High Seas Governance Gaps: International Accountability for Nuclear Pollution

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High Seas Governance: Gaps and Challenges
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The topic

• Governance gap as diminished “international accountability” for nuclear pollution of the high seas

• Accountability as the state of being liable, answerable or responsible

• Diminished accountability less due to the absence of substantive norms for the protection or the preservation of the marine environment; more the result of missing “enabling conditions” for the invocation or operationalization of the substantive norms
UNCLOS: States’ obligations to prevent and minimize the pollution of the high seas

- **Art.192** (general obligation to protect and preserve the marine environment)
- **Art.194, para. 3(a)** (obligation to minimize “the release of toxic, or noxious substances … from or through the atmosphere or by dumping.”)
- **Art. 195** (duty not to transfer damage or hazards or transform one type of pollution…)
- **Art.198** (obligation to notify ‘imminent or actual”)  
- **Art. 204** (obligation to monitor risks or effects pollution)  
- **Art.206** (obligation of EIA)  
- **Arts.197 & 199** (obligation to cooperate generally, and on contingency planning)  
- **Arts. 207-209** (obligations related to pollution from land-based sources; seabed activities on national continental shelf & in the International Seabed Area.
- **Art.210** (obligation related to pollution by dumping)  
- **Art.212** (obligation re pollution from or through the atmosphere)
  
  *Specific FS obligations: Arts.94(1), 211(2) and 217.*

- **Regional Seas Conventions**  
- **London Protocol, Art. 2, etc., etc.**
Accountability

- A hallmark of any legal system, indeed a defining characteristic of “governance” itself;

- “No responsibility, no (international) law”

- From an international legal perspective, accountability is not synonymous with “responsibility”

  nuclear pollution of the H.S. can be the result of activities involving a State’s international wrongful conduct (intentional or negligent act/omission) or it may occur notwithstanding the State’s full compliance with its prevention obligations.
Challenges in assessing the governance gap

State responsibility and state liability represent two manifestations of a state’s accountability under international law; they differ in terms of their origin or the basis of obligation; as well as their nature and scope.

And, accountability varies with the
  - nuclear pollution scenario,
  - type of damage caused,
  - type of claimant (even his/her nationality) and
  - demands for redress
To wit, accountability for loss of life, personal injury or property damage due to nuclear pollution on the high seas tends to be relatively strong – hence the governance gap small, if not non-existent – while conversely, on the other end of this sliding scale, accountability for damage to the environment will be relatively diminished
Nuclear pollution scenarios involving the high seas

- **Non-accidental**
  - Weapons testing on the H.S. or in locations – underwater or in the atmosphere -- potentially affecting the H.S.
    - Last such test: France at Mururoa atoll, in 1974
    - Partial Test Ban Treaty of 1963
    - Comprehensive Test Ban Treaty, 1996 – not in force
  - Dumping at sea
    - LC/LP
      - Dumping of materials containing *de minimis* levels of radioactivity
      - 25-year review (after entry into force in 1994) clause
• Incidents involving a “nuclear ship” – using nuclear power as means of propulsion

• Transportation accident

• Land-based, coastal installation accident causing major pollution affecting the H.S.?

• Floating nuclear power plant
Accountability/Remedies for nuclear pollution

- The nuclear liability conventions
- UNCLOS
- Customary International Law
  - Reparation in the absence of internationally wrongful conduct?
    - State Practice
    - ILC Principles on the Allocation of Loss
  - Invocation of State Responsibility
    - ILC articles on State Responsibility
- Port State Enforcement under Art.218 (1) UNCLOS
<table>
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<th>Extension to H.S.</th>
<th>Counts of Damage Covered</th>
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<td>Convention on Supplementary Compensation</td>
<td>Art V (1)(b)(i-ii)</td>
<td>Art. II (2)</td>
<td>limited redress <em>ratione personae</em> – nationality – and, possibly, <em>ratione materiae</em> -- environmental damage</td>
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<td>1997 Vienna Convention</td>
<td>Art. IA</td>
<td>Traditional counts, plus environmental damage (costs of reinstatement/prevention measures)</td>
<td>Full redress</td>
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<tr>
<td>1963 Vienna Convention</td>
<td>Not specified</td>
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<td><strong>Paris Convention, 1960</strong></td>
<td>Not specified; but in 1968, the NEA Steering Committee recommended that Convention cover nuclear incidents occurring or nuclear damage suffered on the high seas.</td>
<td>Limited traditional counts</td>
<td>Either no redress at all; Or: limited redress for traditional counts of damage; &amp; no redress for environmental damage</td>
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<td><strong>1963 Brussels Supplementary Convention</strong></td>
<td>Art.2 (a) (ii) 2 LIMITED Damage on board a ship or aircraft registered in C.P. or damage by a national of a C.P. on board a ship or aircraft of C.P.</td>
<td>Same as Paris Convention</td>
<td>Limited redress ratione materiae and personae no redress for environmental damage</td>
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<td><strong>2004 Paris Convention</strong></td>
<td>Art. 2 (a) (i) LIMITED: on board a ship/aircraft registered in C.P. &amp; certain non-C.P.s [Art. 2(b) extension possible (C.P. legislation)]</td>
<td>Art. 1(a) (vii) Traditional counts, plus environmental damage (costs of reinstatement/preventive measures)</td>
<td>Same as CSC coverage: limited redress ratione personae – nationality – and, possibly, ratione materiae -- environmental damage</td>
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<td><strong>2004 Brussels Supplementary Convention</strong></td>
<td>Art. 2 (a) (ii) (1) Same as CSC</td>
<td>See 2004 Paris Convention</td>
<td>Limited redress of environmental damage</td>
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Damage compensable, defined

Traditional counts of damage – loss of life, health impairment, damage to property and – more recently – pure economic loss, including loss consequential to environmental degradation

Damage to the environment per se

• costs of measures of reinstating or restoring the environment;
• cost of preventive measures; and
• loss of natural resource services
  • its unresolved status as a proper count of compensation
    • not recognized in any of the nuclear lability conventions
    • the CLC/Fund conventions system
    • ILC articles on state responsibility & principles on the allocation of damage
    • UN Compensation Commission, etc.
    • Domestic legal practice
Reparation under UNCLOS & Customary International Law

- UNCLOS environmental obligations are obligations of due diligence

- Compensation in the absence of international wrongfulness?
  - Limited state practice

- ILC Principles on Allocation of Loss
  - as a guide to international pubic policy, evolving international community expectations

- *ITLOS Advisory Opinion, 2011*: International law on responsibility and liability is not static, the liability regime for deep seabed mining open to new developments in international law, either in the context of the deep seabed mining regime specifically or in conventional or customary international law!
Reparation subsequent to international wrongfulness

Invocation of State Responsibility for Environmental Damage on the High Seas

• *Actio popularis* in international law?

• The ILC articles on State Responsibility -- Art. 42: Invocation of responsibility by an injured State

A State is entitled as an injured State to invoke the responsibility of another State if the obligation breached is owed to:

(a) That State individually; or

(b) A group of States including that State, or the international community as a whole, and the breach of the obligation:

   (i) Specially affects that State; or

   (ii) Is of such a character as radically to change the position of all the other States to which the obligation is owed with respect to the further performance of the obligation.
Invocation of responsibility by a State other than an injured State

Any State other than an injured State is entitled to invoke the responsibility of another State in accordance with paragraph 2 if:

- (a) The obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or

- (b) The obligation breached is owed to the international community as a whole.

*ITLOS Advisory Opinion, 2011:*

The *erga omnes* character of the obligations relating to preservation of the environment of the high seas
Standing yes, but: limited claims (no restitution/no compensation): ASR, Art.48,2

Any State entitled to invoke responsibility under paragraph 1 may claim from the responsible State:

- (a) cessation of the internationally wrongful act, and assurances and guarantees of non-repetition in accordance with article 30; and

- (b) performance of the obligation of reparation in accordance with the preceding articles, in the interest of the injured State or of the beneficiaries of the obligation breached.
Port State Enforcement targeting Pollution on the High Seas, UNCLOS Art. 218, para.1:

- PS may investigate & (where evidence so warrants) institute proceedings provided that
  - incident involves a violation of *applicable international rules and standards established through the competent international organization or general diplomatic conference*
    - A variant of universal principle jurisdiction, a form of “community interest enforcement”
    - Limited state practice
Conclusions re the H.S. governance gap

The analysis offers a decidedly mixed picture

- highlights the intrinsic limits of the bilateralist approach
- overall, international accountability for nuclear pollution of the high seas is limited,
  - but is this of practical relevance?

What changes might be envisaged?

- **Enhance private-vindication-of-collective-interest strategies**
  - Encourage greater state participation in existing nuclear liability conventions
  - Revise nuclear liability instruments -- unlikely
- **Strengthen FS responsibility** – IMO Instruments Implementation Code
- **Support/recognize notion of international “ocean management” mechanism/agency to alleviate standing issues?**
  - BBNJ proposal for Intergovernmental Decision-Making Body/Forum?
- In the interim, call upon states to **increase unilateral enforcement under UNCLOS Art. 218(1)**