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COMPENSATION FOR ENVIRONMENTAL DAMAGE IN INTERNATIONAL LAW

Omar Mahmoud Almakhzoumi[1], *Mohammad Mustafa Eyadat*[2]

[1,2]Faculty of Law, Zarqa University, Jordan.

Email: [1]d-omar-attorney@hotmail.com, [2]Eyadat2000@gmail.com

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ABSTRACT

The establishment of international civil liability for environmental damage will definitely be followed by the civil penalties as a result of the violation for the international commitment, whether this violation relates to the rules of general international law or to the provisions of international environmental law, the general principle governing civil liability must be to compensate for the damage done to others by wrongful or unlawful action caused by the one who caused the damage. Therefore, the availability of the pillars of civil liability for environmental damage, The consequent effect shall be the creation of the right of the aggrieved person to file a civil action and to claim a judgment with an appropriate penalty, which might be an in-kind compensation in order to stop the damages caused by the harmful act and restore the situation to what it was by repairing what was corrupted by this act, which is called (compensation in-kind),or to be monetary compensation when the compensation in kind is impossible, then it is called (monetary compensation),or resort to (consensual) in the case of the impossibility of both monetary and in-kind compensation and this was endorsed by article 34 of the draft articles on international responsibility for the internationally wrongful act which was adopted in 2001, saying "The full reparation for the loss resulting from the internationally wrongful act shall be through restitution, compensation and consent, either singly or in combination."

INTRODUCTION

There is a reciprocal relationship between International and municipal law, International law borrowed civil liability rules from civil law to the extent that their application was commensurate with the nature of the rules of international law. Given the importance of the subject of the study on one of the branches of international law, which is international environmental law. Given the breaches and violations of international environmental obligations and their trans-boundary effects, the study sought to examine the application of international civil liability rules relating to environmental damage in the event of a breach of public international law by a person of public international law. Contractual liability may arise as a result of a breach of a contractual obligation and be derived from the contract, while tort liability shall arise as a result of a breach of an earlier legal obligation. The obligation shall then be the source of the legal act or fact. The elements of liability are the same, whether contractual or tort, and shall compensate the damage. However, the majority of contractual obligations are subject to a specific outcome, whereas the legal obligation arising from breaches of tort is in most cases a matter of offering particular care. In all cases, the establishment of international civil liability has important implications for in-kind, monetary or compromise compensation.

In-kind compensation for environmental damage

The purpose of protecting the environment from harm is not only compensating the victim for the damage, but also preventing the aggravation or recurrence of the damage. Therefore, in-kind compensation is essentially intended to completely eradicate environmental damage, restore the situation to what it was before it occurred, and prevent its further deterioration or recurrence in the future. Thus, this compensation is considered the best and most appropriate for what is the environmental damage.[1]

In-kind compensation takes several forms in the area of compensation for environmental damage. It may take the form of "restitution", which is to restore the status quo ante before the damage occurred, or to stop illegal activities.

First, restitution or return the case to what it was before the environmental damage

Restitution is the first form of reparation available to persons of public international law, it is the synonym of the usual term to restore the situation to what it was before the environmental damage occurred or, more precisely, to re-create the situation

[1]Tarraf, Amer 2008, "Environmental Pollution and International Relations", University Foundation for Studies, Publishing and Distribution, Beirut, pp. 279- 280.

that would have occurred had it not been committed.[2]Article 35 of the draft international liability provides for such compensation.[3]

This is also confirmed by the International Court of Justice in the case of Chorzo factory. It recognized that "the fundamental principle of the concept of an wrongful act is that reparation must, as far as possible, erase all the consequences of the wrongful act, and restore the situation to what it was, and one of the principles that should be used to determine the amount of compensation required is in-kind refund and if it is not possible, pay an amount equal to the value of in-kind refund"[4]

Two conditions are required to achieve an in-kind response, the first of which is that the in-kind restitution is not physically impossible. If the place of damage that must be restored has been destroyed or damaged, which makes it impossible to restore the situation to what it used to be. Such as the destruction of Iraqi forces living materials to the environment of Kuwait, which is called physical impossibility. The legal impossibility is not significant, since the state cannot be invoked and in accordance with its municipal laws and international obligations of the decomposition. This is referred to in article 32 of the draft articles on international responsibility, which reads: “A responsible State shall not invoke the provisions of its municipal law as a justification for non-compliance with its obligations”.[5]It is also in the same sense as the text of article 31 of the draft articles on the responsibility of international organizations. The State and the international organization must make every effort to overcome these difficulties.

It is the same approach as the 1986 Vienna Convention on the Law of Treaties between States and International Organizations, Article 27 states: "1. a party to a treaty shall not invoke the provisions of its municipal law as a justification for its failure to implement the treaty. 2. An international organization that is a party to a treaty shall not invoke the rules of the organization to justify its non-implementation of the treaty."[6]

As for the second condition of restitution, it is the disproportionate benefit rather than compensation, which is meant to balance what should be borne by the State or a person of international law that has committed the wrongful act. The benefit of the affected parties in obtaining such a restitution, and not compensation for the damage suffered. [7]

[2]Ibrahim, Imad Khalil, 2013, “Responsibility of International Organizations for their Illegal Acts,” 1st edition, Zain Publications, Beirut, Lebanon, p. 469.

[3]Article 35 of the draft articles on international responsibility adopted in 2001 states: “The State responsible for an internationally wrongful act has an obligation to respond, i.e., to restore the situation to what it was before the internationally wrongful act was committed, provided that such response was as far as possible; (A) not financially impossible; (b) does not entail a burden that is not commensurate with the benefit of restitution rather than compensation.

[4]See, "Yearbook of the International Law Commission on the Work of its 53rd Session, 2001", op. Cit., P. 125.

[5]See article 32 of the draft articles on international responsibility adopted for 2001, and article 31 of the draft articles on responsibility of international organizations for 2002.

[6]See "Article 27 of the Vienna Convention on the Law of Treaties between States and International Organizations, 1986".

[7]Al-Tai, Adel Ahmad, 2002, "Conditions of State Responsibility for its Internationally Illegal Acts," Al-Balqa Journal for Research and Studies, Al-Ahliyya Amman University, Vol. 9, p. 137.

The judiciary according to the type and seriousness of the wrongful act committed and the seriousness of the damage caused judges this and to be compensated, the International Law Commission recognized the difficulty of such a comparison and concluded that the impossibility of a restitution lay in the fact that the parties had not reached an agreement leading to the resolution of the dispute by mutual consent[8]; or the value of restitution for the affected State is small, so that other forms of reparation will be given priority if the possibility of restitution is impossible because of the destruction of property. Alternatively, the damage has fundamentally changed its character. Judicial bodies in some cases seem to have understood from the compromise provisions or from the parties' positions that they have discretion to issue a compensation award rather than a restitution. In the Walter Fletcher-Smith case, the arbitrator argued that the restitution should in principle be appropriate; however, he interpreted the compromise as giving him discretion to rule on compensation. In the arbitration decision in the Amineol case, the parties agreed that the case could not be restored to the way it was following the cancellation of the concession under a Kuwaiti decree.[9]

In addition, you can find examples on in-kind restitution compensation in the field of environment in the case of the removal of radioactive waste dropped by country and hurt the act of another country. Another example is the treatment of an oil slick in the waters of another State caused by a ship belonging to a State, or the abolition of a law, legislation or administrative decision of a State for an adverse act causing damage to a neighboring State. [10]

And with the approach of this compensational restitution with the special situation of the environment, it is unclear how appropriate this restitution is to the results achieved. The lesson is in the means of trying to restore the situation to what it was, regardless of the outcome. This is confirmed by the Lugano Convention on Civil Liability for Damage to the Environment for Practices of Serious Activities of 1993, which, in its Article 2/8, states, "There shall be no compensation except for the value of reasonable means taken with a view to restoring the status quo ante".[11]Therefore, to put the characteristic of reasonableness into practice requires consideration of some elements, including the possibility of an in-kind restitution. The practical difficulty associated with the environmental situation, the means to be taken, its alternatives and the desired results.

Cessation illegal activities

[8]Al-Tai, Adel Ahmad, ibid., P. 137.

[9]See, "Yearbook of the International Law Commission on the Work of its 53rd Session", op. Cit., P. 125.

[10]Al-Dhalai'een, Jasser Muslim, 2006, "International Responsibility for Harmful Acts in the Environment in International Law", Master Thesis, Amman Arab University for Graduate Studies, Amman, Jordan, p. 89.

[11]Text of Article 27 of the Lugano Convention on Civil Liability for Damage Resulting from the Exercise of Serious Activities, 1993.

The cessation of illegal activities is a preventive means of non-aggravation of the damage, and is not intended to eradicate the damage caused by the activity, so that, its impact is limited to the immediate present and is more effective in the future. Accordingly, the cessation of the illegal activity, although realistically important, is necessary to protect the environment from harm if it continues.

However, in the area of international civil liability and compensation, there can be no compensation except for damage, which is the essence of liability.[12]

The forms of cessation of illicit activity take a broad and flexible connotation, namely, the cessation of the activity first and the temporary prohibition of the activity second, it may also be the organization of activity third. In the first case, the cessation of contaminating activity will be followed by a regulatory intervention by the state by revoking the prior licenses of the activity. This situation may create an internal problem as it clashes with the idea of the acquired rights of persons. In addition, obtaining administrative and legal licenses, resulting in the withdrawal of such licenses confusion by the internal judiciary, and clash with the principle of separation of powers. However, the national judiciary can cancel administrative decisions or pressure the administration to withdraw them, especially if this decision is contrary to the international obligation of the state in accordance with consensual treaties between it and other countries.[13]

In some cases and under certain circumstances, temporary industrial and commercial ban may be necessitated, until the completion of the necessary measures and precautions required by the exercise of these activities. That have caused or may cause environmental damage, such as repairs required by, for example, some classified facilities in order to avoid environmental damage if these activities continue to operate. Especially if this measure is linked to the purpose and respect of the rules of international environmental law in the non-harm to the neighborhood environment.[14]

For reorganization of contaminated activity, working conditions may call for some technical and practical measures to avoid or at least mitigate some of the damage.[15]Insulation may be required on the plant walls to reduce emissions, or leakage of radioactive and chemical substances.

Monetary compensation for environmental damage

[12]M.E. ROUJOU DE BOUBEE: Essaisur la notion de réparation, L.G.D.J., 1974, p. 211

[13]Boufelja, Abdel Rahman, 2016, "Civil Liability for Environmental Damage and the Role of Insurance", Ph.D. Thesis, University of AbiBakrBelkaid / Tlemcen - Algeria, p. 175.

[14]See 2001, Yearbook of the International Law Commission, op. Cit., P. 120.

[15]Buflga Abdul Rahman, previous reference, p. 170.

Monetary compensation is the most common and accepted in claims of international civil liability for reparation caused by internationally wrongful acts.[16]Article 36 of the draft articles on international liability dealt with compensation for damage caused by an internationally wrongful act, if such damage was not repaired by restitution, when it provided that: "1. The State responsible for an internationally wrongful act has an obligation to compensate for the damage caused by that act if such damage is not repaired by restitution. 2. Compensation shall include any damage that is financially assessable, including the loss of profits as much as this gain is certain."[17]

Monetary compensation is one of the most common forms of reparation in international practice and the recognition of civil liability for injurious act, as confirmed by the International Court of Justice in the Gabchikovo case. When it recognized that, "it is a stable rule of international law, that the injured State has the right to compensation for the damage caused by this act."[18]

The importance of monetary compensation for environmental damage lies in addressing the actual losses incurred because of the harmful act, which is financially assessable, and therefore a non-punitive sanction. Rather, the nature of cash payments is intended to compensate, to the extent possible, for damage to the affected State because of the breach, or to include its property, personnel or citizens claimed by the state on their behalf for compensation under diplomatic protection.[19]

The international judiciary did not lose sight of compensation for moral damages, which became financially assessable, it may become the subject of a claim for compensation, as confirmed by the International Arbitral Tribunal in the case of (Lusitania) recognized that "international law permits compensation for psychological suffering, hurt feelings, humiliation, shame, degradation, loss of social status, or damage to reputation, because these injuries are real, and their difficulty in measuring or assessing by monetary standards does not diminish their reality and do not constitute a reason for the injured person not to receive compensation."[20]

Based on the foregoing, monetary (financial) compensation for environmental damage is not easily compensated for other damage, because of the characteristics of environmental damage itself,at the same time, it is equally realistic and compensable for damage, although it is difficult to quantify. Although both the Lugano Convention and the European Directive on Waste set out the concept of environmental damage to be compensated, including death, bodily injury, and

[16]Shiwi, Abdelsalam Mansour, 2009, "Compensation for Environmental Damages under Public International Law," Legal Books House, Egypt, p. 106.

[17]See, "Article 36 of the draft articles on international responsibility for internationally wrongful acts adopted in 2001".

[18]See, 2001 Yearbook of the International Law Commission, op. Cit., P. 127

[19]Kandil, Said El-Sayed, 2004, "Mechanisms to compensate for environmental damage, a study in the light of international legal systems and conventions," New University Publishing House, Alexandria, Egypt, p. 15.

[20]See, 2001 Yearbook of the International Law Commission, op. Cit., P. 131.

damage to funds. [21]This is a clear international trend in the possibility of establishing compensation for purely environmental damage.

Since the definition of damage is generally the decisive section and clear to determine its elements and the basis of the claims for compensation, so it is essential to define realistic and objective criteria that determine the value of environmental damage in particular. In this regard, at its fifty-third session, in 2001, the International Law Commission drafted articles on the draft international liability for injurious consequences arising out of acts not prohibited by international law (prevention of trans-boundary harm from its risk activities).[22]

It states in its second article, "(b) Damage means: damage caused to persons, property or environment(c) Trans-boundary harm means damage caused in the territory of a State other than the State of origin or elsewhere under the jurisdiction or control of that State, whether or not the States concerned share common borders."

The Commission, at its fifty-sixth session in 2004, also approved the draft principles on the allocation of loss in the case of trans boundary harm from its risk activities.[23]

However, the main objective of clarifying all issues related to environmental damage remedies and compensation is to determine and provide prompt and adequate compensation. Whether for natural or legal persons, including States, this faces many legal and realistic difficulties and obstacles in its application. That is why many international conventions have tried to set the frameworks for such compensation in a number of ways, through which a logical convergence between the offending act and actual harm can be achieved. In addition, these international principles may be an incentive for States, individuals, companies and operators to prevent harm to the environment, and to promote the idea of international cooperation to address compensation issues in a friendly and proper manner. As a result, the components of the environment are preserved to the extent possible, either by preventing or minimizing such damage or, at a later stage, by appropriate compensation for such damage in case they take place.

[21]In its Article 2/7, the 1993 Lugano Convention defined damage by saying: (a) loss of life or personal injury; (b) loss or damage to property other than the structure itself, or property held by the operator at the site of dangerous activity. (C) loss or damage caused by environmental degradation; (d) costs of preventive measures and any loss or damage resulting from such measures."

[22]At its 30th session, in 1978, the International Law Commission incorporated the topic of international liability for injurious consequences arising out of acts not prohibited by international law. Legal revisions remained in the Commission's discussions on the subject until 2001, when the In accordance with its Statute, the Commission referred the draft preamble and draft articles to the General Assembly. At its 2701th meeting, the General Assembly recommended the elaboration of a convention on the draft articles on the prevention of transboundary harm from hazardous activities. See "Yearbook of the International Law Commission on the Work of its 53rd Session, 2001", op. Cit., Pp. 186-188.

[23]At the 56th session of the International Law Commission, the Commission completed the preliminary reading of a set of eight draft principles on the allocation of loss in the case of transboundary harm from its risk activities and at its 2882nd meeting in 2006 the Commission received the report of the Drafting Committee and adopted on third reading the preamble and the total At its 2910th meeting, the Commission adopted the preamble text and the draft principles on the allocation of loss in case of transient damage resulting from hazardous activities. "

See, "Yearbook of the International Law Commission on the Work of its 56th Session, 2004", op. Cit., Chap. V, pp. 68-71.

Principle 3 of the draft principles of international liability for injurious consequences referred to this by stating that "the objectives of these draft principles are: a. To ensure prompt and adequate compensation for victims of trans-boundary harm.(B) Conservation and protection of the environment in the event of trans-boundary harm, in particular with regard to the mitigation or rehabilitation of damage to the environment or its restoration".[24]The dual purpose of these draft principles is to ensure the protection of victims of trans-boundary harm and to preserve and protect the environment as a common resource for all.[25]

Paragraph (b) of this article also attaches great importance to the protection and preservation of the environment from damage to it as an existing value in itself, without having to be seen only from the perspective of damage to persons and property. Which aims to protect the environment as a valuable resource in its own right, for the benefit of present and future generations, thereby enabling it to perform its permanent natural and ecological functions. These costs should therefore be reasonable, and if damage cannot be repaired or reinstated, it is reasonable to introduce the equivalent of those constituent elements.[26]

Compromise Compensation

It is the third form of reparation that a responsible State must provide to meet its obligations to provide full reparation for the damage caused by any unlawful international action. This is confirmed by article 37 of the draft articles on international responsibility by stating: 1. A State responsible for an internationally wrongful act has an obligation to provide compromise compensation for the loss resulting from that act if such loss cannot be repaired by restitution or compensation.2. Compromise compensation may not take the form of an acknowledgment by way of expressing regret, an official apology, or any other appropriate form. 3. Compromise compensation should not be disproportionate to the loss and may not take a humiliating form of the responsible State.[27]Consequently, compromise compensation does not take the standard form of reparation, meaning that in many cases where the loss as a result of an internationally wrongful act may occur, full reparation may be restitution and / or compensation. The exceptional nature of treatment of compromise compensation and its relationship to the principle of full reparation is emphasized in the phrase (if this loss cannot be repaired by restitution or compensation) in the preceding article

[24]See, "Principle 3 of the draft principles of international liability for injurious consequences arising out of acts not prohibited by international law."

[25]See, "Yearbook of the International Law Commission on the Work of its 58th Session", op. Cit., P. 87.

[26]See, "Yearbook of the International Law Commission on the Work of its 58th Session", op. Cit., P. 89.

[27]Faqihhan (Anziulti and Morelli) cited compromise compensation as a specific remedy to insult the state in its dignity, honor or reputation, while others believe that the job of compromise compensation may also relate to a judicial injustice that the state believes was insulting to it, and that it is an internationally wrongful act. The state apology or reinstatement of an insulted flag, according to the scholar (Brownley), the cases of compromise compensation that may be often overlapping are three (apology, confession to the offense through a salute to the flag, payment of compensation and measures to prevent recurrence of damage) . According to jurist (Personaz), satisfaction may urge the state to improve its administration of justice, and to ensure that such violations and unlawful acts committed by its citizens will be avoided in the future. " See Ibrahim, Emad, Khalil, op. Cit., Pp. 478-479.

and article 37 is divided into three paragraphs. Each of them deals with an independent aspect of compromise compensation. The first paragraph deals with the legal nature of the compromise compensation and the types of losses it provides. The second paragraph describes in a non-exclusive manner some of the methods of compromise compensation. The third paragraph places limits on the obligation to provide satisfaction, taking into account past practices in cases where unreasonable forms of compromise compensation are sometimes requested. Referring to the text of article 31 of the same articles, it states in its second paragraph, "Loss shall include any damage, whether material or moral, resulting from the internationally wrongful act of the State".[28]

Any material or moral damage resulting from an internationally wrongful act is usually based on a financial assessment. Compromise compensation is a remedy for those losses that are not based on financial account consideration and are often symbolic in nature, resulting from a breach of the obligation, regardless of its material consequences for the State concerned.[29]

Compromise compensation in the field of international law has become an accepted and well-established issue in the treatment of significant losses of this kind, sometimes described as (non-material loss).The International Court of Arbitration in the Renault Warrior case raised it when it acknowledged that "States, international courts and tribunals have long resorted to consent, as a remedy, or as a form of reparation in the broad sense of the breach of international obligations, in particular relating to moral or legal harm directly to the State. In particular, it is distinguished from harm to persons and involves international responsibilities"[30]

According to Article 37, paragraph 2, satisfaction may take some form of acknowledgment of the offense, an expression of regret, an official apology, or any other appropriate form. These forms are not limited, but came for example, and therefore the appropriate form depends on the circumstances and cannot be determined in advance.

As a result, the nature of compromise compensation, as a form of compensation in modern international responsibility, is not commensurate with the damage to the environment, and not commensurate with the risk of violation. Unless the compromise compensation comes as a consequence of actual compensation, either by restoring the status quo ante, or financial compensation commensurate with the state of environmental damage.

CONCLUSIONS AND RECOMMENDATIONS

First

[28]See "Text of Article 31 of the Draft Articles of International Responsibility Adopted for 2001".

[29]See, "Yearbook of the International Law Commission on the Work of its 53rd Session", op. Cit., P. 136.

[30]See, "Yearbook of the International Law Commission on the Work of its 53rd Session", op. Cit., P. 137.

Envisage consideration of the part relating to compensation for environmental damage, in particular financial compensation, can only if the damage relates to the human body, health or property. Which in turn, is measured against environmental damage, although the natural environment is the primary victim of that harmful act, for which international protection must be asserted to minimize pollution. Alternatively, compensation for damage sustained away from the presumed subordination of such harm to a person or property, and therefore the need to strengthen the emphasis on the need to establish more contribution funds to protect the environment.

Second

Environmental damage, with its characteristics that distinguish it from harm in traditional matters, must be accompanied by the development of rules of international liability in general and civil in particular on environmental damage.

Third

The need to establish a permanent international tribunal for the environment to consider human rights issues, such as civil liability, which are more efficient, knowledgeable and realistic in simulating environmental and pollution issues that happens to it and its people, which gives more seriousness to the investigation and reduction of these crimes, especially in times of peace.

Fourth

It is necessary for the international community, especially in its judiciary, to take the idea of the urgent judiciary applied in municipal laws. Which gives the judge the power to adjudicate matters which he fears may be lost, whatever their value, with a view to protecting the right on a temporary basis, pending the adjudication of the origin of the dispute from the competent trial court. This is particularly in line with the idea of environmental protection, which, if implemented, may be an important solution in protecting the environment before the damage and pollution worsen.

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