LEGAL ASPECTS OF SUSTAINABLE DEVELOPMENT

THE ENVIRONMENT, RISK AND LIABILITY IN INTERNATIONAL LAW

JULIO BARBOZA

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The Environment, Risk and Liability in International Law

Legal Aspects of Sustainable Development

General Editor

David Freestone

This series publishes work on all aspects of the international legal dimensions of the concept of sustainable development. Its aim is to publish important works of scholarship on a range of relevant issues including conservation of natural resources, climate change, biodiversity loss and the role of international agreements, international organizations and state practice.

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To my grandchildren, Pedro, Santiago and last but not least, Violeta.

Series Editor's Preface

I am pleased to include this work by Professor Julio Barboza as the tenth volume in the Martinus Nijhoff series on *Legal Aspects of Sustainable Development* published under my general editorship. The aim of this series is to publish works at the cutting edge of legal scholarship that address both the practical and the theoretical aspects of this important concept.

Professor Barboza's very lucid exposition of the basic concepts of risk, harm, responsibility and liability under international law provides an excellent introduction to his consideration of relevant treaty law and state practice and of the work of the International Law Commission (ILC). The work also reproduces in its annexes some of the key texts adopted by the ILC on this subject. Professor Barboza is uniquely qualified to write on this. He is a former member of the International Law Commission and was from 1985 to 1996 its Second Rapporteur (after Professor Quentin-Baxter) on the issue of 'International Liability For Injurious Consequences Arising Out Of Acts Not Prohibited By International Law.'

This work was completed a month before the disastrous oil spill in the Gulf of Mexico from the BP drilling rig *Deepwater Horizon*. For that reason the Gulf incident is not referred to in this work, but it is worth recalling Barboza's prescient words in his own Preface where he writes ... 'modern technologies have helped increase risks by introducing hazardous but socially useful activities and now nature itself feels the threat of human presence and action.' Of course, in an era of anthropogenic induced climate change largely resulting from the unsustainable use of fossil fuels it is perhaps arguable whether oil drilling in very deep water constitutes a 'socially useful activity' within his definition, but the threat to nature and natural ecosystems that it poses have been demonstrated to us all too vividly. *Deepwater Horizon* shows us that this is a very real contemporary issue with which international law as well as national law needs to grapple. This volume provides us with the ideal tools to understand the issues more profoundly and the pointers as to what needs to be done in the future.

David Freestone
Washington DC

Preface

Risk is, and has always been, an element of life—even in civilized society, where the individual lives with more protection from some of the threats of nature. In fact, modern technologies have helped increase risks by introducing hazardous but socially useful activities and now nature itself feels the threat of human presence and action.

Hazardous but socially useful activities seem to belong to a grey area between legality and wrongfulness. They pose a problem to jurists and political leaders alike: is it legal to start an activity which may cause personal injury, and damage to property? That was the original question, but later on another was added regarding the common interests of Mankind: namely, is it legal to conduct an activity which is deleterious to the environment? From private to public interest, from individual concern to common concern—activities involving risk generate a growing preoccupation to our societies.

Oliver W. Holmes put that question to himself and to his pupils in Lecture 1 at Harvard and gave us his answer:

> A man has an animal of known ferocious habits, which escapes and does his neighbor damage. He can prove that the animal escaped through no negligence of his, but still he is held liable. Why? It is, says the analytical jurist, because, although he was not negligent at the moment of escape, he was guilty of remote heedlessness, or negligence, or fault, in having such a creature at all. And one by whose fault damage is done ought to pay for it.[1]

That position is acceptable to those who believe that nothing but fault justifies responsibility, and here fault is something in the style of an *original sin*—a sort of fault which, by virtue of the damage caused, transforms itself from potential to actual. All this is, of course, a matter of controversy, but it is a fact that domestic legal systems accept the legality of hazardous activities on certain conditions, to wit, that all reasonable and available means or prevention should be employed by somebody or some entity deemed responsible for the operation of the activity, and that such person or entity should also be liable for compensating victims of damage. This relatively new type of accountability has been considered by some as a new form of liability—namely, a liability without fault—and by others as something different from the classical concept of responsibility—that is, a guarantee given by the person or entity conducting

[1] O.W.Holmes, Jr. *The Common Law (Lecture 1)*, Boston, 1881, p. 6.

a hazardous activity as a pre-condition for its legality. Be that as it may—and the issue is dealt with in this book rather extensively—that legal technique of reparation for damage has been called something equivalent to "responsibility for risk"[2] in most of the countries of civil law tradition and "strict liability" or "absolute liability" in Anglo-American law. René Lefeber calls it "*sine delicto* liability," because the legal consequences of damage caused by hazardous activities follow without the breach of any obligation, and that is the name that we consider the most appropriate for it.

There is a certain consensus among international lawyers, however, that general international law does not as yet admit such type of liability, whereas some others within that majority group believe that *sine delicto* liability, even if not a rule of positive law, is an emerging principle of general international law. But, on the contrary, *conventional* international law gives a considerable number of examples of such liability. And it is in the legal system created by those conventions where lies the close relationship of *sine delicto* liability with the protection of the environment: most conventions where such "liability" is applied have the protection of the environment as their main object and purpose. In general, those conventions regulate the risk to the environment inherent to a specific activity—like, for instance, the Conventions on nuclear activities, or the conventions referring to oil pollution, or those others regulating the risks created by activities in special regions, like Annex VI to the Protocol on Environmental Protection to the Antartic Treaty. Most of them are civil liability conventions—that is, intergovernmental agreements establishing liability on individuals under the domestic law of a State, either the State of origin (the normal situation) or some other State (normally, the affected State). There is one convention, the Convention on Space Objects, where *sine delicto* liability and responsibility for wrongful acts are exclusively centered on the State. That was due to the fact that the Parties to that Convention considered that only States should be in charge of spatial activities. In other instruments, like in the Paris Convention on nuclear liability, there is a subsidiary State liability and still in others there is no State participation.

The point that we would like to make is that one of the important instruments of environment protection is *sine delicto* liability, as may easily be deduced from a quick glance at Chapter IV (Conventional Law). This is also the reason why we have submitted the present work to be included in a collection on sustainable development. Obviously, sustainable development is a key element in the protection of the environment and everything concerning

[2] Or, better, *sine delicto* liability, since it is incurred without breach of obligation.

environment protection is of high importance to sustainable development. We trust, therefore, that the present book will be useful to better understand why protocols on liability and redress are appended to most of the multilateral conventions on environment protection. The developments in the International Law Commission in relation to the topic of "International Liability for the Injurious Consequences of Acts Not Prohibited by International Law" will help to understand the doctrines behind *sine delicto* liability and also explain some of the circumstances surrounding the international debate on the codification and progressive development of the law in this field, as well as the difficulties surrounding the adoption by the international community of a general legal regulation of risk in international law.

Acknowledgments

I would like to acknowledge here the invaluable help that in many ways I received from Soledad Aguilar, whose opinions and good judgment I consulted constantly. She had a special participation in Chapters II and IV.

I would also like to render tribute to Professor Quentin Quentin-Baxter, who managed to keep his newborn subject alive in the International Law Commission, in spite of adverse circumstances.

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