LIABILITY FOR TRANSFRONTIER ENVIRONMENTAL DAMAGE * IN THE FEDERAL REPUBLIC OF GERMANY

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INTRODUCTION

Damage to the environment does not respect national boundaries. This platitude has been verified especially in Europe with its many narrow, conglomerated single states. [1] The number of environmental damages which originate in other states is especially high in this part of the earth. With Germany situated in the middle of Europe with a great number of immediate neighbours, the legal remedies applicable to such injuries here should be of special interest.

An injury to the environment which crosses borders can be defined as follows: An injury which originates or is aggravated within the territory of one state through the emission of substances or the discharge of energy and which occurs within the territory of another state, in waters used by both states, or outside the jurisdiction of any state through the natural media such as water and air.

Damage in this sense means every change in the natural environmental conditions and its results, the removal and reconditioning of which necessitates financial means.

The definition comprehends also cases of the so-called "leng-distance pollution" (therefore not only the deleterious effects from neighbouring states) and also border crossing effects which only in combination with

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[1] *Cf.*, e.g., "the French-German pollution problems", reported by Grave, ZaöRV, 1974 (to be published shortly); for the pollution problems at the French-Swiss border. See Sand, "Internationaler Umweltschutz und neue Rechtsfragen der Atmosphärennutzung", ZLW, 1971-72, p. 108 et seq., 111; for the controversy between Switzerland and the German State of Baden-Württemberg over the utilization of the Rhine for a nuclear power plant in the Swiss Canton of Aargau, see Rousseau, *Rev. gén. dr. int. public*, 1970, p. 1045.

third circumstances create the damage.[2] Damages which originate in a region without the territorial jurisdiction of a country (*res communis*) (so-called transnational as opposed to transfrontier pollution),[3] which, therefore, affect not one certain state but rather the community of nations, are outside the scope of this paper. It might be argued that in such a case the state causing the injury must pay damages to an international fund and certain states may enforce the payment as custodians[4] by means of an actio popularis.[5] However, international agreements of this sort do not yet exist.

A. Civil liability

In general

When someone suffers from a border-crossing environmental injury, e.g., from industrial fallout on his property which originated in a factory across the border, or from the destruction of his fishing grounds by foreign sewage, or from the pollution of the air in his community by noxious chemical fumes from an industrial district across the border, he faces serious difficulties if he wishes to sue for damages. Firstly, he encounters the familiar difficulties of an action for environmental damages, to which he'd have had to submit without the foreign contacts. The problem of evidence is the most important. The injured party must, first of all, be able to determine the source of the injury in order to name the correct defendant. The seemingly insurmountable problems which appear on the horizon, especially by long-distance pollution and pollution from several sources, have already been discussed elsewhere.[6] This lack of evidence is even worse in cases of transfrontier pollution. Often the foreign authorities will be uncooperative when their assistance in tracing the source of pollution is vital. The victim frequently does not even know in which state (his own, the neighbouring state, or a third, thousands of kilometers away)[7] the emissions originated. The "ideal" border crossing environ-

[2] See Bothe, "Umweltschutz als Aufgabe der Rechtswissenschaft, des Völkerrechts und der Rechtsvergleichung", ZaöRV 1972, p. 483 et set. 491.

[3] See Scott and Bramsen, "Draft Guiding Principles Concerning Transfrontier Pollution", 1972, paper for the OECD (AEU/ENV/72.12.), p. 48.

[4] Hargrove, in Hargrove (ed.), *Law, Institutions, and the Global Environment* (Dobbs Ferry, N. Y., Leyden, 1972), p. 100.

[5] Goldie, *supra* note 4, at 146.

[6] See, e.g., Yannacone a.o., *Environmental Rights and Remedies I* (Rochester, N. Y., San Francisco, 1972), p. 389 et seq.

[7] See Bramsen, "Transfrontier Pollution and International Law", 1972, paper for the OECD (AEU/ENV/72.12.), p. 16; McCaffrey, "Trans-Boundary Pollution

mental injury case in which the person responsible can clearly be identified, will seldom occur.

When finally the originator of the damage is ascertained, the victim is faced with the special legal consequences of international environmental damage. It is possible that he will win or lose the process because the source of the damage lies in a foreign country, although the result would be different for damage inflicted by a domestic originator (problem of the *internal* unequal treatment, I). On the other hand, there can also be the case that the victim wins the process only because the damage appeared on this side of the border, while a victim of the same damage in the neighbouring state receives no compensation (problem of the *international* unequal treatment, II).

I. *Internal Unequal Treatment*

Internal unequal treatment can result when the victim sues the foreign defendant in the foreign courts (1); but it can also occur when he sues the defendant in the domestic courts (2).[8]

1. *Instituting a Foreign Action: General Considerations*

Internal unequal treatment can occur at submission to a foreign court because of differences in the procedural law, which influence the action decisively. For example, foreign regulations about procedural costs, security for procedural costs, or legal aid can make a significant difference.

When one party is well off, different regulations concerning the admissibility and taking of evidence can have decisive consequences.

When the foreign rules of procedure cause no significant change in the chances for the process, the internal unequal treatment can be due to provisions of the foreign private international law, which refer to the foreign substantive law. This is the case when in transfrontier damage suits arising out of torts or quasi-torts, the foreign law prefers as *lex loci delicti commissi*[9] the law of the place of conduct to the law of the place

Injuries: Jurisdictional Considerations in Private Litigation Between Canada and the United States", *Cal. Western Int. L. J.*, 3 (1973), p. 191 et seq., note 2.

[8] The third possibility, i.e., juridisction of the courts of a third state, is not to be discussed here.

[9] The decisiveness of the law of the act (*lex loci delicti commissi*) is universally essentially acknowledged see Kegel, *Internationales Privatrecht* (ed. 3, Munich, 1971), p. 265.

of harm.[10] Unequal treatment occurs when the foreign law in a specific case differs crucially from that of the domestic law of the victim. Of the multitude of all conceivable differences in the law of liability only the differences of liability without fault and for negligence for certain acts,[11] differing rules concerning the burden of proof, the liability for other people's conduct, or the kind and amount of damages are named here.

Also, and in particular in an action for environmental damages, the divergent administrative laws can decisively affect the result:

When the foreign plant that causes the damage is operated with official permission which includes the extent and kind of emissions—but in conflict with the law of the state of the victim—a claim for damages might be excluded under the foreign law if the permission was granted without reservation of the rights of third parties. This exclusion of claims is also valid against foreign victims.[12]

On the other hand, the victim-plaintiff might win his case only because the foreign polluting plant—contrary to the plaintiff's local law—required an official permit and was operated without it. However, the missing permit can be used to the advantage of the plaintiff only if one holds the view that a foreigner can invoke the internal administrative law in court[13]

Further, a claim for damages can be excluded when the tortious act, as often happens with water pollution, is protected according to the foreign law as common usage,[14] especially when this justification also extends to the causation of injury abroad.[15]

[10] For details on various legal systems, see Schneeweiss, "Das Verhältnis von Handlungs — und Erfolgsort im deutschen internationalen Privatrecht unter besonderer Berücksichtigung der Rechtsprechung" (Dissertation Cologne, 1959). Under foreign private international law, the foreign substantial law may be applied for that reason, because it is the more favourable to the victim (see the remarks on the German law, *infra* sub I (2.1.).

[11] An exclusion of claims of that sort exists under § 11 of the German Water Management Act (Wasserhaushaltsgesetz).

[12] The exclusion of liability under § 11 German Water Management Act is not valid against foreign victims, i.e., these injured foreigners retain their claims for damages, see Gieseke and Wiedemann, *Kommentar zum Wasserhaushaltsgesetz* (ed. 2, Munich 1971), Einl. IX 1; Weitnauer, "Die Haftung nach § 22 Wasserhaushaltsgesetz in international-privatrechtlicher Sicht", *Zeitschrift für Wasserrecht* 1965, p. 1 et seq., 13; Boisserée, NJW 1968, p. 1240, seems to be of a different opinion.

[13] Pro: Kiss, "La protection de l'atmosphère en droit international", *Etud. dr. contemp.* 1966, p. 369 et seq.; contra: de Visscher, "La protection de l'atmosphère en droit international", *Rapports généraux au VIIe Congrès international de droit comparé (Brussels 1968)*, p. 338 et seq.

[14] A justification of that sort exists under German law in § 23 Water Management Act.

[15] That is the state of German law according to Weitnauer, *supra* note 12 at 14. However, this statement is, in my opinion, contradictory to his above mentioned view.

If the victim submits to the foreign court, because of a lack of local jurisdiction in such matters or because the local judgment would not be executed in the state of the injury, [16] he might be crucially disadvantaged either by the foreign law or by pure fact situation, e.g., lack of knowledge of the foreign language, unfamiliarity with the foreign judicial system, necessity to select an unknown foreign attorney, etc. This result is unsatisfactory as a rule, not only because of the internal unequal treatment, but because the plaintiff-victim becomes the "victim" of a legal system to which he had not submitted himself voluntarily, e.g., by selecting it as a place of residence or by contract. [17]

2. *Instituting a Local Action*

2.1. *State of the Law in the FRG*

According to the German rules of civil procedure, a German adversely affected by a border crossing environmental damage can sue the foreign defendant in a German court, even if the latter has neigher residence (§ 13 ZPO-Zivilprozessordnung) nor assets (§ 23 ZPO) [18] there. According to § 32 ZPO, which is also available in lawsuits against foreigners, [19] in actions for tort or quasi-tort, [20] the court of the place where the act took place has jurisdiction. Since the place where the damage occurred, as well as the place where the case was presented, are considered as place of the act, [21] the plaintiff has, under § 35 ZPO, the possibility of selecting the German court. Also, when invoking the German courts there exists, however, the danger of an unequal internal treatment. The reason for this lies in the pecularities of German Private International Law (PIL), in cases where the places where the damage occurred and

[16] See *infra* sub (5).

[17] Kiss, "Efforts to Control Air Pollution at International Level", 1972, paper for the Council of Europe — Committee of Experts on Air Pollution (EXP/Air (72)11), p. 48.

[18] When, however, international jurisdiction is based upon § 23 ZPO, enforcement of the judgment (see *infra*, sub (5) abroad may not be possible; see Art. 3 par. 2 of the EEC-Agreement (see *infra*, sub (5.2), according to which this forum is expressly excluded.

[19] *Stein-Jonas-Pohle*, Kommentar zur ZPO (2nd instalment, ed. 19, Tübingen 1964), § 32 I 1; after all, international jurisdiction is often determined under German law according to the same rules as those which referto local jurisdiction (Kegel, *supra*, note 9 at 419), because the rules on local, as well as on international jurisdiction, aim at the same end, i.e., determination of the locally most suitable court.

[20] *Supra*, note 19 at § 32 II.

[21] *Supra*, note 19 at § 32 IV.

where the case was presented differ. The German courts and the majority of writers have declared themselves in favor of an alternative combination: The victim has a claim for damages if this is grounded either according to the law of the place where the damage occurred, or according to the place where the case was presented. This means that the more favorable law for the victim-plaintiff is applied.[22] The law favorable to the victim "rules" over that which, according to German Private International Law, represents a tortious act.[23] Under German PIL these tortious acts include cases of negligence, as well as no-fault liability, and those where the liability for the acts of aides.[24] The more favorable law controls all requirements of the tort claim, e.g., facts causation, illegality, negligence, and its consequences, e.g., damages and compensation for immaterial damages.[25] The unequal treatment occurrs when the claim of the German plaintiff is based on the foreign law of the place of conduct but is unavailable under German law. In this case, the German plaintiff would be successful in spite of the contradictory German law. There is, naturally,

[22] Kegel, *supra*, note 9 at 266; Reason: "Sympathy with the victim generally prevails over the feelings toward the tortfeasor; therefore the latter may be held liable even if he, at the place of action, committed a lawful act (or, if the committed an unlawful act, but without liability)" (*idem* at 268; OLG Saarbrücken, IPRspr., 1962-63, S. 97; disagreeing Boisserée, *supra*, note 12). The Swiss and Italian jurisdictions have also declared themselves in favour of the alternative combination; see Schneeweiss, *supra*, note 10 at 45, 51. This principle is also maintained in Art. 4 par. 3 sent. 1, of the German-Austrian Airport Treaty (Treaty of Dec. 19, 1967). Between the Federal Republic of Germany and the Republic of Austria on Effects of the Airport Salzburg and Its Operation on the Territory of the Federal Republic of Germany, BGBl., 1974 II, p. 13; put into effect on May 17, 1974, BGBl., 1974 II, p. 783; see also the draft of the ratification law by the Federal Government with a memorandum to the Treaty, BT-Drucks., VII/908 of July 17, 1973: "Claims arising out of encroachments caused by airport traffic or operation of the airport on persons, things, or rights, in the territory of the Federal Republic of Germany, can be based either on German or on Austrian law."

[23] Kegel, *supra*, note 9 at 276.

[24] Soergel-Kegel, *infra*, note 26, Art. 12, no. 40. The older German doctrine (see Rabel, *The Conflict of Laws II* (ed. 2, Ann Arbor, Mich. 1960), p. 334) submitted liability for negligence to the law of conduct and strict liability to the law of harm.

[25] Kegel, *supra*, note 9 at 277. It may, however, be questionable whether the more favourable law should control over the existence of justifications; see for this Weitnauer, *supra*, note 12 at 13 et seq. This is also questionable with regard to the term "Ortsüblichkeit" (locally normal activity), which plays an important role in various legal systems; see for the German law § 906 BGB. The OLG Saarbrücken; see *infra*, note 27 (JBl. Saarl. 1958, p. 72), determining the question of "Ortsüblichkeit" which seems to take into consideration the law of conduct as well as the law of harm.

a requirement that the foreign PIL include no renvoi or an existing renvoi provision be not observed by the German judge.[26]

Some German court decisions involving cases of border crossing environmental damage to German territory have been issued in this sense. The following case was appealed to in the OLG Saarbrücken[27] in 1957:

The plaintiff was the owner of a restaurant and motel in Kleinblittersdorf/Saarland, not far from the French border. The area was severely affected by a coal power plant in France. Smoke, dust, and soot came across the border in such amounts that the plaintiff's holiday apartments and restaurant were literally rendered unusable, and his business destroyed. He sued the French plant for damages for loss of income.

The court upheld the verdict of the lower court and allowed the plaintiff's recovery. It based its decision upon the more favourable French law:

> According to Art. 1384 Civil Code, the claim for damages is well founded when the damage is illegally inflicted upon the plaintiff by the plant belonging to the defendant. According to § 823 BGB, on the other hand, the plaintiff must show not only illegal damage to his property or place of business by the defendant and a resulting injury to him therefrom, but also that the defendant acted negligently. According to French law, the claim is not limited to material damages generated through injury to the property or the business. It also comprehends, contrary to the German law, a claim for immaterial damages. The plaintiff can therefore choose the more favourable French law.[28]

In 1961 the Landgericht Saarbrücken[29] had to decide the following case: The plaintiff owned a saw-mill in the Saarland on the bank of the Rossel river which originates in France. As owner of a water right, he made use of the water power of the Rossel river by means of a turbine to operate his machines. On the French side, the defendant's coal mines ran coal and mountain sludge of up to 8 000 tons daily into the Rossel. This eventually caused a complete silting up of the river, as a result of which the plaintiff could no longer operate his turbine and had to rely on the local electric plant for energy.

[26] There is no common opinion in regard to whether under German law a renvoi has to be observed; pro: Soergel-Kegel, *Kommentar zum Einführungsgesetz* (ed. 10, Stuttgart a.o. 1970), Art. 12 no. 64; contra: OLG Saarbrücken 1), *infra*, note 272), *infra*, note 30; Boisserée, *supra*, note 12.

[27] NJW 1958, p. 752 = JBl. Saarl., 1958, p. 69, with comment, Boisserée, NJW, 1958, p. 1239.

[28] JBl. Saarl., 1958, p. 70.

[29] IPRspr., 1960-61, No. 38 = JBl. Saarl., 1963, p. 80.

The court ruled in favor of the plaintiff,[30] basing its judgment on the more favorable French law. Contrary to the French law (Article 1384 Civil Code), the defendant's coal mines could have been relieved under German law (at the time of the injury 24 of the Prussian Water Law was valid) by evidence that they had taken more precautions then usual for the prevention of pollution of the watercourse. In addition, under German law the period of limitations was only three years (§ 24 Prussian Water Law in connection with § 85 c BGB), whereas it was thirty years (Article 2262 C.C.) under French law.

2.2 *Other Legal Systems*

If the domestic courts have jurisdiction, there also exists under the rule of the following principles of Private International Law, the danger of unequal internal treatment:

The Private International Law of the state of the injured party refers, in general, to the foreign law of the place where the case was presented without renvoi.[31]

The Private International Law of the state of the injured party, requires that the claim must be substantiated not only according to the law of the state of the victim (law of the place where the damage occurred), but also according to the foreign law of the place where the case was presented, which does not provide for renvoi.[32]

3 *Particularities of the German Private International Law for Foreign Victims*

When a foreigner is adversely affected by a border crossing encroachment on the environment, which originates in the FRG, two special effects of the German Private International Law must be considered:

3.1 *Instituting Action in German Courts*

When the foreign victim sues the German defendant in a German court, the more favourable foreign law is not applied, contrary to the usually

[30] This judgment was upheld by OLG Saarbrücken, IPRspr., 1962-63, p. 95, as court of appeal.

[31] For arguments in favour of this solution see Kegel, *supra*, note 9 at 267.

[32] *Idem* at 268.

valid principle of most favourable treatment of German Private International Law. The reason for this is found in the provision of Article 2 EGBGB (Private International Law). According to this article, no claims broader than those existing in German Law, can arise out of a tort committed abroad in a suit against a German. Therefore, where under the same set of facts, an injured German would receive the benefit of the more favourable foreign law, the injured foreigner must be content with the less favourable German law.

The German Private International Law produces here not only an unequal internal treatment of the foreign victim, but also a discrimination in favour of German victims. When it is asserted in German literature [33] that Article 12 EGBGB only seeks to avoid subjecting Germans to a broader tort liability than that provided for under German tort law (which is considered broad enough), and not to discriminate against foreigners, it would appear that, especially in border crossing torts, this procedure would be incorrect. In reference to the EEC-Treaty, which in Article 7, par. 1, forbids discrimination against citizens of member states, the application of Article 12 EGBGB to citizens of other EEC-States is rejected. [34] It may be expected that Article 12 EGBGB will disappear from German Private International Law in the future. [35]

3.2 *Instituting Action Before Foreign Courts*

When the foreign victim sues the German defendant before the foreign court, unequal internal treatment can also result when the court applies the foreign law as the more favorable to the plaintiff, or as the law of the place where the damage occurred. Of course, the result here is not different from that of an identical case without foreign contacts. Nevertheless, the possibility exists that Article 12 EGBGB could stand in the way of the execution of the judgment in Germany, when it is based on a claim broader than would be possible under German law. [36] Since Article 12

[33] Soergel-Kegel, *supra*, note 26, Art. 12, no. 53.

[34] Drobnig, "Verstößt das Staatsangehörigkeitsprinzip gegen das Diskriminierungsverbot des EWG-Vertrages?", RabelsZ, 34 (1970), p. 636 et seq. 661.

[35] See the suggestions of the German Council for Private International Law with regard to a reform of the German international marriage law, in: Lauterbach, *Vorschläge und Gutachten zur Reform des deutschen internationalen Eherechts* (Berlin, Tübingen 1962), p. 8. It is recommended that the special reserve clauses of, especially, Art. 13 par. 3 and Art. 17 par. 4 EGBGB, a category, which also Art. 12 EGBGB belongs to, be a bolished.

[36] The recognition of a foreign judgment of that sort is denied by Staudinger-Raape, *Kommentar zum Einführungsgesetz*, 2. Teil (ed. 9, Munich a.o. 1931), Art. 12, B VIII.

EGBGB represents a specialization of the German public order.[37] The recognition of the foreign judgment could be hindered by the German public order.[38] For the above given[39] reasons it might at present certainly seem improbable that the recognition of a foreign judgment —especially of a judgment of an EEC-State— would be blocked by Article 12 EGBGB. Still, there is a certain insecurity factor, the removal of which would be highly desirable.

4 *Elimination of the Unequal Internal Treatment by the National Legislature*

The question remains, whether the unequal internal treatments can be eliminated by the national legislature.

4.1 The unequal treatments which can result when the victim, because of lack of a domestic court, is compelled to institute a foreign action against the defendant, could be remedied by the establishment of a domestic court as it exists under the legal system of the FRG.

If, however, the victim brings an action abroad because a domestic judgment could not be executed there, the inequalities which might result therefrom cannot directly be remedied by the domestic legislature.[40]

4.2 Also the unequal internal treatment which may result if the victim chooses to institute the action before the, for him, more favourable foreign court,[41] cannot be removed by the domestic legislature alone, because its competence ends at the border. Here only an international agreement, which recognizes the exclusive jurisdiction of the domestic court, could help.

For example, Art. 4 part sent. 3 of the German-Austrian Air-port Agreement[42] can be named. According to this agreement, the courts of the FRG have exclusive jurisdiction over claims arising out of the impact of airport traffic or the operation of the airport on persons, things, or rights in the territory of the FRG.

[37] Soergel-Kegel, *supra*, note 26, Art. 12 no. 52.

[38] See, e.g., § 328 par. 1 no. 4 ZPO; Art. 27 EEC-Agreement (see *infra*, sub (5.2)).

[39] Sub (3.1).

[40] See *infra*, sub (5).

[41] For general objetions to a "forum-shopping", see Ehrenzweig, *Private International Law I* (ed. 2, Leyden Dobbs Ferry, N. Y. 1972), p. 107.

[42] See *supra*, note 22.

[43] See *supra*, note 22.

4.3 The inequalities, which can also occur by calling on the domestic courts, could be removed if the legislature prescribed that only the domestic substantive law shall apply to border crossing environmental damage claims. The treaty between the FRG and Austria,[43] which does not eliminate all inequalities,[44] provides, at any rate, in Art. 5 par. 1, that the German state liability law shall apply (the FRG being responsible)

> for damage to persons, things, or rights which are caused by airport traffic or by the operation of the Salzburg Airport in the territory of the FRG and which are negligently and illegally inflicted by authorities of the Republic of Austria in connection with their official activity.[45]

In order at least to avoid placing the domestic victim in a *worse* position, the domestic legislature could grant him adequate compensation in certain damage cases. The draft of the German Third Amendment to the Atomic Act can serve as an example here.

According to the explanatory preamble to the draft,[46] compensation should be provided domestically for the case

> in which a domestic victim receives lesser damages than he would obtain according to the draft,[47] because his claim is decided under the provisions of the Conventions,[48] or by the application of a less favourable foreign law, according to the general principles of private international law.

The claim, according to this German draft law, is one for the difference between the damages available under the foreign and the German law.

[44] See Art. 4, par. 3, sent. 1.

[45] See BR-Drucks., 351/74.

[46] *Idem*, at 15.

[47] Under the amendment act the maximum amount of liability is to be raised from DM 500 Million to 1 Billion.

[48] *a*) Paris Convention on Third Party Liability in the Nuclear Energy of July 29, 1960, with Additional Protocol of January 28, 1964 ["International Atomic Energy Agency", *Legal Series* No. 4 (Vienna 1966], 21; *b*) Brussels Supplementary Convention of January 31, 1963 to the Paris Convention with Additional Protocol of January 28, 1964 [Text in: "Institute of International Law of the University Göttingen" (ed.), *Internationale Atomhaftungskonventionen* (Göttingen 1964), p. 269 et seq. (engl.)]; *c*) Brussels Convention on the Liability of Operators of Nuclear Ships of May 25, 1962, with Additional Protocol of the same day (*ibidem*, at 357 et seq.).

The ratification acts of these Conventions have been introduced to the Bundesrat; see BR-Drucks. 350/74. These Conventions are to create a large international collective liability system, with amounts of up to 120 Million Accounting Units of the European Monetary Agreement or 1 500 Million Poincaré-Francs, see *infra*, sub II (1).

In this way, it is assured that essentially all domestic victims can anticipate damages or compensation in an equal amount, independent of which law is being applied. [49]

Article 4 par. 1 of the German-Austrian Airport Treaty can also be mentioned in this context. [50] According to this article, German victims retain damage claims against the FRG, i.a., under § 19 of the Air Traffic Act, [51] although neither the Federal Republic nor any Federal State is an airport entrepreneur in the sense of the act.

5 *Foreign Execution of Domestic Judgments Abroad*

Even when an internal equality of treatment is achieved in the individual states, the question remains whether a domestic judgment on this basis, unenforceable in the state of issue —e.g. because of lack of assets— would be executed in the state of the polluter or a third state. The question is whether domestic attempts at equality of treatment will achieve foreign assent. When this is not achieved, the attempts can be reversed and themselves become a source of, or lead to inequality, if judgments cannot be executed. This can be prevented only by international agreements.

5.1 *Reasons for Nonrecognition Abroad*

Essentially, recognition of domestic judgments abroad can be frustrated because of the following reasons:

a) According to the law of the state of execution, jurisdiction lies where the conduct occurred, so that the domestic court at the place where the damage occurred has no jurisdiction.

b) The judgment offends against the order public of the state of execution because of:

[49] See *supra*, note 46.

[50] See *supra*, note 22. Art. 4 par. 1, reads as follows: "As far as, according to German law, a liability for damages of the airport operator would arise from measures of German Authorities concerning the Salzburg airport and its operation, the Federal Republic of Germany assumes that liability."

[51] Beyond that, Art. 4 par. 1 aims also at covering obligations of the airport operator to pay damages for impacts of the airport which are not based on the Air Traffic Act. Art. 4 par. 1, therefore, also covers obligations of the airport operator according to the Act for the Protection Against Aircraft Noise of 1971 (BGBl. I, p. 282); see memorandum of the Federal Government to the ratification act, BT-Drucks., VII/908, p. 13.

a1) Failure to observe the law, in view of the state of execution's absolute requirements of procedural justice.

b1) Failure to observe the basic principles of substantive law, e. g.

a2) Deviating from the rule of the foreign private international law, [52] according to which the law of the place where the case was presented applies, to the disadvantage of the foreign polluter.

b2) Lack of consideration of the foreign public law, according to which the operation of the plant was permitted without reservation of third-party's rights.

5.2 *EEC-Agreement*

The EEC-Agreement of September 27, 1968, Concerning Jurisdiction and Execution of Judgments in Civil and Commercial Cases, must be studied as one international agreement which contains provisions pertaining to the recognition of foreign judgment in transfrontier damage cases.

According to this Agreement, which became effective between the original EEC member states, including the FRG, on February 1, 1973, [53] the courts have special jurisdiction for EEC residents —in tort and quasi-tort cases— at the place of the act (Article 5 no. 3), as well as —among others— at the place of residence (Article 2, par. 1). The question whether the place of the act refers to the place where the case was presented or to the place where the damage occurred, has intentionally been left open. [54] Since this agreement regulates jurisdiction to recognize as well as jurisdiction to decide, [55] nonrecognition on the basis of *a*) above,

[52] Kegel, see *supra*, note 9 at 425.

[53] Notification of January 12, 1973, on the effective date of the agreement, BGBl., 1973 II, p. 60, ratification act of July 24, 1972, BGBl., 1972 II, p. 773.

[54] See von Hoffmann, "Das EWG-Übereinkommen über die gerichtliche Zuständigkeit und die Vollstreckung gerichtlicher Entscheidungen in Zivil — und Handelssachen", AWD 1973, p. 57 et seq., 61.

[55] According to the agreement, recognition is denied in the following cases only (see Arts. 27 y 34, par. 2):

a) Violation of the public order of the state of recognition;
b) deficient summons of the defendant;
c) contradictory judgment of the state of recognition;
d) ruling of a preliminary question concerning the law of natural persons, of marriage property, and of succession contrary to the Private International Law of the state of recognition;
e) grave violation of the rules on international jurisdiction in certain cases (Art. 38; see also Art. 34, par. 2).

is excluded. Also, recognition among parties to the Agreement cannot be denied by reason of a^2) above, nor practically by reason of a^1) above. For, firstly, recognition can be refused, according to the Treaty, only for distinct cases (tort cases are not mentioned there) of nonconformity of the judgment with the Private International Law of the recognizing state.[56] Secondly, when faulty proceedings hinder recognition of the judgment, these are only considered improper and untimely summons.[57]

Under the EEC-Agreement, the contracting states thus have created the possibility of modifying *effectively* through the national legislatures, existing unequal internal treatments of injuries, the origin of which lies in another contracting state, and the judgments on which are to be executed within the EEC-territory.

5.3. *The Hague Agreement Concerning the Recognition and Execution of Judgments*

Along with this EEC-Agreement, the Hague Agreement of April 26, 1966, Concerning the Recognition and Execution of Foreign Judgments in Civil and Commercial Cases, which is still ineffective,[58] must be mentioned. This Agreement is far behind the EEC-Agreement with respect to questions of transfrontier pollution because it regulates international jurisdiction only in terms of jurisdiction for recognition.[59]

5.4. *Bilateral Agreements of the FRG*

The FRG concluded bilateral agreements on the recognition of judgments with a number of states. They are, aside from the original EEC member states,[60] Greece, Great Britain and Northern Ireland,[61] Austria, Switzerland and Tunisia.[62] Of these, the agreements with Austria and

[56] See *supra*, note 55 d.
[57] See *supra*, note 55 b.
[58] See Kegel, *supra*, note 9 at 426.
[59] *Idem*, at 428.
[60] The agreements with Belgium (of June 30, 1958, BGBl., 1959, II, p. 765; law of application of June 26, 1959, BGBl., I, p. 425; in effect since January 27, 1961, BGBl., 1960, II, p. 2408), Italy (of March 9, 1936, RGBl., 1937, II, p. 145; law of application of May 18, 1937, RGBl., II, p. 986) and the Netherlands (of August 30, 1962, BGBl., 1965, II, p. 26; law of application of January 15, 1965, BGBl., I, p. 17; agreement and law of application effective since September 15, 1965, BGBl., II, p. 1155 and I 1040 have been replaced by the EEC-Agreement.
[61] Great-Britain, together with Denmark and Ireland, have, however, committed themselves to accede to the agreement (see Art. 3, par. 2, of the deed of accession to the Treaty of January 22, 1972, BGBl., 1972 II, p. 1044).
[62] See Soergel-Kegel, *supra*, note 26, no. 397 before Art. 7 with citations.

Switzerland are the most interesting because of their proximity to Germany and the higher probability of transfrontier pollution resulting therefrom. Further description of these agreements goes, however, beyond the scope of this report.

There are two alternatives open in order to achieve the goal of the removal of unequal internal treatment of border crossing environmental injuries (especially for cases of long-distance pollution) in every state. Either all states conclude agreements among each other on the model of the EEC Agreement, or the laws of liability and procedure have to be unified (see *infra* sub II).

II. *Unequal International Treatment*

The situation that persons affected by transfrontier environmental injury can obtain and enforce a judgment in one country, while victims in the neighbouring state, in a corresponding position, cannot achieve this or can achieve this only in a much more burdensome way, has already often been described as inequitable. This international disparateness, produced by divergent rules of liability and procedural law, can be remedied through the unification of the law or partly through the establishment of international commissions.

1. *The Unification of Laws*

The many atomic liability conventions can be studied as a pattern for the endeavours to achieve international equality for the victims in environment cases. The law of atomic liability was chosen before other laws concerning the liability for environmental damages as targets for various attempts at unification, probably because in this field damages can be extremely costly and unequal international treatment would therefore be especially unfair to the victims.

Besides the above-named [63] Paris and Brussels Conventions, the Vienna Convention on Civil Liability for Nuclear Damage of May 21, 1963, must be mentioned here. [64] In order not to extend beyond the scope of this national report only the relevance of the Paris and Brussels Agreements will be exhibited here, since the FRG has not signed the Vienna Convention.

[63] Sub I (4.3)

[64] 1. Int. Leg. Mat., 727 (1962).

The Conventions [65] establish a broad international system of liability for damages arising out of the operation of nuclear plants and ships. The application of essentially the same procedural maximes and principles of liability as those for domestic victims is thereby guaranteed to the foreign victims of transfrontier atomic damages arising from a nuclear installation (or a foreign reactor ship). [66] This is especially valid for the principle of the so-called legal channelling to the owner of the installation, as well as for the regulation of jurisdiction [67] and execution of judgments [68] laid down in Article 6 of the Paris Convention and in Article III par. 2, of the Brussels Nuclear Ship Convention. However, these conventions guarantee only a minimum of equal international treatment. Although they do play an important role in unifying the law, they do not exclude international inequality. E.g., the contracting states can stipulate through their legislatures a higher (or lower) [69] maximum liability, [70] modify the period of limitation within certain limits, [71] or declare inapplicable [72]

[65] The Paris Convention with Additional Protocol has been signed by 16 states. Up to now, the following states have ratified tre Convention: Belgium, France, Greece, Great-Britain, Norway, Sweden, Spain, and Turkey; Finland has acceded. The Convention has, according to its Art. 19 par. 4 b, come into effect on April 1, 1968 after deposit of ratifications by five signatory states.

The Brussels Supplementary Convention with Additional Protocol has been signed by thirteen states. Up to now, the following states have ratified the Convention: France, Great-Britain, Norway, Sweden, and Spain. According to its Art. 20, Convention and Additional Protocol come into effect three months after deposit of the 5th ratification. After ratification by the FRG, the Convention will be put into force.

The Brussels Nuclear Ship Convention with Additional Protocol has been signed by fifteen states. The FRG will sign soon. Portugal and the Netherlands have ratified the Convention. Zaire and Madagascar have acceded. According to its Art. XXIV par. 1, the Convention comes into force after deposit of at least one permitting state and another. Since the FRG has permitted the operation of a nuclear ship under her flag (N. S. Otto Hahn), the Convention will come into force after ratification by the FRG, see BR-Drucks., 350/74, p. 6.

[66] See BR-Drucks., 350/74, p. 3: "The bill is particularly urgent because the protection of the close to the border living population around Fessenheim has to be secured, since France will start in the middle of next year to operate a nuclear power plant in that region."

[67] See Art. 13, Art. X, respectively.

[68] See Art. 13 e, Art. XI 4, respectively.

[69] As to the Paris Convention, however, not below 5 Million Account Units, see Art. 7 b.

[70] E.g., FRG, see *supra,* note 47.

[71] See Art. 8 of the Paris Convention and Art. V of the Brussels Nuclear Ship Convention. The FRG has also made use of this possibility: The 10-year's term of exclusion under the Conventions will be transformed into a 3-year's period of limitation, running from the point when the victim knew or should have known of the damage, as well as of the person liable, with a 30-year's period of absolute limitation.

[72] See, e.g., the Third German Act to Amend the Atomic Act.

the exclusions of liability under the Convention.[73] Nevertheless, these Conventions have shown the right way and can serve as models for the unification of the law of liability for other environmental damages.[74]

2. *International Commissions*

Another way to diminish international inequalities lies in the establishment of international commissions,[75] especially of neighbouring states, which, when border crossing environmental damage occurs, can be invoked by victims of the concerned states. Such commissions would have at least the advantage that the same procedure would be applied, without giving consideration to the question of on which side of the border was the damage inflicted. Such a commission was established by the little known Third Agreement of the Border Treaty of 1922 between Germany and Denmark.[76] This commission (the "Grenzwasserkommission") consists of German and Danish representatives and is established for a period of six years.[77] It administers the affairs of the six border waters covered by the agreement.

If waste or injurious materials which cause flooding, injure the fishery, or produce other damage to the embankment, are introduced into one of the border waters, then the injured parties are entitled to go to the commission.[78]

The commission decides whether, by whom, and in what form compensation must be paid and who must bear the costs of process.[79] Payment of the sum determined can be exacted by legal execution.[80] The agreement contains the most interesting provision that even plants, operating with permission of the Commission, which later produce environmental injury are not relieved from liability.[81]

[73] See Art. 9, Art. VIII, respectively.

[74] Fischerhof, *Das Gas — und Wasserfach*, 1962, p. 151.

[75] Kiss, *supra*, note 17 at 48/49.

[76] Third Agreement Concerning the Management of Waters and Dikes at the German-Danish Border within the Treaty of April 10, 1922, Concerning the Questions Arising from the Transition of State Authority over Northern Schleswing on Denmark, (Act of June 1, 1922, RGBl., 1922 II, p. 141; effective on June 7, 1922, RGBl., 1922, II, p. 235).

[77] Art. 2.

[78] Art. 45, par. 1.

[79] Art. 46, par. 1.

[80] Art. 46, par. 2.

[81] Art. 45, par. 2.

At another point in the agreement,[82] without description of the procedure, the Commission is given competence to make decisions concerning the payment of compensation: when an irrigation plant on one bank of a watercourse inflicts harm on proprietors on the other side by desiccation of their lands or otherwise, which is not counterbalanced by advantages to them derived from the plant or which cannot be eliminated in some way, the Commission must award the affected parties compensation which the operators of the plant have to pay.

Appeals from the decisions of the Commission may be made to a so-called "Obergrenzwasserkommission" which necessarily is constituted of two German and two Danish representatives, as well as a chairman appointed by the Dutch (!) Government.[83]

This seemingly modern agreement appears, however, to have an unreal existence. Although its continuing validity was explicitly confirmed after the Second World War,[84] this author, in spite of extensive research, was unable to ascertain if the Commission has reached a single decision since 1922.

B. Liability in international law

If the plaintiff-victim does not achieve an adequate compensation under civil law, then a solution must be found at a higher level, in international law.[85]

A regulation of damages must be considered between the respective states[86] (I), or an action of the adversely affected individual against the state of the polluter (II).

[82] Art. 36.

[83] Art. 3.

[84] Notification of June 23, 1954, on the partly reapplication, BGBl., 1954, II, p. 717.

[85] *Cf.* Appendix II of the Paris Convention (see *supra*, note 48), which expressly declares that "this Convention shall not be interpreted as depriving a contracting party, on whose territory damage was caused by a nuclear incident occurring on the territory of another contracting party of any recourse which might be available to it under international law".

[86] In this case the problem has to be solved, determining how the indemnification received from the state is to be forwarded to the injured citizen, or, whether the victim may demand from his state to undertake certain measures against the state of the polluter. This is denied by Kimminich, "Der internationale Schutz des Einzelnen", *Archiv des Völkerrechts* 1971/72, p. 405 note 5; Doehring, *Die Pflicht des Staates zur Gewährung diplomatischen Schutzes* (Cologne and Berlin 1959), p. 45 et seq.; see also Kiss, *supra*, note 17 at 50/51; McCaffrey, *supra*, note 7 at 192/93.

I. *Regulation of Damages Between the States*

1. *General International Law*

The general rules of international law concerning liability and damages for border crossing environmental damages will be—within the frame of a national report—presented here in outline form only. Firstly, because it is not undisputed whether claims for damages result directly from these rules or merely from the duty to conclude agreements which implement the general rules.[87] Additionally, because the rules are valid for all subjects of international law and no cases with participation of the FRG exist which were decided according to these rules.[88]

Current international law recognizes that no state can permit the utilization of its territory in such a way as to considerably damage the territory of another or the persons living thereon. Otherwise, an obligation to pay damages arises.[89] The wellknown decision of the arbitral tribunal in the *Trail-Smelter*[90] case is considered as an international precedent for this principle. Doubts have been expressed, however, as to the weight of this case as precedent, due to its special factual circumstances.[91] Nevertheless, the principle laid down in this decision is well settled in the law today, through the support of many sources and authorities.[92] It is based partly on the theory of the abuse of the law[93] and derived partly from the principle of "good neighbourgliness".[94] In conformity with this general rule, there have been established some more or less narrowly defined duties for certain cases of border crossing environmental damages.[95]

These general rules of international law concerning transfrontier pollution, offer in most cases no adequate foundation for the international

[87] See Fischerhof, *supra*, note 74 at 152.

[88] But see the cases decided by the State Court of the German Empire (Staatsgerichtshof für das Deutsche Reich) which concerned the Salinity of the Weser River (June 9, 1928, Appendix RGZ, 121, p. 1) and see page of the Danube (June 17 and 18, 1927, Appendix RGZ, 116, p. 18).

[89] See, e.g., Rauschning, *Europa-Archiv*, 1972, p. 569; Oppenheim-Lauterpacht, *International Law I* (ed. 8, London 1955), p. 290/91.

[90] First arbitration award of 1938, in A. J. I. L., 1939, p. 338; Second arbitration award of 1941, in A. J. I. L., 1941, p. 684.

[91] Sand, "Trans-Frontier Air Pollution and International Law" (unpublished paper), p. 2 et seq.

[92] Bramsen, *supra*, note 7 at 4 et seq., gives a good survey thereon.

[93] Oppenheim-Lauterpacht, *supra* note 89 at 347; Berber, *Lehrbuch des Völkerrechts I* (Munich 1960), p. 298.

[94] Goldie, *supra*, note 4 at 129.

[95] See the so-called Helsinki Rules on the Uses of Water of International Rivers, adopted by the International Law Association at the 52nd Conference held in Helsinki on August 20, 1966.

regulation of damages. They can be considered only in relatively clear cases of direct and considerable injury,[96] for they include no rules concerning the problem of multi-source emissions, or the contributory causation of pollution of air and water. For these reasons, there is no definite solution to transfrontier pollution in industrial areas or to so-called long-distance pollution, to be deduced from the general rules; not to mention the problem of damages in "areas beyond the limits of national jurisdiction".[97] Beyond that, there exist no definite rules concerning the measure of liability (negligence or liability without fault)[98] or the exclusion of liability because, e.g., the polluting state causes and accepts the same damages on its own territory,[99] or because the advantages which the state of injury enjoys from the industrial activities of the polluting state outweigh the disadvantages of the damage to the environment.[100] As long as the general international law provides no adequate rules, satisfactory solutions for the regulation of damages can only be reached by treaty.

2. *Treaties of the FRG*

The treaties which the FRG has concluded with other states, concerning liability for transfrontier pollution can be dealt with rather briefly, firstly because there are so few, and secondly, because these negotiated rules of liability are, in general, vague and ambiguous.

2.1. *German-Dutch Border Treaty*

According to art. 63 of this treaty,[101] a duty to pay damages is imposed on that party to the agreement, who, in spite of the objections of the other to certain water activities, planned or undertaken, violates his assumed obligations, thereby causing damage within the territory of the

[96] See Trail-Smelter-Arbitration of 1941 (*supra*, note 90): ..."where the case is of serious consequence and the injury is established by clear and convincing evidence".

[97] See principles 21 and 22 of the Stockholm Declaration, which for the first time in history made it binding on the state of the world, not to do any harm to those areas.

[98] See for this subject Goldie, *supra*, note 4 at 133 et seq.

[99] *Cf.* Muraro, "The Cost-Sharing Approach to Upstream-Downstream Transfrontier Pollution", 1972, paper for the OECD (AEU/ENV/72.12), p. 34, who gives preference to the principle "Don't do to others what you don't do to yourself" in opposition to the Polluter-Pays-Principle or the Victim-Pays-Principle.

[100] See O'Connell, *International Law* (ed. 2, London, 1970), p. 593.

[101] Treaty on the Course of the Joint Land Frontier, on the Border Waters, on the Real Property in the Border Area, on the Transfrontier Inland Traffic, and on Other Border Questions (Border Treaty) of April 8, 1960, BGBl., 1963, II, p. 463, put into effect on August 1, 1963, BGBl., 1963, II, p. 1078.

other. These obligations include, among others, to avoid unreasonable pollution of border waters, which might considerably impair the customary use of the water by the neighbouring state. [102] If an amicable settlement cannot be reached, the Treaty provides for an arbitral tribunal which decides on the asserted claim, on the basis of the general rules of international law and of the provisions of the treaty. [103] Since the treaty provides for no specific regulations concerning liability, only these general rules, the ambiguity of which has already been discussed, [104] are available to the arbitral tribunal as a foundation for its decision. Therefore, the German-Dutch Border Treaty did not mean any substantial progress regarding the question of liability.

2.2. *Agreement Concerning the Withdrawal of Water From the Lake of Constance*

The regulation of liability in the Agreement Concerning the Withdrawal of Water From the Lake of Constance is similarly based on the general principles of international law. [105] When there is no friendly settlement, the arbitral commission, established under the treaty, decides according to the general principles of international law on the duty to pay damages for unforeseen injuries caused by water withdrawals. [106]

2.3. *Agreement between the Government of the FRG and the Government of the GDR Concerning the Maintenance and Improvement of Border Waters*

This agreement [107] also provides, in a general manner, that considerable encroachments on the quality of border waters, on its utilization, on water

[102] See Art. 58 (2)e).

[103] See National Report (FRG) on Rules for International Settlement of Controversies, by same author.

[104] I therefore disagree with Gieseke, "Neue Verträge der Bundesrepublik Deutschland und der deutschen Länder über internationale Gewässer", DÖV, 1961, p. 658 et seq., 659, according to whom the legal basis of claims for damages is exactly determined by the Treaty.

[105] Agreement of April 30, 1966, Between the Federal Republic of Germany, the Republic of Austria, and the Swiss Confederation, BGBl., 1967, II, p. 2313, put into effect on November 25, 1967, BGBl., 1967, II, p. 2544.

[106] See Art. 4, Art. 11.

[107] Vereinbarung der Regierung der Bundesrepublik Deutschland und der Regierung der Deutschen Demokratischen Republik über Grundsätze zur Instandhaltung und zum Ausbau der Grenzgewässer sowie der dazugehörigen wasserwirtschaftlichen Anlagen, Bulletin des Presse-und Informationsamtes der Bundesregierung Nr. 115/ S. 1144 (21.9.1973).

installations, on dikes, and on the territory of the other state caused by the implementation of activities concerning the border waters, subject the responsible party to liability for damages.[108] At least, however, it is clearly stated that simultaneously occurring material advantages are to be taken into consideration.[109]

2.4. *The German-Austrian Airport Treaty*

Only this treaty[110] contains concrete provisions with regard to the obligation to pay damages. According to Article 4, par. 2, and Article 5, par. 5, Austria must indemnify the FRG for all necessary expenditures and all damages which arise out of the installation and operation of the airport, especially the compensation payments to German residents, which according to the contract, were expended by the FRG as the representative of Austria.

II. *The Regulation of Damages Between the Victim and the State of the Polluter*

Something of this sort was provided for in the first draft of the Convention for the Protection of International Watercourses Against Pollution developed by the Council of Europe, to which the FRG belongs.[111]

The authors of this Draft were of the opinion that the state liability under international law was not appropriate for the compensation of the injured individual, because the state of the injured party is not always willing—particularly in cases which are less important for the general public—to raise a claim of damages against the state of the polluter.[112] Beyond that, the authors recognized that the main problem for the individual injured by transfrontier pollution, in an action against the foreign polluter, often lies in sustaining the imposed burden of proof. On the other hand, the state of the polluter in an action for recourse against

[108] Art. 1, No. 8.

[109] *Ibidem.*

[110] See *supra*, note 22.

[111] Recommendation 555, adopted unanimously by the Consultative Assembly on May 12, 1969. See also the Report on a Draft European Convention on the Protection of Fresh Waters Against Pollution, Consultative Assembly of the Council of Europe, May 12, 1969 (Doc. 2561), by Mr. Hosiaux (text of Draft Convention on pp. 2-11).

[112] Lammers, "The Activities of the Council of Europe Concerning the Protection of Fresh Water Against Pollution", *Yearbook of the Association of Attenders and Alumni of the Hague Academy of International Law*, 41 (1971), pp. 55 et seq., 64.

the latter has certain advantages, as far as the evidence is concerned, because it can investigate more thoroughly the injurious conduct occurring on its territory.

It was, therefore, provided in Chapter III of the Draft, that every person adversely affected by water pollution may institute an action for damages against the state in whose territory the pollution originated, in the courts of the latter. The aggrieved person had to show only that the damage originated, partly or completely, within the territory of that state and caused damage to him.

However, the Draft provided for distinct restrictions limiting this strict liability of the state. For example, in the case of a determination of quality standards applicable to international waters, liability was only imposed when the standards were not adhered to. In addition, the liability was to be reduced or excluded when the injured party or a third party was also at fault. Finally, a two-year period of limitation, running from the point when the victim knew or should have known of the damage, was provided.

The apprehensions,[113] that no state would ratify a convention which, in spite of the described limitations, included such general and severe obligations to pay damages, prevailed. The Committee of Ministers of the Council of Europe rejected the Draft.[114] A new draft which would have imposed only a state-to-state liability in certain cases[115] was also rejected. The last draft, which has the approval of the Committee of Ministers and has been presented to the Consultative Assembly for an expression of opinion,[116] provides only that "the provisions of this Convention shall not affect the rules applicable under general international law to any liability of states for damage caused by water pollution".[117]

The fate of the progressive first draft indicates with absolute clarity how little the community of nations is currently interested in a just and effective regulation of damages arising out of transfrontier pollution. It is evident that we still have a long way before us.

[113] *Idem* at 66.

[114] See Council of Europe Doc. CM(70)134, (Oct. 27, 1970), p. 2.

[115] See *supra*, note 114 at 13 et seq. A liability of that sort would have been imposed only then if a state allowed a conduct on its territory which did not comply with minimum water quality standards agreed upon. The injured individual was, therefore, able to collect damages from the foreign state only via his own government.

[116] Council of Europe, Consultative Assembly Doc. 3417 (April 4, 1974) with Draft Explanatory Report (Doc. 3417 Addendum). Draft Opinion (Rapporteur Mr. Grieve) of the Consultative Assembly Doc. 3443 (June 4, 1974).

[117] Art. 21.