Panel Discussion:
State Responsibility and Civil Reparations

Mr. Todd Buchwald, U.S. Department of State, Assistant Legal Advisor for Political Military Affairs: I want to thank Professor Grunawalt and the Naval War College for putting this outstanding Symposium together and for inviting me to participate as a moderator. This morning we heard several excellent presentations on the legal framework for protecting the environment during war. Several speakers have already alluded to the fact that, in addition to articulating the legal principles that apply, there are questions related to enforcement and in many ways these are areas where the “rubber hits the road.” At least two areas of importance will be discussed this afternoon. One is the question of reparations, which we will examine now. Later we will hear from a panel on the issue of criminal liability.

We have assembled here an excellent panel to address State responsibility and civil reparations, both from the point of view of their qualifications and background, and also from the perspective that they are perhaps the most aptly named group we could assemble to talk about the environment—Professors Greenwood, Green, and Plant. [Laughter.] Professor Green is Professor Emeritus at the University of Alberta and has held numerous other university appointments, has served as a member of many delegations for the Canadian Government, and is the author of, among other works, “Contemporary Law of Armed Conflict”. Professor Greenwood is Director of Studies in Law and University Lecturer at Cambridge and has also been a visiting professor at numerous universities both in Europe and the United States. His publications include the forthcoming “War and Armed Conflict in International Law”. Professor Glen Plant, our commentator this afternoon, is at the London School of Economics and Political Science. He has taught at the Fletcher School of Law and Diplomacy and has served as a legal adviser in the Foreign and Commonwealth Office. We certainly have an excellent panel this afternoon. With that, I turn it over to Professor Green.

Professor Leslie C. Green, University of Alberta: Thank you sir. The purpose of my paper is to give a general introduction, a general survey of the topic. I will not be discussing problems of Bosnia or Serbia or even Ottawa. I would like to make one personal statement that does not appear in my paper, but I think has become urgent as a result of our discussions during the last day and a half. I was in the Far East when the atomic bombs were dropped, and as a member of the
British Armed Forces let me assure you that, at that time, I could not have given a damn for the effect on the environment or the effect of collateral damage where the enemy was concerned. I knew that this meant one hundred thousand prisoners of war, approximately, were not going to die; that I had five years in the service, untouched, and I was going to remain untouched and I was going home. To be quite honest, I am tired of hearing the breast beating and the mea culpa attitude fifty years later by people who do not know what they are talking about. I think that is something that is of extreme importance because I suspect that if we are engaged in general and long-term hostilities again, that will be exactly the reaction of the man in the field—officer, NCO, and serviceman alike. We ought not to forget it. Having said that let me deal with the environment.

Colonel Finch referred yesterday to the ancient Greeks in telling us that the issue of the environment has been of consideration for a very long time. If you look at the opening paragraphs in my paper, you will see I go further back; I go back to the Old Testament. In the wars of the Israelites, God had instructed that there shall be no damage to the fauna and flora unnecessary beyond that required for consumption by the forces. There is that beautiful statement, “are the trees the enemy of mankind.” But, of course, in those days, the only form of punishment or sanction was divine. But the principles laid down in the Old Testament are in many ways akin, and I am not going to repeat them all, to those that we find in the Stockholm Declaration. If you compare those biblical statements with the principles laid down at Stockholm, you find, allowing for ideology and changing technology, we have not travelled very far. The only thing that I would repeat is from Stockholm—“States will cooperate to develop further the international law regarding liability and compensation for the victims of pollution and other environmental damage caused by activities within the jurisdictional control of such States in areas beyond their jurisdiction.” A very similar statement is to be found, dare I mention it, in the Third Restatement of the American Law Institute where again you have reference to the limits of national jurisdiction. Now if these statements in Stockholm or the Restatement are, in fact, declaratory of the established law, and there may be doubts as to whether this is so or how far they go beyond what is clearly established, there is no indication in any of them of personal liability nor any suggestion that an international crime has been committed. So far, there has been no indication of how the International Court would assess compensation due to a claimant State in respect to damage caused to the environment beyond the limits of its national jurisdiction.

The Court in the past has been very concerned: if you look at the Southwest Africa Cases, yes, you do have a grounding to bring an action, but no, you can not recover because you have not suffered any personal damage, and that causes all sorts of interesting problems. There is no way that it can be claimed that this legal obligation stems, for example, from the 1967 Treaty on Principles Governing the
Activities of States in the Exploration and Use of Outer Space, etc. Article 9 of that treaty refers expressly to damage to the environment, enjoining States when indulging in any form of space activity to avoid adverse changes in the environment of the earth. It sounds wonderful, but it is absolutely silent as to how liability for such damage may arise or how it may be dealt with. There is no suggestion that outside of any State's jurisdiction, which is res communis, that there is a right of an actio criminalis, and this raises all sorts of issues of international interest. An example of the concept of global commons, which this implies, appears in the 1991 Protocol on Environmental Protection of the Antarctica Treaty, designated a natural reserve devoted to peace and science. The only obligations that are really imposed, are obligations to postulate rules and procedures concerning liability for damage, while Articles 18 to 20 provide for settlement of disputes by consultation, the World Court, or the Arbitral Tribunal envisaged by the Protocol itself. There are no general principles therein.

It was not until Additional Protocol I, of 1977 that we really find a legal obligation, an allegedly enforceable obligation, to recognize, during conflict, the needs of the environment. First, we can take environment in the widest sense—you have the provision against starvation. A much more important provision than damage to the environment, whatever that means. But here we have a clear provision relating to humankind and that has not been stressed. While this is very similar to the Biblical injunctions, and again, I say look at those Biblical injunctions, one tends to look at the classics of international law or even to Leman Phillipson on Rome and Greece, and the like. Teddy Meron has taken us to Henry V and some of his precursors, but I fear there is not enough concern in the schools of law for the history of the law of nations. It is sort of assumed that it grew, I suppose, like Venus out of the sea but, in fact, if you look at the ancient law on issues of this kind they were much more advanced than we were ten years ago, in many ways than we are today. It is worthwhile paying attention, especially when one hears, “Oh well! You are trying to do something new that has not happened before.” No, when the religioso tell us that we are trying, remind them that if they are religioso, they are obliged by their own religions, and it applies to all three major religions to recognize these obligations. But they do not know it, and we do not do enough to tell them. The injunction of the Old Testament was only divine. The injunction of the Protocol is criminality. The military codes of the feudal period also dealt with this problem long before we thought of dealing with it, and they made it clear that for a military man to attack agricultural equipment, was in fact, a capital offense. You did not attack the necessities of human life. This was not only true in the rebellions of the feudal period, but even when you were engaging in the 100 Years War abroad. One should pay much more attention to these things than we tend to do. Each of these codes was localized: they did not attempt to internationalize, although Lieber in one of his articles makes it clear
that Americans operating against the enemy, or even enemy subjects who are captured, would in certain circumstances be liable to punishment including for this type of offense.

From the point of view of liability, we have not had much on the international enforcement side. We have had the old Roman law principle which we are told underlies the only leading international decision we have to date the, *Trail Smelter Case*. People tend to forget that the *Trail Smelter Case* is limited in its application because the tribunal was told to apply the law and practice followed in dealing with cognate questions in the United States, as well as in international law and practice and to give consideration to the desire of the high contracting parties to reach a solution which introduces much more national law and equitable principles, than solid international law. So one must be careful how far one uses the *Trail Smelter Case* as an argument of responsibility if you injure another State's environment, or in the wider sense, its fauna and flora, as a result of your activities against or affecting the global environment.

During the decisions or debates in the World Court on the French nuclear tests—for a variety of reasons, the Court was saved the necessity of having to consider whether the French tests would or would not affect the environment and would or would not create a claim against France by either Australia or New Zealand, or anybody else, because of the injury to the environment as such. Whether in the new advisory opinion requested by the U.N. General Assembly on the legality of nuclear weapons, or if they were to reopen the New Zealand case against France, the Court would take its courage in its hands and deal with the problem of liability for damage to the environment, I suppose it would be both interesting and depressing. When we do look to the problem of the *sequitur* rule and the environment of one State being adversely affected by the activities of another, we have to be careful how far we carry our claims. Remoteness becomes extremely important, as we saw in the *Trail Smelter Case*.

If we look at the problems created by Chernobyl, for example, hundreds of miles away from the original source of the damage alleged from the breakdown; if we listen to what is now being heard about the “Gulf War Syndrome,” the difficulties of linking the consequences to the alleged cause show how dangerous it is to assume that it must be a result of environment damage. The practical issues are extremely important and difficult. What I found very interesting was to reread, in this connection, the Tokyo District Court decision of 1963 concerning the legality of the atomic bombs. There are some fascinating statements in that decision. It said that the bombs were comparable to the use of poison and poisonous gases. Their dropping may be considered as contrary to the fundamental principles of the law of war concerning the prohibition of unnecessary suffering. It went on to make a very interesting statement concerning responsibility. It quoted Article 3 of the
Hague Convention on the liability of the belligerent for all actions of those under its command, and it said:

Since it is not disputed that the act of atomic bombing on Hiroshima and Nagasaki was a regular act of hostilities performed by an aircraft of the US Army Air Force, and that Japan suffered damage from this bombing, it goes without saying that Japan has a claim for damages against the United States in international law. In such a case, however, responsibility cannot be imputed to the person who gave the order for the act, as an individual. Thus, in international law, damages cannot be claimed against President Truman who ordered the atomic bombing as it is a principle of international law that the State must be held directly responsible for an act of a person done in his capacity as a State organ and that person is not held responsible as an individual.

What is interesting is that the decision on the atomic bomb was made after the decisions in the Yamashita and the Kurt Mayer Cases concerning the liability of a man who does give an order. Of course, if one were to look at the 1977 Additional Protocol I, we would find that, assuming the statements of the court concerning the legality of the bombing were correct, President Truman would be liable. We thus have a strange decision considering the date at which that decision was delivered.

There have been various efforts in the law of peace to deal with specific areas of the oceans, pollution, overfishing, etc. Again, it becomes clear we are not really concerned with the general issue, the issue of damage to the environment. In the Convention on International Liability for Damage Caused by Space Objects, a launching State shall be absolutely liable to pay compensation for damage. The term "damage" means loss of life, personal injury, other impairment of health, or loss or damage to property, natural or juridical, including property of international governmental organizations.

This brings us close to our debate this afternoon. How? The issue of the damage caused by Cosmos 954 over Canada is illustrative of what the position is. We talk about strict liability, but the only way in which you can enforce your claim for international responsibility is traditional; either diplomatically, by arbitration, or by judicial settlement. In the Cosmos 954 case it was settled diplomatically and not very much to the satisfaction of my country, but then I gather that one is always faced with the issue, the plaintiff claims more, the defendant offers less, both sides knowing that the figures quoted are not the final ones. Nevertheless, we in Canada feel we got the sticky end of the stick—and I assume we are going to get it again as a result of the negotiations with the United States over the cleaning up of former U.S. bases in Canada.

Other problems arise with such agreements as the Long Range Transboundary Air Pollution Agreement which again talks about direct responsibility, and the need for compensation, but again requires direct damage to a State and makes no
provision other than the traditional ones. So whatever we do, whether we look at the Modification Technique Convention, whether we look at the Additional Protocol I, Articles 35 and 55, we are still left with the same theme—personal liability if you can attach it to a particular identifiable individual. But bear in mind, if we are engaged in hostilities, by and large injury to the environment will only be a consequence of a policy decision or of a High Command decision. It is not going to be the decision of the man in the field. If it were his decision, we would get him every time he left an undischarged cartridge lying on the ground because that too is pollution; every time a tank driver tipped his tank over the side and left it. We may know who the driver of the tank is, but it does not arise. In the pollution issues, it is high policy. We do not have any principle at the moment for the prosecution for the criminality of a State if we still stick to the sort of statement in the Japanese Shimoto Case, or if we go on the traditional level, a State is responsible for the acts of its organs and basically, if we are seeking compensation, civil liability. I do not want to go against the man. He does not have the funds that I want. It has got to be against the government. How do we do this?

The International Law Commission (I.L.C.) has talked about international criminality against such fundamental principles of law as relate to the preservation of the environment. With great respect, I would like to know what those fundamental principles of law are. The idea is too much talk in the I.L.C. or in the Vienna Convention on Treaties, on jus cogens. What is jus cogens? It is anything I feel I would like to elevate or that you feel you would like to elevate, because nobody has attempted to define it. It is some sort of wonderful "concept up there." A fundamental principle which is so fundamental that everything else is unimportant. Professor Meron and I probably disagree, basically, on what he regards as jus cogens in the field of human rights and what I would regard as jus cogens. Professor Meron and I have disagreed on that sort of thing before. There are no doubt other issues on which Professor Meron and I would disagree on jus cogens. But on one thing we are equally convinced—he is convinced that his conceptions of jus cogens are correct and I am convinced that mine are correct. What is the value of putting that sort of nonsense into an international document? It sounds good, but it means less than the paper that it is written on. Again, I think one ought to look at "a serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment." It sounds like a ten-year-old school child telling us what he believes in, without paying the slightest attention to what the reality is. Again, the draft on International Crimes Against the Peace and Security of Mankind; I read this with great care. Article 1 - crimes under international law are defined as crimes against peace and security of mankind. Article 26 - an individual who willfully causes or orders the causing of widespread, long-term and severe damage to the natural environment shall, on conviction, be sentenced to whatever it is. They do not tell
us what this is. They do not define the natural environment. They do not define widespread, long-term and severe, it is just there.

I said I would not talk about Iraq. Iraq is an example of how compensation is being achieved, through the medium of a Security Council obligation—the establishment of a special commission; not a general commission. The whole situation remains what it has traditionally been. If you want civil reparation, if you want reparation of any kind for damage to the environment, the law requires that you prove that you, or your interests, have suffered direct injury. There is no point of talking about damage to the environment outside any State’s jurisdiction. We do not have the actio communalis. As international law exists today, arbitration and judicial settlement, for the main part, depend on consent, and the defendant State, most frequently, is not going to come.

If anybody thinks Serbia will surrender Karadzic for trial at the Hague they need to reexamine the political situation and the realities. I have never heard such nonsense as I read in the New York Times. If Karadzic were to come to Geneva to a peace agreement, he would be arrested and handed over. Do not believe it. England said the same about Ian Smith over the Rhodesian Unilateral Declaration of Independence. When he came on the ship to discuss the issue of how to settle it, the government said, “You were brought here to discuss peace; we can not arrest you on a treason charge, though we know you are guilty of treason.” And the same thing applies here.

We would again have to rely on the traditional processes for international responsibility—suit for damages. We may pretend, through the medium of a Security Council Resolution, that the damages are a penalty, that the damages are a sanction. A sanction is a punishment and, therefore, we are getting civil responsibility in the form of a penalty by dressing it up in a Security Council Resolution instead of describing it as a normal process of international enforcement of an international claim, whether of the customary international law of armed conflict, or the treaty law of armed conflict. Breach of the treaty law where a State is concerned is still a tort in international law. It is not a crime. Even if we had an international criminal court, who would we be proceeding against? The head of State? The commander? It would not be a prosecution of the State. There would be no change in the legal system as we know it at the present moment. Thank you.

Mr. Buchwald: Thank you Professor Green. We will now turn to Professor Greenwood.

Professor Christopher Greenwood, Cambridge University: Thank you very much Mr. Chairman. Ladies and Gentlemen. Professor Green is a hard act to follow. Not least because I have learned one very important and fundamental truth;
not just about the concept of *jus cogens*, but also that a ten year old school child—and I am the father of one of these creatures—a ten year old school child can be defined as a very serious threat to fundamental environmental interests. It is clear Leslie, that you have met my daughter.

Now the purpose of my paper today is to look at two questions. First of all, when is a State responsible in international law for damage caused to the environment in time of armed conflict and, secondly, what affect in protecting the environment do these principles of State responsibility really have? I have tried to set out the argument on both of those points in the paper that has been circulated to you. This is a famous first for those of you who have been to conferences with me before; the idea that Greenwood would ever provide a text of one of his papers in advance is really quite extraordinary and shows how effective the United States Government contracting system is.

I can only apologize to you, however, that the paper is not longer. I had thought I had written a long one, but I realize now that I cannot compete with Professor Walker for the sheer number of authorities cited, and I certainly cannot compete with Professor Green because all of my authorities are earthly rather than divine.

Now, Mr. Chairman, the basic principles of State responsibility in this area are very straightforward indeed. Under international law, a State is responsible if there is conduct of its agents or some other persons which is imputable to that State and if that conduct violates a rule of international law. It is a principle that is so well established that it barely needs quoting—which is why it is no doubt quoted in every textbook. Once established, State responsibility means that the State concerned has a duty to compensate the damage caused; that it may expose itself to the risk of retaliation, and indeed looking at it in a more preemptive sense, the likelihood of being held to account under the principles of State responsibility ought to have a deterrent affect. After all, it has had a deterrent effect in terms of ordinary domestic law of civil liability. A company is deterred from polluting the environment partly because it knows that the financial implications of being sued for the damage it has done are very serious indeed.

That basic principle of State responsibility applies to the breach of all rules of international law including those for the protection of the environment. It also applies to breaches of principles of the law of armed conflict. A State is responsible in international law if its agents or those who acts are imputable to it, violate a rule of the law of armed conflict, including one of those rules of the law of armed conflict that deals with environmental protection. I will not go over them again, we spent the morning discussing their content. I would just mention in passing that I belong to the school of thought that believes a rule can in fact protect environmental interests even if it does not have the word "environment" put prominently in its title.
One could, however, just mention briefly two special rules, relating to State responsibility for the acts of the military, which have effects on the environment. The first is that the principles of State responsibility for the acts of armed forces is more extensive than the law of State responsibility is in relation to acts of other, nonmilitary, agents. If you look at Article 3 of Hague Convention IV of 1907, or Article 91 of Additional Protocol I of 1977, they both make clear that a State is responsible for all of the acts of its armed forces in armed conflict. It is clear that if you look at the travaux preparatoires of the 1907 agreement that that was intended to remove the scope for arguing whether the individual soldier who commits the wrong was acting in a wholly private capacity or was acting as an agent of the State. In principle, that question becomes irrelevant because the State is internationally responsible for his acts whether he is acting in his official capacity or not. So that in the context of damage to the environment done by a retreating army where discipline has completely broken down and individual soldiers were committing acts of arson, looting, and pillage, those acts would still be acts for which their State was responsible in international law. The notion attributed to one Iraqi spokesman, as quoted by Mr. Arkin yesterday, that “What the military does is not what the government does,” is quite simply wholly unsound in international law.

The second special principle that I refer to briefly in my paper is that we need, I think, to distinguish very carefully indeed, between responsibility of the State for a violation of the law of armed conflict and the potential responsibility of the State for a violation of Article 2(4) of the Charter. A State that invades its neighbor commits a wrongful act by the very fact of that invasion, and will incur State responsibility as a result even if its armed forces thereafter fight the war entirely by the book, abiding by every principle of humanitarian law and the wider law of armed conflict. Now I think it is quite different if you look at the world of war crimes, and I would here just briefly dissent from something that I think Leslie Green was saying. The responsibility of the State in international law is not in any way antithetical to the individual criminal liability of the serviceman. The two are intended to be complimentary, not mutually exclusive. They differ in this very important respect; the State may be held responsible for the illegal act of invading its neighbor, but the individual serviceman may not. The individual serviceman’s criminal responsibility is limited to breaches of the *jus in bello*. The State’s responsibility can embrace the *jus ad bellum* as well.

Now all of those rules are straightforward. The fact of the matter is, however, they are hardly ever applied. The number of cases to which there has been any serious reference to the principles of State responsibility, either for violating the laws of war or for violating the U.N. Charter, can be counted on the fingers of one hand. That is why it is important to look at the current precedent of the United Nations Compensation Commission for Iraq because that has the potential—I put it no higher—to set a very important precedent indeed that might perhaps serve
to put these principles of State responsibility in the context of armed conflict back on the road; to make them a serious player once again.

We have already touched on the fact in earlier sessions that Security Council Resolution 687 reminds Iraq that it is responsible for direct loss, injury, or damage, including environmental damage and the depletion of natural resources, resulting from the unlawful invasion and occupation of Kuwait. Now the basic principles of State responsibility, of course, existed under ordinary international law. They were not created by the Resolution. What the Resolution creates is the mechanism for giving affect to those underlying principles. The skeleton of Resolution 687 is fleshed out in a series of decisions of the Governing Council of the Compensation Commission. The most important of which, for our purposes, are Paragraphs 34 and 35 of Decision Number 7, and I have quoted the relevant passages in my paper. What the Council decided is that, in principle, Iraq could be held to account for loss suffered as a result of military operations by either side during the Gulf Conflict; that Iraq could be held for account by the acts of its agents and other officials or entities connected with the occupation or invasion. That is effectively taking the principle in Article 3 of the Hague Convention but extending it beyond the armed forces to include a general principle of responsibility for the acts of civilian agents of the Government of Iraq as well. Thirdly, Iraq is responsible for damage and loss resulting from the breakdown of civil order in Iraq and Kuwait. The Decision also goes on to indicate the types of environmental damage which, in principle, could be the subject of compensation. The cost of cleaning up the Gulf, the cost of dealing with the oil slick, of capping the fires in the oil wells, the affects on health, and so on are all set out in Paragraph 35 of that Decision.

Mr. Chairman, I suggest that there are two central features of the compensation commission system that we need briefly to look at. The first is that Security Council Resolution 687 and the Decisions of the Governing Council are all based on the principle that Iraq is responsible for the illegal act of invading Kuwait and that that is the basis for the responsibility that follows, not responsibility for violations of the law of armed conflict. There are one or two exceptions to that. For example, claims by members of the Coalition forces would have to be based on violations of the law of armed conflict. But the basic principle of Iraq's responsibility is for breach of the *jus ad bellum*, not for a breach of the *jus in bello*. Now that has enormous importance in terms of the environmental claims because it means that it does not matter whether the oil slick was in fact the product of a violation of the law of armed conflict by Iraq or an act legitimated by military necessity. In other words, the debate we had yesterday morning would not in fact be important in terms of the Compensation Commission's work. Now I said yesterday that I regard Iraq's act in releasing oil in the Gulf and setting fire to the oil wells as being a breach of the law of armed conflict. But there are other acts by Iraq that are much more difficult to assess, particularly those involved in land
degradation, the affect of the mining of Kuwait territory, the creation of defensive
works there, and so on. None of that is going to be an issue.

Secondly, the affect of basing liability on the act of aggression rather than
breaches of the law of armed conflict opened the way for the Governing Council
to decide that Iraq could be held responsible for environmental damage caused by
the Coalition as well as the damage caused by the Iraqi forces. So again, you do not
have to show how much of the oil slick came not from Iraq's transgressions but
from a tanker that was hit by the French Air Force or the RAF. It doesn't matter.
It is still something which can be put down to Iraq.

On the other hand, the concept of direct loss may well give rise to considerable
difficulties for the Compensation Commission. It is always difficult to prove
causation in environmental claims and an environmental claim in wartime is likely
to be more difficult still. Let me suggest to you four categories of claim that might
be made. First, you have environmental damage resulting from acts of Iraqi agents
acting in the exercise of their authority. In other words, acting under the direction
of the State. There, responsibility is perfectly clear. Secondly, you can have damage
caused by Iraqi agents acting in an unauthorized fashion. Once again,
responsibility here is clear both under the general law, Article 3 of the Hague
Convention, and also as a result of Subparagraph (a) of Paragraph 34 of the
Governing Council's Decision. Thirdly, you have the case where environmental
damage results from the activities of the Coalition forces, but those Coalition
operations are legitimate acts under the law of armed conflict. It is an attack on a
legitimate military objective carried out with all of the necessary precautions, but
it still causes environmental damage. That is apparently going to be treated as a
direct result of the unlawful invasion. Then you come, Mr. Chairman, to the fourth
category. Let us suppose that the Coalition attacked a target in Kuwait, let us say
an oil tanker in Kuwait Harbor, and that attack was a violation of the law of armed
conflict—because the target was not a military objective, or the criterion of
proportionality was not satisfied, or the customary law principles on protection of
the environment have not been complied with—now to what extent, Mr.
Chairman, can Iraq be held responsible for the illegal acts of the Coalition if there
were any? How far does the breach of the law of armed conflict by the Coalition
still engage the international responsibility of Iraq because it can be said to flow
from the original and greater illegality of the invasion? Let me suggest to you
something which might be controversial. I think it would be an outrage if Iraq
were held responsible for illegal activities by Coalition forces and totally
counter-productive in terms of trying to protect the environment. It would set a
precedent that would be most unfortunate for the future.

Now very briefly, Mr. Chairman, let me say a little bit about “MOOTW,” a word
I have only learned to pronounce in the last couple of hours. So far as responsibility
for environmental damage resulting from internal armed conflicts is concerned, I
think the crucial point here is that there will have to be damage to the environment or to the environmental rights and interests of another State. In other words, it would have to be the case that activity by the forces in the armed conflict taking place in State A had repercussions in the territory or on the fishing rights and interests of State B. Unless there is some cross border element, I do not see that State responsibility has a role to play here.

A much more difficult case, and I share the reservations of those who said this morning that they should not really be linked with internal armed conflicts at all, is the question of responsibility for environmental damage caused by United Nations forces or personnel associated with United Nations forces in operations mandated by the Security Council. Who is responsible if UNPROFOR or NATO wreaks havoc on the environment in Bosnia?

Now in principle, with UNPROFOR at least, it ought to be the United Nations. The principle seems to have been established in the past, that the United Nations would be the normal recipient of a claim for damage done by United Nations forces. On the other hand, with a NATO operation, not under the command and control of the United Nations, it is much more difficult to say that the responsibility of the individual member States of NATO is somehow excluded. And to make matters worse, Mr. Chairman, you have, I think, got a blurring of the dividing line between the two. Increasingly, States that contribute a contingent to a U.N. force may put it notionally under the command and control of the United Nations, but there is a hook to pull it back when the moment arises. There I think you have an area where the law of State responsibility is underdeveloped and there is enormous scope for holding the individual State responsible for the activities of its armed forces.

So in conclusion, Mr. Chairman, how effective is all this? How much difference does it actually make? Not very much. The U.N. Compensation Commission has the opportunity to set a very valuable precedent for State responsibility for environmental damage. But it already has $175 billion worth of claims filed before it, none of which relate to environmental damage, with the exception of a handful of cases for personal injury where the complaint is, “I suffered ill health as a result of the pollution of the environment in and around Kuwait”. If Iraq resumes oil production at the pre-war rate and is able to get the pre-war price for its oil, the Commission could probably count on having 6-7 billion U.S. dollars a year in revenue on the assumption that it receives 30 percent of the revenue from Iraqi oil sales. At that rate, assuming roughly 50 percent success in the claims filed, and assuming that the environmental claims were as extensive as people say they will be, it will take Iraq until the middle of the next century to pay off the entire amount awarded against it. That exceeds even Saddam’s most optimistic life expectations.

What about the deterrent value? I was struck by something Bill Arkin said yesterday; that Iraqi officials he spoke to said, “Well, when we did this damage in
Kuwait nothing happened to us.” Well something did happen. The U.N.
Compensation Commission was set up with the authority to hand out billions of
dollars of Iraq’s money. But that clearly has had no impact within Iraq at all. The
deterrent effect simply has not filtered through, at least in terms of the thinking
of Iraqi officials.
So what I suggest, Mr. Chairman, is that State responsibility has a role to play
here, but it would be mistaken for us to place too much reliance upon it. It is
something which exists in the background as a secondary means of enforcement.
A far greater hope for the future is to inculcate in servicemen and in the military
planners a sense of environmental consciousness. We want to ensure that a future
Admiral Farragut tells his officers “Full ahead, damn the torpedoes, but mind the
tuna.” Thank you sir.

Mr. Buchwald: Thank you Professor Greenwood. It is now time to hear from our
commentator, Dr. Glen Plant. Glen?

Dr. Glen Plant, London School of Economics and Political Science: I don’t
think I can improve on Professor Meron’s thanks and comments to the organizers
for this very good conference. I neither deny nor confirm that I was in the vicinity
of Ottawa in July 1991. For reasons that I cannot fathom now, however, I did, in
this little book, list everyone who was. So, I think we can put Ottawa to bed by
referring you to footnotes 274 and 275. Leslie Green was good enough to put one
nail in its coffin; I think I will put the final nail in. The so-called “Chairman’s
Conclusions” were actually draft conclusions of which he has never authorized the
release. So I think it is far more important, if we are to get into anything in the
past, to talk about “Experts Meetings” organized by the ICRC in Geneva where I
think valuable work was done, in particular on military manuals. What I do not
want to look back to is the so called “June 1991 Greenpeace Conference on
Proposals for a Fifth Geneva Convention.” I deny that there was ever such a
conference. What took place in June 1991 was a jointly organized London School
of Economics/Greenpeace conference and I, for my part, never proposed a Fifth
Geneva Convention. I think the problem may have come in the fact that the
Greenpeace press machine forgot to mention that it was a joint venture, jointly
financed. But that is in the past.

Turning to the subject, it is significant that the title of this panel starts with the
words “State Responsibility and Civil Reparation” because, as both speakers have
aptly pointed out, resort to State claims based on responsibility under public
international law is rare in respect to environmental harm occurring even in
peacetime, let alone as a result of military operations including those taking place
in times of armed conflict. It follows that resort to civil liability and domestic
courts is of potentially greater significance. I will mention that to some extent. In
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this context, I will be quick to point out that I do not regard the Trail Smelter Case to be a true environmental case either. And thus to this extent, I agree with the quotation cited by Professor Green in his paper that Trail Smelter was more of a model than a precedent for State responsibility in this area. Trail Smelter concerned pollution damage, of course, but this resulted in claims concerning harm to property, not harm to the environment per se.

While I am not a “tree-hugger,” I do want to talk about the environment, and I think perhaps we have not talked about the environment as much as we ought. Since the essence of State responsibility for acts of transboundary pollution lies in the occurrence of harm, not the mere occurrence of a wrongful act—unlike in other areas of State responsibility where harm is not such a prerequisite—this assumes potential significance where damage occurs to elements of the environment per se which cannot be characterized as property damage or harm to human health. Thus, in the State responsibility context, Professor Greenwood’s point, that much environmental damage in the Gulf War, for example, was already covered by Hague law provisions, has its limits.

The main legal significance of Trail Smelter is implicit in what Professor Green said, and he was quite right to point out its weak legal origins, which, if anything, were based on general principles of international law rather than customary law. That significance was in its recognition of the emergence in embryonic form of this new area of State responsibility. Professor Green mentions in his paper the Stockholm Declaration on the Human Environment of 1972 and cites it in part. I think it is important to point to one provision of that Declaration, that is Principle 21, which is an expression of the sic utere tuo principle in its application to the environment. What is significant is that Principle 21 extends beyond the Trail Smelter context to include the global commons as well. It is not simply inter-State transboundary situations that it is dealing with.

It follows that I accept Professor Green’s argument that the environment has been an object of protection in armed conflict since ancient times, and that there are some parallels between Biblical and modern texts. But this is, essentially, only in so far as the “environment” coincides with owned property or human health; only if you take an anthropocentric view of the environment—i.e., in terms of what is necessary for man’s survival. I think there is an argument for saying there are elements of the environment that might deserve protection in their own right, regardless of the affect they have on man.

My concern is simply that fundamental environmental values, even if looked at in this anthropocentric sense, are preserved. And do not make the mistake that the matters that I raised yesterday, my Mexico example, are matters that relate only to upper echelons of command. I deliberately chose Mexico as an example where clearly any military operations will have environmental impacts. But I also chose the Monarch Butterfly, which many of you may not have heard of,
deliberately because it is a highly migratory species that travels between Mexico, the United States and Canada. That example illustrates that even activity at a training level, or a military operation at a relatively low level, such as a brigade, could damage an area along the flight path of those butterflies that could effectively wipe out the species. Well, you may say "so what." Let me remind you that there are issues like bio-diversity, the loss of which we may come to regret in the future. I am not saying to you that we must sacrifice human lives to save the Monarch Butterfly. But what I am saying, is that it is an act of moral consideration, something that must be taken into account in policy formation and in the formulation of law.

I accept that the ancient texts and the modern texts do differ in another fundamental respect. The Stockholm Declaration, and a number of environmental treaties reflecting Principle 21, as well as a good deal of State practice, are concerned, to an increasing degree, with protecting the environment _per se_. They are also—and this is important—increasingly concerned with doing so by prior preventive action and mechanisms and not by mere posterior consequence-sorting. And here I will expand on what Professor Greenwood said about the deterrent effect of State responsibility. I think it is more than that. Professor Green, in his paper, emphasizes the role of supervisory authority and negotiating international mechanisms in this field. And it is in this context that methods such as environmental impact assessments and other manifestations of emerging or developed customs or principles of cooperation and precaution—indeed, State responsibility principles themselves—should be viewed. I agree it is not always easy to see how such mechanisms can be applied in relation to military operations. Of course, environmental damage will occur in wartime. Of course, the military cannot suspend fighting while the Army Board of Environmental Impact Assessors conducts a full-blown peacetime-type environmental impact assessment. But it does not follow that equivalent principles, which are ultimately related to State responsibility, and indeed, are more than simple mechanisms, cannot be applied in a suitable, limited manner during military operations so as to protect the environment _per se_.

Indeed, the law of war has expressly come to concern itself with the environment _per se_, in so far as we accept that Articles 35 (Paragraph 3) and 55 of Additional Protocol I represent emerging norms. I realize that is a controversial statement. Leslie, they do define the natural environment in one sense. That is, in the sense that at least the ICRC Commentary at page 662 states that it was intended to comprehend the natural environment not only as objects indispensable to the survival of the human population, but also forests and other vegetation mentioned in Protocol III to the 1988 "Inhumane Weapons" Convention as well as flora and fauna and other biological and climatic elements. Now I realize that the
Commentary is not an official interpretation, but it is at least a persuasive guidance, in my mind.

The questions, therefore, are whether the existing protection is adequate and what role does State responsibility play in this arena? I will try to refer in answering these questions to several more of the speakers' points. Before I do so, however, three more preliminary points ought to be made. I think any talk of liability for transboundary injuries as a consequence of acts not prohibited by international law, merely serves to confuse. And I believe this is mentioned in both speakers' papers. The International Law Commission is misguided in applying this concept to environmental harm. Why? Because the lawfulness or not of the act is irrelevant. State responsibility arises from the harm caused by the pollution across State boundaries, not from the suggested nature of the act itself. Professor Greenwood mentions in his paper that it would be controversial for the ICRC to seek to apply this notion to military operations. Well, he will be glad to hear that they decided to exclude military operations from their considerations. I think that is very sensible.

Secondly, I would like to applaud Professor Greenwood's remark about not placing too much emphasis on putative, personal and—God help us—State criminal liability in parallel with State responsibility. I think they are separate issues; looking at them together merely serves to confuse. Finally, I could not agree more with Leslie Green on *jus cogens*.

The point is that either State responsibility arises or it does not. It is simply a matter of examining the relevant State practice and applying the relevant law, including in respect of any *erga omnes* obligations there may be. Either State responsibility is a useful primary device to ensure environmental protection or it is merely an important residual method of last resort when other mechanisms of control or redress have failed. I think it is the latter. It is certainly the latter in the peacetime context. To illustrate this, I have various possibilities—Chernobyl is one. Two States have reserved the right to bring claims, but they have not done so. Secondly, the usual approach to regulating international environmental problems now-a-days is to prepare a framework convention to be followed up by protocols. The last protocols to be negotiated within these framework treaties are State liability protocols; every time.

I think there are other fundamental reasons for this residual role of State responsibility. First, certain environmental problems simply cannot be laid at the door of individual States. Enhanced global warming, depletion of the ozone layer, and, to a large extent, loss of biological diversity, result from the combined actions or inactions of all States and require cooperative global solutions. You simply cannot deal with it in terms of inter-State claims. That is true even where you have a single, notorious contributory act, such as the burning of the oil wells by Saddam Hussein in the Gulf War. It is very, very difficult to find out exactly what
contribution to global warming that act made. It is very difficult. I would note, however, that in terms of long-range transboundary air pollution, it is now possible, through technological advances, to trace pollutants back to their source. The 1979 Convention that Leslie mentioned is no longer a particularly pertinent example. Equally significant is the ineffectiveness of the traditional corollary to State responsibility in cases of breaches of multilateral treaties. It is important to note that an awful lot of international environment law occurs in multilateral treaties. And I am thinking of the exclusion of the party in breach from the benefits of the treaty. Now with the exception of four treaties that I can think of where there is actually cash up front for certain parties, mainly developing parties, I can not think of any environmental treaty where throwing the State out is going to do you any good. You are going to do more harm to the environment by suspending the rights of that State then by keeping it within the treaty's embrace.

One of the difficulties surrounding the concept of State responsibility in the field mentioned by the speakers was the uncertainty concerning the standard of liability to be applied. Whether it is in the nature of strict or absolute liability, or in terms of fault based liability, the treaties and the State practice on this are not clear. But what you can say is that in relation to certain ultra-hazardous activities, and Leslie gave us examples in relation to activities in outer space—the Cosmos 954 claim—to marine pollution and to nuclear threats, the standard has generally been agreed in the treaties to be strict liability, and it is significant that it is in these areas that States have been most willing to bring international claims. It is with respect to ultra-hazardous activities that States have also been most willing to set up civil liability, joint compensation cooperative mechanisms. I think we would all agree that military operations are ultra-hazardous, in the sense that while we might not criticize them, we do not want to be around when they are happening. People get hurt in armed conflict. Joking apart, I think the treatment of certain activities in peacetime as ultra-hazardous, in this context, is judged less in terms of their ultra-hazardousness for the environment than in terms of their ultra-hazardousness for human health and property interests. I am sure that Bill Arkin would approve. The same must be true in times of armed conflict, but I could see no good argument, given the nature of war, for not applying a standard of due diligence, rather than strict liability, to State responsibility for environmental damage in time of armed conflict. Indeed, due diligence has a better track record in most areas than strict liability. But any peacetime judgment as to what is required of a State in terms of due diligence cannot be automatically transferred to the armed conflict context. So we have to work out precisely which standard to apply. That will, of course, depend on which so-called peacetime norms continue to apply in wartime. All I can say on this, and I realize I am being pressed for time here, is that I am not a "lex specialis merchant" by any means, and the issue
has been raised as to whether we need a thorough examination of which treaties continue to apply.

Well here is the plug. I have a European Community research fellow at the Center for Environmental Law and Policy, who is at this moment examining the long list of international environmental treaties, I gather there are over 900 of them, with a view to determining their potential applicability or not in times of armed conflict, including international armed conflict and other emergency situations. I was going to give you the benefit of our preliminary findings in marine environmental matters. I will not do that, but it is surprising how strong a case can be made—leaving aside the whole question of the Law of the Sea Convention—for a number of International Maritime Organization Convention provisions continuing to apply in time of war much the same way as they do in peacetime. I can talk about that to people privately afterwards.

In truth, States prefer to leave the whole issue of compensation for environmental harm in peacetime to the vagaries of national law. They just do not want to know. The most they will do, usually, is encourage the adoption of domestic rules on equal access and nondiscrimination vis-a-vis foreign claimants coming to their courts. In the case of ultra-hazardous risk, they will go further and establish international joint compensation regimes, usually involving strict liability. In so far as such insurance schemes are based on treaties, and I realize not all of them are, I can see no good reason why they should not continue to operate in time of armed conflict, whatever sort of armed conflict there is. The only difficulty I see is equally a difficulty in peacetime. These treaties leave a lot of unsettled questions, such as the quantification and calculation of pollution damage, to the vagaries of national law. So while we have some hope in the form of U.S. decisions in the Zoe Colocation Case, the State of Ohio Case, etc., where some meaning is given to the concept of damage to the environment per se, as opposed to just token damages being given. And, indeed, we have some downright extravagant efforts in some Italian courts at the moment. In general, however, only token damages are allowable. It follows that even if, as I argue, these schemes continue to apply in time of armed conflict, you can not be confident of proper compensation for environmental damage, especially if you do not have a government that is willing to take up a claim pro bono publico. And this comes back to the question of actio popularis, whether in the international sphere or in terms of a domestic court. I do have one or two points on that in my paper, but I will rest with that. Thank you.

Mr. Buchwald: Thank you Dr. Plant.

We have time for several questions from the floor. Professor Meron, you have the first opportunity.
Professor Theodore Meron, New York University: I am grateful to the speakers for the presentations. I have a comment or two. If I may start with Professor Greenwood. I understood you to say that except for cases of damage to neutral States there would be no pertinence to traditional rules of State responsibility?

Professor Greenwood: The point I was making was that State responsibility in this context was limited to the very special case of an internal, non-international armed conflict, and I was suggesting that unless the activity taking place in the State where the conflict was occurring had some effect on the environment outside that State, then it was unlikely to trigger principles of State responsibility. I think we are still some way away from State A being able to bring a claim based on what B is doing to B's environment without showing that is having some effect on State A.

Professor Meron: Chris, thank you for this clarification. I think that basically I understood you correctly, even though I did not spell it out. And I am wondering whether this is not a somewhat formalistic, perhaps even a tiny bit artificial way of viewing the situation. With regard to internal conflicts involving damage to the environment, I think rules of State responsibility could be implicated either directly or by analogy in a number of situations. First, we may have inter-State aliens, who would be victims of environmental damage and could have claims based on State responsibility against the government in power. That is the first situation. Secondly, imagine that individual citizens in the country would have claims, which would be generated as a result of environmental damage and those claims eventually would have to be dealt with either by the government or whoever succeeds to the government. Thirdly, imagine that the conflict results in partition of the country. One could imagine that agreements between the two constituent parts of the country would in fact state various principles of State responsibility as very relevant to the resolution of the conflicts between them. Finally, the rebel authority, should it be recognized eventually as a government of the country, would even under traditional principles of international law be bound by rules of international law. Now I am aware of the fact that you might have difficulty in identifying the proper party plaintiffs, but one could come up with some situations in which you could find such plaintiffs. And, finally, Professor Oxman, a great authority on the law of the sea, added the following to my list of queries: imagine maritime environmental damage in areas beyond national jurisdiction. For instance, oil leaks damaging nets and fishing by third country citizens. This too, might implicate claims to which rules of State responsibility would be directly or by analogy relevant. Thank you.

Professor Greenwood: Well, yes, I think this shows the dangers in trying to summarize something as quickly as I was doing at that stage. To take the cases that
you have raised, let me make it quite clear, first of all, that I am not suggesting for a moment that the substantive rules of law on damage to the environment in non-international armed conflict are limited to cases where there is a transboundary affect. All I was suggesting is that it is unlikely that principles of State responsibility for that environmental damage would come into play without some transboundary affect. Now, of course, Professor Meron is quite right in pointing out that there are immediately two exceptions to that. There is the case in which a national of the State where the conflict is taking place brings a complaint based on violation of his/her human rights. Now that, of course, does involve a form of State responsibility I quite accept, but I was not really thinking of that. I was thinking purely in terms of State-to-State claims. Diplomatic protection, on the other hand, such as a British national caught up in fighting in Rarotonga who suffers harm as a result of environmental damage taking place in the conflict—it is, in theory, a possibility that State responsibility will provide a remedy, but I have to say I think it is a fairly far-fetched notion at the moment. I am not aware that there has been any case of that kind, and I think it is unlikely that there will be in the future. A claim between the two successor States? Yes, that would be a possibility. I confess I had not been thinking about that at the time. I do not understand, I'm afraid, the point about the rebel authority being recognized as the government, and thus, bound by the rules of international law. Of course it would, but who would be the claimant in respect to the damage that is done? Surely not the outgoing government. The question is not which regime is the government of the State, but what it is that entails the responsibility of that State, irrespective of who is its government. And, finally, the point about areas beyond national jurisdiction. That was just a careless slip of the tongue on my part. I tried to make the point that you would have to affect the environmental rights or interests of some other State. That could easily be the case in relation to environmental damage to areas beyond the jurisdiction of the State. I was not thinking purely in terms of polluting the territory of another State itself.

Dr. Plant: I just wanted to add a couple of sentences supplementary to Professor Meron's argument, and that is one can increasingly think of State-to-State responsibility examples here, because there is an emerging concept of international environmental laws—the common concern of mankind—that is particularly well embodied in the Biological Diversity Treaty. That is a treaty that is pretty lousy on transboundary consequences. It concerns mainly what a State does within its own territory. And this is a subject matter of a treaty and, therefore, of international concerns. So, if this trend continues, one can see the possibility of State-to-State
things. Of course, there is going to be a great deal of political will to make that sort of treaty work in practice.

**Professor Ivan Shearer, University of Sidney:** I want to thank Chris Greenwood for his clarification of a number of important issues here. I just want to ask him a question about the as yet very underdeveloped law of State responsibility as it affects the United Nations in operations mandated by it, especially by the Security Council and those participating forces who are acting under the umbrella—under the authorization of the United Nations, not necessarily under U.N. command. I think he is absolutely right when he says that Iraq would not be liable for illegal acts committed by the Coalition forces. Even though it is a somewhat theoretical proposition, I would think that if there were any such illegal acts which were compensable, that they would be set off against Iraq's bill. But I come to the more important point which is really a question. If contributing forces are going themselves to be liable to pay compensation for breaches of the law of armed conflict, would any State be willing to contribute such forces? That is one part of the question. I am reminded of the analogy of the good Samaritan. In the tort law of the United States, and in other common law countries like my own, you go to the assistance of a victim at your own peril because if you render clumsy, negligent assistance, you can be held liable for that negligence. Now it is much the same when you contribute forces to Somalia or Rwanda or wherever. Do it the wrong way, and you get lumbered with a bill. So I am just wondering whether or not that is a fruitful line of inquiry for the future, and whether or not it is linked up with the Lockerbie Case, or the implications of the present round of a Lockerbie Case. Could conceivably the Security Council pass a resolution, as it were, giving an indemnity in advance?

**Professor Greenwood:** If you will excuse me, I won't deal with the last point about the Lockerbie Case because I would have to spend the first 20 minutes of my answer giving various disclaimers. So I think I will pass on that one if I may and just look at the main question which Professor Shearer asked about the responsibility of the State for acts of its forces while operating under U.N. command or in a role ancillary to a U.N. operation. I think it is fairly clear that forces of that kind are capable, of course, of causing very extensive environmental damage. They are also, sadly, capable of doing it in an illegal fashion. We are all too familiar with the Canadian trials from Somalia, some of the history of claims against U.N. forces for their activities in the Congo, and so on, to think that just because somebody wears a blue beret it makes him an angel overnight. Now supposing that you have damage of that kind. There would seem to be three possibilities there. One is that there is no responsibility vested in anyone—the U.N., the State, anyone at all—leaving the country and the individuals who suffered loss as a result completely without any
recourse. That appears to be grossly unfair. The second possibility is that you vest responsibility in the United Nations, which I think is fair enough where the U.N. has command and control of the operation. But where it does not have command and control, to say that the United Nations budget must pay for the illegal acts of, let us say, American personnel serving under American command, merely because they were acting with a U.N. authorization, that I think would be a principle very difficult to accept and would have adverse consequences of a very similar kind to the one that you suggested earlier. It would put the United Nations off making use of this kind of operation at all. The third possibility is that you make the responsible State pay. And I think the principle—while I can see that it is potentially something which would put States off of United Nations operations of this kind—could be put in these terms: If you insist on retaining control of the forces yourself, you must take the consequences that go with that and there may occasionally be a price to pay.

Professor Green: Chris Greenwood has touched on an issue that affects Canada very deeply; the issue of what happened in Somalia. Regardless of the criminal prosecutions and the court of inquiry that is now seeking into those things, I will point out that the immediate reaction of the Canadian Government was to pay the compensation that is normally considered reasonable by Somalis in Somalia for the death of a 17 year-old boy. There was no question that we were not liable because it was under the authority or the umbrella of the U.N. The immediate thing was, regardless of any personal criminality or anything else, we as Canadians carry the obligation to compensate and we did just that. The amount may not appear adequate from the point of view of a Western interpretation, but it was exactly what was expected in the Somalia situation by Somalis.

Professor Adam Roberts, Oxford University: The two very thoughtful papers raise questions which I would really invite the writers to answer in slightly less legal terms than they have incorporated in their papers. My question is first, on the matter of State responsibility versus individual criminal responsibility—and I realize that they should not be seen as necessarily antithetical—is there not an element of opportunism in the way States go one way or the another according to needs and possibilities of the moment? Thus, in the case of Iraq, although there was some initial discussion of individual criminal responsibility, in the end—because of the possible control over Iraqi resources and resumption of oil sales and so on—it was decided to go down the State responsibility route. Of course, in respect to the former-Yugoslavia, it may be that the attempt at establishing individual criminal responsibility is due to the fact that many of the individuals involved do not represent recognized States, and it would be very difficult to establish State responsibility of, let us say, the Republic of Serb-Krajina or the
Bosnia/Serb Republic. That brings me to the second question. Is there not an extreme danger in the position outlined—which is intellectually tidy, legally neat—of putting so much emphasis on *jus ad bellum* and deciding that because an individual State initiated a conflict, a very large range of the consequences, at the hands of whomever, can be laid at the door of that State? First of all it is very rare that one has such a clear case of aggression, but secondly, there is a very great risk of a deep sense of injustice within that State which has to go on paying a high level of compensation over a period of years. This affects individuals who feel in no way directly responsible for that initial aggressive decision. I need only mention here the terrible consequences in post-World War I Germany of precisely such a feeling.

**Professor Green:** In response to the question of criminal liability and State liability—you referred to Germany after the First World War—I refer to the Treaty of Versailles where you had both an attempt at establishing personal criminal liability and a reparation system against the State itself. It is a political decision in every case, either for “the victors” or those who sit down to work out what the future regime is going to be. In so far as the situation in the former-Yugoslavia is concerned, I think we have to recognize that the public opinion created by media reporting of the type of criminality, the type of behavior being enacted in that territory was such that you had almost a public demand for criminal liability far more than you did in the Iraq situation, and partly because the Iraq situation was over so quickly. Despite the exercise by CNN, which in many ways I found deplorable, one still had a very quick operation in Iraq. But in Bosnia, it is something that has been going on for three years. The press reported masses and masses of atrocities. As a result of that, the public has demanded that a criminal action must take place. One of the horrors of it is the sort of thing that we hear from Rwanda, that virtually everybody on the other side was a war criminal, which reminds me of the Japanese effort that everybody who bombed Tokyo was automatically—how dare he bomb Tokyo—a war criminal. So that we have this other aspect that we have not considered. How far a State which has got complaints alleges that everybody—particularly in a non-international armed conflict—everybody on the other side was automatically a war criminal. But the point you raise, I think, relates to the change in public temper. Iraq was a long way; you do have to recognize that the Balkans are part of Europe, and there is a different reaction, whether we like it or not. Some of the Muslim States, some of the Arab complaints are justified—that we are more concerned about the Balkans because it is in Europe, because they are “white,” then we worry about Somalia, Rwanda, Liberia, etc., etc.

**Professor Greenwood:** Very quickly I want to give you a practical, not a lawyer’s, response. You can not have a prosecution unless you have got a defendant in
custody to charge. And there is no point in bringing a civil action unless the defendant has got assets. And that I think is the bottom line of why you get a different approach taken in Bosnia from the one that was taken in Iraq.

**Professor Michael Bothe, Johann Wolfgang Goethe University, Frankfurt, Germany:** Believe it or not, I agree with a lot of what Leslie said. Of course, liability is a different concept where we speak of the protection of the environment. We have aggregation problems on both sides. We may have a particular damage, which cannot be traced to a particular source, and we may have a particular source but we do not know where the damage is. However, it is true that the law of tort liability, or international responsibility, has a role to play as a deterrent and as a means of efficient or just allocation of costs. But this is very complicated. We know that from national law, where legislation has tried to solve some of these problems, and we see it in international law. And there is no wonder that this, which is already complicated as a legal instrument of environmental protection policy in times of peace, becomes more complicated in times of war. All the more reason to work on that and to try to get the most out of the law that we have got. And this is why I think the role which the Compensation Commission may play as a precedent will be important. Whether this is going to be successful remains, of course, to be seen. There are lots of legal traps in the whole thing. The idea that because a State has funds it will be liable for claims compensation until the end of the next century, and whether this is going to work, is highly doubtful.