The Doctrine of State Responsibility under International Environmental Law: A Critical Review

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Abstract

The term "State Responsibility" is inter-locked with public international law and international environmental law which raises complicity while determine the responsibility of a state for doing particular harm to other state or states. This article tried to determine the nature and extent of "State Responsibility" under the norms of customary international law with special reference to various cases concerning international dispute. Various international laws were carefully examined and it was found that, sometimes "State Responsibility" depended on geopolitical environment while others it depends on the nature and consequence of the violation. At the end the article tried to establish possible way-out by which the gap between public international law and international environmental law can be reduced.

Keywords: Convention, environmental law, sovereignty liability, state responsibility.

1. Introduction

The system of international environmental law is not easy to capture. There has been much debate on the question whether international environmental law is a 'self-contained system' or a 'subsystem' of international law. It is crucial to address this question, especially when testing international environmental regulations within the system of state responsibility due to a possible preclusion of state responsibility.

According to article 37 ILC-DASR[1], state responsibility is not applicable to a state if the wrongdoing of that state is regulated by other means of international law besides the concept of state responsibility. In international environmental law, this question of preclusion has to be determined in every single case since a system of 'special' and 'general' international environmental law does not exist. There are many international environmental treaties and some principles developed over the course of the last century that in conjunction built international environmental law. International environmental law covers substantive, procedural, and institutional rules of international law that relate to the environment. It is viewed simply as a part

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[1] Draft article on Responsibility of States for Internationally Wrongful Acts 2001, by International Law Commission

of international law as a whole. Admittedly, many environmental treaties and other legal documents have been negotiated over the past half-century, and the study of international environmental law is to a significant extent a study of these treaties and other instruments. Nevertheless, unlike WTO law, UNCLOS, or Human Rights Law, international environmental law has not been brought into structured form like a single treaty or group of treaties. There is neither a dedicated international environmental organization nor an international dispute settlement process with the ability to provide coherence. It is thus conclusive to test international environmental law within the system of state responsibility as long as the particular international environmental regulation tested does not offer a distinct liability regime and precludes an applicability of state responsibility on these grounds.

2. Responsibility of State for Transboundary Environmental Damage

2.1. Regimes for maritime damage

After the Torrey Canyon incident in 1969, the Amoco Cadiz disaster in 1978 and well-known Exxon Valdez oil spill in Alaska, there was a need for improvement of international legal instruments covering the responsibility and liability for accidental oil pollution damage. Accidents like Erika in the 1999 and Prestige 2002 showed need for further amendments and triggered conclusion of international treaties.

According to Article 235 of the Convention on Law of the Sea "states are responsible for the fulfillment of their international obligations concerning protection and preservation of the marine environment. This regulation is valid only before the occurrence of the damage".

2.1.1. United Nations Convention on the Law of the Sea (UNCLOS)

The 1982 United Nations Convention on the Law of the Sea (UNCLOS)[2] provides liability[3] for damages. However, the Convention is also interesting with regard to swallowed land by sea as a physical fact. Much of the convention is considered to be declaratory of customary international

[2] For further reading on UNCLOS, see: Sands and Galizzi (2004), pp. 294 ff.

[3] Principle 22 and Principle 7 adopted by United Nations Conference on the Human Environment have been major influences to article 253, UNCLOS. See: Nordquist et al. (1991b), p. 401. Principle 22 of the Stockholm Declaration states: 'States shall co-operate to develop further the international law regarding liability and compensation for the victims of pollution and other environmental damage caused by activities within the jurisdiction or control of such States to areas beyond their jurisdiction.' Principle 7 of the Stockholm Declaration states: 'States should discharge, in accordance with the principles of international law, their obligations towards other States where damage arises from pollution caused by their own activities or by organizations or individuals under their jurisdiction and should co-operate in developing procedures for dealing with such damage and the settlement of disputes.'

law. To the extent that UNCLOS reflects international custom, it is also binding for nonparties like the United States.

UNCLOS' first article is dedicated to the definition of the term 'pollution of the marine environment.' The definition has been relied upon in subsequent agreements. Article 1.4 defines pollution of the marine environment as any direct or indirect introduction by man of a substance into the marine environment that results in deleterious effects. Deleterious effects refer to harm to living resources, marine life, and human health and hindrance to marine activities, including fishing and other legitimate uses of the sea, impairment of quality for use of sea water and reduction of amenities.

The seventh part of the convention covers the protection and preservation of the marine environment. States are required to protect and preserve the marine environment[4]; the right to exploit their natural resources must be exercised in accordance with this obligation[5]. Pursuant to article 194 (1) UNCLOS, states are required to take measures to prevent, reduce, and control pollution of the marine environment. Also, states must ensure that activities under their jurisdiction or control do not cause pollution in areas outside where they exercise foreign rights[6]. Compared to other international environmental agreements, UNCLOS is a fairly strong instrument. It owns a stringent regime on responsibility and liability for marine pollution and other activities bearing potential harm for the marine environment in article 235 UNCLOS. Together with the rising sea level, climate change affects different aspects in which UNCLOS may be pertinent[7].

2.1.2. State Responsibility and Liability under the UNCLOS

Some important maritime powers have accepted strict liability for environmental damage, which may have been caused by their flag vessels passing through international straits[8]. Still, consideration must be given to compensation for damages from the many other sources than ships. Currently, UNCLOS provides for damages that are caused on the spot they appear. A

[4] Article 192 UNCLOS
[5] *Ibid,* article 193
[6] *Ibid, 194*
[7] The University of New South Wales Climate Change Research Centre (2009), pp. 7, 23.
[8] Nordquist et al. (1991b), pp. 401, 402.

maritime activity will be given in most cases, e.g. polluting vessels or seabed exploitation. However, climate change damages to the seas are of a different nature. The harmful activity does not necessarily take place at the same temporal and territorial point the damage will occur. Quite the opposite is true; regarding climate change, damage causes and damage effects remain separated. UNCLOS thus establishes basic rules on state responsibility and liability. To date, no such rules have been adopted; the development of precise rules has been a neglected issue.

UNCLOS presents obligations discussed above; what UNCLOS fails to prescribe is the degree to which states may be held liable if they do not meet the obligations. Article 235 UNCLOS sets forth that states may be found liable in accordance with international law if they do not meet their international obligations concerning the protection and preservation of the marine environment. UNCLOS also does not establish a specific legal procedure according to which disputes involving nonparties may be litigated before the International Tribunal for the Law of the Sea or other international bodies[9]. Although any state could agree to arbitrate these cases, under the present circumstances this is highly unrealistic. Compensation for damages has to be carried out prompt and adequately with respect to all damage caused by pollution of the marine environment (article 235 III UNCLOS). The obligation to prevent damage corresponds with the obligation to compensate for any damage done. UNCLOS may thus be a legal regime encompassing at least those climate change damages that relate to the oceans, like coral bleaching.

2.2. Provisions for accidents caused by hazardous waste

2.2.1. **The Lugano Convention and the Basel Convention**

The 1993 Lugano Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment is a regional example for civil liability. The Convention imposes responsibility on all persons and companies and all state or non state agencies exercising control over dangerous activities[10]. Despite offering a potentially proper tool for handling liability for

[9] See: UNCLOS, article 287, and generally UNCLOS, part XV. Theoretically, claims deriving from UNCLOS could also be brought in the International Court of Justice, which *[. . .] settle[s], in accordance with international law, legal disputes submitted to it by states and. . .give[s] advisory opinions on legal questions referred to it by authorized United Nations organs and specialized agencies.*

[10] Kiss and Shelton (2004), p. 142.

activities dangerous to the environment, the Convention has only been signed by very few countries (Cyprus, Finland, Greece, Iceland, Latvia, Liechtenstein, Luxembourg, Netherlands, and Portugal) and ratified by no country as of today[11]. Since at least three ratifications are needed in order to enter into force, the convention has no legal impact to date. The obvious restraint in signing and ratifying the Convention may be due to its legal consequences. The Convention includes objective liability and incorporates the Polluter-Pays-Principle[12], which parties to other international environmental agreements[13] sought to avoid being bound by very carefully[14].

The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal was adopted on 22 March 1989. It regulates the movement from hazardous wastes and their disposal, especially from developed to least-developed countries (LDCs). The Convention has a liability regime which provides for adequate and prompt compensation[15]. According to article 4 of the Protocol on Liability and Compensation for Damages resulting from Transboundary Movements of Hazardous Wastes and their Disposal, strict liability is imposed upon the parties. However, the Convention is not applicable to climate change. The object of the Convention is 'waste' and defined in article 1 as

> *"[. . .] substances or objects which are disposed of or are intended to be disposed of or are required to be disposed of by the provisions of national law [. . .]"*

GHGs do not fall within the category of disposable wastes. Regarding the different categories of waste, the Convention provides an overview in Annexes I– III. It, however, would be interesting trying to incorporate GHGs in the scope of the Convention and thus establish liability for transboundary effects of climate change.

[11] http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT¼150&CM¼3&DF¼&CL¼ENG. Accessed on January 06, 2018
[12] http://conventions.coe.int/Treaty/en/Summaries/Html/150.htm accessed on June 2017.
[13] Especially during the negotiations regarding the climate regime, developing countries were pressing for an incorporation of the Polluter-Pays-Principle (see Sect. 4.6.4).
[14] On the lack of ratification, see: Louka (2006), p. 467.
[15] Kiss and Shelton (2004), p. 141.

2.2.2. **Protocol on Liability and Compensation for Damage resulting from Transboundary Movement of Hazardous Wastes and their Disposal (1999)**

The Protocol recognizes and establishes the regime of liability and compensation of damage occurring during the movement of hazardous waste (including the damage caused by illegal traffic) from the point where the wastes are loaded on the means of transport in an area under the national jurisdiction of the state of export[16].

The Protocol imposes two types of liability: strict liability and fault based liability. The rule for the first type of the liability is prescribed by Article 4, the person who has the obligation of notification is liable for damage until the disposer has taken possession of the hazardous wastes and other wastes. After that, the disposer is liable for damage. If the State of export is the notifier or if no notification has taken place, the exporter shall be liable for damage until the disposer has taken possession of the hazardous wastes and other wastes. Once again, after that disposer is liable for damage.

The strict liable person is liable to the certain limit. If a person can prove that damage occurred as a result of an act of armed conflict, hostilities, civil war or insurrection, result of a natural phenomenon of exceptional, inevitable, unforeseeable and irresistible character, no liability will be applied[17]. Secondly, according to Article 5 of the Protocol, the fault based liability means that any person shall be liable for damage caused or contributed to by his lack of compliance with the provisions implementing the Convention or by his wrongful intentional, reckless or negligent acts or omissions[18].

Some problems may occur regarding the developing countries. The Secretariat of the Basel Convention may, upon request, assist a party to the convention which is a developing country or a country with economy in transition in case of an incident occurring during a transboundary movement of hazardous wastes and other wastes and their disposal, including illegal traffic. In

[16]Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Waste and their Disposal, December 10, 1999 (Protocol), Article 3 (1)
[17]*Ibid*, art. 4 (5)
[18]*Ibid*, art. 5

such case, the Secretariat of the Basel Convention will financially help them through the Technical Cooperation Fund[19].

3. Obligation to Prevent Transboundary Harm

Customary international law is reflected in many international treaties, and it is binding for all states even if the particular treaty reciting the custom is not signed or ratified or both by the state in question. Major accomplishments of international environmental law have been achieved as early as 1941 in the Trail Smelter Arbitration regarding a claim of the USA against Canada for damage to property, which could be traced back to fumes drifting over the border[20].

The idea that harm may be caused on the territory beyond national jurisdiction is not new. International law first dealt with transboundary environmental impacts in the context of no navigational use of international watercourses[21]. Under this maxim, it is settled that a property owner may put his or her property to any reasonable and lawful use, so long as the owner does not thereby deprive the adjoining landowner of any right of enjoyment of the property that is recognized and protected by law and so long as the owner's use is not such as one as the law will pronounce a nuisance[22]. From the same maxim evolve the principle of 'good neighborliness' and the concept of 'abuse of rights.' These rules also establish that territorial sovereign rights correlate and depend on each other and are thus subject to reciprocally operating limitations[23].

[19]Interim Guidelines for the Implementation of Decision V/23 „Enlargement of the Scope of the Technical Cooperation Trust Fund <http://www.basel.int/meetings/interguide00.html> accessed April 1, 2017

[20] Canada v. United States: A zinc and lead smelter in the town of Trail, British Columbia, not far from the U.S. border, emitted sulfurous smoke that drifted southward down the Columbia River valley and caused damage to crops and trees on the U.S. side of the border. From the beginning of its operations in 1896, American farmers suffered damage due to emissions of sulfur dioxide by the plant. In 1903, the record year, these emissions exceeded 10,000 tons a month. In 1930, 300 to 350 tons of sulfur, in addition to other chemical residues, poured into the air. Initially, the smelter company paid indemnities to those suffering from the pollution, either following American court procedures or as a result of bilateral accords. In 1925, the case was reopened after the smelter added two 409-foot stacks to the plant to increase production, resulting in greater pollution. An association of injured persons was formed in order to obtain general damages in the place of individual recoveries. Compensation was awarded for some of the damage claimed by the United States, and some changes were made in order to keep harmful emissions caused by the operation of the plant below an acceptable threshold. See: Gilpin (2000), p. 319; Kiss and Shelton (2004), pp. 182–188. For a summary of the case, see also: Gaines (1989), pp. 337–339.

[21]Handl (2007), p. 533.

[22]Ibid. p. 532.

[23]Ibid. p. 533.

The responsibility to prevent transboundary harm is accepted to reflect customary international law, which means that the maxim places legal constraints on the rights of states regarding the activities they carry out on their territory[24]. The responsibility not to cause environmental damage on areas beyond national jurisdiction has been accepted as an obligation by all states[25]. The right of a state to not receive transfrontier pollution is as absolute as the right of any state to use and exploit its territory. A thorough and deep assessment on this maxim has been established by the arbitral trial in the Trail Smelter case. With respect to climate change damages, the concept almost seems to have envisioned—as early as the beginnings of the last century—the effects of the environmental degradation to come with ongoing industrialization and technological progress.

The Trail Smelter rule is one of the few uncontested rules of customary international environmental law[26]; it was confirmed by the ICJ in the 1996 Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons[27].

3.1. Draft Articles on Prevention of Transboundary Harm from Hazardous Activities

The International Law Commission was tasked to review the issue of transfrontier pollution and to design draft articles. The ILC has completed its Draft Articles on Prevention of Transboundary Harm from Hazardous Activities (ILC-DAPTH), with commentaries in 2001[28]. The articles cover the issue of prevention in the context of authorization and regulation of hazardous activities, which may pose a significant risk of transboundary harm[29].The articles seek to establish basic rules regulating behavior on the state's territory and other places under its jurisdiction or control, in order to safeguard the consequences of these actions.[30]

The first article defines the scope of application as extending to activities that involve a risk of significant transboundary harm. Article 1 ILC-DAPTH further stresses that the draft applies only to activities not prohibited under international law. Article 2 (a) defines risk of causing

[24] Sands et al. (2012), pp. 195, 196.
[25]Ibid. p. 195.
[26]Ibid. p. 79.
[27] Fitzmaurice (2007), p. 1013.
[28] International Law Commission (2001b).
[29] Sands and Galizzi (2004), p. 24.
[30] Sands (2003), p. 902.

significant transboundary harm as including risks both of a high probability of causing significant transboundary harm and a low probability of causing disastrous transboundary harm. The key article of the draft is article 3, which calls upon the state of origin to take all measures to prevent significant transboundary harm or at any rate to minimize the risk thereof. The ILC, however, understands the duty to prevent harm in a manner that the activity is never itself in question to be put to an end; no matter how harmful the activity may be[31].This is crucial difference to the Trail Smelter arbitration, which requested Canada to end the damaging activity. In this respect the Trail Smelter case sets further obligations than the ILC-DAPTH.

The view on the scope of the ILC-DAPTH will be critically discussed in the next section. Lastly, the ILC-DAPTH is based on a standard of strict liability for activities involving risk of significant transboundary harm, which is either unforeseeable or, if foreseeable, cannot be prevented even if the state takes due care.

3.2. Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising Out of Transboundary Activities

After the completion of its work on prevention, the ILC continued with the second part of the topic and concluded this work in 2006 with the 'Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising out of Transboundary Activities.' The ILC made clear that this is a nonbinding declaration of draft principles[32].

The text is narrowed to the suggestion that victims should receive compensation. It is also pointed out that the draft articles are not applicable to problems relating to the global commons[33]. The ILC takes the view that cases that lie beyond the scope of state responsibility shall be resolved by a fair and equitable system established according to the state's discretion. In these draft articles, the ILC turned again to the question of a threshold for environmental damages. In Part II Principle 2, the ILC stipulated that the damage suffered has to be 'significant.' In its

[31] For further reading on this matter see: Handl (2007), p. 540.
[32] General Commentary, ILC Report, UN Doc. A/61/10, p. 113.
[33] General Commentary, ILC Report, UN Doc. A/61/10, p. 113.

commentaries to the Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising out of Transboundary Activities, the ILC defines-

> *The term 'significant' [. . .] to refer to something more than 'detectable' but need not be at the level of 'serious' or 'substantial'. The harm must lead to a real detrimental effect on matters such as, for example, human health, industry, property, environmental or agriculture in other States. Such detrimental effects must be susceptible of being measured by factual and objective standards*[34].

The articles do not call for state liability but only to assign responsibility to the actor. This means the state in which the activity originates owes the responsibility to impose liability upon the actor causing significant damage to persons, property, or the environment. This form of liability should not require proof or fault.

3.3. The Polluter-Pays Principle

The Polluter-Pays Principle is not included in the UNFCCC and the Kyoto Protocol. As a matter of fact, developing states have been struggling for an inclusion during the negotiation talks, but eventually they did not succeed. The principle seeks to impose the cost of environmental pollution upon the party responsible for the pollution. It is designed as an economic principle to allocate the costs of pollution[35].

The Polluter-Pays Principle is reflected in Principle 16 of the Rio Convention:

> *National authorities should endeavor to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with regard to the public interest and without distorting international trade and investment.*

[34] UN Doc. A/61/10; ILC Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising out of Transboundary Activities Yearbook of the International Law Commission, 2006, Vol. II, Part Two, commentary to principle 2 (2).
[35] Kiss and Shelton (2004), pp. 212, 213.

The principle thus equates the price charges for the use of environmental resources with the cost of damage inflicted in society by using the resources[36]. The Polluter-Pays Principle should be used to establish the economic and legal principle that the polluter should bear all the costs that its activities may generate. It is still highly debated whether or not the Polluter-Pays Principle has grown into customary international law and is thus binding for all states, irrespective of whether or not they are part of a convention which incorporates the principle. Also, the scope and exact meaning of the principle remain undefined[37].

The wording 'surrounding' the principle is extremely general, for example, Principle 16 of the Rio Convention, cited above. The phrasing [. . .] should endeavor to promote [. . .] is noncommittal, and not imposing a duty upon a party; endeavor can mean any approach and is not bound to a successful outcome. Another example of the Polluter-Pays Principle is incorporated in the 1992 Convention for the Protection of the Marine Environment of the North East Atlantic. It states in its article 2.2 (b) that

> *[. . .] the contracting parties shall apply: [. . .] the Polluter-Pays Principle, by virtue of which costs of pollution prevention and control and reduction measures are to be borne by the polluter.*

The application itself remains voluntary and for the parties to decide upon. With regard to climate change, some obstacles are detected regarding an application of the principle. All states have contributed to climate change, and thus estimating the cost of the damage to invoke liability on the basis of the Polluter-Pays Principle will prove to be difficult[38].The analysis will come back to this problem in the section on the legal consequences. The principle is recognized as a guideline for environmental legislation. The principle is not automatically binding; it has to be transferred into or incorporated in a binding rule, established by the authority in charge[39]. Thus, it is conclusive to view the principle as not being part of customary international law yet. This is mainly due to its unspecified aim; it is not clear whether the principle focuses on the unlawfulness of the causal act or on the injurious effect it has produced. It is out of consideration

[36] Gilpin (2000), p. 246.
[37]Tomuschat (2011), p. 16.
[38] On this notion, see: Gaines (1991), pp. 492, 493.
[39]Tomuschat (2011), p. 17.

as a primary rule of international law. Thus, it has no relevance for appointing responsibility for wrongful acts within the system of state responsibility.

3.4. Court Opinion

3.4.1. ***Trail Smelter***

The classic case on state responsibility in the context of environmental damage, albeit non-marine, is the *Trail Smelter* Arbitration. The subject of the dispute was damage suffered by property within the territory of the US as a result of the activities of a Canadian smelter which emitted sulphur dioxide fumes. In that case the USA alleged liability on the part of Canada and claimed damages for causing environmental harm. Thus, the question of state responsibility (Canada's responsibility) arose before the Tribunal which considered several important issues in the course of arriving at its findings and making a decision. Canada was held to be responsible in international law for the smelter's conduct since it was physically located within the territory of Canada and fell under Canadian jurisdiction. In particular its activities were held to be in violation of Canada's obligation to refrain from polluting the environment in such manner as to cause harm to another state. The Tribunal ordered Canada to pay compensation and establish a regime of control for the smelter to prevent possible future damage[40].

The *Trail Smelter* Arbitration is the first environmental case in modern times in which the doctrine of state responsibility was the central focus of interstate litigation. It brought to the forefront a new perspective to the understanding and application of the doctrine with regard to pollution law.

3.4.2. ***LacLanoux***

One of the cases dealing with the doctrine of state responsibility is *Lac Lanoux*. Lake Lanoux is located on the French side of the Pyrenees mountain chain the frontier between France and Spain was fixed by the Treaty of Bayonne in 1866and an additional act whereby the regulations were

[40]*The "Trail Smelter" Case (The United States of America* v. *Canada)*, 16 April 1938 and 11 March 1941, Reports of International Arbitral Awards, in *the United Nations Treaty Collection website*, accessed on 9 March 2018, *available at* http://untreaty.un.org/cod/riaa/cases/vol_III/1905-1982.pdf.

made for the joint use of the water resources[41]. The French Government proposed to carry out certain works for the utilization of the waters of the lake and the Spanish Government feared that these works would adversely affect Spanish rights and interests, contrary to the Treaty of Bayonne, between France and Spain and the Additional Act[42]. Spain alleged that the plans proposed by France would adversely affect Spanish rights and interests contrary to the Treaty, and could only be undertaken with prior consent of both Parties.

Thus, the arbitration concerned the use of the waters of the lake; it was claimed that, under the Treaty, such works could not be undertaken without the previous agreement of both parties.302 In any case, *Lac Lanoux* showed how the process of prior consultation and negotiation was interpreted by an international arbitral tribunal, not only as a treaty stipulation, and considered it from the customary international law prospective. Nonetheless, thought the raised in the case issues were of the global environmental character, the matter of the doctrine of state responsibility was not touched upon. Once again, it makes it evident that the usability and validity of the doctrine is becoming rarer.

3.4.3. *Corfu Channel*

In 1946 on October 22 there happened two incidents that gave rise to the *Corfu Channel* case[43] which was held in April of 1949. The mines were struck by two British destroyers in Albanian waters which resulted in damage including loss of life. This case is probably the best example demonstrating how the doctrine of state responsibility was applied by the ICJ. In the context of state responsibility, two issues were raised before the court, namely:

1) Was Albania responsible under international law for the explosions which occurred in Albanian waters and for the damage and loss of human life which resulted from them and is there any duty to pay compensation?

[41]Compendium on Judicial Decision on Matters Related to Environment: International Decisions', in *the UNEP (United Nations Environmental Programme) website*, accessed on 10 April 2018, *available at* http://www.unep.org/padelia/publications/Jud.dec.%20pre(Int%20.pdf.
[42]Lake Lanoux Arbitration (France v. Spain)', in *the ECOLEX (The Gateway to Environmental Law) website*, accessed on 10 April 2018, *available at* http://www.ecolex.org/server2.php/libcat/docs/COU/Full/En/COU-143747E.pdf.
[43]*The "Corfu Channel" Case (The United Kingdom* v. *Albania)*, 9 April 1949, International Court of Justice.

2) Did the United Kingdom violate the sovereignty of the Albanian People's Republic under international law and was there any duty to give satisfaction?

The court determined several issues in order to address the stated questions, namely, the existence of international obligations, the duty of due diligence and whether the state concerned were in breach of their international obligations[44].

In its decision, the ICJ held that Albania was responsible for the explosions and was under a duty to pay compensation. The court also decided that the United Kingdom violated international law by the acts of its Navy in Albanian waters. Thus, both states were held liable under international law on the grounds that all the conditions for liability were met. In other words, both states were found to be in breach of certain obligations or duties to which they were subject under international law. The *Corfu Channel* case therefore represents an illustration of how the doctrine of state responsibility can be applicable in interstate litigation.

3.4.4. ***Torrey Canyon***

Until the second half of the 20th century no major environmental disasters at sea had occurred. However, towards the latter half of that century, high amounts of dangerous materials were increasingly being carried by sea, especially in the last decades. The *Torrey Canyon* disaster which occurred in March 1967 off the coast of the United Kingdom was the most dramatic and significant oil spill both in size and effect[45]. It served as the impetus for the creation of new convention law in both the public as well as the private maritime law arenas. There was only the OILPOL Convention which was regulatory in scope and did not provide for any remedies for victims of pollution damage including a state which had suffered damage to its coastal interests. The damage occurred in waters which then were a part of the high seas where coastal states had no legislative or enforcement jurisdiction. The domestic law of the United Kingdom could not be invoked since the incident occurred outside the territorial seas of that state. In the words of one

[44]*Ibid*, *cited in* M. Enrico 'State Responsibility in Territorial Disputes before the ICJ', in *the European Society of International Law website,* accessed on 9 March 2018, *available at* http://www.esil-sedi.eu/fichiers/en/Milano_441.pdf.
[45]W. Chao, *Pollution from the Carriage of Oil by Sea: Liability and compensation,* Kluwer Law International Ltd Press, United Kingdom, 2016, p 9.

commentator, it was the necessity to turn to the national legal system for the solution but the international character of the disaster itself and the contrary economic interests of the countries led to a conflict of laws.

The *Torrey Canyon* was owned by a subsidiary of the Union Oil Company of California, the USA, and was chartered out to the parent company. The ship which was registered in Liberia ran aground on Seven Stones Reef outside the territorial seas of the United Kingdom[46]. A considerable amount of crude oil cargo was released from the vessel which broke up into four sections; a hundred kilometers of English coastline and eighty kilometers of French coastline were polluted. This disaster reportedly cost the United Kingdom more than three million pounds and France forty one million francs. The incident had its worst impact on the rural coast of southwestern England[47].The beaches were rendered unusable not only to wild life but also to humans.

The *Torrey Canyon* signified that the doctrine of state responsibility by the middle of the last century was still not elaborated enough to deal with marine environmental disasters. As exemplified in this thesis, the situation has not changed significantly, and the ILC is still engaged in deliberations which will hopefully lead to a more definitive state of the law in relation to this doctrine.

4. International liability and redress mechanism according to Convention on Biological Diversity (CBD)

According to Article 1 of the Convention on Biological Diversity states are obliged to conserve their own biodiversity. Under Article 3 it is prescribed that states must ensure that activities within their jurisdiction or control do not cause any damage to the biodiversity of other state. Catherine Tinker states that Article 3 of the Convention:

[46]A C Simpson, 'Torrey Canyon Disaster and Fisheries', in *the Center for Environment, Fisheries & Aquaculture Science (CEFAS) website*, accessed on 6 April 2018, *available at* http://www.cefas.defra.gov.uk/publications/lableaflets/lableaflet18.pdf.

[47]The Times (London), March 28, 1967, at 9, col. 1, in A E Utton, 'Protective Measures and the Torrey Canyon', *Boston College Law Review*, vol. 9, April 1967, pp. 613 – 632, in *the Digital Commons @ Boston College Law School website*, accessed on 9 April 2018, *available at* http://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=1094&context=bclr.

> *Offers a basis for asserting the state responsibility. Although the duty applies only to extraterritorial harm, the Convention's article on jurisdictional scope may give a rise to responsibility for a state's activities, regardless of where the effect occurs.* [48]

However, the Convention on Biological Diversity does not cover the issue of liability and redress. There has been need to develop and establish "effective rules governing liability and redress for environmental harm and diminution in biological diversity[49]."

Paragraph 2 of Article 14 of the CBD provides: The Conference of the Parties shall examine, on the basis of studies to be carried out, the issue of liability and redress, including restoration and compensation, for damage to biological diversity, except where such liability is a purely internal matter.[50]

Preamble of the Convention of Biodiversity notes that the conservation of biodiversity is a "common concern of human kind", therefore it is not clear why the liability and redress are still issues of internal matter. Some of possible transboundary effects of the loss of biological diversity are certainly a matter of international concern.

The problem for economic calculation is the measurement of the intrinsic values. According to Pearce and Moran "intrinsic values are relevant to conservation decisions, but they are generally not measurable"[51]. On the other hand, Bowman thinks that there is now substantial body of scientific literature on the question of assessing and restoring damage of ecosystems. The cost of some types of restoration can be measured in the sense of determining the compensation. When the restoration is not possible, techniques for assessing ecological harm could show the scale of the damage done. Biodiversity beside this economic value has the aesthetic, ethical, ecological and scientific values.

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[48]Catherine Tucker, 'Responsibility for Biological Diversity Conservation Under International Law' (1995) Volume 28, VJTL p. 881

[49]Michael Bowman, 'Biodiversity, Intrinsic Value, and Definition and Valuation of Environmental Harm' in Michael Bowman and Alan Boyle (eds), *Environmental Damage in International and Comparative Law* (Oxford University Press, 2002) p. 41

[50]The Convention on Biological Diversity 1992 < http://www.cbd.int/convention/text/> accessed February 12, 2017

[51]David Pearce and Dominic Moran, 'The economic value of biodiversity' <http://www.cbd.int/doc/external/iucn/iucn-biodiversity-value-1994-en.pdf> accessed April 21, 2017

The central role in controlling the implementation of the Convention has the Conference of the Parties, which is responsible for modifications to the Convention, drafting and adopting additional Protocols with more precise obligations for the parties. After the fifth meeting, the Conference of the Parties requested the Executive Secretary to collect and compile "technical information relating to damage to biological diversity and approaches to valuation and restoration of damage to biological diversity as well as information on national measures and experience". For that purpose technical expert group was formed to assist the Conference of Parties. Technical expert group consists of experts nominated by the governments, observers from relevant international organizations non-governmental organization and convention secretariats. The task of this group is to examine information gathered by Executive Secretary and to make analysis regarding the liability and redress. Precisely their duty is to:

(a) Clarify basic concepts and developing definitions relevant to paragraph 2 of Article 14;

(b) Propose the possible introduction of elements, as appropriate, to address specifically liability and redress relating to damage to biological diversity into existing liability and redress regimes;

(c) Examine the appropriateness of a liability and redress regime under the Convention on Biological Diversity, as well as exploring issues relating to restoration and compensation;

(d) Analyse activities and situations that contribute to damage to biological diversity, including situations of potential concern; and

(e) Consider preventive measures on the basis of the responsibility recognized under Article 3 of the Convention[52].

5. Recommendations

State responsibility may arise only out of illegal acts. Today, there are many activities that are allowed by international law, but may cause catastrophic damage to the environment. The concept of state responsibility started to be insufficient and state liability has developed in the response to that lacuna.

[52]Liability and Redress in the context of Paragraph 2 of Article 14 of Convention on Biological Diversity: An analysis of Pertinent Issue, UNEP/CBD/EG-L&R1/2/Rev1, August 9, 2005, <http://www.cbd.int/doc/?mtg=EGLR-01> accessed May 5, 2017

The purpose of this article has been to present state responsibility and state liability in relation with the environmental damage. We have seen how the concept of state responsibility was developed through customary law and few cases of international tribunals and arbitration. Two main conditions are needed for state responsibility. One is the breach of international obligation and another is the act that constitutes a breach must be attributable to the state. Invoking the state responsibility in field of environment still remains a problem.

State responsibility could be invoked only for internationally wrongful acts of state. Therefore, the International Law Commission stretched its work and produced Draft Articles and Principles on State responsibility and International Liability for Injurious Consequences Arising out of Acts not Prohibited by International Law. Environmental harm became a main focus of International Law Commission while they were drafting the Articles and Principles. For the purpose of prevention of the significant transboundary harm, states shall take all the appropriate measures to minimize the risk of harm. Moreover, states shall cooperate in preventing harm. One should keep in mind that the international co-operation plays important role in the protection of the environment, especially before the occurrence of the damage. Regarding the co-operation it should also be mentioned in the Stockholm Declaration[53] and the Rio Declaration[54] emphasize the importance of international co-operation concerning the protection and improvement of environment, states should cooperate in a spirit of global partnership. In spite of believing that the international co-operation was the key in preventing the environmental damages, the practice and number of cases have shown the opposite. The recent case of the nuclear accident in Japan has pointed out the flaws in existing legal instruments and that improvements are needed.

[53] Principle 24 of the Stockholm Declaration
[54] Principle 7 of Rio Declaration

6. Conclusion

It has been argued that water shall become a major source of conflict in the 21st century. The world's most utilized trans-boundary watercourses are located in Asia. More than 400 treaties apply to various aspects or forms of trans-boundary water sources. The most important legal rule of this body of law is the principle of "equitable and reasonable use" which encompasses both a right and a duty to use an international watercourse in an equitable and reasonable manner. However, the toughest part of the international law is to determine wrongful actor i.e. who violate an international obligation. In this respect all the UN member state need to respectful towards their respective norms and values. If all the state is concern about their responsibility mentioned under the international environmental law then we don't need a body to safeguard the rights of other state.