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International Law and Nuclear Test Explosions on the High Seas*

S. AZADON TIEWUL**

This article is concerned with the nature and juridical consequences of international legal prescriptions regarding state responsibility for nuclear test explosions on the high seas. Specifically, the following two questions will be addressed: (1) Are nuclear test explosions on the high seas illegal? and (2) If so, what amount of international responsibility or liability attaches to a state engaging in such nuclear experimentation?

I
THE QUESTION OF LEGALITY

The question of the legality of nuclear or thermonuclear test explosions on the high seas arose two decades ago following American test explosions of hydrogen bombs in the "Pacific Proving Grounds." Two schools of thought emerged. It was argued by some that the test explosions were contrary to the laws of humanity and to the law of nations.1 Others, however, sought to justify the tests as necessary steps in the defense of the "free world."2 The controversy has recently been

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resurrected before the International Court of Justice on a complaint by Australia, New Zealand and the Republic of Fiji, against France, for the latter's nuclear testing over the Pacific Ocean. But a resolution of the issue can no longer be made by a simple endorsement of one view over the other. The developments, legal and otherwise, which have occurred since the origins of the controversy have seriously undermined the reasoning on which such earlier views were based and have recast the problem in substantially different terms.

Specifically, the legality of nuclear test explosions on the high seas turns upon three principal issues: (1) whether such testing may be deemed in violation of the freedom of the high seas; (2) whether the proven adverse ecological effects of such testing render it violative of international customary and conventional anti-pollution law; and (3) whether such testing is currently proscribed by multilateral non-proliferation treaties and other legal instruments for international disarmament.

A. THE FREEDOM OF THE HIGH SEAS

The doctrine that the high seas constitute a common heritage of mankind enjoyed, at its origin, less than universal approval. Nevertheless, it generated the norm that the high seas, being common to mankind, can belong to no single state. The ramifications of this customary law doctrine were, in 1958, recognized by the United Nations Codificatory Conference on the Law of the Sea. In article 1 of the

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3. Nuclear Tests Cases (Australia v. France; New Zealand v. France), in 12 INT'L LEGAL MAT'LS 749 (1973). These applications were filed on May 9, 1973. Subsequently, the Republic of Fiji applied for, and was granted, permission to intervene in the two cases, in accordance with article 62 of the Statute of the International Court of Justice. On May 16, 1973, the French Government formally voiced its objection to the jurisdiction or competence of the Court. Before considering the question of its own jurisdiction, the Court was requested to issue a preliminary order enjoining France from conducting any further tests until final disposition of the case. In addition to the judicial forum where the issue is being contested, the First Committee of the General Assembly of the United Nations is actively considering, as part of its agenda, an item entitled “Urgent Need for Suspension of Nuclear and Thermonuclear Tests.” For the proceedings of preceding sessions of the Committee on this topic, see U.N. Doc. A/C. 1/1030, 1036 (1973).

4. The doctrine received its first systematic exposition in Hugo Grotius's Mare Liberum (1609). Opposition to the “Grotian doctrine” has been voiced particularly by Selden, who originated the res nullius doctrine of the high seas in Mare Clausum seu de Dominio Maris (1635). Selden’s views, however, were often misinterpreted. That the high seas are res nullius was never intended to imply that no state could use the high seas because they belonged to no state. Rather, Selden’s legal formula purported to remove restraints upon individual state activity on the high seas. The difference between Grotius’s and Selden’s views may thus be little more than terminological.
Convention on the High Seas, the "high seas" are defined as all parts of the sea that are not included in the territorial sea or in the internal waters of a state. Article 2 makes "the high seas open to all nations" and declares that "no state may validly purport to subject any part of them to its sovereignty." The high seas freedoms, enjoyment of which is made expressly subject to conventional and other rules of international law, comprise, inter alia: freedom of navigation, freedom of fishing, freedom to lay submarine cables and pipelines, and freedom of overflight.

Nuclear test explosions on the high seas violate the doctrine of the freedom of the high seas, inasmuch as they interfere with two of its most crucial incidents: the freedoms of navigation and of fishing. Whether the high seas are regarded as res communis or res nullius, no state has the right to monopolize, for its exclusive use, that which either belongs to everyone or can legally belong to no one. As the language of article 2 suggests, of course, the scope of the doctrine is not exhausted by the constituent freedoms specifically mentioned; these are in addition to "others which are recognized by the general principles of international law." The frequent argument that nuclear testing is therefore legally permissible, however, ignores a fundamental rule of construction, that is, that the drafters could not have intended recognition of two inconsistent rights within the same regime. Even if a right, inconsistent with an express one, could be implied, it would necessarily follow that the express one would prevail to the extent of any such inconsistency. Inclusio unius would result in exclusio alterius. In addition, article 2 makes it clear that any other right within its scope "shall be exercised by all states with reasonable regard to the interests of other states in their exercise of the freedom of the high seas." As nuclear test explosions can only proceed safely after excluding totally other users of the seas, they can hardly be accorded the character of reasonable use.

The view that a state cannot, particularly in a res communis regime, exercise its own rights in disparagement of the rights of other states is an application of the doctrine of abuse of rights (sic utere tuo alienum non laedes). Asserted as the general basis of obligation in international law,

the doctrine has been deemed sufficient ground for liability resulting from pollution of international waters. As applied to such waters, the doctrine requires of each state the reasonable use of its rights—such use as will not prejudice the rights of others. "Reasonable use," although not precisely definable, has been deemed to encompass: (1) recreational and aesthetic uses; (2) uses for public consumption; (3) uses by fish, other aquatic life and wildlife; (4) agricultural uses; (5) industrial uses; and (6) navigational uses. While hardly exhaustive of the permissible uses of the high seas, the foregoing enumeration amply suggests, ex exclusio alterius, what uses may be impermissible and, accordingly, imposes the burden of justification upon states or persons contemplating any such impermissible uses. Nuclear testing on the high seas is not only inconsistent with, but completely obstructive of, all of the preceding legitimate uses. It must therefore be regarded as constituting an abuse of rights to the extent of such inconsistency.

B. INTERNATIONAL ANTI-POLLUTION LAW

The hazards of pollution have been adequately documented elsewhere. In response to these hazards, states have enacted anti-

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8. All but the last item are taken from U.S. DEP'T OF INTERIOR, FEDERAL WATER POLLUTION CONTROL ADMINISTRATION, REPORT OF THE COMMITTEE ON WATER QUALITY CRITERIA vi (1968). The work of this Committee was directed toward promulgating guidelines for states to adopt as standards for water quality control, as required by the Federal Water Pollution Act as amended by the Water Quality Act of 1965. See Federal Water Pollution Control Act, 33 U.S.C. § 1152 et seq. (1970).
9. The humanitarian considerations underlying the establishment of a caution zone have also been suggested as relevant to the issue of legality. As will be recalled, the United States tests which injured the Japanese nationals about 120 miles away had taken up an area of 400,000 square miles. The establishment of so vast a warning zone was unquestionably promoted by the purest of humanitarian considerations. But, as discovered, prevention of injury to the Japanese could only have been achieved by further quarantining some 144,000 square miles of high seas. Thus, the greater the scope of humanitarian measures, the greater the encroachment on the high seas. The question arises, therefore, as to whether such progressive exclusion of other persons from the high seas is to be regarded as justifiable by reason solely of the underlying motives. To this, Jowett responded:

I am entirely satisfied that the United States, in conducting these experiments, have taken every possible step open to them to avoid any possible danger. But the fact that the area which may be affected is so enormous at once brings this problem: that ships on their lawful occasions may be going through these waters, and you have no right under international law, I presume, to warn people off.

186 PARL. DEB., H.L. Deb (5th ser.) 808 (1954).
10. "Pollution" may be defined as: such contamination, or other alteration of the physical, chemical or biological properties, of any waters of the State, including change in temperature, taste,
pollution laws, assumed enforcement jurisdiction over areas of the high seas contiguous to their territorial seas, and ratified anti-pollution conventions of varying scope and effect. In recognition, however, that a uniform legal standard of general applicability can alone prevent further deterioration of the marine environment, while taking into account the diverse needs and interests of all states, declarations by international fora have begun to articulate individual state concerns in international juridical terms. In 1956, for example, the Conference of the International Law Association, meeting at Dubrovnik, adopted a resolution on the use of international rivers which has significance for analogous uses of the high seas. The directive contained therein

color, turbidity, or odor of the waters, or such discharge of any liquid, gaseous, solid, radioactive, or other substance into any waters of the State as will or is likely to create a nuisance or render such waters harmful, detrimental or injurious to public health, safety or welfare, or to domestic, commercial, industrial, agricultural, recreational, or other legitimate beneficial uses, or to livestock, wild animals, birds, fish, or other aquatic life.


In short, marine environmental pollution may cause "harm to living resources, hazards to human health, hindrance to marine activities including fishing, impairing of quality for use of sea water and reduction of amenities." Long Term and Expanded Programme of Oceanographic Research, Note by the Secretary General, U.N. Doc. A/7750, at 25 (1970).

12. Among the rules embodied in the resolution were the following:

III. While each State has sovereign control over the international rivers within its own boundaries, the State must exercise this control with due consideration for its effects upon other riparian States.

IV. A State is responsible, under international law, for public or private acts producing change in the existing regime of a river to the injury of another State, which it could have prevented by reasonable diligence.

VII. Preventable pollution of water in one State, which does substantial injury to another State, renders the former State responsible for the damage done.

Annex I, Resolution, 47 INT'L L. Ass'n 241-42 (held at Dubrovnick, 1956). The resolution was not without precedent. A century before its adoption, the Dutch Government had declared its position in relation to the Meuse River in almost the same terms:

The Meuse being a river common both to Holland and to Belgium, it goes without saying that both parties are entitled to make the natural use of the stream, but at the same time, following general principles of law, each is bound to abstain from any action which might cause damage to the other . . . . (T)hey cannot be allowed to make themselves masters of the water by diverting it to serve their own needs, whether for purposes of navigation or of irrigation.

which condemned "all alterations injurious to water, [and] the empty-
ing therein of injurious matter" has been repeatedly affirmed in
declarations by other regional organizations. Thus, the Sixth Session of
the Asia-African Legal Consultative Committee came to analogous
conclusions with specific reference to nuclear testing.¹³

Consolidation of these regional declarations was partially accom-
plished in the four Geneva Conventions of 1958,¹⁴ which contain

¹³. The Committee (which bore the name of the Asian Legal Consultative Committee
until 1958) was established on November 15, 1956. Pakistan (1959) and Thailand (1961)
have since joined the original members—Burma, Ceylon, India, Indonesia, Iraq, Japan
and the United Arab Republic. The Sixth Session's resolution reads, in pertinent part, as
follows:

(2) Scientific evidence examined by the Committee shows that every test explo-
sion of nuclear weapons results in widespread damage, immediate or de-
layed, or is capable of resulting in such damage; the present state of
scientific knowledge does not indicate that the harmful effects of such test
explosions can reasonably be eliminated. Such test explosions not only cause
direct damage, but pollute the atmosphere and cause fallout of radioactive
material and also increase atomic radiation, which are detrimental to the
well-being of man and also affect future generations.

(3) Having regard to its harmful effects, as shown by scientific data, a test
explosion of nuclear weapons constitutes an international wrong. Even if
such tests are carried out within the territory of the testing State, they are
liable to be regarded as an abuse of rights (abus de droit).

(4) The principle of absolute liability for harbouring dangerous substances or
carrying on dangerous activities is recognized in International Law. A State
carrying out test explosions of nuclear weapons is therefore absolutely liable
for the damage caused by such test explosions.

(5) Test explosions of nuclear weapons are also contrary to the principles
contained in the United Nations Charter and the Declaration of Human
Rights.

(6) Test explosions of nuclear weapons carried out in the high seas and in the
airspace thereabove also violate the principle of the freedom of the seas and the
freedom of flying above the high seas, as such test explosions interfere
with the freedom of navigation and of flying above the high seas and result
in pollution of the water and destruction of the living and other resources of
the sea.

Asian-African Consultative Committee on this point have the complete support of a
number of jurists. See, e.g., D. Bowett, THE LAW OF THE SEA, ch. 5 (1967). The
Specialized Conference of Caribbean Countries, meeting in Santo Domingo in 1972, also
recognized "the international responsibility of physical or juridical persons damaging the
marine environment," and reasserted "the duty of every state to refrain from performing
acts which may pollute the sea and its seabed, either inside or outside its respective
jurisdiction." For the text of this Declaration, see U.N. Doc. CCM/RC5 (1972).

T.I.A.S. No. 5578, 499 U.N.T.S. 331 (effective June 10, 1964); Convention on the High
(effective Sept. 30, 1962); Convention on the Territorial Sea and the Contiguous Zone,
Sept. 10, 1954); Convention on Fishing and Conservation of the Living Resources of the
several significant provisions regarding maritime pollution. The Convention on the Territorial Sea and Contiguous Zone provides, at article 24(1):\textsuperscript{15}

In a zone of the high seas contiguous to its territorial sea, the coastal State may exercise the control necessary to:
(a) prevent the infringement of its ... sanitary regulations within its territory or territorial sea;
(b) punish infringement of the above regulations committed within its territory or territorial sea.

Article 7 of the Convention on Fishing and Conservation of the Living Resources of the High Seas\textsuperscript{16} allows any coastal state to adopt unilateral measures of conservation appropriate to any stock of fish or other marine resources in any area of the high seas adjacent to its territorial sea, if such measures are not arrived at through negotiations with other interested states within six months. The purpose of this provision is expressed as “the maintenance of the productivity of the living resources of the high seas.”

Similarly, article 5(7) of the Convention on the Continental Shelf makes protection of the living resources of the high seas from “harmful agents” mandatory for all coastal states.\textsuperscript{17} And article 24 of the Convention on the High Seas requires states to “draw up regulations to prevent pollution of the seas by the discharge of oil from ships or pipelines, or resulting from the exploitation or exploration of the seabed and its subsoil, taking account of existing provisions on the subject.”\textsuperscript{18} Finally, article 25 of the same Convention requires the taking of measures to prevent pollution of the seas from the dumping of radioactive wastes, “taking into account any standards and regulations which may be formulated by the competent international organizations ... in taking measures against pollution of the seas or air space above, resulting from any activities with radio-active materials or other harmful agents.”\textsuperscript{19}

Although too cautiously drafted, the pertinent provisions of the Geneva Conventions represent important legal and political milestones

for an incipient world-wide anti-pollution law. Since 1958, they have been incorporated into the domestic laws of many states and have provided standards for action by international organizations. The Intergovernmental Maritime Consultative Organization (IMCO), 20 for instance, has sponsored three existing multilateral conventions relating to various aspects of maritime pollution. 21 Article 1 of the IMCO-sponsored 1969 Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties specifically entitles the contracting states to take

... such measures on the high seas as may be necessary to prevent, mitigate or eliminate grave and imminent danger to their coastline or related interests from pollution or threat of pollution of the sea by oil, following upon a maritime casualty or acts related to such a casualty, which may reasonably be expected to result in major harmful consequences. 22

Although the IMCO Conventions ostensibly address pollution by oil spillage, they also embody the general legal prohibition of all types and means of high seas pollution. 23 Given the illegality of pollution of the

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marine environment, the fact that it is effectuated not by oil spillage but by a nuclear test explosion is immaterial.

To similar effect is the Declaration of Environmental Principles adopted by the United Nations Conference on the Human Environment\(^\text{24}\) at its 1972 Stockholm meeting, Principle 6 of which states:

The discharge of toxic substances or of other substances and the release of heat, in such quantities or concentrations as to exceed the capacity of the environment to render them harmless, must be halted in order to ensure that serious or irreversible damage is not inflicted upon ecosystems. The just struggle of the peoples of all countries against pollution should be supported.\(^\text{25}\)

As the use of "must" instead of "shall," and the absence of specification suggest, it is doubtful that this principle imposes any legally enforceable obligation on states to halt toxic discharges. In contrast Principle 7 reads:

States shall take all possible steps to prevent pollution of the seas by substances that are liable to create hazards to human health, to harm living resources and marine life, to damage amenities or to interfere with other legitimate uses of the sea.\(^\text{26}\)

The obligation imposed by Principle 7 to protect the living resources and "legitimate uses" of the seas is also qualified, however, insofar as states are required only to take "all possible steps" toward this end.\(^\text{27}\)

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\(^{26}\) As Professor Sohn concludes, it might have been more useful if the Conference instead, or in addition, had in the first sentence imposed an obligation on states to take all practicable steps to halt the discharges of toxic and other harmful substances. There is such a general agreement on the special danger not only to ecosystems but also to human health involved in such discharges, that should an extra effort have been made at the Conference to embody stronger obligation in this paragraph, it might have succeeded here, though it had been rejected in connection with several earlier, more general principles.

Sohn, supra note 24, at 462.

\(^{27}\) Quoted in Sohn, supra note 24, at 463.

\(^{28}\) The significance of this qualification was demonstrated in the course of the proceedings in Sub-Committee III of the Sea-Bed Committee. When certain delegations
Only Principle 26 focuses explicitly, albeit rather compromisingly, on the nuclear weapon:

Man and his environment must be spared the effects of nuclear weapons and all other means of mass destruction. States must strive to reach prompt agreement, in the relevant international organs, on the elimination and complete destruction of such weapons.29

sought to condemn French nuclear tests over the South Pacific, the French delegation immediately responded that no country had ever before maintained stricter testing conditions regarding the prevention and monitoring of side effects; consequently, it contended, France had complied with whatever obligation it had under international law by having taken "all possible steps" to prevent pollution. See U.N. Doc. A/CONF.48/ PC/WG.1(II)/CRP.7 (1972).

29. Quoted in Sohn, supra note 24, at 508. Principle 26 originated from a Japanese proposal urging "every state possessing nuclear or thermonuclear weapons to put an end to the testing of such weapons in all spheres in order to prevent further deterioration of human environment on a global scale." Subsequently, the proposal was amended to read:

The testing and use of nuclear weapons and other weapons of mass destruction should be ended as early as possible in all environments in order to prevent further deterioration of the human environment on a global scale. U.N. Doc. A/CONF.48/PC/WG.1(II)/CRP.7/Rev.1 (1972); Sohn, supra note 24, at 508 n. 331 and accompanying text. Similar proposals were made by other states. See, e.g., U.N. Doc. A/CONF.48/PC/WG.1(II)/CRP.5/Rev.3, at 4 (1972) (draft proposal of Brazil, Egypt and Yugoslavia), and the Working Group itself accepted the following text: "Man and his environment must be spared the serious effects of further testing or use in hostilities of weapons, particularly those of mass destruction." U.N. Doc. A/CONF.48/4, Annex, at 5 (1972); Sohn, supra note 24, at 509 n.334 and accompanying text.


In the proceedings of Sub-Committee III of the U.N. Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor Beyond the Limits of National Jurisdiction, protection of the marine environment from pollution has likewise remained of utmost concern. Some delegations have gone so far as to connect the obligation to protect the marine environment with the fundamental right of human beings to a healthy human environment. See 25 U.N. GAOR Supp. 21, at 65-66, U.N. Doc. A/8021 (1953). Many of the draft instruments, prepared by or placed before the Sub-Committee, have advocated the adoption of a provision to the effect that the use of the oceans and the subsoil thereof "shall not conflict with the principle of freedom of navigation, fishing, research and other activities in the high seas." Others expressly provide that the use of the oceans for military purposes shall be prohibited. In furtherance of this anti-pollution spirit, the delegations of Australia, Canada, Chile, Colombia, Fiji, Indonesia, Japan, Malaysia, New Zealand, Peru, the Philippines, Singapore and Thailand submitted a draft resolution which declared that no further nuclear tests likely to contribute to the contamination of the marine environment should be carried out. U.N. Doc. A/AC.138/SC.3/L.22 (1972). The sponsoring countries based their proposal on the grounds that the test explosions
As the above evidence suggests, despite remaining controversy over certain narrowly-defined issues, the general illegality of nuclear testing on the high seas can no longer viably be resisted. What was once an “inchoate doctrine of ‘pollution’ in international law” has since evolved into a coherent and binding principle of customary international law or, at the very least, into a general principle of law recognized by civilized nations. All states, whether or not parties to an applicable convention, are thus bound not to pollute the seas. Accordingly, they must exercise their rights to exploit the resources of the high seas consistently with their obligation not to contaminate them; they must adopt measures to prevent all types of pollution, and abstain from causing damage either directly, to the marine environment of other states, or indirectly, to that of the international community as a whole.

C. Nuclear Disarmament

In 1963, three of the five nuclear powers concluded a treaty on the non-proliferation of nuclear weapons. This treaty sought to impose a ban on all nuclear test explosions in the atmosphere, outer space and “underwater.” Under article I(1), which contains the principal obligations of the parties, the contracting parties undertake “to prohibit, to

present a potential health hazard to the peoples in surrounding areas, contaminate the marine environment and have the capacity to threaten its living resources on which the economies of many island states are dependent.

30. Margolis, supra note 1, at 640.
31. In the North Sea Continental Shelf Cases, [1969] I.C.J. 3, the International Court of Justice held, inter alia, that the equidistance or median line rule in article 6 of the Geneva Convention was binding on Germany notwithstanding that she had not ratified the Convention. Denmark and the Netherlands contended that . . . although prior to the Conference, continental shelf law was only in the formative stage, and State practice lacked uniformity, yet “the process of the definition and consolidation of the emerging customary law took place through the work of the International Law Commission, the reaction of governments to that work and the proceedings of the Geneva Conference”; that this emerging customary law became “crystallized in the adoption of the Continental Shelf Convention by the Conference.”

Id. at 38. The International Court of Justice did not discount this argument. It accepted that it had some “validity . . . in respect of at least certain parts of the Convention,” although it declined to find that these included article 6. Id. In the present case, the analogous critical point in the development might be located at the Stockholm Declaration.

prevent, and not to carry out” at any place under their jurisdiction or control nuclear weapons tests or other nuclear explosions in the defined spheres. With the aim of securing a complete and verifiable ban on all nuclear tests, the phrase “any nuclear weapon test explosion” is related to “any other nuclear explosion,” so as to preclude any evasion based on the contention that a particular detonation was not a weapon test, but the explosion of an already tested device. Furthermore, no distinctions are made in favour of nuclear test explosions for peaceful purposes.

The treaty is to be of unlimited duration. The element of perpetuity is modified, however, by the further provision that each of the contracting states has the right to withdraw from its obligations whenever it determines that extraordinary events, related to the subject matter of the treaty, have jeopardized its sovereign interests.

Although hailed as “the single most effective instrument to control pollution and one whose terms have been scrupulously adhered to by the parties,” the treaty has two main problems. First, as a law-making treaty, it has no binding effect on non-signatory states, two of which have nuclear build-up ambitions and persist in conducting such nuclear tests. Second, the principal object of the treaty, which is “to impose limits on the nuclear arms race,” begs political questions of the most serious moment.

Nevertheless, the universal character which the treaty has acquired since its inception is significant. Although negotiated between the United States, the Soviet Union, and the United Kingdom, it was open for signature and ratification by any other state and has in fact been signed by one hundred and six states of varying political, social and economic predispositions. Universality in multilateral treaties is probative evidence of opinio juris on the matter to which it relates and hence of the emergence of a customary international law rule.

33. Test Ban Treaty, art. IV.
34. Id. This would appear to imply the recognition of a unilateral right of withdrawal by each contracting party. However, the qualification that the grounds invoked in justification of the exercise of the right be “related to the subject matter” of the treaty casts doubts upon this interpretation. On the right of unilateral termination of treaties in general, see Briggs, Unilateral Denunciation of Treaties: The Vienna Convention and the International Court of Justice, 68 AM. J. INT’L L. 51 (1974). See also, Tiewul, The Fisheries Jurisdiction Cases (1973) and the Ghost of Rebus Sic Stantibus, 6 N.Y.U.J. INT’L L. & POL. 455 (1973).
35. For the list of States parties to the Convention, see 1974 TREATIES IN FORCE 365.
II
THE QUESTION OF LIABILITY

That nuclear testing on the high seas is illegal has been demonstrated by reference to established customary and conventional international law concerning freedom of the high seas, preservation and protection of the marine environment and nuclear disarmament. A more crucial question, however, concerns the juridical consequences of such illegality. Does “responsibility” or “liability” attach automatically to a state in breach of international law, or is it dependent upon a showing of special injury by the injured state seeking to assert such responsibility?

Resolution of the above and like questions turns in large part upon the nature of the illegal act itself. Specifically, the injurious effects of nuclear test explosions on the high seas may be manifested on at least two levels. On the first level, the test explosion may cause material damage to the lives or property of the nationals of a state other than the testing state, or may otherwise impinge upon that other state’s sovereignty. In such case, responsibility for the illegal act is incurred by the testing state as a direct result of its violation of national rights and may be asserted accordingly. On the second level, however, damage may consist of injury to other than national interests; e.g., injury to the international community’s interest in a pollution-free marine environment. In this latter case, imposition of responsibility upon the testing state involves much more difficult considerations, such as what constitutes standing to invoke the judicial process. Part II of this article will analyze, in turn, each of the foregoing legal grounds for liability.

A. VIOLATION OF NATIONAL RIGHTS

When a nuclear test explosion causes damage to the lives or property of the nationals of another state, the question arises whether the testing state thereby becomes subject to international delictual liability. The question first materialized after the 1954 thermonuclear detonation by the United States over the Marshall Islands. Was the United States liable for the injuries resulting from the explosion, such as the radiation exposure of some two hundred and thirty-six Marshallese and the crew of a Japanese fishing vessel?37 If so, was such liability extenuated

37. See U.N. Doc. T/C.2/SR.197, at 5 (1954). At first, it was argued that the vessel must have been within the danger zone. See 100 Cong. Rec. H 4495 (daily ed. April 2, 1954).
or diminished by reason of the *locus delicti commissi*, that is, by the fact that the place of its commission was the high seas? What minimum measure of compatibility with the rights of other states is required of a state exercising its right of enjoyment on the high seas?\(^{38}\)

Customary international law abounds with evidence of the basic principle that delictual liability attaches with respect to any act imputable to a state which causes injury to the nationals of another state.\(^{39}\) As early as 1930, the Third Committee of the Hague Codification Conference declared that:

> International responsibility is incurred by a State if damage is sustained by a foreigner as a result of an act or omission on the part of the executive power incompatible with the international obligations of the State.\(^{40}\)

Although the precise boundaries of these international obligations have never been exhaustively charted, international judicial and arbitral tribunals have repeatedly held that deprivations of alien property,\(^{41}\) acts of assault\(^ {42}\) or other serious bodily injury to aliens,\(^ {43}\) or interference with their fundamental human rights all constitute international wrongs when done with official participation or acquiescence, whether intentional or negligent.\(^ {44}\)

Typically, the *locus classicus* of these wrongs was the territory of the state itself. That the state is sovereign over its territory has never been deemed a defense to its obligation to refrain from injury to aliens. (Sovereignty, even within its domain, has defined and accepted limitations.) In cases of alleged violation of private rights, international law long ago recognized the right of the state whose nationals are injured to intervene on their behalf.\(^ {45}\) In the *Mavrommatis Palestine Concessions*

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\(^{38}\) These questions, of course, remain unresolved, since the United States has denied any wrongdoing, reaching an agreement with the Japanese Government, after rather protracted negotiations, to pay compensatory damages "*ex gratia* and without reference to legal liability."


\(^{40}\) Art. 7, Minutes of the Third Committee, 1930. V. 177, at 236-37, quoted in Briggs, *supra* note 39, at 695.

\(^{41}\) See The Tattler Claim (United States v. Great Britain), American and British Claims Arbitration 489 (1926).


\(^{43}\) See Janes Claim (United States v. Mexico), United States and Mexico General Claims Commission 108 (1927).

\(^{44}\) See The Lenz Case in 6 J. Moore, *Digest of International Law* 794 (1906).

\(^{45}\) Thus, Lauterpacht spoke of those "rights of aliens which the territorial State is
(Jurisdiction) case, the Permanent Court of International Justice described the correlation in the following terms:\textsuperscript{46} It is an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, \ldots By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights—its right to ensure, in the person of its subjects, respect for the rules of international law.

Nor was the application of these principles confined to injury caused within the territory of the state. As early as the thirteenth century, states had been claiming “satisfaction” for robberies and assaults on their nationals committed by the nationals of other states on the high seas.\textsuperscript{47} This development continued unimpeded into the early twentieth century when the categories of acts which would give rise to delictual liability were further widened beyond wilful and malicious acts. In the \textit{Lotus} case, for instance, the Permanent Court of International Justice recognized the right of Turkey to punish the Lieutenant of a French ship for the manslaughter of Turkish nationals ensuing from the negligent collision of two ships.\textsuperscript{48}

In recent years, several arbitral tribunals have upheld the extraterritorial liability of a state with respect to injuries caused by its activities or by those of its nationals. Of these, the most frequently cited is the \textit{Trail Smelter Arbitration} between the United States and Canada.\textsuperscript{49} In that case, the United States complained that fumes from a smelting operation in Trail, British Columbia, polluted the atmosphere in Washington and did damage to crops, pasture lands, trees and agriculture, as well as to livestock. Having found that the fumes consisted of sulphur dioxide emitted from the Canadian smelting plant, the Arbitral Tribunal directed abatement of the nuisance and payment of damages on the grounds that:

\begin{itemize}
\item bound to respect and which the home State is bound to protect.\textsuperscript{46} L. Oppenheim, \textit{International Law} 639 (8th ed. H. Lauterpacht 1955).
\item \textsuperscript{46} [1924] P.C.I.J., ser. A, No. 2, at 12.
\item \textsuperscript{47} See, e.g., Dongressili v. Portugal, Letters of Reprisal against Portugal in 1 R. Marsden, \textit{Documents Relating to Law and Customs of the Sea} 38 (1915). See also Bentlee v. France, Letters of Reprisal against the Persons or Goods of the French, \textit{id.} at 119.
\item \textsuperscript{49} 3 U.N.R.I.A.A. 1965 (1938-1941), digested in 35 Am. J. Int’l L. 684 (1941).
\end{itemize}
... 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 State or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.\textsuperscript{50}

While customary international law recognized the foregoing principles of liability, the clearest and most innovative development has been through conventional law. Although of comparatively recent vintage, conventional law has yielded principles broad enough to accommodate the problems of liability incurred by nuclear activity.

Under article II of the Vienna Convention on Civil Liability for Nuclear Damage,\textsuperscript{51} for example, the operator of a nuclear installation is made liable for any nuclear damage\textsuperscript{52} arising therefrom. Such operator may be an individual, a partnership, any private or public body, any international organization having a legal personality, any state or any of its constituent subdivisions.\textsuperscript{53}

Under article IV of the Convention, liability for nuclear damage is declared to be absolute, subject to the following exceptions: first, the operator may be exempt from liability upon proof that the damage resulted wholly or partly from the contributory negligence or intentional wrong of the victim himself;\textsuperscript{54} second, no liability arises with respect to damage caused by an act of armed conflict, hostilities, civil war or insurrection;\textsuperscript{55} finally, unless the installation state otherwise

\textsuperscript{50.} 35 AM. J. INT'L. L. at 716 (1941).
\textsuperscript{51.} Done May 21, 1963, INTERNATIONAL ATOMIC ENERGY AGENCY, INTERNATIONAL CONVENTIONS ON CIVIL LIABILITY FOR NUCLEAR DAMAGE 3 (Legal Series No. 4, Vienna, 1966). As of May 22, 1963, the Convention had been signed by China, Columbia, Lebanon, Philippines and Yugoslavia, and has since been in effect in accordance with the provisions of article XXIII. It shall remain in effect for a period of ten years from the date of its entry into force, and thereafter for successive five-year periods for consenting states (art. XXV).
\textsuperscript{52.} "Nuclear damage" is defined, in article I(1)(K) of the Convention, as:
(i) Loss of life, any personal injury or any loss of, or damage to, property which arises out of or results from the radioactive properties or a combination of radioactive properties with toxic, explosive or other hazardous properties of nuclear fuel or radioactive products or wastes in, or of nuclear material coming from, or originating in, or sent to, a nuclear installation;
(ii) any other loss or damage so arising or resulting if and to the extent that the law of the competent court so provides; and
(iii) if the law of the Installation State so provides, loss of life, any personal injury or any loss of, or damage to, property which arises out of or results from other ionizing radiation emitted by any other source of radiation inside a nuclear installation.
\textsuperscript{53.} Art. I(1)(a), (c).
\textsuperscript{54.} Art. IV(2).
\textsuperscript{55.} Art. IV(3)(a).
provides, the operator is not liable for nuclear damage resulting from grave natural disaster of an exceptional character.\textsuperscript{56}

In all cases of nuclear damage, the courts which have jurisdiction over the action are the courts of the state in whose territory the damage occurred.\textsuperscript{57} But where the nuclear incident occurred outside the territory of any state, or where its location cannot accurately be determined, the courts of the installation state have jurisdiction over the case.\textsuperscript{58} Significantly, however, article XIV expressly excludes any jurisdictional immunities arising under national or international law, once a court has obtained jurisdiction in accordance with the Convention's terms.\textsuperscript{59}

Substantially in accord with the Vienna Convention's imposition of liability upon the testing state for extraterritorial nuclear damage is the Stockholm Declaration on the Human Environment,\textsuperscript{60} Principle 22 of which provides that:

States shall co-operate to develop further the international law regarding liability and compensation for the victims of pollution and other environmental damage caused by activities within the jurisdiction or control of such States to areas beyond their jurisdiction.\textsuperscript{61}

\begin{itemize}
\item \textsuperscript{56} Art. IV(3)(b).
\item \textsuperscript{57} Art. XI(1).
\item \textsuperscript{58} Art. XI(2). The Installation State is "the Contracting Party within whose territory that installation is situated or, if it is not situated within the territory of any State, the Contracting Party by which or under the authority of which the nuclear installation is operated." Art. I(1)(d).
\item \textsuperscript{59} Other pertinent provisions of the convention are as follows: The extent of recoverable damage, under article V, may not be limited to less than five million United States dollars. Under article VI(1), claims for compensation with respect to nuclear damage are barred unless presented within ten years from the date of the nuclear incident. This limitation is inapplicable, however, if under the law of the Installation State, the liability of the operator is covered by insurance or other financial security or by state funds, for a period longer than ten years. Notwithstanding these provisions, the forum state, under article VI(3), may erect a limitation period of between three and ten years from the date on which the injured party had or should have had knowledge both of the damage, and of the identity of the operator liable therefor. Unless the law of the competent state otherwise provides, a person who has brought a timely action for compensation may, under article VI(4), at any time before final judgment, amend his claim to take into account any aggravation of the injuries.
\item In addition to the Vienna Convention, there are several bilateral and regional arrangements for the payment of compensation to victims of nuclear activity or pollution resulting therefrom on the high seas, the scope of liability ranging from partial to absolute. See, e.g., (1) Convention for the Prevention of Marine Pollution by Dumping from Ships and Aircraft, done at Oslo, February 15, 1972, 11 INT'L LEGAL MAT'LS 262 (1972); (2) the IMCO conventions, supra note 20; and (3) the United States Draft of the U.N. Convention on the International Seabed Area, 9 INT'L LEGAL MAT'LS 1046 (1970). The Oslo Convention spells out in great detail the type of substances that should never be dumped into the seas (art. 5), and those that may, subject to regulation (art. 6). The latter require the issuance of a permit from the home state.
\item See Sohn, supra note 24, at 425.
\item U.N. Doc. \textsuperscript{60} A/CONF.48/PC/WG.1/CRP.4, at 14 (1971); see Sohn, supra note 22, at 496.
\end{itemize}
Under the above Principle, liability is incurred not only for "activities within the jurisdiction" of the state, but also for activities within its "control," whether or not these are conducted within the territory of the state. Furthermore, liability is not limited to pollution, but extends to such other environmental damage as "weather and climate modification, changing the flow of ocean currents, [or] melting the polar ice caps. . ."\(^\text{62}\)

The Vienna Convention and Principle 22 of the Stockholm Declaration have together laid to rest the question of the liability of a testing state for extraterritorial nuclear damage and for its violation of the rights and interests of other states and/or their nationals. As evidence of their juridical value, some states have undertaken to apply these documents to all environmental questions arising between them, and to develop arrangements in accordance with their terms for the compensation of victims.\(^\text{63}\) It remains to consider the legal grounds for asserting state responsibility for nuclear damage in situations where other than purely national interests are involved.

### B. VIOLATION OF OTHER THAN NATIONAL INTERESTS

Traditionally, international law measured liability in terms of proven injury to particular national interests.\(^\text{64}\) This resulted not from any logical necessity but from a technical legal conception that linked the substantive law of liability to the procedural law governing its assertion. Under this conception, legal personality was regarded as coterminous with statehood so that, functionally, participation in the international process—i.e., decision-making, law enforcement and recovery of remedy—was restricted exclusively to "states as actors."\(^\text{65}\) Thus, as one authority has written:

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\(^{62}\) Sohn, supra note 24, at 495.

\(^{63}\) Sohn, supra note 24, at 492 n.264.

\(^{64}\) Early in the development of the rules regarding state responsibility, the doctrinal fiction was generated that only states are the subjects of international law. See, e.g., L. Oppenheim, International Law: A Treatise 362-69 (1912). See also Lauterpacht, The Subjects of the Law of Nations, 63 Law Q. Rev. 438 (1947), and 64 Law Q. Rev. 97 (1948); and Aufricht, Personality in International Law, 37 Am. Pol. Sci. Rev. 217 (1943). This meant, in practice, that objection to manifestly "illegal" conduct of one state, or a claim based upon such conduct, could be fostered only if espoused by another state. Not surprisingly, the international legal system conceptualized many obligations the breach of which amounted to illegality, though the obligations themselves could not be enforced by any legal process. In the South-West Africa Cases, [1966] I.C.J., the International Court of Justice described the apparent contradiction entailed in this position as "the rule rather than the exception."

\(^{65}\) See generally, I. Brownlie, Principles of Public International Law (1966); W. Bishop, International Law, Cases and Materials 626-743 (1962) and authorities cited therein.
The essential requirement of an international claim is a showing that the claimant is entitled to the protection of the state whose assistance is invoked. Aside from the special situation of alien seamen and aliens serving in the armed forces, concerning which considerable confusion exists, it is well settled that the right to protect is confined to nationals of the protecting state. As a general rule, a break in the national ownership of a claim, as by assignment or change in the nationality of the claimant, defeats the claim. Until the right of the claimant to the protection of the state whose assistance is invoked has been established, there is no occasion to consider the facts and law of the case for the purpose of determining whether there is a just grievance against a foreign state.\textsuperscript{66}

With the elaboration of the concept of nationality in the \textit{Nottebohm} case,\textsuperscript{67} at least for the purpose of diplomatic protection, these requirements acquired an even greater rigidity. A fortiori, they also reinforced the broader principle that a state cannot maintain an action before an international tribunal absent proof of damage peculiar to itself. Proof of damage to a community of interests with which the complainant state identifies would not suffice to confer the necessary \textit{jus standi}. Thus, the International Court of Justice in the \textit{South-West Africa Cases} dismissed the claim of Ethiopia and Liberia for lack of standing to invoke judicial decision on the question of whether South Africa violated her mandate by exporting her apartheid laws to South-West Africa (Namibia).\textsuperscript{68}

The situation where one state seeks to institute an action against another on the grounds of injury by that other to some shared international community interest arose, with specific focus on nuclear test explosions on the high seas, in the recent \textit{Nuclear Test Case}.\textsuperscript{69} In

\begin{itemize}
\item \textsuperscript{66} G. Hackworth, \textit{Digest of International Law} 802 (1943). \textit{See id.} at 839-51.
\item \textsuperscript{67} \textit{[1955]} \textit{I.C.J.} 4.
\item \textsuperscript{68} \textit{[1966]} \textit{I.C.J.} 7. The Court discussed the specific issue of the right to assert liability as follows:

\begin{quote}
Next, it may be said that a legal right or interest need not necessarily relate to anything material or "tangible," and can be infringed even though no prejudice of a material kind has been suffered. In this connection, the provisions of certain treaties and other international instruments of a humanitarian character, and the terms of various arbitral and judicial decisions, are cited as indicating that, for instance, States may be entitled to uphold some general principle even though the particular contravention of it alleged has not affected their own material interest—that again, States may have a legal interest in vindicating a principle of international law, even though they have, in the given case, suffered no material prejudice, or ask only for token damages. Without attempting to discuss how far, and in what particular circumstances, these things might be true, it suffices to point out that, in holding that the Applicants in the present case could only have had a legal right or interest in the "special interests" provisions of the Mandate, the Court does not in any way do so merely because these relate to a material or tangible object. Nor, in holding that no legal right or interest exists for the Applicants, individually as States, in respect of the "conduct" provisions, does the Court do so because any such right or interest would not have a material or tangible object.
\end{quote}

\textit{Id.} at 30.
\item \textsuperscript{69} 12 \textit{Int'l Legal Mat'ls} 749 (1973). \textit{See note 3 supra.}
\end{itemize}
formulating the legal grounds for objecting to further French nuclear test explosions in the Pacific Ocean, Australia, notably, urged that:

(i) The right of Australia and its people, in common with other States and their peoples, to be free from atmospheric nuclear tests by any country is and will be violated;

(ii) . . .

(iii) The interference with ships and aircraft on the high seas and in the superjacent air-space, and the pollution of the high seas by radioactive fall-out, constitute infringements of the freedom of the high seas . . . .\(^7\)

In response to these charges, the Republic of France appeared to concede its liability in the event of specific proof of radioactive fall-out constituting “a danger to the health of the Australian population.” But “in the absence of ascertained damage attributable to its nuclear experiments,” the French government maintained that “they did not violate any rule of international law” on which Australia could specifically rely. In broad terms, Australia’s action presented a direct challenge to the traditional view of standing, prohibiting a state, absent proven injury, from invoking the judicial process to vindicate merely the common interest of all states.

The court did not definitively dispose of this challenge. Since only “interim measures” were at issue, it was sufficient at that stage of the proceedings to rely on Australia’s allegation that irreparable loss would result from the deposit of radioactive fall-out on its territory in the event of further nuclear experiments. The Court issued a preliminary injunction on this ground, without reference or prejudice to the “other rights claimed by Australia.” Only Judge Ignacio-Pinto adumbrated the issue. From his dissenting opinion against the Court’s order, it is possible to gauge continuing respect for the traditional view:

> In my opinion, international law is now, and will be for some time to come, a law in process of formation, and one which contains only a concept of responsibility after the fact, unlike municipal law, in which the possible range of responsibility can be determined with precision a priori. Whatever those who hold the opposite view may think, each State is free to act as it thinks fit within the limits of its sovereignty, and in the event of genuine damage or injury, if the said damage is clearly established, it owes reparation to the State having suffered that damage.\(^7\)

Judge Ignacio-Pinto did not define his rather elusive concept of “genuine damage or injury.” However, the yardstick would seem to be related to his postulate that reparation is owed only to “the state having suffered” the particular and general damage. Also, the requirement

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70. Id. at 752 (emphasis added).
71. Id. at 769.
that the damage be "clearly established" would seem to contemplate material damage and to exclude other non-material kinds of damage, such as damage to the juridical interest of a state in securing respect for multilateral treaties to which it is a party. But either of these inferences could only be defended by reliance on two fallacious assumptions.

First, that the international legal system operates in the manner suggested is fundamentally erroneous. The breach of an international obligation and the consequences of that breach constitute two distinct events. The former event engenders liability, while the latter measures its extent. In the *Chorzow Factory Case*, for example, the Permanent Court of International Justice expressly recognized this principle by observing that:

> ... it is a principle of international law, and even a general conception of law, that the breach of an engagement involves an obligation to make adequate reparation.\textsuperscript{72}

The Court later elaborated:

> The essential principle contained in the actual notion of an illegal act—a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals—is that reparation must, as far as possible, wipe out all the consequences of the illegal act . . . \textsuperscript{73}

The second fallacious assumption of the Ignacio-Pinto dissent is a narrow conception of the proper scope and function of international law. Such a narrow perspective not only is contrary to the example set by recent and enlightened state practice, but embodies the anomaly of acknowledging the existence of rights and interests belonging to the international community, while refusing to recognize the means of enforcing and protecting such rights and interests. Consider several cases decided by the United States Supreme Court which address the question of an individual's right to vindicate a general community interest through court action. In the case of *Flast v. Cohen*,\textsuperscript{74} the Supreme Court held that in order to have standing to challenge a governmental action, the challenger must show that a particular interest of his own has been invaded, not merely that he suffers in some


\textsuperscript{73} Id. at 47.

\textsuperscript{74} 392 U.S. 83, 101 (1968). See Perkins v. Lukens Steel Co., 310 U.S. 113 (1940) where steel companies that wanted to sell to the government were held to lack standing to challenge an administrative requirement that they comply with a wage determination, asserted by them to be ultra vires. The Supreme Court emphasized that "[r]espondents, to have standing in court, must show an injury or threat to a particular right of their own, as distinguished from the public's interest in the administration of the law. . . ." Id. at 125.
indefinite way in common with others. A two-fold rationale underlies this requirement. First, in the "public interest" sphere, competent authorities exist to weigh, espouse and defend the interests affected:

To entrust the vindication of this public interest to a private litigant professing a special interest is to impinge on the responsibility of the public authorities designated by Congress.75

Second, and more importantly, lack of a genuine personal stake in such suits may deprive their prosecution of that intensity of interest or adversity requisite to facilitate adequate judicial resolution. Courts have, however, applied the rule requiring *jus standi* neither mechanically nor slavishly. Where its rationale has been absent or would otherwise be ill-served, the rule has been held inapplicable.76

The concept of standing enunciated in *Flast* came under review in the context of a private action to protect the environment, in the case of *Sierra Club v. Morton*,77 in which the plaintiff, a national conservation group, asserted *jus standi* to challenge government approval of the private recreational development of certain public lands in the Sierra Nevada Mountains. A majority of five to four held that Sierra Club lacked standing to bring the action because it failed to exhibit "a direct stake in the outcome." To hold otherwise, said the Court, would be "to authorize judicial review at the behest of organizations or individuals who seek to do no more than vindicate their own value preferences through the judicial process."78

In a strongly cast dissent, Justices Blackmun and Douglas noted that the case poses "significant aspects of a wide, growing and disturbing problem, that is, the nation's and the world's deteriorating environment with its resulting ecological disturbances." Clearly concerned, the Justices questioned:

Must our law be so rigid and our procedural concepts so inflexible that we render ourselves helpless when the existing methods and the traditional concepts do not quite fit and do not prove to be entirely adequate for new issues?79

Since ships, corporations and numerous other inanimate entities have long been accorded legal capacity to bring suit, the Justices proposed

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76. Sometimes, favorable results have been achieved by effectuating the change most subtly. The rule itself is left intact. The plaintiff must have suffered some personal injury, but with an appendage qualifying the amount of requisite injury. *See, e.g.*, Association of Data Processing Service Organization v. Camp, 397 U.S. 150 (1970); Barlow v. Collins, 397 U.S. 159 (1970).
77. 405 U.S. 727 (1972).
78. *Id.* at 740.
79. *Id.* at 755.
analogous treatment of "valleys, estuaries . . . or even air that feels the destructive pressures of modern technology and modern life." Such suits could thus be brought in the name of the entity itself (e.g., Mineral King v. Morton) which, as plaintiff, "speaks for the ecological unit of life that is part of it."

In the more recent case of United States v. Students Challenging Regulatory Proceedings (SCRAP), an environmental group sought to enjoin enforcement of Interstate Commerce Commission orders allowing railroads to collect surcharge on freight rates pending adoption of selective rate increases. It claimed that the rate structure would discourage the use of "recyclable" materials, and promote the use of new raw materials that compete with scrap, thereby adversely affecting the environment by encouraging unwarranted mining, lumbering and other extractive activities. Thus, the injury which SCRAP claimed was to the aesthetic use and enjoyment of the affected environment. Relying on Sierra Club v. Morton, the Commission challenged the plaintiff's standing to sue, arguing that the allegations were "vague, unsubstantiated and insufficient." The Supreme Court affirmed the holding of the lower court that "standing" is not confined to those who show economic harm, since "[a]esthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society . . . ." Nor, the Court continued, may standing be denied simply because numerous people suffer the same injury:

[N]either the fact that the appellees here claimed only a harm to their use and enjoyment of the natural resources of the Washington area, nor the fact that all those who use those resources suffered the same harm, deprives them of standing.

Thus, in the domestic law of the United States, as elsewhere, expanding concern for environmental protection has engendered a concomitant expansion of the law of standing whereby such concern may be more broadly and effectively vindicated. Any lingering restraint upon the right of individuals to seek judicial resolution, moreover, is palliated by the existence of competent administrative agencies vested with

80. Id. at 743.
82. 412 U.S. 669 (1973).
83. Id. at 683-84.
84. Id. at 668, quoted from Sierra Club v. Morton, 405 U.S. 727, 734 (1972).
85. 412 U.S. at 686-87. The Court distinguished its holding in Sierra Club v. Morton on the ground that in that case, no damage was specifically pleaded.
authority to hear and effectively act upon such public complaints. Such multiple avenues for redress contrast markedly with the international legal system wherein individual state action remains the exclusive vehicle for obtaining legal remedy. Accordingly, in the international sphere, expansion of the law of *jus standi* is even more urgently required.

Multiplication on the international plane of novel and increasingly more complex problems has given rise to what has been described as an international "law of cooperation." Such problems as global overpopulation, threats of nuclear holocaust, environmental pollution and economic underdevelopment necessarily require solutions more supranational than national in character. In a "vertical" legal system—which the international legal system is not—such supranational problems could be addressed by a supranational authority. In the present "horizontal" legal system, however, where all participants are formally equal, each member must be charged with promoting objectively-defined positive values both in its own conduct and, through cooperation, in that of others. The very minimum mandate inherent in such a system, therefore, must be the right of an individual state to invoke the judicial process, on behalf of the fundamental and common interest of all states, against such supranationally destructive acts as nuclear test explosions on the high seas.

**CONCLUSION**

Dispositive evidence of the illegality of nuclear test explosions on the high seas is discoverable in at least three related areas of international law. First, nuclear testing violates customary and conventional law

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In his separate concurring opinion to *Advisory Opinion on Conditions of Admission of a State to Membership in the United Nations*, [1947-48] I.C.J. 57, 67, 69-70, Judge Alvarez stated that a new conception of law has emerged, expanding the "traditionally juridical and individualistic conception" to include "political, economic, social and psychological" elements, and creating a "law of social interdependence" with the following specific characteristics:

(a) It is concerned not only with the delimitation of the rights of States, but also with harmonizing them; (b) in every question it takes into account all of its various aspects; (c) it takes the general interest fully into account; (d) it emphasizes the notion of the duties of states, not only towards each other but also towards the international society; (e) it condemns the abuse of rights; (f) it adjusts itself to the necessities of international life and evolves together with it . . . . (emphasis changed).

doctrines of the freedom of the high seas inasmuch as it constitutes an abuse of rights prejudicial to, and totally obstructive of, the free and reasonable exercise by others of the rights of navigation and of fishing. Second, the proven adverse ecological effects of nuclear testing render it likewise violative of customary and conventional anti-pollution law. Finally, nuclear testing is expressly proscribed by the terms of the widely-ratified Nuclear Test Ban Treaty.

Less settled is the question of the juridical consequences of such illegality. Specifically, international delictual liability for nuclear testing turns upon the locus of interests specifically affected by the illegal act. Where extraterritorial nuclear damage results or where the rights and interests of other states and/or their nationals are otherwise violated, the liability of the testing state, under conventional and customary law, is inescapable. Where other than national interests are affected, however, liability devolves into complex considerations of the law of standing. While the traditional view prohibited a state, absent proof of direct injury, from invoking the judicial process to vindicate merely the common interest of all states, global urgency and enlightened state practice suggest both the need and model for a more expansive conception of jus standi.

Only recently, in response to novel and difficult demands, have the distinct rights and interests of the international community, separate and apart from those of its component states, been recognized as meriting separate legal protection. These same demands require that international law, as a law of cooperation, reject the view expressed, for instance, in the Lotus case that "[r]estrictions upon the independence of States cannot . . . be presumed." Presumption of restrictions must now be the norm rather than the exception. Particularly where the sphere of action is the international plane or where the consequences

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88. The starting point for this development was the Reparations for Injuries Suffered in the Services of the United Nations, in which the International Court of Justice recognized the capacity of the United Nations to bring an action to recover damages for injuries suffered in its service. In holding that the United Nations, and not only the national state of the victim has the capacity to bring the claims, the Court stated:

Throughout its history, the development of international law has been influenced by the requirements of international life, and the progressive increase in the collective activities of States has already given rise to instances of action by certain entities which are not States. This development culminated in the establishment in June 1945, of an international organization whose purposes and principles are specified in the Charter of the United Nations. . . .


of state conduct impinge upon that plane, this presumption crystallizes almost irrefutably.

Under a passive "law of peaceful coexistence," it is perhaps sufficient to restrict standing exclusively to direct victims of illegality. The viability of an active "law of cooperation," however, depends upon each component state serving as its brother's keeper. Alternatively, the international legal system risks generating its own extinction by forever spawning unenforceable obligations.