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- Environmental Liability -

Research Report

**Environmental Liability in International Law:
Towards a Coherent Conception**

by

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Summary

This book focuses on liability provisions adopted and applied by states in environmental treaties and protocols as well as the international jurisprudence and non-contractual law creation processes as the decision-making of the Iraq Claims Commission. The international practice is supplemented by the further development of liability instruments in national legislation in Germany and the United States of America. Additionally, attention is drawn to the contribution of private international law and international civil procedure regarding a more effective protection of the environment through the usage of conflicts techniques as means to ensure that the relatively most stringent domestic environmental liability law applies to a given case. Against the backdrop of the development of state responsibility and liability provisions in international law, the final chapter attempts to compile coherent elements of liability regimes.

The book shows that the international and the European level are interdependent regarding standard-setting and compliance-improving in international environmental law. The Council of the European Union demonstrated this connection once again with a decision authorising the Member States to sign and ratify the International Convention on Civil Liability for Bunker Oil Pollution Damage in the overall interest of the European Community. The Convention is designed to be conducive to adequate, prompt and effective compensation for persons who suffer damage caused by spills of oils, when carried as fuel in ships' bunkers. In both law systems, the law creating process in the field of liability law is deeply influenced by expert bodies. The International Seabed Authority approved the Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area, including liability provisions, on the basis of the proposal made by such an expert body. The Regulations refer to the liability provisions of the Convention on the Law of the Sea and establish a fault-based liability for the contractor. According to Regulation 30, the responsibility of the contractor shall continue after the completion of the exploration phase, in particular if damage to the marine environment is concerned.

The Protocol on Civil Liability and Compensation for Damages caused by the Transboundary Effect of Industrial Accidents on Transboundary Waters establishes the liability regime that was postulated by the two Conventions and prepared by the elaboration of a Code of Conduct on Accidental Pollution of Transboundary Inland Waters. The proposal to draw up a legally binding instrument was first made in the wake of the accident at a tailings dam at Baia Mare (Romania) in January 2000, when the spillage of 100,000 tons of waste water with highly toxic pollutants, including cyanide, led to massive water pollution of the Tisza and the Danube Rivers. The Protocol aims to fill one of the major gaps in international environmental legislation, establishing liability for water related damages resulting from industrial accidents. This Protocol is still significant for the reluctance of States to establish state liability. It is based on the strict liability of the operator on the one hand and fault-based liability of any person on the other hand. The Protocol did not follow the broad definition of damage of the ECE-Guidelines nor does it contain any provision with respect to the threat of damage, and it remains silent in so far as substantive rules on state liability are concerned. That definition would have open the way for compensation of ecological damage that does not stop at mere pecuniary repayment of reinstatement costs actually incurred or yet to be incurred or even costs of preventive measures. It is conceivable that in cases where the elimination of damage would be impossible or unreasonable, equivalent ecological substitute measures could be taken, for example introducing a similar species into the damaged area to replace the destroyed species. Furthermore, the Protocol accepts a wider range of circumstances under which the liability of the operator is excluded.

The international and the European level influence the national legal sphere. The Paris Convention gives an example for the far reaching influence of international environmental agreements, as it is directly applicable law in Germany. This Convention contains the principles of liability. The liability provisions of the German Nuclear Energy Act merely have a supplementary function. Under article 3 of the Paris Convention (in conjunction with section 25 paragraph 1 of the Nuclear Energy Act), the owner of a nuclear installation is liable for damage if it is proved that the damage was caused by a nuclear incident involving either nuclear fuel or radioactive products or waste in the installation or nuclear substances coming from the installation. The Paris Convention covers as the cause of the damage not only failures and accidents that occur suddenly, but also the gradual escape of radioactive contamination or radiation exposure that occurs in the course of normal operation. The precondition for liability of the operator of the nuclear installation is that the injured party proves the causal connection between the harmful incident and the damage. This often causes considerable difficulties, because the process of scientific discovery, especially with regard to the causes of long-term damage, is by no means complete.

Likewise, the compensation mechanism of the Iraq Claims Commission is centering around the evidentiary requirement and the burden of proof. Each claimant is responsible for submitting documents and other evidence which demonstrates satisfactorily that a particular claim or group of claims is eligible for compensation. Upon these documents which are presented to the Panel, it has to decide about the admissibility, relevance, materiality and weight of any documents and other evidence submitted. No loss shall be compensated by the Commission solely on the basis of an explanatory statement provided by the claimant. Compensation is recommended in relation to the evidence presented to it. Due to the evidentiary requirement set up by the Panel, the evidence provided by the Claimants is considered together with the evidence or information supported from Iraq or other sources, to determine the circumstances and amount of the loss for which compensation is sought, to decide, whether the damage or loss in fact was a direct result of Iraq's aggressive conduct. In cases where the evidence presented demonstrates that compensable losses or expenses were incurred but the evidence does not enable the Panel to substantiate the full amount of the claimed losses or expenses, the Panel recommends a lesser amount.

Within the range of application of the new EC-Directive on Environmental Liability the environmental responsibility of any operator will be strengthened and combined with the effects of special and general prevention which any system of individual responsibility evolves. In order to prevent environmental losses, the reporting obligations of operators in suspected cases of imminent threat of damage and the right of natural and legal persons to submit to the competent authority any observations relating to instances of environmental damage are promising as far as the prevention of damage is concerned. However, the Directive does not provide for criteria of imputability and therefore, the effect of remedial actions according to the Directive will depend on national legislative and administrative measures improving the allocation of damage to the environment, for example specifying the supervision of occupational activities.

Although the Directive does acknowledge that the European System is influenced by international environmental standards, a self contained regime is established as far as the implementation of these standards through liability is concerned. This self contained regime can be explained as a concept of imposed order that provides its own and complete rules and mechanisms within a certain range of application. However, the system is already shaped to be integrated within the international system, as it will not be applicable in cases where liability under certain international conventions is established.

Thereby, the liability legislation within the European Union illustrates, that the principle of subsidiarity applies in two directions: first, with regard to the Member States acting on behalf of their competencies, and second, as far as international conventions regulate a matter, while

the Community would be authorised as well. Thus, the Community recognises, that Member States transfer competencies not only to the European, but also to the International level, acting in international institutions or through the Conference of State Parties.

The models of subsidiary and supplementary State liability in European Law for non-implementation of European secondary legislation are of particular interest for the development of coherent conceptions of liability regimes in international environmental law, designed to cover not only the liability of private persons, but also the liability of States. According to the Conditions governing State liability, reparation for loss or damage caused to individuals in the case of environmental harm for which the State is responsible is guaranteed under threefold criteria: the rule of law infringed must be intended to confer rights on individuals, the breach must be sufficiently serious, and there must be a direct causal link between the breach of the obligation incumbent on the State and the loss or damage sustained by the injured parties. Thus, if a damage arises after the implementation period is phased out and the directive's implementation would have prevented the damage in question, an individual might claim for compensation in the national courts of the Member State according to the conditions of State liability set by the European Court of Justice. As the Court held in *Delena Wells/Secretary of State* individual liability on the basis of the directive itself is excluded.

Present-day environmental liability law in Germany has a large number of structural features. Apart from the fundamental division into private and public environmental liability law and the subdivision of civil liability into tort liability, strict liability and beneficial impairment liability, it is possible to distinguish between conduct-related liability law (whether on the basis of media-oriented or substance-oriented environmental rules) or installation-related liability law, and with regard to the holder of the claim one can differentiate between claims by public authorities and claims by private persons. The liable party may be the state, in other cases a private person, and occasionally even a fund. There are also differences in the requirements regarding evidence of causation and in the scope of liability. Other features are the question of multiple polluters, the legal significance of authorisation for the establishment or exclusion of liability obligations, the injured party's information rights, the question of conflicting legal rules, and more recently the introduction of the list principle.

The effectiveness of the individual liability elements results from the individual combination of the structural features described above and their capacity to remedy effectively situations of environmental damage. For this reason the following analysis of German environmental liability law is based on the above-mentioned criteria of the individual liability elements, whereas in the assessment the focus will be on the effectiveness of the latter.

In German jurisprudence there is a tendency to draw particular attention to the singularity of the traditional German exclusion of compensation for immaterial aspects of pain and suffering on an international comparison. The claim that there is a fundamental difference between fault-based and strict liability with regard to claims for compensation for pain and suffering is not tenable, however.

Of particular interest and highly controversial is the issue of extending liability to damages which result from certain lawful activities. As is well known, the idea of strict liability is based on the concept of accepted risk. Anyone who operates an installation or handles substances dangerous to the environment must, to offset the danger he creates, answer for the damage that results from these activities regardless of fault. It must be borne in mind that permission to engage in an activity cannot and should not regulate all possible actions that such an activity may embrace. For example, authorisation for a particular form of production leaves the actor a wide range of options which may have the effect of causing or preventing damage. The possible actions open to the actor do not stop where the risk is permitted, but in most cases they are impossible to categorise in terms of fault/no fault. Thus the fact that the risk is permitted does not relieve the operator or actor of his responsibility.

Basically all damage resulting from normal operation is covered by the Environmental Liability Act, the Water Resources Management Act and the Draft of the Environmental Code.

According to section 6 paragraph 2 Environmental Liability Act, the presumption of causation does not apply if the installation was operated normally, in other words if the special operating duties were complied with and no disturbance of operation occurred. In such a case the injured party bears the full burden of proof for the causal connection between the operation of the installation and the damage. In the Professors' Draft of the Environmental Code, by contrast, the victim's legal position is improved by the fact that even in cases of normal operation the basic rule of section 121 paragraph 1 of the Professors' Draft applies, with the consequence that the injured party only has to show an overwhelming probability of a causal connection. Thus the stringency of the evidence requirements applied determines whether the easing of the burden of proof for the injured party results in an excessive burden for the injuring party, in the sense of a liability based on mere suspicion.

Another unsolved problem, which in terms of legal theory is not far removed from the controversial issue of including damage resulting from lawful activities operation in strict liability, is the question of the legal effect of public law authorisations. If such an authorisation exists, and if the operator complies with its requirements, then the operation of the installation is, apart from any accidents or incidents, lawful normal operation.

It has also emerged that private environmental liability law, despite the existing substantive foundations for claims, is not very efficient. The problems of enforcing civil liability claims arise to some extent from the difficulty of proving a causal connection between the conduct of the defendant, the violation of the object of legal protection, and the damage.

The effectiveness of the law of torts is equally reduced by the need to show a causal connection between a specific environment-oriented conduct and a case of actual damage. In the context of liability in tort, the difficulty of proving the causal connection is particularly serious, because the law of torts is not confined to spatially limited situations with a "manageable" number of emitters. At this point mention must once again be made of the problem of "cumulative and remote damage". Moreover, in the establishment of liability under section 823 Civil Code there is no presumption element like the one in the Environmental Liability Act. On the basis of the standard evidence criterion of subjective conviction pursuant to section 286 Code of Civil Procedure, however, court practice to date has nevertheless succeeded in arriving at appropriate results. It also holds out the prospect of an easing of evidence requirements for the injured party, ranging right up to reversal of the burden of proof.

Another problem area of German environmental liability law is that of "contaminated sites" (*Altlasten*). Whereas the problem of liability for remote damage due to multiple causes still lacks a convincing solution, efforts to deal with contaminated sites by using the relevant legislation on waste and contaminated sites, water law regulations and traditional police law have met with a reasonable measure of success. Given the difficulties involved in identifying the person who is actually responsible under existing law for the soil pollution in the individual case, there is a special need here for funding models in cases where the individual parties responsible cannot be determined. The Federal Soil Protection Act enacted in 1998 does not include such provisions.

The third problem area of liability for environmental damage relates to "ecological damage". There would seem to be various approaches to dealing with "ecological damage" in liability law in a way that goes beyond the present legal situation. It has for example been suggested that "rights of nature" be created, violation of which would give rise to claims for compensation. One of the points that would have to be clarified, however, is the question of who is to be granted powers to assert such claims for compensation.

In conclusion, it may be said that German environmental liability law as it stands today, in spite of the Environmental Liability Act and the regime elaborated in the draft of the Environmental Code – General Part, still displays a considerable need for further development. There is an urgent need for a comparative legal study, preferably with US law, which can claim promising solutions especially with regard to the establishment of compensation funds.

The Environmental Liability Directive proposed by the European Commission in 2002 adapts elements of US strict statutory environmental liability to the EU setting. The Memorandum accompanying the EU draft points to the US experience to support the assertion that such liability prevents pollution. Critics complain that the Commission fails to provide concrete evidence to support this conclusion, and that it misinterprets the US experience and underestimates criticism and costs of US style strict liability. While empirical evidence that strict liability prevents pollution indeed appears scarce, the fact remains that the US public and authorities basically accept strict liability as necessary to address certain environmental problems, especially those involving past contamination. The chapter on US law seeks to set out why this is the case, keeping the draft Directive – and these criticisms – in mind in presenting the basic elements of the relevant US statutory systems.

Statutory strict liability is an essential part of environmental protection at both the federal and state level in the United States of America. There is no single national environmental liability act comparable to the German *Umwelthaftungsgesetz*. Instead, a small number of federal statutes regulate liability for environmental damage caused by a specific hazardous substance or to a specific protected area or medium. The Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA) and the Oil Pollution Act of 1990 (OPA) remain the two most important such laws. CERCLA, also known as the Superfund Act, was passed in reaction to the 1978 discovery of 80,000 tonnes of toxic waste under a school and neighborhood in Love Canal, New York. The Oil Pollution Act was enacted the year after the tanker *Exxon Valdez* spilled 11 million gallons of oil into Prince William Sound off the coast of Alaska. OPA primarily regulates liability for the impacts of oil spills and oil dumping in American waters. CERCLA has a much wider ambit, covering emissions caused by hazardous substances not only in the water, but also on land, imposing liability for remediation costs and environmental damage on land where hazardous waste is suspected. Both laws are the product of a single legislative process, begun in the 1970s with the aim of enacting comprehensive legislation on liability for oil and a wide range of hazardous substances. Following Love Canal, CERCLA was separated out from the legislative process and quickly passed to cover only hazardous waste. For its part, OPA must be seen not only as a reaction to a single oil spill but also as an alternative to the international system of the Brussels Civil Liability Convention for Oil Pollution rejected by the United States of America. Both CERCLA and OPA – in line with hazardous waste legislation in the individual states – also address liability for less serious environmental damage that does not attract national attention.

In addition to CERCLA and OPA, three more acts complete the system of statutory federal environmental liability: the Federal Water Pollution Control Act of 1972/1977 (Clean Water Act), the Trans-Alaska Pipeline Authorization Act of 1974, and the Marine Protection, Research and Sanctuaries Act of 1988. Unlike Germany, there is no comprehensive federal law on liability for genetically modified organisms. The Clean Water Act (CWA) originally regulated liability for spills of hazardous substances and oil into federal waters. Since OPA entered into force on 18 August 1990 the CWA's environmentally relevant liability provisions apply only to oil pollution damage affecting federal interests occurring before that date. The Trans-Alaska Pipeline Authorization Act of 1973 (TAPAA) covers only liability for damage occurring either in the vicinity of that pipeline or as a result of pipeline oil discharged from ships prior to OPA's entry into force. The Marine Protection, Research and Sanctuaries Act

(MPRSA) regulates liability for harmful conduct within national marine sanctuaries, regardless of the source of the pollution.

September 11, 2001 may have given TAPAA and CERCLA new significance for resources or substances that are potential targets or vehicles for terrorist acts. No terrorism related amendments have yet affected the acts' liability provisions but the Justice Department is stepping up enforcement of pipeline and hazardous waste laws as "vital" to national security. Only tangentially related to liability are such rules, proposed and enacted, as those requiring background checks for hazardous waste contractors. The September 11th Victim Compensation Fund deals exclusively with compensation by the US government for economic and non-economic loss arising from death or injury related to the plane crashes that day. In another vein, relating both to the "war on terror" and the 2003 US-Coalition war in Iraq, government contractors may seek relief from CERCLA and other environmental liability laws, albeit with limited success, under the War Powers Act. Enacted after the attack on Pearl Harbor and renewed during the Korean War, the Act gives the president extraordinary powers to exempt from existing laws certain activities carried out in wartime and, in the words of one commentator, "to circumvent nearly all of the constraints of government contracting," including compliance with environmental laws and regulations.

Despite the primacy of statutory-regulatory environmental liability, there is of course also a fault-based, non-statutory civil liability under US law. Principles of liability for environmental damage have been developed by non-statutory case law for maritime law at both the federal and state level, and for the fields of "toxic torts" and "public nuisance". Generally, these tort principles apply if there is no relevant statutory rule. That being said, non-statutory tort law and indeed criminal liability can play an important role in complementing statutory environmental liability. Recent literature calls for re-examining how tort can be used or the various public and private law instruments can be more effectively combined to provide as full a recovery as possible for damage arising from environmental injury, both in the US and in the European contexts. The individual US states also make a major contribution to the development of environmental liability law. For example, in cases of damage caused by certain hazardous substances that are not covered by CERCLA the states may order remediation measures. They are also not pre-empted from enacting legislation more stringent than OPA to cover discharges of oil into state waters. A majority of the 50 states have enacted such legislation on water pollution due to oil, and over 40 states regulate liability for hazardous waste or environmental liability in general. Notably, some states repealed strict liability legislation in the mid-1990s.

Apart from the problems of transboundary environmental impacts arising under public international law, aspects of private international law and international civil litigation are of crucial importance when victims of transboundary pollution claim the liability of tortfeasors. Private international law and international civil procedure have in the past contributed to a more effective protection of the environment to the extent that conflicts techniques have been used as means to ensure that the relatively most stringent domestic environmental liability law applies to a given case. It is important, in the interests of the practical enforceability of any claims, to take account of foreign authorisations under public law and their implications for private law claims, if the result, as the Austrian High Court of Justice once put it, is not to be a worthless piece of paper.

With regard to the final proposal of a Rome-II-Regulation, it is a welcome step forward that the Commission has given up on finding a single connecting factor in the field of transboundary pollution. Although applying the law of the place where the injury was suffered is convincing as a general rule in tort choice of law, increasing the deterrence of potential polluters by holding them to the standards of the place of acting, too, reflects a well-established and preferable policy in tort conflicts relating to environmental damage.

Turning to the historical roots of liability provisions in international law, one has to consider that the concept of liability in international law stems from instances of repeated violent and xenophobic attacks against foreign citizens.

The concept of liability in international law is based on the first assertion that a state undertaking “hazardous” activities endorses the consequences of the activities, if the activity in question causes injury to another state whether the state breached any international obligation by undertaking the activity in its territory or not. The concept also covers harmful activities that are carried out not within the territory of a state, but within the exclusive economic zone or on the continental shelf under the jurisdiction of the coastal state.

The work of the ILC on state responsibility is completed by the parallel work on “International Liability for Injurious Consequences Arising out of Acts not prohibited by International Law (Prevention of Transboundary Harm from Hazardous Activities)”, which has now been in progress for more than twenty-five years. At the present time there is no indication of whether or when the work will reach a successful conclusion.

Condition for the applicability of state liability is the existence of “transboundary harm”. There was agreement that the “Liability Draft” should only cover activities that may cause (or have caused) “*transboundary harm*”. This is always the case where the activity giving rise to the damage is performed within the territory of one state and the damage is caused within the territory of another state. However, the Draft only covers activities that involve the risk of causing “significant transboundary harm”. By this the Draft means only “physical consequences” of activities involving risks. It thus includes environmental harm, but not, for example, the financial consequences of an economic policy decision. The risk of causing harm is given a flexible definition: the greater the potential harm, the lower its probability needs to be. It is irrelevant for the purposes of the Draft, who – the state itself or private actors – undertakes the hazardous activities.

According to the ILC Draft, States have a duty to prevent or minimise risks of harm. The Draft contains detailed procedural rules on the requirement of authorisation for activities involving risks, the need for environmental impact assessments, notification of the project to the states potentially affected, exchange of information and the duty to consult. States also have an obligation to co-operate in order to prevent significant transboundary harm or, as the case may be, to minimise the risk thereof. This obligation could have been integrated into the general obligation of “due diligence”, but as co-operation is a central element of prevention it is contained in a separate article of the ILC Draft. The obligation of co-operation is to be fulfilled by “all states concerned”, which means the state of origin, as well as the states likely to be affected by the significant transboundary harm.

Although state practice does not necessarily give clear answers and liability objectives are in fact numerous and highly differentiated along the line of their legitimacy and social function, State practice reflects a consensus on very basic objectives in environmental liability law. Accordingly, there are main objectives of liability in environmental law which are repeatedly stated and thus, can be identified as the basis for a contained regime. The Basel Protocol’s objective is, for example, to provide for a comprehensive regime for liability as well as adequate and prompt compensation for damage. Adopting the Protocol on Civil Liability and Compensation for Damages caused by the Transboundary Effect of Industrial Accidents on Transboundary Waters Protocol of 2003, the Conference of Ministers recognised “the importance of civil liability regimes at the national, regional, and in certain cases, even the global level, to serve as mechanisms of internalising the effects of industrial accidents and environmental harm”.

The main objectives and elements of liability in environmental law that can be found repeatedly in respective agreements are the restoration of the environment through the allocation of responsibilities, to give pollution victims a remedy to claim for their losses and to thereby promote the aim of restoration, to deter further pollution and to enforce

environmental standards through both, restoration and deterrence. It is the need for further clarification of the conditions for liability that leads the consensus of States to its limits. Almost all international agreements are based on the principle that the polluter should pay. Consequently, it is not excluded per se that a State causing pollution would be held responsible. There are few examples under Dutch law, where the State's liability has been established in national courts. In recent State practice, the instalments of claims against Iraq illustrate that environmental damages arising out of an internationally wrongful act are subject to compensatory proceedings against the State, initiated by the legal framework set in force through the United Nations Security Council. However, rarely has the State been held liable for environmental damage caused by an act or omission of the government in the past. However, the standards developed by States and applicable to private parties would be the same for the States, making Government failure actionable.

State liability could be established on the basis of an additional failure of the State, i. e. the State's part of contribution to the occurrence of the damage. The State could be subsidiary liable for the whole damage because its action or default contributed to the damaging event or just because there is no possibility for the stakeholder to make compensation actionable. Besides, States could be held liable for the failure to reduce the risks of an environmental damage. Incorporating the precautionary principle, this type of liability could take place even without the occurrence of a damage. Liability of the States would be supplementary in this case, as it would not necessarily exclude the liability of the polluter if a damage were to occur.

While it is fairly possible and useful to develop State liability in order to establish a comprehensive system, one has to take into account the reluctance of States to accept liability of governments for environmental damages. There is, however, State practice indicating that States acknowledge certain duties and recognise that they have to face legal consequences in the case of disregard.

Within the European Union, the Commission's authority to bring an infraction procedure against a State exemplifies the liability of States for their default to increase the probability that a damage might occur. The legal cause for the Member State's liability is not the occurrence of damage, but their breach with an obligation arising under European law. However, even within the European Union, States are not yet willing to bear such a burden. The drafting process of the liability Directive demonstrates this lack of willingness. While the White Paper of the Commission established certain duties of the authorities subsidiary to those of the polluter, for instance, the legally binding wording has been removed to receive the Council's acceptance.

The European Model is in fact the concept where the precautionary principle, that is widely accepted by States, in conjunction with the obligation to implement a sub-national provision introducing an environmental standard, triggers liability. The failure to implement is the causal link for the State's liability. This liability arises out of the general agreement of the Member States to fulfill certain duties under European law. The obligation to give effect to Community's legislation concerns a rule of primary law and is based on state consensus that has been reached before and that is the Union's basis. Thus, it is not a consequence of the omission to introduce an environmental provision alone, but the fact that this omission is a violation of the Member State's obligation due the supra-national system. Consequently, this infraction procedure does have similar effects as liability, although it is not a genuine environmental liability instrument.

It is questionable, whether States could be held liable in the same way on the international level. As a consequence, a State could be even liable for not attaining the quality level that should be reached according to mandatory environmental law. It is the idea behind the European model, that directs the establishment of supplementary liability on the international level, while taking into account that the legal conditions are different.

