INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

Volume 4 | Issue 2

2021

Responsibility V. Sovereignty: Transboundary Environmental Harm

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ABSTRACT

Hazardous activities relating to air pollution, pollution of watercourses, transborder waste shipment and such are needed to be regulated and governed by customary international laws and treatises. It is possible for a State to create environmental harm for neighbouring States as well, or even globally. This paper analyses the causes of transborder environmental harm and the customary international approach to the same. The environmental harm in one State's territory may spill and seep into neighbouring countries but transborder harm may be also be caused when the pollution is limited to the polluting State's territory. The author discusses the perception and interpretation of sovereignty that is utilized in adjudicating matters of such environmental harm. This work reflects on the influence of jurisprudence in realization of trans-boundary environmental cooperation, due diligence for the protection of environment and application of precautionary principle coupled with the polluter pays principle that a great number of States have adopted. The author also discusses the impact of transborder harm in a post COVID-19 world with individual State response to the coronavirus pandemic and disposal of preventive gear (PPEs). The responsibility and liabilities have changed face with the world's activity slowing down amidst the pandemic and might pave a new way forward for measures against transboundary environmental harm.

I. INTRODUCTION

"Transboundary harm" means harm caused in the territory of or in other places under the jurisdiction or control of a State other than the State of origin, whether or not the States concerned share a common border. [2]

Transboundary environmental harm commonly takes one of three forms: air pollution, pollution of a transboundary watercourse, or transboundary shipment or dumping of wastes. Of these, the regime regarding pollution of transboundary watercourses is perhaps the most

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[2] Draft articles on Prevention of Transboundary Harm from Hazardous Activities 2001, art. 2(c).

 [ISSN 2581-5369]

fully developed and provides the most useful examples. It is also possible for a state to cause global environmental harm or harm to the global commons.[3]

Coming to the legal aspect, strictly confining the scope to transboundary harm, two laws rule this field, namely, the Convention on Biological Diversity and the ILC Draft Articles on Prevention of Transboundary Harm from Hazardous Activities 2001. While the former is forceful for its binding obligation on nation states, the paramountcy of the latter cannot be ignored, owing to the fact that it has been invoked and alluded to in a number of international cases as well as conventions.

The interpretations of the International Law Commission, for "transboundary harm" can be regarded to encompass four major elements namely, first, the physical relationship between the activity concerned and the damage caused; second, human causation; third, a certain threshold of severity that calls for legal action; and lastly, transboundary movement of the harmful effects.[4] In light of national limits, the term "transboundary" stresses the component of border crossing as far as the immediate or prompt results of the act which the source State is considered culpable.[5]

One of the principal reasons, why no standardized rules have come into being with regards to environmental harm is because countries all over the world have preferred keeping their sovereign and economic interests above their responsibility towards maintaining environmental standards and thus not followed international law to the hilt. As a result, the traditional idea of standard of due diligence and efforts to create a strict liability regime has not worked as international customary law.[6]

II. RESPONSIBILITY VS SOVEREIGNTY

Responsibility

The concept of state responsibility is a traditional rule, its enforcement depends on the limitations of the legal system; i.e., it cannot be enforced till assented to by the states in question, thus ensuring that culpable states may slip away.

The Rio Declaration (1992), adopted in a non-binding form by the United Nations Conference on Environment and Development (UNCED), provides in Principle 2 that States shall prevent

[3] Aaron Schwabach, *Transboundary Environmental Harm and State Responsibility: Customary International Law*, International Law and Institutions.
[4] Siddharth Jain, *Transboundary Harm in International Law*, iPleaders, 2018.
[5] *Ibid*.
[6] Jutta Brunnce, *The Responsibility of States for Environmental Harm in a Multinational Context-Problems and Trends*, ssrn.com (1993).

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transboundary damage:

"*States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction and the health of human beings, including generations unborn.*"[7]

In its 1996 Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, the ICJ recognizes: "*The existence of the general obligations of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment*".[8]

Although in earlier times States assumed 'full' and 'absolute' sovereignty and thus could freely use resources within their territories regardless of the impact this might have on neighbouring States, few would argue today that territorial sovereignty is an unlimited concept enabling a State to do whatever it likes.[9] State sovereignty cannot be exercised in isolation because activities of one State often bear upon those of others and, consequently, upon their sovereign rights.

As Oppenheim noted in 1912, "*a State, in spite of its territorial supremacy, is not allowed to alter the natural conditions of its own territory to the disadvantage of the natural conditions of the territory of a neighbouring State*."[10]

Due Diligence and Do-no-Harm

"Due diligence" is one of the key concepts in international law to mediate interstate relations when there is significant change.[11] Due diligence is normally assessed if a responsible state has complied with certain obligations and standards.[12] However, "certain obligations and standards" are internationally not defined and considered flexible[13], and would vary depending on the circumstances of the case.[14] Consequently, more detailed rules have been developed,

[7]Principle 2 of the Rio Declaration (1992), United Nations Conference on Environment and Development (UNCED).
[8] Judgment in ICJ Reports, Para 29, p.225, 1996.
[9] Chinthaka Mendis, *Sovereignty vs. trans-boundary environmental harm: The evolving International law obligations and the Sethusamuduram Ship Channel Project*, Nippon Foundation Fellows Papers, 2006.
[10] OPPENHEIM, INTERNATIONAL LAW, Chapter Eight p.220 (1912: 243–44).
[11] International Law Association (ILA) Study Group, *Due Diligence in International Law*, First Report, Mar 7, 2014, p. 2.
[12] Timo Koivurova, *Due Diligence*, Max Planck Encyclopedia of Public International Law [MPEPIL], Feb 2010.
[13] Kulesza, Joanna, *Due Diligence in International Law*, Nijhoff: Brill, 2016.
[14] *Supra* note 10.

particularly in environmental areas, which include the "no-harm principle" in customary international law.[15]

Due diligence obligations have significantly arisen in areas of transboundary environmental harm.[16] In international environmental law, due diligence is an important component of the obligation to prevent transboundary harm. This obligation requires states to take measures to protect persons or activities beyond their respective territories in order to prevent harmful events and outcomes. [17] The International Court of Justice (ICJ) has confirmed this concept in 1949 in **Corfu Channel (United Kingdom v. Albania)**[18] when referring to a state's obligation to not knowingly allow its territory to be used for acts contrary to the rights of other states.

Moreover, the **Trail Smelter Case (United States v. Canada, awards in 1938 and 1941)** asserts the following: "*Under the principles of international law, no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence*."[19]

In the Trail Smelter Case the Arbitral Tribunal decided that, first of all, Canada was required to take protective measures in order to reduce the air pollution in the Columbia River Valley caused by sulphur dioxide emitted by zinc and lead smelter plants in Canada, only seven miles from the Canadian-US border. Secondly, it held Canada liable for the damage caused to crops, trees, etc. in the US state of Washington and fixed the amount of compensation to be paid. [20]

The Arbitral Tribunal reached this conclusion on air pollution, but it is also applicable to water pollution and is now widely considered to be part of general international law.

Almost all discussions of international environmental law and liability take as their foundation the Trail Smelter arbitration, among the earliest expressions of the principle that a state has responsibility for environmental damage extending beyond its territorial limits.

Thus, the "do-no-harm principle" has been widely recognized as customary law, particularly

[15] *Supra* note 11.
[16] *Supra* note 12.
[17] Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, with commentaries, UN 2001, Commentary to Art 3, 154, para (7). In addition, the Convention on the Law of the Non-Navigational Uses of International Watercourses Adopted by the General Assembly of the United Nations on 21 May 1997, Article 7—Obligation Not to Cause Significant Harm, and the Convention on the Protection and Use of Transboundary Watercourses and International Lakes (Water Convention), adopted in Helsinki on 17 March 1992, the United Nations Economic Commission for Europe, Article 3 Prevention, Control and Reduction.
[18] Corfu Channel Case (UK v Albania) (Merits) [1949] ICJ Rep. 4.
[19] Reports on International Arbitral Awards, Trail Smelter case (United States, Canada), 16 Apr 1938 and 11 Mar 1941, vol. III, pp. 1905–82.
[20] *Ibid*.

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in the context of shared resources such as international water.

Furthermore, Principle 21 of the Stockholm Declaration[21] provides the legal basis of the international standard. With regard to whether the do-no-harm principle requires a duty to prevent all significant transboundary harm, as the Advisory Opinion on the Legality of Nuclear Weapons[22] and the **Gabcikovo–Nagymaros case**[23] indicate, states are only required to prevent harm caused as a result of an active disposition on or over their territory, which does not include the omission of protective measures. This principle of no harm is breached only when the state of origin has not acted diligently with regard to its own activities over state-owned enterprises or private activities.[24]

The **Genocide case**[25] also made it clear that the due diligence obligation is one of conduct and not one of result.[26] This results in the principle of due diligence being an obligation of conduct, rather than an obligation to achieve a result; that is, states are not required to achieve specific results as long as states exercise the best possible efforts to obtain the results. If a state fails to take "all reasonable or necessary measures to prevent" harm, then the states are liable for their conduct, not the result of harm.[27]

Limited Sovereignty

Thus, the principle of territorial sovereignty finds its limitations where its exercise touches upon the territorial sovereignty and integrity of another State. Consequently, the scope for discretionary action arising from the principle of sovereignty is determined by such principles and adages as 'good neighbourliness' and *sic utere tuo ut alienum non laedas* (you should use your property in such a way as not to cause injury to your neighbour's) as well as by the principle of State responsibility for actions causing transboundary damage.[28]

In **The Island of Palmas Case (United States v. The Netherlands, award in 1928)** the sole arbitrator Huber, who was then President of the Permanent Court of International Justice, stated that, "*Territorial sovereignty involves the exclusive right to display the activities of a State. This right has as corollary a duty: the obligation to protect within the territory the rights of*

[21] Declaration of the United Nations Conference on the Human Environment, Stockholm, 16 Jun 1972.
[22] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, [1996] ICJ Rep. 1996 (I), 241–42, para 29.
[23] Case concerning the Gabcikovo–Nagymaros Project (Hungary/Slovakia), ICJ Rep. 1997 41, para 53.
[24] *Supra* note 10.
[25] Application of the Convention on the Protection and Punishment of the Crime of Genocide (Bosnia v Serbia) (Judgment) [2007] ICJ Rep. 1, para 430.
[26] *Supra* note 12.
[27] Buchan, Russell, Cyberspace, *Non-State actors and the Obligation to Prevent Transboundary Harm*, Journal of Conflict and Security Law 21: 429–53, 2016.
[28] *Supra* note 8.

other States."[29]

The **Lac Lanoux Case (Spain v. France, award in 1957)** on the utilization by France of the waters of Lake Lanoux in the Pyrenees for generating electricity. the Tribunal was of the opinion that essential restriction on sovereignty could only follow from exceptional circumstances, such as regimes of joint ownership, co-imperium or condominium.

"[…] to admit that jurisdiction in a certain field can no longer be exercised except on the condition of, or by way of, an agreement between two States, is to place an essential restriction on the sovereignty of a State, and such restriction could only be admitted if there were clear and convincing evidence."

According to the Tribunal, prior agreement would amount to 'admitting a 'right of assent', a right of veto', which at the discretion of one State paralyses the exercise of the territorial jurisdiction of another.

While the Tribunal clearly emphasized the hard-core nature of the principle of territorial sovereignty, it also admitted that it must function within the realm of international law, "*Territorial sovereignty plays the part of a presumption. It must bend before all international obligations, whatever their source, but only for such obligations*."[30]

From this award is derived in general international law, as Lammers puts it: "*A duty for the riparian States of an international watercourse to conduct in good faith consultations and negotiations designed to arrive through agreements at settlements of conflicts of interests*."[31]

III. CORONAVIRUS & HARM

The need and practice of waste management has greatly changed in light of the coronavirus pandemic. Apart from the treatment of infected household waste and other medical waste generated in COVID-19 wards, an important aspect that has emerged is management of used PPE kits.

Personal protective equipment (PPE) such as face masks, gloves, goggles, gowns, and aprons are essential items to help protect individuals from exposure to pathogens and contaminants.[32] Traditionally, PPE use against pathogens was predominantly in the hospital environment. However, the COVID-19 global pandemic necessitated that PPE is now widely used in

[29] Island of Palmas Case, 2 RIAA (1949), pp.829–90. See also Lagoni (1981: 223–24).
[30] International Law Reports (1957) p.120.
[31] Lammers on International Law (1984) p.517.
[32] Singh, Narendra et al., *Environmentally Sustainable Management of Used Personal Protective Equipment*, Environmental Science & Technology Vol. 54, 14 (2020).

domestic situations, leading to shortages in the supply chain, and a rapid accumulation of potentially infectious PPE in domestic solid waste streams.[33]

There is an unprecedented surge in plastic-based PPE usage, arising a s consequence from the ongoing COVID-19 pandemic, which constitutes a new form of single-use-plastic (SUP) waste that will to plague our oceans posing a threat to our marine ecosystems.[34]

Since the COVID-19 coronavirus outbreak, production of plastic-based PPE equipment has increased rapidly. For example, between 2016 and 2020, the compound annual rate of increase in the global market for PPE was 6.5%, from approximately $40 Billion to $58 Billion.[35] In contrast, the World Health Organization projected that PPE supplies must increase by 40% monthly to deal effectively the COVID-19 pandemic. The essential PPE includes an estimated 89 million medical masks, 76 million pairs of medical gloves, and 1.6 million pairs of goggles.[36] The demand for PPE is not expected to decline substantially during the post-pandemic period either, with an estimated compound annual growth of 20% in facial and surgical masks supply from 2020 to 2025.[37]

The increase in PPE manufacture and distribution is generating an equivalent increase in the waste stream, compounded by health and environmental risks along the waste management chain, especially in countries with an underdeveloped infrastructure. In China, approximately 240 tons of daily medical waste was produced at the peak of pandemic in Wuhan, amounting to six times higher than before the disease outbreak.[38] [39]

It has been noted that not all countries are capable of managing such waste appropriately and are been forced to use direct landfills or open burning as alternative strategies.[40] Studies conducted in Pakistan, Greece, Brazil, Iran, and India have shown that higher than normal prevalence of virus infection in collectors of solid waste can be traced directly to pathogens

[33]Ogunseitan O. A., *The Materials Genome and COVID-19 Pandemic*, JOM, 2020.
[34] Surge in marine Plastic waste as people discard PPE used to ward off COVID-19, Euronews 2020. https://www.euronews.com/2020/06/25/surge-in-marine-plastic-waste-as-people-discard-ppe-used-to-ward-off-covid-19
[35] Market Reports. Personal Protective Equipment Market by Type (Hands & Arm Protection, Protective Clothing, Foot & Leg Protection, Respiratory Protection, Head Protection), End-Use Industry (Manufacturing, Construction, Oil & Gas, Healthcare) - Global Forecast to 2022, 2019, https://www.marketsandmarkets.com/Market-Reports/personal-protective-equipment-market-132681971.html.
[36] WHO, Shortage of personal protective equipment endangering health workers worldwide, 2020. https://www.who.int/news-room/detail/03-03-2020-shortage-of-personal-protective-equipment-endangering-health-workers-worldwide.
[37] *Supra* note 32.
[38]Statistics of China's medical waste generation and market size forecast., https://www.reportrc.com/article/20200506/6615.html.
[39] WHO, Health-care waste, 2018, https://www.who.int/news-room/fact-sheets/detail/health-care-waste.
[40] Silva A.L.P. et al., *Rethinking and Optimising Plastic Waste Management Under COVID-19 Pandemic: Policy Solutions Based on Redesign and Reduction of Single-Use Plastics and Personal protective Equipment*, 2020.

found in contaminated wastes.[41]

The United Nation's Basel Convention on the Transboundary Movement of Hazardous Wastes and their Disposal has urged member countries to treat waste management amid COVID-19 as an urgent and essential public service to minimize possible secondary impacts upon health and the environment.[42] Therefore, safe and sustainable recovery and treatment of PPEs should be intensified. It is especially important to clarify the role of informal recyclers in developing countries, where medical waste has not been adequately regulated.[43]

With countries supplying PPEs and other required medical equipment to other countries, developing and in need, the waste generated all over the world, especially toxic fumes by way of burning COVID-19 related material, is an important aspect.

The COVID-19 pandemic has strained solid waste management globally, while also highlighting the bottleneck supply chain challenges regarding PPE manufacture, demand-supply, use, and disposal.[44]

IV. CONCLUSION

According to the International Law Commission, an internationally wrongful act of a State happens in the following cases:[45]

(a) Wrongful conduct that consists of an act or omission is attributable to the State under international law; and

(b) The said conduct can be termed to be a breach of an international obligation of the State.

The ICJ has played a role in developing the old principle of international law – that states are obliged not to inflict damage on or violate the rights of other states – into an obligation not to cause harm to the environment of other states, or to areas beyond national jurisdiction. the Court has on several occasions emphasized that it attaches great significance to respect for the environment, both explicitly and implicitly by recognizing that protection of the natural environment amounts to an essential interest.[46]

The Court has also confirmed that the obligation is not merely one of responsibility ex post facto, but to prevent and control the risk of significant transboundary harm, implying that the

[41] Ibid.
[42] *Supra* note 31.
[43] *Ibid*.
[44] *Ibid*.
[45] Professor Christopher Greenwood, Chapter XIII- *State Responsibility and Civil Liability for Environmental Damage Caused by Military Operations*, International Law Studies- Volume 69, Protection of Environment During Armed Conflict (1996), edited by-Richard J. Grunawalt, John E. King and Ronald S. Mc Clain.
[46] See e.g. Nuclear Weapons, para. 29 and Gabčíkovo-Nagymaros, para. 53.

rule creates legal obligations before the occurrence of any harm.[47]

Due diligence obligations are crucial for states to prevent transboundary harm and are an evolving principle of international law. States tend to engage in co-operation when opportunities exceed the risks and benefits outweigh the costs. Taking procedural obligations into account, such opportunities would lead to a more objective, coherent, and stable interpretation of due diligence concerning transboundary environmental pollution.[48]

The concept of state responsibility for environmental harm is an up and coming notion of holding states accountable that works on preventing and mitigating such harm by enforcing primary and secondary obligations. Several articles of the ILC and major UN summits like the Stockholm declaration, Rio declaration have tried to build principles and concepts to hold states accountable. There have also been some major cases like Pulp mills case. However, a major problem in enforcing such measures has been the reluctance of states to be held accountable for their actions and upholding their sovereign and economic rights.

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[47] Marte Jervan, *The Prohibition of Transboundary Environmental Harm: An Analysis of the Contribution of the International Court of Justice to the Development of the No-harm Rule*, PluriCourts, 2014.
[48]Akiko Takano, *Due Diligence Obligations and Transboundary Environmental Harm: Cybersecurity Applications*, MDPI, 2018.

 [ISSN 2581-5369]