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PREVENTING TRANSBOUNDARY HARM - AN ANALYSIS OF THE ROLE OF ICJ

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Abstract:

This article investigates the role that the International Court of Justice (ICJ) had in the development of laws regarding cross-border environmental harm. In international environmental law, countries are prohibited from destroying the ecosystems of other nations or places outside of their jurisdiction. The no-harm rule, often known as the prohibition of transboundary environmental damage, stipulates that governments cannot engage in or authorize activities on their territory or in common areas that are harmful to other states or the environment. The duty derives from the sic utere tuo et alienum non laedas principle, which stipulates that states must not hurt or violate the rights of other states. This study investigates how international jurisprudence contributed to the need of this concept in international environmental law. In addition, it investigates how international law, state practice, multilateral environmental agreements, and the International Law Commission (ILC) have defined this norm. The no-harm criteria has been included into several environmental agreements and declarations and is regarded as international customary law. The execution of the rule in the actual world and its effects on modern international law pose various difficulties. What is transboundary harm to the environment? Does the rule apply to all damages or simply those above a certain threshold? Does the regulation mandate that all damage over the threshold be prevented, or is there a

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standard of care that may acquit the source state of liability? How should states act if the standard of care holds true? Is there a lower standard for developing states? The writers will examine relevant international law, mostly from the ICJ, to evaluate the legal content of the rule. In current international law, there is an obligation to prevent and regulate transboundary damage and pollution from activities within their control and to cooperate to reduce the risk of such harm by notification, consultation, negotiation, and environmental impact assessments.

Introduction:

Environmental issues are commonly regarded as one of the most pressing issues of our day. The environmental changes generated by humans are pervasive and severe on a national, regional, and global scale. Regional environmental issues, affecting many countries, include cross-border air and water pollution, the effects of resource exploitation, a decline in the quality and quantity of freshwater, nuclear accidents, and international commerce in hazardous waste and toxic chemicals. Global environmental issues include ozone depletion, extinction of species, ocean pollution, loss of biodiversity, diminishing food supply and reduced seafood supplies, deforestation, and human-caused climate change. Often, pollution and environmental concerns have a transboundary component, producing issues for and causing harm to nations other than the originating state and to global common areas. A famous example is a state upstream discharging pollutants into a river, causing harm to a state downstream. A recent example is the burning of forests and land in Indonesia, which generates haze pollution consisting of smoke and dust that drifts over international boundaries and causes health issues in Singapore and Malaysia.

Problems of cross-border damage and pollution can only be properly handled via cooperation and coordination between nations; in this respect, international law and institutions play a crucial role in creating a framework within which members of the international community may work together. The conventional reaction of international law to transboundary issues has been to impose responsibility on the state guilty of inflicting injury, so requiring that state to cease the behavior causing damage and to provide proper restitution to the wounded state. As instances of transboundary environmental damage have dramatically increased due to industrial development, new technology, and population growth, states have increasingly recognized the need for global solutions to environmental issues and that global environmental issues require rules for the protection of natural resources and the

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environment as a shared resource for all states. This insight gave rise to international environmental law. International environmental law is the branch of international law dealing with rights and responsibilities in the management of natural resources and the environment. It consists of both an evolving body of specifically environmental norms and general international law norms applied to environmental problems.

Defining transboundary Harm:

Clearly, not all negative consequences generated by environmental variables should be covered by the requirement not to create transboundary damage. In the literature, it is said that four elements must be met for an injury to qualify as a transboundary harm and hence fall under the responsibility.[1]

First, the injury must be caused by human action. However, not all harm produced by environmental causes that might impact more than one nation is the result of human actions; natural catastrophes such as floods, earthquakes, and hurricanes can also inflict extensive damage across large territories. In the literature, it is ruled that adverse environmental impacts do not come inside the scope of the responsibility unless they have a "reasonably proximate causal relationship to human activity."

The second requirement is that the injury must be a direct result of human action.[2] Thus, the responsibility often include the damage caused to natural resources by industrial and agricultural operations, although economic effects, such as a rise in commodity prices owing to environmental interferences, are omitted.

Thirdly, there must be an influence that transcends national borders.[3] An element that crosses international boundaries commences the application of international law. The illness may potentially have transboundary impacts that traverse numerous national lines, causing harm to many states. Typically, transboundary impacts transcend borders through a medium, such as water, soil, or air, such as when pollution from industrial activity in one state cause acid rain, which destroys forests and lakes in neighboring states. Current international law expands the no-harm criterion to cover

[1] Oscar Schachter, *The Emergence of International Environmental Law*, 44 JOURNAL OF INTERNATIONAL AFFAIRS , 457–493 (1991), https://www.jstor.org/stable/24357318.
[2] *Ibid*.
[3] *Ibid*.

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damage to locations outside state jurisdiction. The rule protects not just the regions under state control, but also the "global commons," which include the high seas, outer space, atmosphere, and Polar Regions.

The fourth criteria is that the alleged wrongdoing must be sufficiently severe to warrant judicial action. Clearly, nations cannot participate in or enable actions on their territory without considering the potential repercussions on regions beyond their control. Similarly, a state cannot require that other states refrain from all actions that may have transboundary environmental implications. Hence, not every boundary crossing injury is banned under the no-harm rule; the damage must surpass a particular severity threshold.[4]

Defining environmental damage in further detail and The criterion for injury

There is little question that damage and injury to property and people are covered by the general requirement not to cause transboundary harm; this was acknowledged in *Trail Smelter*, in which Canada was held accountable for economic loss "to the territory of another or the assets or persons within."[5] The issue of whether or not the responsibility extends to the preservation of the environment presents a challenge of a greater degree.[6]

In *Trail Smelter*, the tribunal acknowledged only economic injury and did not examine potential compensation for damage to broader environmental interests, such as ecosystem variety and wildlife, although the conventional perspective expressed in this judgment seems to have been abandoned today.[7] In *Lake Lanoux*, a possibility of environmental harm in the strict sense was implicitly acknowledged, as the Court referred to changes in the composition and temperature of the waters that allegedly harmed Spanish interests,[8] and separate claims regarding environmental damage were, for instance, presented in the Nuclear Tests cases and the case concerning Certain Phosphate Lands in

[4] *Ibid.*
[5] TRAIL SMELTER CASE (UNITED STATES, CANADA), 3 UNRIAA, p. 1905, 1952
[6] ALAN E. BOYLE ET AL., BIRNIE, BOYLE & REDGWELL'S INTERNATIONAL LAW AND THE ENVIRONMENT (Oxford University Press) (2021).
[7] ALAN E. BOYLE ET AL., BIRNIE, BOYLE & REDGWELL'S INTERNATIONAL LAW AND THE ENVIRONMENT (Oxford University Press) (2021).
[8] LAKE LANOUX ARBITRATION (FRANCE V. SPAIN) (1957), R.S.A., Vol. 12, 405.

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Nauru.[9] In Gabkovo-Nagymaros, the Supreme Court indirectly agreed that environmental harm might be considered independently by stating:

Hungary is entitled to compensation for the damage sustained as a result of the diversion of the Danube, since Czechoslovakia, by putting into operation Variant C, and Slovakia, in maintaining it in service, deprived Hungary of its rightful part in the shared water resources, and exploited those resources essentially for their own benefit.[10]

Furthermore, in Legality of nuclear weapons, the International Court of Justice (ICJ) pointed expressly to the need of nations to guarantee that operations within their jurisdiction and supervision preserve the environment. This requirement was reinforced in the Pulp Mills and Gabkovo-Nagymaros instances.[11]

Commentaries to the ILC Articles on Prevention include damage to "human health, industry, property, environment, or agriculture in other states,"[12] and Principles 21 and 22 of the Stockholm and Rio Declarations refer to responsibility for "damage to the environment," although the concept of environmental damage is undefined. The narrow Trail Smelter technique has been abandoned which seems to be the prevailing opinion in the academic literature.[13] Malgosia Fitzmaurice, for instance, believes that the current idea of damage encompasses both the "intrinsic worth of the environment" and particular ecosystem components.[14] Birnie, Boyle, and Redgwell note that treaty law does not offer a clear standard definition of what is meant by "environment" and hence "environmental injury"; the meanings change based on the aim of the treaty, and so a general definition of harm cannot be provided.[15] It is plausible that the responsibility applies not just to the loss of resources with a monetary value, but also to the intrinsic worth of natural ecosystems, biodiversity, and regions of wildness and aesthetic importance, for instance.[16]

[9] CERTAIN PHOSPHATE LANDS IN NAURU, NAURU V. AUSTRALIA, ICJ REP. (1992) p. 240.
[10] GABČÍKOVO-NAGYMAROS, PARA. 152.
[11] LEGALITY OF NUCLEAR WEAPONS, PARA. 29.
[12] ILC REPORT (2001) DOCUMENT A/56/10, P. 388 PARA. 4.
[13] PHILIPPE SANDS ET AL., PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW (Cambridge University Press) (2019).
[14] MALGOSIA FITZMAURICE ET AL., RESEARCH HANDBOOK ON INTERNATIONAL ENVIRONMENTAL LAW (Edward Elgar) (2021).
[15] PATRICIA W. BIRNIE ET AL., INTERNATIONAL LAW AND THE ENVIRONMENT (Oxford University Press) (2009).
[16] *Ibid*.

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As stated in the article, the no-harm criterion does not apply to all transboundary environmental damage; the damage must be of a specific magnitude. The necessity for a threshold criteria is inherent in the balance between the two purposes discussed, which is that states are obligated not to create harm beyond their borders, but also have the right, by virtue of their sovereignty, to utilize the natural resources inside their jurisdiction. A state cannot mandate that other nations refrain from all activities that may have transboundary environmental repercussions; doing so would violate the sovereign right of states to engage in economic activity on their own territory.

Damage thresholds are not defined in Principles 21 of the Stockholm and Principle 2 of Rio Declarations. The second segment of Principle 21 seems to concern avoiding "environmental damage" regardless of severity. To be considered, however, is the sovereign authority of states "to employ their own resources" in the first part of the notion. The two competing objectives must be reconciled, which necessitates harm qualification. Due to territorial sovereignty, other international law treaties that prohibit environmental harm without an explicit threshold must have a threshold. A threshold criterion is required, although its definition is debatable. Many treaties use the terms "substantial," "serious," "considerable," and "significant" to describe damage. Each term has distinct state obligations. International law has adopted a variety of approaches to the topic. Trail Smelter[17] and Lac Lanoux[18] set the threshold for transboundary hazard at "serious harm." Under recent judicial precedents, the parties' allegations indicate a lower harm threshold. In the matter of Certain Phosphate Lands in Nauru, Nauru urged the court to declare that Australia was "under a responsibility not to make changes to the state of the territory that may cause irreparable harm or materially affect the existing or contingent legal interests of another State."[19] In the Gabkovo-Nagymaros case, Hungary argued that the "obligation enunciated in Stockholm Principle 21 not to inflict significant injury on the territory of another State or on areas beyond national control" had established a norm of international law over time.[20] In the Aerial Herbicide Spraying case, Ecuador said, "Fumigations supplied by Colombia along or near the border line were transferred over the border, resulting in serious adverse effects in Ecuador."[21] The Pulp Mills ruling stated explicitly that "severe

[17] TRAIL SMELTER CASE (UNITED STATES, CANADA), 3 UNRIAA, p. 1905, 1952.
[18] LAKE LANOUX ARBITRATION (FRANCE V. SPAIN) (1957), R.S.A., Vol. 12, 405.
[19] CERTAIN PHOSPHATE LANDS IN NAURU, NAURU V. AUSTRALIA, ICJ REP. (1992) p. 240.
[20] GABČÍKOVO-NAGYMAROS, HUNGARY'S MEMORIAL, P. 318.
[21] AERIAL HERBICIDE SPRAYING (ECUADOR V. COLOMBIA), APPLICATION INSTITUTING PROCEEDINGS, PARA 3.

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environmental damage" was the obligation.[22] The barrier has been decreased by the growing knowledge of irreparable environmental harm and environmental protection. Current research and Articles on Prevention[23] concur that the criterion applies to "substantial" harm.[24]

While there seems to be unanimity about the necessity of "substantial injury," it is not feasible to provide definitive answers regarding the precise meaning of "significant." So, its substance must be established in connection to the precise context of each event, since severity varies with context.[25] According to the comments to the Articles on Prevention, the threshold should be assessed using "factual and objective criteria."[26]

The procedure for determining the exact threshold, i.e. where to draw the line between considerable and insignificant injury, is also unclear. In the literature, two alternate techniques are presented.[27] The first method suggests that the threshold of damage must be decided by weighing the socioeconomic value of an activity against its negative impacts on the environment; hence, the acceptable degree of harm increases as the economic and developmental benefits of the activity grow. This strategy takes into consideration a country's economic and technological capabilities; accordingly, the threshold of damage differs between developed and poor nations. A disadvantage of this strategy is that it may let the value of the activity to exceed the severity of the injury.

According to the second method, a de minimis test must be used to the injury, which suggests that the threshold is exceeded if the harm is not minimal, i.e. inconsequential or trivial. This approach is used by the ILC in the Articles on Prevention, since the definition of "significant" in the comments exceeds "detectable."[28] Yet, the method does not specify which types of injury are important and which are not.

[22] PULP MILLS ON THE RIVER URUGUAY, ARGENTINA V URUGUAY, ORDER, PROVISIONAL MEASURES, ICJ GL NO 135, [2006] ICJ REP 113, (2006) 45 ILM 1025, ICGJ 2 (ICJ 2006), 13TH JULY 2006, UNITED NATIONS [UN]; INTERNATIONAL COURT OF JUSTICE [ICJ].
[23] ILC REP. (2001) DOCUMENT A/56/10, P. 388 PARA. 4.
[24] R. LEFEBER, TRANSBOUNDARY ENVIRONMENTAL INTERFERENCE AND THE ORIGIN OF STATE LIABILITY (Kluwer Law International) (1996).
[25] *Ibid.*
[26] *Ibid*.
[27] R. LEFEBER, TRANSBOUNDARY ENVIRONMENTAL INTERFERENCE AND THE ORIGIN OF STATE LIABILITY (Kluwer Law International) (1996), pp. 87-89.
[28] ILC REP. (2001) DOCUMENT A/56/10, P. 388 PARA. 4.

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Prevention and control of harm

As demonstrated in the article, the general rule prohibiting the causing of transboundary harm, which is rooted in the principle of state sovereignty and developed on the basis of the Trail Smelter arbitration, is the traditional basis for the regulation of state conduct in the field of international environmental law. An important concern is whether the need not to create transboundary environmental damage is only responsibility ex post facto, or whether it also includes an obligation to avoid and manage risk of harm. When environmental damage, such as species extinction, waste of nonrenewable resources, marine pollution, or nuclear fallouts, happens for the first time, it is often irreparable. Hence, damage prevention is vital for addressing environmental concerns.

Already in Trail Smelter, the significance of harm prevention was recognised in international law, as the tribunal ordered Canada to take measures to prevent future harm, and state practise and more recent judicial understandings of the obligation reflect the view that the obligation is one of prevention.[29] For instance, in the first Nuclear Tests case, the intricate chain of causation between the tests and subsequent impacts on the environment and human health made it difficult to establish serious harm to the Court's satisfaction. Australia therefore downplayed the requirement of actual damage to have occurred, and instead based its argumentation on a view that deposit of radioactive material violated international law even if it could not be established that the material caused actual damage.[30] In the second Nuclear Testing case, New Zealand argued that the plan to conduct nuclear tests without a previous risk assessment would be unlawful, regardless of whether real damage happened.[31]

Principle 21 of the Stockholm and Principle 2 of the Rio Declarations are often read as requiring the prevention and management of damage.[32] In Legality of Nuclear Weapons, the International Court of Justice slightly modified the language of the principle from requiring states to ensure that activities under their jurisdiction and control do not "harm" the environment to requiring states to ensure that

[29] TRAIL SMELTER CASE (UNITED STATES, CANADA), 3 UNRIAA, p. 1905, 1952.
[30] Remus Prăvălie, *Nuclear weapons tests and environmental consequences: A global perspective*, 43 AMBIO , 729–744 (2014).
[31] NUCLEAR TESTS, AUSTRALIA V FRANCE, JUDGMENT ON ADMISSIBILITY, [1974] ICJ REP 253, ICGJ 133 (ICJ 1974), 20TH DECEMBER 1974, UNITED NATIONS [UN]; INTERNATIONAL COURT OF JUSTICE [ICJ],
[32] ILC REP. (2001) DOCUMENT A/56/10, P. 390 PARA. 3.

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such activities "respect" the environment.[33] Uncertainty exists as to whether the Court intended to make any substantial alterations to the concept; nonetheless, the use of the broad term "respect" may imply that the principle is extended to situations when no harm is committed. Eventually, the International Court of Justice acknowledged that nations had a duty to avert injury. In the Gabkovo-Nagymaros case, it was determined that "vigilance and prevention are essential in the sphere of environmental protection due to the sometimes irreparable nature of environmental harm and the inherent limits of the mechanism for repairing this sort of damage."[34]

Recently, in the Pulp Mills judgement, the Court ruled that states are "obligated to use all available means to prevent activities from occurring on their territory or in any area under their jurisdiction that cause significant damage to the environment of another State".[35] This is in accordance with the Articles on Prevention, which suggest that the requirement not to create transboundary environmental damage includes a duty of preventive. Throughout the Articles' remarks, it is also highlighted that, from a policy standpoint, prevention is preferable than cure:

The notion of prevention has gained a prominent and timely role. The focus on the responsibility to prevent, as opposed to the requirement to repair, rectify, or compensate, has a number of significant implications. Prevention should be favoured since compensation in the event of damage cannot frequently restore the state that existed before to the incident or disaster.[36]

To hold states accountable for a breach of the no-harm rule, either for causing environmental damage or for failing to take steps to avoid harm, it is required to establish a legally relevant state activity or to impute private actions to the state.[37] The majority of environmental harm and pollution is created by private actors, generally via industrial and agricultural operations, and is not always the responsibility of the government. Even when private actors engage in activities that cause environmental damage, the state still has the responsibility to regulate these actions.[38] In Trail Smelter, the arbitral panel determined that the norm it articulated also extended to private operations

[33] LEGALITY OF THE THREAT OR USE OF NUCLEAR WEAPONS, PARA. 29.
[34] GABČÍKOVO-NAGYMAROS, PARA. 140.
[35] PULP MILLS ON THE RIVER URUGUAY, ARGENTINA V URUGUAY, ORDER, PROVISIONAL MEASURES, ICJ GL NO 135, [2006] ICJ REP 113, (2006) 45 ILM 1025, ICGJ 2 (ICJ 2006), 13TH JULY 2006, UNITED NATIONS [UN]; INTERNATIONAL COURT OF JUSTICE [ICJ].
[36] ILC REP. (2001) DOCUMENT A/56/10, P. 377 PARA. 2.
[37] ALEXANDRE CHARLES KISS & DINAH SHELTON, GUIDE TO INTERNATIONAL ENVIRONMENTAL LAW (Martinus Nijhoff Publishers) (2007).
[38] Christina Voigt, *State responsibility for damages associated with climate change*, RESEARCH HANDBOOK ON CLIMATE CHANGE LAW AND LOSS & DAMAGE , 166–183 (2021).

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that are not adequately regulated by the government, stating that "State has at all times a responsibility to safeguard other States from harmful conduct by persons under its jurisdiction."[39] Principle 21 makes no distinction between state and private activity, but typically requires governments to guarantee that their territory does not cause harm. The Articles of Prevention address the problem by requiring prior authorization for actions conducted on its territory or otherwise under its authority or control that pose a danger of producing severe transboundary damage.[40] Throughout the commentary, it is highlighted that states are not compelled to participate in operational matters pertaining to the activities covered by the articles. It states "When these activities are done by private people or businesses, the State's role is restricted to developing the proper regulatory framework and executing it in line with these rules".[41]

Standard of Care

The amount of prevention needed according to the obligation, i.e., what standard of care is required in the context of the no-harm rule, is an important question. There have emerged two general approaches to this issue. The first approach holds that states are required to accomplish genuine damage prevention. The alternative viewpoint is that states are required to implement preventive measures with due care. Another way to conceptualize this issue is to consider whether the no-harm rule is a result-based or conduct-based rule.

As per the first perspective, it is incumbent upon states to attain effective prevention. Consequently, states bear the onus for any harm resulting from their conduct, irrespective of any lack of care or culpability. The aforementioned principle operates on the basis of strict liability, whereby the occurrence of damage is sufficient to activate the no-harm rule, provided that the requisite threshold is surpassed and a causal connection between the activity and the damage can be established.[42] The aforementioned approach places significant emphasis on determining the degree of harm that is deemed acceptable under the obligation, as well as on the concept of causation.[43]

[39] TRAIL SMELTER CASE (UNITED STATES, CANADA), 3 UNRIAA, 1952.
[40] ILC REP. (2001) DOCUMENT A/56/10, P. 399 PARA. 2.
[41] *Ibid*.
[42] Richard S.J Tol & Roda Verheyen, *State responsibility and compensation for climate change damages—a legal and Economic Assessment*, 32 ENERGY POLICY , 1109–1130 (2004).
[43] Christina Voigt, *State responsibility for damages associated with climate change*, RESEARCH HANDBOOK ON CLIMATE CHANGE LAW AND LOSS & DAMAGE , 166–183 (2021).

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Numerous industrial operations, including the manufacture of hazardous chemicals and the generation of nuclear power, present a significant threat to both human health and the environment. As a result, it is widely believed that the individual or organization seeking to engage in such inherently hazardous activities should assume responsibility for any accidents or harm resulting from said activities.[44] In response to this phenomenon, there has been a development of strict liability regimes in national legal systems, and certain international agreements, such as those pertaining to the transportation of nuclear materials and oil pollution by sea, require private operators to bear strict liability in cases of harm.[45] Certain scholars have contended that ultra-hazardous activities in the context of environmental harm are typically subject to a standard of strict liability. According to Sands and Peel, the imposition of strict liability for such activities could be regarded as a fundamental principle of international law.[46]

An alternative perspective suggests that the primary responsibility of preventing harm lies in the conscientious execution of preventative measures through due diligence. This approach posits that the application of due diligence serves as a criterion for assessing the behavior expected of states, and the violation of the no-harm principle occurs when the prescribed level of diligence is not observed. This approach presupposes that in the event that the state satisfies the necessary standard of care, and harm ensues nonetheless, the state is absolved of liability.

The strategy employed by the ILC with regards to the Articles on Prevention is as follows. As per the commentaries on the Articles, it is not mandatory for states to ensure complete prevention of significant harm in situations where it is unfeasible to achieve such prevention.[47] The state is obligated to make its utmost efforts to reduce the risk, and therefore, the obligation is not violated even if considerable harm is inflicted. The obligation is triggered by the state's failure to take rational measures to avert harm. The aforementioned statement acknowledges the acknowledgement of the principle that the rule is founded on a negotiated settlement between the preservation of territorial

[44] RODA VERHEYEN, CLIMATE CHANGE DAMAGE AND INTERNATIONAL LAW: PREVENTION DUTIES AND STATE RESPONSIBILITY (Nijhoff) (2005).
[45] *See* THE 1971 CONVENTION RELATING TSANDSO CIVIL LIABILITY IN THE FIELD OF MARITIME CARRIAGE OF NUCLEAR MATERIAL AND THE 1969 CONVENTION ON CIVIL LIABILITY FOR OIL POLLUTION DAMAGE.
[46] PHILIPPE SANDS ET AL., PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW (Cambridge University Press) (2019).
[47] REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FIFTY-THIRD SESSION UNITED NATIONS - OFFICE OF LEGAL AFFAIRS, https://legal.un.org/ilc/documentation/english/reports/a_56_10.pdf (last visited Apr 22, 2023).

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unity and territorial autonomy; a duty of effective prevention would likely be perceived as an excessive infringement upon the autonomous authority of states to govern and utilize their own natural resources. Transforming a real prohibition into a conduct obligation renders it more readily embraced by nations.

The approach is supported by international jurisprudence that posits the no-harm rule as an obligation to exercise reasonable care. In the Corfu Channel incident, a due diligence test was implemented. The ICJ conducted a thorough evaluation of Albania's conduct in relation to the explosions that occurred in Albanian waters and the consequential damage, in order to determine whether Albania was responsible for these events.[48] The Court determined that Albania failed to provide notification of the minefield's existence or to alert the warships of the peril they were approaching. Additionally, Albania did not take any measures to avert the catastrophic event. The study determined that Albania bears international responsibility for the serious omissions identified. It acknowledged that the issue of whether a state has violated its obligation to refrain from causing harm to other states hinges on whether the state in question has acted with a particular level of care. The study further noted that a state's failure to implement reasonable measures to prevent harm is what triggers this obligation.

The affirmation that the no-harm principle entails a duty to exercise reasonable care is further corroborated in contemporary legal precedents established by the Court. The Pulp Mills case is noteworthy for the Court's explicit statement that the duty to uphold the environment of foreign states entails a responsibility to exercise reasonable care.

The Court notes that the origins of the customary principle of prevention lie in the obligation of a state to exercise reasonable care on its territory. It is 'every State's obligation not to allow its territory to be used knowingly for acts that violate the rights of other States' (Corfu Channel (United Kingdom v. Albania)). A state is thus obligated to use all available means to prevent activities on its territory or in any area under its jurisdiction from causing significant environmental damage to another state. This Court has determined that this obligation "is now part of the body of international environmental law."

In its judgment, the Court examined whether approval, construction, and future commissioning of two pulp mills constituted a violation of substantive treaty obligations stipulated by the 1975 Statute

[48] *Corfu Channel Case (United Kingdom v. Albania); Assessment of Compensation*, 15 XII 49, International Court of Justice (ICJ), 15 December 1949

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of the River Uruguay. Argentina claimed that the substantive obligations to manage measures to avoid alterations to the ecological balance, to avert pollution, and to safeguard the aquatic ecosystem was violated, as toxic pollutants from one of the mills had altered the ecological balance of the river, and argued that these responsibilities were result obligations. This argument was expressly rejected by the Court, which determined that both states had a duty of conduct to cooperate on their regulatory operations for the purpose of maintaining the ecological equilibrium and stated that "an obligation to adopt regulatory or administrative actions either separately or jointly and to impose them is an obligation of conduct."

Future Challenges:

Climate change is widely regarded as one of our generation's most significant environmental challenges. The most recent reports from the Intergovernmental Panel on Climate Change concluded that the warming of the climate system is undeniable and that the human influence on the climate system is unmistakable. The panel has enumerated a number of severe effects of climate change, including health and ecological damage, loss of land and property, threats to human security, and potential human casualties. What role international environmental law should play in addressing current and future climate change damages, as well as the role of international courts and tribunals in this context, are topics of extensive debate. In this section, I will provide an overview of the primary challenges posed by the application of the no-harm rule in the context of climate change.

A question raised in the literature is whether legal obligations under the no-harm rule can be applied alongside the climate regime, or whether the UN Convention on Climate Change and the Kyoto Protocol have superseded rules of general international law in the context of climate change in accordance with the doctrine of lex specialis. The essence of the doctrine is that principles of general international law may not apply if a specialised legal system of international law is intended to create a self-contained regime. In order to determine whether general principles of international law were intended to be excluded, it is necessary to consider the intent of the legal system's parties. In the literature, the prevailing view appears to be that neither the scope of the climate change treaties, the negotiation history, nor the intent of the parties indicate that the regime is lex specialis vis à vis general rules of international law, and therefore that the no-harm rule remains applicable in the context of climate change. A difficulty associated with applying the no-harm rule in this context is

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the no-harm rule's ambiguity, which involves a number of substantial uncertainties. As demonstrated by the discussion of the substantive content of the no-harm rule, the duty of due diligence requires an equitable balance of the duties and interests of the state of origin and the affected state; consequently, it is nearly impossible to define an objective standard of care. Even if it is proven beyond a reasonable doubt that global warming poses a significant threat to the environment, this risk must be weighed against the significance and desirability of the emitting activities. It is difficult to foresee the outcome of the due diligence evaluation because there is no obvious answer for how the various factors should be weighted in the balancing test. In most instances, it will be difficult for the affected state to demonstrate that another state did not act with reasonable care. Moreover, the multiplicity of victims and pollutants poses a unique challenge in the context of climate change: this raises questions without clear answers in international law, such as the allocation of damages among polluting states.

In addition, it is evident that a claim to the ICJ for damages caused by climate change would encounter jurisdictional obstacles. A constraint inherent in all contentious cases is that both states must assent to the Court's jurisdiction. Importantly, in the context of climate change, a lawsuit concerning the effects of global warming would involve difficult questions of legal standing.

Literature suggests that climate change litigation, along with efforts to find political and legal solutions through international negotiations, may play an important role in combating global warming, and that the ICJ, with its unique visibility and status, could make significant contributions in this regard. Intriguingly, there is a prospect that the Court will address the applicability of the no-harm rule in the context of climate change in the relatively near future. In September 2011, the President of the island nation of Palau petitioned the UN General Assembly to request an advisory opinion from the ICJ on the responsibilities of States under international law to ensure that activities conducted under their jurisdiction or control that emit greenhouse gases do not harm other states. The present formulation of the proposed query as communicated by the Permanent Mission of Palau to the United Nations is as follows: What obligations does international law impose on a state to ensure that greenhouse gas-emitting activities under its jurisdiction or control do not cause or substantially contribute to severe injury to another state or states?

If this query is posed to the ICJ, the Court will be required to specify the content of international law

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norms pertaining to transboundary damage, taking into account both customary and conventional law. It is likely that Palau will invoke the no-harm rule, and this will provide an occasion for the Court to address the rule's applicability to greenhouse gas emissions and the obligations it imposes on a state in this context. The formulation of the question further implies that the Court will only be asked to address fundamental obligations under international law, meaning that the Court would not be required to engage in politically contentious questions regarding secondary rules, such as the attribution of responsibility for injury, etc.

If Palau is successful in obtaining the General Assembly's support for a request for an Advisory Opinion, the Court will have an unprecedented opportunity to clarify the state of international law in this area. Despite the fact that advisory opinions are non-binding, the preceding discussions of this thesis have demonstrated that this type of decision can still carry considerable persuasive weight in subsequent cases and unquestionably contribute to the clarification and development of the law.

One may question whether the International Court of Justice is an appropriate venue for addressing climate change issues and whether a ruling or advisory opinion on the subject would be a step in the correct direction in terms of confronting these global challenges. Evidently, no judicial decision can displace the need to negotiate international legal and political solutions for the comprehensive management of greenhouse gas emissions. Certainly, an advisory opinion on the matter will serve as an essential reminder of the grave consequences of climate change, particularly for Island States such as Palau, in light of the recent failure of diplomatic climate change negotiations to advance. If successful, it could increase Palau's prospects of obtaining compensation for climate change-related damages. Nonetheless, if the Court takes a restrictive stance on the issue, a ruling from the Court may reduce the pressure on states to change their behaviour by "letting them off the hook" legally; as a result, there is a risk that an advisory opinion would hinder efforts to reach political solutions through negotiation.

Conclusion:

The discussions in the preceding chapters of this study indicate that the ICJ played a role in transforming the old principle of international law – that states are obligated not to harm or violate the rights of other states – into an obligation not to harm the environment of other states or areas

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beyond national jurisdiction. As the rule has taken shape as a rule of international environmental law, two particularly significant aspects have been added. In the first place, the Court has confirmed unequivocally that the rule applies to areas beyond national jurisdiction. Consequently, unlike the old sic utere principle, it does not only apply to exclusively transboundary harm to neighboring states. It also applies to harm done to the "global commons" and, ostensibly, not only to damage done to states in the global commons, but also to the environment of the global commons. Although the International Court of Justice has not explicitly stated that even the intrinsic value of the environment, such as natural ecosystems and biodiversity, is protected by the rule, the Court has repeatedly emphasised that it attaches great importance to respect for the environment, both explicitly and implicitly, by recognising that the protection of the natural environment constitutes an essential interest.

With the Court's assistance, another significant dimension has been added to the rule: prevention. The Court has thus confirmed that the obligation is not simply one of responsibility ex post facto, but also one to prevent and control the risk of significant transboundary harm, implying that the rule creates legal obligations prior to the occurrence of harm. The ICJ has applied the obligation as one of due diligence and one of conduct rather than outcome, and in Pulp Mills the Court significantly strengthened the due diligence obligation by affirming in clear terms that states are required to "use all the means at its disposal" to avoid transboundary harm. The no-harm rule therefore requires states to take proactive measures in addition to merely refraining from causing transboundary harm. In addition, the Court has indicated that, while a breach of the procedural duties to notify, consult, and negotiate does not necessarily constitute a breach of the duty of due diligence, compliance with these duties reduces the likelihood of substantive violations. A prior environmental impact assessment is also required when there is a possibility that the proposed industrial activity will have a considerable negative impact in a transboundary context. How high the risk of injury must be for the obligation to prevent to be triggered is an important question. Herein lies an opportunity for the ICJ to provide clarifications, but the Court has thus far provided little guidance on this matter.

Lack of reciprocity in international environmental law is one reason why the no-harm rule may be insufficient for managing global environmental issues. The concept of reciprocity is pervasive in international law. The essence of the concept is that states frequently refrain from pursuing a course of action that may be advantageous to them in the short term, because doing so could disrupt

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reciprocal tolerance and thus result in long-term disadvantages. In the context of environmental protection, however, this incentive to act reasonably and moderately due to the expectation that this will also encourage other states to act along the same lines, which is typically applicable to obligations and rights of states, does not apply as well. This is due to the fact that legal interest in the preservation of the environment is frequently shared rather than reciprocal, and environmental harm is frequently a harm to the community as a whole rather than to a specific party. Consequently, this traditional procedure appears inadequate for addressing environmental damage that crosses international borders on a global scale.