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The Role of The ICJ in Shaping the Development of The Law on Transboundary Environmental Harm: An Analysis

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ABSTRACT

The issue of transboundary environmental harm has gained significant importance in recent decades as the world has become more interconnected, and the impacts of environmental pollution can be observed across national boundaries. The International Court of Justice [hereinafter "ICJ"], the principal judicial organ of the United Nations, has played a crucial role in shaping the international framework for the prohibition of transboundary environmental harm. The aim of the study is to trace the evolution of the law on transboundary harm and provide an analysis of ICJ's role in this area, including the development of jurisdiction, procedural law, substantive law and current standing. Throughout the study, the article will be dealt with critical cases, such as trail smelter and pulp mill cases, to provide an overview of the gradual development of the law and the challenges that still are impediments to achieving equitable and effective outcomes. Ultimately the article will argue the need for continuous engagement with this issue to protect the global environment and realise sustainable development goals.

Keywords: *Transboundary Harm, ICJ, Sustainable development.*

I. INTRODUCTION

In the aftermath of World War II, International law witnessed a notable shift from being primarily focused on individual nations to addressing the global issues affecting mankind as a whole. The development of international environmental law exemplifies this development.[2] In the past few decades, the law around transboundary environmental harm developed to address the problems that currently exist. Environmental problems are widely recognised as one of the significant challenges of this century. One aspect of this challenge that has been emerging recently is the rise of transboundary environmental damage. Pollutions and environmental risks frequently have transboundary impacts, harming the states and global commons other than the one responsible for its origination and addressing issues like transboundary harm requires

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[2] Nayantara Ravichandran, *Restricting Sovereignty - Transboundary Harm in International Environmental Law*, 2 ENV't L. & Soc'y J. 91 (2014).

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collaboration and cooperation among states. In this regard, ICJ and other international organisations, such as the International Law Commission, played a crucial role in providing the ground and framework under which the member of the international community can cooperate.[3]

II. TRANSBOUNDARY HARM: DEFINITION AND DELIMITATIONS

A cornerstone rule of international environmental law is that nations are under an obligation not to cause harm to the environment of other nations or areas beyond their jurisdiction. The maxim " Sic utero tuo, ut alienum non-laedas" has adequately captured the same.[4] Along similar lines, the law on transboundary harm has been developed. Transboundary harm represents harm caused in the territory of a State other than the State of origin.[5] The principle recognises that environmental harm can have far-reaching consequences, and the states have a duty to prevent harm to the environment of other nations. However, it is pertinent to note that not all hazardous effects caused by the environmental effect will fall under the category of transboundary harm.

As per the ILC, four requirements must be satisfied for any harm to qualify as transboundary harm.[6] ***Firstly,*** there needs to be a physical relationship between the activity in question and the damage caused.[7] It excludes those activities which cause damage across borders but are not physical in nature. Thus, it only covers tangible damages and not financial and economic damages. ***Secondly,*** the harm caused must be the result of human activity, thereby excluding the damage caused by natural disasters such as floods, earthquakes, etc., from the category of transboundary harm.[8] ***Thirdly***, there must be a physical effect of crossing national boundaries. It is this element of crossing national borders which triggers the liability for transboundary harm.[9] ***Fourthly***, the harm must have crossed a certain level of threshold.[10] It means not every type of harm will incur liability for transboundary harm. It must have exceeded a certain level of severity that justifies legal action. By satisfying all four requirements, the affected state may establish the liability for causing transboundary harm and hold responsible parties accountable

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[3] Sands, Philippe and Jacqueline PEEL, *Principles of International Environmental Law*, 3(10) CAMBRIDGE UNIVERSITY PRESS (2012).

[4] Trail Smelter Arbitration, (U.S. V. CANADA), 35 Am. J. Int'l L. 684 (1941) [hereinafter "*Trail Smelter Arbitration Case"*]; International Commission on the River Oder Case, (DENMARK, CZECHOSLOVAKIA, FRANCE, GERMANY, U.K, SWEDEN V. POLAND) PCIJ, Series A, No. 23 (1959); Island of Palmas Arbitration, (NETHERLAND V. US) 2 R. Int'l. Arb. Awards 829, 829-831 (1928); Malcolm N. Shaw, *International Law*, 5 CAMBRIDGE UNIVERSITY PRESS, 760 (2003).

[5] International Law Commission [Herein after "ILC"], *Articles on the Prevention of Transboundary Harm from Hazardous Activities with Commentaries*, 2 Y.B INTERNATIONAL COMMISSION, U.N. Doc. A/CN.4/L.566 (2001).

[6] Oscar Schachter, *The Emergence of International Environmental Law*, 44 JOURNAL OF INTERNATIONAL AFFAIRS 457, 457-493 (1991).

[7] Hanqin Xue, *Transboundary Damage in International Law*, CAMBRIDGE UNIVERSITY PRESS (2003).

[8] *Id.*

[9] Franz x. Perrez, *The relationship between "Permanent Sovereignty" and the obligation not to cause transboundary environmental damage*, 26 ENVTL. L. 1187 (1996).

[10] *Supra 6.*

for their actions and promotes compliance with international environmental law.

III. CONCEPTUAL ORIGIN OF TRANSBOUNDARY ENVIRONMENTAL HARM

The very foundation of international law lies in the idea of state sovereignty.[11] The fundamental principle is that all states are sovereign and control all the activities within their territory over which it has sovereignty. The obligation not to cause transboundary harm cannot be understood in isolation and separately from the notion of sovereignty. One principle that is corollary related to state sovereignty is the permanent sovereignty over natural resources (PSNR). This principle reflects the right of the states to have free and wide authority to exploit the natural resources within the geographical area that form part of their territorial sovereignty.[12] The general interpretation of the PSNR principle suggests that International environmental law generally applies solely beyond the area of territorial sovereignty.

However, with the advent of the 21st century, the application of the PSNR principle seems no more relevant because the interdependence on the biosphere and interconnectedness of the ecosystem does not support the artificial boundaries of the nation-state created by mankind.[13] And due to this, mostly the impacts on the natural resources of one state have a transboundary aspect in it,[14] thus leading to a conflict between territorial sovereignty and transboundary environmental harm.

(A) Sovereignty vs Transboundary environment harm

In contemporary International law, the principle of Permanent Sovereignty over natural resources has been restricted to a large extent. An expanding body of treaties and conventions, such as the Convention on biological diversity (1992)[15], the Convention on non-navigational uses of international water discourse (1997)[16] etc., establishes a limitation on territorial sovereignty by imposing the obligation to act in accordance with the rights of the other states. The duty not to intervene in the area of exclusive jurisdiction of the other states is commonly referred to as the concept of "territorial integrity." This principle has widely been used as a tool for imposing an obligation to act in accordance with the rights and integrity of the other states and not to cause transboundary harm. The Permanent Court of Arbitration in Island of Palmas arbitration has expressly stated that "the exclusive right of the state to exploit its natural

[11] *Id.*
[12] *Supra 2.*
[13] Millennium Assessment Organisation, *Ecosystem and Well-Being-Synthesis,* (March 4 2014), http://www.millenniumassessment.org/documents/document.356.aspx.pdf.
[14] *Supra 6.*
[15] Convention on Biological Diversity [hereinafter "*CBD*"], art.5, 1760 UNTS 79, 31 ILM 818 (1992).
[16] Convention on the Law of Non-Navigational Uses of International Watercourses [hereinafter "*Watercourse Convention*"], UNTC No. 52106, 1997.

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resources has a corollary duty to protect the rights of the other states".[17]

The international judicial bodies, in their series of judgments, repeatedly emphasised the importance of the no-harm (sic utere) rule, which led to the seed grown for transboundary harm. The Trail Smelter arbitration was the first instance where the international judicial body recognised the sic utere principle[18]. The tribunal held Canada responsible for causing damage to the crops and lands in the US territory by emitting toxic fumes and stated that under the principles of International law, "no State is allowed to use its territory in such a manner to cause damage to the territory of the other states by emitting fumes". Further, the ICJ in UK v Albania case, widely known as the Corfu Channel case, held Albania responsible for the explosion in Albanian waters and stated that every state is obliged not to act contrary to the rights of the other state".[19] Unlike the trail smelter case, the ICJ did not hold this responsibility based on any treaty or convention but on the general principle of Customary International law. This landmark decision set forth the framework for the development of international law. Furthermore, in the lax Lanoux arbitration, the tribunal held that state sovereignty could be restricted in matters pertaining importance of global commons and joint ownership.[20] Although the case was not explicitly dealt with the environmental issue, the reasoning behind the decision was based on the concept of territorial integrity and sovereignty. It thus can be extended to matters related to transboundary damage.

Together these judgments acted as a guiding torch for the development of the law on transboundary environmental harm. The principle has since been incorporated into various treaties and conventions, eventually becoming a fundamental tenet of international environmental law. Thus, the principle of PSNR is still recognised in contemporary international law. However, its enforcement is increasingly restricted to a large extent in matters pertaining to transboundary harm.

(B) Procedural obligations

With the growing importance of the law for preventing transboundary environmental harm, it gave rise to various procedural and substantive obligations that have emerged in order to avoid transboundary environmental harm. Procedural obligations are those obligations which the

[17] Island of Palmas arbitration, (NETHERLANDS V. THE UNITED STATES), 2 RIAA, 839 (1928).
[18] Trail Smelter Arbitration, (U.S. V. CANADA), 35 AM. J. INT'L L. 684 (1941) [Hereinafter "*Trail Smelter Arbitration Case"*]; International Commission on the River Oder Case, (Denmark, Czechoslovakia, France, Germany, U.K, Sweden v. Poland) PCIJ, Series A, No. 23 (1959); Island of Palmas Arbitration, (NETHERLAND V. UK) 2 R. Int'l. Arb. Awards, 829, 831 (1928); MALCOLM N. SHAW, *International Law*, 5 CAMBRIDGE UNIVERSITY PRESS, 760 (2003).
[19] Corfu Channel Case, (THE UNITED KINGDOM V. ALBANIA), I.C.J. Rep.4 (1949).
[20] Lac Lanoux Case (SPAIN V. FRANCE), 12 R.I.A.A., 281 (1957).

states are required to follow when they take care of certain activities. This includes the duty to cooperate, the duty to notify and consult and the assessment of environmental impacts.[21] Environmental impact assessment is a critical mechanism in international law used by countries to determine the impact and consequence of the actions authorizers to carry on. The importance of the EIA lies in its objective, which is to provide information to national authorities, and sta are likely to be affected by the operationalisation of activity.

The fundamental principle of international environmental law, as recognised by various international instruments and treaties, entails the obligation to cooperate and provide prior notification.[22] These procedural obligations were also included in the International Law Commission's articles on prevention. Article 4 stipulates that states must engage in sincere cooperation to prevent significant harm across borders or, at the very least, minimise the associated risks.[23] Additionally, according to Article 9(1), states are obliged to engage in consultations to find acceptable solutions regarding measures to prevent significant harm or reduce the risk of harm.[24] This places the responsibility on a state to notify in advance of the potentially affected states and share all relevant information on which the risk assessment is based. Moreover, the duty to conduct an environmental impact assessment has become an established principle of environmental law whenever a proposed activity poses a significant risk of transboundary harm. The articles also stress that affected states do not necessarily possess the right to veto harmful projects if consensus cannot be reached through consultations.[25] The International Court of Justice has consistently supported the approach taken by the International Law Commission in its judgments, particularly regarding prior notification and consultations between states in cases involving the risk of significant transboundary harm.

(C) Substantive Obligations

Substantive obligations are those obligations which emerge out of the content of the law itself. It sets out the specific requirements that states must meet to comply with international law and are, therefore specific in nature. Unlike procedural obligations, these obligations are not general in nature but emerge from the particular treaty and convention. This includes the obligation not to cause significant harm, the basic standard of care, the exercise of due diligence, the promotion

[21] Neil Craik, *the duty to cooperate in the customary law of environmental impact assessment*, 69 INT'L & COMPARATIVE LAW QUARTERLY 239, 239-259 (2020)
[22] CBD, art.5,1992; United Nations Convention on the Law of the Sea, art.123, 1982; Vienna Convention for the Protection of the Ozone Layer, art.2.2, 1985, 26 I.L.M. 1529; International Convention on Oil Pollution Preparedness, Response and Cooperation, art.4.7, 1990, 30 I.L.M. 733.
[23] International Law Commission, *Articles on Prevention of Transboundary Harm from Hazardous Activities* [hereinafter "*Article on Preventions*"], art. 4, U.N. Doc. A/CN.4/L.849 (2007).
[24] *Article on Preventions,* art. 9(1).
[25] *Supra 18.*

of sustainable development, and the application of the precautionary principle.[26]

It is important to highlight that the duty to prevent and control transboundary environmental harm is not merely a responsibility but a legal obligation under international law. The aim is to proactively address and manage the risk of harm. In the Gabčíkovo-Nagymaros case, it was underscored that "in the realm of environmental protection, vigilance and prevention are essential due to the often irreversible nature of environmental damage and the limitations inherent in repairing such damage."[27]

Furthermore, from the above paragraph discussion, it appears reasonable to conclude that under the no-harm rule, states are obligated to prevent and control transboundary harm and minimise the associated risk, and this obligation revolves around acting diligently rather than achieving actual prevention. Due diligence is a "framework concept" and depends on the specific risks and activities in question.[28]

Promoting sustainable development is a crucial part of the substantive obligations. The 1987 Brundtland Report has defined sustainable development as 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs'.[29] The legal components of the term "Sustainable Development," as expressed in International agreements, encompass four recurrent components, namely: (a)The Principle of Intergenerational Equity; (b) The Principle of Sustainable Use; (c) The Principle of Equitable Use; and (d) The Principle of Integration.[30] To classify development as sustainable development, these components need to be satisfied.

The International Court of Justice recognises the functional link between procedural and substantive obligations, as compliance with procedural obligations is seen as wise since it increases the likelihood of complying with substantial obligations.[31]

IV. FUTURE CHALLENGES

It is no doubt that in this era, climate change is one of the severe issues that mankind is currently

[26] Gullett, W, *Environmental protection and the precautionary principle: a response to scientific uncertainty in environmental management*, 14(1) ENVIRONMENTAL AND PLANNING LAW JOURNAL 52, 52-69 (1997).
[27] Gabcíkovo-Nagymaros Project (HUNGARY V. SLOVAKIA), I.C.J. 7, 140 (1997).
[28] Voigt, C., *State Responsibility for Climate Change Damages*, *77 NORDIC JOURNAL OF INTERNATIONAL LAW* 1, 1-22 (2008).
[29] World Commission on Environment and Development, *Our Common Future: Report of the World Commission on Environment and Development*, 43 (1987).
[30] Sands, Philippe and Jacqueline Peel, *Principles of International Environmental Law*, 3 CAMBRIDGE UNIVERSITY PRESS (2012).
[31] Jessica L. Rutledge, *Wait a Second - Is That Rain or Herbicide - The ICJ's Potential Analysis in Aerial Herbicide Spraying and an Epic Choice between the Environment and Human Rights*, 46 WAKE Forest L. REV. 1079, 1079-1112 (2011).

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facing. At this time, the role of ICJ and tribunals becomes more crucial in determining the current and future aspects of the law on transboundary harm.[32] Nevertheless, there are several future challenges that must be addressed in the law relating to transboundary environmental harm, particularly in the context of climate change. One of the primary challenges is the lack of effective enforcement mechanisms, rendering international law[33] in this area to be largely based on nebulous principles and guidelines. This leaves few mechanisms for monitoring compliance or enforcing legal obligations. This further makes it more difficult for affected states to seek redress for environmental harm caused by other states.

Identification of causality in cases of transboundary environmental harm is another challenge. [34]It can be very challenging to identify the source of pollution or other environmental harm, especially when caused by multiple actors or taking place over a long period of time. This can complicate efforts to hold states or other actors responsible for the harm, which further adds to the complexity of the issue.

Additionally, the uneven distribution of environmental harms and unequal power dynamics between states give rise to issues of injustice.[35] Developing countries and marginalised communities often bear the consequences of environmental harm caused by more powerful states or actors while having limited resources or access to legal remedies, and even if they can access the legal remedies, the enforcement of the judgment still remains a big impediment.

Lastly, emerging environmental challenges such as climate change and loss of biodiversity demand novel approaches and legal frameworks to address transboundary harm.[36] As these challenges become more pressing, there may be a need for more ambitious and comprehensive international agreements to manage them, further contributing to the high perplexity and burstiness of the issue.

V. CONCLUSION

The recognition of the obligation not to cause transboundary environmental harm under various treaties and conventions can be seen as a confirmation of achieving the sic utere principle as customary international law. Also, the emergence of the substantive and procedural obligation

[32] *Supra 27.*
[33] Daniel Bodansky, *The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?*, 93 AMERICAN JOURNAL OF INTERNATIONAL LAW 596, 596-624 (1999).
[34] Voigt, C., *State Responsibility for Climate Change Damages*, *77 NORDIC JOURNAL OF INTERNATIONAL LAW* 1, 1-22 (2008).
[35] Menton M., Larrea C., Latorre S. et al., *Environmental Justice and the SDGs: from synergies to gaps and contradictions*, 15 SUSTAINABILITY SCIENCE 1621, 1621–1636 (2020).
[36] Geoffrey Palmer, *New Ways to Make International Environmental Law*, 86 AMERICAN JOURNAL OF INTERNATIONAL LAW 259, 259-283 (1992)

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under the treaty or conventional law emphasises the fact of the growing importance of law on transboundary harm. However, despite this recognition, the increasing incidents of transboundary harm on an everyday basis indicate the requirement of consistent state practice in preventing it. Achieving the status of CIL will only amount to half of the battle. The other half requires constant efforts by all the states to control their actions regarding their transboundary impact.

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