SPECIAL LIABILITY FOR ENVIRONMENTAL DAMAGE CAUSED IN AN INTERNATIONAL CONTEXT

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ABSTRACT:*The legal regime for civil liability for environmental damage has developed in a changing way, and in recent decades it has developed, in particular, to damage caused at sectorial level in an international context. The legal mechanism for liability for environmental damage has been extended to cover sources of pollution, pollutants and the way in which damage is repaired, leading to the establishment of a common right in this area.*

In this paper, we will present and analyse the main international legal instruments which are incidents in the field of civil liability for environmental damage occurring in an international context. These legal instruments indicate those causing environmental damage as active and consequently responsible for repairing the damage caused, thus providing a strong incentive to avoid environmental damage.

In this context, we will highlight the overall aim of international environmental instruments, of fully repairing the damaged natural resources and related services and returning them to the state they would have been had the environmental damage not occurred.

The study shows the continuing concern of the international community for identifying legal mechanisms to ensure that environmental damage is repaired and its victims are restored to their rights.

The basic principles of civil liability for environmental damage occurring in an international context are also analysed, with an indication of the mechanism of limited liability and the mechanism of full liability.

KEYWORDS*: ecological damage, polluter, objective liability, international environmental liability.*
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1. INTERNATIONAL REGULATORY ASPECTS OF ENVIRONMENTAL CIVIL LIABILITY (Dogaru, 2020) (Jugastru, 2013) (Prieur, 2011)

The phenomenon of depletion of natural resources, overcoming the environmental capacity to bear the impact of human intervention, affecting biodiversity and the

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emergence of climate change have raised major concerns and concerns for the scientific and political environment, which have resulted in the establishment of legal instruments in the field of environmental protection and conservation. Public environmental policies have started to develop and have a significant impact on the three categories of environmental instruments, namely social, economic and legal (Duțu, 2012) instruments. Legal instruments have proved to be the most effective in the category of instruments for protecting the environment against pollution.

Since national liability regimes for environmental damage did not show uniformity in all EU Member States, a more uniform regime was required, notably as regards the requirements for prevention and repair. [1]

In such a context, the Framework Directive 2004/35/EC on environmental liability in relation to the prevention and remedying of environmental damage[2], as seen as innovative legislation establishing for the first time at Community level a comprehensive environmental liability regime, is adopted, based (Fogleman, 2020) (Martin-Ortega, Brouwer, & Aiking, 2011) on the international environmental principle "polluter pays".

The European environmental liability Directive, by indicating those causing environmental damage[3] as responsible for repairing them, also provides a strong incentive to avoid environmental damage. This legislation also makes it responsible for taking preventive measures for those carrying out activities that pose an imminent risk to the environment. In addition, this document helps to support European legislation in protecting natural resources by providing a unified liability regime to prevent and remedy the damage caused to biodiversity in Europe. In accordance with its provisions, any operator shall be liable for the compensation of the damage caused if it is considered significant and if a causal relationship can be established between the operator's activities and that damage.

The precautionary and preventive obligation[4] (Duțu, Răspunderea pentru viitor, 2015) (Kingston, Heyvaert, & Cavoski, 2017) imposed by this European legislation arises from the moment the threat of environmental damage occurs and only when the operator's activity has caused the damage. Its provisions also have an impact on the environment caused by widespread and diffuse pollution, but only once the causal link can be established. Another feature of this Directive is that it also applies to cases of participation where several operators have contributed to the occurrence[5] of a single incident or persistent environmental damage. It is, of course, only national legislation that can provide for specific rules on cost allocation in situations where there is multiple causality, with the competent authority determining the extent of the damage to each individual situation.

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[1]The European Directive implementation was completed in July 2010. In 2014, the European Commission published reports on the effectiveness of the implementation of the Environmental Liability Directive.

[2]Published in JO L 143 from 30 April 2004, pp. 56, modified by: Directive 2006/21/CE of the European Parliament and Council from 15 March 2006, Directive 2009/31/CE of the European Parliament and Council from 23 April 2009 and Directive 2013/30/UE of the European Parliament and Council from 12 June 2013.

[3]The European Directive defines ecological damages being those damages caused to protected species and natural habitats, waters and soil.

[4]The environmental civil liability relying on the two principles, that of precaution and that of prevention, aims to avoid uncertain damages, of those that have not yet occurred, but that can occur under certain conditions.

[5]See, CJUE Decision from 9 March 2010, in C. Raffinerie Mediterranee SpA (ERG), Polimeri Europa SpA și Syndial SpA/Ministero dello Sviluppo economico and others, C-378/08, pp. I-1919.

It is clear that the extent and duration of environmental damage generally determine the significance of the environmental damage. However, other relevant factors can be taken into account when assessing the damage, such as those concerning the possibility of natural regeneration of environmental factors, which implies the principle of proportionality.

In order to establish environmental liability, the European environmental Directive distinguishes between two major categories of operators, namely, operators engaged in hazardous professional activities and operators engaged in any other professional activity. For first category operators, there is an incident the regime of objective legal liability, regardless of fault, which implies that no fault is necessary for the operator to be liable for the environmental damage caused.

However, for the category of operators not exercising professional activities dangerous to the environment, the liability regime based on their fault applies, in which context the fault or negligence of operators must be determined in order to be held liable for damage caused to protected species and natural habitats.

Environmental civil liability is objective for all activities that are expressly foreseen to be dangerous to the environment through certain European regulations (Hommen, Baveco, Galic, & van den Brink). In this context, we should mention the following activities: The operation of installations under Directive 2008/1/EC on integrated pollution prevention and control, replaced by Directive 2010/75/EU on industrial emissions; Waste management in accordance with the waste Framework Directive 2006/12/EC, recast by Directive 2008/98/EC, integrated into Directive 2010/75/EU on industrial emissions (Oneț, 2017); Manufacture, use, storage, treatment, disposal in the environment and transport of substances, preparations and products, as defined in Regulation (EC) No 1272/2008 on dangerous substances and Regulation (EU) No 528/2012 on biocidal products; The transport of dangerous or polluting goods, covered by Directive 2008/68/EC on road safety and Directive 2002/59/EC on ship traffic; Transboundary movement of waste within, into or out of the EU, covered by Regulation (EC) No 1013/2006 and others.

Of course, the implementation of European environmental provisions at Member State level may subject a broader group of activities with environmental risk to the system of objective liability, where it is not necessary to prove the fault of operators, as this is presumed.

The general objective of the Framework Directive is to fully repair the damaged natural resources and related services and to return them to the state in which they would have been had the environmental damage not occurred. For example, if a wetland has been damaged, full compensation of the damage involves a full return to the habitat and species previously existing, to the number of such species and to the services provided by that area to the public or to other natural resources (including recreation, food, landscape beauty, storm protection). We are saying that three types of measures to repair environmental damage are enshrined in this European document, namely, primary repair measures, compensatory repair measures and complementary repair measures (Valeev & Garafova, 2016) (Douhan, 2013).

As for the costs of repairing a product and the subjects who have to bear it, we make the following points. Where it is the competent public authority that takes preventive or remedial measures, it shall be entitled to recover the costs from the operator that caused

the environmental damage. These costs must include: the costs of environmental assessments carried out to determine the extent of damage and repair actions; any repair efforts made directly by the authority; administrative and legal costs, compliance control and data collection costs, monitoring, surveillance and any related costs. Logically, the costs of the repair measures put in place should not be disproportionate, meaning by disproportion all those situations where the repair exceeds the value lost due to the damage or the environmental benefits obtained through the repair of the damage.

We note that, although this framework Directive does not explicitly require financial guarantees for operators to cover possible liabilities, Member States are nevertheless required to put in place concrete measures to encourage the development of environmental financial instruments. In practice, the most popular tool to cover the prevention and repair of environmental damage has been proven to be insurance, which can be expressed by: extensions of risks covered by non-life insurance policies to the areas covered by the environmental directive or specific environmental liability insurance policies; through solutions proposed by an insurance pool. According to the Commission's October 2010 report, the second-best instrument is the one of the bank guarantee succeeded by other market instruments, such as funds and bonds.

With regard (Stănescu, 2013) to the Regulation of civil liability for environmental damage in an international context, in the following paragraphs we will make some clarifications and analyses.

Civil liability for environmental damage caused in an international context requires that cross-border dimension is the rule in the legal relationship thus created. These legal relationships are essentially governed by national law and are subject to overstate regulations, and only in the subsidiary, in the absence of such rules or of missing rules, legal relations are governed by national law, in accordance with the rules of international law of the notified court.

From a doctrinal point of view, it is distinguished from the legal bases applicable to this form of legal liability on the basis of relevant criteria. Thus, taking into account the level at which regulations have been adopted, there are international sources, community sources and national sources. On the basis of their scope, we distinguish between regulations or general sources (which have a wide scope of coverage) and special sources (those with a limited or concrete scope). And, according to their legal force, they are grouped into a source of coercion for the parts of the legal relationship and a source of unbinding.

The international Community has constantly been concerned about the identification of legal mechanisms capable (Adelle, Biedenkopf, & Torney, 2018) of providing repair for environmental damage. International legally binding and sectorial regulations are comprehensive and relevant to the area of environmental civil liability. The international conventions on civil liability established with regard[6] to environmental damage, which

[6]International Convention on Civil Liability for Nuclear Damage, adopted in Vienna in 1963; International Convention on Civil Liability for Oil Pollution Damage, adopted by Brussels in 1969 and subsequently amended by the London Protocol of 1992; Convention on International Liability for Damage Caused by Objects Launched into Outer Space, adopted in 1972 in London, Washington and Moscow; The Convention on Liability and Compensation for Damage Caused by Carriage of Dangerous Substances by Sea, adopted in London in 1969, as amended by the Protocol of 2010; The 2003 Kiev Protocol on Legal Liability and Compensation for Damage Resulting from Cross-Border Travel and Dangerous Elimination; The International

have contributed significantly to the training and strengthening of international environmental law, are representative. We note that many of these international conventions have been reformed over time, as well as recent legal instruments have been adopted to address the situation arising from environmental pollution and to make it aware of the danger of this phenomenon.

In the category of binding and general international regulations, we invoke the Lugano Convention adopted in 1993 under the aegis of the Council of Europe. This integrating legal document, the purpose of which was to repair environmental damage regardless of the nature of the pollutant, did not come into force even though its general and sanctioning provisions are considered relevant for environmental civil liability (Hinteregger, 2008).

Regional regulations of a binding and general nature include the Framework Directive 2004/35/EC on environmental liability with regard to the prevention and remedying of environmental damage and the financial liability of authors (Anghel, 2010). Although this document does not establish a uniform legal regime for civil liability for environmental damage, it creates the conditions for standardization, imposing on Member States minimum transposition of the legislation in place.

In those situations, where there are gaps or missing international sources or regulations, national legal rules (lex caussae) on liability for pollution damage will apply. This includes binding national and sectorial regulations. The special binding and sectorial law in force in Romania is the Law No 701 of 2001 on Civil liability for Nuclear damage (Pop, 2002).

Incident in the category of binding and general national regulations is the environmental Framework Law, represented by the GEO 195/2005 on environmental protection, updated and republished in 2018, establishing the general legal regime for liability for environmental damage caused by pollution, as well[7] as OGA No 68/2007 on environmental liability with regard to the prevention and repair of environmental damage.

The conclusion to be drawn from these legal instruments is that the institution of civil liability for environmental damage caused in an international context is currently characterized by the existence of many sectorial and integrative regimes with many common features, tasks that can help to shape a general theory of this legal environmental liability.

2. THE SUBJECTS OF CIVIL LIABILITY AND THE CONSEQUENCES OF SUCH LIABILITY UNDER INTERNATIONAL LEGAL INSTRUMENTS

With reference to the subjects of criminal civil liability, we will distinguish between the passive issue and the object which is an active subject of environmental civil liability.

In the subjective view of civil liability, the existence of guilt (irrespective of its seriousness) is essential to identify the passive subject of liability and to make the

Convention on Civil Liability for Damage Causes Oil Pollution from Ship Propulsion, adopted in London in 2001.

[7]It is the normative act through which the European Directive no. 2004/35/CE was transposed into the national legislation.

obligation to make compensation for damage. If the rule of the acquisition of the status of passive subject of civil liability is the existence of the guilt of the offender, by which a loss occurred, the exception is recognition as a passive subject of the person who is the legal guardian of the work, irrespective of the existence of his guilt.

In the field of environmental law, where the rule is that of objective civil liability, independent of guilt, the person who has a dangerous activity for the environment has the status of passive subject, which causes pollution causing ecological damages (Pricope, 2013). This theory is defined by the term "polluter pays", which attributes liability for pollution damage to the polluter (i.e. the operator of the hazardous activity). As a legal guardian of the work, he will be obliged to bear the risks arising from the use of those things that are dangerous to the environment and to provide appropriate guarantees for their use. It is precisely this criteria of awarding liability for environmental damage that is caused that it is essential to establish an objective concept of environmental civil liability (Prieur, 2011).

The legal mechanism for channelling liability to the polluter (the operator of the hazardous activity) has led to some specific consequences. Thus, the injured party or victim of pollution can more easily determine the person responsible, i.e. the person against whom he must seek compensation for the damage (passive subject). It should only prove that a dangerous activity is carried out, that environmental damage is produced and that there is a causal link between the unlawful activity and its outcome. The victim of environmental damage is obliged to take sole responsibility for the operator of the hazardous activity and cannot hold any responsibility[8] for another person. The only exception is that the environmental damage is caused by the unlawful act committed to fault by such third parties. Under the applicable international legal instrument, claims may also be brought directly against the insurer of the holder of the loss-making activity. For the purpose of harmonizing the legal regime applicable to the liability of the polluter and without prejudice to the victim of pollution, the victim is obliged to apply for civil liability of the polluter solely under the relevant international legal regulations. Another specific consequence is that whenever the environmental damage was the result of a hazardous activity carried out by several operators (polluters), their liability is shared (Kiss & Shelton, 2007). This principle of passive solidarity implies that participants are required to be partly and strictly enforceable for the full compensation of the environmental damage they have claimed, of course, that the operator can exercise his right of regression against a third person who proves to be guilty of the damage, to recover the sums paid as compensation to the victim of the pollution. A novelty is the possibility for the victim to choose the applicable rule of law for the repair of environmental damage, as recognized by Regulation (EC) No 864/2007 of the European Parliament and of the Council on the law applicable to non-contractual obligations (Rome II) (Stanescu).

The victim of environmental harm is the active subject of civil environmental liability. In a context where the concept of environmental damage includes both

[8]We mention that there are international legal instruments that expressly prohibit the pollution victim to act against a third party other than the operator of the hazardous activity (for example, Vienna Convention on Nuclear Damage), as well as legal instruments that do not prohibit it (Basel Convention, Lugano Convention, European Directive 2004/35/CE).

environmental damage (those caused to individuals) and damage to the environment itself (in the form of the costs of restoring the polluted environment) (Dogaru, 2020), we will distinguish with reference to the fact that it is an active subject of liability. In the event of environmental damage, the environment is the instrument of pollution and the affected persons in their rights, assets and economic interests are active subjects of liability. The main international legal instruments recognize the active subject matter of liability for environmental damage caused by the environment, the following categories of persons: Persons whose physical integrity and health have been affected; persons whose assets and economic interests have been damaged; persons who have incurred the costs of measures to prevent environmental damage from occurring. These categories of subject-matter of determined law therefore have the status of victims and, consequently, active procedural legitimacy. On the other hand, where pollution caused damage to the environment itself without prejudice to particular persons, the victim of the pollution entitled to the repair is difficult to determine. Under international legal instruments, in such situations persons taking measures to eliminate or limit the effects of pollution have an active legal status (competent authorities, environmental non-governmental organizations, natural and legal persons under private law)[9]. Such active legal legitimacy definitely has a pragmatic basis, which consists in the cost of prevention and environmental restoration measures being borne by these categories of subjects. Thus, it can become the victim of pollution entitled to compensation for the damage suffered and, consequently, an active subject of civil liability, any legal subject that bears these costs.

Whenever the conditions of civil environmental liability are met, an obligation to pay compensation for the environmental damage in the person of the passive subject shall arise. The enforcement of this obligation is governed by two principles which highlight that the compensation of environmental damage is intended to bring the victim of pollution back to the state before the damage occurred. This concerns the principle of full compensation for environmental damage and the principle of compensation in kind in particular of the damage caused[10].

With regard to the extent of the obligation of repairing the environmental damage, the relevant international regulations establish the rule of limited liability and the exception to the unlimited liability of the operator. International legal instruments establishing the rule on the limitation of liability of the operator of a hazardous activity also lay down requirements to be met. Thus, limitation of liability for compensation for environmental damage is justified only where the operator has not acted guilty of the damage. However, there are a number of approaches to the limited nature of civil liability in relation[11] to the existence or non-existence of the holder's fault conduct. Other international legal instruments make the limitation of the liability of the holder to a dangerous activity which has led to pollution conditional on the setting up of a fund

[9]At the European level, Directive no. The Commission has received comments from the applicant on the application of Article 11(3) of Regulation (EC) No 2004/35.

[10]The Authority has also received a request from the Authority to review the existing measures in the light of the new information received from the Authority, which was published in the Official Journal of the European Union on 2002 May 2016. 44-50.

[11]Vienna Convention on Nuclear Damage provided in this way, in Article 5 in conjunction with Article 8 of Law no. 703 of 2001, on civil liability for nuclear damage, in force since 2002.

within the maximum limit of its liability, in order to facilitate the repair of the environmental damage suffered by the victim[12].

The fund will be submitted to avoid the risk of insolvency, at the court where the victim of the pollution submitted the request for legal action, between the time when the damage occurred and the court ruling to order the repair. This fund limiting the liability of the holder consists in the deposit of a sum of money by the holder or in the presentation of a letter of guarantee or other collateral accepted by law. This procedure shall remove the seizure of the assets of the holder, the release of any security or sureties placed and the extinction of the creditor's right to pursue his assets.

It should be noted that the limited liability of the operator does not affect the principle of making full compensation for the environmental damage caused by the hazardous activities carried out by the operator. On the one hand, the principle of limited liability concerns the quantitative component of liability and the determination of the maximum level of compensation, and on the other, the principle of full compensation concerns the qualitative component of environmental civil liability.

As regards the amount of the compensation, international regulations in this area promote a balanced relationship between the victim's interest in repairing the environmental damage suffered and the polluter's interest in being protected from certain incidents which are not attributable to him or her but which nevertheless occur in connection with his or her activities. This is why a ceiling on liability is introduced, allowing both the operator of the hazardous activity and the potential victim of pollution to know the extent of liability for potential damage. The relevant international documents establish two important methods for determining the limit of liability, namely the fixed ceiling method (not influenced by quantitative parameters of the source of pollution or the polluter) and the variable ceilings (those which are influenced by quantitative characteristics).

If compensation for both actual and *work damages is permitted under national law*, reference is made in international environmental law to losses of profit due to degradation or pollution of the environment. This concept, however, includes both pure economic damage and damage caused by the victim's unrealized benefit as a result of contamination of his goods by pollution.

In conclusion, the mechanism of limited liability ensures that any environmental damage caused by any kind is fully compensated, without excluding any damage suffered by the victim of the pollution from compensation.

As regards the unlimited nature of liability for pollution, it is only enshrined in few international legal instruments (the 1972 London, Moscow and Washington Convention on International liability for damage caused by objects launched in outer space, the 1988 Lugano Convention on Jurisdiction and the enforcement of judgments in Civil and commercial matters, the 2006 draft of the Commission of International Law on the allocation of losses in the event of damage caused by hazardous activities). Most international environmental legal instruments remove the limits of civil liability in situations where environmental damage is the consequence of the unlawful conduct of the holder of the hazardous activity, regardless of its form and degree of fault. Similarly,

[12]In this way establish the International Conventions on civil liability for damages caused by hydrocarbon pollution (the HNS Convention from 1969 consolidated by the CLC Convention from 1992).

these limits are also removed in cases where the holder who has caused the damage does not constitute the fund in order to facilitate the repair of the damage. The abolition of the limits on civil liability requires full quantitative and unlimited qualitative redress for the environmental damage caused.

In the field of environmental law, the basic principle of civil liability is the guiding principle of full compensation and of the in-kind compensation of the environmental damage caused. Where it is not possible to repair in kind the damage by monetary equivalent may be introduced as an exception. Moreover, the relevant international legal instruments propose the solution of repairing environmental damage by monetary equivalent, which is the reason for the reasonable cost of preventive measures and measures to restore the environment damaged by pollution.

3. CONCLUSIONS

Taking into account the complex issue of environmental quality, the international Community has constantly been concerned about identifying legal mechanisms to ensure that environmental damage is repaired and the environment affected is rebuilt. Over the last decades, the legal regime of the institution of environmental civil liability has developed and diversified both in international regulation and in the legislation adopted by the European Union in this respect (Misonne, 2011).

Regarding international legal instruments on liability for environmental damage, we note that the institution of civil liability for environmental damage caused in an international context is currently characterized by the existence of many sectorial and integrative regimes which have common features, features that can help shape a general theory of this form of environmental liability.

Under these regulations, the status of a passive subject of civil liability is left to the person who has a dangerous activity for the environment, which results in pollution causing ecological damages.

This theory is defined by the term "polluter pays", which attributes responsibility for pollution damage to the polluter as the legal guardian of the work which will have to bear the risks arising from the use of environmentally hazardous things and also provides adequate guarantees for its use. On the other hand, the fact that the victim of environmental harm is an active subject of civil liability is attributed to the victim of environmental harm as a determined law subject with active procedural legitimacy.

We note that, regarding the extent of the obligation to repair environmental damage, the relevant international regulations establish the rule of limited liability and the exception to the unlimited liability of the operator of a hazardous activity, in which sense, some requirements are also set. The mechanism of limited liability ensures that any environmental damage caused is fully redone, and in the international context it is currently characterized by many sectorial and integrative regimes that share common features that can help shape a general theory of this form of environmental liability.

Under these regulations, the status of a passive subject of civil liability is left to the person who has a dangerous activity for the environment, which results in pollution causing ecological damages.

As regards the extent of the obligation to repair environmental damage, the relevant international regulations establish the rule of limited liability and the exception to the

unlimited liability of the operator of a hazardous activity, in which sense, some requirements are also set. The mechanism of limited liability shall ensure that all environmental damage caused by whatever nature is fully compensated, without thereby excluding any damage suffered by the victim of the pollution. We have to state that the limited liability of the operator does not affect the principle of full compensation for the environmental damage caused by the hazardous activities carried out by the operator, and most international legal instruments remove the limitation of environmental civil liability, which results in a disclaimer of the Council of the European Union and require full quantitative and unlimited qualitative redress of the environmental damage caused.

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