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OVERVIEW OF THE LEGISLATIVE STEPS TAKEN TO FOSTER A MORE EFFECTIVE NUCLEAR LIABILITY REGIME

Introduction

1. The Concept of State Responsibility – The Draft Articles of the *International Law Commission*

The concept of State responsibility had formerly been considered and put forward by the international scientific community. After cumbersome but protracted efforts made by various forums of international policy-makers and actors, the *International Law Commission* (ILC)[1] adopted a quasi-treaty text designated as ILC's Draft Articles of 2001 on the issue of State responsibility (*Responsibility of States for Internationally Wrongful Acts*) without a binding force on States, regarding that these Articles have not yet been materialised in the form of a binding international treaty. Nevertheless, we should take them into account as a *communis opinio doctorum* and a presumptive summary embodying and preserving the main theoretical concepts of State responsibility, which shall manifest themselves either in customary international law or in State practices, or, in both of these sources of international law (Article 38 of the Statute of the International Court of Justice)[2]. Evidently, it is deemed essential that the provisions of the Draft Articles have been surveyed and analysed in view of the concerned legal area parallelly to nuclear legal conventions, on the one hand, if the regulation of State responsibility relating to instruments of nuclear law has not been existed, or, on the other hand, if the governing regulation would be incapable of encompassing all relevant aspects of the aforementioned responsibility under the framework of nuclear and international law.

In general point of view, the ILC had adhered the traditional inter-State approach in its codification work; thereupon the ILC adopted its Draft Articles, irrespective of the increasingly emerging question of the responsibility of non-State actors, such as multinational financial entities or individuals. Obviously, under public international law, if an act of any State has been wilfully and maliciously committed, or the given act would have been committed in a gravely negligent manner implying a breach of an international obligation, these facts (causal relation between cause and the result of a conduct imputable to the State as damage or harm) would entail the responsibility of the State, therefore, compensation and reparations shall supervene pursuant to the generally accepted rule of customary international law. So, the term and legal content of State responsibility shall be distinguished from liability-based issues (irrespective of its two fragments, the concept of State and civil liability) by means of exact concept-formation in the general area of international law (*lex generalis*) and specifically, under the increasing but sporadic sphere of nuclear law (*lex specialis*).

Additionally, the codification process conducted by the ILC was frequently self-contradictory by reason of the departing legal thinking of the five rapporteurs (*Garcia Amador*, *Ago*, *Riphagen*, *Arangio-Ruiz* and *Crawford*), scilicet, their different conceptions deriving from their diverse backgrounds attributed to divergent State establishments and legal systems. Therefore, in the ambit of the problematic and controversial distinction tending to exonerate the substantial *State responsibility vs. State liability debates* often flared up, which basically influenced the fundamental approach of this subject matter. The Draft Articles unambiguously contain only rules concerning State responsibility according with 'State responsibility for internationally wrongful acts' phrase, meaning that the Draft Articles precluded the possibility of raising liability-issues upon the interpretation of its text, since it applied the phrase of 'wrongful act'. The term 'responsibility' postulates the wrongful act of a State[3], while the term 'liability' for injuries may be considered to be attached to lawful and unlawful acts, as well[4]. Presumably, this distinction had been conducive to the decision on which the ILC further divided the liability topic into two projects in 1997. Subsequently, the first project of the ILC in this issue embodied the work on primary obligations relating to the *prevention of transboundary harm from hazardous activities*, while the second project concentrated on *liability for injurious consequences of acts not prohibited by international law*. In the characterization of this ramification, the ILC evolved transcending rules and clauses being severally peculiar to both subjects considering the virtual interrelationship of the given spheres[5].

2. State Responsibility in the Context of Public International Law

The exact distinction between the contradicting and ambiguous notions of responsibility and liability implies two different approaches to the similar and analogous problem. Derivatively, these terms are sometimes applied

without discretion to these subjects in manners, which indicates that the occurrence and evidences of damages or losses are not a sufficient or even a necessary basis for responsibility, and the conditions of the two terms were symbiotic and identical[6].

According to the strict point of view of international law, however, responsibility and liability obtain, when a breach of an obligation laid down under international law has occurred, and this act or omission *per se* does not need to involve the requirement of the element of either negligence or malice. As for the standpoint of ILC, as it is manifest in the abstract of the Draft Articles, every internationally wrongful act of a State entails the international responsibility of that State (Article 1 of the Draft Articles)[7]. Thus, the received scientific and judicial view preserved in Article 1 covers the relations having arisen under international law from the internationally wrongful act of a State (either act or omission, or both of them), whether such relations are limited to the wrongdoing State and one injured State or whether they extend also to other States or indeed to other subjects of international law; or whether they are centred on obligations of restitution or compensation or also give the injured State the possibility of responding by way of counter-measures[8]. The responsibility of a State embraces the duty to make reparations for the damages[9], resulting from a failure following by the fact that the State concerned has not complied with international obligations incumbent upon the State, moreover this State shall have been strictly and legally responsible for accomplishing its mandatory international obligations. Consequently, the rules of State responsibility stipulate and determine whether international obligations have been breached. Thus evidently, an internationally wrongful act entailing State responsibility through the breach of an obligation shall be followed by sanctions[10] (such as reparation, restitution and compensation[11]).

Contrary to the aforementioned statements, it has to be recorded, in sum, that the exact normative concept of State responsibility is still missing both from the legal system of international and nuclear law; concretely, there are no accepted and established binding rules existing in relation to the discussed field of State responsibility.

3. Liability in the Context of Public International Law

The term 'liability' comparing with the term 'responsibility'[12] has been put forward as an issue in cases where damage or loss was incurred as a result of an activity having been conducted neither in breach of an international obligation, nor in breach of the States' *due diligence* obligations (lawful acts involving transboundary damage).

In the 1960s and 1970s, liability and compensation conventions of considerable number were concluded in order to address two of the most hazardous and significant transboundary risks: oil pollution at sea and nuclear accidents[13]. With the substantive thoughts of *Fitzmaurice*, „since the early 1960s, two separate major regimes have co-existed"[14]. These genuine codification techniques have shown exemplar paradigms influencing over the rapid progress on codification of the forthcoming decades. In the 1970s and 1980s, in the midst of the ILC's activities related to the elaboration of the notion of State responsibility, ILC gave its expression for establishing a new category of 'liability' having denominated its project as *International Liability for Injurious Consequences Arising out of Acts Not Prohibited by International Law.*

In the 1990s, during the debates and the legislation process within the framework of the Sixth Committee of the U.N. General Assembly concerning the term 'liability' (State and civil, as well), several possible options were evolved and elaborated upon the idea that the term 'liability' should be ensued from significant transboundary harm (including the type of high-risk harms, such as nuclear damages and losses, etc.). Thus, State liability consists in a liability for damages caused to another State (the damage shall be emerged beyond the borders of the origin State, as the inter-State approach imposed by the ILC requires and admits the liability issue) according to international law, while civil liability embodies the liability of a natural or legal entity for damages caused to any other entity on grounds of municipal and international law. From a doctrinal point of view, on principle and beyond civil liability[15], State liability must be primary, because States have ultimate responsibility for all activities within their jurisdiction and control and must be held to account for any injurious consequences[16]. At its forty-ninth session, in 1997, the ILC's Working Group concluded an agreement in which the expert body split the topic into two parts separately[17], one was under the working title of *prevention of transboundary damage from hazardous activities*[18] and the other was under the working title of *international liability in case of loss from transboundary harm arising out of hazardous activities*[19].

The range of various categories of liability specified in the position of the Sixth Committee had been diverged from the customary classification of the fault-based[20], strict[21] and exclusive[22] liability in pertinent conventions and the doctrinal theories elaborated by jurisprudence on the given subject. The concept of strict liability and the channelled liability of (a) State(s) had been extinguished, since they were only applicable in the regime of civil liability-based documents, where exclusively the operator was liable (or responsible) for activities causing transboundary effects, including nuclear accidents or radiological emergency. According to the presumptive objectives of ILC, residual (subsidiary or supplementary, as well) and joint or multiple liability shall govern the regime in which States ought to compensate victims, who were not satisfied by the operator (after the exploitation of the insufficient subsidiary compensation fund) on the obvious ground that the State concerned has failed to fulfil its obligations and a causal relation between that failure and the emerging damage obtains.

The entire topic of liability (irrespective of State or civil liability aspects within the area of international or nuclear law as a *ius specialis*) has remained controversial throughout its history in the ILC's procedure due to the interfering conditions attributed to the peculiarities of international law and the uncertain character of the accountability for State-involved injurious activities being discussed aforesaid[23]. All the while, the Draft Articles have pretended to clarify the contradictions and anomalies persisting in connection with the existence of a breach of an inter-

national obligation. Being compatible with this attitude, Article 12 of the Draft Articles reads as follows: "[*T*]*here is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character.*"

As ILC's work had legibly demonstrated in the early phase of the codification process, a State could be liable even for acts that were perfectly lawful, but in the event of injurious consequences these acts shall be resulted in the admission of liability of the origin State. As opposed to the doctrinal concept of State responsibility, which arises exclusively from faulty, malicious and unlawful acts prohibited by international law, the facts of the international liability of a State may arise from both lawful and unlawful acts. Accordingly, increasing number of rules of liability for acts not prohibited by international law are irrespective of whether the activity was faulty or lawful; consequently, they emphasise the harm regardless of the conduct in this rudimentary phase **of institualization**.

4. Liability-based Issues within the Entire Nuclear Field

After the tragic occasion of Chernobyl accident in 1986, it was indisputable that the civil liability regime was seriously deficient and called for rectification, as well. Aware of the well-known fact, the former Soviet Union (the Installation State) was not a Party to either of the respective conventions; the issues of due reparation mechanisms in line with issues of responsibility and/or liability had been left out of consideration. Nonetheless, both liability regimes in given time set the upper limit of the operator's liability at USD 5 Million, thus in case, if the Soviet Union would have been a Party to either of the liability regimes, the contingent amount of compensation would have been insignificant, having counted the immense value of harmful transboundary effects in mind.

Re-examining the present status of the legal background in the light of the time has passed, it has to be mentioned that several fundamental liability-based multilateral treaties have been signed but have not yet entered into force in the domain of nuclear law[24]. Being supplemented with the national legislation of the States, where exclusively the objective liability rules govern the field, it goes without saying, the questions of liability have to be solely emphasized in the shape of absolute liability[25]. The hypothetical responsibility-based nuclear field in line with the commitment of compensating damages and losses would undoubtedly entail the undesired outcome being illustrated as the 'escape' of States from the whole nuclear regulation process. The same as in international law, in the field of nuclear law there is a demand, so the more participating States are in the process irrespective of the other, more sufficient and less restricted contingent option being existed, it should be appreciated as the better choice leaving the more efficient but less accepted option out of consideration in the present point of view. Additionally, for asserting these international endeavours, more and more matters in question are governed by absolute/objective liability in the territory of municipal laws by means of State acts and governmental decrees on third party nuclear liability issues. The core subject of these laws on the sphere of absolute/objective liability should be regarded as a joint and mutual governing general principle of the nuclear legislation of States; either considered to be as a guidance for the future codification prospects of States, or labelled as a direct source of the international domain of nuclear law in absence of binding international treaties and concerning applied international customs of the field.

The primary and main principle of the nuclear liability regimes is the clause embodying the principle of channelling the liability that the *operator*[26] *of the nuclear installation is exclusively liable* for damage emerging from accidents at its installation or during the transport of nuclear substances to/from that installation[27]. Hence, the conventions require operators to hold liability insurance or other financial security, on terms specified by national authorities, unless the operator is itself a State[28].

Nevertheless, relevant steps have been taken in the framework of the ILC, the International Atomic Energy Agency (IAEA) and the Organisation for Economic Co-operation and Development – Nuclear Energy Agency (OECD-NEA) for drafting the direct or, in more frequent ways, the residual liability of States within the scope of obligations by means of providing additional pooling-type amounts or guaranteeing complementary financial and insurance-based mechanisms through the States. The fundamental underlying idea of the subsequent regulatory work derived from the general and global recognition that exclusively sufficient financial resources shall be made available for the State to ensure the compensation of victims of an accident[29]. Providing compensation for victims on a residual basis has been considered, since States are deemed liable to remedy the defects of a civil liability regime according to the specific restrictions related to the tiers of compensation. States have the obligation to compensate victims through its public funds and resources regardless of the fact whether the States had carried out activities causing damages (*de iure* exemption, but *de facto* liability to pay or compensate). In response to the previous fundamental shift, during the last decades an appreciable change of approach had been discerned, since the concept of State liability was formulated and transformed into scientific thought or pivotal provisions of a few draft conventions.

5. The Concept of Liability and the Future Prospects within the Single Liability Regimes.

(To be continued).

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[1] According to the provision of Article 13 of the UN Charter, the „General Assembly shall initiate studies and make recommendations for the purpose of […] encouraging the progressive development of international law and its codification." For administering this duty, the General Assembly adopted Resolution 174 (II) of 21 November 1947, establishing the ILC and approving its Statute. As illustrated by Article 1 of the Statute of the International Law Commission, „[T]he International Law Commission shall have for its object the promotion of the progressive development of international law and its codification."

[2] As the last rapporteur (James Crawford of Australia) of the project stated, regardless of the eventual form of the articles it is to be hoped that they will make a significant contribution to the codification and progressive development of the international legal rules

of responsibility. See, Crawford, James: The International Law Commission's Articles on State Responsibility. Cambridge University Press, Cambridge, 2002. 60.

[3] The responsibility of States for transboundary damage depends principally on objective fault, i.e. a failure to act with due care or diligence, or a breach of treaty, or the commission of a prohibited act. Cf. Boyle, Alan: Globalising Environmental Liability: The Interplay of National and International Law. Journal of Environmental Law, Vol. 17 (2005) No. 1, 3.

[4] In the approach of the Black's Law Dictionary, the term 'liability' means „the quality or state of being legally obligated or accountable". See, Black's Law Dictionary (ed.: Garner, Bryan), Thomson-West, St. Paul, 2004. 932. In this sense, by way of comparison with the term 'responsibility', liability does not require from the activity resulting damage to be unlawful and wrongful, but has a vigorous substantive content of being a financial and pecuniary obligation in the form of remedies in order to obtain compensation for the losses incurred.

[5] See in details, Boyle: op. cit. 3-6. and Crawford: op. cit. 75-76.

[6] With a laconic but pertinent remark, „liability or responsibility is the bond of necessity that exists between the wrongdoer and the remedy of the wrong." See, Black's Law Dictionary, 932.

[7] An internationally wrongful act of a State may consist in one or more actions and omissions or a combination of both. Compare, Crawford: op. cit. 77.

[8] See in details, ibid. 79-80.

[9] The obligation to make full reparation is the second general obligation of the responsible State consequent upon the commission of an internationally wrongful act; and it is regarded to be an immediate corollary, as Crawford illustrated. Cf. Crawford: op. cit. 201-202.

[10] Having highlighted the widely accepted view of the theory of international law, Nagy declared that „a sanction is applied by the injured party in all instances, whereas reparations are paid by the wrongdoer." See, Nagy, Kőroly: The Problem of Reparation in International Law. Questions of International Law, Volume 3. (1986) 174.

[11] The notions and quasi-definition of restitution, reparation and compensation as rules of customary international law can be found in Articles 31, 35 and 36 of the ILC's Draft Articles.

[12] On the discrepancies and feasible clarification of the emphasis, see, Horbach, Nathalie: The Confusion about State Responsibility and International Liability. Leiden Journal of International Law, Vol. 4 (1991) No. 1, 47-74.

[13] See e.g., the 1969 International Convention on Civil Liability for Oil Pollution Damage; the 1971 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage; the 1971 Convention relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material; the 1960 Paris Convention on Nuclear Third Party Liability; the 1963 Brussels Supplementary Convention; the 1963 Vienna Convention on Civil Liability for Nuclear Damage and the 1964 Additional Protocol to Amend the Paris Convention. Prior to the efforts taken in the early 1960s, the 1954 International Convention on the Prevention of Pollution of the Sea by Oil has already been signed for attempting to prevent the sea from impairment caused by leaking oil.

[14] See, Fitzmaurice, Malgosia: International Responsibility and Liability, in: Bodansky, Daniel – Brunnйe, Jutta – Hey, Ellen (eds.): The Oxford Handbook of International Environmental Law. Oxford University Press, Oxford-New York, 2007. 1025.

[15] In order to attract broad adherence to the nuclear liability conventions, States must have been committed themselves in a legislation process leading to the general acceptance of civil liability as a first and principal layer of the liability issue. Birnie and Boyle represent the doctrinal point of view as the possibility of State responsibility is not precluded, but the scheme of the civil liability treaties involves States only as guarantors of the operators' strict liability, or in providing additional compensation funds. According to the concomitant of their position, in neither case does the polluting State bear responsibility for the whole loss. See further, Birnie, Patricia – Boyle, Alan: International Law and the Environment. Oxford University Press, Oxford, 2002. 473.

[16] Cf. De la Fayette, Louise: Towards a New Regime of State Responsibility for Nuclear Activities. Nuclear Law Bulletin, No. 50 (1992) 28.

[17] Compare, Yearbook of the International Law Commission. Vol. II (1997) Part Two, 59. Paras. 165-167.

[18] In 2001, the ILC adopted the Prevention of Transboundary Harm from Hazardous Activities and submitted to the U. N. General Assembly.

[19] In 2006, the ILC adopted the Draft Principles of on the Allocation of Loss in the Case of Transboundary Harm Arising out of Hazardous Activities and submitted to the U. N. General Assembly.

[20] Pursuant to the generally accepted scientific view in municipal laws, fault liability is based upon some degree of blameworthiness. See, Black's Law Dictionary, 933.

[21] Referring to the analogous case of civil law in municipal legal systems, strict liability shall be illustrated as the possible type of liability that does not depend upon actual negligence or intent to harm, but that is based on the breach of an absolute duty to make something safe. Cf. Black's Law Dictionary, 933.

[22] On the double motive of the acknowledgement of the operator's exclusive liability, see further, Civil Liability for Nuclear Damage, adopted by the Board of Governors of the IAEA on 2 September 2004. See, GOV/INF/2004/9-GC(48)/INF/5.

[23] Nevertheless, as Birnie and Boyle highlighted, the successful articulation of criteria for adopting a general principle of strict liability applicable to cases of environmental harm would be an invaluable contribution to the subject. Compare with, Birnie-Boyle: op. cit. 190.

[24] The 1960 Paris Convention on Nuclear Third Party Liability, the 1963 Brussels Supplementary Convention, the 1963 Vienna Convention on Civil Liability for Nuclear Damage, the 1964 Additional Protocol to Amend the Paris Convention, the 1982 Protocol to Amend the Paris Convention and the Brussels Supplementary Convention, 1988 Joint Protocol Relating to the Application of the Vienna Convention and the Paris Convention and the 1997 Protocol to Amend the Vienna Convention have been signed and entered into force in this field.

Other liability-based instruments, as the 1997 Convention on Supplementary Compensation and the 2004 Protocol to Amend the Paris Convention (and the 2004 Protocol to Amend the Brussels Supplementary Convention, as well) have been signed but not yet entered into force.

[25] As the facts about the double and comprehensive legislation stand, national tort laws or civil codes may also supply evidence of a general principle of strict or absolute liability for dangerous or unusual activities, but such principles do not invariably cover

nuclear installations. Furthermore, a single important benefit of the nuclear conventions is thus to clarify and harmonize the standard of liability. Compare, Birnie-Boyle: op. cit. 478.

[26] The notion of 'operator' incorporates the licensee or other designated or recognized entity. The duty of designation or recognition shall be within the competence of the national government or the national legislator body, pursuant to the sovereign provisions of the municipal legal system. See, Article 1 a. vi) of the 1960 Paris Convention, which illustrates that the ""[O]perator" in relation to a nuclear installation means the person designated or recognised by the competent public authority as the operator of that installation." Furthermore, akin to the previous definition, Article I 1. c) of the 1963 Vienna Convention reads as follows: ""[O]perator", in relation to a nuclear installation, means the person designated or recognized by the Installation State as the operator of that installation."

[27] As for this issue in the light of the sphere of liability regimes, see in details, Horbach, Nathalie: Nuclear Liability for International Transport Accidents under the Modernised Nuclear Liability Conventions: an Assessment. International Journal of Nuclear Law, Vol. 1 (2006) No. 2, 189-198.

[28] See, Birnie-Boyle: op. cit. 479. However, regardless of the operator's financial solvency, funds should thus be available in the event of an accident. Compare, ibid.

[29] See in details, Lamm, Vanda: The Protocol Amending the 1963 Vienna Convention. In: International Nuclear Law in the Post-Chernobyl Period, OECD-NEA, Paris, 2006. 174.

Резюме

Правові теорії державної відповідальності та державної/цивільної відповідальності за неправомірні дії та дії, заборонені міжнародним законодавством, тривалий час були предметом дискусії в міжнародному публічному праві. Національне законодавство регулює системи цивільної відповідальності у полі приватних законів громадян держави. Як протилежне визначенню поняття цивільної відповідальності, національним законодавством має бути визначене універсальне поняття на міждержавному рівні, що забезпечить захист та попередження єдиної системи державної відповідальності в державі. Проблема державної відповідальності за вчинення ядерної шкоди порушує питання, які мають бути визначені у рамках загальних міжнародних правил, що стосуються питань відповідальності. Окрім того, зменшення фінансових наслідків від ядерної шкоди шляхом встановлення певної компенсації через базу відповідальності за вчинені дії встановлює важливий компонент режиму для безпечного використання ядерної енергії.

Ключові слова: державна відповідальність, державна і цивільна відповідальність, МПК проекти статей, Паризький режим, Віденський режим.

Резюме

Правовые теории государственной ответственности или государственной/гражданской ответственности за неправомерные действия и действия, запрещенные международным законодательством, долгое время были предметом дискуссии в международном публичном праве. Национальное законодательство регулирует системы гражданской ответственности в поле частных законов граждан государства. Как противоположное определению понятия гражданской ответственности, национальным законодательством должно быть определено универсальное понятие на межгосударственном уровне, что обеспечит защиту и предупреждение единой системы государственной ответственности в государстве. Проблема государственной ответственности за нанесение ядерного вреда ставит вопросы, которые должны быть определены в рамках общих международных правил, которые касаются вопросов ответственности. Кроме того, уменшения финансовых последствий от ядерного вреда путем установления определенной компенсации через базу ответственности за совершённые действия, устанавливает важный компонент режима для безопасного использования ядерной энергии.

Ключевые слова: государственная ответственность, государственная и гражданская ответственность, МПК проекты статей, Парижский режим, Венский режим.

Summary

The legal theories of State responsibility and State/civil liability for injurious and internationally prohibited acts have been in the focus of public international law for a long while. By means of domestic legislation, domestic laws govern the systems of civil liability within the area of private laws of individual States. As opposed to the framework of civil liability determined by diverse domestic rules, exclusively a standard regulation framed at an interstate level shall secure and preserve the uniform system of State liability. Obviously, the issue of State responsibility for nuclear damages raises specific questions to be examined in the framework of general international regulations related to the spheres of responsibility and liability. Furthermore, the mitigation of the financial consequences of a nuclear accident through prompt and adequate compensation via liability-based issues shall compose an important component of the regime for the safe utilization of nuclear energy.

Key words: State responsibility, State and civil liability, ILC's Draft Articles, Paris regime, Vienna regime.

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