

## LIMITED ARMED CONFLICT CAUSING PHYSICAL DAMAGE TO NEUTRAL COUNTRIES: QUESTIONS OF LIABILITY

The Iran-Iraq Armed Conflict<sup>1</sup> created one of the worst oil pollution disasters of ail time.<sup>2</sup> Iraqi jets severely damaged Iran's Nowruz off-shore oil fields in the Persian Gulf, and as a result the wells in production there spilled thousands of barrels of oil into the Gulf every day.<sup>3</sup> No country was able to cap the wells nor start clean-up activities because of the continued fighting between Iran and Iraq.<sup>4</sup> To date neither country has claimed liability for the spill;<sup>5</sup> consequently, the ecological life of the Persian Gulf is slowly being put to death. This is evidenced by the unusual amount of dead fish and other sea life being washed up on coastal beaches.<sup>6</sup> Furthermore, many coastal States have been running short of fresh water due to the oil pollution which has contaminated their de-salination plants.<sup>7</sup> In sum, as a result of the conflict between Iran and Iraq, the neutral coastal states of the Persian Gulf have been severely damaged by oil pollution.<sup>8</sup>

Liability for the oil spill disaster would seemingly be governed by the laws of armed conflict, based on the fact that the damage arose out of the Iran-Iraq Armed Conflict. This body of law, however, does not apply to physical damage to *neutral* countries caused by warring nations.<sup>9</sup> The laws of neutrality would also seem to apply to the damaged coastal nations. Yet this body of law renders a nation responsible for the physical damage it causes to neutral nations only

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1. The war between Iran and Iraq broke out in early September 1980, when Iran launched a major offensive and recaptured Khorramshahr. The conflict has continued to the present, only temporarily subdued by the turmoil in Lebanon. The war between the two nations is not of recent origin, but rather is the latest manifestation of a century old religious conflict. For an extensive analysis of the Iran-Iraq conflict, see ISMAEL, *IRAQ AND IRAN—ROOTS OF CONFLICT* (1982).

2. *U.S. Expert Says Persian Gulf Oil Slick is the Worst Spill He's Ever Witnessed*, Wall St. J., Aug. 4, 1983, at 29, col. 4.

3. *Persian Gulf Nations Worry as Oil Spill Goes on Unchecked*, N.Y. Times, Aug. 10, 1983, at 4, col. 3.

4. *Gulf Clashes Imperil Oil Spill Cleanup*, N.Y. Times, April 3, 1984, at 18, col.4.

5. N.Y. Times, *supra* note 3.

6. Begley, *Death of the Persian Gulf*, NEWSWEEK, July 25, 1983, at 79.

7. Wall St. J., *supra* note 2.

8. *Red, Boots, Coots, and Toots*, NEWSWEEK, May 9, 1977, at 50.

9. See *infra* notes 39-48 and accompanying text.

in very limited situations,<sup>10</sup> such as when the principal nation has a military purpose directed at the neutral state or its conduct violates the laws of armed conflict.<sup>11</sup>

Although the laws of armed conflict and the law of neutrality fail to afford the neutral coastal nations of the Persian Gulf any remedy, these States might be able to obtain relief on the basis of judicial decisions, treaties or conventions.<sup>12</sup> Generally, these sources of law provide that nations have a responsibility to ensure that activities within their territory do not damage or interfere with territories outside their own boundaries.<sup>13</sup> Situations such as the Iran-Iraq Armed Conflict, however, present issues of liability and compensation that go far beyond the scope of such peacetime laws.<sup>14</sup> Neutral nations are left without a remedy, and often do not possess the necessary resources to correct the damage they have sustained.

If neutral countries are left without a remedy in this type of situation, they may be encouraged to resort to hostilities for redress.<sup>15</sup> Thus, the lack of a peaceful means of compensation could lead to escalation of existing conflicts, or the creation of new ones.<sup>16</sup> A discussion of this point will show the significance of the problem in the international context, and will demonstrate that a comprehensive method of dealing with the present problems can serve to prevent or alleviate possible armed hostilities.

This Comment will discuss the absence of liability which exists when a neutral State is physically damaged by limited armed conflict,<sup>17</sup> as illustrated by the Iran-Iraq Armed Conflict. This analysis will first explore the factual problems existing in the Persian Gulf and the serious dilemma confronting the coastal nations bordering that body of water. A review of the laws of armed conflict regarding the "treatment of property" will follow. These rules will be applied to the situation in the Gulf and to other instances where neutral nations are damaged by armed conflict. The discussion of these laws will reveal that they do not adequately address such situations. The use of judicial decisions, treaties and conventions for the purposes of establishing liability and responsibility to neutral nations damaged by

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10. See *infra* notes 62-67 and accompanying text.

11. *Id.*

12. See *infra* notes 68-70 and accompanying text.

13. See *infra* notes 71-88 and accompanying text.

14. See *infra* notes 89-105 and accompanying text.

15. See *infra* note 152 and accompanying text.

16. *Id.*

17. Limited armed conflict situations are those in which only a few nations are involved.

limited armed conflict will then be explored. This analysis will demonstrate that the use of such means as a remedy has increased in recent years, although these methods still fail to address adequately questions of liability and compensation. In view of the unavailability of a remedy under current principles of international law, this Comment will propose that a United Nations Resolution or an international agreement should be developed to address the present problem. The resolution would render nations involved in limited armed conflict liable for the physical damage they cause to neutral nations. It is hoped that such a resolution would be accepted as a rule of customary international law.

### I. DEVELOPMENT OF THE PERSIAN GULF OIL SPILL

In February 1983, a platform of the Nowruz off-shore oil field collapsed<sup>18</sup> and oil began leaking into the Gulf.<sup>19</sup> The damage was amplified when Iraqi jets and helicopters hit additional platforms in March and again in July.<sup>20</sup> The coastal States threatened by the huge oil spill which ensued were Bahrain, Kuwait, Oman, Qatar, Saudi Arabia and the United Arab Emirates.<sup>21</sup> These coastal nations, which are neutral in the Gulf war, assembled technical teams to cap the spilling wells.<sup>22</sup> Iran, however, would not guarantee safe conduct for the technicians unless Iraq paid fifty billion dollars in reparations and made a formal apology.<sup>23</sup> Iran was content to let the oil slick threaten the Gulf states that bankroll Iraq's war effort.<sup>24</sup> Iraq, on the other hand, would not accept a cease-fire unless Iran agreed to a broader and more realistic set of terms.<sup>25</sup> Unfortunately, this stalemate prevented the technicians from capping the wells, and consequently the spill increased in size.<sup>26</sup>

On May 7, 1983, Iran and Iraq met with other Persian Gulf nations to discuss ways to control the great oil slick threatening their coasts.<sup>27</sup> Both Iran and Iraq agreed that the wells had to be capped,

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18. The Nowruz off-shore oil field is located in the Persian Gulf, adjacent to the country of Iran. In February 1983 a platform collapsed which in no way was attributable to the Iran-Iraq Armed Conflict. See *Begley, supra* note 6.

19. *Id.*

20. *Id.*

21. N.Y. Times, *supra* note 4.

22. *Id.*

23. *The Midas Touch in the Persian Gulf*, N.Y. Times, Apr. 18, 1983, at 5, col. 6.

24. *Id.*

25. *Id.*

26. N.Y. Times, *supra* note 3.

27. Mitchell, *The Slick in the War Zone*, McClean's, Apr. 18, 1983, at 33. As a result of

but neither would accept responsibility for the task.<sup>28</sup> Iranian officials contended that the country responsible for creating the pollution was liable, while Iraq asserted that the owners of the wells were the responsible parties.<sup>29</sup> No compromise was reached, and the armed conflict between Iran and Iraq continued to be the sole reason for the ongoing spill of oil into the Persian Gulf.

The ecological disasters resulting from the oil spill are of great proportions. The spill has affected three main areas in the Gulf: (1) the sea life, (2) the Gulf waters, and (3) the coastal nations' de-salination plants.

An international ecological society has reported that the sea life in the Gulf is rapidly dying.<sup>30</sup> The report indicated that an unusual amount of dead fish, turtles, dolphins, snakes and birds are washing up on Gulf beaches.<sup>31</sup> Furthermore, the heat in the Gulf area has caused about fifty percent of the oil to evaporate. This has resulted in a sludge residue which eventually forms into tar and falls to the bottom of the Gulf.<sup>32</sup> Biologists are unsure that current technology can remove these "tar balls," and consequently fear that the Gulf waters may be irreversibly contaminated.<sup>33</sup>

The most serious effect on the neutral coastal nations is the pollution of their de-salination plants.<sup>34</sup> These plants provide fresh water to the populations of the coastal States and their industrial sectors by removing the salt from water taken from the Gulf.<sup>35</sup> None of the endangered nations have sufficient sources of fresh water to ensure the survival of their populations without help from the

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the damage to the oil platform, some four thousand to five thousand barrels of oil flowed into the Gulf each day. *Id.*

28. *Id.*

29. *Id.*

30. The World Wildlife Fund, founded in 1961, reported that the Persian Gulf was so severely damaged by the oil spill that essentially all the life in the Gulf was either dead or rapidly dying. Begley, *supra* note 6. The U.S. based conservation society is supported by contributions from individuals, funds, corporations and foundations. The Fund seeks to protect the biological resources upon which human survival depends. The emphasis is on preservation of endangered and threatened species of wildlife, plants and habitats, and natural areas anywhere in the world. Activities are scientifically based, and aim to produce immediate and long-term conservation benefits and provide models for natural management techniques and policies. The Fund maintains a library of 1500 volumes, which is located at 1601 Connecticut Avenue, N.W., Washington, D.C., 20009.

31. *Id.*

32. *Id.*

33. *Id.*

34. N.Y. Times, *supra* note 4.

35. *Id.*

threatened de-salination plants.<sup>36</sup> A United States expert on oil rig accidents<sup>37</sup> summed up the situation in the Persian Gulf by stating that “the giant Iranian oil slick that has been polluting the Persian Gulf for the past seven months ranks among the world’s largest and most difficult oil pollution problems and it’s the biggest and probably the worst thing I’ve ever seen.”<sup>38</sup>

The damage in the Gulf is too extensive for the neutral coastal States to physically and financially handle alone. If the problem is to be rectified, responsibility will eventually have to be taken for the oil spill and its effects upon the coastal Gulf States. However, the fact that the damage arose from an armed conflict situation raises serious doubts as to the liability of the States who have created the situation.

## II. THE INTERNATIONAL LAW OF ARMED CONFLICT: HOW IT APPLIES TO ADVERSE PHYSICAL EFFECTS UPON NEUTRAL NATIONS

International law attaches responsibilities to nations engaged in armed aggression. These laws were developed in several international conventions which delineate the responsibilities and liabilities of nations engaged in war. The provisions of these conventions have undergone considerable changes since World War II.<sup>39</sup> The most significant changes arose with the conclusion of the Geneva Convention in 1949,<sup>40</sup> which rendered the conventional laws of war applicable to armed conflict situations.<sup>41</sup> Article Two of the Geneva Convention states that “the provisions will apply to all cases of declared war or any other armed conflict which may arise between two or more of the high contracting parties, even if the state of war is not

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36. Wall St. J., *supra* note 2.

37. Paul Neal “Red” Adair, now 68 years old, has a global monopoly in the occupation of taming runaway oil wells. “Red” Adair learned the business of stomping out oil well fires from the man who invented the procedure, Myron Kinley. Paul Adair is a living legend of the oil age. NEWSWEEK, *supra* note 8.

38. Wall St. J., *supra* note 2.

39. See generally II G. SCHWARZENBERGER, INTERNATIONAL LAW: THE LAW OF ARMED CONFLICT (1968).

40. The application of the laws of war to an armed conflict situation began due to the increasing number of non-traditional armed aggressions. Traditional declarations of war were either not utilized or they were not recognized. Thus, the international conventions decided that for some situations the laws of war were no longer applicable, and the subject was better described as the Law of Armed Conflict. These changes enabled the traditional laws of war to cover many armed aggressions that were previously under no type of control. See SCHWARZENBERGER, *supra* note 39, at 1.

41. *Id.*

recognized by one of them."<sup>42</sup>

Under international law, an armed conflict situation is deemed to arise when a breach of the peace has been committed.<sup>43</sup> A breach of the peace is defined as any threat to the peace or an act of armed aggression.<sup>44</sup> The conflict between Iran and Iraq satisfies the requirements of a breach of the peace because the countries are actively participating in an armed aggression which threatens the stability and peace of the Gulf area. Invoking the international law of armed conflict in a breach of the peace situation is based on the theory that the consequences of the aggression are not limited to the principle nations involved, but affect the entire world.<sup>45</sup> Thus, the laws of armed conflict render nations which are involved in armed aggression responsible for the physical damage their hostilities have caused to neutral nations.<sup>46</sup> In order to determine whether the laws of armed conflict adequately address the problems that neutral Persian Gulf nations are facing as a result of the Iran-Iraq Armed Conflict, it is necessary to analyze the relevant provisions of the Hague Regulations of 1907.<sup>47</sup> These provisions, under the heading of "treatment of property," distinguish the treatment of public property and cultural property.<sup>48</sup>

#### A. Public Property

In relation to public property, the Hague Regulations make a distinction between movable and immovable State property.<sup>49</sup> The basis for this distinction is that movable State property can easily be used for military purposes and thus can be a threat to the occupying power if left behind.<sup>50</sup> On the other hand, immovable State property has little to no military value. Since such property poses little or no threat, its destruction would be senseless.<sup>51</sup>

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42. *Id.*

43. *Id.* at 97.

44. *Id.*

45. *Id.* at 485.

46. *Id.*

47. E. FEILCHENFELD, *THE INTERNATIONAL ECONOMIC LAW OF BELLIGERENT OCCUPATION* 51 (1942).

48. *Id.* The laws with regard to physical effects on nations are under the heading of "treatment of property," and are contained in Articles 53 through 56 of the Hague Regulations of 1907.

49. SCHWARZENBERGER, *supra* note 39, at 247.

50. II L. OPPENHEIM, *INTERNATIONAL LAW: DISPUTES WAR AND NEUTRALITY* 414 (Lauterpacht 8th ed. 1955).

51. *Id.*

Movable State property that a nation is permitted to seize or destroy under the Hague Regulations is that which can be used solely for military purposes.<sup>52</sup> Specific items listed under Article 53 are “cash, funds and realizable securities which are strictly the property of the State, depots of arms, means to transport, stores and supplies.”<sup>53</sup> Immovable State property is covered under Article 55, which in essence renders the occupying nations an administrator of the public buildings.<sup>54</sup> In addition, the occupying State must adhere to the rules of usufruct<sup>55</sup> in relation to buildings, real estate, forests, and agricultural estates.<sup>56</sup> One exception to the necessity of adhering to the rules of usufruct is the situation involving property damaged or destroyed through military necessity.<sup>57</sup>

The laws regarding the treatment of public property are detailed and provide helpful guidelines for nations engaged in armed conflict situations. Nonetheless, a major drawback to the Hague Regulations of 1907 is that it only applies to the destruction of *enemy* property.<sup>58</sup> Since the Iran-Iraq situation affecting the neutral Gulf States did not involve the destruction of enemy property, the neutral States can not apply Article 55 of the Hague Regulations.

### B. Cultural Property

Article 56 of the Hague Regulations protects cultural property against all seizure, destruction, or wilful damage from acts of armed conflict.<sup>59</sup> Institutions dedicated to religion, charity, education and the arts and sciences fall within the definition of cultural property, as do historic monuments and works of art or science.<sup>60</sup>

The laws regarding cultural property, like the law regarding public property, pertain only to the destruction of enemy property.<sup>61</sup> This means that in a situation where an armed conflict damages cultural property belonging to a neutral nation, Article 56 of the Hague Regulations will not be available as a source of redress for the damaged State. Therefore, neutral nations not involved in the armed

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52. *Id.*

53. FEILCHENFELD, *supra* note 47, at xi.

54. *Id.* at 55.

55. The Laws of Usufructuary limit the exploitation of the immovable property to the “enjoyment of its natural and legal fruits.” *Id.* at 247.

56. *Id.* at 55.

57. *Id.* at 56.

58. SCHWARZENBERGER, *supra* note 40, at 243.

59. *Id.* at 244.

60. *Id.*

61. *Id.* at 243.

conflict can not apply the cultural property laws to the damage or destruction that an armed conflict might inflict upon them.

### C. *Neutral Property*

The rules applicable to neutral nations are primarily governed by customary international law.<sup>62</sup> The position of neutral nations and their property in armed conflict areas has been established in the form of a customary rule with two provisions.<sup>63</sup> The rule states that a nation involved in armed conflict is not responsible for *accidental* injury to a neutral nation, or damage to, or the destruction of neutral property.<sup>64</sup> Neutral States are defined as those States that do not take part in armed conflicts between other States, and thereby remain impartial.<sup>65</sup>

The first provision of this customary rule renders the principle nation liable to pay damages for destruction of property belonging to the neutral nation if the property was singled out for military use.<sup>66</sup> The second provision renders the principle liable if its conduct is contrary to the laws of war.<sup>67</sup> The first provision is not applicable to the situation in the Gulf since Iraq did not single the neutral States out for military use. The attack on Iran's oil platform was for the sole purpose of harming Iran, and the fact that the coastal nations were also harmed was merely incidental. Moreover, the second provision can not be applied to the conflict because the laws of war do not render aid when property is damaged in an armed conflict situation.

The laws of armed conflict leave neutral countries without a remedy for physical damage to their territory. However, different bodies of law have developed to cover situations where nations have caused adverse physical effects upon other nations in peacetime.

### III. PEACETIME LIABILITY FOR ADVERSE PHYSICAL EFFECTS UPON OTHER NATIONS

In a peacetime situation, liability for one nation's adverse effects upon other nations is generally derived from two sources—judicial

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62. *Id.* at 582.

63. *Id.*

64. *Id.*

65. II L. OPPENHEIM, INTERNATIONAL LAW: DISPUTES WAR AND NEUTRALITY 475 (McNair 4th ed. 1926).

66. *Id.* at 583.

67. *Id.*



decisions and treaties and conventions.<sup>68</sup> The judicial decisions stem from the International Court of Justice (I.C.J.), in which claims brought by nations are heard and advisory opinions are rendered.<sup>69</sup> Treaties and conventions, on the other hand, are accords which are formed through the cooperation of several nations working together to achieve a common goal.<sup>70</sup> An analysis of these methods will demonstrate that they also fail to directly address the problems of liability for adverse physical effects upon other nations.

### A. *Judicial Decisions*

The leading case dealing with nations' responsibilities for adverse effects to neutral nations is the *Trail Smelter Arbitration*.<sup>71</sup> A smelter, located in Trail, British Columbia, caused serious pollution damage to the State of Washington by emitting sulphur dioxide fumes.<sup>72</sup> The United States and Canada subsequently formed a tribunal to assess the problem and determine what action was appropriate.<sup>73</sup> The tribunal decided that "Trail Smelter shall be required to refrain from causing any damage through fumes in the State of Washington."<sup>74</sup> Furthermore, the tribunal determined that:

Under the principles of international law . . . no nation 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 nation or the properties or persons therein, when the case is of serious consequences and the injury is established by clear and convincing evidence.<sup>75</sup>

The principles of international law which were set forth in the *Trail Smelter* case can be applied to the situation in the Persian Gulf. The armed conflict between Iraq and Iran caused oil to pollute the waters of the Gulf.<sup>76</sup> The pollution spread, causing irreparable damage to the Gulf's water and sea life.<sup>77</sup> Moreover, the spill affected the

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68. Comment, *IIXTOC I: International and Domestic Remedies for Transboundary Pollution Injury*, 49 *FORDHAM L. REV.* 404, 407 (1980).

69. See *infra* notes 89-105 and accompanying text.

70. See *infra* notes 106-47 and accompanying text.

71. *Trail Smelter Arbitration (U.S. v. Can.)*, 3 *Int'l Arb. Awards* 1095 (1938). For further discussion, see J. SWEENEY, C. OLIVER & N. LEECH, *CASES AND MATERIALS ON THE INTERNATIONAL LEGAL SYSTEM* 283 (1983).

72. *Id.* at 284.

73. *Id.*

74. *Id.* at 288.

75. Comment, *supra* note 68, at 408.

76. See *supra* notes 18-38 and accompanying text.

77. *Id.*

coastal nations' fresh water supplies and fishing industries.<sup>78</sup> The oil slick in the Gulf clearly caused serious consequences and the injury can be established by clear and convincing evidence. Thus, the neutral nations could bring an action for damages in the I.C.J. and cite the *Trail Smelter* case as precedent.

The I.C.J. has also addressed States' liability for transnational pollution damage in the *Corfu Channel* case (*United Kingdom v. Albania*).<sup>79</sup> The facts established that two British ships were damaged by mines while proceeding through the Corfu Channel.<sup>80</sup> The channel had previously been swept for mines,<sup>81</sup> and consequently no ships could have had knowledge of the newly laid minefield.<sup>82</sup> The United Kingdom argued that the Straits were used for international navigation between two parts of the high seas,<sup>83</sup> and that warships of foreign nations therefore had a right of passage without previous authorization, provided that the purpose was innocent.<sup>84</sup> Albania, on the other hand, denied that the Straits were an international highway in which a right of passage existed.<sup>85</sup> Albania asserted that at no time did any vessel have a right of passage through the Straits without prior notification to, and permission of the Albanian authorities.<sup>86</sup>

The I.C.J. decided that Albania was responsible for the damage to the British ships that occurred in Albanian waters, and that Albania also had a duty to compensate the United Kingdom.<sup>87</sup> The I.C.J. recognized the reasoning underlying the *Trail Smelter* case in rendering its decision, and held that a nation is responsible for acts committed within its territory that have injurious effects upon foreign nationals.<sup>88</sup>

Judicial decisions by the I.C.J. are helpful in upholding established rules of international law and in settling disputes.<sup>89</sup> However,

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78. *Id.*

79. *Corfu Channel* (U.K. v. Alb.), 1948 I.C.J. 4.

80. *Id.* at 15.

81. *Id.*

82. *Id.*

83. *Id.* at 10.

84. *Id.*

85. *Id.* at 11.

86. *Id.*

87. *Id.* at 36.

88. Comment, *supra* note 68, at 409.

89. Located at the Hague in the Netherlands, the I.C.J. is the principle judicial organ of the United Nations. U.N. CHARTER art. 92. The Court is composed of fifteen members elected by the General Assembly and Security Council. STATUTE OF THE INTERNATIONAL

using the I.C.J. as a remedy presents problems of jurisdiction which may be conferred upon the I.C.J. in two ways.<sup>90</sup> One method is by agreement between the nations involved in the dispute.<sup>91</sup> There are no formal requirements governing these agreements.<sup>92</sup> The I.C.J. has deliberately kept these agreements informal to encourage States to utilize the Court to resolve their disputes.<sup>93</sup> Additionally, jurisdiction may be conferred through unilateral declaration.<sup>94</sup> Many nations have declared that they recognize compulsory jurisdiction of the I.C.J. in certain legal disputes<sup>95</sup> such as (1) the interpretation of a treaty; (2) any question of international law; (3) the existence of any fact which, if established, would constitute a breach of an international obligation; and (4) the nature or extent of the reparation to be made for the breach of an international obligation.<sup>96</sup> Most of the declarations made by nations, however, accept compulsory jurisdiction in an extremely restricted manner.<sup>97</sup>

The United Nations Charter authorizes the Security Council or General Assembly to request the I.C.J. to issue an advisory opinion on any legal question.<sup>98</sup> Advisory opinions are not binding and do not have the force of law,<sup>99</sup> but are persuasive and States are unlikely to contravene their mandates.<sup>100</sup> Advisory opinions of the I.C.J. are

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COURT OF JUSTICE. art 3 [hereinafter cited as I.C.J. STATUTE]. No two members may be from the same country. I.C.J. STATUTE art. 3.

The I.C.J. is open to all States which are parties to the I.C.J. Statute, and is competent to adjudicate all legal claims. I.C.J. STATUTE art. 35. States which are not members of the UN may litigate in the I.C.J. if they accept the conditions set out by the General Assembly on the recommendations of the Security Council. All States which are members of the UN are also parties to the I.C.J. Statute. G. ELIAN, *THE INTERNATIONAL COURT OF LAW* 45 (1971).

The Court applies international conventions, international customs and general principles of law recognized by civilized nations. I.C.J. STATUTE art. 38. To a limited extent, the Court will also consider other judicial decisions and scholarly writings. I.C.J. STATUTE arts. 38 and 59.

90. I.C.J. STATUTE art. 60.

91. S. ROSENNE, *THE WORLD COURT* 76 (1963).

92. *Id.*

93. *Id.*

94. *Id.*

95. I.C.J. STATUTE art. 36(2).

96. *See generally* DOCUMENTS ON THE INTERNATIONAL COURT OF JUSTICE 345-416 (S. Rosenne ed. 1979).

97. I.C.J. STATUTE art. 36(2).

98. ROSENNE, *supra* note 91, at 82-83.

99. U.N. CHARTER art. 96. Article 96 also authorizes "other organs of the United Nations and specialized agencies, which may at any time be so authorized by the General Assembly" to request advisory opinions on legal questions arising out of the scope of their activities. *Id.*

100. D. PRATAP, *THE ADVISORY JURISDICTION OF THE INTERNATIONAL COURT* 227 (1972).

the opinions of the highest international tribunal,<sup>101</sup> and the moral weight and influence they carry is significant.<sup>102</sup> The international court itself has treated advisory opinions as having authority equal to judgments.<sup>103</sup>

Although the I.C.J. is a powerful tool for resolving international problems, the Court has severe limitations.<sup>104</sup> The strongest of these limitations is that the I.C.J. only has the power to give opinions; and therefore, even if a nation consents to the jurisdiction of the Court, there is no conventional means of enforcement.<sup>105</sup> Considering these limitations on the I.C.J., the likelihood of that body actually hearing the Gulf States' claim is slight. Furthermore, even if the I.C.J. were to hear the case and hand down an opinion, the coastal nations would have no means of enforcing the decision. Hence, it is highly unlikely that the Iran-Iraq dispute will be settled by the I.C.J., and the neutral States of the Gulf must look to a treaty or a convention for a remedy for their damages.

### B. *Treaties and Conventions*

United Nations Conferences, coupled with multilateral agreements, are the source for many of the existing principles of national responsibility in international law.<sup>106</sup> In particular, conferences and agreements regarding environmental and political concerns constitute much of the body of law governing States' responsibility applicable to the Persian Gulf situation.

One such treaty that has particular application to the Persian Gulf is the Kuwait Regional Conference for Co-operation on the Protection and Development of the Marine Environment and the Coastal Areas From Pollution.<sup>107</sup> The treaty provisions in Article III set forth an obligation for signatories to take appropriate measures to prevent pollution in the Gulf.<sup>108</sup> These obligations include

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101. International Status of South West Africa, 1950 I.C.J. 128. For example, although South Africa has often refused to implement the Court's opinions, it generally refrains from complete defiance. PRATAP, *supra* note 100, at 231.

102. PRATAP, *supra* note 100, at 231.

103. *Id.*

104. Comment, *supra* note 68, at 413.

105. *Id.* at 416.

106. I. BROWNLIE, A SURVEY OF INTERNATIONAL CUSTOMARY RULES OF ENVIRONMENTAL PROTECTION 9 (1974).

107. The Kuwait Regional Conference for Co-operation on the Protection and Development of the Marine Environment in the Coastal Areas from Pollution, *reprinted in* 17 INT'L LEGAL MATERIALS 501 (1978).

108. *Id.* at 513. Article III provides that:

establishing national standards, laws and regulations to assure the effective implementation of the Convention.<sup>109</sup> Furthermore, under this Convention contracting States shall cooperate with international and regional organizations in the fields of scientific research, monitoring and assessment concerning pollution in the Gulf area.<sup>110</sup> Obligations of signatories in regard to the fight against pollution emergencies are set forth in Article IX.<sup>111</sup> Contracting States are required to take whatever steps necessary to deal with a pollution situation in the sea area, which includes providing adequate equipment and personnel.<sup>112</sup> In the event that a dispute arises in the interpretation of the Convention, the Signatories are to seek a settlement through negotiation or other peaceful means.<sup>113</sup> If a settlement cannot be reached, the dispute is to be decided by a judicial commission

*General Obligations*

- (a) The Contracting States shall, individually and/or jointly, take all appropriate measures in accordance with the present Convention and those protocols in force to which they are party to prevent, abate and combat pollution of the marine environment in the Sea Area;
- (b) In addition to the Protocol concerning regional Co-operation in Combating Pollution by Oil and other Harmful Substances in Cases of Emergency opened for signature at the same time as the present Convention, the Contracting States shall co-operate in the formulation and adoption of other protocols prescribing agreed measures, procedures and standards for the implementation of the Convention;
- (c) The Contracting States shall establish national standards, laws and regulations as required for the effective discharge of the obligation prescribed in Paragraph (a) of this article, and shall endeavor to harmonize their national policies in this regard and for this purpose appoint the appropriate Authority;
- (d) The Contracting States shall co-operate with the competent international, regional and sub-regional organizations to establish and adopt regional standards, recommended practices and procedures to prevent, abate and combat pollution from all sources in fulfilling their obligations under the present Convention;
- (e) The Contracting States shall use their best endeavour to ensure that the implementation of the present Convention shall not cause transformation of one type of pollution to another which could be more detrimental to the environment.

109. *Id.*

110. *Id.*

111. *Id.* at 515. Article IX provides that:

*Co-operation in Dealing with Pollution Emergencies*

- (a) The contracting States shall, individually and/or jointly, take all necessary measures, including those to ensure that adequate equipment and qualified personnel are readily available, to deal with pollution emergencies in the Sea Area, whatever the causes of such emergencies, and to reduce or eliminate damage resulting therefrom;
- (b) Any contracting State which becomes aware of any pollution emergency in the Sea Area shall, without delay, notify the Organization referred to under Article XVI and, through the secretariat, any Contracting State likely to be affected by such emergency.

112. *Id.*

113. *Id.* at 523. Article XXV provides that:

*Settlement of Disputes*

- (a) In a case of a dispute as to the interpretation or application of this Convention or its protocols, the Contracting States concerned shall seek a settlement of the dispute through negotiations or any other peaceful means of their own choice.
- (b) If the Contracting States concerned cannot settle the dispute through the means mentioned in paragraph (a) of this Article, the dispute shall be submitted to the Judi-

set up by the Convention.<sup>114</sup> However, in a situation involving warships or other non-commercial governmental service, a State that violates the provisions of the Convention shall be exempt from the application of its provisions.<sup>115</sup> Thus, Iran and Iraq can assert they are exempted from the Convention's provisions because their hostilities which caused the oil pollution damage are non-commercial governmental acts.

The United Nations position in regard to environmental damage has been promulgated in The United Nations Conference on the Human Environment. The Conference sets forth nations' responsibility for environmental damage to areas beyond their territories.<sup>116</sup> Articles 21 and 22 are pertinent to the present problem in that the United Nations has established that States have a responsibility to ensure that the activities within their jurisdiction do not cause damage to areas beyond their boundaries.<sup>117</sup> Under these provisions, Iran and Iraq have a responsibility not only to control the environmental damage they have caused, but also to compensate the victims of the environmental damage.<sup>118</sup>

Article 21 provides that nations have a right to exploit their natural resources, although they also have a duty to control their activities with regard to these resources so that they do not damage areas beyond their jurisdiction.<sup>119</sup> Article 22 asserts that nations have a duty to promote environmental pollution laws regarding liability and compensation for victims of pollution damage, and that nations should cooperate in developing these laws.<sup>120</sup> These articles impose

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cial Committee for the Settlement of Disputes referred to in paragraph (b)(iii) of Article XVI.

114. *Id.*

115. *Id.* at 517. Article XIV provides that:

*Sovereign Immunity*

Warships or other ships owned or operated by a State, and used only on Government non-commercial service, shall be exempted from the application of the provisions of the present convention. Each Contracting State shall, as far as possible, ensure that its warships or other ships owned or operated by that State, and used only on Government non-commercial service, shall comply with the present Convention in the prevention of pollution to the marine environment.

116. Report of the United Nations Conference on the Human Environment, U.N. Doc. A/Conf. 48/14 and Corr. 1, *reprinted in* 11 INT'L LEGAL MATERIALS 1416, 1420 (1972).

117. *Id.*

118. *Id.*

119. *Id.* Principle 21 provides that: "States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction."

120. *Id.* Principle 22 provides that: "States shall cooperate to develop further the interna-

an affirmative duty on Iran to control its activities with regard to its oil resources in the Gulf. Since its oil resources have damaged the neutral States in the Gulf, Article 22 demands that Iran and Iraq cooperate in compensating victims for their damage.

The International Law Commission, in its draft articles on State responsibility, questioned whether the articles of the United Nations Conference established strict liability for all types of environmental damage.<sup>121</sup> However, the Commission indicated that transnational environmental damage was clearly among the injuries that the Conference intended to include.<sup>122</sup> Thus, the damage inflicted by Iran and Iraq in the Persian Gulf is clearly the type which establishes strict international liability.

Another United Nations Conference on States' responsibility for transnational damage is the United Nations Third Conference on the Law of the Sea (UNCLOS III).<sup>123</sup> UNCLOS III provides that a nation will be responsible for damage to the marine environment when the damage originates within its territorial boundaries and affects areas outside of its boundaries.<sup>124</sup> In situations where nations cannot agree as to responsibility or liability for the damage they have caused to the marine environment, the Convention provides an effective remedy by establishing a code for the settlement of disputes.<sup>125</sup>

The Code's system for dispute settlement begins by allowing the

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tional 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."

121. Handl, *The Environment: International Rights and Responsibilities*, AM. SOC. INT'L L. PROC. 223, 229 (1980).

122. *Id.*

123. The Final Act of the United Nations Conference on the Law of the Sea was signed on December 10, 1982, at Montego Bay. Third United Nations Conference on the Law of the Sea, Oct. 21, 1982, U.N. Doc. A/Conf. 62/122, reprinted in 21 INT'L LEGAL MATERIALS 1245 (1982) [hereinafter cited as UNCLOS]. For the complete list of the 140 signatories of the Final Act, see *id.* at 1261.

124. "The Law of the Sea Conference establishes that, Polluters of areas (including the marine environment) under the jurisdiction of other [nations] . . . [will be] liable to other [nations] for such damage. The 'activities' of concern may originate on land or anywhere at sea, including flag ship and sea bed installations, and the [nation] is responsible whether the enterprise is public or private." D. LIVINGSTON, MARINE POLLUTION ARTICLES IN THE LAW OF THE SEA SINGLE INFORMAL NEGOTIATING TEXT 23 (1976).

125. Sohn, *Peaceful Settlement of Disputes in Ocean Conflicts: Does UNCLOS III Point the Way?*, 46 LAW & CONTEMP. PROBS. 195 (1983). The development of the code for the settlement of disputes has been one of the most important accomplishments of UNCLOS based on the reasoning that "in the absence of an agreement on impartial third-party adjudication, the view of one State with respect to the interpretation of the Convention cannot prevail over the views of other Member States. Each party can claim forever that its view alone is correct, but another party can make the same claim, resulting in an impasse." *Id.*

parties, at any time before or during the proceedings, to come to a mutual agreement.<sup>126</sup> Only when the parties fail to reconcile their dispute do the compulsory procedures of the Convention apply.<sup>127</sup> The parties may choose several of the available mechanisms under the compulsory procedures for the settlement of their dispute.<sup>128</sup> If the party does not choose one of the mechanisms, the State is deemed to have chosen an arbitral tribunal procedure.<sup>129</sup> All contracting States are bound by the decision of the settlement mechanism they have chosen and are obligated to accept its jurisdiction.<sup>130</sup>

Although all States are obligated to abide by the settlement provisions, the Code has delineated specific limitations and exceptions to the compulsory procedures.<sup>131</sup> In addition, the Code has provided contracting States with the option to exclude certain categories from the dispute settlement procedures.<sup>132</sup> One option allows any dispute concerning military activities to be completely exempt from the dispute settlement under the Convention.<sup>133</sup> Therefore, any contracting State which has opted for the military exclusion will not be responsible for damage to the marine environment when the damage arose out of an armed conflict situation.<sup>134</sup>

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126. *Id.* at 196. Part XV of the Convention contains the essential dispute settlement provisions.

127. Gaertner, *The Dispute Settlement Provisions of the Convention on the Law of the Sea: Critique and Alternatives to the International Tribunal for the Law of the Sea*, 19 SAN DIEGO L. REV. 577, 582 (1982).

128. *Id.* at 582-584. The Parties have their choice of the following procedures for the settlement of their disputes: 1) the International Tribunal for the Law of the Sea (Tribunal); 2) the International Court of Justice (I.C.J.); 3) an arbitral tribunal; or 4) a special tribunal for the handling of disputes regarding fisheries, protection and preservation of the marine environment, marine scientific research or navigation and pollution by vessels. *Id.* at 582.

129. *Id.*

130. *Id.* at 584.

131. *Id.* The limitations to the compulsory procedures relates to States' sovereignty within their Exclusive Economic Zone (EEZ). *Id.*

132. *Id.* The categories which contracting States may exclude from the dispute settlement procedures of the Convention are:

- 1) Disputes concerning sea boundary delimitations;
- 2) Disputes concerning military activities; and
- 3) Disputes which are being dealt with by the UN Security Council.

See also Sohn, *supra* note 125, at 198.

133. Sohn, *supra* note 125, at 198.

134. On December 7, 1982, at Montego Bay, Jamaica, Mr. Hamoud gave the nation of Iraq's statement concerning the final draft of UNCLOS. Mr. Hamoud stated that Iraq had decided to sign the Convention without specifying any reservations. Third Conference on the Law of the Sea (188th Meeting, eleventh session) at 26, A/CONF. 62/PV.188 (prov. ed. 1983).

On December 9, 1982, Mr. Mirmehdi gave the Islamic Republic of Iran's statement. Iran voted in favor of adopting the Convention, although they chose not to be governed by the compulsory procedures entailing binding decisions. As of the date of this article, the UNCLOS



An additional method of setting guidelines for liability in situations of transnational injury is the multilateral treaty. A model multinational treaty of great significance is the agreement of cooperation between the United States of America and the United Mexican States.<sup>135</sup> This agreement focuses on the pollution of the marine environment by the discharge of hydrocarbons and other hazardous substances.<sup>136</sup> The treaty was written in response to the catastrophe surrounding Ixtoc I, an oil rig off the coast of Mexico that produced the largest oil spill in history.<sup>137</sup> The agreement established a joint contingency plan for "coordination of efforts to prevent, detect and respond to any pollution incident which threatens the area of either party."<sup>138</sup> The plan operates through joint response teams that function as the principle link between the party's national detection and response systems.<sup>139</sup> The overall success or failure of the agreement depends on each nation's good will, as the parties remain free to respond to each situation that arises as they see fit.<sup>140</sup> Thus, the possibility exists that neither nation will participate to the extent of their capabilities.<sup>141</sup> Nevertheless, this agreement sets forth a model plan by which nations can work with one another to cleanse and maintain the seas.<sup>142</sup> However, the plan does have weaknesses,<sup>143</sup> the most significant of which is also present in the Persian Gulf treaty. Neither agreement sets forth any procedures for establishing liability, nor do they calculate compensation for those who have been damaged.<sup>144</sup> The treaties therefore fail to afford nations an adequate

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compulsory procedures have not been applied to the Armed Conflict between Iran and Iraq. United Nations Third Conference on the Law of the Sea (191st Meeting, eleventh session) at 27, A/CONF. 62/PV. 191 (prov. ed. 1983).

135. See Barnett, *Transnational Pollution Agreement Regarding Marine Pollution Agreements Between the U.S. and Mexico*, 23 HARV. INT'L L.J. 177 (1982).

136. *Id.*

137. *Id.* at 178. Ixtoc I is located in the Bay of Campeche, which is in the southwestern part of the Gulf of Mexico. The oil rig blew out on June 3, 1979, and was spilling oil and natural gas at the rate of some thirty thousand barrels per day. The spill traveled more than five hundred nautical miles, eventually washing up on a one hundred and forty mile stretch of the Texas Coast. Mexico was able to cap the well on March 22, 1980, but not before three million barrels of oil escaped. 2 INT'L ENVTL. REP. (BNA) 841 (Oct. 12, 1979).

138. Barnett, *supra* note 135, at 180.

139. *Id.* at 181.

140. *Id.* at 184.

141. *Id.*

142. *Id.* at 182.

143. *Id.* at 183.

144. *Id.* at 184. A more thorough analysis of the inadequacy of current international and national laws on compensation to victims of oil spills appears in de Mestral, *The Protection of the Marine Environment Arising from Off-Shore Mining and Drilling*, 20 HARV. INT'L L.J. 469 (1979).

remedy.

The overall impact of international conventions and multilateral agreements is that States' responsibility has significantly increased over the last fifty years.<sup>145</sup> Nations currently regard environmental protection as a high priority, and therefore are generally willing to cooperate with others in taking responsibility for environmental damage.<sup>146</sup> Nonetheless, the question of liability and compensation for damaged parties has generally remained ignored.<sup>147</sup>

#### IV. PROPOSAL

##### A. *The Need for a New Instrumentality*

Neutral nations physically damaged by armed conflict have little or no remedy through the laws of armed conflict.<sup>148</sup> Furthermore, the fact that the damage arose from an armed conflict situation limits peacetime remedies, as these measures do not generally address the question of liability.<sup>149</sup> Therefore, neutral nations are left without legal recourse when physically damaged by the effects of an armed conflict. A remedy must be afforded the neutral States in the Gulf and other nations faced with the same problem now or in the future. The basis for establishing such a remedy is twofold.

First, a nuclear world war has the capability of causing severe destruction.<sup>150</sup> Thus, civilized nations have been committed to avoiding a nuclear conflict since the end of World War II.<sup>151</sup> This situation has led to the almost routine occurrence of "limited" armed conflicts as States have sought alternative ways to air aggressions.<sup>152</sup> Between 1945 and 1970, there were one hundred separate armed conflicts between various nations.<sup>153</sup> This increase in limited armed conflict indicates an increase in the possibility of neutral countries which may be adversely affected by such hostilities.

Second, a remedy must be afforded States affected by limited armed conflict that will enable those States to remain neutral. Where

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145. Comment, *supra* note 68, at 410.

146. *Id.*

147. Barnett, *supra* note 135, at 185.

148. See *supra* notes 39-67 and accompanying text.

149. See *supra* notes 68-144 and accompanying text.

150. Firmage, *The "War of National Liberation" and the Third World*, in *LAW AND CIVIL WAR IN THE MODERN WORLD* 304-305 (J.N. Moore ed. 1974).

151. *Id.*

152. Franck, *Who Killed Article 2(4)? Or: Changing Norms Governing the Use of Force by States*, 64 *AM. J. INT'L LAW* 809, 811 (1970).

153. *Id.*

inadequate legal remedies for neutral States exist it becomes increasingly possible that these States will resort to aggression for redress. As the threat to neutral States from limited armed conflict increases, the possibility of global hostility increases. A remedy for neutral States affected by limited armed conflict is a step toward discouraging the escalation of hostilities. In order to prevent escalation of such conflicts, nations involved in limited armed conflict situations must be made liable for physical damage they cause to neutral nations.

The laws of armed conflict can incorporate this idea through a United Nations resolution or an international convention. The principle behind the laws of armed conflict is that nations should be held responsible for the adverse effects which their conflicts have on other nations.<sup>154</sup> Thus, it is consistent with the underlying principles of the law of armed conflict that this responsibility should also attach for acts committed during armed conflicts as well as declared wars. Moreover, the implementation of a proposal embodying these principles through a United Nations resolution or through an international convention can be achieved since the most important developments in the law of armed conflict have been accomplished through the use of these methods.<sup>155</sup>

The shortcomings of these methods, namely inadequate treatment of liability and compensation issues, can be avoided. The first step is to provide a specific method for resolving issues of liability and compensation. This can be accomplished through the institution of a "Limited Armed Conflict Tribunal" to hear and settle all disputes arising from situations analogous to that in the Gulf.<sup>156</sup> Such a tribunal could provide neutral nations with a mechanism for the settlement of their disputes and thus lessen the likelihood of resort to hostilities for redress.

It is crucial that the proposal eventually be accepted as a rule of customary international law, that is, a "basic norm" of society that has a binding effect on all nations.<sup>157</sup> A United Nations resolution or international convention, on the other hand, generally only binds its signatories, and therefore very few translate into universal adherence.<sup>158</sup>

Customary rules of international law are created as a matter of

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154. See *supra* text accompanying note 46.

155. L. OPPENHEIM, *supra* note 50, at 226.

156. See *infra* § B for the proposed UN resolution on amending the current Laws of Armed Conflict to include situations like the one in the Persian Gulf.

157. J.G. MERILLS, *ANATOMY OF INTERNATIONAL LAW* 87 (1981).

158. *Id.* at 8.

international agreement.<sup>159</sup> This agreement process is accomplished by several States binding themselves to United Nations Resolutions or international agreements.<sup>160</sup> These Member States then interact with non-Member States, eventually rendering the new resolution or agreement a law of general usage, which in turn becomes a rule of customary international law.<sup>161</sup> States recognize these rules of customary international law in their relationships with one another and normally adhere to them.<sup>162</sup> To disregard a rule of customary international law is to upset the established norms "for which a high political price must usually be paid"<sup>163</sup> by way of political and economic sanctions.<sup>164</sup>

It is unreasonable to expect that even if a proposal is accepted as a rule of customary international law it will eliminate all future problems that might arise. International law is an instrument of social control, and thus does not operate in a vacuum.<sup>165</sup> Moreover, customary international law has no conventional means of enforcement; each individual nation must uphold or disregard its principles.<sup>166</sup> Nevertheless, nations must bind themselves to a United Nations resolution or an international agreement if neutral States are to have a mechanism to remedy their damages. If this is achieved, nations participating in a limited armed conflict in the future will have prior knowledge of their international responsibilities to neutral nations, and may be more inclined to act accordingly. It is essential that the community work toward narrowing the presently existing gaps in the law of armed conflict, "for in an anarchic and lawless world, it is not only the weak who lose, but everyone is a loser, including those who are the most powerful. In the process, all humanity loses."<sup>167</sup>

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159. *Id.* at 3. For a complete discussion on the creation of the rules of customary international law, see J.L. BRIERLY, *THE LAW OF NATIONS* 397 et. seq. (H. Waldock 6th ed. 1963); G. TUNKIN, *THEORY OF INTERNATIONAL LAW* 91 (1981).

160. Merills, *supra* note 157, at 8.

161. *Id.* at 14.

162. *Id.* at 86.

163. *Id.* at 88.

164. *Id.*

165. G. SCHWARZENBERGER, *THE DYNAMICS OF INTERNATIONAL LAW* 90 (1976).

166. *Id.* One encouraging event in modern times is the fact that one hundred and fifty nations were willing to spend more than seven years negotiating a treaty on the Law of the Sea.

167. Nanda, *U.S. Action in Grenada Raises Questions of International Law*, Den. Post, Oct. 31, 1983, at C3, col. 1.

## B. *Proposed United Nations Resolution*

United Nations Resolution amending the Laws of Armed Conflict to include provisions covering limited armed conflict that cause physical damage to neutral countries.

### PREAMBLE

The States responsible for the present Resolution,

*Realizing* that the absence of liability for limited armed conflict causing physical damage to neutral countries presents a growing threat to the Environment, Human Health and World Peace,

*Believing* that the codification and progressive development of the laws of armed conflict achieved in the present Resolution will contribute to the maintenance of international peace and security, in accordance with the purposes and principles of the United Nations as set forth in the Charter,

*Having Regard* to the Declaration on Principles of International Law concerning Friendly Relations on Cooperation among States in accordance with the Charter of the United Nations,

*Affirming* that the rules of customary international law continue to govern matters not expressly regulated by the provisions of the present Resolution,

*Have Agreed* as follows:

### ARTICLE I

#### *Definitions*

For the purpose of the Resolution:

(a) "Limited Armed Conflict Situations" are those which involve a maximum of two nations, although they may include an armed conflict situation which is located solely within one Nation or Territory.

(b) "Principals" refer to those nations or individuals actively involved in the armed conflict.

(c) "Physical adverse effects" mean any introduction by the principals, directly or indirectly, of substances or energy which results or is likely to result in such deleterious effects as harm to a neutral nation, including harm to living resources and marine life, hazards to human health, and any other type of harmful effect that would damage a neutral nation's public or private property.

(d) "Neutral nations" are those that do not take part in an armed conflict and those that remain impartial.

## ARTICLE II

### *General Obligations*

(a) The principals shall, individually, jointly, or both, take all appropriate measures, in accordance with the present Resolution and those protocols in force to which they are a party, to prevent where possible and to abate adverse physical effects upon neutral nations, and if adverse effects are present, principals will take responsibility in accordance with the Resolution;

(b) In addition, states shall cooperate in the formulation and adoption of other protocols; prescribing agreed measures, procedures and standards for the implementation of the Resolution;

(c) States shall establish national standards, laws and regulations as required for the effective discharge of the obligation prescribed in Paragraph (a) of this Article, and shall endeavor to harmonize their national policies in this regard and for this purpose appoint the appropriate authority; and

(d) States shall cooperate with the competent international, regional and sub-regional organizations to establish and adopt regional standards, recommend practices and procedures to prevent limited armed conflict situations from causing physical damage to neutral nations, and to assist each other in fulfilling their obligation under the present Resolution if a neutral nation is damaged by a limited armed conflict situation.

## ARTICLE III

### *Liability and Compensation*

States shall conform to the appropriate rules and procedures laid down by the United Nations Tribunal, constituted in accordance with Article VII, for the determination of:

(a) Civil liability and compensation for damage inflicted upon neutral nations resulting from a limited armed conflict situation; and

(b) Liability and compensation for damage resulting from violation of obligations under the present Resolution.

## ARTICLE IV

### *Settlement of Disputes*

(a) In case of a dispute as to the interpretation or application of this Resolution, the parties involved shall seek a settlement of the dispute through negotiation or any other peaceful means of their own choice.

(b) If the parties involved cannot settle the dispute through means mentioned in Paragraph (a) of this Article, the dispute shall be submitted to The Law of Limited Armed Conflict Tribunal described in Article VII.

## ARTICLE V

### *Finality and Binding Force of Decisions*

(a) Any decision rendered or measure prescribed by the Tribunal shall be final and shall be complied with by all the parties to the dispute.

(b) Any such decision or measure shall have no binding force except between the parties and with respect to that particular dispute.

## ARTICLE VI

### *Reports*

Each country shall submit to the Tribunal reports on measures adopted in implementation of the provisions of the Resolution in such form and at such intervals as may be determined by the Tribunal.

## ARTICLE VII

### *1. The Law of Limited Armed Conflict Tribunal*

The Tribunal shall be constituted and shall function in accordance with the provisions of the present Resolution.

#### *(a) Composition of Tribunal*

1. The Tribunal shall be composed of a body of 21 independent members elected from among persons enjoying the highest reputation for fairness, integrity and competence in matters relating to the Law of Limited Armed Conflict.

2. In the Tribunal as a whole, the representation of the princi-

pal legal systems of the world and equitable geographical distribution shall be assured.

(b) *Election of Members*

1. No two members of the Tribunal may be nationals of the same State, and a person who for the purposes of membership in the Tribunal could be regarded as a national of more than one State shall be deemed to be a national of the one in which he ordinarily exercises civil and political rights.

2. There shall be not less than three members from each geographical group as established by the General Assembly of the United Nations.

(c) *Procedure for Nomination and Election*

1. Each State may nominate not more than two persons for membership of the Tribunal.

2. At least three months before the date of the election, the Secretary-General of the United Nations, in the case of the first election, and the Registrar of the Tribunal, in the case of subsequent elections, shall address a written invitation to the States to submit their nominations for members of the Tribunal within two months. He shall prepare a list in alphabetical order of all the persons thus nominated, with an indication of the States which have nominated them, and shall submit it to the States before the seventh day of the last month before the date of each election.

3. The first election shall be held within six months of the date of entry into force of the present Resolution.

4. Elections of the members of the Tribunal shall be by secret ballot. They shall be held at a meeting of the States convened by the Secretary-General in the case of the first election, and by a procedure agreed to by the States in the case of subsequent elections. At that meeting, for which two-thirds of the States shall constitute a quorum, the persons elected to the Tribunal shall be those nominees who obtain the largest number of votes and a two-thirds majority of votes of the States present and voting, provided that such majority shall include at least a majority of the States.

(d) *Term of Office*

1. The members of the Tribunal shall be elected for nine years and may be re-elected; provided, however, that of the members elected at the first election, the terms of seven members shall expire at the end of six years.

2. The members of the Tribunal whose terms are to expire at the end of the above-mentioned initial periods of three and six years



shall be chosen by lots to be drawn by the Secretary-General of the United Nations immediately after the first election has been completed.

3. The members of the Tribunal shall continue to perform their duties until their places have been filled. Although replaced, they shall finish any proceedings which they have begun at the time of their replacement.

4. In the case of the resignation of a member of the Tribunal, the resignation shall be addressed to the President of the Tribunal. The position shall become vacant upon the receipt of the letter of resignation.

(e) *Vacancies*

1. Vacancies shall be filled by the same method as devised for the first election, subject to the following provision: the Registrar shall, within one month of the occurrence of the vacancy, proceed to issue the invitations provided for in Article IV, and the date of the election shall be fixed by the President of the Tribunal after consultation with States.

2. A member of the Tribunal elected to replace a member whose term of office has not expired shall hold office for the remainder of the term of his predecessor.

(f) *Conditions Relating to Interests of Members*

1. No member of the Tribunal may exercise any political or administrative function, or associate actively with or be financially interested in any ongoing limited armed conflict.

2. No member of the Tribunal may act as agent, counsel or advocate in any case.

3. Any doubt on these points shall be decided by a majority of the other members of the Tribunal who are present.

(g) *Conditions Relating to Participation of Members*

1. No member may participate in the decision of any case in which he has previously taken part as agent, counsel or advocate for one of the parties as a member of a national or international court or in any other capacity.

2. If, for some reason, a member of the Tribunal decides that he should not take part in the decision of a particular case, he shall so inform the President of the Tribunal.

3. If the President considers that for some reason one of the members of the Tribunal should not sit in a particular case, he shall give his notice accordingly.

4. Any disagreement as to whether a member should sit in a particular case shall be decided by a majority vote of the other members of the Tribunal who are present.

(h) *Consequences of Ceasing to Fulfill Conditions*

If, in the unanimous opinion of the other members of the Tribunal, a member has ceased to fulfill the required conditions of membership, the President of the Tribunal shall declare the seat vacant.

(i) *Diplomatic Privileges and Immunities*

The members of the Tribunal, when engaged in the business of the Tribunal, shall enjoy diplomatic privileges and immunities.

(j) *Declaration by Members*

Every member of the Tribunal shall, before taking up his duties, make a solemn declaration in open session that he will exercise his powers impartially and conscientiously.

(k) *President, Vice-President and Registrar*

1. The Tribunal shall elect its President and Vice-President for three years; they may be re-elected.

2. The Tribunal shall appoint its Registrar and may provide for the appointment of such other officers as may be necessary.

(l) *Seat of Tribunal*

1. The seat of the Tribunal shall be determined by the States, provided that the Tribunal shall have the right to sit and exercise its functions elsewhere whenever the Tribunal considers it desirable.

2. The President and the Registrar shall reside at the seat of the Tribunal.

(m) *Quorum*

All available members shall sit, but eleven members shall be required to constitute a quorum of the Tribunal.

(n) *Special Chambers*

1. The Tribunal may form such chambers, composed of three or more members, as the Tribunal may deem necessary for dealing with particular categories of disputes.

2. The Tribunal shall form a chamber for dealing with a particular dispute submitted to it if the parties so request. The composition of such a chamber shall be determined by the Tribunal with the approval of the parties.

3. With a view to the speedy dispatch of business, the Tribunal shall form annually a chamber composed of five members which may hear and determine disputes by summary procedure. Two alterna-

tive members shall be selected for the purpose of replacing members who are unable to participate in a particular proceeding.

4. Disputes shall be heard and determined by the chambers provided for in this Article if the parties so request.

5. A Judgment given by any of the chambers provided for in this Article shall be considered as having been rendered by the Tribunal.

(o) *Rules of Tribunal*

The Tribunal shall frame rules for carrying out its functions. In particular, it shall lay down rules of procedure.

(p) *Nationality of Members*

1. Members of the nationality of any of the parties to a dispute resulting from a limited armed conflict shall retain their right to participate as members of the Tribunal.

2. If the Tribunal hearing on any dispute includes a member of the nationality of one of the parties to the dispute, any other party to the dispute may choose a person to participate as a member of the Tribunal.

3. If the Tribunal hearing does not include a member of the nationality of the parties, each of these parties may proceed to choose a member as provided in Paragraph 2.

4. Should there be several parties in the same interest, they shall, for the purpose of the preceding provisions, be recognized as one party only. Any disagreement on this point shall be settled by the decision of the Tribunal.

(q) *Remuneration of Members*

1. Each member of the Tribunal shall receive an annual allowance, and for each day on which he exercises his functions he shall also receive a special allowance, provided that in any year the total sum payable to any member as special allowance shall not exceed the amount of the annual allowance to that member.

2. The President shall receive a special annual allowance.

3. The Vice-President shall receive a special allowance for each day on which he acts as President.

4. The people chosen to serve as members of the Tribunal who are not the originally elected members of the Tribunal shall receive compensation for each day on which they exercise their membership functions.

5. These allowances and compensation shall be fixed periodi-

cally at a meeting of the States, taking into account the workload of the Tribunal. They may not be decreased during the term of office.

6. The salary of the Registrar shall be fixed at a meeting of the States on the proposal of the Tribunal.

7. Regulations made at the meeting of the States shall fix the conditions under which retirement pensions may be given to members of the Tribunal and to the Registrar, and the conditions under which members of the Tribunal and Registrar shall have their travelling expenses refunded.

8. The above salaries, allowances and compensation shall be free of all taxation.

(r) *Expenses of Tribunal*

1. The expenses of the Tribunal shall be borne by the States and by the Tribunal on such terms and in such manner as shall be decided at a meeting of the States.

2. When an entity other than a State is a party to a dispute submitted to the Tribunal, the Tribunal shall fix the amount which that party is to contribute toward the expenses.

(s) *Parties Before Tribunal*

1. States may be parties before the Tribunal.

2. Entities other than States may be parties before the Tribunal in accordance with any other agreement conferring jurisdiction on the Tribunal and accepted by all the parties to any dispute submitted to the Tribunal.

(t) *Access to Tribunal*

The Tribunal shall be open to the States. It shall be open to entities other than States in accordance with any other agreement conferring jurisdiction on the Tribunal and accepted by all the parties to any dispute submitted to the Tribunal.

(u) *Jurisdiction*

The jurisdiction of the Tribunal shall be comprised of all disputes and applications submitted to it in accordance with the present Resolution and all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal.

## 2. *Reference of Disputes Subject to Other Agreements*

If all the parties to a treaty or convention already in force and relating to the subject-matter covered by the present Resolution so agree, any disputes relating to the interpretation or application of

such treaty or convention may, in accordance with such agreement, be submitted to the Tribunal.

(a) *Institution of Proceedings*

1. Disputes may be submitted to the Tribunal, as the case may be, either by a written application addressed by a party or parties to the dispute, or by the notification to the registrar of any special agreement between the parties to the dispute. In either case, the subject of the dispute and the parties involved shall be indicated.

2. The Registrar shall forthwith communicate the application to all concerned.

3. He shall also notify all States.

(b) *Hearing*

1. The hearing shall be under the control of the President or, if he is not able to preside, the Vice-President, and if neither is able to preside, the senior judge present shall preside.

2. The hearing shall be public, unless the Tribunal decides otherwise, or unless the parties demand that the public not be admitted.

(c) *Conduct of Case*

The Tribunal shall make orders for the conduct of the case, shall decide the form and time in which each party must present its arguments, and make all arrangements connected with the receiving of evidence.

(d) *Majority for Decision*

1. All questions shall be decided by a majority of the members of the Tribunal who are present.

2. In the event of an equality of votes, the President or the member who acts in his place shall have a casting vote.

(e) *Judgment*

1. The judgment shall state the reasons on which it is based.

2. It shall contain the names of the members of the Tribunal who have taken part in the decision.

3. If the judgment does not represent in whole or in part the unanimous opinion of the members of the Tribunal, any member shall be entitled to deliver a separate opinion.

4. The judgment shall be signed by the President and by the Registrar. It shall be read in open court, due notice having been given to the parties to the dispute.

5. The judgment of the Tribunal is final and shall be complied with by all the parties to the dispute.

## ARTICLE VIII

### *Entry into Force*

(a) The present Resolution shall enter into force on the day following the date of deposit of the instrument of ratification or accession.

(b) For each State ratifying or acceding to the Resolution after the deposit of the instrument of ratification or accession, the Resolution shall enter into force on the day after the deposit by such a State of its instrument of ratification or accession.

## ARTICLE IX

### *Testimonial Clause*

In Witness Whereof, the undersigned, being duly authorized thereto by their respective Governments, have signed the present Resolution.

## V. CONCLUSION

The armed conflict between Iran and Iraq raises several issues as to liability for the oil pollution damage affecting neutral States in the Persian gulf.<sup>168</sup> The fact that damage was caused by an armed conflict suggests that the laws of armed conflict should govern the situation.<sup>169</sup> However, these laws deal with the treatment of property and do not cover the types of damage caused by situations such as the Iran-Iraq conflict.<sup>170</sup> Furthermore, while mechanisms such as judicial decisions and international conventions are helpful, they do not adequately deal with the issues of liability and compensation. Consequently, both alternatives leave neutral nations without an adequate remedy.<sup>171</sup> Policy and analogous international law support the proposition that principle nations should be liable for damage inflicted upon neutral nations as a result of their limited armed conflicts, and for compensating those nations victimized by such armed activities. This proposal can be accomplished by the establishment of a Limited Armed Conflict Tribunal that sets out a specific method for resolving issues of liability and compensation, and by international recognition of the problem and eventual acceptance of the proposal as a rule of

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168. See *supra* notes 18-38 and accompanying text.

169. See *supra* notes 39-48 and accompanying text.

170. See *supra* notes 49-67 and accompanying text.

171. See *supra* notes 68-147 and accompanying text.

customary international law.<sup>172</sup>

*Richard L. Weiner\**

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172. *See supra* notes 148-67 and accompanying text.

\* I would like to thank Beth A. Weiner, whose support, encouragement and assistance made this Comment possible.