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Progressive Development of International Law and Order Since the Events of 11 September 2001

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GOLDEN GATE UNIVERSITY

SCHOOL OF LAW

ELEVENTH REGIONAL MEETING OF
THE AMERICAN SOCIETY OF INTERNATIONAL LAW
TWELFTH ANNUAL FULBRIGHT SYMPOSIUM
on
INTERNATIONAL LEGAL PROBLEMS

**PROGRESSIVE DEVELOPMENT
OF INTERNATIONAL LAW AND ORDER
SINCE THE EVENTS OF 11 SEPTEMBER 2001**

by

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Golden Gate University School of Law
Thursday, 28 March 2002

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by

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**PROGRESSIVE DEVELOPMENT
OF INTERNATIONAL LAW AND ORDER
SINCE THE EVENTS OF 11 SEPTEMBER 2001**

Mr. President of Golden Gate University,
The Dean of the School of Law,
Distinguished Fulbright Scholars in Residence,
Honorable members of the American Society of International Law
and of the American Society of Comparative Law,
Fellow Members of GGU Faculty,
Consoeurs et Confrères :

It is twelve years ago that Golden Gate University initiated its first Annual Fulbright Symposium on international legal developments. Today we are celebrating the close of the first cycle of the Annual Fulbright Symposia.

Simultaneously Golden Gate University School of Law is hosting the initiation of the second decade of international law. It is the Eleventh Regional Meeting of the American Society of International Law.

It is this time of year that international scholars and practitioners of international law in diverse fields are gathered at Golden Gate from the region of the Bay Area and beyond to pursue a meaningful exchange of views among themselves and with learned counterparts from outside the United States, notably a selected body of Fulbright Scholars in Residence and comparatists from within and without the region.

Last year Golden Gate launched its second decade entitled "THE DAWNING OF A NEW ERA FOR THE EVOLVING RULE OF INTERNATIONAL LAW." This year a succession of events have taken place which deserve the closest attention of observers of the rule of international law and order in the making.

The events of 11 September 2001, which sent shock waves to the conscience of mankind the world over, have entailed other consequences unattended by perpetrators of the terrorist acts against the United States and little suspected by the international community at the time. To every action, there is a reaction. The wheel of international justice moves slowly but surely as it requires necessary accompaniments, especially the overwhelming support of the global community and the underlying rule of international law on the subject.

I. THE LAW OF STATE RESPONSIBILITY AND INTERNATIONAL LIABILITY

The terrorist attacks of 11 September 2001 set the stage for an accelerated pace in the progressive concretization of rules of international law on the topic of State Responsibility with particular regard to its application to the breach of the primary rule of international law governing international liability.

Under pre-existing international law, a State is liable, irrespective of fault or proof of wrongfulness, for its failure to prevent the occurrence of harm or infliction on another State or States of injurious consequences arising out of activities initiated or conducted in the territory within its jurisdiction or control.¹¹ While States and international and regional organizations promptly responded to the apparent urgent universal call for the cessation, suspension and immediate termination or discontinuance of such nefarious activities, the forces of destruction continue vigorously to threaten and to terrorize the global community. International terrorists persisted in their relentless efforts to inflict untold pain, sorrow and sufferings, accompanying the menacing reign of terror, striking innumerable indiscriminate fatal blows at countless members of the international community, regardless of their creed, religion, belief, gender, age, nationality or political ideology and affiliation.

General principles of the law of State Responsibility appear intimately involved in

¹¹ The duty of care is placed squarely on the State, from whose territory harmful activities emanated, transgressing national boundaries, or activities otherwise within its jurisdiction or control. Liability is therefore based on the territoriality principle or the principle of jurisdiction or control of the State which is held to be strictly if not indeed absolutely liable for the injurious harms.

connection with circumstances precluding wrongfulness, such as counter-measures^{2]} and self-defense.^{3]} It is of primary interest to ascertain the legal consequences of an internationally wrongful act, in particular the rights of the injured State^{4]} and the obligations of the State which has committed the internationally wrongful act,^{5]} as well as the rights and obligations of third States.^{6]} Theories based on the practice of States and of competent international and regional organizations deserve an examination in the light of the on-going crisis that continues to threaten the peace and security of mankind.

In addition to a critical analysis of the relevant part of the law of State Responsibility, attention will also be directed to two other areas of international legal development in contemporary international law and practice. The first concerns the primary rule of law on the international liability of a State for injurious consequences arising out of acts not prohibited by international law. The second relates to the concerted international actions and measures in pursuit of individual offenders perpetrating organized crimes under the law of nations, the grave crime of international terrorism, targeting primarily on one State in particular, symbolizing the free world but ultimately directed against the international community as a whole, being a serious crime under international law designated as an offence against the peace and security of mankind. The crime of "international terrorism", as such, should be revisited in the context of

^{2]} In Draft Articles on State Responsibility, adopted at second reading by the Drafting Committee of the International Law Commission, UN Doc. A/CN.4/SR.2662, appendix to the Report of the ILC, New York 2000, GA Doc. Supplement No.10 (A/55/10) at pp. 110 *et seq.* Part II, Chapter II : Counter-measures, especially Articles 50-55, as well as Article 23 : Counter-measures in regard to an internationally wrongful act.

^{3]} See *Ibid.*, Draft Article 22 : Self-Defence.

^{4]} See *Ibid.*, Draft Articles 43 and 44 : The right of the injured State or States to demand compliance and the form of reparation.

^{5]} See *Ibid.*, Draft Article 28 : Legal consequences of an international wrongful act; Article 29 : The continuing obligation of the State responsibility to perform the obligation breached; Article 30 : Obligation to cease and desist and non-recurrence; and Article 31 : Obligation to make reparation.

^{6]} See *Ibid.*, Draft Articles 41 and 42 : Consequences of grave violations of obligations owing to the international community as a whole (*erga omnes*).

the events of 11 September 2001.

II. STRICT INTERNATIONAL LIABILITY FOR STATES GENERATING INTERNATIONAL INJURIES

Strict or absolute international liability of States may be traceable to Draft Article 27 (former Article 35) of State Responsibility, which states that the existence of circumstances precluding wrongfulness in this Chapter (Chapter V Part I) is without prejudice : a) to the respect for the obligation in question or its extent if the circumstance precluding wrongfulness no longer exists; or b) to the question of compensation for the injuries or material losses suffered as the result of that international wrongful act.⁷¹ Therefore, even where wrongfulness is precluded, a State may still be liable for the injurious consequence it has effectively caused or allowed to occur, or indeed failed to prevent. On this general principle is based a primary rule of law fastening strict or absolute liability on the State on whose territory or under whose jurisdiction or control activities conducted thereon or thereunder have resulted in transnational harms or inflicted injuries or material losses across and beyond the limits of its national jurisdiction or territorial boundaries.

This primary duty on the part of the State to prevent the occurrence of harms across its frontiers and beyond has initially developed from transboundary pollution or emission of transfrontier air pollutants as in the case of Trail Smelter between the United States and Canada in 1938 and 1941.⁸¹ The origin of this primary obligation under contemporary international law has its foundation in the Roman Law and Anglo-American common law, as evidenced by the Latin maxim : *sic utere tuo ut alienum non laedas*, which literally means "use your property in such a way as not to harm others". This concept of liability is based on restrictive enjoyment of one's own property, or limited and regulated use of proprietary rights subject to the need to prevent harm to others. It appears to be a primary obligation towards the international

⁷¹ See *Ibid.*, Draft Article 27 (35) at pp. 116-117.

⁸¹ 3 Report of International Arbitral Awards (RIAA) 1905 (Trail Smelter Arbitral Tribunal 1938-1941).

community as a whole or an *obligatio erga omnes*, so that there is a primary duty on the part of every State to undertake precautionary measures that are consistent with obligation to prevent harm.^{9]}

This was emphatically endorsed by Principle 21 of the Stockholm Declaration 1972 in these words :-

Principle 21 : States have, in accordance with the Charter of the United Nations and the Principles of International Law, the sovereign rights and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to other States or areas beyond the limits of national jurisdiction."^{10]}

This principle has been identified with the primary rule of strict liability initially for environmental damage to neighboring States. In time, the rule has been extended to cover injuries and losses suffered by persons beyond the immediately adjacent territories. Settlements of bilateral disputes between States illustrate far reaching coverage of this rule of law as in the Lake Lanoux Arbitration (1957)^{11]} and in the settlement of the Gut Dam Claims (1969).^{12]} In these cases, the rule that a State must refrain from harming its neighbors, received further application with far wider implication. A State must also prevent harm in the territories of adjacent States and beyond. It has given rise to the European Polluter Pays Principle as in the pollution of the River Rhine^{13]} which runs across western Europe from Switzerland through

^{9]} See, e.g., Report of the ILC covering the work of its 44th Session, ss. 112-276, UN Doc. A/47/10 (1992), reprinted (1992) 2 Yearbook of ILC, Part 2, at 1. 18-41, UN. Doc. A/CN.41, Ser, A/1992/Add/1 (Part 2).

^{10]} Stockholm, 5-11 June 1972; UN Doc. A/CONF. 48/14 (1972); reprinted in 11 ILM 1416 (1972).

^{11]} France v. Spain, 24 International Law Reports 101 (Arb.Trib. 1957).

^{12]} USA v. Canada, 8 ILM 118 (Lake Lanoux Claims Tribunal 1969).

^{13]} Convention Relating to the Protection of the Rhine against Chemical Pollutants (with annexes), Dec. 3, 1976, UNTS I-17511. Compare the Convention on the Prevention of Marine Pollution by Dumping of Waste and other Matters, Dec. 29, 1972, 11 ILM 1291 (1973). See also the Brussels Convention on Establishment of an International Fund for

the Federal Republic of Germany to the Netherlands and Belgium. The losses and injuries were suffered by the communities in the riparian States.

In the Corfu Channel Case (1949),¹⁴¹ it should be observed that the International Court of Justice held Albania liable for failure to warn international shipping of the existence of mines within its waters, of which Albania ought to have known. In any event, the knowledge of their existence was imputed to Albania with the consequential duty to warn the sea-faring nations of the existence of the danger to enhance the safety in international navigation through the international waterway, the Corfu Channel.

This rule of strict or absolute liability under international law is based on the analogy of private law, common law as well as civil law. The law of land-owners' liabilities or liabilities of occupiers of premises has its counterpart. The vicarious liability of an owner of a dangerous animal, such as a tiger or a vicious dog, may entail the possibility of noxal surrender.

In the case under review, the fact that Afghanistan under the Taliban Government, not only did not attempt to prevent the disaster from occurring but also failed to surrender the alleged offenders who caused the injuries and losses to the United States and the international community. In addition to these grave omissions, the Afghan Taliban authorities also attempted to conceal the truth and refused to disclose the hide-outs or whereabouts of the Al Qaeda within Afghan territories under Afghan jurisdiction and control. Without at this stage examining the degree of guilt and complicity of the Taliban authorities for the international acts of terrorism of 11 September 2001 and the continuing threats of terror, it is sufficiently if not abundantly clear that the host State, Afghanistan, from where the attacks originated, must bear the responsibility under the primary rule of international law : *sic utere tuo ut alienum non laedas*. The liability of Afghanistan is established beyond doubts. The fate of the Taliban for the destruction of the image of the standing Buddha appears inevitable under the Karmic Law : for every evil deed there is a sanction, and for each good deed a reward is awaiting.

Compensation of Oil Pollution Damage, Dec. 18, 1981, 834 UNTS 17-46.

¹⁴¹ UK v. Albania, 1949, ICJ Report 4 (Merit april 9). Albania was held liable because "*nothing was attempted by the Albanian authorities to prevent the disaster. The grave omissions involved the international responsibility of Albania.*"

III. QUANTIFICATION OF COMPENSATION, SELF-DEFENSE, PRE-EMPTIVE STATES AND COUNTER-MEASURE

Once liability of the State of Afghanistan is established for the injuries and losses suffered by others, an assessment could be made of the quantum of the reparation required of it to wipe out the consequences of the internationally wrongful act.^{15]} The irony of the matter is that any conservative estimate of the amount of compensation under international law would be far beyond the capacity of the successor government of Afghanistan, let alone the Afghan population who stands in dire need of international rescue and assistance..

Other legal discussions relate to the exercise of self-defense which is the inherent right of every State, and the United States is not excluded. The danger of an unannounced suicidal attack against the United States everywhere has in no way receded, hence the right of the United States is recognized to exercise its legitimate self-defense. Care should be taken in the exercise of the right of self-defense that all the elements of an armed attack must be present, the danger of an attack being overwhelming, leaving no choice of means and no moment for deliberation.^{16]} Furthermore, measures of self-defense have to be proportional to the risk and limited in scope as well as in time. Pre-emptive strikes have to be based on the need for self-defense and similarly restricted in application.

Counter-measures, on the other hand have other limitations, and only legitimate counter-measures are permissible. A State contemplating counter-measures does so at its own risk, i.e., the risk of excessiveness, which will engage its own responsibility. In any event, forcible counter-measures or the use of force in the implementation of counter-measures must have been approved by the international community, such as the Security Council, the principal organ of the United Nations, primarily responsible for the maintenance of international peace and security.

^{15]} See the Chorzow Factory Case, Germany v. Poland, PCIJ Ser. A., No 9, p. 31 (1927).

^{16]} See *The Caroline*, 2 Moore, International Law 409-414 (1906); Robert Jennings, *The Caroline and Macleod cases*, 32 AJIL 82 (1983).

IV. TREATMENT OF ALLEGED TERRORISTS

Much debate has taken place surrounding the treatment of the Taliban and Al Qaeda detainees, who for reasons of collective safety based partly on the precautionary principle have been isolated and kept under preventive detention at a United States base in Cuba at Guantanamo Bay. Questions have been raised regarding the applicability of the Geneva Convention of 1949 and Protocols of 1977, especially in regard to the Taliban and the Al Qaeda detainees, their right to counsel, right of appeal and right to a fair trial. This concern should not detract from the tense situation and potentials of further repetition of terrorist suicidal acts, harmful to society and fatal to the terrorists themselves.

Whatever types of proceedings selected by the United States for the trial and criminal process, it should be recalled that, not unlike pirates *ex jure gentium*, even though enemies of mankind (*hostes generis humani*), they are nonetheless human beings, entitled to be treated as such, and protected by international humanitarian law including their entitlements to the rights and dignity of man. The eyes of the world are watching the actions taken by the United States, which is bound to conduct itself in an exemplary manner, having regard to the oft-cited invocation of the international RULE OF LAW, for which the United States must not relinquish its responsibility as champion.

V. RECENT JURISPRUDENCE OF THE INTERNATIONAL COURT OF JUSTICE

It is customary for the Annual Meeting to discuss landmark decisions of the International Court of Justice in the months preceding the occasion. This past year has seen two celebrated cases worthy of the most careful attention, namely, the case concerning the execution of Walter LaGrand (Federal Republic of Germany v. United States of America, ICJ. Report, 27 June 2001 and the Judgment of 14 February 2002 in The Democratic Republic of Congo v. Belgium, ICJ Report, 2002.

The LaGrand Case

To our incredulous but pleasant amazement, the Federal Republic of Germany, unlike

Paraguay, did not relinquish its pursuits against the United States even after the execution of Walter LaGrand in the face of provisional measures indicated by the International Court of Justice (ICJ Report 1999, p. 9 para. 6) in the following terms :-

- (a) The United States of America should take all measures at its disposal to ensure that Walter LaGrand is not executed pending the final decision of these proceedings and should inform the Court of all the measures which it has taken in implementation of this order;
- (b) The Government of the United States of America should submit this Order to the Governor of the State of Arizona.

On the same day as the above of 3 March 1999, proceedings were brought by Germany in the United States Supreme Court against the United States and the Governor of Arizona, seeking inter alia to enforce compliance with this Court's Order indicating provisional measures. In the course of these proceedings, the United States Solicitor General, as counsel of record took the position, inter alia, that "an order of the International Court of Justice indicating provisional measures is not binding and does not furnish a basis for judicial relief." On the same date, the Supreme Court dismissed the motion by Germany on the ground of the tardiness of Germany's application and of jurisdictional barrier under United States domestic law. On the same day, proceedings were also instituted in the United States Supreme Court by Walter LaGrand. These proceedings were decided against him. Later that day, Walter LaGrand was executed.

The United States acknowledged and did not contest Germany's basic claim, that there was a breach of its obligation under Article 36 (b) of the Vienna Convention on Consular Relations, "promptly to inform the LeGrand brothers that they could ask that a German Consular post be notified of their arrest and detention.

Germany argued in its second submission that under Article 36 (2) of the Vienna Convention, the United States was under an obligation to ensure that its municipal "laws and regulations enable full effect to be given to the purposes for which the rights accorded under this Article are intended: and that it "is in breach of this obligation by upholding rules of domestic law which make it impossible successfully to raise a violation of the right to consular notification in proceedings subsequent to a conviction of a defendant by a jury." The Court found for

The Court emphasizes, however, that the immunity from jurisdiction enjoyed by incumbent Ministers for Foreign Affairs does not mean that they enjoy impunity in respect of any crimes they might have committed, irrespective of their gravity. Jurisdictional immunity may well bar prosecution for a certain period or for certain offences; it cannot exonerate the person to whom it applies from all criminal responsibility. Accordingly, the immunities enjoyed under international law by an incumbent or former Minister for Foreign Affairs do not represent a bar to criminal prosecution in certain circumstances. The Court refers to circumstances where such persons are tried in their own countries, where the State which they represent or have represented decides to waive that immunity, where such persons no longer enjoy all the immunities accorded by international law in other States after ceasing to hold the office of Minister for Foreign Affairs, and where such persons are subject to criminal proceedings before certain international criminal courts, where they have jurisdiction.

Finally, the Court finds that the issue against Mr. Abdulaye Yerodia Ndobasi of the arrest warrant of 11 April 2000, and its international circulation, constituted a violation of a legal obligation of the Kingdom of Belgium towards the Democratic Republic of the Congo, in that they failed to respect the immunity from criminal jurisdiction and the inviolability which the incumbent Minister for Foreign Affairs of the Democratic Republic of the Congo enjoyed under international law.

The Court also finds that the Kingdom of Belgium must, by means of its own choosing, cancel the arrest warrant of 11 April 2000 and so inform the authorities to whom that warrant was circulated.

Thus, the wheel of international justice continues to progress at its own speed as surely as the earth rotates around the sun.

Sompong Sucharitkul

28 March 2002