

THE LIABILITY ISSUE AND THE NOTION OF ENVIRONMENTAL DAMAGE

A STARTING POINT OF DEFINITION

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For the assessment of the damage regarding the statement of environmental liability of a state or civil entity, the relevant treaties shall characterize the notion of damage as an objective point of view and an element of causal relationship (the direct causal link between the damage and the conduct justified as wilful and intentional act or negligence) in order to set up this conjunctive criterion, thereupon the liability shall be based. However, this definition and clarification is relatively deficient as well as divergent within the scope of environmental regimes. The core and interlinked treaties of the environmental sectors or separate domains of environmental challenges (thus, binding documents with similar competence and aim) often contradict themselves regarding the notion of the damage.

1. Damage as a Core Characteristic and Basis of Liability/Responsibility

The transcending spread of civil liability in binding treaty-based regimes and the quasi-judicial recognition of the concept on absolute/objective/strict liability of states are recognized to be a noticeable trend in scientific discourse, being backed up by genuine pivotal „environmental treaties” of a considerable number. Besides, referring to the latest developments in the domain of international law, the liability (and for the sake of solidity, state responsibility) concept has been accepted and characterized by the International Law Commission (hereinafter: ILC) in a non-binding way.

In the framework of public international law, the theoretical concept of transboundary environmental damage has been exclusively emerged in physical way but partly qualified in legal literature. The later element refers to the prerequisite of existing notions containing transboundary (trans-frontier with an old phrase) effects, transboundary harm and damage, transboundary pollution, environmental and hazardous harm and legal consequence of an activity being included to a binding treaty-based regime. However, the ramification in regulating the environmental sectors promoted the creation of divergent regimes based upon firstly on specific notions (e.g. the definition of environmental damage, etc.), which had been regarded to be essential for the authentic application of the given regime.

The exact substance of ‘transboundary’ incorporates the damage caused to another state or the damage emerging in the areas of global commons (*res communis omnium usus*, common concern and common heritage – in considerably analogical and synonymous meaning). These two directions have of some importance when a claim against the polluter (whether it is a state or a civil entity) has been brought in order to compensate the harm caused by the

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origin entity, wherever it has taken effects in a strictly geographical view (*state* and/or *global commons*).

2. Defining “Damage” within the Liability Regimes – Prerequisite of the Further Liability Issues

The author is utterly convinced that inquiring the issue of the environmental damage in general point of view and the concluding results to be stated would promote and clarify some substantive aspects of the legal field of international environmental law and the linking field of liability law.

2.1. *The Concept of Liability for Injurious Consequences*

From a highly abstract point of view and potential international legislation purposes, liability shall be adjudicated for damages caused to another entity (state, person or global commons) irrespective of the fault of the liable part. Within the domain of public international law, it should be noted that the interrelationship between the acts of the liable or potential liable entity and the caused damage emerging in the territory of another state (whether it has detrimental effects either on the side of the state, or on the side of civil or legal persons) shall be proved in the form of causal relation by means of the binding rules of public international law, consequently only the proven occurrence of damage may trigger the liability.

Furthermore, the term ‘liability’ shall be applied in cases where damage or loss had been incurred as a result of an activity having been conducted neither in breach of an international obligation, nor in breach of the so-called due diligence obligations (lawful acts involving risks and transboundary damage). As opposed to the doctrinal concept of (state) responsibility based upon unlawful and faulty acts prohibited by international law, the facts of international liability of a state or other entities shall be induced by both lawful and unlawful but injurious acts or omissions.¹ The concept of state responsibility, which is left aside from our scientific, liability-orientated consideration, is not yet accepted in a form of a treaty; however, the ILC adopted its Draft Articles in 2001², without binding force on states but with several roots traced back to a huge number of generally accepted rules of customary international law.³

Turning back to the aspects of liability issues, the increasing numbers of rules of liability for acts not prohibited by international law are irrespective of whether the activity was faulty or lawful; consequently, they emphasize the harm, rather than the conduct in this rudimentary phase of institutionalization.

¹ On the two-side-of-the-coin differentiation, see Boyle, Alan: State Responsibility and International Liability for Injurious Consequences of Acts not Prohibited by International Law: A Necessary Distinction? *International and Comparative Law Quarterly*, Vol. 39 (1990) No. 1, 1-26.

² Cf. Draft Articles on Responsibility of States for Internationally Wrongful Acts. *Yearbook of the International Law Commission*, 2001, vol. II (Part Two) 25-30.

³ On its theoretical characteristics, parameters and practical history, see in detail, Crawford, James: *The International Law Commission's Articles on State Responsibility, Introduction, Text and Commentaries*. Cambridge University Press, Cambridge, 2002. 1-60.

Following a recommendation by the United Nations General Assembly in Resolution 3071 (XXVIII) of 30 November 1973, the ILC had a legal duty for compiling a separate and summarized study on the topic „International liability for injurious consequences arising out of the performance of other activities”; this working title remained unchanged through the following five years. By 1978, the *differentia specifica* phrase had consequently arisen, because the requirement of injurious consequences of act was constant, but the term ‘international liability’ had been determined as a result of an act not prohibited by international law, instead of the term ‘performance of other activities’.

After 1978, the topic International liability for injurious consequences arising out of acts not prohibited by international law left unchanged. As a result of the prolonged codification work, the ILC adopted the text of Draft Articles on Prevention of Transboundary Harm from Hazardous Activities in 2001⁴ and submitted to the United Nations General Assembly. After three years, the ILC adopted the Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising out of Hazardous Activities,⁵ dealing with the other aspect of the subject in question, pointing out the harm arising out of hazardous activities as a differentiation factor which was a fundamental shift relating to the existing symbiosis of that time. Neither the Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, nor the Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising out of Hazardous Activities have a self-executing binding character, but several embedded and inherent rules of these articles and principles shall be considered as a manifestation of the existence and recognition of customary international law.

2.2. Damage as an Essential Element of the Liability Regimes

In the initial phase of the protection of environment, long time before the creation and institutionalization of the term ‘international environmental law’ at the 1972 *United Nations Conference on the Human Environment*,⁶ the conception had been explicitly narrow; besides, this limited domain had exclusively focused on the “bilateral consequences” of transboundary injury, as opposed to the idea of the environment as an international common good to be preserved by all the states.⁷

After 1972, the scope of international environmental law has been rapidly extended; the process was duplex:

- ❖ firstly, the concept of the global and human environment forged ahead, consequently, the regulation mechanisms of globally focused and environmental integrity-issued treaties have prevailed; and

⁴ Cf., Yearbook of the International Law Commission, 2001, vol. II (Part Two) 145-148.

⁵ On its text and commentaries, see, *Yearbook of the International Law Commission*, 2006, vol. II (Part Two) 116-182.

⁶ The United Nations Conference on the Human Environment was held at Stockholm. The ‘milestone’ world conference “considered the need for a common outlook and for common principles to inspire and guide the peoples of the world in the preservation and enhancement of the human environment”, as it is illustrated in the Preamble of Stockholm Declaration.

⁷ Cf. Viñuales, Jorge: The Contribution of the International Court of Justice to the Development of International Environmental Law: A Contemporary Assessment. *Fordham International Law Journal*, Vol. 32 (2008) No. 2, 237.

- ❖ secondly, the purposes of creation of (intergovernmental and non-governmental) organizations, conventions, measures and other ways of settlement relating to environment have been advanced.

In consequence of the aforementioned changes, the notion of 'transboundary', 'damage', 'pollution', 'harm' and 'liability' had been taken into the consideration of the international community and the international policymakers, as well.⁸ The definition of 'environment' had been proclaimed by the non-binding Declaration of the Stockholm Conference on the Human Environment; as the Principle 2 states, by all actors of the international community (states, first or foremost) must safeguard „the natural resources of the earth, including the air, water, land, flora and fauna and especially representative samples of natural ecosystems” as the open-ended, accurate meaning and the most precisely definition of the environment.

The real paradigm-change has been due to the Principle 21 of the non-binding Stockholm Declaration which reads as follows, „States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and 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.” The present principle proclaimed shall be traced back to the funding treaty of the United Nations with its „priority principle” (see, Article 103 of the U. N. Charter), making it possible to be applied on the level of inter-state relations.⁹

For a long while, most of the significant international legal instruments did not tend to distinguish between damages to the environment and the traditional forms of damages (for example, damage to person or property). Many of the earlier treaties and national legal regimes only consider damage in terms of human property and human health and exclude environmental damage. The reasons were several. According to *Bowman and Boyle*,

- ❖ on the one hand, the exact notion of environmental damage is still missing from the general rules of international law,
- ❖ on the other hand, the legal system of international law does not state objectives for assessing damages,¹⁰ and thus, the assessment of damages should be determined via *ad hoc* methods.¹¹

⁸ The terms “harm”, “damage” and “injury” are occasionally used as synonyms, although “damage” is mainly used in the context of property being harmed, and “injury” correspondingly in case of personal harm. Furthermore, „harm” is used as the broader term including damage to the environment *per se*. The term „damages” means a monetary quantification of harm, the monetary award for damage, injury or loss. See, Larsson, Louise-Marie: *The Law of Environmental Damage. Liability and Reparation*. Kluwer Law International, The Hague, 1999. 34.

⁹ Cf. Principle 22 of the *Stockholm Declaration*.

¹⁰ Cf. Bowman, Michael – Boyle, Alan: *Environmental Damage in International and Comparative Law: Problems of Definition and Valuation*. Oxford University Press, Oxford, 2002. 26. Xue restricts four elements of the discussion relating to transboundary damage, such as (1) the physical relationship between the activity concerned and the damage caused, (2) human causation, (3) a certain threshold of severity that calls for legal action, (4) transboundary movement of the harmful effects. See in details, Xue, Hanqin: *Transboundary Damage in International Law*. Cambridge University Press, Cambridge, 2003. 4-10. While, *Schachter* laid down the classification of the conjunctive parts of the damage in legal literature. Invoking *Schachter's* thoughts, transboundary environmental harm must result of a human activity, that is occurred due to a physical consequence of the human activity, which have transboundary effects and is significant and substantial. See *Schachter, Oscar: International Law in Theory and Practice*. Martinus Nijhoff, Dordrecht, 1991. 366-368.

As for the assessment, Larsson points that environmental damage per se entails pure ecological damage only, while two kinds of environmental damage can be identified; first, pure ecological damage, sometimes referred to as environmental impairment, and secondly, property damage with an ecological dimension.¹²

As for the ecological damage, the Lugano Convention (Council of Europe Convention on Civil Liability for Damage Resulting From Activities Dangerous to the Environment – not yet in force) contains a regime for strict liability that in principle covers all types of damages caused by dangerous activities, irrespective of the identification of the damage (traditional and/or ecological with transboundary effects). Regarding that the most European states' environmental liability regimes (it is worth mentioning that this convention was adopted under the aegis of the Council of Europe) do not cover damage to biodiversity and the concept of ecological damage, the Convention seems to be a model mechanism and instrument to urge the European states for accepting these newly constituted forms of damage.

Bearing in mind the numerous treaties and other documents being adopted or proclaimed in the field of international environmental law with special regard to the definition of damage, the universal notion is still missing, but several sector-specific definitions still exist. The most comprehensive notions of damage that combine the elements of the sector-specific notions reads as follows: „any injurious effect concerning the environment, including human health and safety, flora, fauna, soil and water, climate, landscape, historical monuments or other physical structures or the interaction among these factors, effects on cultural heritage or socio-economic conditions resulting from alterations to those factors.” Similarly to this „optimal” definition, the *Convention on Environmental Impact Assessment in a Transboundary Context*¹³ contains a paragraph, under the name of 'impact',¹⁴ that is considered being the synonym of damage because the word 'impact' is regularly used for injurious results of activities.

Highlighting the White Paper on *Environmental Liability* of the European Commission¹⁵ and some relevant directives, the scope of environmental damage in the European law includes three categories with proper rules and peculiarity in accordance with the sectors in

¹¹ Larsson focuses on three categories according to the different scope of potential damage. Firstly, the *global issues* concentrate on deforestation, desertification, and other global-concerned priorities, secondly, *regional environment* focuses on transboundary pollution, static units of ecological species, problems of migratory birds, and lastly, *local level* incorporates the problems arising from industrial risks, waste management. Consequently, the three levels demand different concepts of environment and damage in the concerned issues by means of their peculiar factors. As the so-called *sector-specific definitions* have been excluded from the regulation, Larsson only enumerates the effects *exemplificative* that could cause damages. Cf. Larsson: *op. cit.* 122-124.

¹² Cf. with Larsson: *op. cit.* 122.

¹³ Also known as *Espo Convention*, adopted in 1991.

¹⁴ Article 1 reads as follows: (vii) „Impact” means any effect caused by a proposed activity on the environment including human health and safety, flora, fauna, soil, air, water, climate, landscape and historical monuments or other physical structures or the interaction among these factors; it also includes effects on cultural heritage or socio-economic conditions resulting from alterations to those factors; (viii) "Transboundary impact" means any impact, not exclusively of a global nature, within an area under the jurisdiction of a Party caused by a proposed activity the physical origin of which is situated wholly or in part within the area under the jurisdiction of another Party.

¹⁵ *White Paper on Environmental Liability*. COM(2000) 66, 9 February 2000. Presented by the European Commission.

which the damage could be occurred.¹⁶ The sectors are the ‘protected species and natural habitat’ with more cited directives dealing with detailed aspects of the sector; the ‘water damage’ sector which incorporates any damage that significantly adversely affects the ecological, chemical and/or quantitative status and/or ecological potential, as defined in Directive 2000/60/EC; and finally the ‘land damage’ sector which concerns any land contamination that creates a significant risk of human health being adversely affected as a result of the direct or indirect introduction. Moreover, the White Paper covers the ‘damage to biodiversity’ that could be justified as the synopsis of the above-mentioned three categories [i) protected species and natural habitat; ii) water damage; iii) land damage].

The ILC’s Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising Out of Hazardous Activities in its Principle 2, point c) states a general, abstract notion of transboundary damage, not aiming to define the exact concept of the dual phrase, instead the text specializes the meaning of the ‘transboundary’, while the notion of damage [Principle 2, point a)¹⁷] left unchanged and should be applied in accordance with the general rules and definitions.

If the traditional damage directly (loss of life or personal injury, damage to property, etc.) deriving from an economic interest in any use of the environment, or incurred as a result of impairment of the environment, and the costs of measures of reinstatement of the impaired environment,¹⁸ the definition shall be influenced by environmental characteristics. By the appearance of instruments in the field of transboundary pollution, the notion of pollution with transboundary effects has been exponentially emerged, instead of the method integrating the concept of pollution to the concept of damage.¹⁹ In line with the argumentation of *Springer*, pollution could be defined under a range of approaches, as any alteration of the existing environment; as the right of territorial sovereign; as damage; as interference with other uses of the environment; or as exceeding the assimilative capacity of the environment.²⁰

In sum, witnessing the transcending and developing theory of international environmental law, the damage or pollution occurred in the territory of other state shall be regularly assigned to individuals or companies from their activities the polluter materials and techniques had been released; thus, the justification of civil liability had been put forward as

¹⁶ Cf. *Directive 2004/35* of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage, Article 2.

¹⁷ It reads as follows: „damage” means significant damage caused to persons, property or the environment; and includes: (i) loss of life or personal injury; (ii) loss of, or damage to, property, including property which forms part of the cultural heritage; (iii) loss or damage by impairment of the environment; (iv) the costs of reasonable measures of reinstatement of the property, or environment, including natural resources; (v) the costs of reasonable response measures.

¹⁸ Cf. Article 2, point 2 c) of *Basel Liability Protocol* (Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and their Disposal) and Article 2, point 2. of *Protocol on Civil Liability and Compensation for Damage Caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters* to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes and to the 1992 Convention on the Transboundary Effects of Industrial Accidents.

¹⁹ On the difficult issues of the regulation of transboundary pollution, cf. Merrill, Thomas: Golden Rules for Transboundary Pollution. *Duke Law Journal*, Vol. 46 (1997) No. 5, 937-938.

²⁰ Cf. Springer, Allen: Towards a Meaningful Concept of Pollution in International Law. *International and Comparative Law Quarterly*, Vol. 26 (1977) Issue 3, 531.

an increasing and extending issue in the procedure of the courts.²¹ It is generally accepted that if the states intend to use areas and pursue activities under their jurisdiction or control in a way that may cause significant and serious trans-frontier or transboundary environmental damage, they will be held liable and must pay compensation to the affected state(s) – as the original consideration on state liability required thereupon.

The relatively high amount of damages and inevitable participation of the private sector in activities of one-time public duties yielded the recognition that private sector will not be able to compensate the possible amount of damage, pollution or harm. According to the ILC, the conduct of organs of the state, the conduct of persons or entities exercising elements of governmental authority, the conduct of organs placed at the disposal of a state by another state, the conduct directed or controlled by a state, the conduct carried out in the absence or default of the official authorities, the conduct acknowledged and adopted by a state as its own *shall be considered as an act of that state under international law*, aiming to transform the exclusively civil liability concept into the partial application and residual background of state liability.

3. Conclusions

The codification and development of the elements of the law on transboundary harm has advanced significantly since *1992 Rio Declaration on Environment and Development*, in the work of the ILC and in the jurisprudence of the International Court of Justice (regarding several cases with environmental aspects which had been or are in the docket of the Court).

A general or widely accepted consensus as to a notion of environmental damage within international law is still missing. The relevance of sector-specific definitions should be eliminated for the sake of universal concept of damage included into a multilateral treaty. On the one hand, due to the decreased consideration of states, it would probably cause the reduction of international lawmaking process. Yet, on the other hand, universal notion of damage would prevail over the fragmentation of compensation and liability regimes. The positions of states point out that the concept of sector-specific definition is overwhelmingly supported due to its character based upon case-to-case or treaty-to-treaty consideration focusing special interests; after this level, the process ended in cooperative and joint text reflecting the mutual agreement of states. Furthermore, the *Institute of International Law* supported the concept that the international environmental legal regimes should define the issue-related notion of damage, considering the special rules and requirements of the field concerned.²²

Moreover, beyond the international sphere, the mostly non-binding classification, definition and valuation of environmental damage and consequently the classification of liability concepts are based upon the legal regimes being applied in accordance with the legal systems or legal cultures. The common law-based Anglo-Saxon states (including some Commonwealth, one-time colonial states) use the concept of environmental damage that is more influenced by the practice of the courts, while the notion of environmental damages

²¹ On the channelling of liability (arisen as a result of a private activity, but compensated by the State or States), see Boyle, Alan: *Globalising Environmental Liability: The Interplay of National and International Law*. *Journal of Environmental Law*, Vol. 17 (2005) No. 1, 6-8.

²² Cf. Article 19 of *Responsibility and Liability under International Law for Environmental Damage*. Resolution of the Institute of International Law. Session of Strasbourg, 1997.

in civil and statutory law-based states²³ is closely connected to the clarified and binding rules (without judicial precedents). The geographical, natural and hydrological factors, the state of development, the density of population and the characters of the states concerning natural affairs, experiences of disasters, political system significantly influence and determine the national laws in the field of environmental law and liability-regimes. Regarding the fact that the international relations of the states are basically formed according to their interests, the creation of international treaties is the result of the consensual ability of the states which presupposes the consent appeared between developed and developing, coastal and landlocked, civil law-based and common law-based states, etc.

Last but not least, the distinguished role of international judicial fora and scientific bodies should not be neglected; however, regarding the special characters of international law, the judicial fora have different competence comparing with the national judicial bodies. The concept of international law does not recognise the precedents of international courts (*stare decisis doctrine* of the common law), but, as we have seen the International Court of Justice declarations concerning the notion of environment,²⁴ the scientific definitions, concepts and judicial reasoning are able to conduce the initiatives to define universal, wide-ranging concept of environmental damage within the field of, particularly, international (environmental) law.

²³ As *Bowman* stated, the cause of environmental protection is arguably better served by statutory initiatives than by judge-made law. See Bowman, Michael: The Definition and Evaluation of Environmental Harm: An Overview. In: Bowman, Michael – Boyle, Alan (eds.): *Environmental Damage in International and Comparative Law: Problems of Definition and Valuation*. Oxford University Press, Oxford, 2002. 10.

²⁴ Cf., Para. 29 of the *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of the International Court of Justice and Para. 53 of the Judgment of *Case Concerning the Gabčíkovo-Nagymaros Project* (Hungary/Slovakia).