TRANSBOUNDARY DAMAGE IN THE LIGHT OF INTERNATIONAL ENVIRONMENTAL LAW

Oana Maria HANCIU*

Abstract

Some activities that are useful for economic and social development of a State even if are not prohibited by national or international law can cause transboundary damages to other countries.

This kind of transboundary damages have given rise to theories of State responsibility and a worldwide demand for increased environmental protection.

"Under the principles of international law...no State has the right to use or permit the use of its territory in such a manner as to cause [environmental] injury ... in or to the territory of another or the properties of persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence." (Stockholm Principle 21)

The paper analyses the impact of transboundary damage in the light of international environmental law and the increasing concern among States for environmental protection.

Keywords: *transboundary damage, environmental protection, State responsibility, injury, victim compensation.*

1. Introduction

Since the adoption of Stockholm Declaration[1] environmental concerning has increasingly developed and particularly after the adoption of the Rio Declaration[2]and Johannesburg Conference (2002) an impressive number of norms in environmental matters have been elaborated. The purposes of these Conferences were to debate and take action regarding global ecological problems and future development of environmental norms which also established the access to justice in environmental matters.

Some of these global ecological problems are characterized by activities that have a harmful impact on environment and that are causing an ecological damage. Article 2 of Lugano Convention[3] refers to ecological damage as "any loss or damage which can result from altered environment surroundings."

A consequence of the scientific progress in all fields - industrial, agriculture, technical field, although useful for mankind progress is also a source of possible destruction of this. In many situations, some activities conducted in one country can cause damage in another country or to areas of the global commons[4]. This kind of transboundary damage has given rise to theories of State responsibility and a worldwide demand for increased environmental protection.

* Lawyer, Bucharest Bar (oanahanciu@gmail.com).

[1] UN Conference on the Human Enviroment, 1972 Stockholm Declaration (1972).

[2] Rio Declaration on Environment and Development (1992).

[3] Lugano Convention – 21 June 1993.

[4]Hanqin Xue – *Transboundary Damage in International Law,* Cambridge University Press, 2009 : " …global common, which are located beyond national jurisdiction and control. Damage to the polar areas, the high seas, or outer space during their exploration…".

Transboundary damage brings many questions regarding the responsibility of states and the obligation of *due diligence* of this states in controlling potentially harmful effects of some activities.

2. The Concept of Transboundary Damage

Expression of transboundary damage, as cross-border environmental pollution, refers to damage of environment, property or persons caused in the territory of another State. This damage can occur via land, water or air and it is not mandatory that the state affected to have common border with the State that is responsible for transboundary damage.

A definition of the concept of transboundary damage belongs to Hanqin Xue[5] who assesses that "transboundary damage embodies a certain category of environmental damage, including physical injury, loss of life and property, or impairment of the environment, caused by industrial, agricultural, and technical activities conducted by, or in the territory of, one country, but suffered in the territory of another country or in the commons areas beyond national jurisdiction and control".

The concept of environmental damage was first discussed in 1960, at the Convention on Third Party Liability in the Field of Nuclear Energy where the damage was defined as a prejudice caused to people and any prejudices caused to property. The concept was also approached in 1989 at the Conference on Civil Liability for Damage Caused During Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels, which besides damage to property speaks about "any loss or damage caused by dangerous goods through environmental contamination." Another definition was furnished at the Lugano Conference from 1993 which refers to damage as "any loss or damage that results from environmental alteration."

According to these definitions we can see that the concept of transboundary damage is fairly complex and that there is not a precise and unanimous definition. Therefore, we are going to try to identify some common and essential features regarding the concept of transboundary damage.

The first feature that is important is the relation between the activities conducted in one State and the ecological damage caused by its activities in the territory of another State.

The second feature is the existence of transboundary damage and the responsibility caused by it, responsibility that depends from the level of seriousness of damage.

The last point of view is the way that environmental damage is affecting not only the environment in general, but also people, property or goods. This environmental damage can affect in the same measure natural resources like water, atmosphere, land, biodiversity, terrestrial ecosystem, natural monuments, and also artificial environment created by man like cultural heritage.

In regard to these features, we can try to define the concept of transboundary damage as the activity conducted in one State that has a serious impact on environment, in general, on people, property and goods, in particular, from other States and that involves a certain international responsibility.

3. International environmental regulations regarding transboundary damage

The problem of international responsibility for environmental damage has raised many discussions by the doctrine. The violation of an international obligation concerning the

[5]Hanqin Xue – *Transboundary Damage in International Law*,Cambridge University Press, 2009.

environmental protection or a principle of international environmental law will determine in some cases the international responsibility of States.

Still, we need to stress the fact that in environmental field the States manifested some doubts for the enforcement of rules relating to environmental protection, even if there are many international treaties regarding international responsibility for environmental damage, some of them suggesting the solution of diplomatic path, International Court of Justice or Arbitration.

When speaking about regulation regarding transboundary damage it is crucial to note the importance role of Non-Governmental Organisations (NGOs) in these environmental matters. The importance of NGOs in the environment protection field is widely recognized, a good example of this is the fact that in 1992 during the Rio Conference more than 8000 NGOs attended the NGO forum[6]. NGOs play a major part in negotiations of protocols and treaties and also in bringing a large number of cases before International Court of Justice, International Tribunal on Law of the Sea and involving in the mechanism of access to justice in environmental field.

When trying to present the regulations regarding transboundary damage a main aspect is to determine from which State the pollution has emanated. If in some cases this is obvious (Trail Smelter dispute between Canada and United States over sulphur dioxide pollution from a Canadian smelter which damaged trees and crops on the American side of border) in other cases this problem is complicated. This is the case of acid rain which it forms from chemicals emitted from factories that rise in atmosphere and react with water and sunlight. It is also the case of ozone depletion and global warming which is the result of the consumption of fossil fuels and deforestation. Wishing to continue the issues discussed at Stockholm Conference there was established the UN Environment Program and also the UN General Assembly adopted a number of resolutions concerning the environment.

If sometimes it is complicated to determine which State the pollution has emanated, another important issue in determining the regulations regarding transboundary damage is the linkage between international human rights and international environmental law. A number of human rights norms have relevance to the environment. The first principle of Stockholm Declaration links the human rights to the environment: "Man is both creature and moulder of his environment, which gives him physical sustenance and affords him the opportunity for intellectual, moral, social and spiritual growth……Both aspects of man's environment, the natural and the man-made, are essential to his well-being and to the enjoyment of basic human rights the right to life itself". Also the three principal human rights treaties – The European Convention on Human Rights (ECtHR), The American Convention on Human Rights and The African Charter on the Humans and Peoples Rights deal with the environmental protection on trying to protect the right to life, the right to health and so forth.

Another important Convention that links human rights and the environment is the Aarhus Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters from 1998 which states that "adequate protection of the environment is essential to human well-being." Despite being a regional treaty the Convention purpose is for global scale significance. Even former General Secretary of UN, Kofi Annan, said: "Although regional in scope, the significance of Aarhus is global. It is the most ambitious venture in the area of environmental democracy". In regard to access to justice in environmental protection, the Aartus seeks to implement Principle 1 of Stockholm Declaration and Principle 10 of Rio Declaration by trying to implement effectively remedy against environmental rights violation. It is worthy to mention here the Taskin case (2004): the applicants alleged that, as a result of the Ovacık gold mine's development and operations,

[6]See Birnie P. and Boyle A., *International Law and the Environment*, 2nd edn OUP, Oxford, 2002.

they had suffered and continued to suffer the effects of environmental damage; specifically, these included the movement of people and noise pollution caused by the use of machinery and explosives. In this case the ECtHR took both Principle 10 of Rio Declaration and the three pillars of Aarhus into consideration when it assessed the relevant law. Although Turkey had not signed Aarhus at that time the Court considered its provisions to be important and demonstrated once again the aim of Aartus Convention of global treaty.

Another important linkage in determining transboundary damage regulations is the relationship between the protection of environment and the economic development. This could be the most important challenge that the international community is facing. To find a correct balance between environment protection and economic development seems to be difficult.

According to what was analysed so far and trying to find some answers regarding State responsibility for transboundary damage and proper victim compensation we must classify the activities that generate transboundary damage in illegal activities (prohibited by international law) and not illegal activities that involve transboundary damage consequences.

The illegal character of an activity is an essential element for international liability of the State for environmental damage. In this concern, International Law Commission (ILC) work regarding the liability of States for illegal activities (2001) established that an activity is illegal from international point of view, if it is assigned to a State by international law and is a violation of an international obligation of that State (art2). There is a third element that is not mentioned in article 1 and article 2 of ILC work, and that is the "damage". This element "dominated the international liability of States doctrine until then, by considering the occurrence of damage as a *sine qua non* condition for the liability."[7]

Another important element is the proof of fault which can arise from breaches of treaty or customary international law. The proof of fault it is of paramount importance in starting the international liability of a State for transboundary damage as a consequence of lack of responsibility and *due diligence* obligation for environmental protection.

Illegal activities that involve transboundary damage can arise from air pollution, water damage and damage from land use. Very important in this regard it is the balancing interests between States on concerning sovereignty doctrine, which plays an important role in international relations between States and the concept of significant damage of the environment along with normal use of natural resources shared among States and the due diligence doctrine.

Concerning State responsibility article 8 of the ILC Articles provides that the conduct of a person or group of persons shall be considered as an act of State under international law. This article is strengthening the idea that the State is responsible for the unlawful acts of his people on consideration the fact that the State may be responsible for the failure to exercise the necessary control to prevent such act, in this case act that involve transboundary damage. The second part of the 21 Principle from Stockholm Declaration tries to underline the issue that a State is responsible for transboundary damage arising out of activities under its control, because of his duty to prevent such harmful effect from happening: "under the principles of international law...no State has the right to use or permit the use of its territory in such a manner as to cause [environmental] injury ...in or to the territory of another or the properties of persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence." The same idea contains article 30 of United Nations General Assembly which says: "All States have the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction."

[7]Besteliu-Miga Raluca, *Drept international public*, vol. II, Bucharest,C.H. Beck Publishing House, 2008, p.28.

The issue of State responsibility in environmental field is dominated by prevention principle and precautionary principle. The tendency nowadays is rather to prevent the occurrence of irreversible environmental damage even if the damage is unforeseeable. When it is not possible and breaches of treaties or customary international law appear the injured state may claim the harm by diplomatic actions or by recurring to international mechanism like International Court of Justice, International Tribunal on Law of the Sea and World Trade Organisations Dispute Settlement Understanding. In this regard important is "polluter pays" principle which triggers a liability mechanism for ecological damage, which can cover all the effects, in this case transboundary damage.

Another important issue is the problem of international liability of States for injurious consequences arising out of acts not prohibited by international law.

Some activities that are useful for economic and social development even if there are not prohibited by national or international law can cause transboundary damage to other countries.

As a consequence of the scientific progress in science and technology fields, some activities conducted on the territory of one country can cause damage on the territory of other countries, even if these activities are not prohibited by international law. The Chernobyl disaster and the Amoco Cadiz oil spill are only a few examples of environmental catastrophes that have crosses national borders and resulted in complex legal disputes in international law. This kind of disasters produced a worldwide demand for increased environmental protection and many discussions about more strictly international rules and compensation procedures that should be applied in transboundary environmental disputes.

Such transboundary damage can arise from ultra-hazardous activities like: nuclear activities, space activities, maritime pollution and activities involving other hazardous substances.

The nuclear activity brings in the same time risks and benefits, but the most important question is what if the risks overtake the benefits. Nuclear activities are likely to produce irreversible damage to the environment with catastrophic results to humankind - this is the case of the accident at the Chernobyl nuclear reactor in 1986. Following this catastrophe and the evident failure of URSS to inform immediate the affected States of the disaster, was adopted in 1986 the Vienna Convention on Early Notification of Nuclear Accident, which provides rules that in the event of a nuclear accident the relevant State shall inform directly or through International Atomic Energy Agency those States that may be affected by nuclear accident. In 1994 was adopted the Convention on Nuclear Safety in order to establish the responsibility for nuclear safety to the States with nuclear activity.

In addition to such nuclear accidents several conventions and protocols were adopted and they implement that fact that the operator of nuclear installation in case of a nuclear accident bear the loss and have to pay compensation to persons affected by the nuclear accident repercussions.

In contrast to nuclear damage, issues of State responsibility and international liability arising from outer space activities have drawn increasing attention in national legislature (especially for the recent development of commercial satellite services and activities) as well at international level. "In this regard, the 1972 Convention on International Liability for Damage Caused by Space Objects (the Space Liability Convention) is often considered the only example where States themselves undertake strict or absolute liability for damage caused by space objects"[8].

Marine pollution may arise from different sources like pollution from ships[9], which can be maritime oil pollution, activities on the seabed or effects of pollution originated from

[8] Hanqin Xue – *Transboundary Damage in International Law*, Cambridge University Press, 2009, p. 45.
[9] See International Convention for the Prevention of Pollution from Ships, 1973.

land but entering in the sea. As for establishing a responsibility for maritime pollution an example is the Convention on Civil Liability for Oil Pollution Damage from 1969, which provides that if there is oil pollution from a ship that causes damage to the territory or territorial sea of one State, the ship-owner is responsible for the damage.

The problem of hazardous substances is serious and difficult to control. Disposal of toxic and chemical substances are the subject of national regulation and it is a serious lack of international regulations in this field. Because of different national regulation there is a practice of seeking more permissive national regulations, especially in the Third World, and dumping these hazardous substances with severe impact on human health. In this concern were adopted the Convention on the Transboundary Effect of Industrial Accidents in 1992 and the Oslo Convention for the prevention of Marine Pollution by Dumping from Ships and Aircraft in 1972.

In 2001 ILC adopted the work "Prevention of transboundary damage from hazardous activities". "The whole concept of this work is based on the idea of pre-eminence of the duty of prevention, before the duty for repairing and compensation of damage"10.

As a completion of the project from 2001, ILC adopted in 2006 the work with the title "Draft principles on the allocation of loss in case of transboundary harm arising out of hazardous activities" and submitted it to the General Assembly. The scope of this work is presented in the first principle which says that "the present draft principles apply to transboundary damage caused by hazardous activities not prohibited by international law". The second principle deals with the notion of "damage", which was omitted from the work regarding the liability of States for illegal activities (2001). In this regard, ILC in principle 2 established that "damage" means significant damage caused to persons, property or the environment. It also explains the terms of environment, state of origin, transboundary damage, victim, operator and hazardous activities, considering it useful to insert these mentions in order to better define the notion of damage, that was previously considered by part of the doctrine and international jurisprudence as a sine qua non condition of responsibility, even if in the ILC work (2001), in order to determine State responsibilities, illicit conduit and imputability were considered necessary and sufficient.

The purpose of this draft as it is presented in principle 1 is to „ensure prompt and adequate compensation to victims of transboundary damage and to preserve and protect the environment in the event of transboundary damage... ". In the end, principle 8, states that „each State should adopt the necessary legislative, regulatory and administrative measures to implement the present draft principles".

The projects for codification of international responsibility of the States from 2001 and 2006 even if there are useful from the doctrinal point of view, due to the fact that they have been elaborated in quite a long time period, they have lost part of the interest they presented some time ago, in special due to the present international trend to institute juridical norms that are specific in the matter of States international responsibility (i.e. Sea Law, Air Law, Regime of International Commerce etc.).

It is unlikely that the articles from ILC work (2001) and principles from ILC work (2006) will form the basis for an international treaty or to be adopted in another form.

Even so, the works of ILC are likely to influence the development of customary international law on transboundary damage.

It is worthy to mention also about the "injurious consequences of human activities in the areas beyond the limits of national jurisdiction or control, usually referred to as *the global commons*, or simply *the commons*"[11]. In this regard the first signal for the need of development legal rules of State responsibility and liability for damage caused to the areas

[10]Besteliu-Miga Raluca, *Drept international public*, vol. II, Bucharest, C.H. Beck Publishing House, 2008, p.46.
[11]Hanqin Xue – *Transboundary Damage in International Law*, Cambridge University Press, 2009, p. 191.

beyond the limits of national jurisdiction was in 1972 at the Stockholm Declaration on the Human Environment in its Principles 21 and 22. One decade later, in Montego Bay, the Convention on the Law of the Sea in article 235 stresses the importance of State responsibility and liability for damage to the marine environment.

Issues as marine environmental protection12, the depletion of the ozone layer13, biological diversity14, climate change15 and land degradation16 are more and more in the attention of international environmental law which recognises the urgency of developing a comprehensive international response to this environmental changes, and drafting rules of international liability for damage caused in the commons areas.

These issues raised profound questions about environmental protection and the human rights impact if this protection is not sustained by stricter rules of international liability for damage caused in this areas. There is obvious a need for action from international actors in this concern, knowing although the fact that the political will is of paramount importance in settling international rules for environmental protection and transboundary damage.

In order to prepare for the challenges of this century, especially the development of scientific and technical filed, and to avoid humanitarian and environmental catastrophes, the international community must act now and deal with these issues.

4. Conclusions and future perspectives

Despite the developments in environmental field, despite the great number of treaties, protocols and NGOs implication, the international response to concrete transboundary damage remain week and most of the time at theoretical level.

The problem to identify from which States the pollution is emanated, especially acid rain, ozone depletion and global warming, is difficult and it is the result of uncontrollable industrial developments, from ecological point of view, and irrational exploitation of natural resources.

The environment protection cannot be separated by the concept of human rights. It was demonstrated that environmental damage has great impact to humankind, especially to the right to life and right to health.

The most important challenge that international community is facing is the need for economic developments which comes with a demand for environmental protection. It is important to find the right balance between the two, because as we have seen in nuclear accidents, for instance, even if the nuclear activity has its benefits, the risk is greater and many times the environmental damage is irreversible.

Unfortunately, time demonstrated that only after serious ecologic damage international community tried to take measures and adopt rules in environmental field. States should prevent or minimise an environmental harm, particularly in the case of transboundary damage which most of times have serious human rights consequences.

On the same time there it is a need for international harmonization of environmental norms and a good cooperation at international level so that the environmental protection to be efficient.

Access to justice, access that many times is difficult to obtain, because most of the treaties do not offer a simple and easy mechanism of access to justice and compensation remains a problem. In this regard a step was made with Aarhus Convention which suggested

[12]See the International Convention on Liability and Compensation for Damage in Connection with the Carrige of Hazardous and Noxious Substances by Sea.
[13]See the Convention for the Protection of the Ozone Layer (Vienna, March 22, 1985).
[14]See the Convention on Biological Diversity (Rio de Janeiro, June 5 , 1992).
[15]See UN Framework Convention on Climate Change (New York, May 9, 1992).
[16]See UN Convention to Combat Desertification in Thouse Countries Experiencing Serious Drought and /or Desertification, Particulary Africa (Paris, June 17, 1994).

that the access to justice to be more effective and gives remedies against environmental harm, but it is not enough.

Considering this facts, it is obvious that there is the need for international cooperation and enforcement of rules in environmental field and even a fusion of environmental norms with the purpose to simplify the procedures and give real effectiveness to this norms, because the normative background in this field is over-dimensioned and sometimes it is difficult to distinguish between the juridical norms and soft law.

References

- Boyle Alan - Globalising Enviromental Liability: The Interplay of National and International , Journal of Environmental Law (2005) Vol 17 No 1, 3–26
- Hanqin Xue – *Transboundary Damage in International Law*, Cambridge University Press, 2009
- Besteliu-Miga Raluca, *Drept international public, vol. II*, Bucharest, C.H. Beck Publishing House, 2008
- Anghel Doina – *Raspunderea juridical privitoare la protectia mediului*, Bucharest, Universul Juridic Publishing House, 2010
- Dutu Mircea – *Dreptul International al Mediului*, Bucharest, Economica Publishing House, 2004
- Shaw Malcom – *International Law*, Fifth Edition, Cambridge University Press, 2004
- Constantin Valentin – *Drept International*, Bucharest, Universul Juridic Publishing House, 2010
- http://www.ciel.org/Publications