prompt and adequate compensation in respect of damage caused by pollution. Evidently, this paragraph seeks to ensure access of private victims of transboundary damage to justice. Nevertheless, paragraph 3 refers to the international level with the objective of assuring prompt and adequate compensation in respect of all damage caused by pollution.[78]

This reference to "all" indicates the existence of damage that cannot be compensated in accordance with national legal systems,[79] and still they must be compensated under the Convention itself and the international law, which it refers to. Let us review then the state of development of the various sources of international law, for a better understanding of the content of these international obligations of States and their eventual responsibility and liability.

international convention. Regardless of the good neighbor principle, it is obvious that the development of these activities is the sole responsibility of the State of origin.

[78] A pertinent assessment of the work of the ILC and its consequences on the balance between the access to justice of private persons and the claims between States may be consulted at Boyle, A.E. "Globalizing Environmental Liability: the interplay between National and International Law." at Multilevel Governance of Global Environmental Change: Perspectives from Science, Sociology and the Law, Cambridge University Press, 2006, pp. 536-559

[79] This would be the type of damage against the res publica of a State or against private victims that would not or

Chapter 2. Sources of International Law and State Practice. Assessment of and contribution to the content of international legal relationships on responsibility and liability of States, in case of transboundary damage.

Article 38.1 of the Statute of the International Court of Justice clearly determines the sources of international law.[80] This article considers treaties as the primary source of contemporary international law.[81] These treaties alone cannot solve the numerous conflicts generated by the very life of nations. Therefore, the need to appeal to custom and general principles of law increases due to the insufficient development of conventional law on a specific issue. Nevertheless, determining the existence of a legal provision under custom or general principles is, above all, a matter of subjective assessment. The task is even complex if an undisputable rule, like the prohibition of the use of force[82] and the current tendencies to undermine said prohibition,[83] is analyzed.242.7645 316.077]/Subtype /Foc

treaty that generally regulate the general principles of environmental law.[85]

The question of international liability for injurious consequences arising out of acts not prohibited by international law will negatively result in: (1) a draft article that essentially upholds the idea that States must foresee that, while conducting their dangerous activities, they do not cause transboundary damage; (2) the question of liability for damages will be reduced to a timid draft principle on how to assign loss. On the limited legal validity of these principles, suffice it to quote the Commission itself: “It did not attempt to identify the current status of the various aspects of the draft principles in customary international law and the way in which the draft principles are formulated is not intended to affect that question.”[97]

Summarizing the work of the ILC, the divide generated by the approach adopted in its works on State responsibility brought up the wrong question. The attempts to answer it affected the very system of international State responsibility. Consequently, it would seem lawful to harm another State as a result of acts not prohibited by international law. The lesson learned confirms the old proverb that goes: «As the twig is bent, so grows the tree».

2.2.- Custom ary International Law.

Under Article 38.1, custom is provided as a source of international law as it reflects a uniform and repeated practice of subjects of international law. Additionally, this standard of conduct must possess the subjective element of opinio iuris sive necesitatis.[98] This implies that States must be convinced they are acting under the law.

Custom is the oldest source; it originates from the fact that some States behave the same manner before a relation affecting them: such conduct, when continued and visibly adopted by a high number of States without opposition of others, is transformed into an international acquiescence, becomes part of the rules governing the generality of States, turns binding as a legal provision.[99] Its importance lies in the fact that “[i]nternational obligations may be established by

a customary rule of international law, by a treaty or by a general principle applicable within the international legal order."[100] Additionally, it is important to point out that treaties and custom are interdependent. As stated by Sands, custom may become a treaty and treaties may confirm the existence of custom.[101]

Moreover, we agree with professor Handl on the impossibility to have a practice indicating the existence of a strict liability regime, including for an ultra-hazardous activity.[102] We even question that someday a uniform and repeated State practice of repairing transboundary damage voluntarily and spontaneously may exist. The Cosmos 954 incident is evidence that even before the clearest conventional rules of strict liability, States will try to deny international responsibility. We must not forget that "[t]he matter was settled by a payment of three million dollars without admission of liability."[103]

In such complex and polemic matters, affirming the existence of a customary rule, without jurisprudential support, is mere speculation; even more if the intention is to affirm the existence of an entire legal framework. The debate may be transformed into the byzantine discussion on whether a glass is half full or halion otS2(ul)6(l)6(r)7(nla.)2Tc 0 Tw 121 0.004 Tc 0.078 Tw 0.ut ades t(es)10(n t)2(h)1

2.3.- General Principles of Law

international responsibility and liability of States for transboundary damage. Most of the authors[121] study the existence of these elements, although there is an extensive legal debate on the potential scope of these rules.[122]

2.4.1.- Cases cited by legal writers in support of the thesis on a strict liability of States for transboundary damage .

2.4.1.1.- Trail Smelter Case. United States vs. Canada. Arbitration -1938.[123]

This is a case of transboundary damage in US territory, caused by a great amount of sulfuric dioxide emanating from a factory located in Canadian territory. The tribunal issued the following award:

"The Tribunal, therefore, finds that the above decisions, taken as a whole, constitute an adequate basis for its conclusions, namely, that, under the principles of international law, as well as of the law of the United States, no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence."[124]

The legal writers are divided in their analyses on the scope and content of this case. Some of them affirm that this is not a case of liability sine delicto, for they consider the case was resolved under the traditional regime of responsibility for wrongful act.[125] This position is based on the wrong supposition that the traditional regime of responsibility for wrongful act does not include the liability

[121] See, Fitzmaurice, Malgosia., "Environmental protection and the International Court of Justice." Fifty Years of the International Court of Justice. Essays in Honor of Sir. Robert Jennings. Cambridge University Press, 1999, p.300.
[122] The minority of authors believes that none of these rules would be applicable to a strict liability regime for lawful activities. See, e.g., Barstow, Daniel., "Transboundary Harm. The International Law Commission's study of international liability." American Journal of International Law, Vol. 80, 1986, p.320.
[123] Trail smelter case (United States of America v. Canada). Award of 16 April 1938 and 11 March 1941. U.N.R.I.A.A., Vol. III. 2006, pp. 1905-1982. http://legal.un.org/riaa/vol_III.htm. An extensive study of the case by different writers can be found at "Transboundary Harm in International Law. Lessons from the Trail Smelter Arbitration." Ed. Rebecca Bratspies and Russell Miller, Cambridge University Press, 2006.
[124] Id. p. 1965.
[125] See, Barboza, Julio., "Liability: Can We Put Humpty Dumpty Together Again." Chinese Journal of International Law, Vol. 1, Issue 2, 2002, p. 517.

In conclusion, the arbitral award has the virtue of simplicity. The tribunal determined, in an evident and clear manner, the existence of serious damage. As a consequence, it established the strict responsibility of Canada, based on the international responsibility generated by allowing the use of a territory in a manner affecting another State. Nonetheless, in assessing the damage, the arbitral tribunal was strict and ruled out all liability in cases of indirect, remote or uncertain damage.[143]

2.4.1.2.- Corfu Channel case. United Kingdom v. Albania. ICJ -1949.[144]

In 1946, British vessels Saumarez and Volage sunk in Albanian territorial waters. While exercising their right to innocent passage through the Corfu Channel, they hit some mines located in Albanian territorial waters.[145] The case was taken to the International Court of Justice, which delivered its judgment on 9 April 1949. The content of this judgment has generated a strong legal debate on the existence of an international obligation of States to make reparations for

of a strict responsibility regime for States that cause transboundary damage. Other authors[148] consider this question irrelevant, since the liability analysis was

of result, there will be no need to prove the subject's fault or intention, for his or her relation to the result will suffice.

mines could not be planted without the consent of Albania. Consequently, from its mere knowledge, the obligation to notify and warn the British authorities also "emerges". This is not an object of discussion, for it implies a clear wrongful behavior, understood as negligent or serious misconduct.

In this context, the Court judgment must be interpreted systematically: “The obligations incumbent upon the Albanian authorities consisted in notifying, for the benefit of shipping in general, the existence of a minefield in Albanian territorial waters and in warning the approaching British warships of the imminent danger to which the minefield exposed them. Such obligations are based, not on the Hague Convention of 1907, No. VIII, which is applicable in time of war, but on certain general and well-recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war; the principle of the freedom of maritime communication; and every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States.”[155]

The conclusion is not the need to determine the fault, understood as negligence or fraud, to demand State responsibility. In this case, Albania's knowledge of the activities conducted in its territory was determined, which is enough to invoke its liability. This, in turn, is a serious matter due to the wrongful character of its omission.

The degree of fault was very important when fleshing out the obligations to make reparations. Otherwise, the decision would have been obviously unjust, if the seriousness of the obligations breached by each party were considered in the abstract. The Court deemed the serious breach of Albania's sovereignty duly compensated by its mere recognition of the event.[156] Nevertheless, Albania

As well stated in the judgment, the obligations to notify and warn did not emanate from an international treaty, but from well-established general

transboundary damage. The primary obligation is deemed breached from the very moment the State does not fulfill its duty to protect the rights of other States in its territory. The liability will be aggravated so far as there is fault, construed as negligence or fraud.

2.4.1.3.-

Starting from the principle set in the Rainbow Warrior arbitration [168] that "any violation by a State of any obligation, of whatever origin, gives rise to State responsibility and consequently, to the duty of reparation," the ILC pointed out the following extract from the Gabcíkovo-Nagymaros case: "[it´s] well established that, when a State has committed an internationally wrongful act, its international responsibility is likely to be involved whatever the nature of the obligation it has failed to respect."[169]

The abovementioned implies that, if an international obligation of result existed, as in the Trail Smelter and Corfu cases, breaching that obligation would imply, according to the Commission, an international responsibility for wrongful act. Additionally, concerning the Gabcíkovo-Magymaros judgment, this would imply a liability to make reparations that does not disappear, not even before circumstances that allow the exclusion of the act wrongfulness, because "[a]s soon as the state of necessity ceases to exist, the duty to comply with treaty obligations revives."[170]

In reference to reparations for environmental damage, there is also the Nauru v. Australia case brought to the ICJ.[171] This case was decided over through an extrajudicial agreement, whereby Australia paid Nauru for damage caused.[172] In spite of the fact that there are no court decisions, this case evidences a tendency of States to evade judgments in demands relating to responsibility for environmental damage. To do so, extrajudicial offset agreements for damage are signed, without formal recognition of the responsibility.

Another interesting case is the claim against France for the South Pacific Nuclear Tests. Au stralia and New Zealand requested the ICJ to stop the nuclear tests announced by France in its overseas territories. In its famous preliminary award in 1973, the Court ordered inter alia that "…the French

out on the territory of New Zealand, the Cook Islands, Niue or the Tokelau Islands."[173] As a result of this provisional measure, France committed itself not to conduct such tests and the Court made a final decision, closing the case in

On these two last cases, it is interesting to verify the practice followed by the

Part II.- Bases for the creation of an international regime of responsibility and liability for transboundary damage resulting from offshore activities in the Gulf of Mexico.

Chapter 3. - Theoretica

The first element to be considered in terms of international State responsibility is that the ILC deemed the difference between responsibility and liability[189] to be unimportant[190]. Crawford explains that “in fact, the presence of the term ´liability´ on its own means no more or less than the term 'responsibility' would, and it is only the inclusion of an adjective that makes a difference…'responsability' as used in the ARSIWA and 'Liability' as it appears in the ILC's work on transboundary harm bear the same meaning.”

dolus, must be proved. When there is an 'objective' responsibility, suffice it to demonstrate the existence of damage and the causal link with the responsible subject. This type of responsibility is based on the fact that any harm or damage caused to another person is a wrongful civil act and generates the obligation to compensate,[193] unless there are exemptions.

In its concept of international State responsibility, the ILC rightly stated the thesis that there is no need to prove any fault for a breach of an international obligation to be a wrongful act. However, it omitted that the existence of a wrongful act presupposes the presence of harm or damage. The Commission seeks to demonstrate that "…there is no exception to the principle stated in Article 2…" and, to do so, it assumes that neither fault nor damage is necessary for a wrongful act to exist.[194]

From the viewpoint of the Commission, a wrongful act without damage takes place when a State does not enact a national law to comply with an obligation emanating from an international treaty.[195] This stance reflects a very limited concept of harm or damage and disregards the complex dynamics of the integration mechanisms of international law and domestic law in the State practice on treaties.[196]

Barboza demonstrates the invalidity of the Commission's thesis, when he wonders: What is an obligation to make reparations based on, if not on legal damage?[197] Obligation and right are the two sides of the content of legal relationships that make up international law. The breach of an international obligation

in the relationship: tangible or intangible property, singular acts by other persons, services, family relations.[198] In criminal matters, the doctrine of the 'legal good damage' is used.[199]

able to invoke successfully the responsibility of a specific State for the damage suffered as, inter alia, it will not be possible to establish causality."[203] The element of causality is inherent to any responsibility or liability regime and should not be confused with the 'fault'.

Clarifying the concepts avoids countless misunderstandings. As indicated above, the State responsibility regime for wrongful acts implies a liability gradation, from 'objective' to 'subjective', but always in the presence of harm or damage. This gradation will depend on the type of primary international obligation allegedly breached.

It is a fact that, under this regime, there is no need to consider the State's intention to breach an international obligation. "Of course, no one doubts that either fault or intention (dol, dolus), when proved, are sufficient to generate responsibility."[204] This stance is clearly supported in the principle enunciated by international tribunals in the Trail Smelter and Corfu Channel cases. It is also supported by the practice of internationally sued States which, still without recognizing their 'fault', assume the reparation of transboundary damage, either directly or through private persons.

Having adopted this position, one might wonder whether for victims of transboundary damage to obtain more benefits, it is nece -1.72 To7( )(t)ngt tn mt( )]TJ 0te

In this regard, any

liability sine delicto and liability for risk concepts. All these concepts are assimilated into the so-called 'objective responsibility', for none of them requires considering the intention of the subject breaching the obligation, so that the subject's responsibility may be invoked.

In the legal analyses on transboundary damage, it is very common for the term strict liability/liability

affected State never decided on the convenience of assuming the cost-risk of an activity to be developed under the jurisdiction of another State.

Additionally, the economic benefit of the risky activity causing transboundary damage hardly contributes to the economic development of the affected State. For example, the use of nuclear energy, which unquestionably entails risks, generates benefits for only a reduced group of States with the technological capacity to develop it. In this connection, neither the State threatened by the risk, nor the majority of States may impose an international prohibition on another State, nor demand the transfer of that technology. Besides the principles of sovereign equality and non-interference in the internal affairs of States, the supposed interest balance test, essenti

As indicated before, the international case law has never considered assessing the risk in order to analyze the lawful nature of transboundary damage. The national legislations regulating these questions normally establish a clear list of activities to be deemed risky. Nevertheless, this understanding does not exist internationally,[222] beyond the commitment undertaken by each State party to a treaty that regulates a concrete activity. Risk, as a basis for considering international State responsibility, will always introduce a significant degree of uncertainty, given the different levels of technological development and the access to it.

Likewise, understanding this type of liability based on illicit enrichment is a conceptual mistake.[223] This would require proving that the State of Origin became rich as a result of the damage suffered by the Affected States and that it has the obligation to refund up to the extent of enrichment without legitimate cause.

Also, no international court has stopped to assess the lawful or unlawful nature of the activity breaching an international obligation. Neither metal smelting, nor mine planting, nor failing to comply with the obligation to notify a danger, nor diverting the water course of a lake, nor conducting nuclear tests, just to mention some examples, constitute activities prohibited by international law. However, when there is significant transboundary damage the State of Origin paid compensation.

In conclusion, the development of an international liability regime based on the concepts of 'risk' and 'lawfulness' of an activity, seems to generate more gaps than the classic responsibility regime itself. However, it is true that the general principles of law could support the existence of strict liability for these activities, as for any international obligation of result. According to Handl " …all major

[222] Based on a study on the agreements regulating these activities, Sands highlights the existence of at least four different approaches to what is understood by hazardous substance and activities. See, Sands, Philippe., "Principles of International Environmental Law." Second Edition, Cambridge University Press, 2003, p. 620.

[223] See, Barboza, Julio., "La Responsabilidad Internacional." p. 22. www.oas.org/dil/esp/132%20Barboza%20Julio%20def.pdf

domestic legal systems in one way or the other provide for strict liability regimes for 'sources of increased danger' or 'abnormally dangerous activities'."[224]

The disadvantage results from distorting, fragmenting, and limiting the scope of the classic State responsibility regime. We do not consider pertinent to for ac

Rather than a conceptual type of liability, this is essentially a mechanism to ensure a prompt and adequate compensation of victims.[225] In this regard, "[s]ubsidiary direct state liability is an eminently reasonable proposal."[226] Due to the characteristics of the legal relationships established in these treaties, States decide to attribute the condition of passive international subjects to private persons who benefit from an activity conducted under their responsibility. "After all, the policy reasons for imposing strict liability on the private operator vis-á-vis the individual transnational victims have equally compelling force on an international level, that is, between victim and acting states when damage is due to a transnationally hazardous activity."[227]

In our opinion, these conventional regimes may be an efficient mechanism in so far as the liability of the 'polluter' is not limited and the State guarantees 'subsidiarity' the compliance with the obligation to compensate any damage. Such compensation must occur under the full international responsibility of the State for harming the rights of another State.

After this first general approach to the issue of responsibility and liability regimes, let us review other two important issues. Focusing on transboundary damage resulting from offshore activities, the nature of the obligation considered violated will be analyzed, as well as the bases for its attribution to the State.

3.2.- The breach of international obligations .

In the proposed creation of a special regime of liability for risk, the supposed advantage for the victims of not having to prove the subject's fault,[228] is

[225] In these cases, compensation is the modality that has established itself through practice in order to repair damages. See, Dupuy, Pierre M., "La Responsabilité Internationale des États pour les dommages d´origine Technologique et Industrielle." Revue géné

transferred to the burden of “… proof that the state's lack of due care or due

course of conduct determined in some unspecific manner. The determination must, on the contrary, be extremely precise, in other words, the obligation must determine in a 'particular' manner what is required of a given branch of the State machinery."[232]

In the case of obligations of result, a specific conduct is not required. After a thorough analysis, the Commission concludes: "In the light of the foregoing considerations, there is, in the Commission's view, no doubt that, for the purpose of establishing how an international obligation which can be characterized in general terms as an obligation 'of result' is breached, what counts is the result actually achieved by the State as compared with the result required by the obligation. If the two results coincide, the obligation has been fulfilled; otherwise it must be concluded that the obligation has been breached. In other words, a comparison of the result achieved with the result which the

Commission starts from the understanding that the obligations of prevention "are a special type of the general category of obligations 'of result'.[236] Nevertheless, it seems to contradict itself by defining that "…there is a breach of that obligation only if, by the conduct adopted, the State does not achieve that result."[237]

The key to understand this apparent contradiction lies in the nature of the event to be prevented and the type of relation existing between the State, as an abstract entity, and the persons involved in the event. As rightly clarified by the Commission, these obligations are, in essence, obligations to prevent third persons from affecting the interests of other States.[238] In addition, the 'result'[239] is required as condicio sine qua non for the existence of breach of the obligation of prevention. The difference lies in the fact that two clearly differentiated conducts will serve as a basis for considering if the international obligation of prevention has been fulfilled or not.

Concerning international obligations of result, the conduct demanded is only expected or considered from the State. Obviously, States act through persons, but these persons shall be considered part of the State due to their condition or the activity they perform. For international obligations of prevention to be violated, two clearly differentiated conducts must coincide, which will be objectively and subjectively examined. Individuals not considered part of the State shall conduct themselves in a manner causing an event proscribed by international law. The conduct generated by this event shall perceived 'objectively'; that is, there will be no need to assess the intention of these subjects in order to continue with the analysis where assessing the subject's

These complex and abstract considerations makes us think that, occasionally, an international obligation may be deemed of result and also of prevention, depending on the subject involved in the event. For example, States have the obligation to ensure the inviolability of diplomatic offices. Such obligation shall be an obligation of result if the State orders its army to enter a diplomatic office, regardless of its motive to do so. In this case, it may be said this is an obligation of result considered to be breached from the very moment duly authorized individuals (soldiers) enter the diplomatic office. However, if a group of individual decides to attack that diplomatic office, the State shall be responsible only if it fails to take all necessary steps to protect the embassy from seizure, or to regain control over it.[241] Therefore, this will be an international obligation of prevention.

The above shows that the international obligation to prevent the conduct by a third party may be in turn construed as an obligation of result of its own acts; that is, they are directly attributed to the State. The special rapporteur Roberto Ago rightly presented the obligation of prevention as a special type of obligation of result, instead of conduct or of means. This same logic should be used in discussing the character of the obligation contained in UNCLOS Article 194.2. In our view, this international obligation should be considered of prevention and/or of result, according to the type of event and the subjects involved in it.[242]

3.3.- Bases for attributing responsibility to States in offshore activities.

As well indicated by Sands "[t]he responsibility of states not to cause environmental damage in areas outside their jurisdiction pre-dates the Stockholm Conference…"[243] and the negotiation of Principle 21.[244] The basis for the consequent development of this international obligation may be found in

[241] See, United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran), Judgment of 24 May 1980, I.C.J. Reports 1980, p.3.
[242] This is apart from the existence of general obligations and principles which impose on States an objective responsibility in the case of significant transboundary damage.
[243] See, Sands, Philippe., "Principles of International Environmental Law." Second Ed. Cambridge University Press, 2003, p. 241.
[244] See, Sohn, Louis B., "The Stockholm Declaration on the Human Environmental." Harvard International Law Journal, Vol. 14, 1973, pp. 432-515.

the Palmas Case[245] and subsequently recognized and adapted as appropriate in treaties and by international courts.

The question of attributing responsibility to States for transboundary damage in offshore activities has its own characteristics. The first notable element is that drilling activities on the Continental Shelf are conducted, as indicated in Chapter 1, in accordance with the exclusive sovereign rights, emanating from the international law, of the coastal State. The Coastal State alone may authorize and regulate the exploitation of natural resources over which there is permanent sovereignty.

Given the special characteristics of this activity, it could be argued that the occurrence of this event involves international State responsibility, for these being activities carried out by private persons exercising governmental authority and under the control of the State. The event evidences the existence of an act attributable to the State and considered as contrary to the conventional rights of other States.[246]

Based on Article 5[247], the 'event' could be considered State act attributable to the State, as a conduct of persons exercising governmental authority. Although this is not the classic act of sovereign power, taking into account its repressive character, it is undoubtedly an authorization to exercise sovereign rights[248] held exclusively by States at the international level.

international law is breached, [249] even partially.[250] Likewise, “[t]he irrelevance of the classification of the acts of State organs as iure imperii or iure gestionis was affirmed by all those members of the Sixth Committee who responded to a specific question on this issue from the commission.”[251]

Attributing to the State the conducts of private persons under its leadership or control has been thoroughly addressed by legal writers.[252] The approaches generally refer to all activities entailing risk and, therefore, start from the premise of a marked division between the conduct of private persons and that of States, as due diligence in the international obligation of prevention.

On this matter, two remarks are worth making. Firstly, international law requires higher and exclusive involvement of coastal States in the authorization and regulation of drilling activities on the Continental Shelfrnegulation of drn9t9004 Tc 0.004 Tw 8.0

link. This part is concluded without underestimating the need and importance of developing specific conventional regimes on transboundary damage for offshore activities, including a potential international agreement for the Gulf of Mexico.

3.4.-

countermeasures due to the breach of an obligation, force majeure, extreme danger, state of necessity, and compliance with peremptory norms.[260] In Chapter 4, some concrete examples of specific conventional regimes for transboundary damage in certain activities will be mentioned. At the moment, attention will be focused on those considered to be relevant to the development of a responsibility and liability regime in the Gulf of Mexico, namely, consent, force majeure, and state of necessity.

In the last two cases, they are invoked when the resulting situation is not totally or partially caused by the conduct of the State invoking responsibility. That is,

affected State is irrelevant to the undertaking of drilling activities on the Continental Shelf of the State of Origin. Nonetheless, based on the consent, it is possible and convenient to create specific regimes to determine the behavior of responsibility and liability in pre-determined situations.

3.5.- National and international victim compensation mechanisms.

There are several mechanisms involved in cases of transboundary damage n v 4 (i

Although there are various approaches to the concept of damage and the convenience of the adjudicating body that shall determine it,[271] specific conventional regimes provide the possibility to establish such rules.[272] However, the question of punitive damage should be briefly addressed.

In international law, the issue of punitive damage is clearly excluded from State responsibility.[273] Nevertheless, some national laws[274] positively consider this matter against the operator. A new conventional regime[275] in which operators of offshore activities assume an unlimited international liability should contemplate a balanced solution. At the international level, a priority would be stipulated for transboundary damage compensation.[276] Once this damage has been compensated, the operator shall pay punitive damage, for which States shall establish judicial cooperation mechanisms.

diplomatic protection mechanism is influenced by the political considerations of States. This situation would eventually be detrimental to private victims.[279]

At the national level, access of victims to justice will depend on the will of States and often on their technical-legal training.[280] At this level, it seems neither convenient nor possible[281] to satisfactorily address the compensation for direct damage to the affected State as public trustee[282] or official responsible[283] for the protection of the res publicae.[284] For example, while there is a law in the husprct</M9(i)6(at)11.9 rha(eni)60(f)2(r)7k10(J -0.018.6Td [(to)-(e)]TJni)6.9.9uprotms(Cs)ehif

not deny the existence of an international situation, understood as the need to develop increasingly strict conventional responsibility and liability regimes, which ensure efficient mechanisms for prompt and appropriate compensation of victims of transboundary damage.

4.1.1.- Declaration of the United Nations Conference on the Human Environment (Stockholm, 1972).

The Stockholm Declaration initiates the so-called modern era[293] of International Environmental Law, by providing a new global approach.[294] This is an undeniable milestone[295] concerning the evolution of that branch of international law and some of the principles therein "… apply also to the protection and preservation of the marine environment."[296] Regardless of the attitude adopted by the States[297], principles 21 and 22 are particularly important to our research.[298]

As a result of political discussions at that time and in conformity with the principles of the Charter of the United Nations[299], principle 21 recognizes the right of States to use their natural resources, while establishing the sole restrictioTd [(t)4prini h.i0.218 Tw00 -1.73 TD 1(pr)7()-3(p)10(ot)2(an)110(t004 T)-16( )0(ar)7(dr

This obligation is complemented in principle 22 by the obligation of States to cooperate in the development of an international responsibility and compensation legal regime for victims of potential transboundary damage. Both principles enjoy political consensus, although there are some differences when giving them a concrete meaning, within previously analyzed international law rules.

4.1.2.- The Rio Declaration on Environment and Development (Rio de Janeiro, 1992).

Principles 2 and 13[302] of the Rio Declaration reflected principles 21 and 22 of the Stockholm Declaration, respectively. It is true that slight changes in the rewording of said principles show a desire to dilute the primary responsibility of States[303] concerning the limits to the exercise of their sovereign rights. Nevertheless, the basic ideas of the Stockholm Declaration on the responsibility of States to avoid transboundary environmental damage still exist and the right of victims to compensation was further developed to the national level.[304]

As pointed out by Kiss, principle 21-Stockholm/2-Rio is repeated in numerous international documents.[305] Albeit its wording is unclear about some important issues[306], principle 21 has become "a customary international Law rule by its own virtue."[307] This stance has been supported by international courts in cases like Trail smelter[308], Corfu Channel[309], Lake Lanoux[310], Pulp Mills on the River

[302] See, "Principle 2. 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 and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction. (…) Principle 13. States shall develop national law regarding liability and compensation for the victims of pollution and other environmental damage. States shall also cooperate in an expeditious and more determined manner to develop further international law regarding liability and compensation for adverse effects of environmental damage caused by activities within their jurisdiction or control to areas beyond their jurisdiction." (emphasis added)

[303] For further details See, Guruswamy, Lakshman's opinion. "International Environmental Law: Boundaries, Landmarks, and Realities." Natural Resources & Environment, Vol. 10, 1995, p. 46.

[304] See, Sanwal, Mukul., "Sustainable Development, the Rio Declaration an Multilateral A6(o)-11.8.3(a)-6(nd 2.7(f)-6.7(ur)(

Uruguay,[311] just to mention some cases that have already been analyzed, and it was clearly reflected in the Advisory Opinion on the Legality of the Thereat or Use of Nuclear Weapons.[312] The efforts to implement principle 22-Stockholm/13-Rio at the international level have not been equally successful.[313]

These two principles were strengthened in Rio with the inclusion of principles 18 and 19.[314] They established an immediate notification system for disasters or emergencies, the effects of which could transcend national borders, and the duty to provide information to and consult with neighboring States on activities that may have an adverse transboundary effect.

Likewise, Principle 15[315] raises behavioral standards of States when developing their activities in the oceans, beyond the disputes on the principle's scope.[316] The principle was supported by the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea in the Advisory opinion on Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area.[317]

---

[310] Affaire du Lac Lanoux. (Espagne v. France), Sentence Arbitral du 16 Novembre 1957, U.N.R.I.A.A., Vol. XII, 2006, pp. 281-317.

[311] Pulp Mills on the River Uruguay case (Argentina v. Uruguay). Judgment of 20 April 2010, I.C.J., Reports 2010, pp. 14-107.

[312] Legality of the Thereat or Use of Nuclear Weapons (Advisory Opinion of 8 July 1996). I.C.J. Reports 1996, pp. 226-267. http://www.icj-cij.org/docket/index.php?p1=3&p2=4&k=e1&case=95&code=unan&p3=4

[313] See, Kiss, Alexandre. "The Destiny of the Principles of the Stockholm Declaration." The Stockholm Declaration and Law of the Marine Environment, Published by Kluwer Law International, 2003, p.62.

[314] Principle 18 "States shall immediately notify other States of any natural disasters or other emergencies that are likely to produce sudden harmful effects on the environment of those States. Every effort shall be made by the international community to help States so afflicted."
Principle 19 "States shall provide prior and timely notification and relevant information to potentially affected

The implementation of these principles, which are clearly interconnected[318], might seem obvious and advisable for deep-sea oil prospecting and production activities in the Gulf of Mexico. Regardless of their potential transboundary effects, these activities are developed within the limits of science and technology, in a semi-enclosed coastal sea with valuable natural resources and strong sea currents.

However, the absence of a regional legal framework to regulate responsibility and liability for transboundary damage in case of oil spills is a fact, beyond the UNCLOS general provisions. Let us add other notes on this convention and review some conventional State practices. For example, the responsibility and liability regime in outer space, because it is the strictest regime and the three Gulf States are party to it; and the civil liability regime for oil shipping, because it is directly related to offshore activities.

4.2.- Binding legal framework.

4.2.1.-The umbrella regime of the UNCLOS: Part XII. Protection and Preservation of the Marine Environment. [319]

UNCLOS is considered the Constitution for ocean affairs and the law of the sea,[320] having a comprehensive scope and almost universal acceptance.[321] Part XII of the Convention, entitled “Protection and Preservation of the Marine Environment”, provides the general principles on this matter and works as “an 'umbrella' or framework for the legal regime of marine pollution.”[322]

[318] See, e.g., Duvic-Paoli, Leslie-Anne and Viñuales, Jorge E. “Principle 2: Prevention” pp. 107-138. / Fitzmaurice, Malgosia., “Principle 13: Liability and Compensation” pp. 351-[illegible] / Okowa, Phoebe N., “Principle 15: Precaution” pp. 404-428. / Okowa, Phoebe N., “Principle 18: Notification and Assistance in case of Emergency” pp. 471-492. / Boisson de Chazournes, Laurence and Sangbana Komlan “Principle 19: Notification and Consultation on Activities with Transboundary Impact” pp. 493

Concerning the rights of States, Article 81 of the Convention clearly stipulates that “[t]he coastal State shall have the exclusive right to authorize and regulate drilling on the continental shelf for all purposes.” This exclusive right is confirmed in Part XII, Article 193, by stating “the sovereign right to exploit their natural resources.”

In accordance with Stockholm Principle 21- 2 Rio, UNCLOS will reaffirm the need for a balance between these rights and the rights of the other States, including environmental protection as a matter of general interest.[323] It will do so through a thorough regulatory standard[324]

rule res inter alios acta tertiis nec nocent nec prosunt, this implies that UNCLOS provisions are not binding for the US, unless they reflect an applicable rule of customary international law.[330] Secondly, neither Cuba nor the US recognizes the compulsory jurisdiction of the International Court of Justice. Therefore, the procedural options for an international transboundary damage claim, among Gulf States, are virtually non-existent under this Convention if there is no political will from the State of origin.

In summary, although UNCLOS provides a general regime of rights and obligations on the protection of the marine environment, which may be applicable to oil prospecting and production activities in the continental shelf, it does not establish an effective 'umbrella' to claim liability and compensation for transboundary damage in the Gulf of Mexico. Other conventional regimes must be reviewed, in search of key elements that will help develop a specific conventional regime in the Gulf of Mexico. According to State practice, the new regime will be an appropriate legal safeguard to protect important interests at stake.

4.2.2.- The absolute liability of States: Convention on International Liability for Damage Caused by Space Objects. [331]

To create a liability and compensation regime for transboundary damage caused by oil spills in the Gulf of Mexico, in which States play a primary role, would be crucial, but not a novelty in international law.

The United Nations General Assembly adopted Resolution 1962 (XVIII) by consensus in 1963. Operative paragraph 5 stated that “States bear international responsibility for national activities in outer space...”[332] This political principle was established in the Conventional International Law, in article VII of the Outer

[330] See, Vukas, Budislav. The Law of the Sea. Selected Writings. Ed. Vaughan Lowe, Oxford University Publica tions, Ocean Development, Vol. 45, 2004, p. 16.

[331] Convention on International Liability for Damage Caused by Space Objects. Adopted by the General Assembly 26th session. RES 2777 (XXVI). 29 November, 1971. http://www.unoosa.org/oosa/en/ourwork/spacelaw/treaties/introliability-convention.html

[332] United Nations, Office for Outer Space Affairs. “Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space.” General Assembly, 18th session. RES 1962 (XVIII). 13 December, 1963. http://www.unoosa.org/oosa/oosadoc/data/resolutions/1963/general_assembly_18th_session/res_1962_xviii.html

Space Treaty[333] and subsequently developed in the Space Liability Convention.[334]

The Space Liability Convention begins by stating that damage may on occasion be caused, notwithstanding the precautionary measures adopted.[335] This implies that "[w]hether the State took reasonable precautions or all necessary measures to avoid harm is irrelevant in imposing damages."[336] In the Convention, "both theories of international liability, that is, the liability for fault and the absolute liability (no reference to risks are made), are applicable."[337]

Fault shall be essential in attributing liability only if an accident occurs between States with space objects or launching States.[338] Its role shall be limited to determine the liability between the launching States. In these suppositions, fault shall be irrelevant to determining the liability of both launching States in relation to the damage caused in the territory or the property of a third State.[339] Such third State and its victims shall demand absolute liability for the damages and the launching States shall be jointly and severally liable. Except for this limited supposition, the use of the theory of liability for fault is irrelevant in the rest of the liability regime established by the Convention.

In general, the Convention provides that any damage caused to an aircraft or on the surface of the earth by a space object, shall fall within the principle of absolute liability.[340] Exoneration from this principle shall be only granted if the launching State proves that the claimant States caused the accident as a result of gross negligence or an act or omission done with intent to cause damage.[341]

---

[333] Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies. Adopted by the General Assembly 21st session. RES 2222 (XXI). 19 December, 1966. http://www.unoosa.org/oosa/oosadoc/data/resolutions/1966/general_assembly_21st_session/res_2222_xxi.html

[334] Space Liability Convention is the shortened form for Convention on International Liability for Damage Caused by Space Objects.

[335] See, preambular paragraph 3 of the Space Liability Convention.

[336] Kovudhikrulrungsri, Lalin and Nakseeharach, Duangden. "Liability Regime of International Space Law: Some Lessons from International Nuclear Law." Journal of East Asia and International Law, 2011, p. 295.

[337] Seara Vázquez, Modesto., Derecho y Política en el Espacio Cósmico. Ed. Universidad Autónoma de México. 1986. p.38. Unofficial translation of the reference: "Las dos teorías de la responsabilidad internacional, de la culpa y la absoluta (no se habla del matiz de riesgo), tienen aplicación."

[338] See, article III de la Space Liability Convention.

[339] See, article IV.I of the Space Liability Convention.

[340] See, article IV and V of the Space Liability Convention.

[341] See, article VI of the Space Liability Convention. Another exception is regulated in article VII, which establishes that the Convention shall not apply to damage caused to nationals of the launching States or foreign nationals participating in the launching operation.

This exceptional State responsibility and liability regime is the most rigorous in Conventional International Law. Nonetheless, it has been signed by 113 States and ratified by 92 States such as Mexico, the United States, and Cuba.[342] Its wide acceptance makes us wonder why this state liability regime has not been implemented in other areas of human activity, like deep-water oil prospecting and production or other hazardous activities. The answer is complex; but certainly it is not the magnitude of the potential transboundary damages what justifies this type of regime, but the underlying political context and the will of the States involved in its development.

The transboundary damages caused by the incident Cosmos 954, "…a much more serious and dramatic warning..."[343], pale besides the transboundary damages that may be caused by an oil spill in the Gulf of Mexico.[344] We must not waste the "window of opportunity" that opened, especially for the Gulf of Mexico, with the terrible accident Macondo, so as to create a liability regime for transboundary damages from oil spills. As indicated by Handl "…the memory of the accident fades and the pressure of public opinion diminishes…"[345]

Other elements of this liability regime may be of interest for our research. For instance, the dispute resolution mechanism initiated through diplomatic channels; and if no agreement is reached, a Claim Commission is established.[346]

In accordance with article XIX.2, the decisions of the Claim Commission shall not always be binding, since a previous agreement is needed. Viikari points out that "[t]he non-binding nature of the Liability Convention´s dispute resolution mechanism has been often criticized."[347] Although this criticism is well founded, it must be kept in mind that, in terms of compulsory jurisdictional State submission, not even the Statute of the International Court of Justice manages

[342] See, Sta

to implement it. However, certain balance is achieved by stipulating that the parties shall consider [the decision] in good faith, because bad faith could be on the reverse side of that coin. The solution to the case Cosmos 954 seems to confirm "… that questions of compensation for damage by a space object would be settled without major difficulty…"[348]

On the other hand, modifying the classic regime for exercising diplomatic protection, it is established that it does not require the prior exhaustion of any local remedies and that nothing prevents victims from filing direct claims to the launching State. In this case, the States could not file claims under the same concepts of personal damages.[349] In this innovative line, and to extend victims protection, the Convention thoroughly establishes who could be in a position to file claims against the launching State.[350]

Last but not least, it is striking how the Convention solves the problem of the applicable rule to determine the damage. Albeit the formula was agreed in accordance with international law and the principles of justice and equity, several approaches were brought to the negotiating table: the law of the launching State, the lex patriae or the lex loci.[351]

In our view, the solution is appropriate for a liability regime involving essentially sovereign States. However, it might be different in a regime where private entities play a major role. Let us review then a liability regime with those characteristics and in line with the goals of this research.

[348] Lyall, Francis., and Larsen, Paul B., Space Law. A Treatise. Ashgate Publishing Limited, 2009, p. 112.
[349] See, articles XI of the Space Liability Convention.
[350] See, articles VIII of the Space Liability Convention.
[351] See, United Nations, Official records., The preparatory work of the Space Liability Convention. http://www.unoosa.org/oosa/en/ourwork/spacelaw/treaties/travaux-preparatoires/liabilityconvention.html

4.2.3.- The strict liability of private entities and the complementary role of States: The conventional regime on Civil Liability for Oil Pollution Damage (CLC regime). [352]

The basic pillars of the CLC regime are a strict but limited liability for the shipowner, the existence of a system of compulsory liability insurance and the creation of a compensation fund for pollution damage. The Civil Liability

result of his actual fault or privity."[361] In such cases, the burden of proof is placed onerously on the victim.[362]

Other two elements deserve our attention, for they may be convenient when designing a liability regime in the Gulf of Mexico, in the case of transboundary damages caused drilling offshore activities: the demand for compulsory liability insurance for ships carrying a certain amount of oil[363] and the determination of a

This type of regulations should be considered in an eventual liability regime in the Gulf of Mexico, where hurricanes become per se a natural phenomenon of an exceptional, inevitable and irresistible character. As Handl points out "the crucial element in a state's original liability for private activities turns out to be the transnational significance of the risk associated with the activity concerned."[375] When Gulf States authorize the operation of oil rigs in their continental shelf, they do so knowing the existence of hurricanes as a risk. In 2005, the rig Thunder Horse was on the verge of collapsing as a result of hurricane Dennis.[376]

In summary, although it could be said that the CLC regime somehow replaces the international State responsibility with the shipowner's liability, its complementary mechanism evidences the prevalence of State responsibility in cases of transboundary damage. Also, "[t]here are several basic (and conceptually important) similarities between transnational damage caused by a tanker spill and transnational injury caused by an offshore drilling platform blowout."[377] The CLC regime may make important contributions to the creation of a legal framework in the Gulf of Mexico.[378] Despite its deficiencies, the CLC regime fulfills its duty of providing an effective possibility of compensation for the victims. Let us review then the question of creating a new legal framework of liability and compensation for transboundary damages in the Gulf of Mexico and the role States should play in it.

[375] Handl, Günther. "State Liability for Accidental Transnational Environmental Damage By Private Persons." American Journal of International Law, Vol.74, 1980, p. 541.

[376] See, New York Times article "In BP's Record, a History of Boldness and Costly Blunders." July 12, 2010. http://www.nytimes.com/2010/07/13/business/energy-environment/13bprisk.html?_r=0

[377] Hancock, William N. and Stone, Robert M. "Liability for Transnational Pollution Caused by Offshore Oil Rig Blowouts." Hastings International and Comparative Law Review, Vol. 5, 1982, p. 384.

[378] It should be noted that neither Cuba nor the US is a State party to these treaties. Mexico is party to the Convention on Civil Liability for Oil Pollution Damage (1992) and International Convention for the Establishment of an International Fund for Compensation for Oil Pollution Damage (1992). http://www.iopcfunds.org/about-us/membership/az-listing/#fund-0

4.3.- Basis for an agreement on transboundary damage from offshore activities in the Gulf of Mexico.

The establishment of a conventional responsibility and liability regime in the Gulf of Mexico is necessary, convenient and possible. It is necessary because this is an area where there is an intense offshore activity; there are considerable economic and natural resources which may be affected; and where two of the three largest oil spills in history have occurred.[379] It is convenient because, despite the existence of certain legal bases to demand responsibility and liability from a State for significant transboundary damage to another State,[380] this will be subject to political considerations, legal and diplomatic complicated procedures, wide discretional powers granted to international courts and the limited role of national courts. It is possible due to important issues with political consensus and a conventional international practice aimed at strengthening the mechanisms of international State responsibility and liability, in their obligation to ensure prompt and appropriate compensation for victims of transboundary damage in certain activities.

In the Caribbean area, there is a regulatory framework on marine pollution prevention, reduction and control,[381] including pollution from activities relative to Sea-Bed.[382] However, the issue of State responsibility and liability is insufficiently addressed in those agreements.[383] Despite being Mexico, the US and Cuba States parties to said agreements, they are not the ideal framework to reach an agreement on responsibility and liability for offshore activities in the Gulf of Mexico.

The multilateral character of this regulatory framework would make negotiating the text more complex, particularly because this is a matter on which an understanding is difficult to achieve. Naturally, an eventual agreement would complement the regional efforts; but negotiations should be considered as bilateral or trilateral, according to the interests of States involved.

In this connection, taking into account the lessons learned in the Ixtoc I case; the recent memory of the BP threat; and the new chapter of political cooperation that was opened with the restoration of diplomatic relations between Cuba and the US, it is convenient to propose potential bases for the negotiation of said

(10) It will be established that the responsibility and liability regime will be applied even in circumstances of force majeure, state of necessity or extreme danger.[392]

(11) In case of armed confrontation between the State of Origin and the Affected State, operator's liability will be excluded; however, State liability will remain if the spill was caused due to negligence or dolus. This is the only case where fault, as negligence or dolus, would have certain role.

(12) Two levels will be established with differentiated compensation mechanisms for significant transboundary damage. Firstly, operators will be held unlimitedly and directly responsible for all significant transboundary damage. Secondly, States will directly assume the payment to victims that have not been compensated in the first level.

(13) The first mechanism will establish as a principle that the courts of the damaged State will determine the extent of damage, leaving the possibility to consider punitive damage.

(14) As a complement to this mechanism, judicial cooperation will be established in a manner enabling the direct enforcement of civil judgments against operators.

(15) Likewise, States will undertake to ensure, within their legal systems, equal access to justice and non-discrimination to all victims, including transboundary damage victims.

(16) It would be convenient to assess the possibility to prioritize the enforcement of national judgments against operators, taking into account the nature of damage.[393] Thus, private victims would be favored in the payment and punitive damage would be pushed to the end.

---

authorities See, United Nations. “Report of the International Law Commission.” General Assembly, Official Records, Fifty-sixth session, Supplement No. 10 (A/56/10).

[392] As indicated before, these three circumstances excluding international State responsibility may not be invoked if the State contributed to the incident. This supposed contribution is considered part of the authorization regime with which any private person seeking to exercise exclusive sovereign rights of Coastal States must comply. Such rights must be acquired under International Law, not as a condition inherent to State territoriality.

[393] As established before, the priorities could be set in the same manner as in the definition of damage of ILC Principle 2, although punitive damage would be included at the end.

(17) Also, States will require operators to establish an insurance to cover certain level of damage and the costs of emergency measures adopted by States in case of disasters.[394]

(18) To establish an intermediate compensation level similar to an international fund or a general insurance pool would not be appropriate, due to

The need to exhaust all legal resources against the operator, whose liability will be unlimited; existing judicial cooperation mechanisms; and States' possibility to negotiate the remaining compensable amount will considerably reduce the number of contentious international conflicts among States. As long as private victims have priority in the enforcement of national judgments against operators, they will not be significantly affected as a result of political negotiations among States or States' ultimate relinquishment of their right to exercise diplomatic protection.

In summary, on the basis of the rules and practices established in international law, an international responsibility and liability regime for transboundary damage from oil spills in the Gulf of Mexico could be negotiated and created. Such conventional regime would bridge existing gaps; protect important economic and natural interests in the area; contribute to establishing higher prevention standards; and, in case of an accident, victims would be previously assured of an efficient compensation mechanism.

CONCLUSIONS

This research has shown that, despite the existence of rules which may be applicable to an event of this nature, a solid responsibility and liability regime for this type of events has not been developed in conventional law. International judicial statements have a limited scope. Moreover, there is a wide range of criteria, as well as confusion among legal writers, on the scope and type of responsibility and liability States should assume in case of transboundary damage.

The experience gained and the important economic and natural interests in the area enable us to address the necessity and urgency of developing a conventional responsibility and liability regime for the Gulf of Mexico. The success of this endeavor will depend on the political commitment of Gulf States to environmental protection, and to increasingly responsible international practices in which the role of States is essential and their commitment indispensable.

BIBLIOGRAPHIC REFERENCES

Books, articles and scientific research reports .

Adetoro, David O. and Adetoro, S. H., “Resolving Disputes Involving Accidental Pollution by Oil: What are the Challenges.” European Energy and Environmental Law Review, Vol. 18, 2009.

Akehurst, Michael., “

Barboza, Julio., “La Responsabilidad Internacional.” at www.oas.org/dil/esp/1-32%20Barboza%20Julio%20def.pdf

Barboza, Julio., “Liability: Can We Put Humpty-Dumpty Together Again.” Chinese Journal of International Law, Vol. 1, Issue 2, 2002.

Barboza, Julio., The Environment, Risk and Liability in International Law. Martinus Nijhoff Publishers, 2011.

Barros, James., and Douglas M. Johnston., Contaminación y Derecho Internacional

Crawford, James., State Responsibility: The General Part. Cambridge University Press, United Kingdom, 2013.

Crawford, James., The International Law Commission´s Articles on State Responsibility. Introduction, Tex and Commentaries. Cambridge University Press, United Kingdom, 2002.

Delgado Sánchez, Lester. "Los Pactos sobre Derechos Humanos: Un paso en el camino." Revista Temas, No. 59, Julio-Septiembre de 2009.

Diez de Velasco, Manuel., Instituciones de Derecho Internacional Público. Tomo I, Ed. Tecnos, Madrid, 1983.

Dixon, Martin., McCorquodale, Robert., and Williams, Sarah., Cases & Material son International Law. 5th Edition, Oxford University Press, 2011.

Duguit, Leon., "Lecciones de Derecho Público General: Impartidas en la Facultad de Derecho de la Universidad Egipcia, durante los meses de enero, febrero y marzo de 1926." Translated by Javier García Fernández, Ed. Marcial Pons, 2011.

Dupuy Pierre M., "The international Law of State Responsability: Revolution or Evolution?" Michigan Journal of International Law, Vol. 11, 1989-1990.

Dupuy, Pierre M., "La Responsabilité Internationale des États pour les dommages d´origine Technologique et Industrielle." Revue générale de droit international public. Publications, Vol. 27, 1976.

Dupuy, Rene-Jean and Piquemal, A., "Les Appropriations Nationales des Espaces Maritimes." Actualités du Droit de la Mer, Colloque de Montpellier, Paris, Pédone, 1973.

Dupuy, Rene-Jean., "Humanity and the Environment." Colorado Journal of International Environmental Law and Policy, Vol. 2, 1991.

Duvic-Paoli, Leslie-Anne and Viñuales, Jorge E. "Principle 2: Prevention." at The Rio Declaration on Environment and Development. A commentary. Ed. Jorge E. Viñuales, Oxford University Press, 2015.

Handl, Günther., "International Liability of States for Marine Pollution." The Canadian Yearbook of International Law, Vol. 21,1983.

Handl, Günther., "State Liability for Accidental Transnational Environmental Damage by Private Persons." The American Journal of International Law. Vol. 74, 1980.

Handl, Günther., "Territorial sovereignty and the problem of Transnational Pollution." American Journal of International Law, 1975, pp. 60-63.

Handl, Günther., "Balancing of Interests and International Liability for the Pollution of International Watercourses: Customary Principles of Law Revisited." The Canadian Yearbook of International Law, 1975.

Handl, Günther., "Case Note: Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area: The International Tribunal of the Law of the Sea´s recent contribution to International Environmental Law." Review of European Community & International Environmental Law, RECIEL 20 (2) 2011.

Handl, Günther., "Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration), 1972 and the Rio Declaration on Environment and Development, 1992." United Nations Audiovisual Library on International Law, at http://legal.un.org/avl/ha/dunche/dunche.html

Handl, Günther., "International Law and the Liability for Catastrophic Environmental Damage." Proceedings of the Annual Meeting, American Society of International Law, Vol. 105, March 23-26, 2011.

Handl, Günther., "Liability as an Obligation Established by a Primary Rule of International Law." Netherlands Yearbook of International Law, 1985.

Handl, Günther., "The Case for Mexican Liability for Transnational Pollution Damage Resulting from the Ixtoc I Oil Spill." Houston Journal of International Law, Vol. 2, 1979.

Handl, Günther., "Towards a Global System of Compensation for Transboundary Nuclear Damage: Reflexions on the Interrelationship of Civil and

International State Liability." at Nuclear Accidents: Liabilities and Guarantees, OECD, Paris, 1992.

Handl, Günther., "Transboundary Nuclear Accidents: The Post-

Kelson, John., “State Responsibility and the Abnormally Dangerous Activity.” Harvard International Law Journal, Harvard University, Vol. 13, 1972.

Kiss, Alexandre Ch., “Problèmes juridiques de la pollution de l´air.” Recueil des Cours de la Académie de Droit International, 1973.

Kiss, Alexandre., “The Destiny of the Principles of the Stockholm Declaration.” at The Stockholm Declaration and Law of the Marine Environment, Published by Kluwer Law International, 2003.

Kovudhikrulrungsri, Lalin and Nakseeharach, Duangden. “Liability Regime of International Space Law: Some Lessons from International Nuclear Law.” Journal of East Asia and International Law, Vol. 4,

Macrory, Richard., and Turner, Sharon., “Participatory Rights, Transboundary Environmental Governance and EC Law.” Common Market Law Review, Vol. 39, No 3, 2002.

Mahmoudi, Said., “Introduction.” at

Schlutter, Birgit., Developments in Customary International Law: Theory and the Practice of the International Court of Justice and the International Ad Hoc Criminal Tribunal for Rwanda and Yugoslavia. Martinus Nijhoff Publishers and VSP, Netherlands, 2010.

Schneider, J., World Public Order of the Environment: Towards an International Ecological Law and Organization. Ed. Stevens, 1979.

Schwartz, Priscilla., "Principle 16: The Polluter-Pays Principle." at The Rio Declaration on Environment and Development. Ed. Jorge E. Viñuales, Oxford University Press. 2015.

Seara Vázquez, Modesto., Derecho y Política en el Espacio Cósmico. Ed. Universidad Autónoma de México. 1986.

Shenker, Arden., "Oral Proceedings." Oregon Law Review, Vol. 15, 1971.

Sohn, Louis B., "The Stockholm Declaration on the Human Environmental." Harvard International Law Journal, Vol. 14, 1973.

Sornarajah M., The International Law on Foreign Investment. Third Edition, Cambridge University Press, 2010.

Starace, Vincenzo., "Protection and Preservation of the Marine Environment in the United Nations Convention on the Law of the Sea: An Appraisal." Italian Yearbook of International Law, Vol. 5, 1981.

Stoll, Peter-Tobias., "Transboundary Pollution." at International, Regional, and National Environmental Law. Eds. Fred L. Morrison and Rudiger Wolfrum. Kluwer Law International, 2000.

Subedi, Surya P., International Investment Law: Reconciling Policy and Principle. Second Edition, Oxford and Portland, Oregon, 2012.

Thornley, Drew. "Energy & Environment: Myths & Facts." Second Edition. Pub. Manhattan Institute, Center for Energy Policy and the Environment. 2009, at http://www.manhattan-institute.org/energymyths/myth8.htm

The Caribbean Environment Programme. “Protocol Concerning Co-operation and Development in Combating Oil Spills in the Wider Caribbean Region.” Cartagena de Indias, Colombia, 24 March 1983. http://www.cep.unep.org/cartagena-convention

The Caribbean Environment Programme. “Protocol Concerning Pollution from Land

United Nations. “Report of the International Law Commission.” General Assembly, Official Records, Fifty-sixth session, Supplement No. 10 (A/56/10). http://legal.un.org/ilc/reports/2004/

United Nations. “Report of the International Law Commission.” General Assembly, Official Records, Sixty-first session, Supplement No. 10 (A/61/10). http://legal.un.org/ilc/reports/2009/

United Nations. “Report of the International Law Commission.” General Assembly, Official Records, Thirty-fifth session, Supplement No. 10 (A/35/10). http://legal.un.org/ilc/reports/reports1980.shtml

United Nations. “Report of the International Law Commission.” General Assembly, Official Records, Thirty-second session, Supplement No. 10 (A/32/10). http://legal.un.org/ilc/reports/reports1980.shtml

United Nations. “Report of the International Law Commission.” General Assembly, Official Records, Thirty-third session, Supplement No. 10 (A/33/10). http://legal.un.org/ilc/reports/reports1980.shtml

United Nations. “Resolution on Permanent sovereignty over natural resources.” General Assembly, 17th session, A/RES/1803 (XVII). 14 December 1062. http://research.un.org/en/docs/ga/quick/regular/17

United Nations. “Rio Declaration on Environment and Development.” Report of the United Nations Conference on Environment and Development, UN Doc. A/CONF.151/26 (Vol.I), 12 August 1992, Annex I. http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm

United Nations. “Stockholm Declaration on the Human Environment.” Report of the United Nations Conference on the Human Environment, UN Doc. A/CONF.48/14, at 2 and Corr.1 (1972). http://www.un-documents.net/unchedec.htm

United Nations. “Yearbook of the International Law Commission 1956.” Vol. II., (Doc A/CN.4/96) http://legal.un.org/ilc/publications/yearbooks/1949_1959.shtml

United Nations. “Yearbook of the International Law Commission 1957.” Vol. II., (Doc A/CN.4/106)

United Nations. “Yearbook of the International Law Commission 1958.” Vol. II., (Doc A/CN.4/111) http://legal.un.org/ilc/publications/yearbooks/1949_1959.shtml

United Nations. “Yearbook of the International Law Commission 1959.” Vol. II., (Doc A/CN.4/119) http://legal.un.org/ilc/publications/yearbooks/1949_1959.shtml

United Nations. “Yearbook of the International Law Commission 1960.” Vol. II., (Doc A/CN.4/125) http://legal.un.org/ilc/publications/yearbooks/1960_1969.shtml

United Nations. “Yearbook of the International Law Commission 1961.” Vol. II., (Doc A/CN.4/134) http://legal.un.org/ilc/publications/yearbooks/1960_1969.shtml

United States Code., “Clean Water Act.” Codified at Title 33, Chapter 26, §§1251- 1274. Published at United States Code, 2006 Edition, Supplement 5, Title 33 - Navigation and Navigable Waters. http://www.gpo.gov/fdsys/granule/USCODE-2011-title33/USCODE-2011-title33-chap26-subchapI-sec1251/content-detail.html

United States Code., “The Foreign Sovereign Immunities Act.” Codified at Title 28, §§ 1330, 1332, 1391(f), 1441(d), and 1602-1611. Published at United States Code, 2006 Edition, Title 28 - Judiciary and Judicial Procedure. http://www.gpo.gov/fdsys/search/pagedetails.action?st=28+U.S.C.+1330&collection=USCODE&historical=true&granuleId=USCODE-2006-title28-partIV-chap85-sec1330&packageId=USCODE-2006-title28

United States Presidential Proclamation No. 2667, 28 September, 1945 and Executive Order No. 9633, 28 September 1945. http://www.archives.gov/federal-register/executive-orders/1945-truman.html

Jurisdiction of the Courts of Danzig. (Advisory opinion of 3rd March 1928), Collection of Advisory Opinions, C.P.J.I. Series B Nº 15. http://www.icj-cij.org/pcij/series-b.php?p1=9&p2=2

Legality of the Thereat or Use of Nuclear Weapons (Advisory Opinion of 8 July 1996). I.C.J. Reports 1996, p. 226. http://www.icj-cij.org/docket/index.php?p1=3&p2=4&k=e1&case=95&code=unan&p3=4

Military and Paramilitary Activities in and against Nicaragua. (Nicaragua v. United Estates of America), Judgment of 27 June 1986 (Merits), I.C.J., Reports 1986, p. 14. http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=66&case=70&code=nus&p3=4

Mosul Boundary case: "Article 3, paragraph 2, of the Treaty of Lausanne. Frontier between Turkey and Iraq." (Advisory opinion of 21 November 1925), Collection of Advisory Opinions, C.P.J.I. Series B Nº 12. http://www.icj-cij.org/pcij/series-b.php?p1=9&p2=2

Nuclear Tests case (New Zealand v. France), Judgment of 20 December 1974, I.C.J. Reports 1974, p. 457. http://www.icj-cij.org/docket/index.php?p1=3&p2=3&code=nzf&case=59&k=6b&p3=0

Nuclear Tests case. (New Zealand v. France), Order of 22 June 1973 (Interim Protection), I.C.J. Reports 1973, p. 135. http://www.icj-cij.org/docket/index.php?p1=3&p2=3&code=nzf&case=59&k=6b&p3=0

Rainbow Warrior Arbitration. (New Zealand vs. France). Award of 30 April 1990, U.N.R.I.A.A., Vol. XX, 2006, pp. 215-284. http://legal.un.org/riaa/vol_XX.htm

Seabed Disputes Chamber of the International Tribunal for the Law of the Sea. "Advisory Opinion of 1 February 2011 Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area."