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INTERNATIONAL AND SUPTRANATIONAL ASPECTS OF NUCLEAR LIABILITY

1 Introduction - legal framework and principles

The historical roots of the legal regime of liability for nuclear damage go back to the 1960s when there were parallel established two legal regimes. The Vienna regime[1] represented by the Vienna Convention on Civil Liability for Nuclear Damage (hereinafter as the „Vienna Convention“)[2] is an open system with a „worldwide applicability“. It enables all states to accede without any restrictions. The Paris regime[3] represented by the Paris Convention on Third

1 The contracting states of the Vienna Convention and also the members of the “Vienna liability regime” are Argentina, Armenia, Belarus, Bolivia, Bosnia and Herzegovina, Brazil, Bulgaria, Cameroon, Chile, Croatia, Cuba, Czech Republic, Egypt, Estonia, Hungary, Jordan, Kazakhstan, Latvia, Lebanon, Lithuania, Mauritius, Mexico, Montenegro, Niger, Nigeria, Peru, Philippines, Poland, Moldova, Romania, Russian Federation, Vol. Vincent and the Grenadines, Saudi Arabia, Senegal, Serbia, Slovakia, Macedonia, Trinidad and Tobago, Ukraine, Uruguay.

2 The Vienna Convention on Civil Liability for Nuclear Damage was established on 21 May 1963 under the auspices of the International Atomic Energy Agency (IAEA).

3 The contracting states of the Paris Convention and also the members of the “Paris liability regime” are Belgium, Denmark, Finland, France, Germany, Greece, Italy, Netherlands, Norway, Portugal, Slovenia, Spain, Sweden, Turkey, United

Party Liability in the Field of Nuclear Energy of 29th July 1960, as amended by the Additional Protocol of 28th January 1964 and by the Protocol of 16th November 1982 (hereinafter as the „Paris Convention")[1] is open only for OECD member states which are entitled, due to their membership, to accede to international treaties that were initiated by the Nuclear Energy Agency[2].

After the Chernobyl accident, states under the auspices of the IAEA carried out a review of the existing nuclear liability regime and of the regulations specified in the 1960s, taking especially into account the lessons learned by the Chernobyl accident. This exercise resulted in new international instruments, namely the 1988 Joint Protocol Relating to the Application of the Vienna Convention and the Paris Convention[3] that broadened the coverage of the two Conventions combining them into one expanded liability regime and the 1997 Protocol to Amend the Vienna Convention on Civil Liability for Nuclear Damage[4], revising the "old Vienna liability regime". Another area that was of interest of the international community was the creation of public funds which aimed to compensate nuclear damages in cases where the operator of the nuclear equipment, as a liable entity, would not provide the compensation. As a result of these efforts, the 1997 Convention on Supplementary

Kingdom. (Switzerland ratified the Paris Convention in 2009, however in the version as amended by the Protocol (2004); as a consequence the Paris Convention will become effective in Switzerland together with the Protocol (2004).)

1 Convention on Third Party Liability in the Field of Nuclear Energy of 29th July 1960, as amended by the Additional Protocol of 28th January 1964 and by the Protocol of 16th November 1982. Available on-line at: https://www.oecd-nea.org/law/nlparis_conv.html.

2 MARIANNA KOSNÁČOVÁ, "Občianskoprávna zodpovednosť za jadrovú škodu v práve EU", International and Comparative Law Review (2004, No. 11), p. 35. MARIANNA NOVOTNÁ, PETER VARGA, "The relation of the EU law and the nuclear liability legislation: Possibilities, limits and mutual interaction", Societas et iurisprudentia (2014, No. 3), p. 5.

3 On the Joint Protocol see: OTTO VON BUSEKIST, "A bridge between two conventions on civil liability for nuclear damage: The Joint Protocol Relating to the Application of the Vienna Convention and the Paris Convention", Nuclear Law Bulletin (1989, No. 43).

4 On the Protocol to Amend the Vienna Convention on Civil Liability for Nuclear Damage see: VANDA LAMM, "The Protocol amending the 1963 Vienna Convention", Nuclear Law Bulletin (1998, No. 61); JAKUB HANDRLICA, The Protocol of 1997 to Amend the Vienna Convention on Nuclear Liability and European Union, Czech Yearbook of Public and Private International Law (2013).

Compensation for Nuclear Damage[1] (hereinafter as "CSC") as was adopted. This is considered to be an independent convention which does not belong either to the Vienna- or the Paris regime. The CSC is an instrument to which all States may adhere regardless of whether they are parties to any existing nuclear liability conventions or have nuclear installations on their territories. The CSC is supported especially by the USA that ratified it in 2008 [19].

Despite very promising developments in nuclear energy at the very beginning of the new millennium, the accident in Japanese nuclear power plant "Fukushima Dai-ichi" triggered once again public concerns over the risks arising from peaceful uses of nuclear energy. The reaction of national governments has been twofold. Some of them denounced their previously announced plans for constructing new nuclear power plants (Italy). Other announced to cease using nuclear energy for the terms of producing electric energy in their territory in the near future (Germany, Switzerland). However, there is a considerable group of governments, which remain supporting "nuclear renaissance" and still identify nuclear as a prospective source of energy [10].

To provide adequate protection to the public from possible damage and to ensure a fair and sufficient compensation for the victims of a nuclear accident, the nuclear liability regime was founded on several principles[2], that had become binding under public international law on their respective Contracting Parties [21] and had built international standard of a risk-adequate liability legislation, which was also implemented by non-contracting parties at national level [19].

Unlike typically constructed international treaties regulating the compensation of damages, the nuclear liability conventions are not based on direct and exclusive international liability of the countries, but as a priority

1 The 1997 Convention on Supplementary compensation defines additional amounts to be provided through contributions by States Parties collectively based on installed nuclear capacity and a UN rate of assessment, at 300 SDRs per MW thermal. On the 1997 Convention on Supplementary compensation see: BEN MCRAE, Overview of the Convention on Supplementary Compensation, In: Reform of civil nuclear liability (Paris, 1999). M. LAGORCE, The Brussels Supplementary Convention and its Joint Intergovernmental Security Fund. Nuclear Law for a Developing World (Vienna, IAEA 1968). VLADIMIR BOULANENKOV, Main Features of the Convention on Supplementary Compensation for Nuclear Damage – an Overview, In: Reform of civil nuclear liability (Paris, OECD 1999).

2 On the basic principles of nuclear civil liability regime see: J.P.H TREVOR, "Principles of civil liability for nuclear damage" Nuclear Law for a Developing World. (IAEA, Vienna, 1968).

from civil law constructed liability of the operator of nuclear installation [10] (person designated or recognized as the operator of a nuclear installation by the installation state[1])[2], who, as a sole entity is liable for occurrence of nuclear damage (so-called *legal channelling*)[3]. While constructing this so-called concentrated liability the position of international „lawmaker" was based on the proposition that shifting the liability for nuclear damage solely to the operator of the nuclear installation is in accordance with the principles of civil law liability, since while using the nuclear energy as activity which is organized, managed by the operator and the operator makes profit out of it, there are certain processes of using certain types of technology or forces of nature which alone bear relatively high risk of harmful consequences. The operator is an entity which, due to its position of organizing and managing entity, has the biggest influence on the safest method of using of these dangerous sources and thus an opportunity to avert and prevent the damages [10].

Under the conventions, the operator of a nuclear installation is held liable, regardless of whether fault can be established. It follows that the claimant does not need to prove negligence or any other type of fault on the part of the operator. The simple existence of causation of damage is an adequate basis for the operator's strict liability. The principle of strict liability of the operator simplifies the litigation process eliminating potential obstacles, especially such as might exist with the burden of proof.

The conventions qualify the operator's liability as "absolute", in order to make it clear that it is not subject to the classic grounds of exoneration such as force majeure, acts of God or intervening acts of third persons [11]. However, the operator may be exonerated from nuclear liability under special circumstances provided in nuclear liability conventions, for example if he proves, that the nuclear incident was directly due to an armed conflict,

1 Installation State, in relation to a nuclear installation, means the contracting party within whose territory that installation is situated or, if it is not situated within the territory of any State, the contracting party by which or under the authority of which the nuclear installation is operated. See Article I (1) (d) of the Vienna Convention.

2 See Article 1 (a) (vi) of the Paris Convention and Article I (1) (c) of the Vienna Convention

3 For legal channelling concept see more EVELYNE AMEYE, "Channelling of nuclear third party liability towards the operator: is it sustainable in a developing nuclear world or is there a need for liability of nuclear architects-engineers?" European Energy and Environmental Law Review, (2010, 19), p. 33-58. NORBERT PELZER, "Die rechtliche Kanalisierung der Haftung auf den Inhaber einer Atomanlage – ein juristischer und wirtschaftlicher Fehlgriff?", Versicherungswirtschaft, (1966, 17), p. 1010-1016.

hostilities, civil war or insurrection, or that it resulted from a grave natural disaster of an exceptional character (if the law of the installation state provides so)[1].

According to Article IV par. 3 letter b) of the Vienna Convention and Article 9 of the Paris Convention the operator of a nuclear facility shall not be liable for nuclear damage caused by a nuclear incident which is a direct consequence of a grave natural disaster of an exceptional character. However, the member states may exclude the grave natural disaster of an exceptional character from liberation grounds; as a consequence, the operator of nuclear installation would be liable also for *vis maior*[2].

The reasons which led the nuclear legislation to establish the concept of objective liability as one of the core principles of nuclear liability, were very clearly and concisely formulated by Exposé des Motifs of the Paris Convention. According to the art. 14 of Exposé des Motifs: *„In Western Europe, with but few exceptions, there is a long-established tradition of legislative action or judicial interpretation that a presumption of liability for hazards created arises when a person engages in a dangerous activity. Because of the special dangers involved in the activities within the scope of the Convention and the difficulty of establishing negligence in view of the complex techniques of atomic energy, this presumption has been adopted for nuclear liability. Absolute liability is therefore the rule; liability results from the risk irrespective of fault. This does not, however, mean that merely to engage in a nuclear activity or to transport nuclear substances is to be considered in itself as a presumption of fault; but where an incident occurs, the liability of the operator of the nuclear installation concerned is absolute."* These reasons, despite the fact that they primarily relate to the interpretation of the provisions of the Paris Convention, may be given, due to the identity of the nuclear damage liability legal regimes, also applicable to the concept of objective liability established by the Vienna nuclear liability regime.

1 Article 9 of the Paris Convention; Article IV (2) of the Vienna Convention.

2 The Protocol revising the Vienna Convention excluded the grave natural disaster of an exceptional character from the liberation grounds. Similarly did the 2004 Protocol revising the Paris Convention. The new narrower extent of liberation grounds brought not only a strengthened protection of injured entities, but as an added value can be considered the unification of national legislations. In addition, this solution removed interpretative problems that were associated with the interpretation of the undefined legal concept of "grave natural disaster of an exceptional character". (F. BLOBEL, „Das Protokoll von 2004 zum Pariser Übereinkommen – wesentliche Verbesserungen im internationalen Atomhaftungsrecht", Natur und Recht (2005, No. 3), p. 140.)

The specific character of the risk which is closely connected with the use of nuclear energy and that is characterized by insufficient manageability of natural forces and substances used in the nuclear energy, which is (even by maintaining an adequate care) connected with a high level of negative consequences, was a strong motive for preference of the strict objective liability of the operator. Finding the real cause of the damage or discovering the attributable unlawful act of a person would be in the process of indemnification of nuclear damages caused by a complex of technical equipment often in complicated situations, very difficult. In such a situation, the imposition of the proof of fault on the harmed person would cause that in most cases the harmed person would have a lack of evidence as it would be very difficult to detect the fault of a particular person. The harmed person would thus be put in a situation, in which the court, due to the lack of evidence concerning the fault, would not admit the right to compensation of nuclear damage.

The requirement to prevent the situation in which there would be lack of evidence and thus to provide an easier access to compensation of the threatened values (life, health, property) protected by law, was one of the starting points to implement the principle of objective liability. Obviously, considering the reasons having led to the operator's no-fault liability, we cannot forget the preventive reasons, as the damages in its widest range fulfil a preventive function. Imposing the stricter liability by the legislature, undoubtedly intended to ensure that operators, aware of the objective nature of their liability, sought actively to identify every possible reason of damage occurrence to prevent it (e.g. by improvement of technical and safety equipment, improving the professional qualifications of employees etc.).

While the liability imposed upon the operator is exclusive and strict, it is limited in both amount[1] and time. Under the Paris convention, the maximum liability of an operator is set on 15 million SDRs[2]. The contracting state may establish a greater or lesser amount by its legislation to a lower limit of 5 million SDRs, taking into account the availability of obtaining insurance or other financial security. Pursuant to Article V par. 1 of the Vienna Convention liability of the operator of the nuclear installation for nuclear damage caused

1 Limitation of nuclear liability in amount was considered to be necessary in order not to jeopardize the development of the nuclear industry. It was a consequence of the congruence principle between liability and mandatory coverage, i.e. limitations of liability amounts in national legislation are dependent on insurance market and its insurance offers.

2 SDR stands for the Special Drawing Right as defined by the International Monetary Fund. This unit of Account is calculated on the basis of a basket of currencies of five of the most important trading nations.

by nuclear incident is generally based on the concept of unlimited liability modified by the possibility of the member states to determine by its national legal regulations maximum amount of damages for which the operator of the nuclear installation is liable. Despite the fact that determination of the maximum line of liability was left to the member states these must honour mandatorily set minimum extent of liability set by the Vienna Convention representing 5 million gold US dollars per each nuclear incident, whereas such minimum limit of liability is determined at the value of dollar as a clearing unit which is converted in the rate to gold as of 29 April 1963, i.e. USD 35 per one Troy ounce of pure gold. Due to the fact that this is a so-called floating limit which depends on the development of the price of gold in the world markets, current amount of minimum liability of the operator in the regime of the Vienna Convention varies depending on these movements[1].

The nuclear liability regime provides a time limit for the submission of claims as an instrument which helps to re-establish legal peace after a certain period of time [21]. The Vienna and the Paris Convention provide an extinction period of ten years, which may be prolonged by national legislation, provided coverage is available. There is also a possibility of establishing a prescription period of two and three years respectively, running from the time when the damage and the operator liable have become known to the victim, provided that the ten-year period is not exceeded[2].

1 Under the amended Vienna Convention effected by the Protocol the possible limit of the operator's liability is set at not less than 300 million SDR. The increase in liability amounts can be explained by the fact that one of the main motives for revising the Convention was the consideration that the US 5 million dollar limit, as the lowest amount of the operator's liability, had become unrealistic in view of the extent of damage that might result from an eventual nuclear incident. (VANDA LAMM, "The Protocol amending the 1963 Vienna Convention", Nuclear Las Bulletin (1998, No. 61), p. 15). Naturally, the upper limit may be under the national law a higher amount. Provided the upper limit of the operator's liability is less than 300 million SDRs, the difference between that upper limit and 300 million SDR must be secured from public funds.

2 Taking into account, that personal injury caused by radioactive contamination might not become apparent for a longer time after exposure and to strengthen the principle of victims protection, the Protocol to Amend the Vienna Convention as well as the Protocol to amend the Paris Convention established a longer period of 30 years for compensation for loss of life and personal injury, while retaining the ten-year period for all other types of damage. The extension of the extinction period with respect to loss of life and personal injury and the split of periods between personal injury and all other damages inevitably give rise to certain practical problems, when it comes to compensating procedure. According to Prof. Pelzer, as the period for

The extent of risk and intensity of hazard related to operation of the nuclear installation required, both within the regulations of international law and in accordance with them also within the national laws of the member states of the international treaties regulating the liability for damages caused by nuclear incident, linking of the operation of the nuclear installation to fulfilment of duty of financial security for the operator's liability in the form of insurance or other financial security [10]. The operator is obliged to cover its liability for nuclear damage up to the limit of liability set forth in nuclear liability legislation, whereby this represents the fulfilment of the principle of congruence (conformity) of the extent of the operator's liability and its financial coverage. The objective of such constructed principle was to ensure that the amount of damages for which the operator is liable is always covered by equal amount of available and/or quasi-available cash which represents an advantage both for the aggrieved entity as well as the operator of the nuclear installation. The aggrieved entity has the certainty that possible legal claims shall be financially covered and the operator has compensation sources available in the form of available cash[1]. In most cases, the coverage of the operator's liability is to be provided by the insurance industry but Both Vienna Convention as well as Paris Convention generally allow the possibility to cover the liability via means other than insurance[2] (e.g. bank guarantees or the capital markets). Insurance market (unlike other forms of financial coverage) created a special mechanism for coverage of risk of occurrence of nuclear damage meaning the creation of special association of insurance entities so-called insurance *pools* via which the bearing of risk is shared amongst more entities, which on the basis of the insurance contracts provide coverage of the liability of the operators of the nuclear installations.

Like other civil law claims to compensation of damage the claim to compensation of nuclear damage caused by nuclear incident is based on the system of individual actions brought in civil process and exercised by legal action filed at the substantively and locally competent court. Jurisdiction over actions lies exclusively with the courts of the contracting party in whose territory the nuclear incident occurred[3] and according to the nuclear liability

personal injury is considerably longer than the period for other damage, money has to be set aside to make sure that there are still funds available to compensate late personal injury which could inhibit from prompt compensation of other damages. NORBER PELZER, cit. supra, p. 430.

1 Ibidem, p. 51

2 See Article VII par. 1 of the Vienna Convention; Article 10 (a) of the Paris Convention.

3 Article XI (1) of Vienna Convention; Article 13 (a) of Paris Convention.

conventions of second generation (1997 Protocol and 2004 Protocol) each state party shall ensure that only one of its courts has jurisdiction in relation to any one nuclear incident[1]. The concentration of procedures within one exclusive competent court not only creates legal certainty and a fair distribution of the available amount but also excludes the possibility that victims of nuclear incidents will seek to submit their claims in states in which their claims are more likely to receive favourable treatment [24]. Nevertheless, the system of individual actions seems to be unconvincing in the main, as it could be considered appropriate for the compensation of minor incidents, but it would be hardly conceivable in the event of a catastrophic nuclear accident resulting in thousands or millions of claims. In the case of a major nuclear accident, there could be considered as grave barriers administrative and technical capacities of the national courts adjudicating the compensation of nuclear damage or from the perspective of victims, distances in the case of transboundary damages, expenses or the duration of the individual case decision [14]. Accordingly the point at issue is, if civil liability system based upon the liability of the operator is appropriate to cope with a catastrophic nuclear accident of Chernobyl magnitude and if it is adequate to compensate victims of such a major nuclear accident. Provided that civil liability law is only designed to deal with damages which can normally be compensated by the means of the tortfeasor [21], the obvious conclusion in nuclear liability theory should be, that expletively to the civil liability principle, there must be some other sources of funding such as state liability to reach the primary goal of protecting and fully compensating the victims of nuclear damage [14].

2. State's liability under international public law

Despite the time that has commenced from the time of adoption of the first generation nuclear liability conventions, we may still say that international public law does not offer any contractual legal framework of the state's nuclear liability. Either the analyse of the case law, nor the non-contractual practice of the states towards specific generally applicable rules on international liability of the states for harmful results of actions not prohibited by international law and established in international common law have not sufficiently demonstrated the existence of such rules in international customary law.

The thesis on "pure" civil-based character of nuclear liability relations may be demonstrated on Article XVIII of the Vienna Convention that established that any provision of this convention shall not be construed as affecting the rights, if any, of a Contracting Party under the general rules of public

1 Article 12 (4) of Protocol to Amend the 1963 Vienna Convention on Civil Liability for Nuclear Damage (Article XI (4) of the revised Vienna Convention).

international law in respect of nuclear damage. From this provision it is clear that any rights acknowledged by international public law do not fall within the scope of the convention which follows the aim to harmonize the internal civil-law in nuclear liability damage; on the other hand, the formulation of that provision in fine doubts the existence of these rights related to nuclear damage[1] acknowledged by international public law.

Similar provision may be found in Annex II of the Paris Convention that stipulates that the Paris Convention *shall not be interpreted as depriving a Contracting Party, on whose territory damage was caused by a nuclear incident occurring on the territory of another Contracting Party, of any recourse which might be available to it under international law*. Despite the Paris Convention does not directly doubt by this provision the existence of such international rules, the conditional formulation in the text towards these rules does not show their undisputed existence.

Despite some different opinions [12] deducting the state's liability for transnational nuclear damage from the concept of the liability of a state for international illegal actions[2], the international custom is not – despite some applicable decisions of international courts or arbitrary courts[3] or some relevant and by their nature similar cases that were not solved by international courts or arbitrary courts[4] – a sufficient bases for action for damages against the state in the case of nuclear accident [10, 13].

In the history of formation of the nuclear liability legislation, the issue of state's contractual liability was subject to several discussions, either academic or institutional. The issue of international liability for nuclear

1 Article XVIII of the Vienna Convention is probably not applicable to subjective rights arising from international contract law, but exclusively to rights arising from „generally accepted rules " of international public law relating to nuclear damage.

2 To the concept of international liability of the states for harmful results of actions not prohibited by international law see „Articles on responsibility of States for internationally wrongful acts" prepared under the auspices of UN International Law Commission. Available on-line www.un.org./law/ilc.

3 Trail Smelter Case [R.I.A.A. (1941), vol. III, p. 1905 ff.]; Corfu Channel Case [I.C.J. Reports 1949, p. 4 ff.]; Lac Lanoux Arbitration [R.I.A.A. (1957), vol. XII, p. 281 ff.].

4 E.g. Chernobyl catastrophic nuclear accident in 1986; Daigo Fukuryū Maru incident - a Japanese fishing boat exposed to and contaminated by nuclear fallout from the United States' thermonuclear device test on Bikini Atoll in 1954 or pollution of the Canadian sea shore by maritime oil spill near Cherry Point (Washington) in 1973.

damage and working out of principles of the international liability became subject to discussion in late 80s and in the early 90s of the last century when the Board of Governors of the International Atomic Energy Agency (IAEA) decided to establish a working group to review all aspects of the liability for nuclear damage. The activity of this working group was stopped within one year and the Board of Governors re-established a Permanent Committee for nuclear damage liability. This was also delegated to deal with the aspects of the state's liability for nuclear damage, including international civil liability[1], international liability of a state as well as the mutual relation between both these types of liability[2].

The issue of states' international liability as subjects of international law for nuclear damages and connected means to apply international actions against states with nuclear potential were rejected very quickly both by experts and some states (especially USA, UK and France). Their negative statement was based on opinion that the concept of state's liability may not be reasonable due to its nature. They argued that the state's liability may be realized by creation of system of additional compensation for nuclear damage that exceeds the liability of the operator of nuclear installation[3].

Due to a strong disagreement, the scenario of the state's international nuclear liability has not been realized [22] and the idea of international state's liability was replaced by the more effective system of additional funding.

However, during the revisions of the Vienna Convention, its Article XVIII was changed. According to this provision, the Convention shall not be applicable to the rights and obligations of the contracting party under general rules of international public law. The clause doubting these rules, including the reference to rules regulating the nuclear damage has been cancelled.

This provision keeps open to the future a possibility to compensate the victims of a nuclear disaster also on the states' liability base in case there would be an international convention adopted establishing the international

1 The concept of international civil liability is understood as civil-law liability under the international convention that imposes on its contracting parties, according to international public law, an obligation to apply these liability rules in their national laws. (Compare: PETER WETTERSTEIN, "Current Trends in International Civil Liability for Environmental Damage", Annual Survey of International and Comparative Law (1994, No. 1), article 8, p. 7-8.)

2 Also compare the documents IAEA GC (XXXVI) 1009 (1.7.1992), p. 1-2.

3 Also compare the documents NL/2/4, p. 7–9; SCNL/1/INF.4, p. 15–18; SCNL/2/INF.2, p. 2–3; SCNL/3/INF.2/Rev.1, Annex II; SCNL/4/INF.6, p. 5–6 and 6–7; SCNL/6/INF.4, p. 9–10; SCNL/7/INF.6, p. 9; SCNL/16/INF.3, p. 3.

states' liability for nuclear damage (or if there would be a possibility to use the customary law as a legal base for an action against a state).

3. European approach to the nuclear liability regime

The current status quo of the EU member states and their nuclear liability regimes is not homogenous. Ten EU member states are party to the Vienna Convention (Bulgaria, the Czech Republic, Croatia, Estonia, Hungary, Latvia, Lithuania, Poland, Romania and Slovakia) and thirteen EU member states are party to the Paris Convention (Belgium, Finland, Greece, France, Netherlands, Germany, Spain, Sweden, United Kingdom, Italy, Denmark, Portugal, Slovenia), some EU member states do not take part in any international regime (Austria, Ireland, Luxembourg, Cyprus and Malta). These states either adopted their own national legislation independent from the international regimes or they rely on the universal tort law and generally applicable conflict of law rules. Part of the revised regime of the Vienna Convention, as amended by the 1997 Protocol (effective as from 2003) are Latvia, Poland and Romania (the Czech Republic, Hungary, Italy and Lithuania signed the Protocol but have not yet ratified it). The 2004 Protocol amending the Paris Convention was signed on behalf of the European Community by all the EU member states that are the party of the "old" Paris Convention. However, the 2004 Protocol has not become effective yet. With respect to the Convention on Supplementary Compensation for Nuclear Damage from 1997 may be said that Romania is the only EU member state that ratified this convention.

The membership in the EU significantly restricts the freedom of its member states to act independently in the accession to international agreements that are eligible to influence the applicability of EU law in this area, i.e. those laws that are regulated by EU law. In addition, the EU itself also enters into some areas, including the liability relations of nuclear law [20].

With respect to the material aspects of nuclear liability it is necessary to note that the nuclear liability has not been regulated by any legal act of EU law. Not any EU legislation has been adopted yet that would regulate concrete matters of nuclear damage liability and its compensation or that would be contrary to current or potential future nuclear liability legislation. One of the reasons of the missing EU legal regulation (despite the current efforts of the EU to cover the nuclear liability regime by unitary EU secondary legislation) is the scope of competences of the EU in this area.

Although some nuclear law publications refer to articles 98 and 203 of the Treaty establishing the European Atomic Energy Community ("EURATOM

Treaty"), the competence of the EURATOM in this area is not explicitly established[1].

An explicit interpretation of Article 98 of the EURATOM Treaty is that it only regulates adoption of a directive regulating conclusion of insurance contract that cover the nuclear risks. Despite the relatively closely specified field of application that could fall within the relevant directive, interpretation of this article becomes broader and some authors suggest that it is also applicable to an area of nuclear liability[2].

The purpose of the Article 203 of the EURATOM Treaty is to enable the European Atomic Energy Community (hereinafter as "EURATOM") to act if the EURATOM does not have an explicit competence to act, but adoption of certain act is necessary to attain the objectives of the EURATOM Community (this article has an equivalent in Article 352 TFEU). If the Article 203 of the EURATOM Treaty is used, unanimous decision of all member states in the Council is required. However, it is still questionable if the requirement of the necessity of the objectives of the EURATOM is achieved [10].

The competence of the EU in the area of nuclear liability is clearly identified in accordance with the Article 81(2) TFEU. This article enables the European Parliament and the Council to adopt measures, particularly when necessary for the proper functioning of the internal market, aimed at ensuring the mutual recognition and enforcement between member states of judgments and of decisions in extrajudicial cases (the competence of the EU in the justice cooperation) [20].

Due to the EU competence in the area of enforcement and recognition of decisions in civil and commercial matters represented by the Regulation Brussels I[3] that is overlapped with the procedural regulation of the conventions regulating the nuclear liability, it is clear that the states are not entitled to accede to these conventions without an authorization of the EU institutions [20].

On the contrary, as the EU itself cannot participate in an international regime of the international nuclear liability law, it enters into this area in a way that the EU authorises its member states to accede or to ratify specific

1 Ibidem, p. 101.

2 See Ibidem, p. 101.

3 Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. Further see JAKUB HANDRLICA, "Exclusive jurisdiction vs. forum shopping in European nuclear liability law", International Journal of Nuclear Law (Vol. 3, No. 2, 2010).

international conventions. The EU must in such an authorization act explicitly specify the relation of EU law to the regime established by the international convention [19].

The EU issued two authorization decisions concerning the international liability regime of nuclear law.

The first authorization decision No 2004/294/EC authorized the member states that participate in the Paris regime of nuclear liability to ratify the Protocol that amended the Paris Convention or to accede to the Paris Convention. This authorization decision obliged[1] the member states that were parties to the Paris Convention[2], to ratify or accede to the Protocol that revised the original Paris Convention. The obligation to ratify or to accede to the revised Paris Convention is however not applicable to Austria, Ireland and Luxemburg and the non-nuclear states that were not in the past or are currently not the contracting parties of the Paris Convention in its original or amended version.

The second authorization decision No 2013/434/EU was adopted in 2013 in relation to the Vienna nuclear liability regime. It authorizes specific EU member states, in the interest of the EU, to ratify the Protocol that amends the Vienna Convention or to accede to this Convention and to make a declaration on application of relevant internal rules of the EU[3]. This authorization decision, unlike the former, only authorizes (i.e. enables, but not obliges)[4] the member states to which it is addressed (Slovak Republic, Bulgaria, Czech Republic,

1 Compare article 1 of the authorization decision to the Protocol (2004): „Without prejudice to the Community's powers, the Member States which are currently Contracting Parties to the Paris Convention shall ratify the Protocol amending the Paris Convention, or accede to it, in the interest of the European Community".

2 Belgium, Finland, France, Netherlands, Germany, Spain, Sweden, United Kingdom, Denmark, Italy.

3 Protocol (1997) interferes with its procedural provisions into the exclusive competence of the EU in its jurisdiction competence and the competence of enforcement and recognition of decisions. Due to this fact must the ratification or accession to the protocol authorized by the EU.

4 The original proposal of the authorization decision imposed the member states an obligation to ratify or to accede to the Protocol. The change of the wording was influenced by the significant reservations of the member states concerning several of its provisions, including the proposed obligation to accede the revised nuclear liability regime represented by the Protocol (1997). For further information relating to the original proposal of the authorization decision and its potential impacts see: JAKUB HANDRLICA, MARIANNA NOVOTNÁ, "Európska únia a Protokol z r. 1997, ktorým sa doplňuje Viedenský dohovor o občianskoprávnej zodpovednosti za jadrové škody z r. 1963", Justičná revue (2014, No. 2).

Estonia, Hungary, Lithuania and Poland), to ratify the Protocol from 1997 that amended the Vienna Convention from 1963.

4. Conclusion

The history of commercial functioning of nuclear plants has shown that major nuclear accidents have inevitable transboundary implications and its consequences could affect, directly or indirectly, many countries even at large distances from the site of an accident. Consequently, the benefits of the use of nuclear energy needs to be weighed against possible risks associated with operation of nuclear installations which is connected with the probability of extensive damage to life, health and property. To minimalize the negative effects of the limits of the nuclear liability regime, the states (as contracting parties of the nuclear liability conventions) have to undertake specific steps to protect victims of nuclear accidents by means of international law.

However, the patchwork of nuclear liability conventions currently in force, together with the EU secondary legislation – Rome II[1] regulation and Brussels I bis regulation[2] (despite that none of these EU legislative acts directly regulate the nuclear damages) and the different status quo of member states of the nuclear liability conventions result in a complicated system of different levels of liability. As a result of this legal inconsistency there are different rules and standards of operator's liability and its financial security and different rules regulating jurisdiction. All this engenders an incoherent system of victims' protection and victims' compensation (especially in case of cross-border accidents). Moreover, as the European Commission states: *This lack of legal unity might in particular have an impact on the functioning of the internal market, because of the non-level playing field conditions between operators in different MS (intra-sectorial distortion). Equally the rather low levels of limitation of third party liability (and the limited financial security) enjoyed by most nuclear operators, and resulting in relatively low insurance costs, may favour the nuclear industry over other electricity producers and could be perceived as an advantage provided by the State to the nuclear industry.*

In this context, the ongoing initiative of the EU to create a unified compensation system and to increase the legal coherence in the field of nuclear liability seems to be justified and convincing.

1 Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II)

2 Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

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Marianna Novotná, Peter Varga. International and supranational aspects of nuclear liability

The Vienna Convention on Civil Liability for Nuclear Damage and the Paris Convention on Third Party Liability in the Field of Nuclear Energy represent the fundamental international conventions regulating the issues of liability for damages caused as a result of a nuclear incident. These conventions have promoted a special regime (nuclear liability regime) which is based on the system of civil law and founded on several principles and which enables the compensation of victims of nuclear accidents by operators of nuclear installations.

The paper deals with some aspects of the current nuclear liability framework, analysing the fundamental principles which had become binding rules for respective contracting parties (states) over the preceding half-century, considering the commitments arising from the international nuclear liability conventions and trying to assess the possibility of application of the state's liability for transnational nuclear damage under the regime of international public law. Further, the paper deals with the role, position and the competence of the European Union in the existing nuclear liability framework pointing out major challenges for the future development of nuclear liability regime legislation, taking into account the legislative activity and other forms of EU actions.

Keywords: nuclear third party liability, European legislation, international conventions on nuclear liability, EURATOM, nuclear damages.