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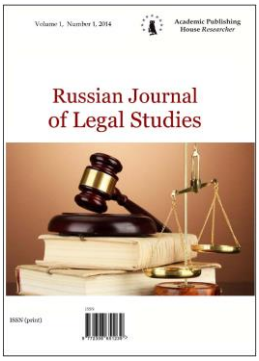

"The Ultimate Responsibility of State" for Radioactive Waste Disposal: A concept of International Law

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Abstract

The very special nature of radioactive waste triggers variable challenges to the allocation of responsibilities between the state and waste generators, then is usual by conventional types of wastes, such as municipal (household, commercial and demolition) and by certain other hazardous wastes (electronic, etc.). Apart from the producers of radioactive waste (including operators of nuclear power plants, who are responsible for ensuring the safe management within their premises) and who should cover all costs for the radioactive waste management up to disposal, the management of radioactive waste inevitably affects several other involved parties (public, workers, municipalities where radioactive waste will be finally disposed of). To identify some clear delineation between the responsibility of the waste generator and that of the state to protect its citizens, this contribution turns its attention to the legal framework created in this field of by means of international law. It examines the concept of "the ultimate responsibility of the State" in the international law in order to analyze the allocation of responsibility between the waste generator and the state in whose territory radioactive waste is produced.

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Keywords: Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management of 1997, Paris Convention on Third Party Liability in the Field of Nuclear Energy of 1960, Vienna Convention on Civil Liability for Nuclear Damage of 1963, Ultimate Responsibility of the State, Radioactive Waste Disposal.

1. Introduction

Hannes Alfvén, Nobel laureate in physics, in 1979 described the as yet unsolved dilemma of high-level radioactive waste management: "The problem is how to keep RAW in storage until it decays after hundreds of thousands of years. The final disposal must be absolutely reliable as the quantities of poison are tremendous. It is very difficult to satisfy these requirements for the simple reason that we have had no practical experience with such a long term project. Moreover permanently guarded storage requires a society with unprecedented stability" (Abbate, 1979: 13-14). It is a matter of fact, that the very special nature of radioactive waste triggers variable

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challenges to the allocation of responsibilities between the state and waste generators, than is usual by conventional types of wastes, such as municipal (household, commercial and demolition), by clinical wastes and also by certain other hazardous wastes (Riley, 2004: 33-56). Concerning the radioactive waste, states face a choice between reprocessing or disposal. The first option recovers plutonium and uranium for possible re-use, but also generates further radioactive waste, all of which will require final disposal. Where radioactive waste is not to be reprocessed, the normal management option is an extended period of storage. However, disposal should not be confused with. Temporary storage is an important stage in their overall management for technological reasons (heat removal and radiation protection). Storage is also needed until disposal facilities become available. However, storage cannot replace disposal as the end point of the management. In the long term only disposal can guarantee protection against potential hazards, as it eliminates permanent and continuous human activities, such as control, retrieval and repackaging which otherwise would be required for an undefined storage period.

In general, the "*polluter pays*" principle applies to waste generators in most of the jurisdictions (Montjoie, 2011: 60). However, in the field of radioactive waste management, governments basically do not limit their involvement to the pure creation of legislative and regulatory frameworks. Given their longevity, radioactive waste introduce a "new time dimension in the field of radiation risk management" (Vial, 2004: 16). Current governments must plan the management of radioactive waste while considering possible future evolution of up to several hundred years or even many thousands of years, each according to its own safety standards and thus hand over a safe legacy. Then it will be up to future generations to continue or to reconsider the approaches taken by current governments. Whatever the future of nuclear power and other nuclear non-power applications, the implementation of disposal solutions, as the end of managing radioactive waste, are needed for assuring both safety and sustainability. Only adequate disposal provides workers, the public and the environment with protections from the hazards radioactive waste may pose over time. Consequently, governments must bear the overall responsibility for formulating and implementation comprehensive national policies for long-term management of radioactive waste, reflecting the interests and positions of all affected parties (Kelson, 1972: 199-200). Such national policies must aim to reflect the very special socio-political, geo-political, economic and strategic features that are considerably varied from the characteristic features of other categories of waste.

In order to identify some clear delineation between the responsibility of the waste generator and that of the state to protect its citizens, we turn our attention to the legal framework created in the field of radioactive waste management by means of international law. In the following parts, major legal instruments will be examined, analysing the allocation of responsibility between the waste generator and the state in whose territory radioactive waste is produced.

2. Materials and methods

The main sources for writing this article became the provisions of the binding international treaties, in particular of the Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management of 1997 and of the Vienna Convention on Civil Liability for Nuclear Damage of 1963 and its official interpretation, as presented by the International Atomic Energy Agency (IAEA) in the "IAEA International Law Series".

Further, in order to analyse obligations arising from the provisions of these treaties, results of existing academic studies have been reflected (Kageneck, Pinel, 1998: 409-425; Montjoie, 2011: 52-74; Segrestain, 1980: 20-65; Stendahl, 2009: 226-242; Tonhauser, Jankowitsch-Prevor, 2006: 206-223; Tromans, 2010: 399-409).

The study used the method of comparative law. Author's arguments are based on both authoritative interpretation of international law and on interpretation done by academic writings.

3. Discussion

Allocation of responsibilities under international law: General remarks

In the field of international public law, the legal framework created under the auspices of the IAEA is to be analyzed to tackle the question of how responsibilities are distributed among the polluters and the state, regarding radioactive waste. Here, the Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management of 1997 plays an

eminent role, its having been adopted as one of the salient reactions of the international community of states on the accident in Chernobyl (Kageneck, Pinel, 1998: 410). The Joint Convention intents to address the issues of safety of radioactive waste management "through the enhancement of national measures and international co-operation, including where appropriate, safety-related technical co-operation."

Further, it also intends to "ensure that during all stages of spent fuel and radioactive waste management there are effective defenses against potential hazards so that individuals, society and the environment are protected from harmful effects of ionizing radiation, now and in the future, in such a way that the needs and aspirations of the present generation are met without compromising the ability of future generations to meet their needs and aspirations" and to "to prevent accidents with radiological consequences and to mitigate their consequences should they occur during any stage of spent fuel or radioactive waste management." Consequently, the Joint Convention is the first legal instrument to address the issue of spent fuel and radioactive waste management safety on a global scale. The Joint Convention establishes minimal standards for spent fuel (i.e. „all activities that relate to the handling or storage of spent fuel, excluding off-site transportation; it may also involve discharges" (Art. 2 letter/o)) and radioactive waste management (i.e. „all activities, including decommissioning activities, that relate to the handling, pre-treatment, treatment, conditioning, storage, or disposal of radioactive waste, excluding off-site transportation; it may also involve discharges" - Art. 2 letter/i) and reaffirms "*ultimate responsibility*" of the State vis-á-vis these activities. Beside this Convention, a rather complex corpus of "Safety Standards" has been developed by the Agency during the last years, also dealing with the issue of radioactive waste management.

Further, due to a certain level of risk arising from operation of the storage and repository facilities, attention must also be paid to the international conventions in nuclear third party liability. Here, two independent liability systems exist, side by side: the system, created under the auspices of the Organisation for Economic Co-operation and Development (the Paris Convention on Third Party Liability in the Field of Nuclear Energy of 1960) and the auspices of the International Atomic Energy Agency (the Vienna Convention on Civil Liability for Nuclear Damage of 1963). Despite principally creating an international system of private liability, these treaties also allow a certain stage of state involvement, that clearly reflects the general obligation to protect its citizens. Having said this, we can refer to the Vienna Convention, which enables the Installation State to provide by legislation that, in accordance with such terms as may be specified therein, a person handling radioactive waste may, at his request and with the consent of the operator concerned, be designated or recognized as operator in the place of that operator in respect of such radioactive waste respectively. In this case, such person shall be considered, for all the purposes of this Convention, as an operator of a nuclear installation situated within the territory of that State.

"Ultimate responsibility of the State" in nuclear safety

It is a matter of fact, that traditionally, the safety of radioactive waste management was considered a kind of "*domaine reservé*" of sovereign states (Stendahl, 2009: 240). Such approach had clearly reflected the strategic importance of nuclear energy for their national economies. Further, the fact, that some reprocessing and storage facilities were used for civil purposes, as well as the means of the military sector, strengthened the resistance of certain states to accept any kind of binding regulation by means of international law. This was also the reason why some very early efforts for international co-ordination in research activities in this area (e.g. the Eurochemic Project, launched by thirteen Member States of the European Nuclear Energy Agency in 1959) failed.

In this respect, the Joint Convention on the Safety of Spent Fuel Management and the Safety of Radioactive Waste Management of 1997 (hereinafter - "the Joint Convention") represents the first legally binding international treaty on the safety of radioactive waste management (Tromans, 2010: 400-401). It was adopted with the following objectives:

to achieve and maintain a high level of worldwide safety in radioactive waste (i.e. radioactive material in gaseous, liquid or solid form, for which no further use is foreseen by the Contracting Party or by a natural or legal person whose decision is accepted by the Contracting Party, and which is controlled as radioactive waste by a regulatory body under the legislative and regulatory framework of the Contracting Party (Art. 1 par. n)) management, through the enhancement of

national measures and international cooperation, including, where appropriate, safety-related technical co-operation,

- to ensure that, during all stages of radioactive waste management, there are effective defenses against potential hazards, so that individuals, society and the environment are protected from the harmful effects of ionizing radiation, now and in the future, in such a way that the needs and aspirations of the present generation are met without compromising the ability of future generations to meet their needs and aspirations;
- to prevent accidents with radiological consequences and to mitigate their consequences, should they occur, during any stage of radioactive waste management.

Although representing first legally binding international treaty in the field from the point of view of its enforcement, the Joint Convention represents an incentive instrument, as it does not entail any sanctions for non-compliance. The Joint Convention is not designed to ensure the fulfilment of obligations by the Contracting Parties through controls and sanctions, but is based on their common interest in achieving the objectives of the Convention. In addition, the Joint Convention does not require the development of national programmes for the long-term management of radioactive waste, even though this is regarded as a key requisite for the successful implementation of national policies. Consequently, it also lacks specific requirements as to the elements of such national programmes. These points are also considered to be major shortcomings of the Joint Convention (Webb, 1998: 270-274).

The Joint Convention shall apply to the radioactive waste that results from the operation of civilian nuclear reactors or from other civilian applications. Consequently, wastes resulting from the operation of any military (defense) nuclear facilities are not to be covered by the provisions of this Convention, unless declared as radioactive waste for the purposes of this Convention by the respective Contracting Party. Further, neither is the radioactive waste held at reprocessing facilities as part of a reprocessing activity covered in the scope of this Convention, unless the Contracting Party declares reprocessing to be part of radioactive waste management. Under the scope of the Convention, also do not fall any waste that contains only naturally occurring radioactive materials and that does not originate from the nuclear fuel cycle, unless it constitutes a disused sealed source or it is declared as radioactive waste for the purposes of this Convention by the Contracting Party (Tonhauser, Jankowitsch-Prevor, 2006: 208-209).

The Joint Convention follows the concept of the "*ultimate responsibility*" of the state, stipulating that each Contracting Party shall provide for the establishment of applicable national safety requirements and regulations for radiation safety, which will cover national licensing systems, prohibition of the operation of a radioactive waste management facility without a license, a system of appropriate institutional control, regulatory inspection, documentation and reporting, the enforcement of applicable regulations and of the terms of the licenses and clear allocation of responsibilities of the bodies involved in the different steps of radioactive waste management.

In relation to allocation of responsibility between the waste producer and the state, the Joint Convention explicitly declares (Art. 21 par. 1) that "each Contracting Party shall ensure that prime responsibility for the safety of spent fuel or radioactive waste management rests with the holder of the relevant license and shall take the appropriate steps to ensure that each such license holder meets its responsibility"

As the "license" is to be considered as "any authorization, permission or certification granted by a regulatory body to carry out any activity related to management of radioactive waste", we deduce that the "polluter" and the "license holder" are one and same person (Cans, 2013: 192). Both those subjects to private and public law can be involved in the field of radioactive waste management. The Joint Convention takes the position of the state into consideration (and enables it), when stipulating for the "effective independence of the regulatory functions from other functions where organizations are involved in radioactive waste management and in their regulation."

However, it is a matter of fact that the Joint Convention does not provide for further definition of the license holders *"prime responsibility"*. As each Contracting Party must "establish and maintain a legislative and regulatory framework to govern the safety of radioactive waste management", it is understood that shaping a precise definition of this „prime responsibility" is in the hands of the respective Contracting Party. In this connection, reference may also be made to

the Convention on Nuclear Safety of 1994, which provides for the same principle in relation to holders of a license for the operation of a nuclear power plant (Kamminga, 1995: 874).

Further, the Joint Convention stipulates some minimal requirements in relation to the national legal and regulatory framework. In particular, the following are of interest for the scope of this study:

Each Contracting Party shall "take appropriate steps to ensure, that qualified staff are available as needed for safety-related activities during the operating lifetime of a SF and a RAW management facility." Further, each Contracting Party shall "take appropriate steps to ensure adequate financial resources are available to support the safety of facilities for radioactive waste management during their operating lifetime and for decommissioning."

Consequently, the Joint Convention deliberately fails to channel the major responsibilities to the "license holder" (polluter), but remains (also deliberately) neutral in this regard, enabling the Contracting Parties to decide upon the type and range of state involvement in the field of radioactive waste management. E.g., the Contracting Party is basically free to decide on the form of a financing scheme in this area. Similarly, the Contracting Party is free to decide whether the necessary research and development will be conducted by the state, or by the license holder. Such a neutral construction clearly reflects the fact, that when adopting the Convention, different states had already developed various financial and organisational systems in the area of radioactive waste management (Segrestain, 1980: 55-65; Cans, 2013: 192).

Last but not least, the Joint Convention explicitly provides that, if there is no license holder or „other responsible party", the responsibility rests with the Contracting Party that has jurisdiction over the radioactive waste. Thus, this rule also reflects the concept of the "*ultimate responsibility*" of the state, which points to potential hazards that may arise during the long-term operation of storages and repositories.

"Ultimate responsibility of the State" in nuclear liability

It is a matter of fact, that the relation between nuclear third party liability treaties and radioactive waste management has been the subject of long academic discussion (Reyners, 1997: 123-145). The core of these discussions represents the issue of the applicability of these conventions to those facilities where the radioactive waste are temporary stored, or definitively disposed. Under the legal framework of the Paris Convention on Third Party Liability in the Field of Nuclear Energy, the following facilities („nuclear installations") are covered: „reactors other than those comprised in any means of transport; factories for the manufacture or processing of nuclear substances; factories for the separation of isotopes of nuclear fuel; factories for the reprocessing of irradiated nuclear fuel; facilities for the storage of nuclear substances other than storage incidental to the carriage of such substances; and such other installations in which there are nuclear fuel or radioactive products or waste as the Steering Committee for Nuclear Energy of the Organisation shall from time to time determine."

The Vienna Convention on Civil Liability for Nuclear Damage provides for a very similar definition of the same term: „any nuclear reactor other than one with which a means of sea or air transport is equipped for use as a source of power, whether for propulsion thereof or for any other purpose; any factory using nuclear fuel for the production of nuclear material, or any factory for the processing of nuclear material, including any factory for the re-processing of irradiated nuclear fuel; and any facility where nuclear material is stored, other than storage incidental to the carriage of such material."

Consequently, both liability treaties basically apply to the reprocessing facilities and to facilities, where radioactive waste has been temporary stored since the 1960s. However, neither treaty explicitly addressed the issue of the final disposal facilities (repositories), which became gradually more and more relevant over the course of the last decades. This challenge was reflected by both the Protocol to Amend the Vienna Convention on Civil Liability for Nuclear Damage of 1997 and the Protocol to Amend the Paris Convention on Third Party Liability in the Field of Nuclear Energy of 2004.

In the legal framework of the Amended Vienna Convention, the Board of Governors of the International Atomic Energy Agency was empowered to determine which installations with nuclear fuel, Radioactive products or waste are to be considered „nuclear installations" in the sense of the treaty. That brings the possibility of also extending the application of the treaty to waste repositories. The Amended Paris Convention also extended the definition of the "nuclear

installation" to "installations for the disposal of nuclear substances." However, the progressive effects of these changes are rather limited in reality, as only three Member States belong to the legal framework created by the Amended Vienna Convention (Latvia, Poland and Romania). Further, the Amended Paris Convention has not yet entered into force.

In strict contrast to a rather reserved definition of license holders "prime responsibility" for the safety of radioactive waste management in the Joint Convention, the nuclear third party liability treaties channel all liability for damages (arising from a nuclear incident) in the "nuclear installation" to the person designated or recognized by the competent public authority as being the "operator of the installation." Thus, the operator of a reprocessing and storage facility (and under the liability system of the Amended Paris Convention also the operator of the deep geological repository) is *exclusively* liable for all damages, arising from the radioactive, toxic, explosive or other hazardous properties of nuclear fuel, or radioactive products, or waste, or with any of them, or from ionizing radiations emitted by any source of radiation inside these installations.

Both liability systems allow only very limited liability exonerations (armed conflict, hostilities, civil war, insurrection, grave natural disaster of an exceptional character). Further, in contrast to a vague limitation of financial obligations among the state and polluter in the Joint Convention, the nuclear third party liability treaties unambiguously prefer the direct allocation of financial responsibilities on the operators' part. Therefore, the operator is obliged to have and maintain some other financial security in order to cover his exclusive liability.

However, neither of the nuclear liability treaties create a liability system free of state intervention. On contrary, the treaties provide for a whole range of interventions from the side of the Contracting Parties, which shape the contours of operator liability: As a *quid pro quo* for the principle of exclusive liability and for very limited liability relief, the Contracting Party *must* limit operator liability for damages under the Paris Convention of 1960. The same system also applies, in slightly modified form, under the Vienna Convention of 1963, which enables the Contracting Parties to limit the operator liability, or to provide for unlimited operators liability. To cover operator liability under the Paris Convention of 1960, the operator shall be required to have and maintain insurance or other financial security of the amount established and of such type and terms as the Contracting Party provides. Also, under the Vienna Convention of 1963, the operator shall be required to maintain insurance or other financial security covering his liability for nuclear damage in such amounts, of such types and in such terms as the Contracting Party shall specify. However, in contrast to the Paris Convention of 1960, the Vienna Convention of 1963 also provides that the Contracting Party shall ensure the payment of claims for compensation for nuclear damage that have been established against the operator by providing the necessary funds to the extent that the yield of insurance or other financial security is inadequate to satisfy such claims, but not in excess of the limit established in national legislation. Further, the Vienna Convention of 1963 provides that nothing shall require a Contracting Party or any of its constituent sub-divisions, such as States or Republics, to maintain insurance or other financial security to cover their liability as operators.

Consequently, though the nuclear third party liability conventions link liability for damages directly to the operator, they also provide a rather wide field of state intervention and basically assign their Contracting Parties to define these rules in national legislation. Thus, even in the field of liability for damages that may occur by operating the facilities serving for reprocessing of spent fuel, storage and final disposal, international law itself fails to provide a clear cut between operator liability and state responsibility to protect. Further, liability limitations and a system of state guarantees represent a major modification to the "polluter pays" principle in this area.

Also, while not exactly stipulated in the provision of the treaties, in the area of damage compensation, certain "ultimate responsibility" rests in the state. *Nemo dat quot not habet*. Even by opting for the regime of unlimited liability (which is possible under the Vienna Convention in both 1963 and 1997 versions) and under the Amended Paris Convention, after the financial funds of the operator are exhausted, any remaining damages remain a burden of the state, depending on its solvency and willingness to cover them (Emmerechts, 2010: 156-157). Further, within the meaning of the liability treaties, each disposal facility must have an operator liable with financial coverage of his liability. The question raised at this stage is to determine, who in this system must ensure that there will be the effective and continuous presence of an operator liable. Here, the treaties provide for no explicit answer to this question, however, the very definition of a

nuclear operator entails a specific obligation of a state to designate or recognise an operator for any nuclear installation. Consequently, it would be reasonable to consider by extension, that this provision also includes the obligation to ensure, that someone will always remain liable for the radioactive waste disposed of. One possibility envisaged is that this liability be transferred to the state or a public agency it has designated. In this scenario, victims would have no other recourse but to claim compensation directly from the state where the radioactive waste disposal facility is located (Reyners, 1997: 142-144).

4. Results

Taking the above presented perspectives into consideration, one can argue that any allocation of responsibilities between the state and waste generators represents a considerable challenge to the field of radioactive waste management:

1. Existing binding legal instruments of international law fail to provide for an exact determination between the "*primary responsibility*" of the waste generator (license holder) and the "ultimate responsibility" of the state (Dagincour, 2001: 265-266). Notwithstanding the "*ultimate responsibility*" of the state, under the polluter pays principle, the generators are responsible for managing the waste. It seems clear that licence holders' "*primary responsibility*" entails (at least) financial responsibility. "*Beyond this core, the contours of the polluter pays principle become blurred.*"
2. It is commonly held that the polluters pays principle is, in the field of radioactive waste management, subject to further shaping and specification by the state and therefore its function is rather to "justify the imposition of physical or operational responsibility on waste generators." Such responsibility seems to be common as regards interim storage (which is also not the case of all jurisdictions), but may be extended to final disposal and/or to research and development obligations. *A vice versa*, the obligations mentioned can also rest in the state. This possible extension shows that there is no a clear-cut borderline between the polluter pays principle and the state obligation to protect in this field.
3. In any case, the state bears its "*ultimate responsibility*" once the radioactive waste have finally been disposed into the repository, if responsible polluter is not known, does not exist, ceases or has become unable to duly fulfil his obligations.

5. Conclusions

The "Ultimate Responsibility of the State" in the area of radioactive waste management is to be regarded a concept of International Law, which is currently shared worldwide. This has been reflected in the rather wide adherence of the State to the obligations of the Joint Convention. At the same time, the concept of the "Ultimate Responsibility" is shared also by the liability treaties, which primary link the civil liability to the "license holders" (operators), however, they recognize the key role of the State in this area too. Consequently, the current legal framework, created by the international treaties, recognizes the importance of the State as a subject of the "last instance" in regard to any dangerous activities. Any responsibility of private subjects cannot supersede the role of the State in this regard.

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