

## THE CONCEPT OF ENVIRONMENTAL DAMAGE IN THE FRAMEWORK OF INTERNATIONAL LAW

### *I. Relevant concepts in the wider field*

#### *1. The concept of liability for injurious consequences*

The term of 'liability' is applied in cases where damage or loss was incurred as a result of an activity that had been conducted neither in breach of an international obligation, nor in breach of the states' due diligence obligations (lawful act that involves risks and transboundary damage).

As ILC's codification work clearly demonstrates, a State can be liable even for acts that are perfectly lawful, but in the event of injurious consequences, they can entail liability.<sup>1</sup> As opposed to State responsibility, which arises exclusively from acts prohibited by international law, the facts of the matter of the international liability of a State may arise from both lawful and unlawful acts.

Accordingly, rules of liability for acts not prohibited by international law are irrespective of whether the activity was faulty<sup>2</sup> or lawful, they emphasise the harm, rather than the conduct.

Following a recommendation by the United Nations General Assembly in resolution 3071 (XXVIII) of 30 November 1973, the International Law Commission (hereinafter: ILC) should undertake a separate study of the topic "International liability for injurious consequences arising out of the performance of other activities", and the name of the theme remained unchanged through five years. By 1978, a *differentia specifica* phrase has arisen, because compared with the topic of state responsibility meaning injurious consequences arising out of unlawful activities, the topic had to be specialized. The requirement of injurious consequences of act was constant, but the term 'international liability' was determined as a result of an act not prohibited by international law, instead of the term 'performance of other activities'. After 1978, the topic "International liability for injurious consequences arising out of acts not prohibited by international law" left unchanged. As a result of the prolonged codification work, the ILC adopted the text of Draft Articles on Prevention of Transboundary Harm from Hazardous Activities in 2001, and the ILC submitted the text to the United Nations General Assembly. After three years, the ILC adopted the Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising out of Hazardous Activities,<sup>3</sup> dealing with an other aspect of the issue, considering the harm arising out of hazardous activities as a differentiation factor. Neither the Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, nor the Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising out of Hazardous Activities have a binding character, irrespective of the fact that the text of these documents were considerably based upon international customary law.

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<sup>1</sup> Cf. *Yearbook of the International Law Commission*. United Nations, New York, 1980, Vol. 1. 246.

<sup>2</sup> *Fault-based liability* means that any person shall be liable for damage caused or contributed to by his lack of compliance with the provisions implementing the concerned treaty or by his wrongful intentional, reckless or negligent acts or omissions. *Strict liability* could be determined when liability is imposed irrespective of fault or negligence, while the concept of *absolute liability* is similar to the notion of strict liability, except for the act of God (*vis maior/force majeure*) that is included to the concept of absolute liability.

<sup>3</sup> In 2006, the Commission completed the liability aspects by adopting draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, and recommended to the General Assembly that it endorse the draft principles by a resolution and urge States to take national and international action to implement them.

### *State liability vs. civil liability*

From a highly general point of view, State liability consists of a liability for damages caused to another State according to international law, while civil liability implies the liability of a natural or legal entity for damages caused to another natural or legal entity on grounds of national law.<sup>4</sup>

The regimes concerned basically converge, since 'State liability' arises from transboundary effects, which create inter-states legal relations, in which the rules pursuant to special, supplementary principles and provisions differ from the rules of civil liability regimes based upon the distinction between State and civil liability. For instance, civil liability regimes are divided into separate branches pursuant to the classification of liability, whereas, within the scope of (residual) State liability, similar classification is considered to be redundant (en passant, the so-called vicarious liability could be mentioned in re State liability).

This could be substantiated by the role of public international law within the domain of State liability, as opposed to the role of the civil law regime in the domain of civil liability. While civil law, as a rule, distinguishes various forms of liability (the classification derives from the character of civil law), public international law establishes merely two categories (responsibility and liability, in the regimes of which no further divisions obtain, since even this separation is ambiguous).

In the area of international environmental law, the damage or pollution occurred in the territory of other State is regularly assigned to individuals or companies (e. g. factories), which would entail the civil liability in the procedure of the courts. The relatively high amount of the damages and the inevitable participation of the private sector in the activities of one-time public duties yielded the recognition that the private sector will not be able to compensate the possible amount of the damage, pollution or harm. The concept of attribution means the measure or auxiliary maxim that should surmount this anomaly. The ILC's Draft Articles on State Responsibility contains the principle being embedded in the international customary law.<sup>5</sup> According to the ILC, the conduct of organs of the State, the conduct of persons or entities exercising elements of governmental authority, the conduct of organs placed at the disposal of a State by another State, the conduct directed or controlled by a State, the conduct carried out in the absence or default of the official authorities, the conduct acknowledged and adopted by a State as its own shall be considered an act of that State under international law, which transforms the originally civil liability concept into the application of State liability.<sup>6</sup>

### *2. The concept of (State) responsibility for injurious consequences*

Therefore, the concept of State responsibility<sup>7</sup> had formerly been considered by the international (academic) community, when, as a result of the efforts made by various forums of international policy-makers and actors,<sup>8</sup> the ILC adopted a quasi-treaty text<sup>9</sup> (after an almost five-decade

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<sup>4</sup> On the channelling of liability (arisen as a result of a private activity, but compensated by the State or States), see, Boyle, A.: *Globalising Environmental Liability: The Interplay of National and International Law. Journal of Environmental Law*, Vol. 17 (2005) No. 1, 6-8.

<sup>5</sup> See, Chapter II (Article 4-11) of the Draft Articles on State Responsibility.

<sup>6</sup> On the changes concerning the liability for environmental damage, see, Gehring, T. - Jachtenfuchs, M.: *Liability for Transboundary Environmental Damage, Towards a General Liability Regime? European Journal of International Law*, Vol. 4 (1993) No. 1, 92-106.

<sup>7</sup> As for the traditional, brief history of 'state responsibility', cf. Bodansky, D. – Crook, J. R.: *Symposium: the ILC's State Responsibility Articles. American Journal of International Law*, Vol. 96 (2002) 773-779.

<sup>8</sup> E.g. the substantial discussion in the Sixth Committee of the UN General Assembly, written comments by a number of Governments, as well as by a study of the International Law Association. Cf. *Fourth Report on State Responsibility*. Para. 1.

<sup>9</sup> As for the proof of this phrase, ILC annexed lengthy and comprehensive commentaries and the draft had been made in the dominant working style of the ILC, so these articles „had the look and feel of a treaty." See Caron, D.: *The ILC Articles on State*

codification activity) designated as ILC's Draft Articles on State Responsibility.<sup>10</sup> It is the very general and legally non-binding character of ILC's Draft Articles on State Responsibility (regarding that these articles have not yet been materialised in the form of a convention or any international legal document) that accounts for the fact that in research work, ILC's Draft Articles on State Responsibility have been ignored, nevertheless, we should take them into account as a *communis opinio doctorum* and as a summary containing the main theoretical concepts of State responsibility, which need to manifest themselves either in international customary law or in international State practices, or, in both of these practices.

The codification process conducted by ILC was frequently self-contradictory by reason of the departing legal thinking of the five rapporteurs, scilicet, their different conceptions deriving from their diverse backgrounds as to State establishments and legal systems. Therefore, in the domain of the problematic distinction to be made between State responsibility and liability debates often flared up, which basically influenced the fundamental approach of this subject-matter (see, particularly Riphagen's thoughts concerning this dilemma<sup>11</sup>). The final draft unambiguously contains only rules concerning State responsibility because of the "state's responsibility for internationally wrongful acts" phrase, which means that the draft precluded the possibility of raising liability-issues upon the interpretation of the articles, since it used the phrase of "wrongful act". The term 'responsibility' postulates the wrongful act of a State,<sup>12</sup> while the term 'liability' for injuries is attached to lawful acts, in addition. For this reason, it is generally accepted that the codification of State liability would have been the subject of a separate ILC work.

The exact distinction between the notions of responsibility and liability implies two different approaches to the same problem. In the following, for the purpose of the differentiation of the dual meaning by means of a semantic overview,<sup>13</sup> the terms of responsibility and liability must be clearly circumscribed. Nevertheless, these terms are sometimes applied without discretion to questions of liability or responsibility in manners, which indicate that the occurrence of damages or losses is not a sufficient or even a necessary basis for responsibility.<sup>14</sup> The classification, definition and valuation of environmental damage, and consequently the classification of liability concepts are based upon the legal regimes being applied in accordance with the legal systems or legal cultures. The common law-based Anglo-Saxon states (including some Commonwealth, one-time colonial states) use the concept of environmental damage that is more influenced by the practice of the courts, while the definition of environmental damages in civil law-based States is closely connected to the clarified and binding rules (without judicial precedents). The geographical, natural and hydrological factors, the state of development, the density of population and the characters of the States concerning natural affairs, experiences of disasters, political system significantly influence the national laws in the field of

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Responsibility: The Paradoxical Relationship Between Form and Authority, *American Journal of International Law*, Vol. 96 (2002) 861-862. But the draft does not recommend to the General Assembly that the articles be considered for adoption as a treaty. See *ibid.* On the theoretical approaches of its form, see *ibid.* 862-866. The Resolution 56/83 (December 12, 2001) adopted by the General Assembly commends the articles to the "attention of Governments without prejudice to the question of their future adoption or other appropriate action." See Point 3 of the GA Res. 56/83.

<sup>10</sup> About the draft, see particularly Crawford, J.: *The International Law Commission's Articles on State Responsibility, Introduction, Text and Commentaries*. Cambridge University Press, Cambridge, 2002. 381. Following the ILC's Draft Articles, a diplomatic conference has not been convened by the UN General Assembly to create a treaty on the basis of the ILC's Draft Articles. That was the reason for being legally non-binding instrument. At this stage, it shall have been emphasized that the ILC's Draft Articles exclusively uses the term 'responsibility' or 'responsible' even if the use of 'liability' or 'liable' would be expedient in such cases for avoiding the possible problems arising from this legally non-precise usage.

<sup>11</sup> See Bodansky-Crook: *op. cit.* 778.

<sup>12</sup> ILC's Draft Articles state a logical equation: conduct not in conformity with an international obligation and attributable to a state equals an internationally wrongful act resulting in state responsibility. See Bodansky-Crook: *op. cit.* 782. Cf. Article 12 of the ILC's Draft Articles.

<sup>13</sup> Cf. Horbach, N.: The Confusion about State Responsibility and Liability, *Leiden Journal of International Law*, Vol. 4 (1991) No. 1, 47-74. English and German - opposed to the French (*responsabilité*) and Hungarian (*felelősség*) - language draw a distinctive word-form between the two notions (*responsibility* and *liability* - *Haftung* and *Verantwortlichkeit*).

<sup>14</sup> See *Fourth Report on State responsibility*. Para. 30.

environmental law and liability-regimes. Regarding the fact that the international relations of the States are basically formed according to their interests, the creation of international treaties (and, in this manner, the definition of damage) is the result of the consensual ability of the States which presupposes the consent appeared between developed and developing, coastal and non-coastal, civil law-based and common law-based States, etc.

According to the strict point of view of international law, however, liability and responsibility obtains, when a breach of an obligation laid down under international law has occurred,<sup>15</sup> which per se does not need to involve the requirement of the element of either negligence or malice.<sup>16</sup>

As for the standpoint of ILC, as it is manifest in the legally non-binding draft in the abstract, every internationally wrongful act of a State entails the international responsibility of that state (according to Article 1 of ILC's Draft Articles on State Responsibility). On the other hand, the term 'state liability' does not necessitate that the facts of the case of an internationally wrongful act of a State obtains. Subsequently, every act of a specific State, regardless of its possible legal grounds, can effectuate the liability of the State irrespective of the fact whether it has caused transboundary damages.<sup>17</sup>

In general, the ILC adopted the traditional state-to-state approach<sup>18</sup> irrespective of the increasingly emerging question of the responsibility of non-state actors, such as terrorist groups and individuals. A key question in this respect is whether under international law a State is responsible for damages or injuries incurred to another State and, if so, to what extent it bears international responsibility for its actions.<sup>19</sup> Generally, under public international law, if an act of any State has been wilfully and maliciously committed, or the act in question would have been committed in a gravely negligent manner and implies a breach of an international obligation, these facts (direct causal relation between cause and the result of a conduct imputable to the State as damage or harm<sup>20</sup>) would entail that State responsibility obtains, therefore, compensation and reparations shall supervene pursuant to the legal regulation of State liability.<sup>21</sup> So, firstly, the term and meaning of State responsibility shall be distinguished from State liability by means of exact determination in the general area of international law.

Consequently, the rules of State responsibility stipulate and determine whether international obligations have been breached,<sup>22</sup> moreover, an internationally wrongful act entailing State responsibility through the breach of an obligation and occurrence of damage, pollution, harm or other serious or injurious consequences have to be followed by sanctions (such as restitution,

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<sup>15</sup> Pursuant to the Article 12 (*Existence of a breach of an international obligation*) of the ILC's Draft Articles on State Responsibility, „there 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.”

<sup>16</sup> In the early literature, Hardy regarded that fault-based liability had been always required in opposition to the argumentation that State had automatically incurred responsibility for whatever it had been done, so it appeared preferable to say that liability is in all cases to be determined by international law – or rather according to the legal literature of the 1950's and 1960's. Cf. Hardy, M.: International Protection against Nuclear Risks. *International and Comparative Law Quarterly*, Vol. 10 (1961) Part 4, 755.

<sup>17</sup> As for *de la Fayette's* position, she thought that 'responsibility' is to prevent damage (to take care of control of a person, thing, installation, activity), while 'liability' almost exclusively concentrates for compensating the victims (obligation to repair the damage or to compensate the innocent victim). See de la Fayette, L.: Towards a New Regime of State Responsibility for Nuclear Activities. *Nuclear Law Bulletin*, No. 50 (1992), 21.

<sup>18</sup> Cf. Weiss, E. B.: Invoking State Responsibility in the Twenty-first Century. *American Journal of International Law*, Vol. 96 (2002) 798.

<sup>19</sup> See Jabbari-Gharabagh, M.: Type of State Responsibility for Environmental Matters in International Law. *Article de la revue juridique thémis* (1999) 63.

<sup>20</sup> See Article 2 of the Draft Articles on State Responsibility.

<sup>21</sup> As an international customary norm, the Permanent Court of International Justice stated „it is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form.” See, *Chorzów Factory Judgment*, No. 8. (1927) 21.

<sup>22</sup> Breach of an international obligation is defined as “an act [...] not in conformity with what is required [...] by that obligation” – as the ILC's Draft Articles state. See Crawford: *op. cit.* Note 1, Article 12. The breach of an international obligation entails two types of legal consequences. Firstly, it creates new obligations for the breaching state, principally, duties of cessation and non-repetition (cf. Article 30 of the ILC's Draft Articles) and secondly, a duty to make full reparation (cf. Article 31 of the ILC's Draft Articles).

reparation, compensation,<sup>23</sup> therefore, as to the ensuing consequences, no relevant difference between the notions of responsibility and liability obtains).

Another cardinal problem is also deemed of considerable importance. Rapporteur Ago distinguished "secondary" rules from "primary" rules of obligation.<sup>24</sup> This scheme was taken over by Crawford apart from the fact that ILC had not decided to emphasize the primary rules, furthermore, it declared that "state responsibility should be dealt with within the purview of secondary rules."<sup>25</sup>

## II. The concept of environmental damage

### 1. The formation and development of the regulation sphere

In the initial phase of the protection of environment, before the creation of the term 'international environmental law' in 1972 at the United Nations Conference on the Human Environment, the conception was narrow and exclusively focused on the consequences of transboundary injury, as opposed to the idea of the environment as an international common good to be preserved by all States.<sup>26</sup> From the Trail Smelter case,<sup>27</sup> however, the international community has widely accepted the principle being declared by the arbitration of the case concerned, as the principle reads, „no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence."<sup>28</sup> The segmented position had been successively extended to the principle in which not just the injury by fumes, but all kinds of injuries had been permitted. The principle could be linked to the principle of absolute territorial integrity that had emerged in response to the doctrine of absolute territorial sovereignty (also known as Harmon Doctrine).<sup>29</sup> According to this principle, States are not restricted in the use of natural resources within their territory as long as they do not interfere with the interests of other states enjoying the same right. Thus, the principle of State sovereignty (without the epithet 'absolute' implies both the right of an independent exploitation of existing natural resources and the right to inviolability of the national territory.<sup>30</sup>

Before the 1972 Stockholm Conference,<sup>31</sup> the regulation of the prevention of the species was sporadic, the philosophy of the prevention concentrated on the separated species by means of sporadic and specific rules, chiefly conventions. Neither the general requirement of the human environment, nor the special preventive demands of the whole natural system (including flora and

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<sup>23</sup> On these forms, see, Article 34-37 of the ILC's Draft Articles on State Responsibility.

<sup>24</sup> Secondary rules determine the legal consequences arising out of failure to perform obligations set forth in the primary rules. *Yearbook of the International Law Commission*. United Nations, New York, Vol. 1. 1974. 5.

<sup>25</sup> Cf. *Yearbook of the International Law Commission*. United Nations, New York, Vol. 1. 2001. 106.

<sup>26</sup> See, Viñuales, Jorge: The Contribution of the International Court of Justice to the Development of International Environmental Law: A Contemporary Assessment. *Fordham International Law Journal*, Vol. 32 (2008) No. 2, 237. See in details, Sohnle, J.: Irruption du droit de l'environnement dans la jurisprudence de la C.I.J.: l'affaire Gabcikovo-Nagymaros. *Revue Générale de Droit International Public*, Vol. 102 (1998) No. 1, 85-86.

<sup>27</sup> Trivia, it is the only decision of an international court or tribunal (arbitration) that deals specifically with trans-frontier air pollution and being decided preemptorily.

<sup>28</sup> This principle is the equivalent of the traditional Roman maxim *sic utere tuo ut alienum non laedas* (use your own property in such a manner as not to injure that of another or principle of good neighborliness).

<sup>29</sup> While the doctrine of absolute territorial sovereignty insists upon the complete freedom of action of the upstream state that of absolute territorial integrity maintains the opposite: the upstream (upwind) state may do nothing that might affect the natural flow of the water (or any pollution) into the downstream (downwind) state. See in details, Hall, N: Transboundary Pollution: Harmonizing International and Domestic Law. *University of Michigan Journal of Law Reform*, Vol. 40 (2007) No. 4, 692-699.

<sup>30</sup> See, Gehring – Jachtenfuchs: *op. cit.* 92.

<sup>31</sup> The United Nations Conference on the Human Environment was held at Stockholm in June 1972. The 'milestone' world conference "considered the need for a common outlook and for common principles to inspire and guide the peoples of the world in the preservation and enhancement of the human environment", as the Preamble of the accepted Stockholm Declaration reads.

fauna) can be realized before 1972. As many species needed the mankind's help, States had adopted more and more conventions.

After 1972, the scope of international environmental law has been extended rapidly; the process was duplex: firstly, the concept of the global and human environment forged ahead, consequently, the regulation techniques of globally focused and environmental integrity-issued treaties have prevailed. Secondly, the purposes of creation of organizations (intergovernmental and non-governmental, as well), conventions, measures and mechanisms relating to environment were instituted. In consequence of the mentioned changes, the notion of 'transboundary', 'damage', 'pollution', 'harm' and 'liability' were taken into the consideration of the international community and the international policymakers, as well.

## 2. *The notion of environmental damage*

The notion of 'environment' was proclaimed (non-binding) by the Declaration of the Stockholm Conference on the Human Environment; as the Principle 2 states, by all actors of the international community (States, firstly) must safeguard "the natural resources of the earth, including the air, water, land, flora and fauna and especially representative samples of natural ecosystems", summarizing the environment.

The real paradigm-change is due to the Principle 21 of the Stockholm Declaration which reads as follows, "States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction." The principle proclaimed by the arbitration of the Trail Smelter case and the well known *sic utere tuo maxim* was traced back to the Charter of the United Nations, making it possible to be applied in inter-state relations (in spite of the non-binding state of the Declaration).<sup>32</sup>

It is generally accepted that, if the States intend to use areas and pursue activities under their jurisdiction or control in a way that may cause significant trans-frontier or transboundary environmental damage, they will be held liable and must pay compensation to the affected State(s).

For a long time, most of the significant international legal instruments did not tend to distinguish between damages to the environment and the traditional forms of damages (for example, damage to person or to property). Many of the earlier treaties and national legal regimes only consider damage in terms of human property and human health (or traditional damage) and exclude environmental damage. The reasons were several. Pursuant to Bowman and Boyle, on the one hand, the exact definition of environmental damage is still missing from the general rules of international law, on the other hand, the legal system of international law does not state objectives for assessing damages,<sup>33</sup> thus, the assessment of damages should be determined via ad hoc methods.<sup>34</sup> As for the assessment,

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<sup>32</sup> Regarding this matter, see the Principle 22 of the Stockholm Declaration, as follows: "*States shall cooperate to develop further the international law regarding liability and compensation for the victims of pollution and other environmental damage caused by activities within the jurisdiction or control of such States to areas beyond their jurisdiction.*"

<sup>33</sup> Compare with Bowman, M. – Boyle, A.: *Environmental Damage in International and Comparative Law: Problems of Definition and Valuation*. Oxford University Press, Oxford, 2002. 26. On the general standpoint of concept of damage, see, RIEDEL, E.: Damages. In: Bernhardt, R. (ed.): *Encyclopedia of Public International Law*, Instalment 10 (1987) 68-73. Xue Hanqin restricts four elements of the discussion relating to transboundary damage, such as (1) the physical relationship between the activity concerned and the damage caused, (2) human causation, (3) a certain threshold of severity that calls for legal action, (4) transboundary movement of the harmful effects. See, Xue, H.: *Transboundary Damage in International Law*. Cambridge University Press, Cambridge, 2003. 4-10.

<sup>34</sup> Larsson focuses on three categories according to the different scope of potential damage. Firstly, the *global issues* concentrate on deforestation, desertification, and other global-concerned priorities, secondly, *regional environment* focuses on transboundary pollution, static units of ecological species, problems of migratory birds, and lastly, *local level* incorporates the problems arising from industrial risks, waste management. Consequently, the three levels demand different concepts of environment and damage in

Larsson points that environmental damage per se entails pure ecological damage only, while two kinds of environmental damage can be identified. First, pure ecological damage, sometimes referred to as environmental impairment, and secondly, property damage with an ecological dimension.<sup>35</sup>

As for the ecological damage, the Lugano Convention (Council of Europe Convention on Civil Liability for Damage Resulting From Activities Dangerous to the Environment) contains a regime for strict liability that in principle covers all types of damage caused by dangerous activities, irrespective of the identification of the damage (traditional and/or ecological). Regarding that the most European States' environmental liability regimes do not cover damage to biodiversity and the concept of ecological damage, the Convention seems to be a model mechanism and instrument to urge the European States for accepting these newly constituted forms of damage.

Bearing in mind the numerous treaties and other documents being adopted or proclaimed in the field of international environmental law with special regard to the notion of damage, the universal definition of damage is still missing, but several sector-specific definitions still exist. According to my opinion, the most comprehensive definition of damage that combine the elements of the sector-specific notions reads as follows: „any injurious effect concerning the environment, including human health and safety, flora, fauna, soil and water, climate, landscape, historical monuments or other physical structures or the interaction among these factors, effects on cultural heritage or socio-economic conditions resulting from alterations to those factors.” Similarly to this “optimal” definition, the Convention on Environmental Impact Assessment in a Transboundary Context<sup>36</sup> contains a paragraph, under the name of ‘impact’,<sup>37</sup> that is considered being the synonym of damage because the word ‘impact’ is regularly used for injurious results of activities in environmental legal regimes.

In keeping with the White Paper on Environmental Liability of the European Commission<sup>38</sup> and some relevant directives, the definition of environmental damage in the European law includes three categories with proper rules and peculiarity in accordance with the sectors in which the damage could be occurred.<sup>39</sup> The sectors are the ‘protected species and natural habitat’ with more cited directives dealing with detailed aspects of the sector; the ‘water damage’ sector which incorporates any damage that significantly adversely affects the ecological, chemical and/or quantitative status and/or ecological potential, as defined in Directive 2000/60/EC; and finally the ‘land damage’ sector which concerns any land contamination that creates a significant risk of human health being adversely affected as a result of the direct or indirect introduction. Moreover, the White Paper covers the damage to biodiversity that could be justified as the synopsis of the above-mentioned three categories.

The ILC's Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising Out of Hazardous Activities in its Principle 2, point c) states a general, abstract definition of transboundary damage, not aiming to define the exact concept of the dual phrase, instead the text specializes the meaning of the ‘transboundary’, while the notion of damage left unchanged and should be applied according to the general rules and definitions.

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the concerned issues by means of their peculiar factors. As the so-called *sector-specific definitions* have been excluded from the regulation, Larsson only enumerates the effects *exemplificative* that could cause damages. See, Larsson, M. L.: *The Law of Environmental Damage. Liability and Reparation*. Kluwer Law International, The Hague, 1999. 122-124.

<sup>35</sup> Compare, Larsson: *op. cit.* 122.

<sup>36</sup> Also known as *Esposo Convention*, adopted on 25 February 1991.

<sup>37</sup> Article 1 reads as follows:

(vii) "Impact" means any effect caused by a proposed activity on the environment including human health and safety, flora, fauna, soil, air, water, climate, landscape and historical monuments or other physical structures or the interaction among these factors; it also includes effects on cultural heritage or socio-economic conditions resulting from alterations to those factors;

(viii) "Transboundary impact" means any impact, not exclusively of a global nature, within an area under the jurisdiction of a Party caused by a proposed activity the physical origin of which is situated wholly or in part within the area under the jurisdiction of another Party.

<sup>38</sup> *White Paper on Environmental Liability*. COM(2000) 66, 9 February 2000. Presented by the European Commission.

<sup>39</sup> See, *Directive 2004/35/CE* of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage, Article 2.

The generally accepted point of view recognises that the notion of international (transboundary) environmental damage consists of the notion of damage under the general rules of international law, and the environmental impacts are added to this concept. If the traditional damage directly (loss of life or personal injury, damage to property) deriving from an economic interest in any use of the environment, or incurred as a result of impairment of the environment, and the costs of measures of reinstatement of the impaired environment,<sup>40</sup> the definition be influenced by environmental characteristics.

By the appearance of instruments in the field of transboundary pollution, the definition of pollution with transboundary effects has been exponentially emerged, instead of the method integrating the concept of pollution to the concept of damage.<sup>41</sup> Pursuant to Springer, pollution could be defined under a range of approaches, as any alteration of the existing environment; as the right of territorial sovereign; as damage; as interference with other uses of the environment; or as exceeding the assimilative capacity of the environment.<sup>42</sup>

### *3. A single case – Iraq and the United Nations Compensation Commission*

The United Nations Compensation Commission<sup>43</sup> was established to process claims and pay compensation for losses and damage suffered by individuals, corporations, Governments and international organizations as a direct result of Iraq's unlawful invasion and occupation of Kuwait in the early 1990s.<sup>44</sup> The Commission decided to give priority to individual claimants in both the processing and the payment of claims in several categories. The category of environmental damage was the F4<sup>45</sup> „direct environmental damage and depletion of natural resources” includes losses or expenses resulting from:

- (i) Abatement and prevention of environmental damage, including expenses directly relating to fighting oil fires and stemming the flow of oil in coastal and international waters;
- (ii) Reasonable measures already taken to clean and restore the environment or future measures which can be documented as reasonably necessary to clean and restore the environment;
- (iii) Reasonable monitoring and assessment of the environmental damage for the purposes of evaluating and abating the harm and restoring the environment;
- (iv) Reasonable monitoring of public health and performing medical screenings for the purposes of investigation and combating increased health risks as a result of the environmental damage; and
- (v) Depletion of or damage to natural resources.

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<sup>40</sup> Compare with Article 2, 2. c) of *Basel Liability Protocol* (Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and their Disposal) and Article 2, point 2. of *Protocol on Civil Liability and Compensation for Damage Caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters* to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes and to the 1992 Convention on the Transboundary Effects of Industrial Accidents.

<sup>41</sup> On the difficult issues of the regulation of transboundary pollution in details, see, Merrill, T.: *Golden Rules for Transboundary Pollution*. *Duke Law Journal*, Vol. 46 (1997) No. 5, 937-938.

<sup>42</sup> Springer, A. L.: *Towards a Meaningful Concept of Pollution in International Law*. *International and Comparative Law Quarterly*, Vol. 26 (1977) Issue 3, 531.

<sup>43</sup> The United Nations Compensation Commission (UNCC) was created in 1991 as a subsidiary organ of the UN Security Council. Its mandate is to process claims and pay compensation for losses and damage suffered as a direct result of Iraq's unlawful invasion and occupation of Kuwait. See, Gattini, A.: *The UN Compensation Commission: Old Rules, New Procedures on War Reparations*. *European Journal of International Law*, Vol. 13 (2002) No. 1, 166-180.

<sup>44</sup> As the Para 16. of *U. N. Security Council Resolution 687* reaffirms, „Iraq is liable under international law for any direct loss, damage, including environmental damage and the depletion of natural resources [...] as a result of Iraq's unlawful invasion and occupation of Kuwait.”

<sup>45</sup> The “F4” instalment consists of claims for expenses incurred for measures to abate and prevent environmental damage, to clean and restore the environment, to monitor and assess environmental damage, and to monitor public health risks alleged to have resulted from Iraq's invasion and occupation of Kuwait. See in details, Paragraph 35 of Governing Council decision 7 (S/AC.26/1991/7/Rev.1). See, *Report and Recommendations Made by the Panel of Commissioners Concerning the First Instalment of “F4” Claims*. United Nations, 2001.

The concept of environmental damage and the compensation mechanisms recognized by the Commission were of unique nature; while the direct causality with the occupation committed by Iraq, the exact determination and classification of damages made an effect that these mechanisms have been constant reference point within the discussed area for any significant actors of the theme.

### *III. Conclusions*

Codification and development of the elements of the law on transboundary harm has advanced significantly since 1992 in the Rio Declaration on Environment and Development, in the work of the International Law Commission (adopted three drafts after a long codification activity on different areas of the theme concerned), and in the jurisprudence of the ICJ (regarding that three cases with environmental issues and aspects are in the docket of the Court).<sup>46</sup>

A general or widely accepted consensus as to a definition of environmental damage within international law is still missing. The relevance of sector-specific definitions should be eliminated for the sake of universal concept of damage included into a multilateral treaty. On the hand, due to the decreased consideration of States, it would probably cause the reduction of international lawmaking process. Yet, on the other hand, universal notion of damage would prevail over the fragmentation of compensation and liability regimes. The positions of States point out that the concept of sector-specific definition is overwhelmingly supported due to its character based upon case-to-case or treaty-to-treaty consideration focusing special interests; after this level, the process ended in cooperative and joint text reflecting the mutual agreement of States. Furthermore, the Institute of International Law supported the concept that the international environmental legal regimes should define the issue-related notion of damage, considering the special rules and requirements of the field concerned.<sup>47</sup> Moreover, the main advocates of the sector-specific definitions are the entities in the field of the sectors in question, for understandable reasons.

The ILC's draft documents (draft articles or draft principles) on the State liability, State responsibility, the prevention of transboundary harm from hazardous activities and the allocation of loss should be adopted by a diplomatic conference. These rules or principles are based on the international customary law and derived from the most qualified and excellent legal experts of international law representing all the group of the States and the main legal systems of the world. For these reasons, the States should not ignore the above-mentioned documents with delaying the process.

Last but not least, the distinguished role of international judicial forums and scientific bodies should not be neglected; however, regarding the special characters of international law, the judicial forums have different competence comparing with the national judicial forums. The concept of international does not recognise the precedents of international courts (*stare decisis* doctrine of the common law), but – as we have seen the ICJ declarations concerning the notion of environment<sup>48</sup> – the scientific and judicial notions or reasoning are able to conduce the initiatives to define universal, wide-ranging concept of environmental damage within the field of international (environmental) law.

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<sup>46</sup> See, Birnie, P. - Boyle, A.: *International Law and the Environment*. Oxford University Press, Oxford, 2002. 105.

<sup>47</sup> „Environmental regimes should provide for the reparation and compensation of damage in all circumstances involving the breach of an obligation. In the case of a regime providing for responsibility for harm alone, the threshold above which damage must be compensated must be clearly established.” See, Article 19 of *Responsibility and Liability under International Law for Environmental Damage*. Resolution of the Institute of International Law. Session of Strasbourg, 1997.

<sup>48</sup> See, Para. 29 of the *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of the ICJ, and Para. 53 of the Judgment of *Case Concerning the Gabčíkovo-Nagymaros Project* (Hungary/Slovakia).