

## **River Legislation**

### **International Liability Peculiarities in Environmental Law**

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**Abstract:** Environmental protection is one of the main concerns of contemporary society, being at the same time, a challenge for the current millennium, if we consider the countless events that had an impact upon the environment. All the above have determined the international society to rethink the relation with the environment, being aware of the fact that the man is an intrinsic part of it. One of the problems of present interest is the liability for environmental prejudices. Activities such as nuclear power production, oil transportation, and different industrial processes have positive effects, benefits, however, in certain situations they can cause damages, not only to the state where it takes place, but also to other states. This paper regards a topic analyzed by other authors as well, but we emphasized based on analysis and case study certain features of international environmental liability. In conclusion, we can say that, although the current international legal instruments on environmental protection are in force, they are not properly applied by states' parties, on the one hand, and on the other it is not still in force an international liability regime for environmental damage.

**Keywords:** environment; international liability; States Parties; damages; legal system

#### **1. General Considerations**

If the first environmental concerns have entered into a process of "insuring an increased welfare" (clean environment into a new dimension of quality of life) (Duțu, 2007, preface), the emergence of global environmental problems regarding the climate change, global warming, desertification, etc. has determined the relocation of international relations in the field and the establishment of norms and rules on environmental liability. Therefore, the international society has become aware of the importance of international environment (Otel, 2009, p. 7), aspects on environment being integrated into social, economic, public policies, in general. However, the difficulty, given the pollution, is in establishing a balance between public, industrial and individual interests. (Larson, 1999, p. 3)

The liability for environmental damage represents a constant concern of the past decades. Numerous activities such as nuclear power production, oil transportation, etc., although they have benefits, they may also cause environmental damage, at national and international level.

State responsibility, but also other subjects of international law intervenes in two distinct situations, leading to two types of liability, namely, liability for acts or illegal acts in terms of international law (violation of international law or

customary law) and liability for prejudice consequences resulting from activities which are not prohibited by the international law (Popescu, Năstase, 1997, p. 335).

At its 53rd session in 2001, the International Law Commission has adopted regarding the first form of liability, the articles' project "State liability for internationally illegal acts."

Regarding the second form of liability in contemporary international law, within the same session, in 2001, the International Law Commission adopted the articles project on "Prevention of cross-border prejudice resulted from hazardous activities".

The activity of protection, preservation and environmental liability in the domain of environment protection has led to, at international level, numerous conventions on liability for caused prejudices.<sup>1</sup>

At European level, within the environmental liability it was established by adopting Directive 2004/35/EC on environmental liability with regard to the prevention and remedying the environmental prejudice<sup>2</sup>, complemented by article 15 of Directive 2006/21/EC of the European Parliament and the Directive 2004/35/EC of the Council, on 15 March 2006 regarding the management of waste from extractive industries and amending.

In Romania, the legal framework of liability environment was shaped by the adoption of Government Emergency Ordinance no. 68/2007 on environmental liability with regard the prevention and remedying the environmental prejudice, as amended.

## **2. Features of International Liability in the Environment Domain**

The peculiarities of international liability in the environment domain have as fundamental right the objective nature, specific to the liability of this area. Such a feature aimed at the causes (general and specific) that remove the liability.

Public international law establishes in some cases, the removal, exceptionally, of the illicit nature of the crime or act of violation of the international obligation. In these situations, the author of the crime or unlawful act shall be relieved of the liability. As mentioned in the specialized literature (Otel, 2009, p. 212), the expression "causes that remove liability" assumes the existence of some situations

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<sup>1</sup> Brussels Convention on Civil Liability for prejudices caused by the oil pollution in 1969, as amended in 1992, the Convention on Civil Liability for caused prejudice during the transportation of dangerous assets by road, rail and inland waterway vessels, achieved at Geneva 1989, the Civil Liability Convention for prejudice caused by pollution from the fuel of ships, done at London in 2001, etc.

<sup>2</sup> Published in J.O.U.E. no. 1 of 30 April 2004.

whose intervention does not allow the prosecution of the one who caused the damage, his conduct being based on as a risk. Moreover, the international agreements concluded in the environment domain contain other provisions related to certain circumstances in which liability for produced damage is removed. For example, the 1993 Lugano Convention on Civil Liability for damage resulting from dangerous activities to the environment, article 8 establishes the following causes which exclude the liability: a) an act of war, hostilities, civil war, insurrection or a natural phenomenon with an exceptional feature, unforeseeable and irresistible; b) an act done with the intent to cause damage by a third person, despite the security measures undertaken for this type of dangerous activity, c) compliance with a specific order or compulsory measure of a public authority, d) pollution at tolerable levels according to the local relevant circumstances; e) a dangerous activity undertaken in the interests of the legal person who suffered the damage when it is reasonable to such person to be exposed to the risk of the dangerous activity.

The circumstances listed from a) to c) are considered general causes for removing liability. The others are the special reasons for removing liability in international environment law. In the following we give a brief analysis of the special causes of liability disclaimer. As regards the pollution at tolerable levels, according to the local circumstances, the extent of this exception aimed precisely at avoiding the liability regime at acceptable inconveniences. As you can see, "tolerable level" is determined by local circumstances. This leads to the conclusion that all activities determined by the development of the society cause pollution and as always there will always be a certain level of pollution. However, this level of pollution should not harm the environment and human health. Therefore, the "tolerable level" shall be determined based on local circumstances. However, even tolerable pollution levels may lead in time, to causing a prejudice. In such a situation, if it can be established a causal link between the damage and the polluting activity of an operator, it will be held responsible.<sup>1</sup>

Another special case concerns the legal hazardous activities undertaken in the interests of the person who suffered the prejudice. This also applies to emergency situations or where the dangerous activity was conducted with the consent of the person who suffered prejudice (Otel, 2009, p. 229).

As highlighted in the specialized literature (Popescu, Năstase, 1997, p. 345), in order to be in the presence of a circumstance that eliminates the liability there must be fulfilled several conditions regarding the consent: it is given before or even during the commission of the offense; to be expressed explicitly; to be attributed to the subject of law; the offense is committed within the scope and limits established by the consent. Concurrently, it is required that the conducted activity is lawful.

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<sup>1</sup> Article 4 par. 5 of Directive 2004/35 / EC.

At the same time we must determine whether carrying out dangerous action is an acceptable risk to the person who suffered the prejudice. The “reasonable feature” of the dangerous activity towards the risk that it poses for the injured person is determined by the court, which will take into account the circumstances of each case.

Directive 2004/35/EC sets out two circumstances in removing environmental the liability i.e. activities whose purpose is to serve the national defense or the international security (article 4, paragraph 6) and the activities whose purpose is to protect against natural disasters. (article 4, paragraph 6)

As it can be seen in the analysis of the first circumstances, not all activities related to national defense or international security are exempted from environmental liability regime, but only those who have the sole purpose of such activities.

The second circumstance set by the European document is found in the African Convention on Preserving Nature and Natural Resources, which states, in paragraph 2 that the parties to the Convention are entitled to take specific measures derogating from its provisions, in declared emergencies resulted from disasters and public health protection. Analyzing the provisions of Directive 2004/35/EC in the light of the stated circumstance, it results that, in order to be in the presence of some circumstance that would remove the liability it would require that the actions have the sole purpose of defending against natural disasters. In fact, the reason for the exemption of such activities is precisely to prevent the loss of human life, material destruction and prejudices to the environment.

Defending human life or safety is a circumstance of removing liability under the African Convention on Preserving Nature and Natural Resources, and Annex VI to the Madrid Protocol. This exception takes into account actions for protecting human life or safety, although those documents do not define them. In such cases the active subject must prove that the taken measures fall in activities that have the mentioned aim, and the court will decide, depending on the circumstances in each case. (Otel, 2009, p. 237)

Another exception in Annex VI to the Madrid Protocol (article 8, paragraph 2) implies taking response actions in case of environmental emergency. This exception stems from the fact that, in the situation where there is an environmental emergency following the response measures to other environmental emergency, the operator that has taken the measures is not responsible for the created urgency.

But in order to be in the presence of the listed circumstance, it must meet several conditions: the operator or a state agency is expressly authorized to take response

measures, otherwise you will be responsible for the damage caused by the taken measures, the response would be reasonable in all circumstances.<sup>1</sup>

**In conclusion**, we believe that the international legal instruments on environmental protection are not always properly applied by the States Parties, on the one hand, and on the other hand, there is still a general regime of international responsibility for environmental damage. At the same time, the existing international legal instruments contain less detailed procedural aspects, extremely necessary for avoiding the issuance of arbitral or contradictory judgments.

Therefore, it is necessary, based on the Principles - project of the International Law Commission, that the Member States should decide the negotiation and the conclusion of the legal instrument in this field.

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<sup>1</sup> Such measures must comply with the local circumstances, so as to reduce as much as possible the environmental impact produced by the environment urgency.