

TRANSNATIONAL STATE RESPONSIBILITY FOR ENVIRONMENTAL HARMS IN INTERNATIONAL LAW *

1.1

INTRODUCTION

International environmental law challenges many fundamental concepts of traditional international law. It puts limits on State Sovereignty, intrudes into the domestic jurisdiction and territorial integrity of States, creates greater responsibilities for States, and involves many non-state entities in the process of international law. The sheer scale of the environmental issues¹ means that national action by itself, while important, is insufficient², and that significant international cooperation is required.

The international legal system offers considerable benefits to a State, from conferring recognition of its sovereignty to protecting its territorial integrity. Accordingly, as part of a State's consent to the operation of that system, it must accept corresponding legal obligations. Primarily, it must accept responsibility for its actions, which have an effect on other international legal persons and the international community at large. As stated by Judge Huber in the Spanish Zone of Morocco Claims Case:- 'responsibility is the necessary corollary of a right. All rights of an international character involve international responsibility'.³

State responsibility⁴ arises from the violation by a State of an international obligation. That obligation can be one of customary international law or a treaty obligation. The violation must be due to conduct attributable to a State. The enforcement of this responsibility is generally taken by a State either on its own behalf or on behalf of its injured national. However, as each State may decide for itself whether to enforce an apparent violation of an international obligation by another State, there may be no legal action taken against a State which has clearly violated international law. Additionally, as States themselves largely determine the scope of customary international law, they can allow certain exceptions to international obligations, and so determine for themselves when State responsibility exists.

International law allows States to run their economies in any way they deem fit.⁵ The State is free to locate its factories or industries and plants in any part of its territory and in the absence of any treaty to the contrary, to manufacture by whatever means military weapons including nuclear weapons. The State is equally free subject to treaty obligations to conduct nuclear tests in its territory or at the high seas or in any place that is not under the jurisdiction of any other State. The power to make laws to govern economic and other activities is an evidence of sovereignty. Through laws States can define, demarcate and proscribe any activity within their territories and indeed to extend such proscriptions to acts done outside their territories.⁶

International law would allow the culprits of environmental harm to be arrested and tried if they find their way, into the territory of the State. The exercise of jurisdiction is lawful so long as the criminal law under which arrest and trial are being made is not contrary to the rules of international law itself. In such a case, the State of the nationality of the accused would be estopped from any protests. Further, international law considers it an international tort for a State to use its territory in such a way as to cause environmental harm to the territory of another State. Despite the precedent supporting this position,⁷ the notion of State responsibility for transnational environmental harm remains uncertain.

The objective of this article is to examine critically the development of the law governing transnational environmental harm, with a view to finding some solid grounding in international law for the concept of transnational state responsibility, which has largely remained uncertain.

Part one focuses on the constituents of transnational environmental harm. Part two deals with the nature and scope of the notion of State responsibility for transnational environmental harm and the law governing it. Part three concludes by pointing out the way forward to solving the problem in this area.

2.2 TRANSNATIONAL ENVIRONMENTAL HARM

The word 'environment' is a description of physical matter, being the air, the sea, the land, natural resources, flora and fauna and the cultural heritage (being items of archaeological, historical, artistic and scientific interest). It can also be a description of a non-physical sense of surroundings and perceptions. The term 'environment' has been criticised, with terms such as 'ecosystems' and 'biological diversity' also used, however, it is a generally understood term and will be used here.⁸

The word 'harm' in law means, 'loss, detriment or damage resulting from any cause'.⁹ The term environmental harm could be understood to mean "an undesirable change in the physical, chemical or biological characteristics of air, land and water that may, or will harmfully affect human life or that of other desirable species, industrial processes, living conditions and cultural assest...".¹⁰

Transnational environmental harm therefore means, the introduction of substances or energy into the environment of one state in such a manner as to cause injury by fumes in or to the territory of another State or the properties or persons therein, when the cause is of serious consequences and the injury is established by clear and convincing evidence.

3.3 STATE RESPONSIBILITY FOR TRANSNATIONAL ENVIRONMENTAL HARMS

To begin this discussion, it is important to note that there is, at least on one level, some solid grounding in international law for the concept of state responsibility based on the principle that one state has a duty not to cause harm in or to the territory of another state.¹¹ In the Trail Smelter case,¹² Canada was found to be in violation of international law when emissions from an industrial plant located in British Columbia were causing environmental damage in the United States. The Arbitral tribunal held that:-

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.¹³

The tribunal found that this transnational air pollution namely, the emission of fumes containing sulphur dioxide from a factory at Trail at the Columbian River in Canada situated about 12 kilometers from the border with the USA and causing damage to persons and property in the state of Washington, USA, contravened both international law and the law of the USA "when the case is of a serious consequence". The tribunal observed that:- "a State owes at all times a duty to protect other States against injurious acts by individuals from within its jurisdiction".¹⁴

The tribunal thus qualified the limit of the exclusive jurisdiction of State over persons and property. Since such competence was conferred on states by international law that law has also the power to limit its exercise. Normally, acts of individuals, that is, factory operators or private companies engaged in commercial activities cannot be attributed to the States of their nationality as to make those States liable in international law.¹⁵ The tribunal however did not focus attention on the official members of the company and the legal consequences of their operation within the laws of Canada because the matter before it had an international complexion. The tribunal rather concerned itself with the responsibility of a state for the acts emanating from its territory and having an effect on another state.¹⁶

Would the injured persons within another State of emission be under a duty? Although the tribunal referred to "injurious acts by individuals" it does not follow that responsibility vanishes if the injurious acts were caused by organs of the state rather than by individuals. If a State contracts with a private company for the latter to send toxic waste into the State's territory which the State organs subsequently dump in a remote area of its territory from where leakages occur and the radioactive emissions cause damage in an adjoining territory, responsibility would attach a fortiori to the State of emission. This is because international law is essentially a law between States as distinct

from individuals. Acts of organs of a State are attributable to the State and if contrary to international law, make the State responsible. The distinction between State responsibility for its territory including anything done there and the responsibility of a State for the acts of its officials is a fundamental feature of international law. The tribunal was clear on this and it was in this light that it made the earlier mentioned profound assertion of the law that "no State has the right to use... is established by clear and convincing evidence".¹⁷

The tribunal links the "no-right" of a State with the fact that the injury has to be serious thereby implying that there is no duty where the injury is not serious. This thinking is faulty. Right and duty relationships are not pegged on the degree of injury caused or suffered. The law refuses to take this position to avoid the unending inquiry as to how serious must an injury be to attract liability. The tribunal was probably confusing quantum of damages resulting from a breach of an international obligation with the breach of obligation itself. This confusion introduced by the tribunal was repeated in the UN General Assembly Resolution 2995 which states that: "...in the exploration, exploitation and development of their natural resources, State must not produce significant harmful effects in zones outside their national jurisdiction".¹⁸

The Stockholm Declaration which was adopted by the United Nations Conference states the correct position of the law. In Principle 21 of the Declaration, it is recognised that States have the sovereign right to exploit their natural resources in accordance with their environmental laws. States in exercising this right are under a duty to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or areas beyond the limits of national jurisdiction.¹⁹

Another point which the tribunal referred to, albeit obliquely, was the fact that Canada refused to respect the claims of its neighbours. This has raised the question that perhaps liability in international law in such a situation can possibly be founded on the principle of good neighbourliness.²⁰ The content of this principle, it has been argued, includes an obligation on a State not to use its territory in such a way as to injure its neighbouring State; to respect the rights and integrity of its neighbour and to abstain from any action which would directly or indirectly affect its neighbours. Article 74 of the Charter of the United Nations recognised this principle of good neighbourliness.

The rule enunciated in the Trail Smelter case emphasised the fact that Canada and USA are neighbours and have similar laws on the issue. If 'neighbourliness' is taken to be proximity or propinquity it would then mean that no responsibility would arise if radioactive waste was dumped, for example, in an Island over which a State exercised sovereignty and which escaped into waters and destroyed flora and fauna not of immediate neighbours but of distant States. Indeed the neighbours in the Smelter Case were not both subjects of international law as Canada was then a dominion of the United Kingdom. Strictly speaking, the sulphure escape produced its effects on the territory of the United

States, although the tribunal held that:- "the Dominion of Canada is responsible in international law for the conduct of the Trail Smelter",²¹

The principle of good neighbourliness if viewed from the standpoint of international law as distinct from comparative municipal legal practices adopted by the tribunal²², would not be limited to neighbours in the literal sense. It enunciates a community interest not geographical proximity.²³

Finally, there is the vexed question of whether the emission which caused the damage ought to be knowingly done. A State in whose territory toxic waste is dumped and which has unsuccessfully taken steps to control an escape of the radioactive substances which could cause damage to health, property and environment of other States may deny responsibility. The Smelter case had no cause to deal with this matter. The so-called 'acid rain' that falls in Norway causing fish to die and metal to corrode, is believed to come from sulphur fumes emitted by industry in the United Kingdom and the Federal Republic of Germany and carried across the North Sea by wind, may fall also in line with this example.²⁴ International law is not settled whether to adopt strict liability as a basis for liability or fault.²⁵ In the Corfu Channel case, the World Court observed that States have an obligation:-

not to allow knowingly its territory to be used for acts contrary to the rights of other States.²⁶

If international law anchors liability on fault in case of damages resulting from escape of radioactive from the dump of toxic waste into the territory of a State it would become a licence for a free-play on peoples lives. The toxic nature of nuclear waste should be attended with strict liability. Handlers of such wastes as well as the State must be presumed to be familiar with the scientific knowledge of the hazardous nature of such wastes. When the subjective notion of fault is balanced with the dangers inherent in toxic waste disposal the conclusion to be drawn is that such wastes are dangerous things which when they escape and cause damage liability attaches fault or no fault.

Despite the precedent in the Trail Smelter cases, the law governing transnational environmental harm remains somewhat uncertain. Indicative of this, perhaps, is the fact that no states presented claims against the former Soviet Union for the enormous levels of damage they sustained as the result of the Chernobyl nuclear power disaster.²⁷ And in fact the governing body of law is itself fraught with indecision concerning liability. Principle 22 of the 1972 Stockholm Declaration sets forth the current "standard" governing liability for transnational environmental damage:- "States shall co-operate 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."²⁸

International law has also not been successful in controlling the environmental practices of transnational corporations (TNC). The efforts in the late 1970s and early 1980s to establish a draft Code of Conduct ultimately failed. In 1990, there was another attempt by G-77 and the United Nations Center on Transnational Corporations (UNCTC) to revive these efforts, but this went nowhere because of opposition from the Organisation for Economic Co-operation and Development (OECD) countries and the United States. In 1992, the UNCTC was closed and its activities integrated into the office of the United Nations Conference on Trade and Development (UNCTAD). In addition to these failed international efforts, industrialised countries have made little attempt to apply domestic restrictions to the environmental practices of their own corporations operating in other lands.²⁹ Where there have been some major advances in this area has been with regard to the transportation of hazardous and radioactive materials. Publicity over scandals concerning disposal of toxic chemical wastes in Africa brought this problem to the United Nations' Agenda. Law occupied the forefront of all debates because the lack of international law enabled the evasion of strict national laws by moving the problem, together with the toxic waste, to developing countries that had no protective legislation. The crucial role of law has been described succinctly by the WHO's Regional Office for Europe:- "A comprehensive system for the disposal of hazardous waste will not develop unless its basic requirements are prescribed and enforced by law".³⁰ The UN General Assembly affirmed the importance of law by urging governments to "take the necessary legal and technical measures in order to halt and prevent" illegal international traffic in and dumping of toxic wastes,³¹ and recognised "the necessity of developing rules of international law, as early as practicable, on liability and compensation for damage resulting from the transboundary movement and disposal of hazardous wastes."³²

The first important step in the development of international law in this area was the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal.³³ The Basel Convention is important for present purposes because of the changed perception of state sovereignty that it reflects. In theory, developing countries have always had the option of refusing to import hazardous waste from the West. Thus, a traditional approach would be to say that there was no need for such a Convention, and that attempts to regulate the transnational shipment of hazardous wastes would violate the sovereignty of states (receiving states and sending states alike). But what the Basel Convention recognizes – in fact, what it is premised upon – is that a country's responsibilities do not simply end at its borders. In 1989, the fourth ACP-EEC Convention of Lome went even further than the Basel Convention and adopted a prohibition on exports between the EEC and certain African, Caribbean and Pacific countries.³⁴ Furthermore, in 1990 the IAEA Code of Practice on the International Transboundary Movement of Radioactive Waste³⁵ filled in one of the gaps of the Basel

Convention and delegated financial and environmental responsibility to the originating country.

Notwithstanding these developments, the notion of responsibility for transnational environmental harm remains uncertain, and perhaps there is no better example of this than the case of French nuclear testing in the South Pacific. The health hazards of radioactivity have been addressed by the United Nations as early as 1955,³⁶ and safeguards are provided in numerous international instruments. These have continued the historical pattern of steadily lowering the permissible exposure to radioactivity in every subsequent revision,³⁷ thus affirming in law-making the general principle often reiterated by the WHO that any increase in the level of ionizing radiation in the atmosphere constitutes a threat to the health of present and future generations.³⁸

It is against this background that France carried out a number of nuclear tests far away from France, geographically and legally speaking. A series of atmospheric tests was carried out from 1966 to 1975 and underground tests followed from 1975 to 1992. A moratorium suspended nuclear testing from the year 1992 to 1995, but testing was resumed in 1995 and 1996. Legal challenges to this testing failed, as discussed below.

The first series of tests was challenged before the International Court of Justice (ICJ) by Australia and New Zealand, the argument being that the deposit of radioactive fallout from these blasts and its dispersion into the airspace of those two countries violated their state sovereignty.³⁹ The Court, however, avoided the issue altogether. It held that in view of the unilateral declaration made by the French Government concerning its intention to terminate atmospheric tests, the claims no longer had any object, and thus no decision was called upon to be given by the ICJ.⁴⁰

After France announced the resumption of nuclear testing in June 1995, protests and boycotts were soon supplemented by legal challenges made by potential victims. Three venues were approached – the European Commission on Human Rights, the court of First Instance of the European Communities, and the Human Rights Committee. The European Commission declared the applications inadmissible,⁴¹ as did the Human Rights Committee.⁴² The Court of First Instance of the European Communities went into the merits to a certain extent because the applicants were seeking interim relief, namely, asking for the Commission to exercise its powers under the European Atomic Agency Commission (EAEC) to refuse to assent to French nuclear tests on the grounds that they constituted “particularly dangerous experiments”.⁴³ The Court, however, denied locus standi to the applicants, claiming that they were not exposed to any more danger than any other residents of Polynesia.⁴⁴ In addition, it also interpreted Article 34 of the EAEC as obligating the Commission to assess the effects of nuclear tests on the affected people “based on considerations of public interest”.⁴⁵

In sum, all three human rights bodies denied that individual rights were at stake. Even more disappointing is the fact that each of these decisions was premised on the idea that France's view of its own "national interest" necessitated nuclear tests carried out on the other side of the globe, far away from where any and all harm would take place. The denial of access to Justice for the people who were exposed to the negative effects of French nuclear tests reveals just how easily such negative effects can be exported. This case also testifies to the continuing gap between the postulated universality of human rights, on the one hand, and the territorial limitation or restrictions of governmental obligations.

4.4 CONCLUSION

In the past three decades there have been enormous advances in the development of the law governing transnational State responsibility for environmental harms caused in another State and under the instruments to implement it States are no longer free to do as they will in the domestic sphere. Instead, they are bound by provisions of international law that are aimed at protecting the rights of receiving States of any transnational environmental harm.

The principles concerning imputability of acts to a State would seem to extend to where a State corporation causes pollution, or even where a State refuses to take any legislative, judicial or administrative action against perpetrators of environmental damage, who are of non-State bodies.* The OECD has recommended that the polluter pays.⁴ Yet, there must first be a recognition by States of their responsibility to ensure that the environment is adequately protected.

The International Law Commission has been examining international environmental harm as part of its report on 'International Liability for Injurious Consequences Arising out of Acts not Prohibited by International Law'. By so categorising the environment, it makes the (questionable) assumption that environmental harm is at present not prohibited by international law, and that damage must occur before any liability let alone responsibility, arises.

There may be a general interest of all States, being a right *erga omnes*, to seek to enforce environmental obligations, as suggested by Australia in the Nuclear Tests cases above.⁴⁸ To this end, the concept of State Sovereignty will have to be limited so that a common interest of the entire international community can be upheld. The reluctance of States to use international law to define the legal responsibility of the USSR in regard to the transboundary pollution caused by Chernobyl nuclear power plant accident in April 1986 highlights the difficulty in relying on States alone to determine the extent of State responsibility.

State responsibility may be able to be invoked in the environmental area where there is an intentional abuse of rights over territory and where a right to compensation arises from an otherwise lawful exercise of sovereignty. It could also be extended to include an obligation to provide information on environmental damage.

National legislation to protect the environment is continually growing. However, the Tasmanian Dams case⁴⁹ and Minors Oposa V. DENR⁵⁰ highlight the difficulty of attempts to enforce international environment standards in national courts, particularly because procedural issues, such as standing to bring a claim, and economic issues can also limit enforcement. The 1974 Nordic Convention on the Protection of the Environment⁵¹ is an unusual treaty, in that it gives some rights to individuals affected by environmentally harmful activities in another contracting State to bring a claim in their own State. In *Sierra Club v. Morton* case,⁵² before the Supreme Court of the United States, Justice Douglas said eloquently:-

The voice of the inanimate object, therefore should not be stilled. That does not mean that the judiciary takes over the managerial functions from the federal agency. It merely means that before these priceless bits of Americana (such as a valley, an alpine meadow, a river or a lake) are forever lost or are so transformed as to be reduced to the eventual rubble of our urban environment, the voice of the existing beneficiaries of these environmental wonders should be heard.⁵³

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