

# THE LIABILITY OF STATES AS REGARDS THE COMPENSATION OF THE LOSSES RESULTED FROM THE ENVIRONMENTAL DAMAGES

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**Abstract.** Environmental protection is a necessity that everyone insists on it and the international law has declared every action by the states that would cause a harm or loss to the environment to be a subject of international liability. It is needless to say that whenever this international responsibility of the states is used in a correct fashion it can reduce the damages done to the environment. This requires comprehensive cooperation in the international community whose lack is felt today. The current study uses a descriptive and analytic method to assay various aspects of the liability of the states before the losses resulted from the damages to the environment. This research has shown that the "principle of sustainable use of land" is a proper basis for acceptance of the liability of states before the possible environmental damages. This basis in the sources of international law is among some conventions or decisions that have been adopted by the authorities in charge of investigation of international cases. However, it seems that one can consider it an example of the common rules or general principles of international laws and for this reason; it is binding for all countries. Of course, taking the states liable before the environmental damages requires some conditions to be fulfilled including attribution of the action to the state and violation of an international treaty (committing an international crime) in the presence of which the state should compensate the damages via paying indemnity.

**Key words:** International Responsibility of States, Environmental Damages, Principle of Sustainable Use of Land, International Liability.

**Introduction.** Upon the discovery of the evolved tools and technologies and movement towards the ever-increasing developments, man was informed of the existence of natural resources on the earth that could fulfill many of his long standing aspirations. Thus, first steps for comprehensive use of environment and its resources were taken. This procedure continued until the early years of the past century when the man noted very dangerous phenomena resulted from the environmental pollution and destruction and in this way people's understanding of environmental issues grew in the course of time. Human experiences of vast pollutions showed that any harm done by a state to the environment would have repercussions in the land of other states and international scale and here international law is expected to provide proper answer before the behaviors that cause such harms.

According to the Charter of United Nations and in line with the principles of international law, states have the right to exploit their specific resources based on certain policies regarding the environment and development and at the same time are obliged to take care of the activities within their jurisdiction not to cause any harm to the environment of other states or regions within their national jurisdiction (Saed, 2009, p. 64). Since 1960s onward attention to environmental issue started to grow with a fast pace relying on the suitable public support and interest and due to it laws and obligations related to it – either in internal law or in international law – were codified. For such disastrous events as the explosion of nuclear reactor in Chernobyl in Ukraine under Soviet Union and also the leakage of a poisonous gas in Bhopal of India that caused the death and injury of numerous people in past century have warned the world that environmental protection is an international responsibility (Zamani, 2002: 166).

The current study has been conducted in order to recognize various aspects of this international responsibility in relation to states, and besides the explication of the content of this responsibility, its principles and sources are assayed in view of the rules of international law.

## **2- Concepts:**

Given the fact that undertaking any study requires familiarity with some specific terms and concepts in that area, in this part we first seek to get more familiar with the concept of responsibility (liability) and then with the military forces organization.

### **2-1- International Liability**

The necessity of environmental protection in international community requires the states to be liable before their actions because no state could enjoy its rights without accepting and observing the rights of other states. This liability brings the state into the area of international law. International liability is one of the significant branches of international law that has a special nature and place.

In the dictionary of the terms of international law the concept of international liability has been defined as follows: "legal international liability is an obligation that is forced to a state based on the codes of international law in order to compensate the losses and damages that it has caused as a result of violation of the international codes" (quoted from Amir Arjmand, 1995, p. 236). In another definition "international liability is [defined] as a legal institution due to which a state that has violated a code of international law is obliged to recompense the damages resulted from the violation of international codes by the state" (Fiuzi, 2000: pp. 25-026). Moreover, it is suggested that "in every legal system there should be an obligation for every negligence as regards the responsibilities which is better known in international law as liability" (Harris, 1998, p. 482).

In other words, "in international relation, like other social relation, violation of one's rights results in liability in various forms that is decided by the legal system. Shortly speaking, liability is concerned with the effects of illegal actions, specifically with the payment of indemnity in return of an incurred damage" (Brownlie, 1990, p. 111). In international law a state's liability is based on the necessity of performance of a set of obligations that should be undertaken by it. According to these obligations, all states are equally liable before the violation of the codes of international laws. A state cannot resort to the regulations of its national system or actions that are not considered illegal in the latter system in order to neglect its liabilities (Wallace, 1999: p. 257).

However, one needs to say that today in international law of environment two concepts of "international liability" and "international responsibility" which are related to the results of negligence as regards the observation of codes of environmental laws are distinguished; because international responsibility is more general and enjoys both civil and criminal aspects. Moreover, first concept is concerned with the violation of international law and international criminal actions while international responsibility is resulted both from the latter violations and the banned actions. Thus, one has to say that international liability is distinguished from international responsibility and their relation is a type of absolute general vs. specific. Furthermore, it should also be noted that in the current essay we just assay the concept of international liability of states that covers the actions that can be taken in the interest of a state or an international organization in order to compensate the incurred damages (Fiuzi, *ibid*, p. 536).

## **2-2- Environmental Damage**

The term "environmental damage" was used for the first time by a French law expert that refers to the damages done to environment (quoted from Firuzi, 2005, p. 14). The major difficulty with environmental damage is related to its definition because it is not specified if the victim is man or the environment. To put it otherwise, whether environmental properties are legally protected or not? There are two main approaches in response to this question: 1) some authors have considered the environment the source of damages suffered by man. 2) on the other hand, some legal experts believe that environmental damages regardless of their reflections are demandable (Katoozian, 2008: p. 295). To the state the matter differently, sometimes environment is the source of damage not the one who has suffered a loss. Some other time without incurring any direct harm to anyone it suffers a decrease of natural elements; because pollution has a common and collective effect.

Thus, in international documents this point is noted; for example, in the Lugano Convention of 1993 on "Civil Liability for damages resulting from activities dangerous to environment", which was adopted by European Commission as a series of regional laws related to civil liability, it is noted in the article 2 that environmental damage includes all types of harm that is incurred to the natural resources including renewable and non-renewable like air, water, soil, and all animals and plants and the mutual effect of these factors on each other as well as the properties that are part of cultural heritage along with special panoramas and perspectives (Saed, 2009, p. 69). Some might seek to generalize this definition arguing that the concept "environmental damage" refers to damages to environment that is associated with considerable qualitative losses or reduces the quantitative capacity of the environment in supporting natural species (Saed, 2009, p. 210).

As to the concept of environmental damage European Commission in its documents has adopted a variety of approaches. Insofar as in the bill of 2000 two types of damages have been predicted: first, environmental damage that cause losses to the biodiversity in the land and water. Second, traditional environmental damage that is the very damage incurred to the individuals and their properties. Following the criticisms that have been leveled against European Commission in the regulations adopted in 2004 the traditional damages were set aside from the regulations. For the aim of the regulations is prevention of environmental damage and their compensation and has no effect on the recompense of traditional damages. Then, according to regulations, physical damages and the losses incurred to the properties are not demandable and as this regard the internal civil liability rules of the countries will be applied (Katoozian, *ibid*, p. 296).

## **3- Principles and Sources of States Liability before the Environmental Damages**

In this part of the essay we proceed to assay the principles and sources of international liability of the states before the environmental damages. Given the necessity of acceptance of the right of sovereignty of the states over their land, on the one hand, and its limitation in causing damage to the environment, on the other hand, the principle of sustainable use of land can be considered one of the most important notable bases for international liability specifically as regards the issue of environment. Accordingly, no state has the right make use of its land or allow any other state to use it in a way that would cause harm to other state's properties and individuals (Momtaz, 2002, p. 261).

In other words, it should be said that equality of sovereignty that has been articulated in the clause 7 of article 2 of the Charter of United Nations as follows: "no single regulation indicated in the Charter of United Nations is allowed to interfere in those affairs that are essentially within the jurisdiction of the countries". This is indeed to say that states should exercise their laws in order to establish order in a way that they would not breach any other country's laws. Thus, we continue to study the principle of sustainable use of land in the international law of environment in the documents of international law:

### **3-1- Principle of sustainable use of land in international documents**

#### **A) Stockholm Declaration**

The aforementioned principle was recognized for the first time in the Stockholm Declaration. According to the principle 21 of this declaration: "*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."* (Abdullahi, 2002: p. 149).

**B)** Draft of articles of international law commission regarding international liability resulted from unbanned actions. The commission of international law has started its plan of "international liability before the consequences of activities that have not been banned by international law". But other preoccupations of the commission caused several years of delay in the implementation of the plan insofar as the UN General Assembly issued the Resolution 50/54 on 11 December 1995 and asked the commission to resume the preparation and codification of the final articles related to the subject. The commission decided to form a particular work group on 28 June 1996 in order to complete the prepared articles so that after the finalization to send to the General Assembly. In 2001 the draft of articles concerning the prevention of the foreign damages resulted from the dangerous activities (ibid, p. 150).

The article 3 of the draft of the articles of commission of international law concerning international liability resulted from the banned dangerous activities reads as follows: "member states will adopt all required measures in order to reduce the possibility of any danger to the minimum and prevent foreign damage". The article 3 of the draft of the plan is based on the principle of sustainable use of land. Despite the exercised limitations on the freedom of states in the article 21 of Stockholm Declaration the article 3 of the draft and other articles force a number of special limitations. Basically, articles 3 and 4 of the draft of commission grounds the major basis of the articles related to the prevention and announces particular obligations for the countries due to which the states are obliged to reduce the danger of pollutions outside their borders to the minimum (ibid).

### **C) Rio Declaration 1992**

Having endorsed the articles of Stockholm Declaration, the Rio Declaration speaks of sustainable use of land in its principle 2. This principle is in fact the principle 21 of Stockholm Declaration but there are certain differences as the principle 2 adds the word "development" to environmental policies (Abdullahi, ibid, p. 152).

As to the value of these documents one should say that the majority of announced documents are not the result of international environmental conferences that have perfect binding power; but these texts reveal the emergence of principles in the practice of states and constitute the basis of the international conventions and according to the legal teachings of the announced principles in these declarations they are reflecting the common international law codes (Ramezani Qawamabadi, 2007, p. 62).

Generally speaking, the declarations of Stockholm and Rio are considered to be among the first steps that have been taken for gradual development of international laws of environment but one needs to take it into earnest account that the major content of the principles outlined in these documents does not bear any legal value. Some of these principles are merely announcements while some others force international obligations to the states. As a result, this subject causes a dual approach to appear as regards the nature and legal value of these declarations in international scene. The principle of sustainable use of land as expressed in principle 21 of the Stockholm Declaration bespeaks the balance between the states' right of development and their obligations regarding prevention of the environmental damages outside their national borders. This principle along with the principle of prevention and caution are considered to be the substantial principles of the international law of environment and has an independent condition in international statutes. Continuous insistence of the International Court of Justice on the principle of sustainable use of land has a pivotal role and constitutes the identity and value of the aforementioned principle. The latter obligation is part of the international law of environment. Then, though environmental documents are mostly in the form of announcements this does not change their common nature (ibid, p. 63).

### **3-2- Principle of sustainable use of land in international investigations**

**A) Trail Smelter Case (United States v Canada).** No doubt the renowned case of Trail factory between US and Canada was the first decisive step as regards the transnational pollution. This case shows a shift from the common international laws based on the compensation of losses to the formation of special regulations regarding the environmental protection and cooperation between the beneficiary states. In 1930s the court that was investigating the conflict between Canada and US considered the latter principle applicable in the relations of states and announced: no state has the right make use of its land in a way that would cause harm to the land or properties of the citizens of other state (Rodriguez, 2002: p. 216).

This verdict contained two fundamental principles of international law: first, principle of prevention that revealed one of its early manifestations in this case. The International Court of Justice recommended the Canadian government to adopt certain measures in future to prevent from the dispersion of smoke into the territory of Washington. This verdict could be considered an example of the fulfillment of a code of international law that forces the states to prevent pollution outside their borders. The second principle is the principle of sustainable use of land. These principles emphasize the sovereignty of states over their natural resources but they make its implementation conditional upon the decisions of the ecologic authorities. It seems that here there is a kind of conditional sovereignty (Ramezani Qawamabadi, ibid, p. 75).

**B) The Case of Lano Lake.** The case of Lano Lake is the second arbitration that has been conducted based on the principle of sustainable use of land (ibid). In this case the court of justice rejected the claim of Spain as regards the deviation of water by France from a French lake into a hydraulic system that had affected the Spain's water exploitation. This rejection was done because the approval of the Spain's claim and the endorsement of the necessity of an agreement between the two states would have been tantamount to recognition of the unconditional veto right of Spain and the annulment of the right of sovereignty of France. On the other hand, the only responsibility of France was informing its

neighbor of its plans and it was obliged to adopt required measures for providing the neighbor's need for the agricultural water before any reference to the arbitration because otherwise in the irrigation season all water will flow through the Carole River. Finally the court of justice announced that France can exercise its right but it cannot neglect the interests of Spain. Spain can ask its neighbor to observe its rights and considerations. The arbitrators thought that the state having the upper hand should keep with the principle of good will and take all aspects of the issue into account and show that it has real concern for compromising its interests in order to clear a room for the interests of the other party. This verdict highlighted the severe harm that has been incurred to the interests of the neighbor and at the same time showed that the principle of sustainable use of land does not have an unconditional implementation domain (Jamali, 2010, p. 364).

#### **4- Conditions of Liability of States before the Environmental Damages**

Among the most important conditions that are required to pave the path for the fulfillment of international liability of a state before the environmental damages one can refer to the following:

**4-1- Attribution of Action to State.** International judiciary procedure has created a principle according to which the actions taken by organizations or representatives of a state that are violating an international treaty might be attributed to the state. The situation of a state organ that acts within the framework of a government does not change the scale of liability of the state that is responsible for the action. For example, states might be responsible for the actions taken or neglected by legislative institutions or courts. Even the actions outside the limits of jurisdiction so long as a state organ acts as a representative of a state would be attributed to the mentioned state (Musavi, 2001, p. 46). Although international law, police, legislators and administrative authorities are attributed to the state the organs and representatives of states are rarely involved in the creation of pollution outside the national borders. Anyway, state commercial institutions can function in a way that they would cause harm to environment outside the national territory. However, scholars and thinkers have not paid sufficient attention to the question if such behaviors can be attributed to the state or not? Some believe that "as long as a state adopts a procedure through which it may play a central role in commercial activities via creation of an organization, having property, investment, receiving profit and management of similar activities, such an action shows that at least from an international perspective this organization has worked as the general representative of the government (ibid, p. 48). In other words, when the activities and actions of individuals and private corporations are at stake the principles of the international judicial procedure obliges the states to adopt required measures in order to prevent such activities. Thus, if these activities are not done by the state it shows that the state has not observed its most initial international obligation. Therefore, a state is obliged adopt all intelligible and normal measures in order to prevent pollutions outside its borders. For example, when a state commits negligence as regards the adoption of necessary regulations the pollution resulted from this negligence can be attributed to the state; because this state has violated its obligations. If a state has adopted all measures but damage has been incurred to the environment of other state due to the activities of a private company within its territory the state is obliged to take the necessary actions in order to punish the delinquents otherwise this pollution could be attributed to the state (ibid, p. 49).

**4-2- Violation of an International Obligation.** The violation of obligation is the second pillar of action from international point of view. According to the article 2 of liability draft: "when a state violates the international codes it commits a wrong action according to international norms" (Molaei, 2005, p. 41). That an action of a state causes international liability can be only decided by international law. Then, if an action is declared illegal in international law, regulations of internal law are ineffective as regards the action. For according to an accepted principle, actions in international law are judged based on the international regulations (Moqtader, 1994, p. 146). As it is stipulated in the article 3: "description of the action of a state as internationally wrong under international law is not modified based on the description of the same action as a legitimate action according to internal laws". The article 12 of the draft determines the time of realization of the violation as follows: "a violation of an international obligation occurs by a state when the action of the state is not compatible with its obligations". The members of the commission of international law have preferred to use "lack of compatibility" instead of "contradictory" or "opposite"; because it is by no means necessary that an action of a state to be in total contradiction with an international obligation; rather incompatibility of an aspect of the behavior of the state with this obligation is also enough (Saed and Samiei, 2009, p. 76). Of course according to the article 13 of the liability draft: "an action of the state that is not compatible with an international obligation is considered a violation when the action is undertaken by the state". Therefore, violation of an international obligation exists only if the obligation at issue is in contradiction with the action. Moreover, it is clear that international obligations in this context refer to the legal obligations of the state based on international law and include not the obligations which are essentially moral and internationally normal. Then, no legal order save international law order could create any legal obligation for the states.

The other point that should be taken into account is that in international law, like the internal law, legal obligations have various sources. For example, common regulations of international law, international treaties and the general principles of international law can be the source of international liability. Thus, one can ask if the violation international obligation regardless of the source of obligation is always incorrect from an international point of view. The answer to this question is positive from a logical point of view. If a state has real obligation its source as such cannot change its invalid nature that is not compatible with the obligation at issue. If we are allowed to state that an action of a state that is incompatible with the international obligation of the state is not necessarily incorrect then it should be demonstrated that the obligation is not legally binding or it does not exist in reality. Then, international liability is caused by all violations of an international treaty (Hwnkin, 1982, p. 556). The article 12 of the liability draft

stipulates: "an international obligation is violated by a state when an action of a state is not compatible with the obligation regardless of the source and nature of the obligation".

The reality that international obligations have different sources raises another question: if the common source of the violated obligation has any effect on the type and form of international liability resulted from the action? In the case of *Russia damages (1912)* the court rejected the existence of any hypothesis of the distinction between liability resulted from contractual obligations or semi-crimes (quoted from Musavi, 2006: p. 129). Investigation of the detailed work record of the commission of international law concerning the codification of the principle and rules of liability endorses the conclusion that in the determination of the effects of an action that is wrong based on international norms one cannot refer to such a distinction and the different source of the violated obligation does not serve as a justification for preference of a special form of compensation of losses. For example, a state cannot claim that since the violated obligation has been conventional it should pay lesser recompense and only it is obliged to pay higher recompense when there is a treaty. In international law of environment, obligation of states before the compensation of the loss resulted from legal actions is among the obligations whose sources or principles are various. Today this obligation is endorsed in international treaties. The verdicts of international courts do also approve the existence of this obligation as a principle. Also today despite some opposition the conventionality of the mentioned obligation has been endorsed by the majority of international lawyers (Saed, 2010, p. 107).

**5- The Mechanism of Loss Compensation.** The major goal of civil liability is compensating the losses of the one who has suffered a damage that is raised after the demonstration of its pillars of existence. The compensation of the losses of the one who has incurred damage is conducted in various forms. Basically determination of the method or methods of loss compensation is first within the jurisdiction of the states or international organizations that are involved in a conflict based on an agreement; otherwise the subject is within the jurisdiction international arbitration authorities. Of course, the Security Council of United Nations in some cases has the jurisdiction to undertake such an action under the chapter seven of the Charter of United Nations (Zamani, 2002, p. 168). In general, one should say that the most important methods for compensation of loss include the following:

**A) Retrieval of the Past Condition:** The retrieval of the past condition is the most basic and best method of loss compensation and has two different forms: if the loss is material with the restoration of the destructed building that belongs to a stranger or freeing an innocent man and likewise the restitution takes place. If the damage is resulted from a legal action (like a law or order in contradiction with international law) the loss compensation happens via the nullification of the legal action and adoption of a decision that is against that action (Rezaei, 2010, p. 73).

**B) Attraction of the Satisfaction of the One who has suffered a Loss:** When damage is directly incurred to a country or an international organization the latter has the right to ask loss compensation from the country or the international organization that has caused the damage particularly if the damage is spiritual. Then, its satisfaction should be attracted with certain actions (Helmi, 2008, p. 219). These actions are adopted in various forms like official apology, symbolic actions like military salutation to the flag or dispatching a particular delegation for intermediation, legal prosecution and internal punishments including administrative, disciplinary and judicial measures against the state or personal agents. Furthermore, it is often accepted that the announcement of the wrongness of a damaging action by the judge or an international arbitrator is also an action that can attract the satisfaction of the one who has suffered a loss. To put the matter otherwise, a country that is internationally recognized as responsible for illegal actions is obliged to compensate these illegal actions and attract the satisfaction of the state that has incurred a loss. Of course, this loss should not be already compensated via retrieval of the past condition or paying restitution. The attraction of satisfaction should not be irrelevant with the damage and it cannot be insulting to the liable state (ibid).

**C) Termination of the international criminal action:** One of the methods of loss compensation is the commitment of the liable state or international organization to termination of the international criminal action and not repeating it. In other words, if the conditions are ready the state that has incurred damage has the right to ask the violating state to terminate the illegal action and provide a guarantee for the state that has suffered that the action will not be repeated. The international court of justice in its verdict dated 27 June 2001 of the *La Grande Case* forced the convict state to attract the satisfaction of the state that has suffered the damage and make sure that the action will not be repeated in the future (Hanji, 2005, p. 66). In general, it seems that the issue of guarantee and confidence building is more resulted from the gradual development of international law instead of being a result of codification of statutes.

**D) Counteractions:** Counteractions not only thwart the illegal aspect of the action in the international scene rather they are cancel the international liability and it is a method of loss compensation (Thurayaei Azar, 2003, p. 143). Counteractions include any measure that can be adopted by the state that has incurred the loss in order to force the convict state or international organization to compensate the loss.

**E) Indemnity:** Indemnity is the most popular way of loss compensation. International Court of Justice in a verdict dated 11 November 1912 in the case of war reparations of Turkey to Russia used this way. It argued that "various liabilities of the states are not diametrically different and usually most of them can be fulfilled by paying an amount of money" (Case, 2007, p. 94). The indemnity should be exactly in proportion to the loss. Of course, if the damage is material the reparation is estimated based on probabilities. Then, indemnity includes damage that can be financially evaluated and could be consisted of interests and even under some conditions without any interest. However, indirect loss could not be demanded. Meanwhile, it is evident that all methods of loss compensation cannot be expected to be applicable as regards environmental damages, e.g. retrieval of the past condition in such cases as extinction of a plant or animal species or destruction of an ecosystem. This is also the case with counteractions that is in conflict with

the goals of international environmental laws that aim at sustainable development. Even the attraction of the satisfaction of the one who has suffered a loss is meaningless in this regard because the aim of the legislator from the adoption of this method is the compensation of spiritual losses. Then, it seems that we merely can take advantage of few methods of loss compensation like reparation or termination of the illegal action in the current conditions.

**Conclusion.** To confront the magnitude and emergency of international environmental problems and damages, world states require awareness and serious consolidation. Although environmental issues are not of priority in international relation today world states are increasingly paying attention to environmental problems and bringing them from margins of their political agenda to the fore. Moreover, international law has adopted new regulations regarding the liabilities and obligations of the states particularly as to the accountability before the pollutions outside the national borders and accordingly, it monitors the behaviors of the states within this liability framework. The current essay is an effort to study the legal aspects of the compensation of international environmental damages as well as the principles and sources of the liability of states in loss compensation. The results of the study show that "principle of sustainable use of land" is a proper basis for acceptance of the liability of the states in cases where damage is done to the environment. This basis in international law sources including some conventions or decisions taken by legal authorities in international arena have been accepted but it seems that they can be considered to be among the conventional regulations or general principles of international law. Thus, they are binding to all states. Of course, declaring states liable before the compensation of the damages that are incurred to the environment requires some conditions including the attribution of the action to the state and violation of international obligation (commitment of international crime). In this case the state can compensate the damage via paying indemnity and termination of illegal action because other methods of loss compensation like retrieval of the past condition or counteraction are useless in these conditions.

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