International law and liability regimes in the context of transboundary transportation of hazardous waste

Revol Valeev, Diliara Garafova
Kazan Federal University

Abstract

Hazardous waste could have serious effects on the environment; and given the lack of economic resources, education, etc. in some countries importing the waste, population could more easily become vulnerable to these substances. The significance of international legal responsibility issue is based on the fact that it is a necessary legal mean for compliance of actors’ behavior with international law. Among the huge number of international agreements only a few treaties deal with the question of hazardous waste treatment and even less number of them establish any proper regime of liability. The authors examine the existing rules enshrined in these conventions explicitly concerning the question of liability. Moreover, the possibility to claim compensation for environmental damage through the mechanism of states responsibility is considered. In this regard there is need to elaborate the liability regimes protecting the environment and people’s lives, not the economic interest of the states.

Keywords: Hazardous waste, environmental damage, responsibility, liability
Introduction

Nowadays despite the rapid development and advancement of technologies for processing hazardous waste, human needs and growth opportunities create a new generation of waste that cannot be recycled and therefore, unfortunately, are accumulated abundantly. The problem lies in the nature of waste, which unlike other transported goods is a useless by-product of production that is expensive to dispose of. Obviously, when hazardous waste move from the state of origin to another state in order to be disposed or recycled, mismanagement and wrong treatment can cause serious damage both in the state of destination or any other transited state.

According to statistics, among the waste generated in the twenty eight European Union (hereinafter EU) countries in 2012, some 99.9 million tons (4.0 % of the total) were classified as hazardous waste [1], and “an estimated 3 million tons of toxic and hazardous waste cross national borders each year” [2, para. 1]. Indeed, hazardous waste could have serious effects on the environment; and, population of the countries importing the waste could more easily become vulnerable to these substances given the lack of economic resources, education, etc. [3, p. 33]. In this respect Human Rights Council has recognized that “the management and disposal of toxic and dangerous products and wastes has now become a global problem” [4, para. 23]. However, although the incident taken place in Koko, where “about 40,000 tons of toxic wastes were dumped in a delta area of Nigeria”, raised public attention on this issue, but it has not stopped the attempts to find cheap and easy way to dispose the waste. For example, “South Africa agreed to import 60 tons of hazardous waste from Australia in 2000” [5]; in 2006, a ship “flying the Panamanian flag chartered by a Dutch transnational corporation, allegedly disposed of 500 tons of toxic wastes in Abidjan” [6, p. 2].

Addressing transportation of hazardous wastes on the work of its fifty-eighth session the International Law Commission (ILC) mentioned that “incidents involving hazardous activities may occur despite compliance by the relevant State with its obligations concerning prevention of transboundary harm from hazardous activities” (liability sine delicto lato sensu) [7]. Therefore, each State is highly recommended to “take all necessary measures to ensure that prompt and adequate compensation is available for victims of transboundary damage caused by hazardous activities located within its territory or otherwise under its jurisdiction or control” [7, principle 4(1)].
Considering the importance of the above problems, in the framework of this article we will focus on the special rules relating to international legal liability for the transportation of hazardous waste. Objective need to limit the movement of chemicals and hazardous waste and establish the liability for such activities is obvious. The treatment of hazardous waste has in many cases been relocated from developed to developing countries, “with potentially lower regulatory standards and/or a lower level of enforcement due to the expensiveness of the disposal of some types of wastes” [8, p. 225]. In accordance with the United Nations Environment Programme’s estimate, a few years ago “European countries exported some 700 000 tons of hazardous wastes to each other and some 120 000 tons to developing countries, while the United States and Canada exported some 200 000 tons” [9, p. 268].

The aim of the paper is the identification of possible and the most effective ways (if any) to get redress under current international law for the environmental damage occurred due to the transportation of hazardous waste. With the above aim in mind, the main research questions to be referred to in this paper is going to be:

➢ Does the existing international legal framework offer effective mechanisms for the provision of financial recompense to victims of environmental degradation caused by the transboundary transportation of hazardous waste?

The structure of the paper will be organized as follows: first the paper will address the methodological issues. Next, the outcomes of the research will be revealed, answering consequently to the following questions: (1) who can claim compensation for the damage caused after or during transportation of hazardous waste? (2) who should bear the responsibility in this context – states, private actors or both? (3) what kind of challenges could be faced in the process of getting redress in this regard? This paper will end with the conclusion and some recommendations.

Materials and Methods Used

The paper follows the legal analysis of international treaty and customary norms as the methodology for exploring the liability mechanisms in the context of transboundary transportation of hazardous waste.

Moreover, the historical analysis was used to examine the links between the existing treaty norms on international liability for transboundary movement of hazardous waste. For example, among more than 1200 multilateral international environmental agreements and
more than 1600 bilateral ones [10] only a few treaties deal with the question of hazardous waste treatment and even less number of them establish any proper regime of liability. In this regard it is necessary to mention several important multilateral conventions: the Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (Basel Convention) with its Liability Protocol, the Convention on civil liability for damage caused during carriage of dangerous goods by road, rail and inland navigation vessels (CRTD Convention), International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea (HNS Convention), etc. and in some sense the ILC Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising out of Hazardous Activities and Cairo Guidelines and Principles for Environmentally Sound Management of Hazardous Wastes. Besides the above conventions, the states are parties to big amount of bilateral agreements on waste management or liability regimes. So, due to the historical perspective the basis and background of modern norms on international responsibility and liability in the context of transboundary movement of hazardous waste were identified.

Secondly, the wide number of conventions on different related fields such as nuclear liability, oil pollution liability, liability for damage originated from hazardous and noxious substances at sea, as well as ongoing discussions for conventions on bunker liability, liability for wreck removal requires to move beyond the descriptive study of regimes or jurisdictions in isolation. For these purposes the extensive comparative legal analysis was used. The author compared the provisions of the different conventions covering civil liability issues, as well as the civil liability as such with the norms on international states responsibility.

In addition to the conventions and norms enshrined in different draft articles and reports concerning the question of international liability and responsibility for transboundary movement of hazardous waste the author considered decisions and orders of different judicial organs in this regard. Moreover, the national courts’ cases were investigated to understand the domestic approaches on the particular rules of international law.

**Outcomes**

The standing issue is important to find out who has the right to file an action to claim compensation. It could be governments, individuals or, for example, NGOs – the answer depends on the regime chosen. On the one hand, within the framework of the civil liability
regime the domestic legislation of States plays significant role. It is logical that in the cases when “the environment itself is the victim the government or a non-governmental organization” should have right to ask “for remedies on behalf of the environment” [11, p. 227]. In practice, the issue of standing most probably “does not arise while dealing with the damage to natural resources which are subject to property rights” [12]. Indeed, the owner has the direct interest and right to protect its own property. Along with the property right, other groups of right could be affected in the context of transboundary movement of hazardous waste. For example, in Önestyildiz v. Turkey [13, para. 65] the European Court of Human Rights (ECHR) addressed environmental issues as components of the “right to life” [14] or in the case Lopez Ostra v. Spain the ECHR referred to the “right to respect of private and family life” in regard to the environmental matters [15, para. 51]. Indeed, the European Convention on Human Rights was not specifically designed to provide general protection of the environment [16, para. 52-53]. On the other hand, it is obvious that the claim in the interstate litigation in accordance with the States’ responsibility regime may be submitted by the injured State protecting its own interests or exercising diplomatic protection [17], as hazardous wastes can contaminate freshwater resources, coastal regions and even the air (usually because of vaporization from open waste dumps) shared by two or more countries. In particular cases (e.g. damage to global commons or damage caused in the course of armed conflict) environmental damage could only be compensated through the mechanism of state responsibility [18, para. 33].

When do states bear responsibility in such cases? International law establishes that the State can be responsible for the internationally wrongful act which “consists of two constituent elements: a legally relevant act or omission that is imputable to the State and breach of an international obligation of the State as resulting from this act or omission” [19, art. 2]. The main universal instrument, which should be mentioned, establishing norms on hazardous waste treatment is the Basel Convention, the adoption of which was preceded by the development of many acts of recommendation in the framework of international organizations [20]. There are a lot of other conventions enshrining the states’ obligations in the context of hazardous waste transportation.

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1 Breach of the above-mentioned obligation will not necessarily be the basis for claiming compensation in any event, as there is no general duty to compensate for each instance of damage caused by the pollution. There are certain other requirements for claiming the compensation, except the occurrence of the damage.
Consequently, there are certain obligations of the states established by treaty norms and states are liable only in the cases when they failed to observe the provisions established there. However, as it was mentioned in *Greenpeace USA v. Stone*, the Basel Convention is not self-executing [21, para. 24] – this applies also to almost all the conventions relevant to the hazardous waste transportation – therefore, states are bound by the provisions only in the case of the signing and ratification. Apart from treaty-based obligations of the States there are also customary norms establishing the States’ obligations, among which are the duty to cooperate, due diligence, the principle of good neighborliness (*sic utere tuo*) and others. So, states should respect these norms, even if they are not parties of the treaties where these norms are enshrined. However, in this case the imposition of state responsibility requires that the State “knew or ought to have known about the actual circumstances of the case and the illegal conduct of the private person resulting in damage” [22, p. 168].

Meanwhile, it is important to note that the problem of environmental damage and risks concerning the transportation of hazardous wastes cannot be solved simply through States responsibility for internationally wrongful act regime, the comprehensive and forward-looking approach is supposed to be connected with the consideration of norms on liability of private actors. The logical question in this regard is why states should be liable for damage they have not caused? The hazardous waste is usually transported by private companies (for instance, “Joseph Paolino and Sons” handled the waste in the Khian Sea waste disposal incident in 1986), which have no connection with the government. Indeed, claiming compensation from the State for environmental degradation caused due to the waste mismanagement by the private actors does not seem to be fair and in compliance with the widely recognized ‘polluter pays principle’ [23, principle 16]. Therefore, from this point of view, “state responsibility and the liability of states are and should be no more than residual sources of redress” [24].

In response to this problem, the international community has adopted different treaties and regulations. For instance, the CRTD Convention, the HNS Convention, the Bamako Convention on the Ban of the Import Into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes Within Africa (Bamako Convention), Convention to Ban the Importation into Forum Island Countries of Hazardous and Radioactive Wastes and to Control the Transboundary Movement and Management of Hazardous Wastes within the South Pacific Region (Waigani Convention), etc. The common
features of the all civil liability conventions related to the hazardous waste transportation are: they “aim to create the ‘obligations of result’”; almost all treaties “seek to ensure the compensation will be available for victims (for example, through insurance system or fund)” [25].

One of the challenges in this regard is that despite the fact that some treaties (for instance, the Bamako Convention, Waigani Convention, London Protocol) contain the liability clause, the State parties have not yet been agreed and adopted a proper protocol on liability. Such Protocol was elaborated only in the framework of Basel Convention. Moreover, the above conventions do not fully reflect the modern challenges. For example, when the Basel Convention was drafted in 1989, e-waste was not a big issue, nevertheless, today e-waste is one of the most ubiquitous and compelling issues that nations are trying to address within this legal framework [26].

In practice, getting redress for the damage occurred because of the transportation of hazardous waste is quite challenging. One of these complexities is proving a causal link between the particular act or omission and the damage in question, because of the long latency period of illnesses and environmental degradation caused by hazardous substances. The fact that dozen years or more may intervene between the exposure and the manifestation of disease makes the proving nexus more difficult and creates additional obstacles. Moreover, the fact that “segments of the entire population are afflicted by any toxically-induced diseases requires the state, years after their exposure, to counter the argument that other intervening exposures or forces were the cause of their injury” [27, p. 441]. For instance, one of the recent cases in Sweden concerns Arica Victims KB (representing 707 people in the Chilean town of Arica) and Boliden Mineral AB, one of the largest Swedish mining corporations. The background of the case is following. The sludge, containing high levels of arsenic, mercury, lead and cadmium, was transported by Boliden Mineral AB and dumped in Polygono in 1984-1985. From the late 1990s, a wave of serious diseases was observed in the community, including cancer, impaired breathing, skin diseases, physical and mental disorders and an increased rate of miscarriages [28, p. 404]. However, the first medical tests of the inhabitants were made in 2009–2012. Obviously, taking into account such a long period of time between the dumping and appearance of any evidence of the consequences, it is hardly ever to stipulate undoubtedly that the diseases were caused by this hazardous sludge and prove the causal link.
The nature of the damage occurred is another problem related to the liability and compensation. What is included into compensable environmental harm occurred due to the transportation of hazardous waste? One of the ways is to ask compensation in the amount of reasonable costs of prevention and remediation. In the human rights context the ECHR, for instance, clarified the issue in one of its decisions stating that “the operation by the public authorities of a site for the permanent deposit of waste is described as a ‘dangerous activity’, and ‘loss of life’ resulting from the deposit of waste at such a site is considered to be ‘damage’ incurring the liability of the public authorities” [13, para. 60]. Therefore, it is unclear for what exact sum of money should the claimant request as a compensation or for what exact sum should the liability be insured – all these are pretty approximate. There a lot of very subjective factors and ethical values, which could hardly be fitted into economic terms and numbers [29].

**Conclusion**

Considering the all above, it becomes clear that existing international legal framework seems to be working and there is no need in establishing new rules, however there is need in further development aiming to increase the efficiency of such norms due to the following reasons.

Firstly, the state responsibility mechanism “does not seem to be the appropriate instrument to respond to transnational damage of hazardous waste, as the waste in most cases is carried out by private parties” [30, p. 73]. Indeed, the principles of state responsibility could be applied to private companies only if their actions can be attributed to the State. Moreover, this approach arises the risk that the interests of the claimant in obtaining redress for moral or property damage do not necessarily coincide with the interests of its government.

Secondly, as for civil liability, rarely do international treaties and agreements in this field include the provisions providing adequate liability regime. Generally, they do not set out specific penalties for offenders or compensation schemes for victims. Therefore, it seems to be obvious that in the interest of sustainable development, the international community must increase its influence on the process of preventing the production of a new generation of hazardous waste, as well as on the development of a global system of regulation and control of the traffic of such waste through the liability. The lack of “widely ratified liability rules has
serious consequences for deterrence, compensation of victims and the global environment” [31].

One of the possible ways is to develop further liability clauses in the framework of considered conventions or unify the disparate provisions on liability and compensation. Moreover, the cooperation between conventions and elimination of existing overlapping provisions are an important tool in improving the efficiency of international legal regulation of environmental protection in the context of hazardous waste management and liability.
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