INTERNATIONAL LIABILITY FOR ENVIRONMENTAL DAMAGE

-Abstract-

First of all, it is appropriate to mention the general objective of this thesis, namely the analysis of international and community legal instruments and documents in order to determine specific and essential elements of the environmental responsibility institution at international and community level.

We examined the international and community responsibility for environmental damage, completing closely the original international conventions, international custom, general principles of law recognized by civilized nations, international judicial decisions and doctrine, and also community dimensions relevant to this topic, following mainly to highlight a number of specific concepts and strict principles of environmental liability in international law and Community law, to identify specific and essential elements of liability for environmental damage at community and internationally labels, the conditions of using it in various cases and areas, as well as to reveal the influence of the solutions given at international and/or community level in various cases on future events, which implies liability and on the concept itself of liability.

Therefore, in this thesis we considered the analysis of general rules of international law, of the Community law on environmental liability institution, of the special ones from maritime, nuclear, space fields, but as well as the most relevant cases and decisions rendered by international and community courts.

Prior to present the mechanism of international responsibility and community, we made some introductory details in **Chapter I**, entitled **General considerations on international liability for environmental damage** to the concept of responsibility, the definition of responsibility in international law, its objective or subjective character in various areas, as well as liability for damage to the common heritage of humanity.

Regarding the term *liability* in the Latin origin languages, usually only the word *responsibility* is used. In English, there are terms of *liability* and *responsibility*, although the difference between them is not always considered. In legal terms, *responsibility* is used for *unlawful acts* and *liability* for *legal acts*; as a rule, the word *responsibility* is used for general

liability and the *liability* for civil liability. In international environmental law, the two concepts should be used as: for the responsibility of States for unlawful international acts, the concept of *responsibility* and for international liability for injurious consequences arising from activities not prohibited by international law the concept of *liability.*

The term *responsibility* refers to the mechanism that leads to repair, however *liability* is to be responsible for a person, thing or situation.

Traditionally, the conditions of international liability for damage caused to the environment are like those of tort liability, namely: (i) of any action causing injury, (ii) an injury, (iii) the causal link between the act causing damage and injury; and (iv)guilt.

But from the rule meeting all these conditions for international environmental liability, there are some exceptions, when the responsibility may be objective, being based on the idea of risk and security in the field of nuclear, sea or space activities.

In **Chapter II**, **Topics and elements of liability in international environmental law** given that there is no international legal instrument or document governing the legal regime generally unified and coherent of international liability for environmental damage, we studied subjects, conditions and general characteristics of international liability for unlawful acts and liability for injurious consequences arising out of activities not prohibited by international law, governed by the three projects developed by the International Law Commission: *Draft articles on responsibility of States for acts of international unlawful, Draft articles on prevention of trans boundary damage of dangerous activities, Project principles for cost allocation in case of trans boundary harm arising from hazardous activities* and *Lugano Convention of June 20, 1993 on civil liability for environmental damage from hazardous activities*, which is the most developed international treaty that regulates the liability and compensation for environmental damage.

These projects and/or the Lugano Convention shall apply only if there is no special legal regime of liability covered, such as nuclear, maritime, space, waste etc. field.

Chapter III, The significance of the fundamental principles of international law and environmental law, was dedicated to the presentation content of the **precautionary principle, prevention, polluter pays and sustainable development principles**, highlighting the latest trends in liability as a result of their application.

Applying the *precautionary principle*, states must act without waiting for all samples, leading to the conclusion of a threat to the environment, to be scientifically established.

Prevention requires both risk assessment to avoid hazards, and actions based on knowledge of the current situation, to prevent environmental degradation.

The principle of prevention requires action on the causes that cause pollution or degradation and destructive activities or limit adverse effects on environmental factors, as applied in the prior assessment procedures of the incidents of environmental projects or activities.

Although many international instruments provide that only qualified as reasonable remedies should be in charge of the responsibility, the polluter pays principle is reflected in a full internalization, covering the costs of prevention and the fight against pollution and all environmental damage.

Sustainability principle has become *erga omnes* principle being considered by the International Court of Justice in Gabcikovo-Nagymaros case, when the Court referred to the "need to reconcile economic development with environmental protection which is expressed in the concept development sustainable."

Further on, in **chapter IV, Regulation of international liability for environmental damage in various international treaties and conventions**, we have examined the relevant international treaties and conventions on the law of the sea, the space law, oil pollution, nuclear damage, transportation of goods and hazardous substances, conclude this analysis with the Convention of Strasbourg of November 04, 1998 on environmental protection through criminal law.

In **chapter V**, **Environmental liability under Community law**, we continued the analysis of the liability under Community law, in particular, according to Directive 2004/35/EC on environmental liability with regard to preventing or repairing environmental damage and the regulations relating to the introduction of criminal penalties for pollution offenses.

The Directive 2004/35/EC provides two distinct and complementary liability regimes, which are distinguished both in terms of defining the person responsible and the type of damage covered, and even objective or subjective nature of responsibility:

1. The first regime concerns the **objective liability** imposed on certain operators, whose activity is specifically identified in Annex III, preventing and remedying environmental damage (including damage to protected species and natural habitats and affecting water and

soil), without the need to establish guilt, of intention or fault of the operator. Thus, in this case, the conditions of the liability will be: (i) the act causing injury consisting of a professional activity as listed in Annex III, (ii) the damage caused to the environment (including damage to protected species and natural habitats and those affecting water and soil) or an imminent threat of such damage, (iii) the causal link between act and damage.

2. The second regime of **subjective liability**, applies to any operator of a professional activity (other than those listed in Annex III), if the operator acted with intention or negligence, but not cover, however, than the damage or imminent threat on species and habitats protected. In this case, the conditions of liability will be: (i) the act causing injury consisting of a professional activity other than those listed in Annex III, (ii) the damage caused to protected species and natural habitats or imminent threat of such damages, (iii) the causal link between act and injury, (iv) the act is committed with guilt (intention or fault).

As regards criminal liability in 2005 was adopted Directive 2005/35/EC of the European Parliament and the Council of September 07, 2005 on ship-source pollution and introduction of penalties for infringements, and the Framework Decision 2005/667/JAI of July 12, 2005 to strengthen the criminal law framework for the enforcement of the law against ship-source pollution, including the nature, type and levels of criminal penalties. Directive aims to incorporate into Community law the international rules on ship-source pollution and to provide procedures for persons responsible for discharges are subject to appropriate penalties, in order to improve maritime security and strengthen the protection of the marine environment against pollution by ships. It was important not only to be punished those responsible, but also to prevent the penalizing the offense, which should allow to launch a serious message to potential polluters.

The Framework Decision 2005/667/JAI was annulled by the Court of Justice,[1] dated October 23, 2007, with the reasoning that this decision, which obliges Member States to apply criminal penalties for certain conduct, contains provisions, such as the Articles 4 and 6, concerning the type and level of criminal penalty, not falling within Community competence and could not therefore be validly adopted by it. Subsequently annulled Framework

[1] Case 440/05, Commission of European Communities c / Council of Ministers, the Commission of European Communities asks the Court to annul the Framework Decision 2005/667/JHA of the Council of July 12, 2005 to strengthen the criminal law framework for the enforcement of the law against ship-source pollution. http://curia.europa.eu/jurisp

The 2005/667/JAI Decision, as expected, was proposed a Directive of the European Parliament and Council amending 2005/35/EC Directive on ship source pollution and introduction of penalties for infringements[2]. As shown in the explanatory memorandum of the proposed directive, with the common foundation of operational concern on illegal discharges of polluting substances from ships at sea and on large accidental oil spills, in 2003 the Commission presented a proposal for a directive on "ship-source pollution and introduction of sanctions, including criminal, for pollution offenses" stipulating that ship-source pollution is considered a crime and to criminal penalties, and a proposal for a framework decision" to strengthen the penal framework for law enforcement against pollution from ships", mainly aimed at approximating the levels of criminal penalties.

The last **chapter VI**, entitled **Conflicts of laws and jurisdiction in matters of environmental liability**, which conclude the analysis of international liability for environmental damage, we presented the solutions offered by various international treaties and conventions (such as Lugano Convention, which is a general, special character conventions on liability for damage caused by harmful substances or activities, such as hydrocarbons, nuclear power, transport of goods and hazardous substances etc., and by Directive 2004/35/EC) relating to the requests from victims of environmental damage that are submitted to certain jurisdictions.

At the end of this thesis, we made several findings of my scientific approach, highlighting the most significant proposals of lex ferenda on the basis of international and EU environmental liability.

Finally, considering the scientific research on international liability for environmental damage, the analysis of literature and the relevant international jurisprudence, we make the following proposals:

- **Adopt an international legal instrument governing a general clear regime of environmental liability applicable at international level.**

This international legal instrument may have as its starting point the three projects of codification of international responsibility, developed by the ILC, the Lugano Convention,

[2] Proposal for a Directive, COM/2008/0134 final - COD 2008/0055, dated March 11, 2008. http://eur-lex.europe.eu

other international conventions and even the Strasbourg Convention of November 04, 1998 on environmental protection through criminal law . Formulated this proposal given that although there are several international legal documents and instruments governing the legal regime of international liability for damage caused to the environment, which we analyzed in this thesis, we can not say that there is a general international legal regime, unified and coherent applicable to the environmental damage.

- **Inclusion of compliance and the principles of precaution and prevention as obligations on all subjects of international law, to eliminate and minimize both the known and unknown risks, given the consequences of environmental responsibility, embodied in preventive and remedial measures regulated by general international legal instruments**.

Thus, we consider replacing the polluter pays principle, the basic principle of international documents and legal instruments and EU, the principles of precaution and prevention of environmental liability corresponding objectives.

- **Regulation by mandatory rules of a general regime of liability for damage caused to the common heritage of mankind, by establishing a liability without the existence of damage and fault, as a breach of the precautionary principle by any subject of international law.**

In this regard, it must be clearly defined the concept of **common heritage of mankind** and established a due diligence **obligation *erga omnes***. Also, consider necessary to create an authority to act on behalf of humanity, for breach of duty of care. In regard to possible cases of exemption from liability, I propose one such case, that a natural phenomenon of exceptional, inevitable and irresistible.

- **Generalization environmental objective liability regime targets both international and Community whenever there is an actual injury or imminent threat of injury, setting a limited number of cases to exclude liability.**

Thus, in terms of Community environmental liability covered by Directive 2004/35/EC, in particular, we propose the following changes:

1. Amendment of Article 3 paragraph 1, by extending **the system of strict liability** not only for damage caused by the activities listed in Annex III, but for any damage or imminent threat of environmental damage (including damage to protected species and natural habitats and affecting water and soil) caused by any activity.

2. Amendment Article 8, in order to remove paragraph 4 letter a and b, as a result of generalized strict liability regime.

3. Replacing the **polluter pays principle**, by the **principles of precaution and prevention** which corresponds to an environmental objective liability.

4. Inclusion in the Directive **principles of full and in-kind repair of injury**.

5. The inclusion of a definition in Article 2 in full of **the environment** in which to understand natural resources, both biotic and abiotic, such as air, water, soil, fauna, flora, interactions between these factors and the characteristics of the landscape (pleasure of being in nature due to its beauty, recreational attributes and opportunities related thereto)[3].

6. Also, the inclusion of definitions in Article 2 of the **event and incident**.

7. Changing Article 2 paragraph 1 letter c, for the purposes of defining **land damage**, as any land contamination that creates a significant risk of environment being adversely affected as a result of the direct or indirect introduction, in, on or under land, of substances, preparations, organisms or micro-organisms. Thus, I propose replacing the text of Article 2 paragraph 1 letter c a human health with **the environment**. In its current form, it is possible that an activity listed in Annex III to be authorized and under Article 8 paragraph 4 letter b, the operator claimed that environmental damage was caused by an emission, an activity or any way use of a product during an activity for which the operator demonstrates that it was not possible with state of scientific and technical knowledge at the time the emission was released or the activity took place, to produce environmental damage. Thus, the operator may be exempted from liability since the damage did not create a significant risk to human health but the environment in general.

[3] Regarding this, see the environment definition provided by Principle 2 letter b of the Project principles for cost allocation in case of transboundary harm arising from hazardous activities and CDI comments contained in the Draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, in 2006, par.20, p.133, http://treaties.un.org/Pages/Home.aspx?lang=en

8. Changing Article 2 par.6 in order to define the operator as any natural or legal, private or public person who operates or controls the occupational activity or, where this is provided for in national legislation, to whom decisive economic power over the technical functioning of such an activity has been delegated, including the holder of **any regulatory act under law for such an activity** or the person registering or notifying such an activity**.** Thus, I propose replacing the text of Article 2 par.6 permit or authorization by **any regulatory act[4] under national law** (which shall mean any permit, approval or authorization), as, for example, national legislation, which regulates the environmental approval, and would thus be excluded from this definition, exonerating the holder of the environmental liability.

9. Changing Article 2 par.8 as to define the emission as the release in the environment, directly or indirectly, from point and diffuse sources, as a result of human activities, of substances, preparations, organisms or micro-organisms.[5]

Thus, I propose expanding the definition of emissions so as to understand the release directly or indirectly in the environment, from point and diffuse sources, as a result of human activities, of substances, preparations, organisms or micro-organisms

10. Changing the meaning of Article 2 par.9 defining **an imminent threat of damage** as sufficient likelihood that environmental damage will occur in the near future. Thus, we propose the abolition of the concepts b and **in the near future** (likely enough to cause environmental damage in the near future).

Given the irreversible and devastating effects of damage caused to the environment, consider that the exemption from liability should be expressly limited only to the following three cases:

1. **armed conflict, the hostilities, a civil war or insurrection;**
2. **an exceptional, inevitable and irresistible natural phenomenon;**

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[4] According to Article 2 item 2 of O.U.G. No.195/2005 regarding the environmental protection, published in M. Of., Part I, No.1196/03.12.2008, with changes and additions, in regulatory acts means "the environmental, environmental agreement, the opinion of Nature 2000, environmental approval, integrated environmental authorization, the authorization regarding emissions of greenhouse gases, the authorization of activities with GMOs. "

[5] See in this regard, emission definition contained in Article 2 item 28 of OUG Nr.195/2005 that "emissions means direct or indirect discharges from point and diffuse sources, substances, preparations, organisms or microorganisms, vibration, heat or noise in air, water, soil", with which disagree, given the use of terms of air, water and soil and not the environment

3. **the third party's action for which an active subject is not held liable, unless the latter has taken all appropriate security measures to be taken in that case, but nevertheless the damage or imminent threat to its production occurs.**

Regarding the case of relief consisting of an order, authorization or instruction that would emanate from a public[6] authority, whether there would be provided as required by Directive 2004/35/EC of the order or instruction not to follow an emission or incident caused by the activities of operators, we consider that this case should be removed, both from international and the community texts who provides it and where it would occur, the joint liability of the active subject with the issuing authority, considering the principles of precaution and prevention.

With regard to emergency situations or where an activity would be undertaken with the consent of the person who suffered damage, from which damage is caused to other issues of law or environment, consider that responsibility should be the active subject joint and several with that the person has consented, if the court found that this consent: (i) was real and unequivocal, that is expressed explicitly, (ii) was given before or during the activity, (iii) the activity is comply with the framework and limits of consent, (iv) the work was legal.[7]

- **Establish a compulsory insurance for all legal entities performing in economic activities that may have a risk of an environmental damage.**

- **Establishment of a guarantee fund in case of environmental damage.**

- **Creating a coherent procedural framework to ensure effective defense of the rights of injured subjects and full and immediate repair of damage.**

[6] Article 8 paragraph 3 letter b of Directive 2004/35/EC. See also Lugano Convention, Article 8.
[7] Lugano Convention, *Ibidem*.s