Environ in the Doldrums: Insight into Culpability of Sovereign States

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The culpability of the sovereign state is hard to determine as it is against the concept of sovereignty. But, with the growing consciousness of human rights, economic, peace and development, the concept of absolute territorial sovereignty is a thing of the past. Now, the states can be booked for their wrongful acts under various laws collaboratively made by UNO & other fundamental declarations. This Article attempts to give insight on such environ laws like the application of the principle of due diligence & expansion of responsibility of states for their acts that damage the environment on an extraterritorial level. Along with this, the article attempts to state brief history on consciousness that started from 1968, & tries to put comprehensively as to how by virtue of UN Charter's Principle of International Co-operation & Codification, Draft Article 2001 & 2006 formulated on the subject. Moreover, it is important to note that, they should not be kept in abeyance as, these articles form part of customary practices all over the world which is codified & thereof, becomes the part of the source of International Law. The article also attempts to put various cases starting from Trail Smelter Case & many more where the liability of states has been fixed by the International Court & tribunals, at last concluding with a critical appraisal of these laws & highlighting the lacunas keeping in mind the major being enforcement issue.

Introduction

"Man is unlikely to succeed in managing his relationship with nature unless in the course of it he learns to manage better the relations between man & man."[1]

-1972, Stockholm Conference on Human Environment.

From the time immemorial, we humans have been dependent on nature to satisfy our ever-increasing demands & nature has openhandedly given us enough to satisfy our needs but, the problem lies in satisfying our increasing greed for development. Hence, for our selfish thirst, we have exploited nature- water, air, and land by our very creative endeavors giving ways to put up a conscious effort for preservation so that our existence is not threatened.

Environmental Jurisprudence prompted us to involve in "environmentalism"[2] which has so far helped to improve the quality of life on the planet. The

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1 An Opening Statement by Maurice Strong, Secretary-General, at the Conference in 1972.

2 Gurdip Singh, *Global Environmental Change & International Law*, 10th edition, Aditya Books Pvt. Ltd., New Delhi, 2016.

environment being our ally, if we threaten our alliance then the rate of our survival also becomes jeopardized. This idea can only strike its overarching achievements if we, humans make our relations better with one another, because biggest harm comes to our nature from none other than ourselves, in our craving to hold Mega Power over one another.

State Responsibility

The law for affixing State Responsibility has been established on Customary Practices that have been codified by the ILC so formed & it submitted the same to UNGC in 2001. Though these articles in DAOSR have not been adopted yet they are the source of CIL due to its influence & evidence that states have *generally accepted* it along with it having in its force of *opinio juris.*

Now, DAOSR clearly mentions that the state is responsible for all of its conduct in international arena[3], even if these organs of state acted in excess of its authorities.[4] Moreover, this concept of state responsibility in regard to the environmental issues where the concept of absolute territorial sovereignty has been changed & now the states are 'not to act as to injure the rights of other states'.[5] Thereby, leading to the emergence of the principle of Good neighborliness.[6]

The International Cooperation on Environments & State Sovereignty came up in 1972. Stockholm Conference who's Principle 21[7] along with Principle 2 of

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3 DAOSR, Article 4. Conduct of organs of a State:
(1) the conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.
(2) An organ includes any person or entity which has that status in accordance with the internal law of the State.

4 DAOSR, Article 7. Excess of authority or contravention of instructions:
The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions.

5 Malcon N.Shaw, *International Law,* 6th edition, Cambridge University Press, Cambridge, 2009.

6 Larisa Kralj, 'State Responsibility and the Environment', Masters of Law in European Law dissertation, Universiteit Gent, 2011 available at https://lib.ugent.be/fulltxt/RUG01/001/787/295/RUG01-001787295_2012_0001_AC.pdf, accessed on 14 March 2018.

7 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 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. Report of the United Nations Conference on the Human Environment and Development, Stockholm, 5-16, June 1972, Vol. I, UN Doc. A/

Rio declaration[8] deals with the Trans-boundary harm & principle of Territorial Sovereignty. Moreover, many conventions have adopted these principles.[9] Along with this many cases of International Tribunal has also provided for these principles.[10]

The appropriate standard generally has been *first, strict liability principle*, the state has the duty to prevent any activity from happening irrespective to their fault this principle forms the objective theory. But this view has not been acceptable uniformly in international standards as the cases vary from situation to situation. Also, the treaty has been variable on this question. While there is *an absolute liability* at some places[11] still there exists a *fault theory* application[12] in this arena.

Lastly, the test of *due diligence* is, in fact, most appropriate.[13] Many conventions have given it force[14] though the meaning & scope of it is yet unclear. A reason for it being appropriate is flexibility & wider outreach than strict liability where the state is responsible for its action even when it has no intention. In this test, the state has to take all necessary steps to prevent substantial pollution from going cross border.

ILC draft article (2001) is the way via which the compromise between thinkers of subjective & objective theory has been compromised.[15] Thus according to the draft articles, 'for every internationally wrongful act of a state entails the international responsibility'.[16] By internationally wrongful act we mean, the acts

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CONF.48/14/REV.1, 1 January 1973.

8 Conference on Environment and Development, Rio de Janeiro, Brazil, 3-14 June 1992, Report of the United Nations Conference on Environment and Development, Vol. I, UN Doc. A/conf.151/26/REV.1, 1 January 1993, principle 2.

9 *United Nations Convention on the Law of the Sea*, 1833 UNTS 3, adopted on 10 December 1982, art. 194 (2); Convention on Biological Diversity, 31 ILM 822, adopted on 5 June 1982.

10 *Corfu Channel case, Albania v. United Kingdom,* Merits, 1949, ICJ Rep. p. 4. (this case mentioned that it was the obligation of every state 'not to allow knowingly its territory to be used for acts contrary to the rights of other states'); *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996, ICJ Rep.,p. 226, para 29. (the Court, in this case, declared that 'the existence of the general obligation of states to ensure that activities within their jurisdiction and control respects law. The environment of other states or of areas beyond national control is now part of the corpus of international law relating to the environment.)

11 *Convention on International Liability for the Damage by Space Objects*, U.N. Res. 2777(XXVI), adopted on 1971, art I.

12 *Ibid* art III.

13 Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, Report of the ILC, 53rd Session, A/56/10, p. 392. (This is the view taken by the ILC in its Commentary on the Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, 2001.)

14 *United Nations Convention on the Law of the Sea* (n 9) art 194.

15 Kralj (n.6).

16 ILC Draft Articles on State Responsibility, A/56/10, adopted on 2001, art I.

which are a breach of any international obligation either arising out of CIL or Treaty. A major problem arises in making the link between the wrongful acts & the damage occurred.[17] Moreover, in international setup there are many kinds of pollution which have not been enlisted as a wrongful act.[18]

Moreover, the Draft Article (2001) also states that reparation for the wrongful act[19]. First, the state should cease the act & then it should try and make reparation as, restitution, compensation, and satisfaction.[20]

The Articles also has the provision of defenses to escape from the state responsibility on international delinquency.[21]

General Principle: International Law on Environment

"The general principles & prescriptions of international law are not without applicability of transnational pollution or environmental degradation. This fundamental principle of international law limits action by one state which would cause injury in the territory of another state."[22]

"There has been a general recognition of the rule that a State must not permit the use of its territory for the purposes injurious to the interest of another state."[23] The principle thus, in turn, has been developed from the famous doctrine: *'sic uteretuoutolienum non leades.'*

These general principles do not provide for the degree of specificity that will help the international concern on global environment concern but, it does indicate the duty of states to not to use their territory in such a way that results in the injury outside its territory. Thus it seems necessary that even though we have an international tribunal for claimant but yet they are not sufficient to cope with the huge problems in this area, thus it has been seen that the global international cooperation is a must have to come up with these problems & help the tribunals on this matter.

17 Kralj (n.6).

18 Elli Louka, *International Environmental Law: fairness, effectiveness and world order*, Cambridge University Press, 2006.

19 Draft Article (n16). Article 31 Reparation-(1).The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.
(2) Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.

20 Ibid arts 35-37.

21 Ibid arts 20 – 25.

22 *The Lake Lanoux Arbitration, France v. Spain,* 24 Intl L. Rep: 101, 1957; *Trail Smelter Arbitration Case*, United States of America v. Canada, U.N. Rep. Int'l Arb. Awards, vol. III, 1941, pp. 1905-1982; *Corfu Channel Case* (n 10).

23 Survey of International Law, 34 U.N. Doc. A/CN. 4/1 REV. 1, 1949.

Consciousness to Environment

"International Collaboration, on the scale seen in the history of the world is essential if mankind is to meet basic human needs while safeguarding the environment for future generations" [24]

MostafaK.Tolba[25]

Until 1972 no major global initiative was taken up by the nations at large rather, many treaty laws[26] existed & were binding, ratified and signed in general assembly declaration, 1970. But apart from this nothing was done at a global level i.e. till Stockholm Conference, 1972 also known as, United Nation Conference on the Human Environment, the history of the conference dates back to the year 1968 when Sweden made the proposal to UN to hold the International Conference on Environment problem & identify the need for international co-operation on this issue. The major contribution of the Stockholm conference, 1972 has been: declaration on human environment,[27] the action plan, the resolution on institutional & financial arrangements, and designation of world environment day etc.[28]

UNEP has been an important organization for the furtherance of many treaty & conventions in the field of environmental protection. It has been responsible for the development of conventions including, Vienna Convention for the protection of the ozone layer, the 1987 Montreal Protocol & 1992 Convention on Biodiversity. To add more the greatest contribution of the UNEP is the Habitat Conference in 1976[29] which has the theme on human settlements declaring that "the nations must avoid the pollution of the biosphere, of the oceans & should join in an effort to end irrational exploitation of all environmental resources."[30]

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24 U.N. Monthly Chronicles, vol. XII No. 3, March 1976, p. 44.

25 UNEP, Executive Director, 1976.

26 Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, TRE-000420, adopted on 29 December 1972; *International Convention relating to intervention on the high seas in cases of oil pollution casualties*, 970 UNTS 14049, adopted on 29 November 1969.

27 Report of the United Nations Conference on the Human Environment and Development (UN Documents Gathering a body of global agreements
part 1- proclaims & part 2- principles & important principle being, Principle 21 as already discussed & Principle 22-States shall cooperate to develop further the international law regarding liability and compensation for the victims of pollution and other environmental damage caused by activities within the jurisdiction or control of such States to areas beyond their jurisdiction available at http://www.un-documents.net/unchedec.htm, last accessed on 22 March 2018.

28 S.K. Kapoor, International law & Human Rights, 12thedition, Central law agency, Allahabad, 2016.

29 Vancouver Declaration on Human Settlements available at https://unhabitat.org/wpcontent/uploads/2014/07/The _Vancouver _Declaration_19761.pdf, accessed on 22 March 2018.

30 U.N. Monthly Chronicle Vol. XII No. 7, July 1976, p. 52.

UN Convention on Law of the Sea[31] has in it, the international law relating to the protection of the environment i.e. to protect & preserve the marine environment.

Nuclear safety has been in question only after the drastic incident at *Chernobyl Nuclear Plant*, 1986.[32] Thus in 41st session on UN General Assembly, the then Secretary-General presented his report i.e. "the Chernobyl syndrome has rammed the lesson home that no country can remain safe if the nuclear genie manages to escape… the moral. It is in one word or none. The split atom & a sharply divided world can't co-exist."[33] So by this, it has been further proved that state can't use its territory to cause injury to any other State as in Nuclear Test Case[34] or cases like in India conduct the nuclear test in Pokhran, 1974.[35]

The next major Event that is the largest international conference was the Earth summit[36] that was held at Rio de Janerio in 1992 and is also called the Rio summit. This summit was also called the United Nation Conference on Environment & Development. According to the Secretary-General of UNCED, "If we fail at Rio, it will be one of the greatest breakdowns ever in international relations especially concerning north & south."[37] Thus, this summit is also known for the last chance to save mother nature. The story to this summit began when in 1983 the UN established a commission under the chairmanship of PM Brundtland of Norway[38]. In its report called 'our common future',[39] the commission highlighted the risks of continued unsustainable development.[40]

Moreover, in 1990 the General Assembly created the Inter-Governmental Negotiation Committee[41] which conducted a single negotiating process on climate change.[42] Thereby Agenda 21[43] was formulated which was adopted in

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31 *United Nations Convention on the Law of the Sea* (n 9) arts 192,194,207,208,209 &210.

32 Ibid.

33 Mohamed El Baradei, IAEA Director General, The Enduring Lessons of Chernobyl, 6 September 2005 available at https://www.iaea.org/newscenter/statements/enduring-lessons-chernobyl, accessed on 22 March 2018.

34 Nuclear Tests Case, New Zealand v. France, Merits, 1974, ICJ Rep. p. 457.

35 Ibid.

36 *See* The Earth Summit*, available at* http://www.un.org/geninfo/bp/enviro.html, accessed on 23 March 2018.

37 Kapoor (n 28) p. 438.

38 Ibid, p.439.

39 Report of the World Commission on Environment and Development, 'Our Common Future, 1987', available at http://www.exteriores.gob.es/Portal/es/PoliticaExteriorCooperacion/Desarrollosostenible/Documents/Informe%20Brundtland%20 (En%20ingl%C3%A9s).pdf, accessed on 23 March 2018.

40 Ibid.

41 Report of the Intergovernmental Committee of Experts on Sustainable Development Financing, Final Draft, 8 August 2014 available at https://sustainabledevelopment.un.org/content/documents/4588FINAL%20REPORT%20ICESDF.pdf, accessed on 24 March 2018.

42 Kapoor (n. 28) p. 441.

43 *See* United Nations Conference on Environment and Development, 'Agenda 21', available

1992 earth summit.[44] UNCED has been a success for the formulation of many conventions after its inception namely: on biodiversity, on climate change, on forestry & on bio declaration.

Responsibility and Liability[45]

"International action is generally interstate action based on state responsibility and liability."[46] Thus it's the responsibility of the state that the reparation is made to the wronged state. In international environmental law, the difference has to be made because the responsibility arises upon breach of an international obligation while liability is the consequences of the damage so caused either from lawful or unlawful activity.[47]

"State responsibility arises as consequences of & the sanction against, non-performance by the states of their international obligations."[48] The state responsibility has mainly two elements: subjective & objective where the former means that the said act is imputed as that of state, while the latter means that breach should be done by the state. Thus it is [49] believed that, there is a fault & objective responsibility wherein for former you need the intention of state under consideration but for later; the breach of the international obligation is a sufficient cause to arise state responsibility.[50] The legal consequences of environment harm cover both the state responsibility for violation of international law & liability for harm caused by activities allowed by the state.[51] Moreover, according to a convention[52] it is in practice which focuses on the scope of absolute liability.[53] Thus liability is either strict or absolute as the case may be the only difference between both is former has an exception to it.

Now, the question arises as to the responsibility & liability for the action of a

at https://sustainabledevelopment.un.org/content/documents/Agenda21.pdf, accessed on 22 March 2018. (It has the following subparts:
Social & economic dimensions; Conservation & management of resources for development; strengthening the role of major groups; Means of implementation.)

44 Ibid.

45 Kralj (n. 6).

46 Alexandre Kiss & Dinah Shelton, 'Strict Liability in International Environmental Law', in Thomas A. Mensah et al (eds), *Law of the Sea*, Brill Academic Publishers, 2000, p. 605.

47 Kralj (n. 6).

48 Brain D. Smith, *State Responsibility & The Marine Environment,* Oxford University Press, 1988, p.6.

49 Ibid.

50 Ibid, p. 15.

51 Kiss & Shelton (n. 46) p. 606.

52 *Convention on International Liability for the Damage by Space Objects* (n 11).

53 Ibid art II. (Article II-A launching State shall be absolutely liable to pay compensation for damage caused by its space object on the surface of the earth or to aircraft flight.)

private person. The state is responsible by the objective element of responsibility because there is some benefit that state incurs from the activity causing no benefit to the wronged state. But the individual has liability as civil for his action of harming the environment to another state.[54]

Thus, in conclusion, we can say that state responsibility, liability & civil liability though may look similar but are quite different. At first instance there exists a breach of international obligation by an act (commission/ omission) which could be attributed to as that of the state action- this leads to the state responsibility. On the other side there exist liability which could arise while performing the lawful or unlawful act within the territory for the only reason that when state gains benefit while other has faced loss than the former state should be made liable to give compensation. Civil liability comes into picture when the private individual gains at the expense from the other state, thereby making itself liable to pay compensation to that state.

Draft Articles

Fully aware of the sovereignty of state & their *supreme* control on their natural resources, along with role of UN in promoting the spirit of internationalism as stated in its charter[55]& principle 2[56] of Rio declaration (1992), ILC had come up with the draft articles for protection of the environment, which are not an only codification of CIL but are also the laws governing the environmental issues which have an increasing trend. Even though many cases[57] had been decided but have failed to give a general rule as to the rule of law.

These draft articles are of two kinds- one that focuses on prevention (2001) & the other that focuses on compensation as to liability after harm caused (2006).

But before discussing the draft articles it is important to understand the history, origin of this concept. Draft articles on state responsibility for wrongful act was

54 Karl Zamanek, *'*State Responsibility & Liability', Graham & Trotman Ltd, 1991, p.195.

55 Article 13-The General Assembly shall initiate studies and make recommendations for the purpose of: a) promoting international co-operation in the political field and encouraging the progressive development of international law and its codification; b) promoting international co-operation in the economic, social, cultural, educational, and health fields, and assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

56 Principle 2- 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. *See* UNESCO*, 'Rio Declaration',* 3-14 June 1992, available at http://www.unesco.org/education/pdf/RIO_E.PDF, accessed on 24 March 2018.

57 As to be dealt in the latter part of this Article.

not considered appropriate because a harm to the environment can be caused by the state with even a lawful activity understanding the issue ILC started with its journey in 1978 to understand 'international liability for injurious consequences arising out of the acts not prohibited by international law.'[58]

While looking up for the responsibility of the state for harm caused as consequences of the acts of the state which are legal *per se* caused many hurdles because the state was reluctant to this extent of responsibility moreover the state at individual level started with the imposition of the Civil Liability.[59] Thus ILC started its study from liability but while doing so they recognized that their study has two main focus are i.e. prevention of the act & liability arising out of the act. In this, the former deals with the state responsibility that as has been decided in numerous cases[60] moreover, it was considered appropriate to make the state liable for the hazardous harm done by the plant or operator if that is in its jurisdiction.

Draft Articles on Prevention of Trans-Boundary Harm from Hazardous Activities (2001)

The scope of this draft article is mentioned in its opening article[61] thus giving way to the establishing up of law where the state is liable for any hazardous activity causing harm, thus putting the responsibility on the state to take all the necessary step & due diligence to prevent harm from happening. While defining the state[62] the view of territory and the consonance of the Art. 1 is taken up. & the state likely be affected[63] is the one wherein the risk of Trans-Boundary harm exist. Moreover the risk[64] in question includes both high & low degree of harm. Now coming to

58 Louis Angelique de la Fayete, 'International Liability for the damage to the Environment', in Malgosia Fitzmaurice et al (eds), *Research Handbook on International Environmental Law*, Edward Elgar Publishing Limited, United Kingdom, 2010 available at *https://books.google.co.in/books?id=ABYTxWnihdwC&pg=PA320&lpg=PA320&dq=international+liability+for+damage+caused+to+environment+by+angelique+de+la+fayette&source=bl&ots=EuSP9ZfLr9&s=XIN8zeqqW1HCHhypXXz9iYSLpOI&hl=en&sa=X&ved=0ahUKEwi Loea8r9jWAhWBpo8KHSsdAkcQ6AEILTAB#v=onepage&q&f=true,* accessed on 23 March, 2018.

59 Ibid.

60 *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996, ICJ Rep., p.226; Gabcikovo Nagymaros Project Case, Hungary/Slovakia, Merits, 1997, ICJ Rep., p. 7.

61 Draft Articles on Prevention of Transboundary harm from hazardous activities (n 13) art 1. (Article 1, Scope: The present articles apply to activities not prohibited by international law which involve a risk of causing significant trans-boundary harm through their physical consequences.)

62 Ibid art 2(d) (Article 2- (d) "State of origin" means the State in the territory or otherwise under the jurisdiction or control of which the activities referred to in article 1 are planned or are carried out.)

63 Ibid, art 2 (e).

64 Ibid art 2(a). (Article 2 (a) "risk of causing significant trans-boundary harm" includes risks taking the form of a high probability of causing significant trans-boundary harm and a low probability of causing disastrous transboundary harm.)

the harm[65] it includes a normal definition of harm & trans-border definition of same. Moreover, the risk & harm should be the one which is significant[66] which has been defined in the commentary to this draft article[67]under para 4.[68] Thus the summary of the important articles out of 19Articles of this Draft article is:[69]

Draft Principles on Allocation of Loss in Case of Trans-Boundary Harm Arising Out of Hazardous Activities (2006)

The object of the articles has been described in the preamble of the draft principles (2006) wherein the emphasis is on providing appropriate & effective measures for prompt & adequate compensation for harm incurred.[70]

The scope of the draft principle is same as of in draft articles[71] but it is different from the concept of state responsibility & prevention draft articles because it does not have its focus on the legality of activity but the consequences on the same.[72] Principle 2 demarcates the scope of words like damage,[73] environment[74]

65 (b) "harm" means harm caused to persons, property or the environment;
(c) "trans-boundary 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;

66 (b) "harm" means harm caused to persons, property or the environment;
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67 *See* Draft Articles on Prevention of Transboundary harm from hazardous activities (n 13).

68 Ibid.

69 The obligation of the State of origin to take preventive or *minimization measures is one of due diligence…* The main elements of the obligation of due diligence involved in the duty of prevention could be thus stated: the degree of care in question is that expected of a good Government. It should possess a legal system and sufficient resources to maintain an adequate administrative apparatus to control and monitor the activities. It is, however, understood that the degree of care expected of a State with a well-developed economy and human and material resources and with highly evolved systems and structures of governance is different from States which are not so well placed.

70 Principles on the Allocation of Loss in the Case of Transboundary Harm Arising out of Hazardous Activities, U.N. G.A. Res. 61/36, adopted on 2006 available at http://www.tjsl.edu/slomansonb/11.1_AllocationLossPrin.pdf, accessed on 28 March 2018.

71 Ibid. (Principle 1—Scope of Application the present draft principles apply to trans-boundary damage caused by hazardous activities not prohibited by international law.)

72 Ibid.

73 Ibid. (Principle 2- (a) "damage" means significant damage caused to persons, property or the environment; and includes: (i) loss of life or personal injury; (ii) loss of, or damage to, property, including property which forms part of the cultural heritage; (iii) loss or damage by impairment of the environment; (iv) the costs of reasonable measures of reinstatement of the property, or environment, including natural resources; (v) the costs of reasonable response measures.)

74 Ibid. (Principle 2- (b) "environment" includes: natural resources, both abiotic and biotic, such as air, water, soil, fauna and flora and the interaction between the same factors; and the characteristic aspects of the landscape.)

etc. the purpose of the draft principles has been mentioned in Principle 3[75]& Principle 4[76] i.e. to take all necessary step to ensure adequate compensation, includes the liability of the operator without the proof of fault & requirement on the operator to maintain financial security.

The draft (2006) also provides for a procedure that is to be followed after the harm had been caused.[77] With the remedies available at international & domestic level[78] which lay emphasis on that the state of origin should provide with proper judicial & administrative bodies to give prompt & adequate compensation & moreover the remedies that are not available in that state can, without prejudice to any other remedy, be available. Moreover being a skeleton structure, the principles give way for effective arrangements[79] that is to be made for specific hazardous activities at the global or bilateral level. Moreover, arrangements must also include the supplementary additional compensation funds.[80] While the final principle talks about the cooperation to implement this draft principle are made without any discrimination & the state should adopt in municipal law as well.[81]

Cases

This paper so far had looked into the laws established via conventions & different draft articles made by the international law committee of UNO. On this matter i.e. draft articles on prevention of transboundary harm & draft articles on the allocation of loss in case of transboundary harm were also discussed. But before concluding paper, it is important to look into famous cases which had changed the outlook to the international law on the environment.

Trail Smelter Case (U.S.A. v Canada)[82]

Facts:

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75 Ibid. (Principle 3-Purposes The purposes of the present draft principles are: (a) to ensure prompt and adequate compensation to victims of trans boundary damage; and (b) to preserve and protect the environment in the event of trans-boundary damage, especially with respect to mitigation of damage to the environment and its restoration or reinstatement.)

76 Ibid.

77 Ibid, principle 5.

78 Ibid, principle 6.

79 Convention on Civil Liability for Damage resulting from Activities dangerous to Environment, European Treaty Series no. 150, adopted on 1993; International Convention on Civil Liability for Oil Pollution Damage, BGBI 1996 II s. 671, adopted on 1996; International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971; Basel Protocol on Liability and Compensation for Damage resulting from Transboundary Movements of Hazardous Wastes and their Disposal, UNEP/ CHW.1/WG/1/9/2 adopted on 1999.

80 Principles on the Allocation of Loss in the Case of Transboundary Harm Arising out of Hazardous Activities *(n 70)* principle 7.

81 Ibid principle 8.

82 *Trail Smelter Arbitration Case*, United States of America v. Canada, U.N. Rep. Int'l Arb. Awards, vol. III, 1941, pp. 1905-1982.

Columbia is the river that passes from the USA & Canada & in the city of Canada-Trail; there was a smelter company which helped in providing economic gains to the population there till initial times. Moreover, the Industry built on Columbia River at Trail was about 11 miles away from the US State- Washington's small rural community called Northport.[83] The issue was; the US alleged that the smelter is causing the harm to the tree, crop & other vegetation under its territory. "In 1925 & 1927, stacks, 409 feet high was set up to increase the output which in result led to further pollution in the regime"[84]

With the treaty signed by both the US & Canada in 1909, the International Joint Commission was established which under the article 5[85] heard the case.

Decision:

A crucial case as it propounded the principle of polluter pays & re-affirmed from the environmental point of view that territory should not be used in such a way that it causes harm to the other state. Moreover, the important aspect of this principle is it helped in the formulation of the concept of due diligence that had been taken up in draft articles (2001).

Gabcikovo Nagymaros Case (Solvakia v. Hungary) [86]

Facts:

The Danube is a river that runs across 200 km. of land between the Slovakia & Hungary. In 1977 both signed a treaty which gave them the head start for "construction & operation of Gabcikovo – Nagymaros system of locks"[87], it provided for clean hydroelectricity to both the regions. Now the issue was that Hungary unilaterally let go of the treaty thereby breaching the principle *pacta sunt sarvanda* on the pretext of environmental concern which was way too vague but rather the real reason being the change in the political structure which find no use of getting hold of hydroelectricity.[88] , but Slovakia did not leave this issue

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83 Catherine Prunella, 'An International Environmental Law Case Study: The Trail Smelter Arbitration', *International Pollution Issues*, 2014 available at https://intlpollution.commons.gc.cuny.edu/an-international-environmental-law-case-study-the-trail-smelter-arbitration/, accessed on 30 March 2018.

84 Law Teachers, 'The Trial Smelter Case', *Law Teacher Official Website* (July 2018) available at https://www.lawteacher.net/free-law-essays/international-law/trail-smelter-case.php?vref=1, accessed on 30 March 2018.

85 Ibid.

86 Gabcikovo Nagymaros Project Case, Hungary/Slovakia, Merits, 1997, ICJ Rep., p. 7.

87 Summary of ICJ Judgments, case concerning Gabcikovo-Nagymaros Project, *International Court of Justice Official Website* available at http://www.icj-cij.org/files/case-related/92/7377.pdf, accessed on 30 March 2018.

88 Slovakia.org-The Guide to the Slovak Republic, ' Gabcikovo Dam Dispute', *Slovakia Org*

here rather it moved further to find an alternative to this called variant C. The issue was at last resolved by calling ICJ to arbitrate in the matter.

Decision:

This case is important for environmental concern because Hungary used the cover of an ecological concern than the issue of political concern to decrease its own creditability.[89] The defenses of *force majeure*[90]*necessity*[91]*and the* changing environmental concerns etc. but ICJ has set all this aside & looked into the matter calling the act of Hungary unilaterally thereby dismissing the treaty as wrong, moreover the alternative that has been taken up by Slovakia was also not valid, thus calling up the two states to resolve it by own. i.e. to say, finally, the court prescribed this rather ambiguous solution- *Hungary and Slovakia must negotiate in good faith in the light of the prevailing situation, and must take all necessary measures to ensure the achievement of the objectives of the Treaty of 16 September 1977.*

Corfu Channel Case (U.K. v. Albania)[92]

Facts:

The case was between the UK & Albania and was decided by ICJ. In this case, UK warship was passing through Corfu channel, without permission of the latter state, Albania in return open fired on it. Later, the British ship was passing through the Channel was stuck by mines & severe damage took place. Then later the UK unilaterally took upon itself to clean the strait from mines. This caused a dispute between the two.

Decision:

ICJ upheld that there existed the responsibility of Albania, as it had the control of the strait & it is a solemn obligation on it to take due care of the strait. Thereby developing the principle of due care which has been one of the important concept used in the issues relating to the environment. Moreover, the case also laid the basis of reparations i.e. if a state due its irresponsibility causes harm to another state then it is an obligation upon the state to make good the loss.

Official Website available at http://www.slovakia.org/history-gabcikovo.htm, accessed on 23 March 2018.

89 Ibid.

90 ILC Draft Articles on State Responsibility (n 16) art 23.

91 Ibid, art. 25.

92 *Corfu Channel case, Albania v. United Kingdom,* Merits, 1949, ICJ Rep. p. 4.

Legality of Threat or Use of Nuclear Weapon[93]

Facts:

By the UN General Assembly resolution, ICJ was called upon to give an answer to the UN on the legality of threat to or use of nuclear weapons in any circumstances in International law?[94]

Decision:

ICJ unanimously upheld that, there is no International treaty or customary international law on the threat or use of nuclear weapon. Moreover not any one of the two sources prohibit the same, but by looking into the UN Charter provision the World court held that the threat or use of nuclear weapon amounts to use of force as mentioned in Art 2(4) of the Charter. Albeit Art. 2 of the charter there exists an exception which authorizes the use of force individually or collectively in pursuance of self- defense.[95]

But the most controversial issue of the case was the court had to decide between the state practice of all the states to collect the nuclear weapons as the mean of deterrence but, on one side *opinion juris* was claimed by them on not using the nuclear weapon post world war II. The court rejected the contention of establishing *opinion juris* ever since the 1950's on use of nuclear weapon.

Also, the court gave an open-ended answer to UN General Assembly wherein even though the use of a nuclear weapon can be used in armed conflict as no treaty or CIL expressly prohibits its use, yet keeping in view the humanitarian laws & growing consciousness to the environment the use of same is to be restricted. Thus at the end, a dubious answer was provided which had been severely criticized by all nations & Jurists.

Mox Plant Case (U.K. v. Ireland) [96]

Facts:

The case is between countries – UK & Ireland on the issue of establishing a plant in Sellafield of Irish Sea coast.[97] UK wanted to establish MOX (Mix oxide)

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93 *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996, ICJ Rep.,p. 226, para 29.

94 Judith Hippler Bello and Peter H. F. Bekker, 'Legality of the Threat or Use of Nuclear', vol. 91, no. 1, *American Journal of International Law p. 126,* 1997.

95 Charter of the United Nations, art 51.

96 Mox Plant Case, Ireland v. United Kingdom, 126 ILR 310, 2003.

97 Ted L. McDorman, 'Access to Information under Article 9 of the OSPAR Convention (Ireland v. United Kingdom)', vol. 98, no. 2, *American Journal of International Law p. 330,* 2004.

plant in the Irish coast & for this, it had done all the needful obligation under EURATOM treaty[98] which states that the economic/ social benefits should be found out by a commission before setting up the plant.[99] Moreover, the UK under its domestic laws formed the UK Environment Agency[100] to give the report. But Ireland who was reluctant to see any good in the report because of its policy to curb the use of sellafield for radioactive purposes contended that some part of the report has not been shown up to the public which is an important w.r.t span, sales price, production capacity etc. of the plant.

Decision:

Rejecting the plea of Ireland, the tribunal, formed under Article 32 of OSPAR Convention,[101] held that these documents related to the MOX Plant are not essential & does not come under the preview of Art. 9.[102] This case is way too central for the reason to show that the important aspect of the international law is to resolve litigation by application of hard laws, legally obligating treaty rather on the soft laws which in this case acts as an inspiration for environmental protection.

Pulp Mills on River Uruguay Case (Argentina V. Uruguay)[103]

Facts:

The matter was in regard to an issue between Uruguay & Argentina for industrial establishment on banks of Uruguay River. For the settlement of the dispute, there existed the bilateral mechanism which was established as 1975 statute of the river Uruguay, under the commission of river Uruguay.

Whereas the main contention was that two Uruguayan companies started the construction of pulp plant together and the investment was $1.7 billion which was one of the largest investments.[104] But on both sides, there was a different outcome where it gave more benefit to Uruguay and damage to the local rural

98 *European Atomic Energy Community*, 298 UNTS 167, adopted on 25 March 1957.

99 Ibid art. 32.

100 Permanent Court of Arbitration: Dispute Concerning Access to Information under article 9 of The Ospar Convention — Ireland v. United Kingdom, vol. 42, no. 5, *International Legal Materials* p. 1118, 2003 available at https://www.jstor.org/stable/pdf/20694411.pdf?refreqid=excelsior%3A9d97027c791b1469d6e1c2a4ed9d549a, accessed on 13 March 2018.

101 Ibid.

102 It focuses on the information be made available on the State of maritime area or activities that adversely affecting the maritime area.

103 *Pulp Mills on the River Uruguay, Argentina v. Uruguay,* Merits, 2010, ICJ Rep., p.14.

104 Cymie R. Payne, 'Pulp Mills on the River Uruguay (Argentina v. Uruguay)', vol. 105, no. 1, *American Journal of International Law* p. 94, 2011.

population of Argentina.

Argentina claimed that Uruguay had breached 1975 Statute, by not referring to the construction & industrial setup causing destruction to environment & river, by not notifying Argentina.

Decision:

The court upheld the claim of Argentina that, Uruguay failed to notify it via CARU as formed under 1975 statute, but did not hold Uruguay responsible for substantive breach as alleged by Argentina. Court held that the precautionary principle can't evade the responsibility of proving the burden of proof to the state contesting it. Moreover Art. 41[105] of the Statute have not been breached at all, as Uruguay had prepared the environmental impact assessment and not only this it also had the provision of public consultations, to add more the company production technology in order to meet the required standards. Court looked also into the impact it caused to water quality before & after the operation of the plant.

But this case was severely criticized because of the court's view on traditional approach on things i.e. burden of proof, the use of experts as counsels of both parties did not aid the court for technical assistance.

Some Other Aspects

Environmental studies & law is a field which is in consequence and includes many issues and subjects i.e. human rights, peace, security and economic development along with its own problem of implementation.

The main covenants[106] do not expressly deal with the issue of environment & human rights, yet due to ambiguity in this regard, the application of the same is seen in ICESCR.[107] There exist not many hard laws at regional level[108] on the same front; we still find the application of environment along with the protection of human right in countries of Europe, America & Africa.

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105 Article 4 of 1975 Statutes state that responsibility "to protect & preserve the aquatic environment & to prevent pollution, by appropriate measures, with guidelines."

106 *International Covenant on Civil and Political Rights*,999 UNTS 171, adopted on 16 December 1966; *International Covenant on Economic, Social and Cultural Rights*, 993 UNTS 3, adopted on 16 December 1966.

107 *International Covenant on Economic, Social and Cultural Rights*, 993 UNTS 3, adopted on 16 December 1966, art 11. (Article 11- Right to enjoy the highest standard of physical & mental health- with the subject to Article 12.)

108 *African Charter on Human and Peoples' Rights*, 21 I.L.M. 58, adopted on 1982; *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights* (*Protocol of San Salvador)*, A-52, adopted on 17 November 1988.

The issue of environment & peace-security has been expressly taken up in the Brundtland Report.[109] This relation is obvious because due to an armed conflict the danger to the environment increases multiple times & the optimum example of this could be the World War I & II along with the atomic bomb attack in Hiroshima & Nagasaki or the Kosovo Conflict, 1999. Thus there are many treaties which make the law applicable to the states who have ratified it like first additional protocol AP-I.[110] According to the International Committee of Red Cross, Art. 35(3) & art. 55(1) has become the CIL.[111] But apart from this, a question arises that whether these MEA are applicable in times of armed conflict? On this topic the soft law[112] comes to rescue & the famous case of 1996.[113]

The most controversial topic in relation to the environment is with respect to the economic development which was one of the most debated issues in Rio Declaration, on the north & south divide which was also on the issues that how can the developing/ developed countries can develop without causing any damage to the environment. Thus, here the Agenda 21 calls upon the economic actor to contribute to sustainable development by liberalizing the trade and by trade & environment supportive policy. WTO is one of the most important organizations when we talk about economic development before WTO there was GATT wherein the environment concern was not too much included.[114] But with the development in the 1970s with Tokyo Round & Uruguay Round that further took up in Rio Declaration, now in WTO agreements, we see great matter and concerns involving many grave environmental issues.[115] In 1995 the WTO Committee on Trade & Environment[116] was established to establish a link between international trade & environment within the WTO Agreement framework. Now the issue arises that, what is the relation between the WTO &

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109 Report of the World Commission on Environment and Development: Our Common Future, 21 May 1987, *United Nations Official Website* available at http://www.un-documents.net/our-common-future.pdf, accessed on 30 March 2018.

110 *Protocol Additional to the Geneva Convention 1949 and relating to the Protection of Victims of International Armed Conflicts*, 1125 UNTS 3, adopted on 7 December 1978.

111 Ulrich Beyerlin and ThilloMarauhn*, International Environmental Law*, Hart Publishing Ltd, Oxford, 2011.

112 Rio Declaration (n 56). (Principle 24, of Rio Declaration- State shall…. Respect international law providing protection for the environment in times of armed conflict & cooperate in further development, as necessary.)

113 *Legality of the Threat or Use of Nuclear Weapons* (n 93).

114 General Agreement on Trade and Tariff, Article XX, Para (b) - Measures necessary to protect human, animal or plant life or health & (g)- measures relating to conservation of exhaustible natural resources.

115 Preamble- nontrade issues: Living standards, full employment and optimal use of resources in accordance with the objective of Sustainable Development.
GATS- Art. XIV similar to Art. XX of GATT Agreement on TRIPS - Art. 27(2): allows the party to exclude the patentability in interest or wherein it is necessary to protect human, animal without the prejudice to environment etc.

116 Ulrich Beyerlin & Thillo Marauhn (n 111).

MEA? To answer this question we need to know the UN Convention on the law of treaties, 1969 Art. 30[117] and with the application of this article we can get to know that WTO agreements shall prevail on MEA.

Conclusion

After a detailed study of all the major issues & the draft articles together with the concept of state responsibility along some of the important cases we can conclude safely that all around the globe the states have become aware with regard to the ever-growing environmental issues. Starting from the global initiative by Stockholm Conference, 1972 the area of environmental problem is increasing day by day & the major problem is, as to fixation of the responsibility of state is that there is difficulty to get a nexus between the act of state that is alleged to have led to the harm to another state & the harm so caused to the state. Moreover, there are environmental issues which are being caused due to the contribution of many state & individual responsibility.

To add more to this problem we have certain issues which are the consequence of the lawful act of the state that has caused act, this is where the reason for the development of the draft articles (2001) & draft principles (2006) came into play.

Nonetheless, it is really difficult to ascertain as to what standard should be adopted to protect the environment keeping in mind that it is country's economic or national interest that makes them implement these laws relating to the environment as in their dealing with the other country. They are yet to take a conscious step as to the implementation of the steps as to the environment. Moreover, these important declarations like the Earth summit (1992) & Stockholm Conference (1972) are soft law instruments & have no or quasi-legal obligation.

At the end the major problem of international law is the enforcement of the laws as here the major subject we are dealing are the states which are sovereign in their application & no one can bound them unless they themselves make themselves self-bound (by application of *Pacta Sunt Servanda*), but the issue is they are sovereign & even if the economic sanction & political sanctions exist what will happen to international law when the powerful block themselves and feel reluctant to bind themselves thereby threatening the enforcement of laws.

[117] *Lex Posterior* rule.