TRANSBOUNDARY POLLUTION: A JURISPRUDENTIAL ANALYSIS

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ABSTRACT

Environmental degradation is a reality in today's world. It has a negative impact on every state, large or small, wealthy or underprivileged. States are taking steps to curb this monstrosity in their jurisdictions by enacting legislation, but the problem of environmental degradation harm is not limited to a state's domestic area but it has gone beyond its territorial jurisdiction. This has given rise to a new problem known as transboundary harm or cross-border harm, which occurs when something goes beyond a state's territorial jurisdiction and harms that state's environment. Regrettably, the atmosphere knows no bounds, pollution that starts in one state and spreads to another is extremely difficult to control for either authority and the cost of the damage could be in the hundreds of millions of dollars The affected state may not be able to establish jurisdiction over actors in the source state, or if it can, it may have trouble enforcing any decree it issues. Transboundary pollution not only has a negative impact on the territory of neighbouring countries, but it has also accelerated the process of global climate change.

Keywords: no-harm principle, environmental damage, prevention of transboundary harm, international environmental jurisprudence, international court of justice, climate change.

Introduction

This research aims to better understand the issues surrounding transboundary harm and the international law that has been enacted to address them. In addition, the author hopes to investigate the role of various international institutions and the judiciary in developing jurisprudence on this issue through this paper. In this regard, there is an old international law principle known as "*sic-utere-ut-alienum non-laedas*,"[1] which talks about this and imposes an international obligation on all states. This principle states that states should use their property or territory in such a way that their acts or activities do not cause damage to another's territory or harm to another's property. Violations or breaches of this principle may result in the guilty states being held accountable on an international level. This principle is also referred to as the "No-harm principle".

The author of this paper wishes to investigate how international environmental jurisprudence has evolved from case laws involving different states and court interpretations of the above rule of no harm principle. There is clear evidence that the International Court of Justice played a critical role in the development and crystallisation of this principle of international environmental jurisprudence into a fundamental principle of international law. Furthermore, this principle of no-harm has been adopted by states in various multilateral treaties as a sound principle of international law and has been given the status of customary international law.

Some questions that strike the mind are, what exactly is meant by transboundary harm? What causes it, and who is responsible? And what is the solution to the problem, and so on. So, in order to find the answers to the above questions, the author is conducting this study, which will investigate the entire background of the problem as well as the role of the international community in determining the genesis of the problem and efforts made by international institutions such as an international court of justice to solve the problem by issuing verdicts in various cases that came before it for adjudication about transboundary harm.

It is a well-established rule of international law that states should not engage in acts or activities that may harm the environment of other states, either by themselves or by allowing others in their domestic jurisdiction to do so. This creates an international obligation that every state should follow when engaging in any activities in their jurisdiction. This principle is known as a no-harm principle in international law, and it is derived from the principle of "*sic-utere-tuo*

[1] G. A. I., "*Sic Utere Tuo ut Alienum Non Laedas*", 5 Michigan Law Review 673 (1907) at page 1

ut-alienum non-laedas"[2] (use your land or property in a way that does not harm others).

The author hopes to learn more about how the principle of no-harm has aided in the translation of international law into a fundamental principle of international environmental law through this research. This rule of no-harm has been adopted by states in a number of international conventions and treaties relating to environmental protection. As a result, the principle of non-harm has been elevated to the status of customary international law. The author of this paper wishes to reflect on all of the circumstances that compelled the global community to put this principle into full swing in their work. The paper will also discuss the role of the International Law Commission...

The author also wants to critically examine whether the principle of no-harm is absolute or has allowed some relaxation in favour of states where a limit is set in the form of a threshold beyond which only the principle will be deemed broken and within that threshold limit or which may be understood as permissible limit pollution can be caused by one state into the jurisdiction of other states. This principle of non-harm clearly requires states to exercise extreme caution in their activities within their jurisdiction. But the crucial question is: how high is that standard of care? And whether that standard is the same in all states or varies from one to the next? The answers to the above question will undoubtedly be the study's goal. A thorough examination of international environmental law and a close examination of ICJ decisions will shed light on the problem and its solution.

As a result, the author's goal in writing this paper is to examine relevant international jurisprudence, with a particular focus on the role of the international court of justice in identifying the principle's basic ingredient. When it comes to international agreements, things only get slightly better, despite the fact that customary international law on transboundary contamination is based on a small number of inconclusive adjudications and a mountain of official commentary attempting to make sense of them. Despite the fact that over 200 international treaties deal with environmental issues, only a few directly address transboundary pollutions. With a few exceptions, the few transboundary treaties that exist are primarily concerned with encouraging information-sharing and consultation rather than establishing liability regimes or establishing substantive limitations. The discussion will also look at the current state of the transboundary harm principle and how, by imposing obligations on states,

[2] See *supra note* 1.

it has prevented and checked cross-border environmental damage and thus reduced the risk of such harm.

Definition of Transboundary Pollution

Transboundary pollution can be construed and defined in a number of ways, but the most widely accepted definition is that it is transboundary harm or transboundary principle when pollution travels from one sovereign territory to another and harms the people and property of that nation[3]. The traditional definitions have been widened in the current scenario because an act of one state not only affects the property of other states, but it also affects the global commons, as both population and production are increasing around the world. As a result, industrial activities are expanding exponentially, increasing the risk of pollution spreading from one country to another.

It means that a state has the capability to affect or degrade the environment of many states at the same time, or to affect common property such as outer space, oceans, rivers, and polar regions. The spread of air pollution from one state to another state or states, or the creeping of industrial wastes into rivers that flow from one state to another and eventually into oceans, are examples of transboundary pollution. Similarly, nuclear accidents involving radioactive substances in one state can have an impact on the environment of neighbouring states, as the Chernobyl nuclear disaster demonstrated. Transporting nuclear materials and having insufficient and unsafe storage facilities are also issues.[4].

Types of Transboundary Pollution and Their Boundaries

Now, the author wonders whether all types of transboundary harm fall within the definition of transboundary harm and impose an obligation on the source states, or if there are some exceptions to this principle or if it has some limits or not. To get the answers to these questions, a thorough investigation is required. First, it should be noted that pollution is not only caused by human activities; there are some natural factors that can cause pollution, and these factors can also cause transborder pollution or cross border pollution, such as natural disasters such as floods, earthquakes, and hurricanes. because these types of natural disasters may transport pollution in the form of ash and destroy the natural environment of neighbouring states but this

[3] 'Transboundary Pollution | Encyclopedia.Com' (Encyclopedia.com, 2021) available at https://www.encyclopedia.com/environment/encyclopedias-almanacs-transcripts-and-maps/transboundary-pollution (last accessed on 5 October 2021).

is not treated as transboundary pollution as there is no human intervention in such cases.

As a result, it qualifies for transboundary pollution exemption, or it is correct to say that these are not eligible for transboundary harm or pollution. As a result of the preceding example, it is clear that only harm caused by human activity falls into the category of transboundary harm. It is also important to note that the harm must have been caused by a physical consequence of human activity, such as harm caused by industrial and agricultural activities. The third and most important condition that qualifies for transboundary is pollution crossing the border because it is the only factor that gives rise to the application of this principle of no-harm, which, as stated above, is not limited to destroying or damaging the environment of neighbouring states but also includes, as stated above, damaging global commons.

Last but not least, the harm in question must exceed a certain level of degree of harm, i.e., the severity of harm must be very high in order for the above principle to be applied. This means that not all cross-border harm is prohibited under the no-harm principle, but only severe harm qualifies for this principle, while minor harm or harm that does not harm a person's property or health outside the territory of source states is excluded. It means that there is a limit to the applicability of the no-harm principle, which is commonly understood as "significant" or "substantial harm.".

Background of the Problem.

Environmental degradation is occurring at an alarming rate in every jurisdiction at the moment, posing a serious threat to humanity and other forms of life on the planet. Environmental damage is caused by a variety of factors, some of which are natural and others which are manmade. Human-caused environmental degradation, also known as anthropogenically, is the leading cause of climate change, affecting every constituent element of the environment at the individual, regional, and global levels.at the global level, man is confronted with environmental issues such as biodiversity loss, species extinction, ozone depletion, and ocean pollution. At the regional level, environmental issues entail multiple nations, and cross-border pollution, also known as transboundary harm or cross-border harm, results.

This controversy arose first *in trial smelter arbitration case*[5], it was the first case of its kind recognizing very first time the issue of transboundary pollution, in this case, which was a

[5] US vs. Canada,1941

controversy between the united states and Canada the liability is fixed on Canada for destroying the environment of united states, the important thing to note down here is that there was no treaty of such kind in international laws which puts an obligation over the states not to cause cross border harm but despite the absence of laws of such kind the liability of Canada was fixed and held guilty and ordered by the arbitration to pay damages to the united states for the damages it has suffered[6], the court here recognized the principle of "sic-utere ut-alienum non-laedas" as the basis of its decision.

The court issued a landmark decision in which it stated that no state has the right to use its territory or property in such a way that it causes injury or damages to the property or people in another state's territory. The court went on to say that when the consequences of such an act are serious and injury is proven through clear and convincing evidence, the guilty state must accept responsibility for the losses suffered by the victim state and pay damages. This case is significant in the history of transboundary harm jurisprudence, as it is from here that the principle of no-harm emerges for the first time. It also reminds us that the duty a state owes to other states not to harm their environments or areas beyond national jurisdiction cannot be understood without first understanding the concept of state sovereignty, which is a fundamental principle and requirement of the international legal system[7].

At this point, it is worth mentioning to take into account a landmark English case of torts ***Rylands vs. fletcher[8],*** Justice Blackburn developed the principle of strict liability, which states that anyone who collects and keeps anything likely to cause mischief for his own purposes should exercise proper care and caution, and if it escapes and causes damage to others' property, that person is responsible for all losses suffered by the other party. However, this principle only applies to private parties or citizens within the state and has no bearing on the state, but it is significant in that it is where the no-harm principle germinated In many ways, the case was a watershed moment because it sparked a realisation among states that, while they have territorial sovereignty under international law, they have obligations to neighbouring states to not do anything that could harm the property or environment of others in any way, resulting in the formation of international law preventing transboundary harm.

Following that, plenty of similar cases arose between states, with the Trail, smelter principle

[6] https://legal.un.org/riaa/cases/vol_III/1905-1982.pdf (last accessed on 12/09/2021).
[7] See Article 2(1) of the UN Charter
[8] https://www.britannica.com/topic/Ryland-v-Fletcher last accessed on 08/10/2021).

serving as the guiding principle in all of them. Other cases of transboundary harm, such as aerial herbicide spraying case[9] have reached the International Court of Justice for adjudication. Gabcikovo-Nagymaros project[10] and in the latest case of Nicaragua vs. costa Rica[11]. the author will discuss all these cases in detail in the latter part of this paper to understand well the nature of disputes and the court's approach in matters of disputes like this. So, from the above discussion, it is established that transboundary harm is posing a serious threat to our global environment and global commons[12]. So, there was a felt need of developing an international legal framework to prohibit and prevent this problem of transboundary harm and after those various treaties and conventions took place from time to time to curb it. A full-fledged international law jurisprudence regarding the prevention of transboundary harm has developed as a result of these international efforts, and now it has acquired the status of customary international law.

Need of A Global Legal Framework In Preventing Transboundary Harm

Issues of cross-border harm or transboundary pollution, as discussed above, are an emerging international problem and source of disputes and controversy among states, such disputes sometimes escalate to the point where warlike situations develop between states. To effectively address the problem, an adequate legal framework is required, which can only be achieved through international cooperation and collaboration between and among states. International organisations can play a proactive role in this problem by providing a legislative framework for the international community's member nations to follow. As of now, the traditional response of international law about this problem is not satisfactory despite the law of imposing responsibility on the guilty states and by refraining it to cause harm to the victim states and also to pay compensation to the injured states[13].

This rule of international law has not proven effective, and cases of transboundary injury are increasing day by day and year by year. This is due to increased industrialization in states seeking economic growth, and the issue has now become a global concern. As a result, the

[9] Equador vs Colombia,2000
[10] Hungary vs.slovekia,1993
[11] ICJ, December.2015
[12] 'Global commons', which may include spaces beyond national jurisdictions, essential resources and concerns such as biodiversity conservation and climate change, are the focus of much international interest from a governance perspective by Surabhi Ranganathan, 'Global Commons' (2016) 27 the European journal of international law.
[13] Art. 36 of draft code on responsibility of states for internationally wrongful Act,2001 P.9 available at https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf (last accessed on 10/10/2021).

international community must find new ways in the form of a strict legal framework, and it is as a result of this realisation that a separate branch of international law known as international environmental law has emerged and developed. It includes both an evolving body of specifically environmental norms as well as general laws applied to environmental problems.

There are various treaties or international convention which has been framed by the states to prevent transboundary harm. Treaties as mentioned in article 38(1) clause A of the statutes of the internal court of justice is characterized as the primary source of law[14] and to address this problem various treaties are formed by the states at bilateral treaties, regional treaties and global treaties. the second source of international law is customary international law as mentioned in Article 38(1) clause B of the statute of ICJ and it says that general practice between the states will be accepted as law[15], the same applies in the case of developing jurisprudence concerning the development of internal law and specifically in developing the jurisprudence of transboundary harm principle known as no harm principle. However, there is a disadvantage with customary law that it is often hard to give the shreds of evidence of its existence as it requires evidence of constant, consistent state practises and a sense of mutual conviction among the state parties for its validity often called as" *opinion Juris[16]"* which is very difficult to prove. Sometimes the pieces of evidence of state practises are so vague that there is no meaning of it at all and the claims fail.

It is therefore right to say that a theory of opinion Juris that fails to take account of the practice in a way it is presently perceived is flawed[17]. So, it is better in the present context that laws should be codified in the form of treaty law. There is a long list of treaties and conventional law regarding the problem under consideration out of them some need to be mentioned here which are very important from the point of our understanding like treaties of Stockholm conference,1972[18] the Rio declaration, 1992[19] and ILC Draft articles on prevention of transboundary harm from hazardous substances adopted by the commission at its fifty-third

[14] Available at https://www.icj-cij.org/en/statute(last accessed on 11/10/2021)
[15] Id
[16] (Legal.un.org, 2021) https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf(last accessed 9 October 2021).
[17] Elias, Olufemi. "The Nature of the Subjective Element in Customary International Law." The International and Comparative Law Quarterly, vol. 44, no. 3, Cambridge University Press, 1995, pp. 501–20, http://www.jstor.org/stable/761200.
[18] United Nations Conference on the Human Environment, 5-16 June 1972, Stockholm
[19] United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992

session[20]and long-range Air pollution convention etc.

Role of International Judicial Forums in evolving No-Harm Jurisprudence

The role of international judicial forums in the development of transboundary pollution matters cannot be overlooked as there have been many disputes between states for which solutions can only be reached through arbitration. However, at the international level, there is no specialized court to specifically deal with cases related to environmental disputes, in general, judicial bodies deal with or adjudicate issues between and among States under international law to settle environmental disputes, moreover, the environment. disputes are of a new nature and this is why, in the absence of any specialized forum, questions are often resolved by forums like the international court of justice, International Court of the Law of the Sea, Permanent Court of Arbitration. etc. Apart from the fact that arbitration formed between two or more States plays an important role in the settlement of disputes in environmental matters and therefore, credit for the development of the case goes to all of the above forums. We will now discuss some of the cases which have been decided by the courts and thus shed lights on the understanding of their role in the development and evolution of transboundary jurisprudence

Analysis of Some landmark cases of cross-border harm

1. Trail smelter arbitration case[21]

The very first case which comes to our mind when we talk about transboundary pollution or harm is the Trail smelter case which was a controversy between the US and Canada in fact, it is treated as the first case in the history of transboundary pollution. Factual background in brief of this case is that Canada has allowed an activity in his territory which was just situated near the border of the US. It was an iron smelting company and because of its operation, a large amount of fumes goes to the territory of the US by crossing the border, as we know pollution does not see the territorial limits and thus these fumes in the form of Air pollution have caused significant damage in the territory of US as AIR pollution and has severely damaged the health of the natives and many more hazardous effects were noticed by the US on other sectors within the territory.

When the US government investigated the reports of damage that has been caused in a

[20] https://legal.un.org/ilc/texts/instruments/english/commentaries/9_7_2001.pdf (last accessed on 11/10/2021)
[21] https://legal.un.org/riaa/cases/vol_III/1905-1982.pdf (last accessed on 08/10/2021).

particular area than it is revealed that the air pollution that is coming from across the border i.e., from Canada is responsible for this destruction. The environmental quality in US territory was completely ruined. the US government informed the Canadian government about the problem and asked for the immediate closure or relocation of the above factors and also sought compensation to restore the status quo but the Canadian government refused to pay any compensation and also denied to stop the project as their argument was based on the principle of territorial sovereignty which says that the activity was within their territory and they have all the right to use their territory in the way as they wish and rejected the request of US government. than negotiations were going on between the two states and finally both the states agreed to hand over the matter to be settled down by arbitration. The Tribunal shall finally decide the following questions, hereinafter referred to as "the Questions", set forth hereunder, namely[22].

- Whether or not damage caused by the Trail Smelter in the State of Washington has occurred since January 1, 1932, and, if so, what indemnity should be paid as a result?
- If the answer to the first part of the preceding Question is yes, should the Trail Smelter be required to refrain from causing damage in the State of Washington in the future, and if so, to what extent?
- In light of the answer to the preceding Question, what measures or regime, if any, should the Trail Smelter adopt or maintain?
- What indemnity or compensation, if any, should be paid in the event that the Tribunal makes a decision or decisions in accordance with the next two preceding Questions?

Following a consideration of the facts, the arbitration panel ruled in favour of the United States and issued an award ordering Canada to cease all activities immediately and pay the damages to the United States in the form of compensation. The arbitrator's ruling was founded on the concept of no-harm, which recognises that territorial sovereignty does not grant any state the right to utilise its territory to the detriment of another state's territory, a practise known as encroachment. The court decides that one should use and utilise her territory in a way that does not hurt neighbouring states territory and environment or it should also must not damage property in commons, i.e., global commons, and therefore this case judgement has made significant contributions to no-harm-principle jurisprudence.

[22] Article 3 of the Convention for Settlement of Difficulties Arising from the Operation Of Smelter At Trail, signed at Ottawa, April 15, 1935; ratifications exchanged Aug. 3, 193, p-5.

2. Corfu channel case[23]

The second important controversy in this regard is that of Great Britain vs. Albania also known as the Corfu channel case. This case was submitted to ICJ for adjudication as negotiations between the two states have failed. Brief facts of this case are that a British vessel sailed through north Corfu strait, which was part of Albanian territorial waters the Albanian government has laid down landmines in that water and while the British ships which were carrying British soldiers and goods reached that part the landmines exploded and due to which British ship was destroyed and all the British citizens on the board were killed in the accident and goods were damaged. Thus, Britain suffered severe material damage because of the fault of Albania. Britain held Albania guilty for the accident and sought compensation but Albania denied his part of guilt and invoked the principle of territorial sovereignty.

The dispute was finally submitted to ICJ for adjudication with the consent of both states. Now before the court both the states forwarded their arguments and there were various questions the court has to decide but the first question the court has to settle was whether Albania is responsible for the loss the UK has resulted or not? And if the answer is positive then whether Albania is under a duty to pay compensation to the UK govt. or not? So, here also once again court applied the same approach as was being applied in the Trail smelter case by saying that "every state is under a duty not to use or allow her territory for acts which are contrary to the rights of another state". And the court further cited the principle of "sic-utere ut non- laedas". Thus held Albania guilty and awarded compensation to be paid to the UK govt for the loss it has suffered. The court, in this case, has generalised the principle of no- harm which was evolved in Trail smelter in this case and found that this principle can be violated not only by the act but can also be violated by omissions. Thus, the ICJ has played a pivotal role in formulating the principle of no-harm and in enriching jurisprudence.

3.Gabcikovo-Nagymaros case[24]

This was a controversy regarding the construction of a barrage system on the river Danube between Hungary and Czechoslovakia and interestingly, it was the first case of international environmental law where the ICJ considered the matter in great detail. the background of the dispute was a treaty which was signed by the two countries mentioned above which has the

[23] Available at https://www.icj-cij.org/en/case/1 (last accessed on 11/10/2021)
[24] Available at https://www.icj-cij.org/en/case/92 last accessed on (11/10/2021)

provision of construction and operation of locks. It was a joint investment of the two countries and as per the terms of the treaty agreed between them the broad utilization of the natural resources of a section called Bratislava-Budapest on the Danube River will be utilized combinedly by both the contracting countries for their development of energy sector, transport, agriculture and for the advancement of the national economy. The treaty was signed in 1977 and the project become operational in 1978, included the building of locks at Gabcikovo on Czechoslovakia territory, and Nagymaros on Hungarian territory, in meantime the project received huge criticism and protest in Hungary, and finally the Hungarian -Government had to suspend the works at its side i.e., Nagymaros till it gets Environmental clearances from various environmental research which were in process in the country. finally, after the results of research and studies have been undertaken the government of hungry abandoned the project due to environmental concerns raised by the environmentalist in the studies. On the other hand, Czechoslovakia had already spent a huge sum of money and other resources on the project.

4. Lac Lanoux Arbitration Case[25]

This case again is a very important case after the Trail smelter and Corfu channel case in the jurisprudence of the no-harm principle. this controversy was between France and Spain about a lake" lac Lanoux". this lake was situated inside the territory of France and the water flowing from the lake crosses the border to Spain where it finally flows into the River Ebro which is Spain's one of the major rivers. Also, it should not be forgotten that there was a treaty between the two states regarding the flow and use of water in its natural course that means the flow of the water cannot be diverted to some other direction by the states having control over the diversion of water flow. In the year 1917, the French government brought a developmental project to establish a dam over the lake for generating electricity and thus utilizing the water for electrical power. however, the course of the water flow will not per be diverted and it will flow as it is towards Spain as it is naturally flowing but the government of Spain by her calculations of the project seems unhappy and they did not grant permission to the government of Spain to carry out the project. because as per their calculation the development project will badly hit the Rights and Interests of Spain. the main argument of the Spanish government was that Spain will face a shortage of water and that may result in poor irrigation and thus the project may become injurious for Spain. The two-government negotiated but no consensus

[25] https://www.informea.org/en/court-decision/lake-lanoux-arbitration-france-v-spain(last accessed on 11/10/2021).

could be developed between the two and finally, the dispute was handed over to arbitration for disposal.

Now the question which were before the tribunal was whether the project is violative of the treaty that is entered onto by the two states about the use and utilization of water of the lake that flows from France towards Spain? and second, whether the French government project is in any way injurious to the rights and interest of Spain as she is alleging? the tribunal after taking into consideration the arguments forwarded by the two governments concluded that the rule of territorial sovereignty is not unlimited in doing anything or carrying out any activity which may become injurious to other's territory, that means the rule prohibits the French government not to do any act which may change the course of water resulting into serious environmental risks to Spain. But the tribunal here did not find any such violations of the above-mentioned rule because the French development project is nowhere going to divert the flow of water from its natural direction i.e. even after the project is carried out Spain will not suffer a shortage of water supply and hence there is no risk of serious nature that may result in Spain's territory and thus allowed the French project even without the consent of the Spanish government. Thus, this case also reflects the principle of territorial sovereignty and no-harm principle and is a landmark case in the development of the jurisprudence of transboundary harm principle.

5. Pulp Mill Case[26]

This dispute arose between Uruguay and Argentina regarding a river that flows between the two states and also forms the international boundary between the two countries. The river has always been used for recreational activities, fishing and serves as a source of drinking water supply for both countries besides utilization of water for irrigation. Uruguay and Argentina had also formed a treaty about the optimum use of water of the river in the year1975. Joint machinery in the form of the commission called an administrative commission of the river Uruguay (CARU) consisting of an equal number of members of both the states was established which will monitor the rational and optimum use of river water and will also take into consideration the established rules of international law in preserving the rights and interest of both the countries as per the agreements entered into by the two states. In the agreement entered into by the two countries, there was a provision that any activity involving risk of significant

[26] https://www.icj-cij.org/en/case/135/judgments(last accessed o 11/10/2021)

damage if planned by any of the two countries it must not be initiated unless the notification of that proposed activity is brought to the notice of the other party and she gives written consent to that activity. If the other party have any objection the proposed activity or project should not proceed.

However, Uruguay planned and authorized a pulp-mill project on the bank of the river by establishing two pulp-mills without informing the other party i.e. Argentina and thus has violated the terms of agreements entered into by the two states. Argentina expressed her dissent regarding the project to Uruguay and asked for immediate stopping of the project which the Uruguay government denied. Aggrieved by this Argentina filed an application to the ICJ in the year 2006 invoking Article 60 of the 1975 treaty entered into between the two states where it gives jurisdiction to the ICJ in case dispute does not settle by negotiations between them[27]. Argentina expressed her concern that Uruguay has breached the terms of agreements and by establishing the two pulp-mills has put Argentina at great risk of pollution of the water of the river which will further pose a great risk to the biodiversity, ecosystem and the health of the citizens of Argentina and considered it as an activity causing overall damage to the environment in the territory of Argentina.

Thus, Argentina requested the ICJ to immediately issue orders to the government of Uruguay for stopping the project. The main argument of Argentina was that Uruguay has violated the terms of the treaty entered into by the two states about the optimum use of water of the river Uruguay and thus has violated obligations of international law also Uruguay violated the conventional or customary law of transboundary principle which is recognised by almost all the world as a principle of great importance protecting the environmental damage in other's territory. Argentina further alleged Uruguay for violations of procedural requirements of the treaty by not informing her about the proposed activity.

The ICJ decided the case on merit and found Uruguay guilty of breaching the terms of the 1975 treaty. The court assessed that Uruguay by not informing Argentina about the project has violated the international obligations which are based on the principle of the customary law of transboundary principle. the court further cited the judgement of the Corfu channel case where it was held "that it is an obligation of every state that while using their territory the concerned

[27] Any dispute concerning the interpretation or application of the Treaty and the Statute which cannot be settled by direct negotiations may be submitted by either Party to the International Court of Justice available at https://treaties.un.org/doc/Publication/UNTS/Volume%201295/volume-1295-I-21425-English.pdf (last accessed on 14/11/2021).

state must take due diligence and must not do any act or omissions which may be injurious to the territory or environment the of another state".

Thus, these cases laid down the very foundation of the no-harm principle and converted the blurred idea into a clear and enriched jurisprudence of international environmental law. this flexible principle evolved first in trail smelter was later recognised by the world communities as a sound principle of environmental protection and in 1972 the principle was recognised as the most important principle in the form of principle no 21 of Stockholm declaration and later on after 20 years later the same principle found a place in Rio declaration as principle no 2. The beauty of this principle is that it harmonised the two-competing interest of the states i.e. sovereign right of states to exploit its territory and the right of the other states not to be harmed by the first state while she enjoys her sovereign right, which is opposites to each other in a harmonious way.

Reparations of injury to the Victim State of Transboundary Pollution

When a state commits an internationally wrongful activity, the international law of State responsibility governs the consequences. This law has been largely codified by the International Law Commission (ILC) Articles on State Responsibility[28], which were written over decades by the ILC and accepted by the United Nations (UN) General Assembly. 'When it comes to issues of state responsibility for violations of any primary commitment, including duties imposed in the field of economic, social, and cultural (ESC) rights, the ILC Articles must be used as a starting point. According to the ILC Articles, when a State commits an act or omission that is attributable to it, the act or omission results in State responsibility.

Although there is widespread concern, the presence and content of specific norms must be demonstrated. Following the identification of a standard of care and specific duties, as well as the demonstration of a breach, the issue of causation arises in identifying offending States or non-State actors, as well as determining the extent of the injury for which reparations may be sought. These factors are examined in further depth in this chapter, which draws on international environmental law for lessons on the problem of causality that can aid in detecting and ensuring compliance with transboundary harm commitments.

The law of State responsibility outlines the nature of the new responsibilities that naturally

[28] https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf (last accessed on 13/10/2021).

arise when a State performs an internationally wrongful act in the absence of treaty provisions laying forth the precise consequences resulting from a breach of an obligation. Whether or not an international human rights authority that monitors compliance has the mandate or capacity to order particular remedial steps, these obligations nonetheless exist. Furthermore, the requirements of cessation and reparation are not contingent on an aggrieved State filing a complaint. The duty to perform the breached obligation remains in all cases, the mere fact of a violation does not terminate a treaty

To better understand the basis of the obligation, the paper traces the origins of the normative requirement placed on States to prevent significant transboundary harm and imposed a duty on states to take appropriate measures to prevent that significant harm, and the scope of that duty about both State and non-State actors[29] The critical question now is what constitutes an international mechanism under international environmental law for the redressal of injuries suffered by an aggrieved state.

To respond to this issue, we must look at the proposed code on international responsibility sections, which explicitly specify the grievance redress procedure[30]. The goal of these articles is to codify and develop the core rules of international law governing states' liability for their international wrongful acts. The focus is on secondary rules of State responsibility, or the broad conditions under international law that allow a State to be held accountable for wrongful acts or omissions, as well as the legal repercussions that follow. The provisions make no attempt to clarify the content of international duties that result in responsibility. This is the purpose of primary rules, whose codification would require the bulk of customary and substantive rules to be restated.. The following are the remedies available to aggrieved states under the Draft Code:

Reparation

Chapter II deals with the various forms of reparation for injury, spelling out in greater detail the general principle stated in article 31, and in particular attempting to clarify the relationships between the various forms of reparation, namely restitution, compensation, and satisfaction, as well as the role of interest and the question of taking into account any contribution to the injury

[29] Alistair Rieu-Clarke, 'The Duty To Take Appropriate Measures To Prevent Significant Transboundary Harm And Private Companies: Insights From Transboundary Hydropower Projects' (2020) 20 International Environmental Agreements: Politics, Law and Economics.
[30] Legal.un.org, 2021 available at https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf (accessed 9 October 2021.)

which the defendant may have made[31]. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.[32]in a very famous case Chorzow factory case the PCIJ had an opportunity to declare a general principle of the consequences for an internationally wrongful act[33].

The essential principle contained in the actual notion of an illegal act—a principle that appears to be established by international practise, particularly decisions of arbitral tribunals—is that reparation must, to the greatest extent possible, wipe out all the consequences of the illegal act and re-establish the situation that would have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum equal to the value of restitution in kind; the award, if necessary, of damages for loss sustained that would not be covered by restitution in kind or payment instead of it—these are the principles that must be followed.[34]. In the first sentence, the Court gave a general definition of reparation, emphasizing that its function was the re-establishment of the situation affected by the breach. In the second sentence, it dealt with that aspect of reparation encompassed by "compensation" for an unlawful act—that is, restitution or its value, and in addition damage for loss sustained as a result of the wrongful act[35].

Restitution

A State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution[36]:

1. is not materially impossible

2. does not involve a burden out of all proportion to the benefit deriving from restitution instead

[31] Id Art. 34, p 66
[32] Id Art. 31 p.62
[33] It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form. Reparation therefore is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself. Differences relating to reparations, which may be due by reason of failure to apply a convention, are consequently differences relating to its application.
[34] See Art.31, para. 2 of commentary p.62
[35] Id.
[36] Art 35 Draft Code on Responsibility of States available at https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf (accessed 9 October 2021.)

of compensation.

According to article 34, the first form of reparation available to a State injured by an internationally wrongful act is restitution. Restitution implies restoring, as far as possible, the situation that existed before the commission of the internationally wrongful act, to the extent that any changes in that situation can be traced back to that act. In its most basic form, this entails actions such as the release of wrongfully detained individuals or the return of wrongfully seized property. In other cases, restitution may be a more complex procedure[37]. Restitution is not a well-defined concept. According to one definition, restitution entails restoring the status quo ante, or the situation that existed before the wrongful act. Restitution, according to another definition, is the establishment or reestablishment of the situation that would have existed if the wrongful act had not occurred.

The former definition is the narrower one; it excludes compensation that may be due to the injured party for loss suffered, such as loss of use of goods wrongfully detained but later returned. The latter definition incorporates other elements of full reparation into the concept of restitution and tends to conflate restitution as a form of reparation and the underlying obligation of reparation itself. Article 35 uses a narrower definition, which has the advantage of focusing on an assessment of a factual situation rather than requiring a hypothetical inquiry into what the situation would have been if the wrongful act had not been committed. As stated in article 36, restitution in this narrow sense may have to be supplemented by compensation to ensure full reparation for the damage caused[38].

Compensation

The State responsible for an internationally wrongful act is obligated to compensate for the damage caused by such act if such damage is not compensated for by restitution. 2. Insofar as it is established, the compensation shall cover any financially assessable damage, including loss of profits[39]. Article 36 deals with compensation for damage caused by an internationally wrongful act that is not compensated for by restitution. Article 31, paragraph 2 defines "damage" broadly as "any damage, whether material or moral." Article 36, paragraph 2 expands on this definition by stating that compensation shall cover any financially assessable damage,

[37] Id para of Art.35 p.67
[38] Id para 2 of Arti.35 p.67
[39] Id Art.36

including loss of profits, to the extent that this is established in the given case[40].

The qualifier "financially assessable" is meant to exclude compensation for what is sometimes referred to as "moral damage" to a State, i.e., the affront or injury caused by a violation of rights that is not associated with actual harm. Compensation is probably the most commonly sought form of reparation in international practice. "It is a well-established rule of international law that an injured State is entitled to obtain compensation from the State that has committed an internationally wrongful act for the damage caused by it[41]," the ICJ stated in the Gabcikovo-Nagymaros Project case. It is also well established that an international court or tribunal with jurisdiction over a claim of State responsibility has the power to award compensation for damages suffered as part of that jurisdiction[42].

Satisfaction

Satisfaction is the third form of reparation that a guilty state may be expected to perform to fulfil its commitment to provide full reparation for an internationally unlawful act. It is not a conventional type of reparation in the sense that restitution and/or compensation can often entirely restore the harm caused by an internationally wrongful act of a state. The term "insofar as the injury cannot be made good by restitution or compensation" emphasises the unique nature of the remedy of satisfaction, as well as its relationship to the principle of full reparation. It's only in circumstances where those two forms haven't given you all of the information you need[43].

According to Article 31 (2), the damage for which a responsible State is obliged to make full reparation includes “any material or moral damage caused by an act of a state contrary to international law”. Material and moral damages resulting from an internationally illegal act can generally be financially assessed and therefore covered by the claim for damages. Satisfaction, on the other hand, is the remedy for such violations that are not financially assessable and are an insult to the state. These violations are often symbolic and result solely from the breach of the obligation, regardless of its material consequences for the State in question[44]. The availability of the remedy of satisfaction for injury of this kind, sometimes described as “non-material injury”, is well established in international law. The point was made, for example, by

[40] See paragraphs (5) to (6) and (8) of the commentary to article 31
[41] See note
[42] See note 33
[43] Art. 37 draft code on internationally wrongful act ,p 76
[44] Id para 2

the tribunal in the "Rainbow Warrior" arbitration[45].

Issues not covered by ILC Draft code

1.As already noted, it is not the function of the articles to specify the content of the obligations laid down by particular primary rules or their interpretation. Nor do the articles deal with the question of whether and for how long particular primary obligations are in force for a State. It is a matter for the law of treaties to determine whether a State is a party to a valid treaty, whether the treaty is in force for that State and concerning which provisions, and how the treaty is to be interpreted. The same is true, mutatis mutandis, for other "sources" of international obligations, such as customary international law. The articles take the existence and content of the primary rules of international law as they are at the relevant time; they provide the framework for determining whether the consequent obligations of each State have been breached, and with what legal consequences for other States.

2.The consequences dealt with in the articles are those which flow from the commission of an internationally wrongful act as such. No attempt is made to deal with the consequences of a breach for the continued validity or binding effect of the primary rule (e.g. the right of an injured State to terminate or suspend a treaty for material breach, as reflected in article 60 of the 1969 Vienna Convention). Nor do the articles cover such indirect or additional consequences as may flow from the responses of international organizations to wrongful conduct. In carrying out their functions it may be necessary for international organizations to take a position on whether a State has breached an international obligation. But even where this is so, the consequences will be those determined by or within the framework of the constituent instrument of the organization, and these fall outside the scope of the articles. This is particularly the case with the action of the United Nations under the Charter, which is specifically reserved by article 59.

3.The articles deal only with the responsibility for conduct that is internationally wrongful. There may be cases where States incur obligations to compensate for the injurious consequences of conduct that is not prohibited, and may even be expressly permitted, by international law (e.g. compensation for property duly taken for a public purpose). There may also be cases where a State is obliged to restore the status quo ante after some lawful activity

[45] Case concerning the difference between New Zealand and France concerning the interpretation or application of two agreements concluded on 9 July 1986 between the two States and which related to the problems arising from the Rainbow Warrior affair, UNRIAA, vol. XX (Sales No. E/F.93.V.3), p. 215 (1990).

has been completed. These requirements of compensation or restoration would involve primary obligations; it would be the failure to pay compensation or to restore the status quo which would engage the international responsibility of the State concerned. Thus, for these articles, international responsibility results exclusively from a wrongful act contrary to international law. This is reflected in the title of the articles.

4.The articles are concerned only with the responsibility of States for internationally wrongful conduct, leaving to one side issues of the responsibility of international organizations or other non-State entities (see articles 57 and 58), the treaties on the other hand, are concerned with the entire subject of state responsibility. As a result, they are not confined to breaches of bilateral obligations, such as those arising from a bilateral treaty with another country. They apply to all aspects of a state's international obligations, whether the responsibility is owed to one or more states, a person or a group, or the international community as a whole. They are, for the most part, residual because they are universal. States are permitted to stipulate that a rule's violation will result in only specific consequences when creating or agreeing to be bound by it, so excluding the conventional principles of responsibility.

The articles are broken down into four sections. Part One is titled "A State's Internationally Wrongdoing." It discusses the prerequisites for a State's international obligation to emerge. Part Two, "Content of a State's International Responsibility," examines the legal ramifications of a responsible State's internationally unlawful behaviour, particularly in terms of cessation and reparation. "The Implementation of a State's International Responsibility" is the title of the third section. It identifies the State or States that may respond to an international wrongful act and outlines the procedures for doing so, including, in some cases, by using force. .

The No-Harm Principle's Impact on Climate Change Mitigation

Climate change has been considered one of the most serious threats of the present time.it is also now very much clear that it is the man created pollution that is responsible for climate change i.e., anthropogenic pollution[46]. Climate change is felt globally by man only after almost 1oo years later after industrialization. The environment was damaged by the anthropogenic activities of man in the pursuit of economic development by using the machines indiscriminately in the industries for increasing production. Studies relating to an environmental impact assessment by the indiscriminate use of technologies in the industries

[46] Art.2 UNFCCC, 1992

were not undertaken by the man nor there were principles of international environmental laws framed by the international communities to check the environmental degradation could not be evolved out and the resultant is that environment was completely damaged, destroyed and becomes unfit for survival. Now as stated above man realised the impact of industrialization only almost 100 years later in the 19th century. after realising the problem some States started taking steps individually to restore the environment but these were not enough as the problem is global and it can only be addressed by taking steps globally and that is the reason the world community took a very first positive step in the year 1972 by calling a world conference in the form of Stockholm conference[47] to negotiate the issues of environmental degradation and climate change. Good thing is that 26 principles were evolved out of this great conference which is called Stockholm declarations.

Though the principles that emerged from these declarations were not legally binding on states, they served as guiding principles for states to regulate their activities within their domestic jurisdictions to prevent environmental degradation and climate change. In the end, it worked positively, as many states, including India, passed regulations in their jurisdictions to combat environmental declarations..

Now the question is that when states are not equally placed economically and technologically, the world may be divided into two broad categories developed and developing states depending on their financial status and that's why the question of how the framing of laws would work efficiently and effectively? realising these aspect states are categorized in three categories depending on economic and technological capabilities and capacity as mentioned in UNFCCC[48] as annexe-1[49] countries, annex-II[50] countries and non-annexe[51] countries. So, the laws cannot be applied uniformly on them rather as stated in UNFCCC burden of laws in the form of legal duties should be applied proportionately depending on their capacities and

[47] United Nations Conference on the Human Environment, 5-16 June 1972, Stockholm available at https://www.un.org/en/conferences/environment/stockholm1972(last accessed on 13/10/2021).
[48] Available at https://unfccc.int/(last accessed on 13/10/2021).
[49] https://unfccc.int/cop3/fccc/climate/annex1.html
[50] https://unfccc.int/cop3/fccc/climate/annex11.html
[51] The majority of the parties are from underdeveloped nations. The Convention identifies some groups of developing countries as particularly vulnerable to the harmful effects of climate change, including those with low-lying coastal areas and those prone to desertification and drought. Others, such as countries that rely substantially on revenues from fossil fuel production and commerce, are concerned about the potential economic consequences of climate change response measures. The Convention emphasises actions that promise to address these vulnerable countries' specific needs and issues, such as development, insurance, and technology transfer available at https://unfccc.int/parties-observers(last accessed on 13/10/2021).

capabilities and thus the principle of common but differentiated responsibilities (CBD)[52] emerged out

Both developing and developed states have a common duty to protect the global environment under international environmental law, which is based on the principle of global partnership and solidarity, which emphasises the need for global cooperation and collaboration among states in order to effectively address global climate change and environmental crises. However, it does not appear to be good or feasible because there is a significant barrier to adopting a multilateral international legal framework in the form of multilateral accords due to a lack of economic and technological capabilities.

Thus, to effectively deal with the problem of global non-implementation of multilateral agreements, developed countries should bear greater responsibilities and should assist and facilitate developing countries in all possible ways so that these nations can meaningfully overcome their constraints, and the great solution, according to the author is the transfer of technology from developed to developing countries, as well as other factors associated with it. As a result, our work contributes to the advancement of international environmental law in general and the international climate change regime in particular. The author's goal is to comprehend the impact of the no-harm principle on climate change, i.e., to what extent is the no-harm principle effective in mitigating climate change? Or whether this principle has no bearing on climate change mitigation.?

To answer these problems, we must consider the status of the no-harm principle and its applicability in a state-to-state conflict that has already occurred. So far, the no-harm concept has not been acknowledged as a norm of international law by the international community, and it remains ambiguous. Climate change is often regarded as one of the most important environmental challenges of our day. The Intergovernmental Panel on Climate Change's (IPCC)[53] most recent findings conclude that global warming is unmistakable and that human influence on the climate system is obvious. Climate change has had a wide range of negative consequences. The panel discusses concerns such as health and environmental harm, as well as land and property loss. human security threats and the potential for human casualties. What role should international environmental law play in mitigating climate change-related damage

[52] https://www.britannica.com/topic/common-but-differentiated-responsibilities (last accessed on 13/10/2021).
[53] Intergovernmental panel on climate change, 1988 available at https://www.ipcc.ch/about/history/ last accessed on (13/10/2021).

now and in the future?

One question raised in the literature is whether legal obligations under the no-harm rule can coexist with the climate regime, or whether the UN Convention Following the doctrine of lex specialist, the United Nations Framework Convention on Climate Change[54] and the Kyoto Protocol[55] have displaced general international law rules in the context of climate change. The doctrine states that if a specialised legal system of international law is intended to create a self-contained regime, general international law rules may not be applicable. As a result, when determining whether general rules of international law were meant to be excluded, one must look at the intent of the legal system's parties. The prevalent viewpoint in the literature appears to be neither the scope nor the severity of climate change. Neither the treaties nor the history of negotiations can be changed.

Conclusions and Suggestions

The goal of achieving a measure of sustainable development following the Brundtland Report's principles has now taken on an unprecedented level of urgency, and the survival of future generations depends on our innovative thinking and collective commitments more than ever. Thus to achieve this goal of preventing transboundary pollution certain steps need to be taken by the international community which may be first strengthening the existing legal and institutional framework for preventing the harm second there should be a specialised judicial forum either in an international court of justice or somewhere else which specifically entertain environmental-related disputes because it is seen that ICC is not a good forum to decide environmental disputes as it requires expertise.

Many states are gradually removing legal barriers to claims for damages and repair costs associated with transboundary environmental pollution, which can be described as a more focused effort to prevent or limit environmentally harmful activities and ensure that those responsible must bear responsibilities and associated costs in real terms. In recent years, the international community has decided that the ongoing battle to preserve the our-pristine environment can only be won if developed and developing countries work together even more closely to ensure that non-residents have unrestricted access to the judicial system that is responsible for pollution. In recent times, role of NGO's is very important and the states should

[54] See supra note n. 61
[55] Adopted on 11 Dec.1997 https://unfccc.int/kyoto_protocol (last accessed on 11/10/2021).

promote them in all possible ways. The international community i.e., both developed and developing nations has decided that the only way to win the ongoing battle to protect our pristine environment is to cooperate, co-ordinate and work more together more than ever closely. Residents should have unrestricted access to the legal system and all states should cooperate to develop and enforce stricter environmental regulations in their respective jurisdictions.

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