Maritime Zones and The New Provisions on Jurisdiction in the 1997 Vienna Protocol and in the 1997 Convention on Supplementary Compensation

by Andrea Gioia*

1. The new provisions on jurisdiction in the 1997 conventions

Under Article XI of the 1963 Vienna Convention,[1] jurisdiction over all actions against the operator of a nuclear installation arising out of the same nuclear incident (including actions to establish rights to claim compensation and, if provided by the applicable law, direct actions against insurers or other guarantors), lies only with the competent court[2] of the State Party in whose "territory", including its territorial sea,[3] the nuclear incident occurs (the incident State). Where, however, the nuclear incident occurs outside the territory of a State Party (for example, in the course of maritime transport, on the high seas), or where it is not possible to determine with certainty the place of the nuclear incident (for example, where the incident is due to continuous radioactive contamination in the course of transport), jurisdiction lies only with the competent court of the State Party in whose territory the installation of the operator liable is situated (the installation State).

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1. *Convention on Civil Liability for Nuclear damage*, Vienna 21 May 1963. The Convention entered into force on 12 November 1977. On 23 April 1999, the following 32 States were party to the Convention: Argentina, Armenia, Belarus, Bolivia, Bosnia and Herzegovina, Brazil, Bulgaria, Cameroon, Chile, Croatia, Cuba, Czech Republic, Egypt, Estonia, Hungary, Latvia, Lebanon, Lithuania, Mexico, Niger, Peru, Philippines, Poland, Republic of Moldova, Romania, Slovakia, Slovenia, the Former Yugoslav Republic of Macedonia, Trinidad & Tobago, Ukraine, Uruguay, Yugoslavia. The Convention is open to all Members of the UN, the IAEA, or a UN specialised agency.

2. Article XI actually refers to "the courts" of the State in question, as is typical of most international conventions on civil jurisdiction. It is, however, understood that only one court should be competent in relation to the same nuclear incident, as is expressly stated in Article 12(4) of the 1997 amending Protocol (*infra*, note 10).

3. Unlike other conventions on civil liability, neither the 1963 Vienna Convention nor the 1960 Paris Convention, which will be referred to shortly, expressly state that a State's "territory" includes its territorial sea. This notwithstanding, both conventions are generally interpreted to that effect: for the Paris Convention, see paragraph 7 of the *Exposé des motifs* approved, in its revised form, on 16 November 1982 by the OECD Council.

Similar provisions are made in Article 13 of the 1960 Paris Convention,[4] which, indeed, served as a model for the 1963 Vienna Convention. For States party to the 1988 Joint Protocol,[5] the court having jurisdiction under one Convention is also competent for actions deriving from nuclear damage suffered in the territory of Parties to the other. As for supplementary funding, no specific provisions on jurisdiction are set out in the 1963 Brussels Convention,[6] which is designed to supplement the 1960 Paris Convention by increasing the amount of compensation for damage suffered in the parties' territory: since the Brussels Convention only applies if a court of a State Party has jurisdiction pursuant to the Paris Convention, no such specific provision was deemed necessary.

Against this background, the new provisions on jurisdiction are undoubtedly among the most interesting features of the two conventional instruments adopted by the diplomatic conference convened by IAEA in September 1997. In particular, while confirming the general rule that a court of the incident State has exclusive jurisdiction over actions concerning nuclear damage, Article XIII of the new Convention on Supplementary Compensation[7] adds that, "where a nuclear incident occurs within the exclusive economic zone of a Contracting Party or, if such a zone has not been established, in an area not exceeding the limits of an exclusive economic zone, were one to be established by that Party", jurisdiction lies only with the competent court of that Party, *i.e.* the coastal State. Thus, for the purposes of Article XIII, the exclusive economic zone, or an area of equivalent extension, has been equated to the territorial sea.

Unlike the 1963 Brussels Convention, the new Convention on Supplementary Compensation is not only designed to increase the amount of compensation for nuclear damage, but also purports to create "a worldwide liability regime" and is open for ratification, or accession, by States party to either the 1963 Vienna Convention or the 1960 Paris Convention, as well as by States party to neither convention whose national legislation complies with the basic principles of both, as specified in an Annex. The negotiating States felt, therefore, that uniform provisions on jurisdiction should bind all States party to the new Convention, irrespective of whether or not they were also party to either the Vienna Convention or the Paris Convention. Article XIII of the new Convention is thus intended to

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4. *Convention on Third Party Liability in the Field of Nuclear Energy*, Paris 29 June 1960. The Convention entered into force on 1 April 1968, as amended by an Additional Protocol of 28 January 1964, and was later further amended by a Protocol of 16 November 1982. The following 14 States are party to the Convention: Belgium, Denmark, Finland, France, Germany, Greece, Italy, Netherlands, Norway, Portugal, Spain, Sweden, Turkey, United Kingdom. The Convention is open to Members of the OECD: other States may only accede to the Convention with the unanimous assent of all Parties.

5. *Joint Protocol Relating to the Application of the Vienna Convention and the Paris Convention*, Vienna 21 September 1988. The Protocol entered into force on 27 April 1992. On 23 April 1999, the following 20 States were party to the Protocol: Bulgaria, Cameroon, Chile, Croatia, Czech Republic, Denmark, Egypt, Estonia, Finland, Hungary, Italy, Latvia, Lithuania, Netherlands, Norway, Poland, Romania, Slovakia, Slovenia, Sweden. The Protocol is open to all States party to either the Vienna Convention or the Paris Convention.

6. *Convention Supplementary to the Paris Convention of 29 July 1960*, Brussels 31 January 1963. The Convention entered into force on 4 December 1974, as amended by an Additional Protocol of 28 January 1964, and was later further amended by a Protocol of 16 November 1982. The following 11 States are party to the Convention: Belgium, Denmark, Finland, France, Germany, Italy, Netherlands, Norway, Spain, Sweden, United Kingdom. The Convention is open to all Parties to the 1960 Paris Convention; however, a non-signatory State may only accede to the Convention with the unanimous assent of all Parties.

7. *Convention on Supplementary Compensation for Nuclear Damage*, Vienna 12 September 1997. The Convention will remain open for signature by all States until its entry into force; it will enter into force on the 90th day following ratification or accession on the part of at least 5 States with a minimum of 400 000 MW of installed nuclear capacity. By 23 April 1999, the following 13 States had signed the Convention: Argentina, Australia, Czech Republic, Indonesia, Italy, Lebanon, Lithuania, Morocco, Peru, Philippines, Romania, Ukraine, United States. On the same date, only Romania had ratified the Convention.

replace, in relations between Parties thereto, Article XI of the Vienna Convention, Article 13 of the Paris Convention,[8] as well as national legislation in force for States party to neither Convention.

It was felt, however, that the new provisions might cause some problems for States party to both the new Convention on Supplementary Compensation and either the Vienna or the Paris Convention, in their relations with other States party to either one of these latter but not party to the new Convention.[9] A partial solution to these problems was the inclusion in the 1997 Protocol to Amend the Vienna Convention,[10] adopted at the same time, of new provisions on jurisdiction, identical to those in Article XIII of the Convention on Supplementary Compensation, intended to amend Article XI of the 1963 Vienna Convention. The States party to the 1960 Paris Convention, which are currently discussing possible amendments to this latter convention, are expected to adopt, in their turn, corresponding new provisions on jurisdiction. But of course there is no guarantee that all Parties to the Vienna or Paris Conventions will eventually ratify, or accede to, the amending protocols; moreover, ratification of, or accession to, the new Convention on Supplementary Compensation will always be possible for States party to the original version of either the Vienna or the Paris Convention.[11] For this reason, it was felt necessary to insert in Article XIII of the Convention on Supplementary Compensation a proviso to the effect that, if the exercise of jurisdiction on the part of the coastal State is inconsistent with its obligations under either Article XI of the Vienna Convention or Article 13 of the Paris Convention, "jurisdiction shall be determined in accordance with those provisions".[12]

2. Rationale and precedents

One of the distinguishing features of the international legal regime of civil liability for nuclear damage is precisely the choice of a single competent forum to deal with all actions arising out of the same nuclear incident. This solution is traditionally justified on various grounds, among which is the need for a single legal mechanism to ensure that the limitation on the operator's liability is not exceeded, and the need to assure equitable distribution of compensation.[13] But other international legal regimes of civil liability have opted for different solutions, which are arguably more advantageous to the victims of an incident causing damage. For example, the 1969 IMCO (now IMO) Convention on Civil Liability for Oil Pollution Damage (Oil Pollution Convention),[14] which applies to damage caused

8. Article 30 of the 1969 Vienna Convention on the Law of Treaties deals with the "application of successive treaties relating to the same subject-matter". Paragraph 3 states that "when all parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty". Under paragraph 4 (a), the same rule also applies "when the parties to the later treaty do not include all the parties to the earlier one", as between States parties to both treaties.

9. Article 30(4) (b) of the 1969 Vienna Convention on the Law of Treaties states that: "When the parties to the later treaty do not include all the parties to the earlier one: (b) as between a (State) party to both treaties and a State party to only one of the treaties, the treaty to which both (States) are parties governs their mutual rights and obligations".

10. *Protocol to Amend the Vienna Convention on Civil Liability for Nuclear Damage*, Vienna 12 September 1997. The Protocol will remain open for signature by all States until its entry into force; it will enter into force three months after 5 States have ratified or acceded to it. By 23 April 1999, the following 14 States had signed the Protocol: Argentina, Belarus, Czech Republic, Hungary, Indonesia, Italy, Lebanon, Lithuania, Morocco, Peru, Philippines, Poland, Romania, Ukraine. By the same date, only Romania had ratified the Protocol.

11. See Article I (a) and (b) of the Convention.

12. On the implications of this proviso, see *infra*, paragraph 5.

13. See, for example, paragraph 54 of the *Exposé des motifs* attached to the 1960 Paris Convention (*supra*, note 3).

14. *International Convention on Civil Liability for Oil Pollution Damage*, Brussels 29 November 1969. The Convention entered into force on 19 June 1975. Amendments were adopted in 1984 and 1992, but they have not yet entered into force: see *infra*, note 23.

by pollution resulting from the escape or discharge of oil from ships, allows victims to bring their actions for compensation in the courts of *any* State Party or Parties where damage was suffered; only after the shipowner liable has constituted a fund for the total sum representing the limit of his liability with a court of any one of the States where damage was suffered, does this court become exclusively competent to determine all matters relating to the apportionment and distribution of the fund.[15] A similar solution has been adopted in the 1996 IMO Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea (HNS Convention).[16]

As for the specific choices made in the nuclear liability conventions, the general rule that a court of the incident State has jurisdiction would not seem to cause major practical difficulties in the event of a minor incident where damage is mainly suffered in the territory of that State; on the other hand, in the event of a major nuclear incident causing damage in the territory of many States, sometimes at a considerable distance from the place of the incident, practical disadvantages for foreign victims having to bring their actions in the competent court of the incident State may be considerable. Disadvantages would be even more obvious in the event of an incident occurring in the course of transport outside the territory, or territorial sea, of a State Party to the applicable convention: in such a case, all victims would have to bring their actions in the competent court of the installation State, which might be at an even greater distance. Such practical disadvantages were, indeed, envisaged by the drafters of the nuclear liability conventions, but the conclusion was eventually reached that it was impossible "to find another solution which would enable the victims to refer to their national courts and which would at the same time secure unity of jurisdiction".[17]

The author of this article shares the view that, at least in the case of a major nuclear incident causing transboundary damage, the competence of an international tribunal applying specific rules of procedure would be more appropriate than jurisdiction of national courts.[18] Proposals to such effect were, indeed, put forward by some States within the IAEA Standing Committee on Liability for Nuclear Damage during negotiations on the revision of the Vienna Convention,[19] but such proposals were unfortunately opposed by most "nuclear" States and were eventually dropped.

Seen in this context, the new provisions on jurisdiction in the 1997 Vienna Protocol and in the Convention on Supplementary Compensation can be regarded as a minor, but important, step forward towards better protection of victims of nuclear incidents, in particular where such incidents occur in the course of maritime transport. In fact, by equating a Party's exclusive economic zone (which has a maximum breadth of two hundred nautical miles) to its territorial sea (whose maximum breadth is a mere twelve nautical miles), these provisions will allow victims to bring their actions in their national court in many more cases, thus avoiding the need to refer to a court of the installation State.

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15. See Article IX of the Oil Pollution Convention.

16. *International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea*, London, 3 May 1996. The Convention (which does not apply to damage caused by radioactive material "of class 7 either in the International Maritime Dangerous Goods Code, as amended, or in appendix B of the Code of Safe Practice for Solid Bulk Cargoes, as amended") will not enter into force until eighteen months after at least 12 States, including 4 States with at least 2 million units of gross tonnage, have expressed their consent to be bound by it. Articles 38 and 39 relate to jurisdiction.

17. *Exposé des motifs* attached to the 1960 Paris Convention (*supra*, note 3), paragraph 55.

18. In this sense, see, for example: Lopuski, *Liability for Nuclear Damage. An International Perspective*, Warsaw, 1993, at p. 67.

19. See, in particular, proposals by Austria and the Netherlands during the second, third, fourth and sixth sessions of the Standing Committee.

From a different point of view, the new provisions on jurisdiction also seem, to some extent, a natural consequence of the new provisions on so-called "geographical scope" which have also been inserted in the 1997 conventions.

Whereas the 1960 Paris Convention and the 1963 Brussels Convention supplementary thereto only cover damage suffered in the territory of States Parties,[20] the 1963 Vienna Convention does not expressly address the issue and is generally interpreted as allowing each Party freely to decide whether or not to cover damage suffered outside the territory of other Parties. On the other hand, the 1997 Protocol to Amend the Vienna Convention expressly covers damage "wherever suffered", but only as a matter of principle: the legislation of the installation State will in fact be allowed to exclude damage suffered in the "territory" or "in any maritime zones established by a non-contracting State in accordance with the international law of the sea", except where such State has no nuclear installations in its "territory" or "maritime zones", or where it affords equivalent reciprocal benefits.[21] Thus, damage suffered in the "territory" or "maritime zones" of all States Parties, as well as damage suffered on the high seas, will always be covered. As for the 1997 Convention on Supplementary Compensation, the fund thereby established in order to increase the amount of compensation will always be reserved to cover damage suffered in the "territory" or "in or above the exclusive economic zone or continental shelf of a Contracting Party in connection with the exploitation or the exploration of the natural resources of that exclusive economic zone or continental shelf".[22]

Thus, the new conventions take into account the changes which have taken place in the international law of the sea in recent times. It seems clear that, once it is accepted that the civil liability regime must cover not only damage suffered in the territorial sea, but also in other "maritime zones" established by a coastal State in accordance with the law of the sea, it would be unreasonable to allow the victims to refer to the competent court of the coastal State if an incident occurs in its territorial sea, but ask them to bring their actions in a court of the installation State if the incident occurs in such other "maritime zones".

The reason why the drafters of the 1997 conventions chose the exclusive economic zone, as opposed to other "maritime zones", in order to widen the scope of the coastal State's civil jurisdiction will be made clearer, it is hoped, by a brief reference to the new law of the sea in the next paragraph. However, it may be interesting to point out right away that the solution adopted in the 1997 conventions is part of a wider trend to equate the exclusive economic zone to the territorial sea for the purpose of determining which court, or courts, have jurisdiction for actions originating from industrial incidents occurring in the course of dangerous activities and having transboundary effects.

For example, the 1969 Oil Pollution Convention was recently amended in order to cover damage caused in the exclusive economic zone of a State Party and, in that context, jurisdiction for actions for compensation was granted to the courts of any State Party within whose exclusive

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20. See Article 2 of the 1960 Paris Convention, which, however, allows the legislation of the installation State to cover damage suffered in the territory of third States. As for the 1963 Brussels Convention, Article 2 makes it clear that the Convention only covers damage suffered in a Party's territory. However, damage suffered on the high seas is also covered, provided it is suffered on board a ship or aircraft registered in a Party's territory or by a Party's national.

21. See Article 3 of the Protocol.

22. See Article V of the Convention. Like the 1963 Brussels Convention, the Convention also covers damage suffered "in or above maritime areas beyond the territorial sea of a Contracting Party" (including the high seas but excluding third States' territorial waters) by a Party's national or on board a ship or aircraft registered in a Party's territory; in addition, the Convention also covers damage suffered "on or by an artificial island, installation or structure under the jurisdiction of a Contracting Party".

economic zone damage is suffered.[23] Similarly, the 1996 HNS Convention covers damage by contamination of the environment caused in the exclusive economic zone of a State Party, and then provides that actions for compensation may be brought against the shipowner only in the courts of any State Party where such damage was caused.[24]

3. The international law of the sea and maritime zones beyond a State's territory

As stated above, the new provisions on jurisdiction in the 1997 conventions take into account the changes which have recently occurred in the international law of the sea and which are reflected in the 1982 United Nations Convention on the Law of the Sea[25] (LOS Convention). The new law of the sea no longer allows for a strict alternative between the territorial sea, which is considered as part of the coastal State's territory,[26] and the high seas, considered as being open to all nations and encompassing all parts of the sea that are not included in the territorial or internal waters of any coastal State.[27] On the contrary, one of the characteristics of the new law of the sea is precisely that the territorial sea is no longer the only form in which the power of the coastal State is manifested over sea areas: whereas the outer limit of the territorial sea[28] is still considered as marking the seaward frontier of coastal States, it is now generally recognised that such States can exercise specialised rights beyond their territorial sea within certain maritime zones which are situated between the territorial sea and the high seas.[29]

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23. See Articles 3 and 8 of the *Protocol to Amend the International Convention on Civil Liability for Oil Pollution Damage*, adopted in London on 25 May 1984. When it became clear that this Protocol would probably never enter into force because of the difficulty to meet its entry into force requirements, similar provisions were inserted in a new amending Protocol, adopted in London on 27 November 1992. The 1992 Protocol will enter into force twelve months after ratification or accession on the part of 10 States including 4 States with at least 1 million units of gross tanker tonnage.

24. See Articles 3 and 38(1) of the HNS Convention.

25. *United Nations Convention on the Law of the Sea*, Montego Bay 10 December 1982. The Convention entered into force on 16 November 1994 after the adoption, on 29 July 1994, of an agreement relating to the application of its Part XI, which entered into force on 28 July 1996 (but which was provisionally applicable as from the date of the entry into force of the LOS Convention). Article 311 specifies that the Convention is designed to replace, as between Parties, the four Geneva Conventions of 29 April 1958: the Convention on the Territorial Sea and the Contiguous Zone, the Convention on the High Seas, the Convention on Fishing and Conservation of the Living Resources of the High Seas, and the Convention on the Continental Shelf.

26. See Article 1 (1) of the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone and Article 2 (1) of the 1982 LOS Convention. The territorial sea is measured from the low-water line along the coast or from straight baselines which the coastal State is allowed to draw in specific cases: in such cases, the waters lying inside the baselines are called "internal waters" and, like territorial waters, are subject to the coastal State's territorial sovereignty.

27. See Articles 1 and 2 of the 1958 Geneva Convention on the High Seas.

28. Article 3 of the LOS Convention states that the outer limit of the territorial sea cannot extend further than twelve nautical miles from the baselines. Before 1982, the maximum breadth of the territorial sea was controversial both in State practice and in the legal literature, since the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone had not expressly laid down a limit.

29. It is significant that the LOS Convention no longer defines the high seas as encompassing all parts of the sea that are not included in a State's internal or territorial waters: under Article 86, Part VII of the Convention, relating to the high seas, applies to "all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State…".

The oldest of such zones is the *contiguous zone*, which has a maximum breadth of twenty-four miles measured from the baselines of the territorial sea;[30] this is a zone where the coastal State can exercise the control necessary to prevent and punish infringements of its customs, fiscal, immigration or sanitary laws and regulations, committed, or about to be committed, "within its territory or territorial sea".[31] The contiguous zone, which is optional and only exists if the coastal State has expressly proclaimed it, is not very relevant for the purposes of the international regime of civil liability for nuclear damage: it is significant that neither the 1960 Paris Convention nor the 1963 Vienna Convention made any reference to it despite the fact that its existence had been recognised long before their adoption and had been "codified" in the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone.

Surprisingly enough, during negotiations within the IAEA Standing Committee on Liability for Nuclear Damage, Spain insisted on the need to cover damage suffered in a Party's contiguous zone and/or to exclude damage suffered in the contiguous zones of third States,[32] whereas most other States simply wanted to refer to the continental shelf and to the exclusive economic zone.[33] A compromise was eventually reached whereby Article 3 of the 1997 Vienna Protocol ambiguously refers to damage suffered in the "maritime zones" established "in accordance with the international law of the sea",[34] whereas Article V of the 1997 Convention on Supplementary Compensation only covers damage suffered "in or above the exclusive economic zone … or on the continental shelf of a Contracting Party in connection with the exploitation or the exploration of the natural resources" of such zones.[35]

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30. See Article 33 (2) of the LOS Convention. Under Article 24 (2) of the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone, the maximum breadth of the zone was twelve miles from the baselines of the territorial sea. Since, however, twelve miles is now the maximum breadth of the territorial sea, the LOS Convention allows a coastal State to extend its contiguous zone to a further twelve miles from the outer limit of its territorial sea.

31. See Article 24 (1) of the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone and Article 33 (1) of the LOS Convention.

32. A proposal to that effect was first presented in 1995, during the thirteenth session of the Standing Committee, but received virtually no support. The Spanish delegation seemed to attach much importance to the fact that, unlike the 1958 Convention, the LOS Convention no longer defines the contiguous zone as an area of the high seas. But that surely follows from the fact that the LOS Convention allows a coastal State to claim an exclusive economic zone and in no way implies a change in the nature of the coastal State's rights in the contiguous zone. Indeed, if the coastal State had no exclusive economic zone, its contiguous zone would still form part of the high seas: this seems to follow from the definition of the high seas in Article 86 of the LOS Convention.

33. See the original text of the Draft Protocol in *IAEA Doc. SCNL/13/INF.3*, at p. 61.

34. As stated above (paragraph 2), Article 3 provides that the Protocol applies to damage wherever suffered, but that the legislation of the installation State can, upon certain conditions, exclude damage suffered in the territory, or "maritime zones", of a third State. This solution, which was adopted without giving much thought to its implications, seems rather unsatisfactory to this writer. In fact, on the one hand, damage suffered in a Party's "maritime zones" or on the high seas will always be covered, irrespective of whether it is suffered by a Party's national or on board a ship registered in a Party's territory; on the other hand, if the legislation of the installation State confines itself to excluding damage suffered "in any maritime zones" established by third States "in accordance with the international law of the sea", coverage of damage suffered beyond those States' territorial waters will depend on whether or not each of them has claimed an exclusive economic zone. In other words, if a third State has not claimed an exclusive economic zone damage suffered beyond its territorial waters will be covered, whereas such damage will not be covered if that State has claimed an exclusive economic zone, even if suffered by a Party's national or on board a ship registered in a Party's territory.

35. As stated above (note 22), the Convention also covers damage suffered by a Party's national or on board a ship or aircraft registered in a Party's territory, irrespective of whether such damage is suffered in a Party's "maritime zones", on the high seas, or in a third State's "maritime zones" (excluding its territorial sea); in addition, it covers damage suffered on or by an artificial island or structure under a Party's jurisdiction.

This writer finds it difficult to understand precisely what kinds of damage suffered in the contiguous zone Spain wanted to refer to.[36] On the other hand, coverage of damage suffered in a Party's exclusive economic zone or on its continental shelf seems entirely justified in light of the nature of the coastal State's rights in or over such zones.

The *continental shelf* is not actually a sea area since it comprises the sea-bed and subsoil of the submarine areas extending beyond a State's territorial sea and does not affect the legal status of the superadjacent waters. The coastal State enjoys "sovereign rights" over its continental shelf for the purpose of exploring it and exploiting its natural resources, including so-called "sedentary fisheries".[37] It is only natural, therefore, that damage suffered in connection with the exploration or exploitation of a Party's continental shelf should be covered by a uniform regime of civil liability for nuclear damage, even if suffered by third States' nationals or on board a ship or aircraft registered in a third State.

The same is true for the *exclusive economic zone*, which is an area beyond and adjacent to the territorial sea where the coastal State enjoys a complex of "rights, jurisdiction and duties", among which are "sovereign rights" for the purpose of "exploring and exploiting, conserving and managing the natural resources of the waters superadjacent to the sea-bed and of the sea-bed and its subsoil".[38]

Whereas rights over the continental shelf do not depend on occupation or on any express proclamation,[39] the exclusive economic zone, like the contiguous zone, is optional and its existence depends on an actual claim. If a coastal State has claimed an exclusive economic zone, its rights over the continental shelf are, to some extent, absorbed by its rights in the exclusive economic zone.[40] If, on the other hand, the coastal State has not claimed an exclusive economic zone, the waters above its continental shelf remain subject to the regime of the high seas.[41]

This brief, and necessarily superficial, description of the specialised zones which exist, or may exist, between a State's territorial sea and the high seas also seems to shed some light on the reasons behind the choice of the exclusive economic zone made by the drafters of the 1997 Vienna Protocol and the Convention on Supplementary Compensation in order to extend the coastal State's civil jurisdiction in case of nuclear incidents occurring in the course of maritime transport. In fact, the

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36. In fact, in the context of the original Draft Protocol (*supra*, note 33), coverage of damage suffered in a Party's contiguous zone by a Party's national or on board a ship registered in a Party's territory would have been assured anyway. Similarly, the exclusion of damage suffered in third States' contiguous zones would have resulted from the exclusion of damage suffered in their exclusive economic zones. It is true that, if a third State had no exclusive economic zone, damage suffered in its contiguous zone by a Party's national or on board a ship registered in a Party's territory would have been covered, but that seemed reasonable since, in such a case, the contiguous zone could still be defined as an area of the high seas: see *supra*, note 32. As for the Convention on Supplementary Compensation, if a Party has no exclusive economic zone but has a contiguous zone, damage suffered therein by a Party's national or on board a ship or aircraft registered in a Party's territory would be covered under Article V (1) (b).

37. See Articles 1, 2 and 3 of the 1958 Geneva Convention on the Continental Shelf and Articles 76 to 78 of the LOS Convention.

38. See Articles 55 and 56 of the LOS Convention. Under Articles 60 and 80 of the LOS Convention, a coastal State also enjoys the exclusive right to construct or authorise and regulate the construction, operation and use of artificial islands, installations and structures within its exclusive economic zone or on its continental shelf; under Article 56, it enjoys "jurisdiction" with regard to the establishment and use of such islands, installations or structures. Understandably therefore, Article V (1) (b) of the Convention on Supplementary Compensation covers damage suffered "on or by an artificial island, installation or structure under the jurisdiction of a Contracting Party".

39. See Article 2 (3) of the 1958 Geneva Convention on the Continental Shelf and Article 77 (3) of the LOS Convention.

40. This is only partly true since the continental shelf may actually extend beyond the outer limit of the exclusive economic zone: see Article 76 of the LOS Convention, and *infra*, note 42.

41. This follows from Articles 78 and 86 of the LOS Convention.

choice of the contiguous zone would have extended the coastal State's jurisdiction to a mere twenty-four miles from the baselines of its territorial sea, and would have made little sense anyway. As for the continental shelf, this is not really a sea area since the superadjacent waters are either part of the high seas or of the coastal State's exclusive economic zone. In addition, the width of the continental shelf, as a legal concept, depends to some extent on the extension of that part of the sea-bed which can reasonably be considered as the "natural prolongation" of the coastal State's land territory.[42]

The exclusive economic zone, whose maximum breadth is two hundred miles from the coastal State's territorial sea baselines, was, therefore, the obvious candidate. As seen above, however, the exclusive economic zone only exists if the coastal State has expressly claimed it: while there may be various good reasons why some coastal States have yet to claim an exclusive economic zone, the drafters of the 1997 conventions understandably felt that it would have been unreasonable to ask the victims to bring their actions in a court of the installation State in the event of a nuclear incident occurring within two hundred miles of the coast, simply because the coastal State had not (yet) claimed an exclusive economic zone. This explains why both conventions state that, if an exclusive economic zone does not exist, jurisdiction still lies with the competent court of the coastal State if an incident occurs "in an area not exceeding the limits of an exclusive economic zone, were one to be established".[43] In this respect also, precedents can be found in the 1969 Oil Pollution Convention, as will be amended by a 1992 Protocol,[44] and in the 1996 HNS Convention,[45] which, indeed, was specifically mentioned during negotiations within the IAEA Standing Committee.

4. The international law of the sea and civil jurisdiction for acts outside a State's territory

Even if the law of the sea has influenced the new provisions on jurisdiction in the 1997 conventions, there remains to be seen whether or not these provisions are actually in keeping with the law of the sea. In fact, in the later stages of negotiations within the IAEA Standing Committee as well as during the 1997 diplomatic conference, some States and in particular the Russian Federation expressed worries that the new provisions might actually extend coastal States' "jurisdiction" beyond what is permitted under the 1982 LOS Convention and/or the corresponding rules of international customary law. These worries are to some extent reflected in the proviso stating that the new provisions shall not be interpreted "as permitting the exercise of jurisdiction in a manner, which is contrary to the international law of the sea, including the United Nations Convention on the Law of the Sea".[46] But in this writer's opinion, a conflict between the new provisions on jurisdiction and the law of the sea does not really arise.

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42. Whereas the continental shelf has a *minimum* breadth of 200 miles from the baselines of the coastal State's territorial sea, it can in fact extend much further "throughout the natural prolongation of its territory to the outer edge of the continental margin". There *is*, however, a maximum limit of the continental shelf: under Article 76 of the LOS Convention, the outer limit of the shelf cannot exceed either 350 nautical miles from the baselines of the territorial sea or 100 nautical miles from the 2 500 metre isobath, *i.e.* "a line connecting the depth of 2,500 metres".

43. However, in order to be able to exercise jurisdiction, the coastal State must have notified the Depository of such area prior to the nuclear incident: see Article XIII (2) of the 1997 Convention on Supplementary Compensation and Article 12 (1) of the 1997 Vienna Protocol.

44. See *supra*, note 23.

45. See *supra*, note 24.

46. See Article 12 (1) of the 1997 Vienna Protocol and Article XIII (2) of the Convention on Supplementary Compensation.

The law of the sea traditionally aims at finding a compromise between the exercise of States' authority over sea areas and the idea of the freedom of the seas, intended mainly as freedom of navigation: this explains why the law of the sea is mainly, though not exclusively, concerned with the exercise of governmental power resulting in *material* interference with foreign shipping.

It is significant, in this respect, that even within a coastal State's territorial sea ships of all nations enjoy a so-called "right of innocent passage",[47] and that, in order to avoid undue interference with such passage, limits are provided in respect of the exercise of criminal and civil jurisdiction on the part of the coastal State. As far as criminal jurisdiction is concerned, the coastal State is expected not to exercise its jurisdiction "on board" a foreign ship in order to arrest any person or to conduct any investigation in connection with a crime committed on board the ship during its passage unless the consequences of the crime "extend to the coastal State" or if the crime is of a kind to disturb "the peace of the country" or "the good order of the territorial sea".[48] As for civil jurisdiction, the coastal State is expected "not to stop or divert a foreign ship passing through the territorial sea for the purpose of exercising its civil jurisdiction in relation to a person on board the ship"; in addition, it may not "levy execution against or arrest the ship for the purpose of any civil proceedings, save only in respect of obligations or liabilities assumed or incurred by the ship itself in the course or for the purpose of its passage through the waters of the coastal State".[49]

It seems clear, therefore, that what matters is not the fact *per se* that the coastal State extends the jurisdiction of its courts to acts committed on board a foreign ship: the purpose of such provisions is rather to avoid undue interference with the ship during its "innocent" passage through the territorial sea. *Mutatis mutandis*, similar considerations apply as regards the exercise of jurisdiction over facts occurring or acts committed beyond a coastal State's territorial sea within its exclusive economic zone or on the high seas, where foreign ships enjoy "freedom of navigation".[50] It must be pointed out in this respect that, if a coastal State has no exclusive economic zone, the exercise of jurisdiction on the part of its courts in respect of a nuclear incident occurring within two hundred miles from its coast but beyond its territorial sea would amount to the exercise of jurisdiction for an incident occurred on the high seas.

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47. See Articles 14 *et seq.* of the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone and Articles 17 *et seq*. of the LOS Convention. Both conventions state that the coastal State can take "the necessary steps" to prevent passage which is not "innocent". It may be interesting to point out in this context that Article 19 of the LOS Convention contains a list of activities which are considered incompatible with the concept of innocent passage, and that the carriage of nuclear substances or materials is not listed among such activities. Although the list is not exhaustive, Article 23 of the LOS Convention implicitly confirms that foreign nuclear-powered ships and ships carrying nuclear or "other inherently dangerous or noxious substances" enjoy the right of innocent passage: in fact, the article in question provides that, when exercising passage, such ships must carry documents and "observe special precautionary measures" established for them by international agreements. In addition, under Article 22, the coastal State may require them to confine their passage to such sea lanes as it may designate or prescribe, where this is necessary for the safety of navigation.

48. See Article 19 of the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone and Article 27 of the LOS Convention. In addition, the exercise of criminal jurisdiction "on board" the ship is permitted if necessary for the suppression of illicit traffic in narcotic drugs or if requested by the ship's master or by a diplomatic agent or consular officer of the flag State.

49. See Article 20 of the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone and Article 28 of the LOS Convention. Execution or arrest are, however, permitted for the purpose of "any" civil proceedings if the ship is lying in the territorial sea or passing through it after leaving internal waters.

50. Under Article 58 of the LOS Convention, freedom of navigation and overflight is listed among freedoms enjoyed by all States in a coastal State's exclusive economic zone. As for the high seas, see Article 2 of the 1958 Geneva Convention on the High Seas and Article 87 of the LOS Convention.

In a famous judgement rendered in 1927 and relating to a claim to exercise criminal jurisdiction against an officer of a foreign ship for a collision which occurred on the high seas, the Permanent Court of International Justice dismissed the idea "that international law prohibits a State from exercising jurisdiction, in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law"; on the contrary, the Court held that, "far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable".[51]

In this writer's opinion, even if the evolution of the law since 1927 is taken into account,[52] there is still no such general prohibition in customary international law, nor are there specific prohibitive rules in the law of the sea preventing the courts of a coastal State from exercising civil jurisdiction for actions for compensation arising out of a nuclear incident occurring beyond its territorial sea. This conclusion seems to be confirmed, in particular, by Part XII of the 1982 LOS Convention dealing with the "protection and preservation of the marine environment": in fact, Article 229 unambiguously states that nothing in the LOS Convention affects "the institution of civil proceedings in respect of any claim for loss or damage resulting from pollution of the marine environment".

When it comes to enforcement action, Article 220, relating to pollution from ships, allows the coastal State to "institute proceedings, including detention of the vessel" only if there is clear evidence that a vessel, while navigating in the exclusive economic zone[53] or in the territorial sea, committed a violation of environmental rules resulting in a "discharge causing major damage or threat of major damage to the coastline or related interests of the coastal State, or to any resources of its territorial sea or exclusive economic zone".[54] No interference with the ship seems, therefore, to be allowed if the coastal State has no exclusive economic zone and an incident occurs on the high seas. But account must be taken in this respect of Article 221 (1) whereby nothing in Part XII of the LOS Convention "shall prejudice the right of States, pursuant to international law, both customary and

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51. *Permanent Court of International Justice, Collection of Judgements, Series A/B, No. 22, The Case of the S.S. "Lotus"*, at p. 19. The Court then held that no prohibitive rule prevented a State from exercising criminal jurisdiction in its own territory over acts occurred on board a foreign ship on the high seas (at p. 25).

52. It may be interesting to point out in this respect that a specific prohibitive rule has evolved precisely in respect of cases such as the one decided by the Court in 1927: Article 97 of the LOS Convention unequivocally states that penal or disciplinary jurisdiction in matters of collision or any other incident of navigation concerning a ship on the high seas exclusively lies with the judicial or administrative authorities of either the flag State or the State of which the person responsible is a national.

53. Apart from the protection of the marine environment, Article 73 (1) of the LOS Convention states that "the coastal State may, in the exercise of its sovereign rights to explore, exploit, conserve and manage the living resources in the exclusive economic zone, take such measures, including boarding, inspection, arrest and judicial proceedings, as may be necessary to ensure compliance with the laws and regulations adopted by it in conformity with this Convention".

54. Where there is no evidence of a discharge but there are grounds for believing that the vessel has violated environmental rules, the coastal State can only require the vessel to give information regarding its identity and port of registry, its last and next port of call and "other relevant information". Where there is evidence of a "substantial" discharge but only "significant pollution", as opposed to "major damage", has been caused or threatened, the coastal State may undertake "physical inspection" of the ship if the ship has refused to give information or if the information supplied is manifestly at variance with the evident factual situation, but can still not "institute proceedings". On the other hand, Article 216 gives general enforcement powers with respect to pollution by "dumping", defined in Article 1 as including "any deliberate disposal of wastes or other matter from vessels, aircraft, platforms or other man-made structures at sea", as well as any deliberate disposal of such vessels, aircraft, platforms or structures.

conventional,[55] to take and enforce measures beyond the territorial sea proportionate to the actual or threatened damage to protect their coastline or related interests, including fishing, from pollution or threat of pollution following upon a maritime casualty or acts relating to such a casualty, which may reasonably be expected to result in major harmful consequences".[56]

5. Main implications of the new provisions

If, then, no prohibitive rule exists in the law of the sea preventing a coastal State from extending the civil jurisdiction of its courts to nuclear incidents outside its territorial sea, precisely such a rule exists for parties to the 1960 Paris Convention or the 1963 Vienna Convention, which give exclusive jurisdiction over such incidents to the competent court of the installation State. As stated above, the purpose of the new provisions adopted at the 1997 Vienna conference is to replace that rule and allow the coastal State to exercise jurisdiction.

Indeed, a Party to the 1997 Vienna Protocol and/or the Convention on Supplementary Compensation will actually be obliged, *vis-à-vis* other Parties, to ensure that one of its courts has jurisdiction for incidents occurring within its exclusive economic zone. If, on the other hand, that Party has not (yet) established an exclusive economic zone and an incident occurs within two hundred miles from its coast, jurisdiction will lie with the competent court of the installation State, unless, prior to the incident, it has notified the Depository of its intention to exercise jurisdiction for incidents occurring in an area not exceeding the limits of an exclusive economic zone.

As seen above, however, a proviso was added to Article XIII of the 1997 Convention on Supplementary Compensation to the effect that, if the exercise of jurisdiction on the part of the coastal State is inconsistent with its obligations under Article XI of the Vienna Convention or Article 13 of the Paris Convention in relation to a State not party to the Convention on Supplementary Compensation, "jurisdiction shall be determined according to those provisions". In this writer's opinion, this proviso is, in some respects, superfluous and, in others, unfortunate in that it may have very negative and (perhaps) unforeseen consequences.

During negotiations within the IAEA Standing Committee, the supporters of the proviso presented it as a means of avoiding possible "conflicts of jurisdiction" which might arise until all States party to either the Paris or the unamended Vienna Convention had ratified or acceded to the new Convention on Supplementary Compensation, but such "conflicts of jurisdiction" are not very likely to arise: in fact, if the coastal State were a party to the Convention on Supplementary Compensation but the installation State were not, the Convention would not apply and there could be no "conflict of jurisdiction";[57] if, on the other hand, both the coastal State and the installation State were party to the

55. Account must be taken in this connection of the 1969 IMCO Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, which was adopted following the 1967 incident of the Liberian tanker *Torrey Canyon*.

56. Paragraph 2 of Article 221 defines "maritime casualty" as "a collision of vessels, stranding or other incident of navigation, or other occurrence on board a vessel or external to it resulting in material damage or imminent threat of material damage to a vessel or cargo".

57. Under Article II (2), the Convention only applies if liability for nuclear damage lies with the operator of an installation situated in the territory of a Party thereto.

Convention, the new rule would prevail in their mutual relations and there would again be no "conflict of jurisdiction".[58]

But the proviso does not in fact refer to "conflicts of jurisdiction": rather, it refers to possible conflicts of conventional "obligations" for the coastal State. It would seem to follow that coastal States party to either the 1960 Paris Convention or the unamended Vienna Convention will be prevented from exercising jurisdiction for nuclear incidents outside their territorial sea until *all* parties to the applicable convention have ratified or acceded to the new Convention on Supplementary Compensation;[59] until that happens, jurisdiction for incidents occurring within their exclusive economic zone, or equivalent area, will continue to lie with the courts of the installation State, even if the installation State has in fact already ratified or acceded to the new Convention. It may seem ironic that a similar proviso was not adopted in the context of the Vienna Protocol, since conflicts of conventional obligations, and indeed in some cases even real "conflicts of jurisdiction", might well arise in relations between Parties to the Protocol and Parties to the unamended Vienna Convention.[60]

Leaving aside the question of possible conflicts of conventional obligations, the main practical problems which may arise as a result of the new provisions on jurisdiction seems to relate to the delimitation of the exclusive economic zone, or of the equivalent area, between States whose coasts are opposite or adjacent.[61] In fact, Article 74 of the LOS Convention merely states that the delimitation of the exclusive economic zone "shall be effected by agreement on the basis of international law … in order to achieve an equitable solution", and that, pending such agreement, the States concerned, "in a spirit of understanding and co-operation, shall make every effort to enter into provisional arrangements of a practical nature"; no rule is laid down which might apply where neither an agreement nor provisional arrangements are reached between the States concerned. One might then ask what would happen if a nuclear incident occurred in a disputed area claimed by more than one Party as part of its exclusive economic zone, or of the equivalent area.[62]

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58. This does not mean that such States would not be guilty of a violation of either the Paris or the (unamended) Vienna Convention in their relations with Parties thereto which had not yet ratified or acceded to the Convention on Supplementary Compensation: see Article 30 (5) of the 1969 Vienna Convention on the Law of Treaties.

59. Under Article 30 (2) of the 1969 Vienna Convention on the Law of Treaties, "when a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail".

60. Under Article 19 of the 1997 Vienna Protocol, Parties to the unamended Vienna Conventions will still be bound by its provisions when they ratify or accede to the amending Protocol, in their relations with other Parties which have not (yet) ratified or acceded to the Protocol. Similarly, when States not party to the unamended Vienna Convention ratify or accede to the 1997 Protocol they will also be bound by the unamended convention in their relations with the Parties thereto, unless they express a contrary intention.

61. Of course, in the case of States whose coasts are opposite, problems would only arise if the distance between the baselines of their respective territorial seas were less than four hundred miles.

62. The same question may actually be asked in the event of a nuclear incident occurring in an area claimed by more than one State as part of its territorial sea. In this case, however, both Article 12 of the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone and Article 15 of the LOS Convention provide that, in the absence of a delimitation agreement, neither of the States concerned can extend its territorial sea "beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial sea of each of the two States is measured". It is true that this provision is said not to apply "where it is necessary by reason of historic title or in other special circumstances, to delimit the territorial sea of the two States in a way, which is at variance therewith". But it would seem that the median line rule could still be provisionally applied until an agreement is reached on the effect of such special circumstances (such as, for example, an island lying "on the wrong side" of the median line). As for historic titles, this writer believes that historic titles relevant for the delimitation of maritime areas between two States are really in the nature of tacit delimitation agreements: see Gioia, The *Law of Multinational Bays and the Case of the Gulf of Fonseca*, in *Netherlands Yearbook of International Law*, Vol. XXIV (1993), pp. 81 *et seq*., at pp. 111 *et seq*. and in note 101.

As far as the delimitation of the exclusive economic zone is concerned, Part XV of the LOS Convention, dealing with the settlement of disputes, provides in general that, if no settlement has been reached by the parties by means of their own choice, disputes relating to the interpretation or application of the Convention can be submitted, at the request of any party, to compulsory procedures entailing binding decisions. But then Article 298 allows a State at any time to declare that it does not accept such compulsory procedures with respect to certain categories of disputes, among which are those concerning the interpretation or application of Article 74. If a State has not claimed an exclusive economic zone but has declared that it will exercise jurisdiction for nuclear incidents occurring within an area of equivalent extension, Part XV of the LOS Convention will not even be applicable to disputes concerning the delimitation of such area, since, for the purposes of the law of the sea, that area is part of the high seas.

It is unfortunate then that the drafters of the 1997 conventions have finally opted for dispute settlement procedures that give no assurances of binding decisions. In fact, both Article 17 of the Vienna Protocol and Article XVI of the Convention on Supplementary Compensation provide that, if no settlement has been reached within six months, disputes shall be submitted to compulsory arbitration or judicial settlement, but then allow each ratifying or acceding State to declare that it will not be bound by such provisions.