

1987

Chernobyl Fallout: Recent IAEA Conventions Expand Transboundary Nuclear Pollution Law

Michael A. Heller
Columbia Law School, mheller@law.columbia.edu

Follow this and additional works at: https://scholarship.law.columbia.edu/faculty_scholarship



Part of the [Environmental Law Commons](#), and the [International Law Commons](#)

Recommended Citation

Michael A. Heller, *Chernobyl Fallout: Recent IAEA Conventions Expand Transboundary Nuclear Pollution Law*, 23 STAN. J. INT'L L. 651 (1987).

Available at: https://scholarship.law.columbia.edu/faculty_scholarship/3823

This Article is brought to you for free and open access by the Faculty Publications at Scholarship Archive. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Scholarship Archive. For more information, please contact scholarshiparchive@law.columbia.edu.

Recent Developments

CHERNOBYL FALLOUT: RECENT IAEA CONVENTIONS EXPAND TRANSBOUNDARY NUCLEAR POLLUTION LAW

*The Chernobyl accident demonstrates vividly that nuclear safety is truly a global issue. . . . In a very real sense we are all hostages to each other's performance.*¹

After releasing a radioactive cloud over Europe, the April 1986 nuclear power plant accident at Chernobyl in the USSR² sparked a chain-reaction of diplomatic negotiation that culminated in two recent International Atomic Energy Agency (IAEA) conventions on nuclear accidents.³ The Convention on Early Notification of a Nuclear Accident (Convention on Early

¹ *Chernobyl Causing Big Revisions in Global Nuclear Power Policies*, N.Y. Times, Oct. 27, 1986, at 1, col. 1 (statement of James K. Asselstine, Member of the U.S. Nuclear Regulatory Commission).

² See generally Serrill, *Anatomy of a Catastrophe*, TIME, Sept. 1, 1986, at 26; Fischer, *The International Response: Chernobyl, The Emerging Story*, BULL. ATOM. SCI., Aug./Sept. 1986, at 46; *Nuclear Plant Safety—Response to Chernobyl*, IAEA BULL., Autumn 1986, at 5–39.

³ Convention on Early Notification of a Nuclear Accident, *opened for signature* Sept. 26, 1986, 25 I.L.M. 1370 (1986), *reprinted in* IAEA BULL., Winter 1986, at 52 [hereinafter Convention on Early Notification], and Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency, *opened for signature* Sept. 26, 1986, 25 I.L.M. 1377 (1986), *reprinted in* IAEA BULL., Winter 1986, at 55 [hereinafter Convention on Assistance]. See also Phuong, *Experts Adopt Nuclear Safety Agreements*, IAEA BULL., Autumn 1986, at 63–64 (summarizing the conventions); *Message from the President of the United States Transmitting Two Conventions*, S. TREATY DOC. NO. 4, 100th Cong., 1st Sess., at v–xi (Letter of submittal by Secretary of State George P. Schultz to the President, Mar. 10, 1987) (summarizing the Conventions from a U.S. perspective) [hereinafter *Message*]; *Highlights—Special and Regular Sessions of the IAEA 30th General Conference*, IAEA BULL., Winter 1986, at 44 [hereinafter *Highlights*].

Because three nations “definitively” signed the Convention on Early Notification on Sept. 26, 1986, it automatically entered into force on Oct. 27, 1986 pursuant to art. 12, paras. (2), (3). The Convention on Assistance entered into force on Feb. 26, 1987. See *Message, supra*, at vi. The Committee on Foreign Relations of the United States Senate began consideration of the conventions on March 23, 1987. See 133 CONG. REC. S3690 (daily ed. Mar. 23, 1986)(Treaty Doc. No. 100–4).

The *IAEA Bulletin* publishes in each issue the following statement defining the Agency:

The International Atomic Energy Agency, which came into being on July 29, 1957, is an independent intergovernmental organization within the United Nations system. Headquartered in Vienna, Austria, the Agency currently has 113 Member States who together work to carry out the main objectives of IAEA's Statute: To accelerate and enlarge the contribution of atomic energy to peace, health, and prosperity throughout the world and to ensure so far as it is able

Notification) and the Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency (Convention on Assistance) were both opened for signature on September 26, 1986 at the end of a three-day IAEA special session on the lessons of the Soviet nuclear plant disaster.⁴ In the months following adoption, sixty IAEA member-states signed the Convention on Early Notification and fifty-nine members signed the Convention on Assistance.⁵

These conventions structure international expectations for quick response to the transnational effects of nuclear accidents.⁶ In doing so, the conventions aim to reduce the confusion immediately following such accidents by: (1) allowing more rational and effective crisis management responsive to accident-specific information; and (2) coordinating specialized national and international assistance capabilities. Although only committing signatory countries to do "what most would consider obvious and natural,"⁷ the conventions nevertheless expand international legal responsibility for the extraterritorial consequences of nuclear pollution.

I. TRANSBOUNDARY RADIOLOGICAL POLLUTION UNDER INTERNATIONAL LAW

The principle of territorial sovereignty is the analytical starting point for assessing state responsibility for extraterritorial environmental effects of activities conducted on national territory.⁸ The doctrine has two potentially conflicting sides: first, a state is sovereign within its boundaries, and should therefore be permit-

that assistance provided by it, or at its request or under its supervision or control, is not used in such a way as to further any military purpose.

IAEA BULL., Winter 1986, at 3.

⁴ See Final Document of the Special Session of the General Conference, Sept. 26, 1986, IAEA Doc. GC(SPL.1)/RES/1, reprinted in *Highlights*, supra note 3, at 44; *Atomic Power Safety Steps Approved*, N.Y. Times, Sept. 27, 1986, at 36, col. 1 [hereinafter *Safety Steps*].

⁵ *Message*, supra note 3, at vi (number of signatories as of Feb. 15, 1987); see also Szasz, *Table on the Status of the Conventions*, 25 I.L.M. 1391 (1986) (showing status as of October 29, 1986).

⁶ *Learning From Chernobyl*, N.Y. Times, Oct. 7, 1986, at A30, col. 1. "The adoption of the two Conventions indicates the will of the international community to provide additional support for an international legal framework in the areas of notification and emergency assistance." Szasz, *Introductory Note*, 25 I.L.M. 1369 (1986).

⁷ *Soviets Ready to Discuss Liability Pact for Nuclear Mishaps*, L.A. Times, Oct. 6, 1986, at 12, col. 1 [hereinafter *Soviets Ready*].

⁸ Handl, *Territorial Sovereignty and the Problem of Transnational Pollution*, 69 AM. J. INT'L L. 54 (1975).

ted to conduct any activity not per se illegal within its territory; second, sovereignty entails freedom from outside interferences and externally caused harm.⁹ International law has increasingly acknowledged that the equal sovereign rights of states are interdependent, and has subjected these rights to reciprocally operating limitations.¹⁰

The *sic utere tuo* principle has been defined by the International Court of Justice in the *Corfu Channel* case as "every State's obligation not to allow knowingly its territory to be used contrary to the rights of others."¹¹ The *Trail Smelter* arbitration between Canada and the United States¹² is generally cited, along with the *Corfu Channel* case, as the *locus classicus*¹³ of principles of liability for transnational environmental pollution:

[N]o State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.¹⁴

While arbitration offers a possible route for recovery in cases of transborder pollution damage, "it appears that a country does not have the power to compel another country to arbitrate a dispute unless a treaty or agreement concerning the matter in question has previously been concluded between the countries."¹⁵

⁹ Handl, *An International Legal Perspective on the Conduct of Abnormally Dangerous Activities in Frontier Areas: The Case of Nuclear Power Plant Siting*, 7 *ECOLOGY L.Q.* 1 (1978). Handl also discusses a second principle guiding the development of international law in this area that focuses on the "importance of rational management of environmental resources irrespective of national boundaries." *Id.* at 5. But, as he notes, this international environmental law "has generally addressed instances of continuous transnational pollution causing immediate actual damage," rather than the liability issues arising from single-incident pollution following a nuclear accident. *Id.* at 5.

¹⁰ Handl, *supra* note 8, at 55.

¹¹ *Corfu Channel (U.K. v. Alb.)*, 1949 I.C.J. 4, 22 (Judgment of Apr. 9); see also Handl, *supra* note 8, at 55. *Sic utere tuo ut alienum non laedas* means "use your own property so as not to injure your neighbor's."

¹² *Trail Smelter Arbitration (U.S. v. Can.)*, 3 R. INT'L ARB. AWARDS 1905 (1941), reprinted in 35 AM. J. INT'L L. 684 (1941); see also Nanda, *The Establishment of International Standards for Transnational Environmental Injury*, 60 IOWA L. REV. 1095 (1975); Billingsley, *Private Party Protection Against Transnational Radiation Pollution Through Compulsory Arbitration: A Proposal*, 14 CASE W. RES. J. INT'L L. 339, 342 n.12 (1982); Handl, *supra* note 8, at 60.

¹³ Handl, *supra* note 8, at 60.

¹⁴ *Trail Smelter Arbitration*, 3 R. INT'L ARB. AWARDS at 1965.

¹⁵ Billingsley, *supra* note 12, at 347. For example, the *Trail Smelter* arbitration "apparently was possible only because an earlier boundary pact between the United States and Canada contained provisions dealing with the subject matter of the dispute." *Id.* See also Handl, *supra* note 8, at 62-63.

The most definitive statement approving the *sic utere tuo* principle in the international environmental sphere appears in Principle 21 of the Declaration on the Human Environment¹⁶ adopted at the 1972 United Nations Conference in Stockholm:

States [have], in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control [do] not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.¹⁷

While the United Nations General Assembly endorsed the Conference Declaration a year later,¹⁸ the Declaration itself is not binding upon states.¹⁹ Nevertheless, it was generally the view of the states at the Conference that Principle 21 affirmed existing international legal obligations.²⁰

The *sic utere tuo* principle, though well established in customary international law, affords little practical protection to individuals or states seeking recovery for transnational radiological damage. For example, Australia and New Zealand brought suit before the International Court of Justice in 1973 to halt French atmospheric nuclear testing in the South Pacific, basing their claim in part on a violation of territorial sovereignty caused by fallout from the tests.²¹ While the Court eventually declined to decide the case on the merits after France publicly declared a halt to further atmospheric tests,²² commentators questioned whether Australia and New Zealand could base such a claim on territorial sovereignty grounds.²³ In a dissenting opinion to the Court's interim protective order, Judge Ignacio-Pinto wrote: "I see no existing legal means in the present state of the law which would authorize a State to come before the Court asking it to prohibit another State from carrying out on its own territory such

¹⁶ See Declaration on the Human Environment, 1972 U.N.Y.B. 317.

¹⁷ *Id.* at 320-21.

¹⁸ G.A. Res. 2995, 27 U.N. GAOR Supp. (No. 30) at 42, U.N. Doc. A/8730 (1973).

¹⁹ See *Chernobyl Mishap: Payments Unlikely in Wake of Fallout*, L.A. Daily J., May 9, 1986, at 20, col. 1 [hereinafter *Mishap*]; Billingsley, *supra* note 12, at 342 n.12.

²⁰ Bramsen, *Transnational Pollution and International Law*, in PROBLEMS IN TRANSFRONTIER POLLUTION 257, 278 n.20 (1974).

²¹ Nuclear Tests (Austl. v. Fr.), 1973 I.C.J. 99 (Interim Protection Order of June 22); Nuclear Tests (N.Z. v. Fr.), 1973 I.C.J. 135 (Interim Protection Order of June 22).

²² See U.N. MONTHLY CHRON., Jan. 1975, at 99; see also Nanda, *supra* note 12, at 1099; Billingsley, *supra* note 12, at 346-47. See generally B. JOHNSON, INTERNATIONAL ENVIRONMENTAL LAW (1976).

²³ See Handl, *supra* note 8, at 50-53, 60.

activities, which involve risks to its neighbors."²⁴

Diplomatic negotiations have sometimes yielded compensation for nuclear-related damages, but have not created legal precedents or obligations. For example, the United States paid \$2 million to Japan in 1954 to compensate Japanese fisherman for harm resulting from U.S. nuclear tests in the Marshall Islands.²⁵ The diplomatic note setting forth details of the agreement stated, however, that the payment was made "without reference to the question of legal liability."²⁶ "The United States has not accepted the argument that it must assume responsibility under international law for damages caused accidentally and without malicious intent by nuclear experiments conducted with what were considered adequate safeguards."²⁷ More recently, in 1981, the Soviet Union concluded a settlement with Canada on a clean-up bill for retrieving radioactive debris from a Soviet nuclear-powered satellite that broke up over northern Canada in 1978.²⁸ However, in that case, the Canadians bolstered their diplomatic claim by referring to the 1972 Convention on International Liability for Damage Caused by Space Objects—a convention signed by both Canada and the Soviet Union.²⁹

Only a limited number of international liability agreements have dealt with transnational pollution problems in the nuclear sphere.³⁰ The 1960 OECD-sponsored Paris Convention on Third Party Liability in the Field of Nuclear Energy and the 1960 Convention Supplementary to the Paris Convention create individually enforceable rights for persons within Europe injured by nuclear mishaps originating in European land-based nuclear power plants.³¹ The 1963 IAEA-sponsored Vienna Convention

²⁴ 1973 I.C.J. at 131 (Ignacio-Pinto, J., dissenting).

²⁵ Agreement on Personal and Property Damage Claims, Jan. 4, 1955, United States-Japan, 6 U.S.T. 1, T.I.A.S. No. 3160. See generally Comment, *Bravo's Fallout: International Law and Nuclear Pollution in the Pacific*, 14 N.C. CENT. L. J. 172 (1983).

²⁶ Agreement on Personal and Property Damage Claims, *supra* note 25, at 1.

²⁷ *H-Bomb Payments to Toyko Detailed*, N.Y. Times, Jan. 5, 1955, at 6, col. 1.

²⁸ *Soviets Ready*, *supra* note 7, at 12, col. 1.

²⁹ Convention on International Liability for Damage Caused by Space Objects, Mar. 29, 1972, 24 U.S.T. 2389, T.I.A.S. No. 7762; see also *Mishap*, *supra* note 19, at 1, col. 6.

³⁰ See Billingsley, *supra* note 12, at 351-54 (discussing anti-pollution conventions and liability agreements). Anti-pollution conventions have generally constituted "more a statement of intent than an explicit duty," *id.* at 350, unlike the liability conventions discussed in the text. See *infra* text accompanying notes 31-37. While this discussion focuses on multilateral treaties, a range of bilateral agreements on early notification and emergency assistance following nuclear accidents also exists within Europe. See *infra* text accompanying notes 48-50.

³¹ Convention on Third Party Liability in the Field of Nuclear Energy (Paris Con-

on Civil Liability is almost identical to the Paris Convention, but is global in scope.³² When opened for signature, however, it was signed only by China, Colombia, Lebanon, the Philippines, and Yugoslavia.³³ The 1962 Brussels Convention on the Liability of Operators of Nuclear Ships establishes that nuclear ship operators are absolutely liable for accidents involving their nuclear ships.³⁴ That Convention was signed by fourteen states, none of which operates nuclear ships; the United States, Canada, the United Kingdom, the Soviet Union, France, and Germany are not signatories.³⁵ Finally, the Convention on the Protection of the Environment Between Denmark, Finland, Norway, and Sweden establishes liability for transnational radiation pollution, and gives individuals a right of action to prevent environmental damage.³⁶ This Convention guarantees equal access and nondiscrimination to citizens of a signatory State who bring suit in another signatory State.³⁷ While this Nordic Convention has an extensive scope of action, its geographic reach is obviously limited.

The Soviets acknowledge a "moral responsibility"³⁸ for the damage the Chernobyl accident caused in Europe. But they maintain that they are not legally bound to compensate those damaged.³⁹ "[T]he case that the Soviet Union is responsible for this sort of thing under customary international law is a very weak case."⁴⁰

The legal difficulties in holding the Soviets responsible . . . include sovereign immunity bars to private lawsuits, the

vention), July 29, 1960, *reprinted in* 55 AM. J. INT'L L. 1082 (1961); Convention Supplementary to the Paris Convention, Jan. 31, 1963, 2 I.L.M. 685 (1963); *see also* Jenks, *Liability for Ultra-Hazardous Activities in International Law*, 117 RECUEIL DES COURS 98, 133 (1966) (Académie de Droit International). *See generally* J. BARROS & D. JOHNSTON, *THE INTERNATIONAL LAW OF POLLUTION* (1974).

³² Vienna Convention on Civil Liability for Nuclear Damage, May 21, 1963, IAEA Doc. CN-12/46, 2 I.L.M. 727 (1963).

³³ *Id.* There are currently 13 parties and signatories. The United Kingdom is the only major nuclear power to have signed. M. BOWMAN & D. HARRIS, *MULTILATERAL TREATIES: INDEX AND CURRENT STATUS* 276 (1984).

³⁴ Convention on the Liability of Operators of Nuclear Ships, May 25, 1962, *reprinted in* 57 AM. J. INT'L L. 268 (1963); *see also* JENKS, *supra* note 31, at 138.

³⁵ BOWMAN & HARRIS, *supra* note 33, at 268.

³⁶ Convention on the Protection of the Environment, Denmark-Finland-Norway-Sweden, Feb. 19, 1974, 13 I.L.M. 591 (1974), *reprinted in* UNITED NATIONS, *NATIONAL LEGISLATION AND TREATIES RELATING TO THE LAW OF THE SEA* 397, U.N. Doc. ST/LEG/SER.B/18 (1976); *see also* Billingsley, *supra* note 12, at 353.

³⁷ Billingsley, *supra* note 12, at 353.

³⁸ *Safety Steps*, *supra* note 4, at 36.

³⁹ *Id.*

⁴⁰ *Mishap*, *supra* note 19, at 20 (statement of Prof. P. Trimble of U.C.L.A. Law School).

Soviets' standing refusal to accept the jurisdiction of the World Court, the lack of any treaty specifically governing nuclear reactor mishaps, and the assumed reluctance of Eastern European countries to press such a claim against the Russians. In addition, [difficulties include] the meager case law and the lack of full acceptance of what few specific international law principles have been written recently to impose responsibility for transborder pollution.⁴¹

Absent an already extant treaty prescribing a specific rule of international law, the evolving *sic utere tuo* principle, in most situations, "merely creates a right without a remedy."⁴²

II. BACKGROUND AND SUBSTANCE OF THE CONVENTIONS

Within this sparse context, the recent IAEA Conventions on Early Notification and Assistance recognize a relatively noncontroversial common ground of legal responsibility for the transnational consequences of national nuclear activity. The Conventions do not attempt to resolve the knottier issues of radiological safety standards or accident liability.

The concepts behind these Conventions are not new. IAEA guidance on prompt notification and emergency assistance was formulated as early as 1969 and has been periodically revised.⁴³ Despite the "inherent tendency for guidance material to be relegated to the dusty shelves of libraries, offices, and storage rooms,"⁴⁴ the most recent IAEA Information Circulars in this area⁴⁵ proved useful as the negotiating drafts for the current Conventions.⁴⁶ "In matters of substantial impact such as information exchange (including early notification) and mutual emergency assistance, . . . 'institutionalizing' the available guidance through legal instruments [raises] the visibility of some types of guidance and make[s] the most important ones binding among

⁴¹ *Id.*

⁴² Billingsley, *supra* note 12, at 349.

⁴³ INT'L ATOMIC ENERGY AGENCY, PLANNING FOR THE HANDLING OF RADIATION ACCIDENTS (IAEA Safety Series No. 32, 1969); INT'L ATOMIC ENERGY AGENCY, PLANNING FOR OFF-SITE RESPONSE TO RADIATION ACCIDENTS IN NUCLEAR FACILITIES (IAEA Safety Series No. 55, 1981), *noted in* Collins, Emmerson & Phuong, *Information Exchange and Mutual Emergency Assistance*, IAEA BULL., Autumn 1986, at 16.

⁴⁴ Collins, Emmerson & Phuong, *supra* note 43, at 16.

⁴⁵ Guidelines for Mutual Emergency Assistance Arrangements in Connection with a Nuclear Accident or Radiological Emergency, IAEA INFCIRC/310 (1984); Guidelines on Reportable Events, Integrated Planning and Information Exchange in a Transboundary Release of Radioactive Materials, IAEA INFCIRC/321 (1985), *noted in* Collins, Emmerson & Phuong, *supra* note 43, at 16.

⁴⁶ Collins, Emmerson & Phuong, *supra* note 43, at 17.

the parties to such instruments."⁴⁷

In addition to this history of guidance materials, international agreements on notification and assistance have been developed. The 1963 Nordic Mutual Emergency Assistance Agreement was the earliest and only multilateral precedent to the present Conventions.⁴⁸ In 1977, the IAEA concluded an agreement with the United Nations Disaster Relief Office on cooperation in providing assistance following nuclear accidents.⁴⁹ More recently, the IAEA has successfully encouraged a number of bilateral agreements on notification and assistance. However, these bilateral agreements have been concluded only between European countries.⁵⁰ Thus, the current Conventions transform previously developed IAEA guidance materials into legal obligations and universalize existing IAEA-sponsored bilateral agreements.

A. *Convention on Early Notification of a Nuclear Accident*

The Convention on Early Notification of a Nuclear Accident is designed to "strengthen further international cooperation in the safe development and use of nuclear energy" by providing "relevant information about nuclear accidents as early as possible in order that transboundary radiological consequences can be minimized."⁵¹ According to Hans Blix, Director General of the IAEA: "Had [the Convention on Early Notification] existed in [the Chernobyl] case, the information needed by neighbors would probably have been forthcoming. They would have been alerted earlier and could have taken some precautions."⁵²

The Convention applies broadly to any accident in a signatory state, except weapons-related leaks or underground tests, that results or may result in international transboundary release of radiological material of safety significance to another state.⁵³ The Convention outlines implementing and pre-accident procedures

⁴⁷ *Id.*

⁴⁸ Nordic Mutual Emergency Assistance Agreement, IAEA INFCIRC/49 (1963), noted in Collins, Emmerson & Phuong, *supra* note 43, at 17.

⁴⁹ Collins, Emmerson & Phuong, *supra* note 43, at 17.

⁵⁰ During the 1977-1982 period, a number of bilateral agreements were entered into by Austria, Belgium, Czechoslovakia, Denmark, France, West Germany, Luxembourg, the Netherlands, Portugal, Spain, and Switzerland. *Id.* See, e.g., Agreement on the Exchange of Information About Accidents with Potential Radiological Consequences, France-Switzerland, Oct. 18, 1979, noted in Collins, Emmerson & Phuong, *supra* note 43, at 17.

⁵¹ Convention on Early Notification, Preamble, *supra* note 3.

⁵² Blix, *The Post-Chernobyl Outlook for Nuclear Power*, IAEA BULL., Autumn 1986, at 11.

⁵³ Convention on Early Notification, *supra* note 3, art. 1.

under which, for example, IAEA can assist in setting up a radiation monitoring system for countries that lack significant nuclear experience, but have nonsignatory neighbors with active nuclear programs.⁵⁴

A party experiencing a nuclear accident must immediately notify the IAEA and potentially affected states of the location, time, and type of accident, and must provide any available information to minimize radiological consequences to affected states.⁵⁵ The IAEA will then act as an information clearinghouse⁵⁶ by relaying a detailed list of "notifying state" information that should include:

- a) the time, exact location where appropriate, and the nature of the nuclear accident;
- b) the facility or activity involved;
- c) the . . . cause and the foreseeable development . . . relevant to the transboundary release . . . ;
- d) the general characteristics of the radioactive release . . . ;
- e) information on . . . meteorological and hydrological conditions, necessary for forecasting the transboundary release . . . ;
- f) the results of [relevant] environmental monitoring . . . ;
- g) the off-site protective measures taken or planned;
- h) the predicted behavior over time of the radioactive release.⁵⁷

Disputes concerning the Convention's interpretation or application are handled initially through negotiation among the parties to the dispute.⁵⁸ If not settled within a year, such disputes may, at either party's request, be submitted to arbitration or to the International Court of Justice for resolution.⁵⁹ However, parties can, upon signing the Convention, declare themselves not bound by the dispute resolution procedures.⁶⁰ Twelve signatories, including four key nuclear powers (the Soviet Union, the United States, France, and China), exercised this option, limiting the Convention's force by eliminating automatic international ju-

⁵⁴ *Id.* art. 8. This article applies, for example, to signatories bordering South Africa.

⁵⁵ *Id.* arts. 2, 5.

⁵⁶ *Id.* arts. 4, 7.

⁵⁷ *Id.* art. 5.

⁵⁸ *Id.* art. 11, para. 1.

⁵⁹ *Id.* art. 11, para. 2.

⁶⁰ *Id.* art. 11, para. 3.

isdiction over these parties.⁶¹

However, the key nuclear powers also agreed to apply the Early Notification Convention to accidents not covered by the Convention,⁶² referring primarily to leaks from weapons and underground tests.⁶³ These statements effectively include notification of accidents arising out of the five nations' nuclear military activities, a significant expansion of the Convention's reach, albeit on a somewhat less stringent legal standard.⁶⁴

With "the ink scarcely dry on the accord,"⁶⁵ the Convention's procedures were followed in the first nuclear accident after its adoption: the USSR promptly notified the IAEA when one of its nuclear-powered and nuclear-armed submarines exploded and sank between October 4 and 6, 1986.⁶⁶ The USSR indicated that there was no danger of nuclear explosion or radioactive contamination of the environment. "Though it was not specified that this notification was made in accordance with the Early Notification Convention, it may be noted that such notification would be consistent with the undertakings by the USSR to apply the Convention provisionally and also to apply it to *all* nuclear activities."⁶⁷

⁶¹ Reservations and Declarations Communicated to the Depositary, IAEA Docs. N5.55.2 circ. and N5.55.3 circ., Annex C, 25 I.L.M. 1395 (1986). The United Kingdom, the remaining nuclear military power, did not exercise this option.

⁶² Statements of Voluntary Application of Early Notification Convention to Accidents Not Covered by the Convention, 25 I.L.M. 1394 (1986) (verbatim excerpts from statements made at the IAEA Special Session adopting the Convention). The statements were made pursuant to article 3 of the Convention.

⁶³ *Safety Steps*, *supra* note 4, at 36, col. 2.

⁶⁴ See Declaration by India, 25 I.L.M. 1401 (1986). After expressing disappointment that nuclear military accidents were not included in the Conventions, the Indian declaration concludes:

Nevertheless, we have decided to sign both conventions, subject to ratification, in view of the solemn assurance that has been given by the five nuclear weapons states to the effect that they undertake to notify all accidents. This is in keeping with our policy of according to public declarations of state policy equal validity with other international commitments.

Id.

⁶⁵ *Learning From Chernobyl*, *supra* note 6, at A30, col. 1.

⁶⁶ See *id.*; *Moscow's New Policy Reflected in Sub Report*, N.Y. Times, Oct. 5, 1986, at 14, col. 5; Lomonick, *A Scary Accident at Sea*, TIME, Oct. 20, 1986, at 73; *Death on a Soviet Sub*, NEWSWEEK, Oct. 13, 1986, at 51: "The [United States] State Department commended the Kremlin for its 'quick notification' of the incident and offered U.S. assistance, which the Soviets so far have not accepted."

⁶⁷ Szasz, *supra* note 6, at 1370 (emphasis in original); see also *Highlights*, *supra* note 3, at 44. Many parties, including the Soviet Union, agreed to apply the Convention provisionally, pursuant to art. 13, until ratified by the signatory's government and until the Convention formally entered into force. Szasz, *supra* note 5, at 1391 (listing signatories agreeing to apply the Convention provisionally). The submarine incident occurred during this provisional period. See *Soviet Ratifies Nuclear Accident Conventions*, N.Y. Times, Nov. 16, 1986, at 19, col. 1.

B. *Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency*

The Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency closely parallels the Convention on Early Notification. Both conventions set up identical implementation and technical structures.⁶⁸ The Convention on Assistance provides that parties will “facilitate prompt assistance in the event of a nuclear accident or radiological emergency to minimize its consequences and to protect life, property and the environment from the effects of radioactive releases.”⁶⁹ According to Hans Blix of the IAEA, “[w]hile the Soviet Union and other States with large nuclear programmes may be less in need of such assistance, many countries with smaller nuclear programmes might be more dependent upon it.”⁷⁰

The Convention is meant to simplify and speed procedures for bringing in emergency aid by, for example, granting immunity from taxation, arrest, and other legal problems to the people providing assistance.⁷¹ If a state needs assistance after a nuclear accident, it may call for assistance from any other party or from international intergovernmental agencies.⁷² The parties then respond by notifying the requesting state regarding the aid they are willing to make available and financial terms for that aid.⁷³ The Convention outlines procedures for establishing points of contact between parties,⁷⁴ chains of command for assisting personnel,⁷⁵ and policies on reimbursement of costs.⁷⁶ In addition, the Convention provides that the IAEA will function as an assistance clearinghouse⁷⁷ and coordinator, preparing emergency plans, radiation monitoring programs, and personnel training courses.⁷⁸

⁶⁸ See *supra* note 54 and accompanying text.

⁶⁹ Convention on Assistance, *supra* note 3, art. 1, para. 1.

⁷⁰ Blix, *supra* note 52, at 11; see also Collins, Emmerson & Phuong, *supra* note 43, at 16: “Even highly developed countries . . . could find themselves hard-pressed to cope effectively with such an accident, especially if it involved serious off-site radiological consequences.”

⁷¹ Convention on Assistance, *supra* note 3, arts. 8, 10; see also *Soviets Ready*, *supra* note 7, at 12, col. 1.

⁷² Convention on Assistance, *supra* note 3, art. 2, para. 1.

⁷³ *Id.* art. 2, paras. 3, 4.

⁷⁴ *Id.* art. 4.

⁷⁵ *Id.* art. 3.

⁷⁶ *Id.* art. 7. Assisting countries are encouraged to give “due consideration to the needs of developing countries,” when determining whether to waive or postpone reimbursement for assistance provided. *Id.* art. 7, para. 3.

⁷⁷ *Id.* art. 2, para. 6, art. 4, para. 3.

⁷⁸ *Id.* art. 5.

As with the Convention on Early Notification, the Convention on Assistance provides a clause by which signatories can exempt themselves from the dispute resolution procedures.⁷⁹ The same twelve parties that exercised this option under the Convention on Early Notification also exercised it under the Convention on Assistance.⁸⁰

III. CONCLUSION

By their global reach and rapid acceptance, the Conventions on Early Notification and Assistance represent an advance over previous multilateral treaties dealing with the extraterritorial consequences of nuclear accidents. The scope of the Convention on Early Notification has been further expanded by the commitment of the five nuclear military powers to a measure of international accountability concerning nuclear military accidents. The conventions create a legal right in affected countries to rapid information from the country in which a nuclear accident occurs and assistance from that country or from other nations or international organizations. The conventions have reinforced this right by establishing a dispute resolution procedure and authorizing centralized and systematized information gathering and dissemination by the IAEA.

The conventions should not give rise to cynicism despite their admittedly narrow scope and the exceptions to their dispute resolution procedures. They represent the core of agreement emerging from the political fallout of the Chernobyl accident. Both were opened for signature "in what diplomats agreed was probably record time—four months from the start of technical negotiations."⁸¹ Viewed as part of an ongoing negotiating process, these conventions may signal a broader willingness to overcome significant obstacles to multilateral agreement on nuclear accident liability, such as varying radiation protection standards among the IAEA's 113 member countries.⁸² In the final session,

⁷⁹ *Id.* art. 13, para. 3.

⁸⁰ See Reservations and Declarations Communicated to the Depository, *supra* note 61.

⁸¹ *Soviets Ready*, *supra* note 7. "The international community has acted with exceptional speed. . . . These Conventions fill key gaps that existed in the international structure; they reflect an international consensus." President's Message to the Senate Transmitting the Conventions, 23 WEEKLY COMP. PRES. DOC. 291 (Mar. 23, 1987).

⁸² *Soviets Ready*, *supra* note 7, at 12. "It may be impossible to cover the whole world with a single agreement. Circumstances vary so much from one region to another, from Asia, to Europe to Latin America, that we may have to solve this on a regional basis, with

at which the conventions were adopted, the General conference passed a measure noting the range of proposals in the air and commented that they were "[c]onvinced that the subject-matter of international cooperation in the field of nuclear safety has not yet been exhausted and that further consideration should be given to the [listed] statements and proposals."⁸³

There is now a substantial international constituency backing negotiations for a liability convention. The Soviet Union has indicated that it is willing to discuss the liability question in principle. It insists, however, that discussions relate to future accidents, and consider "material, moral, and political damage caused by unwarranted action taken under the pretext of protection against the consequences of nuclear accidents,"⁸⁴ an apparent reference to Western reaction to Chernobyl.⁸⁵ At the IAEA Conference adopting the conventions, Peter Walker, Britain's energy minister, said, "the British Government is anxious to see a general system of compensation in respect of nuclear accidents, and we would support a binding international regime to provide that compensation."⁸⁶ West Germany, Austria, and Luxembourg voiced similar support.⁸⁷ As Walter Wallmann, West German minister for the environment and nuclear safety, wrote:

Chernobyl's most important—ethical—lesson is that nations cannot ignore the consequences of nuclear problems beyond their borders and that national interest must yield to a broader concern for the safety and well-being of everyone on this planet. . . . [T]he principle that the "polluter pays" must be applied when compensation for damages is sought. Financial responsibility for trans-border damages must be borne by the country that causes an accident. Chernobyl has made possible the beginnings of international cooperation in providing nuclear safety.⁸⁸

As the incident at Chernobyl demonstrates, accidents will

regional agreements." *Id.* (statement of a ranking Western diplomat at the IAEA session).

⁸³ Measures to Strengthen International Cooperation in Nuclear Safety and Radiological Protection, Draft Resolution adopted unchanged by the Special Session of the General Conference, Sept. 26, 1986, IAEA Doc. GC(SPL.I)/15/Rev.1, 25 I.L.M. 1389 (1986).

⁸⁴ *Soviets Ready*, *supra* note 7.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ Wallmann, *Toward Nuclear-Energy Safety*, N.Y. Times, Nov. 7, 1986, at 35, col. 2 (editorial by West German Minister of Environment, Protection of Nature, and Nuclear Reactor Safety).

happen.⁸⁹ When they do, the Conventions on Early Notification and Assistance will provide an established and legally recognized mechanism for ameliorating the damage they cause. Concretely, the conventions define international expectations for minimally acceptable behavior following nuclear accidents; more abstractly, they expand legal recognition of global environmental interdependence and national responsibility for the transnational consequences of nuclear activities.

Michael A. Heller

⁸⁹ “[I]n the period from 1971 to 1985 there were 151 accidents [at nuclear power plants] of varying degrees of seriousness in 14 countries of the world.” Petrosyants, *The Soviet Union and the Development of Nuclear Power*, IAEA BULL., Autumn 1986, at 5, 7 (the author is Chairman of the Soviet State Committee on the Utilization of Atomic Energy). See generally Costello, *Armed Forces* (Columbia Records 1978).