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The Onus of The Maimed Nature: Known by Each, Owed by None

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ABSTRACT

The article highlights the complexities of defining and implementing environmental liability, focusing on international law and key cases like the Trail Smelter and Chorzow Factory. It discusses state liability, civil liability, and efforts to establish compensation regimes, particularly in hazardous activities like nuclear installations, etc. Despite international treaties like the Paris Agreement, challenges persist due to discrepancies in emissions levels and political influences, affecting effective implementation. The article underscores the need for collaborative efforts and effective participation to address environmental damage and ensure accountability.

I. INTRODUCTION

From the massive destruction of the Amazonian rainforests to the rapid glacial melting in Antarctica, environmental damage remains at the root of all such 'sorry state of affairs'. The nature of such damage is not isolated or limited, it is transboundary in nature. But how can such an encompassing term be defined? There are two aspects to it. Firstly, what constitutes environmental damage? Secondly, what is the threshold of such damage which would give rise to liability? "Damage" refers to substantial harm done to people, environment (which includes both biotic and abiotic natural resources like air, water, soil, fauna, and flora), or property that is a part of cultural heritage.[3]According to the Nagoya-Kuala Lumpur Supplementary Protocol, "damage" is defined as a detrimental effect that is observable and significant on the preservation and sustainable use of biological variety, including dangers to human health.[4] The term pollution helps in a better understanding of environmental damage, although they cannot be used interchangeably. The 1993 Lugano Convention, which provides that, in appropriate local conditions, an operator of a harmful industry will not be held accountable for damage (impairment of the environment) caused by pollution at "tolerable" levels , serves as an example of the distinction between pollution and environmental damage (and compensable

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[3] Yearbook of the International Law Commission, 1973, Fifty- Third Session, (A/56/10), (2001).
[4] Nagoya-Kuala Lumpur Supplementary Protocol on Liability and Redress to the Cartagena Protocol on Biosafety, Nagoya, Art. 2(2)(b), (15 October 2010)

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environmental damage). Other than pollution, 'adverse effects' can also be considered as valid after-effects of environmental damage. Although it is important to define what constitutes environmental liability, what remains the most crucial part is - Who is liable for such damage and how such liability is to be construed? Without answering these questions the definition alone would become like a ship without a radder. And that's where 'liability' comes into the picture.

II. LIABILITY

Environmental liability is a salient instrument of environment protection which demands accountability and reparation from the players through financial compensation or other remediation measures. The term "liability" was chosen after the American member of the ILC stated during the twenty-fifth session of the exchange of views in 1973 that the term "responsibility" should only be used in reference to "internationally wrongful acts" and in reference to the "possible injurious consequences" that arise out of the performance of some lawful acts, and that the term "liability" should be used more appropriately in these situations.Unfortunately, in international law, there is no go-to source which has the answers to all such questions when it comes to liability. But the available international legislations, state practice and judgements of international courts gives some guidance on how this works. According to a 1993 European Commission Green Paper on Environmental Liability, there are a number of methods to determine the threshold at which the effects of a pollutant on the environment cannot be reversed to the status quo ante by natural processes. These methods include using environmental indicators to analyse the environmental conditions, interpreting current international legislation that sets quality standards for air, water, and plant and animal quality, and interpreting "critical loads" to determine the threshold at which an individual responsible for the increase would be held accountable for the consequences. [5] According to the rule to protect the environment by the International Court of Justice- Under international law, the duty to prevent environmental degradation necessitates the following issues to be addressed: (1) Is the liability arising upon fault or is it construed through strict or absolute liability? (2) Is the obligation based upon the need to prevent any transboundary environmental damage or only transboundary environmental damage that has serious, significant, or appreciable consequences? (3) What kind of reparations should be made for environmental damage? (4) What is the extent of liability and the measure of damages? The nationality of claims rule, the exhaustion of local remedies rule, any rules governing the statute of limitations on when a claim

[5] Philippe Sands, Jacqueline Peel, Principles of international environmental law, 770-775, (4th ed. 2018).

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can be brought, and the rules governing the allocation of state responsibility for the actions of private individuals and public bodies are among the additional legal requirements that must be satisfied in order to bring an international claim. Treaties, state practice, case law, and scholarly literature cannot provide conclusive answers to these or other issues. Every case needs to be assessed on its own merits.[6]

1. Trail-Smelter Case:

In the Trail Smelter case, four key issues were addressed. Firstly, whether damage had occurred in Washington State since January 1, 1932, due to the Trail Smelter's activities, and if so, what compensation was appropriate (1). Secondly, whether the Trail Smelter should be required to prevent future damage in Washington State, and to what extent (2). Thirdly, what measures or regulations should be implemented by the Trail Smelter to address the situation (3). Finally, determining compensation for any decisions made by the Tribunal regarding the previous questions (4).[7]

And the tribunal was of the opinion and ruled Canada accountable for damages inflicted upon the United States. The compensation deliberation encompassed a broad spectrum of grievances, including those related to land, livestock, property, and commercial enterprises. Compensation for damage to both cleared and uncleared land was assessed based on the reduction in land value. Notably, claims pertaining to livestock or town property damage were dismissed due to insufficient evidence. Additionally, claims regarding the detrimental impact on the Columbia River were rejected. Future damages necessitated settlement arrangements, indicating a forward-looking approach to addressing potential harms. It's worth noting that the tribunal's decisions did not directly tackle pure environmental damage, and instead adhered to a market value approach, which may have overlooked the broader implications of environmental loss. This approach, aligned with US court practices at the time, might yield different outcomes today, considering evolving legal standards that account for environmental amenity and natural resource preservation.[8]

2. Chorzow Factory Case:

Furthermore, in the Chorzow Factory case, In addressing objections regarding its jurisdiction over reparation issues, the Court underscored that its authority extended to disputes encompassing both the application and interpretation of pertinent articles, including those

[6] Menon, P. K. *International Journal on World Peace*, vol. 12, no. 3, (1995), http://www.jstor.org/stable/20752045.
[7] The Trail Smelter Case (United States v. Canada), Arbitral Award,1941 VOLUME III pp. 1911, last visited-04.04.24
[8] *Supra, Note 8.*

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relating to reparation. The Polish Government argued that Article 23 of the convention only covered disputes on the application of Articles 6 to 22, excluding matters of reparation. However, the Court reasoned that reparation naturally followed from breaches of these articles, emphasizing the obligation to provide adequate reparation for any failure to apply them. It asserted that its jurisdiction inherently included disputes concerning reparation resulting from the failure to adhere to the convention's provisions. This position was supported by historical precedents in international law and the intentions of the parties involved. Consequently, the Court rejected the contention that its jurisdiction was limited solely to issues of application and confirmed its authority to adjudicate disputes involving reparation as well.[9]

III. STATE LIABILITY

When it comes to liabilities and holding parties accountable for the damage they have caused, the issue of state liability becomes pertinent. When a state violates or is not in accordance with an international law which is binding on that state, and some environmental damage is caused due to the same it incurs international responsibility.The idea that "every internationally wrongful act entails the international responsibility of that State" is a well-established one in international law. [10] The International Law Commission states that a State commits an internationally wrongful act when it engages in conduct that violates one or more of the following criteria: (a) the conduct is attributable to the State under international law; and (b) it violates an international obligation of the State.[11] According to the International Law Commission there must be a serious violation of the international law i.e. it must be substantial in nature. But, there are various challenges when it comes to constituting state liability in international environmental law. To start with, most of the conventions and treaties in this regard are not binding in nature and even if they are, the threshold of damage and compensation fluctuates among the agreements. Since every state has different capacities to protect the environment, hence, they have different standards of conduct to meet. That’s why it is difficult to define a common threshold that can be made applicable to all the states. More often than not, there is a series of acts behind the damage, so, it is tough to construe the causation of the damage i.e. which act(s) exactly caused the damage? Even if such an act is identified, it may be difficult to identify the injured state, particularly if the damage is globally dispersed. When it comes to environmental issues, it can be better to avoid harm than to pursue ex post compensation—for

[9] Summaries of Judgments, Advisory opinions and orders of the Permanent Court of international Justice, pp - 91-94, visited 04.04.24.
[10] International Law Commission (I.L.C.), Draft Articles on State Responsibility, Part I, Art.1 [hereinafter Draft Articles).
[11] Draft Articles, supra, n.8, Art. 3.

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instance, in cases when the harm is irreparable.[12] It appears improbable that a state responsibility strategy could, or even ought to, be used in this case to address global environmental issues.[13] The most eminent source of ascertaining state liability are multilateral, regional, or bilateral treaties. Each treaty in the realm of environmental law is unique in the sense that it gives rise to a unique set of rights and obligations. Certain agreements, like the 1992 UN Framework Convention on Climate Change (UNFCCC), the 2015 Paris Agreement, and the 1992 Biodiversity Convention (CBD), pertain only to certain regions, while others address global challenges. Each treaty is also based on a different kind of liability, namely, strict, vicarious or absolute liability.The 1972 Convention on International Liability for Damage Caused by Space Objects is the only convention that expressly addresses objective international liability.[14] The 1982 UN Convention on the Law of the Sea (UNCLOS)[15] lays down laws governing the world's seas and oceans. Article 235 of UNCLOS says that states shall act in accordance with international law when it comes to the preservation of the marine environment. This provision does not create a new separate liability for rule for marine damages, rather it is an incidental provision read into the pre-existing laws. Certain international treaties specifically forbid liability and/or damages. In a footnote, the 1979 Convention on Long-Range Transboundary Air Pollution (LRTAP) is said to 'not contain a rule on state obligation as to harm'.[16] Similarly, the 2015 Paris Agreement underlines in the decision adopting the agreement that Article 8 on "loss and damage associated with the adverse effects of climate change" "does not involve or provide a basis for any liability or compensation."[17]

IV. CIVIL LIABILITY

No matter who the operator[18] is ,the environment[19] is the victim[20] that suffers damages[21] caused by it during the various activities that subdues its being. But it is pertinent to establish liability so as to compensate, even though minimally, to all the loss that has been caused due to the ruthless nature of hazardous activities[22] rendering severe vandalism to the environment. And therefore, "Each State should take all necessary measures to ensure that prompt and adequate

[12] Edith Brown-Weiss, 'Invoking State Responsibility in the 21st Century' (2002).
[13] American Journal of International Law, 111(4), pp. 1074–1079.
[14] Draft Articles, *Supra Note*.l, Art. 2.
[15] U.N. Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397.
[16] BrunnÉee, J. (2004) 'Of Sense And Sensibility: Reflections On International Liability Regimes As Tools For Environmental Protection', *International and Comparative Law Quarterly*, 53(2), pp. 351–368.
[17] Rep. on 'Adoption of the Paris Agreement'., at 8, U.N. Doc. FCCC/CP/2015/10/Add.1.
[18] G.A. Res. A/RES/61/61/36, (Nov. 7 2006).
[19] Principle 2(b).
[20] Principle 2(f).
[21] Principle 2(a).
[22] Principle 2(c).

compensation is available for victims of transboundary damage caused by hazardous activities located within its territory or otherwise under its jurisdiction or control"[23]

Usually, the rules related to civil liability have developed in context of certain specified activities that are considered to be ultrahazardous, and rules have been made for quite some time now, for activities like oil spills and nuclear activities and hazardous activities to marine environment, etc.[24] Also, efforts have been made in order to make regimes that are general in nature - of civil liability but conventions drafted in the same direction, one of them being 1993 Lugano Convention[25]- have emerged to be not successful.

But there are some similar rules that are common establishing regimes for civil liability such as; (1)require the maintenance of adequate insurance or other financial security,(2) channel liability,(3) defining the activities,(4) defining the damage,(5) identifying a court or tribunal to receive the claims, etc.[26]

If we take the example of **nuclear installations**, we can explain how the regimes of civil liability work. There are prominently 3 main treaties which govern the regime of civil liability in case of peaceful use of nuclear energy, and these include; 1960 Paris Convention[27], 1963 Vienna Convention[28] and the 1997 supplementary compensation convention[29].

(A) 1960- Paris Convention and 1963- Brussels Convention

The Paris convention lays down and recognises the importance of ecosystems which include oceans, also protection of biodiversity which is recognised as mother nature by some cultures around the world and recognises the significance of 'climate justice' as a concept. But do these objectives actually work things out in the actual non-fairytale world is the question that entails in this scenario.

But in reality , there are major discrepancies in regards to both the level of emission and conditions of the countries, subsequently these discrepancies reflect in terms of the climate policy goals; like initially only Indonesia had submitted an NDC which stands for Nationally Determined Contribution and it had committed to increase its emissions by only 2.1% annually until the year 2030, whereas Saudi Arabia had only submitted an INDC "with targeted

[23] Principle 4.
[24] *Supra, Note 8.*
[25] Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, Mar. 8, 1993, COE.
[26] Philippe Sands, Jacqueline Peel, Principles of international environmental law, 771-772, (4th ed. 2018).
[27] *Supra, Note 8.*
[28] Vienna Convention on Consular Relations, Apr. 24, 1963, UN.
[29] Convention on Supplementary Compensation for Nuclear Damage, Sept. 12, 1997, IAEA.

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'mitigation co-benefits' of up to 130 Mt CO eq annually, and Iran has not ratified the Paris Agreement."[30] Furthermore, owing to their high population and economic growth, these three presently small emitters - would be overtaking the (former) EU28 and would almost reach the USA, by constituting a share of 6.4% of global CO emissions by the year 2030.

Talking about the USA, if we look at the scenario, it is very much politically influenced as to how the giant responses to climate change and other environmental problems. And a lot of it is has to do with, whether the American president is Republican or Democrat and which party has the majority in Congress and the Senate[31]. This is reflected in participation in international climate protection agreements: Bill Clinton signed the Kyoto Protocol and George W. Bush did not ratify it. Barack Obama joined the Paris Agreement, Donald Trump withdrew, and finally Joe Biden rejoined.

Therefore, these factors coupled with more case to case basis deterrents, amount to obscurity and undeniable lack of efficacious implementation, and that may not be because of the conventions or treaties lacking comprehensiveness of any sort, rather it is the effectiveness is actually dependent on how the parties to the same, contribute in the success.

And therefore, Global emissions in 2030 will be even if all signatory nations to the Paris Agreement meet their commitments to reduce climate change. 40.8 Gt, which is 2.8 Gt more than 2019 and, most importantly, 10.8 Gt more than 2005, the (most usual) base year for the Paris Agreement NDCs.

Even more concerning are the CO budgets, which show that the funds for the 1.5 degree objective will run out by 2028 and that the funds for the 1.75 degree and 2 degree targets will still run out by 2030. There are still a decent third or fewer than 60% (with a 0.67% probability for each). Globally speaking, there has not been a significant advancement in climate protection under the Paris Agreement[32] .

V. CONCLUSION

There are a myriad of challenges when it comes to environmental law, and the major impacts globally, due to the deteriorating conditions of the environment and nature, bring in the scope of international law into the scene. As the topic is suggestive of the very fact as to how the

[30].Renate Neu Bäumer, *Is the Paris Agreement the breakthrough towards a global climate agreement?,* Economic Service (Apr. 10, 2024, 4:25 PM), https://www.wirtschaftsdienst.eu/inhalt/jahr/2021/heft/10/beitrag/ist-das-pariser-abkommen-der-durchbruch-zu-einem-weltweiten-klimaabkommen.html

[31] Thomas Hummel, *When it comes to climate change, there are six Americas,* Süddeutsche leitung (Apr. 10, 2024, 4:37 PM), https://www.sueddeutsche.de/politik/usa-klimawandel-biden-interview-1.5272344

[32] *Supra, Note 36.*

environmental concerns are buried in nebulae of oblivion, it becomes more pertinent to address these issues. And at this juncture, it isn't only for the generations to arrive or the progeny, but for the present human dwellers on earth, as well.

Through means of this essay, it is described as to how, the initiatives undertaken remain in vain, because of either non-sincerity towards the signed regimes and instruments or disregard to the very inevitable upcoming nuisances or rather human-induced catastrophes. For instance, civil liability frameworks, especially in industries like nuclear energy, provide avenues for addressing and compensating those affected by environmental damage. Nonetheless, persistent challenges arise from variations in emissions among nations and the influence of political dynamics on climate policy decisions. The Trail Smelter and Chorzow Factory cases exemplify the evolving jurisprudence in international law concerning environmental damage and reparation. All in all, addressing the challenges demands a concerted global effort, with nations prioritizing environmental stewardship over short-term interests. Strengthening international cooperation, enhancing transparency, and promoting sustainable practices are imperative for safeguarding our planet for future generations.

And the title, brings forth the very embodiment of the essay, where it remains a serious question that even after so many intricacies to the law, the onus is conferred upon none, and liability and accountability still remains a distant dream.

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