NAVIGATING THE WATERS: THE INTERSECTIONS OF INTERNATIONAL LAW, ENVIRONMENT AND HUMAN RIGHTS

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Abstract: Over the years, the relationship between the environment and human rights has received global attention. The connection between the individuals, environment and international law is indispensable. However, domestic environmental activities and globalisation set domino effects on climate change where the actions within one jurisdiction affect the environment of neighbouring states. Sovereignty, state obligations and human rights are instruments that can regulate the protection of the environment. Set against this background, this paper will assess the contribution of international law to the protection of the environment, particularly the extent of enforceability of general state obligations through the 'no harm rule.' Arguably, transboundary harm is inevitable in most environmental activities. Therefore, the engaging state is obligated to take measures known as due diligence to regulate the transfer of transboundary harm. The threshold for these environmental activities is significant transboundary harm. In addition, it is observed that there is a limit to which state can be held accountable for violations of human rights where corporate actors, through their business activities, have contravened human rights. Hence, through case analysis, this paper examines the extent of corporate legal accountability for environmental degradation.

Keywords: Sovereignty, Due Diligence, Environment, Human Rights, State Responsibility, International Law.


Kata Kunci: Kedaulatan, Uji Tuntas, Lingkungan, Hak Asasi Manusia, Tanggung Jawab Negara, Hukum Internasional
Introduction
To date, there has been no agreement on the precise definition of the 'environment' because a specific definition tends to limit its scope and meaning. However, the environment has been defined to include: "natural resources both biotic and abiotic, such as air, water, soil, fauna and flora and the interactions between the same factors." Although the differences in opinions still exist, there appears to be an agreement that the environment is an abode for man, animals, plants and the ecosystem.

This denotation exemplifies that the environment is neither watertight nor abstract; it is both a biological and social reality. Biological reality because of the functional ecosystem and social reality as a result of the inherent social order. Moreover, there is an interconnectedness between one domain and the other. Thus, the activity in one region will inadvertently filter into another. One of the most significant challenges of the sovereignty of states in international environmental law is that despite the boundaries that separate each territory, some environmental concerns cannot be contained exclusively within a jurisdiction because of biotic and abiotic factors. And the inability to enclose the result of some anthropological activities, on the other hand. As a result of this, environmental damage in one territory inevitably affects another. Thus, the fluidity of the environment reinforces complex interactions between people, the environment and states. Over the years, the developments in international environmental law, including legal frameworks, declarations, rules of customary international law, emphasise delimitation. Arguably, the principle of state sovereignty in the global environment is not absolute- a similar outcome of the sovereignty of states in international law and relations. States are required to consider the impact of their environmental exploits on the surrounding territories.

This paper seeks to examine the limitation placed on state sovereignty vis-à-vis the principles of international environmental law: precautionary principle and 'no harm rule.' In addition, this paper will also assess the relationship between human rights and the protection of the environment.

How enforceable would such an obligation be?
Central to the development of international environmental law is Principle 21 of the Stockholm Declaration, which stipulates that states in conformity with the United Nations Charter and international law principles have the sovereign right to exploit their resources pursuant to their environmental and developmental policies. However, with this autonomy comes the obligation 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.'

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2 Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, Lugano 1993, Art.2(1).
4 Ibid (n 3 6).
Similarly, Principle 2 of the Rio declaration is identical to the above provisions. This principle is expressed in the Latin maxim *sic utere tuo ut alienum non laedas*; 'no one has the right to use his property in such a way to cause harm to another.' It is noteworthy that both provisions specify soft laws for transboundary activities within a State, obligations which are not legally binding, given the persuasive nature of these soft laws. However, some courts and tribunals have held States responsible for the degradation of the environment. It shall be discussed somewhere in this paper. In addition, it is argued that the protection of human rights and the environment are inalienable.

Evidence suggests that climate change objects to the traditional view that what happens in one sovereign state has no corresponding effect in another state. Although both natural and anthropogenic causes are attributable to climate change, while less can be done to curb the natural causes of climate change, the best way to mitigate climate change is to reduce anthropogenic activities responsible for climate change. This notion is the underlying factor for the United Nations Framework on Climate Change Convention (UNFCCC) and the adoption of the Kyoto Protocol. This Kyoto protocol sets out obligations for state parties on the mitigation of climate change. In addition, it adopts the principles of customary international law to address climate change. Both laws are legally binding on the signatories. One of the drawbacks is compliance, monitoring and implementation. Due to the inability of most states to meet up with their quota and commitments, it becomes challenging to prevent transboundary harm. Interestingly, it appears the precautionary principle provides reasonable steps to be taken to reduce transboundary damage.

The precautionary principle provides that scientific uncertainty shall not be used as a defence to suspend cost-effective measures to prevent environmental degradation, where serious or irreversible damage is imminent. In a similar vein, other conventions contain this provision, for instance, the preamble to the Vienna Convention for the Protection of the Ozone Layer 1985 and the UNFCCC. This principle focuses on measuring and managing the risk caused by industrial and technological development, otherwise deleterious to the environment if these measures were not taken to forestall such occurrence.

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10 Ibid (n 9).


As mentioned earlier, at the centre of the limitation of state sovereignty is the obligation to prevent transboundary damage (the "no harm rule"), which can be said to entail state responsibility.\(^{15}\) A classic example of a transboundary harm case is the *Trail Smelter* case\(^{16}\); in this case, the United States of America (USA) brought an action against Canada for the emissions of Sulphur dioxide from Canadian Smelter, which resulted in air pollution in Washington. Also, the USA filed an injunction to prevent future pollution from the Smelter. The Tribunal found Canada responsible for Sulphur dioxide pollution, awarded damages to the USA and, granted the injunction to prevent future transboundary harm. It held that:

"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.\(^{17}\)

Furthermore, the *Corfu Channel Case* demonstrates a similar conclusion,\(^{18}\) in this case, the minefield set in the Albanian waters caused the death of a British naval officer and damaged the waters, the International Court of Justice (ICJ) found that Albania was responsible for the death of the British officer and, the damage caused to the waters because it failed to notify the British warship of the minefield in order to prevent the disaster. It also held that Albania had caused damage to the United Kingdom by not acting within a "*certain standard of care*.\(^{19}\) It is worthy of note that omission was the basis for invoking state responsibility.\(^{20}\) Given this situation, the ICJ held Albania responsible for the death of the British naval officer and damages.

Accordingly, it is established that the 'no harm rule' necessarily prohibits any state from causing 'significant' or 'substantial' transboundary harm to another state. Therefore, the threshold is 'significant harm'. A state that has not suffered significant injury cannot apply for compensation in the form of damages or reparation.\(^{21}\) In addition, it imposes an obligation on each state to adhere strictly to the adequate measures set out for the regulation of imminent 'significant' transboundary harm.\(^{22}\) Hence, if the damage cannot be curtailed, the risk should be minimised.\(^{23}\) Finally, the standard obligates states to take adequate measures, known as 'due diligence'. Bernie, Boyle and Redgewell contend that fault cannot be used to invoke state responsibility for environmental damage. Still, due diligence is a genuine basis for state responsibility in international environmental law.\(^{24}\)

\(^{15}\) Xue Hanqin, “*Transboundary Damage in International Law*” (Cambridge University Press 2003).


\(^{17}\) Ibid 16.

\(^{18}\) United Kingdom v Albania, ICJ Reports (1949).

\(^{19}\) Ibid (n 18) Merits of the Judgments 9 April 1949.

\(^{20}\) Ibid (n 18).


\(^{22}\) Ibid 21.

\(^{23}\) Ibid 21.

For emphasis, it is worth noting that due diligence is the cornerstone of the 'no harm rule'. This is highlighted in Article 2(1) of the Convention on Transboundary Environmental Impact Assessment:

"The parties shall, either individually or jointly, take all appropriate and effective measures to prevent, reduce and control significant adverse transboundary environmental impact from proposed activities."

It connotes an obligation imposed on the state(s) to act with due diligence. Due diligence encompasses standards, protocols, and policies formulated by the government. These are to be applied to private and government-owned industries to prevent or minimise the potential risk of transboundary harm to neighbouring states or the global environment. However, it is noteworthy that 'due diligence' has a major drawback. It is dynamic and proportional to the technological advancement at that particular time. Additionally, it involves conducting an environmental impact assessment. For instance, in the Pulp Mills case, Argentina filed an action against Uruguay for the release of dangerous waste by Uruguay's pulp mill into the Uruguay river-mutual river on the boundary of both countries. The ICJ found Uruguay was in breach of the procedural and substantive obligations of the 1975 treaty on the mutual use of the river for failing to negotiate with Argentina and failing to notify the Commission of the planned works to be constructed on the mills and port terminals. The ICJ held that Argentina's evidence was inadequate to establish discharges from the pulp were of significant harm:

"there is no conclusive evidence in the record to show that Uruguay had not acted with the requisite degree of due diligence or that the discharges of effluent from the onion mill have had deleterious effects or caused harm to living resources or to the quality of the water or to the ecological balance of the river since it started its operations in November 2007."

Therefore, the ICJ declined to grant an interim injunction because Uruguay's evidence regarding 'likely irreparable harm' was insufficient, and the harm was not considered severe. Arguably, the threshold for granting injunction by the ICJ is high in terms of transboundary harm. Perhaps, this is to prevent frivolous and malicious requests which might undermine the operations of the corporations.

Having considered the case laws that underscore the threshold of transboundary harm, it is also reasonable to examine the draft articles. The Draft Articles on State Responsibility for Internationally Wrongful Act posits that where a State is in...
breach of public international law, such state is under an obligation to compensate/repair the damage caused to the injured state.\textsuperscript{32} In international law, it is stated that a claim for damages(for invoking State responsibility) must be in accordance with: "(i) identifying the damaging activity attributable to a state,(ii) establishing a causal link between the activity and the damage (iii) determining either a violation of international law or a violation of a duty of care(due diligence) which is,(iv)owed to the damaged state (v)in a court of law would be to quantify the damage caused and relate those back to the activity."\textsuperscript{33} Besides, the ILC Articles on Prevention\textsuperscript{34} augment the ILC Articles on State Responsibility and evolve principle 21/2 into a conventional framework.\textsuperscript{35} Therefore, the Law on State Responsibility is an effective tool for the protection of the environment.

As mentioned earlier in the introduction of this paper, human rights also limit sovereignty. As the cynosure of sustainable development, human beings possess some inalienable rights that must be considered in the environmental law.\textsuperscript{36} Feasibly, the protection of the environment is also linked to the protection of human rights. Although initially, individuals do not have locus standi under the international law to institute proceedings for environmental degradation, except under the umbrella of human rights, there has been considerable progress in granting remedies under national laws and regional instruments.\textsuperscript{37} It is also commendable that the European Court of Human Rights(ECtHR)\textsuperscript{38} allows persons who claim to be victims of the violation of the rights enshrined in the Convention to institute a case before the ECtHR.\textsuperscript{39} Evidently, the human right to a safe, healthy and decent environment must be considered in assessing the link between human rights and protecting the environment from degradation. This range of human rights has been categorised as 'Third generation' rights.\textsuperscript{40} These rights are emerging rights, which are viewed in continuity because it integrates the demands of the present generation without relegating the needs of the future generation.\textsuperscript{41} Some of these legal frameworks include United Nations Declaration on Human Rights(UDHR),\textsuperscript{42} the Brundtland

\textsuperscript{32} Ibid 31.


\textsuperscript{34} Seidi Hohenveldern, Current Legal Developments in the Field of Transboundary Pollution.<http://journals.cambridge.org/action/displayFulltext?type=1&fids=4240408&jid=LJL&volumeId=1&issueId=02&aid=4240400&newWindow=Y>1LJL (1988)217.

\textsuperscript{35} European Convention on Human Rights 1950.

\textsuperscript{36} Ibid ( n 38) Art.34.( as amended by the Eleventh Protocol).


\textsuperscript{41} Ibid 40.
While it is noted that there is a restriction on the determination of social and economic rights in Nigeria, the limitation is a barrier to holding the government and violators accountable—a clog in the wheel of development. Nevertheless, these rights are

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43 Legal Principles for Environmental Protection and Sustainable development 1987,Art.1.
44 Rio Declaration on Environment and Development 1992,Principle 1 and 14,Chapter 6, Agenda 1
enforceable by virtue of the African Charter on Human rights, provided the cases are decided in regional and foreign courts with jurisdictions. Furthermore, according to the Nigerian Foreign Judgements (Reciprocal Enforcement) Act of 1961, now C35 in the laws of the Federation of Nigeria 2004, foreign judgements are enforceable in Nigeria, subject to compliance with the rules and conditions. In addition, the Reciprocal Enforcement of Judgment Ordinance of 1922 is now in Chapter 175 in the laws of the Federation of Nigeria, and Lagos 1958 also makes provision for enforcement of foreign judgments. These instruments ensure the recognition and enforcement of foreign decisions.

On preventive measures, the Nigerian Federal Legislation, the Oil Pipeline Act 1956, Section 11(5), stipulates, a license holder is obligated to compensate any person whose land or land in interest is seriously affected through the exercise of Shell’s licence.\textsuperscript{47} In addition, the provision makes the company subject to a statutory duty of care to protect, maintain and repair their pipeline, and pay compensation where they fail or breach the statutory duty.

Moreover, it is said that obligations are a corollary to rights. It follows that legal obligations and duties are imposed not only on States but organisations and corporations. These obligations include, but are not limited to, refraining from activities that might trigger environmental harm or likelihood of risk.\textsuperscript{48} In addition, there is a duty of care that obliges corporate actors to prevent or limit the possibility of damage that would arise in the course of their activities. For instance, in the \textit{Ogoni Case},\textsuperscript{49} The Social and Economic Rights Action Center(SERAC)\textsuperscript{50} and Center for Economic and Social Rights(CESR)\textsuperscript{51} filed a complaint(class action) against the joint venture between Nigerian National Petroleum Corporation(NNPC)\textsuperscript{52} and Shell Petroleum Development Company(SPDC).\textsuperscript{53} CESR and CESR filed this action based on deleterious effects on the environment and health of the inhabitants, which resulted from the negligent oil exploration and drilling of the joint venture. The complaint was specific about the contamination of the air, water, soil, a drastic climatic change, burning of housing and the destruction of farm produces suffered by the community’s inhabitants. In addition, they argued that NNPC and SPDC violated their rights to a healthy environment and food.\textsuperscript{54} As a result, the African Commission found the Nigerian government violated the right to health of the people and the right to a good environment as enunciated in Article 24.\textsuperscript{55} This judgment reiterated the obligations of the state to take necessary measures to protect the health of their people in accordance with Article 16(2) of the African Charter on Human Rights.

\textsuperscript{47} The Nigerian Oil and Pipelines Act, Section (5), a-c;Section 19 ; Section 20(2)
\textsuperscript{50} Social Economic Rights Action Centre in Nigeria.
\textsuperscript{51} Centre for Economic and Social Rights Centre in New York.
\textsuperscript{52} Nigerian National Petroleum Company.
\textsuperscript{53} Shell Petroleum Development Company.
\textsuperscript{55} African Charter on Human Environment 1981,Article 24
The Commission concluded that the Nigerian Government "falls short of the minimum conduct expected of governments, and therefore, is in violation of Article 21 of the African Charter."\(^{56}\) It can be inferred from the case that the government failed to follow due diligence concerning the activities of the Shell Company and its consequences on the people and environment of Ogoni. Interestingly, while this decision underscores the significance of regional legal frameworks as well as the intervention of the African Commission, it also highlights the gaps in the Nigerian constitution in recognising and codifying the right to a healthy environment and the protection of the environment.

Similarly, in a recent development, in the case of Fidelis Oguru, Alali Efanga and (Milieudefensie also known as MD) referred to as Oguru, Efanga and MD v Shell Petroleum Development Company of Nigeria Ltd(referred to as Shell)).\(^{57}\) The plaintiff sued the parent company of Shell in its headquarters, Netherlands. This case was analysed as a distinct part of the six cases of MD and Nigerian farmers/claimants against Shell(case a and b). Two Nigerian farmers with an NGO, MD, filed a lawsuit at the Hague District Court(DC)against Shell in 2008 regarding the impact of oil leakage in Oruma in June 2005. The Plaintiffs argued that the oil leaked out of Shell's strip of land where they(Shell) hold 'right of way'. As a result, it spread to the surrounding land and environment, thereby polluting the land and fish ponds of the people, making it unfit to use. In response to this, the plaintiffs, Oguru, Efanga and MD, claimed inter alia that (i)Shell was liable for the leakage and damages because of its unlawful conduct (ii)Shell refused to react to the leakage adequately, (iii) and that Shell's decontamination after the leakage was not done adequately. Shell's inadequate decontamination subsequently led to further environmental and health desecration to the inhabitants of the surroundings and the local community, Oruma. MD requested that DC order Shell implement an adequate plan for reaction to oil leakages in Nigeria. Furthermore, they asserted that Shell's negligent activities infringed Oguru and Efanga's physical integrity. Consequently, Shell violated the right to a clean living environment as provided in Sections 20,33 and 34 of the Nigerian Constitution and Article 24 of the African Charter on Human and Peoples Rights.

The District Court dismissed the MD et al.'s claims. It noted that the Shell ceased and rectified the leakages on 29 June and 7 July 2005. It also ruled that Shell's reaction to the leakage was apposite.\(^{58}\) Not satisfied with the determination, MD et al. appealed the decision. On appeal, relying on tortious acts -unlawful acts under common law-tort of negligence, the tort of nuisance and tort of trespass to chattel, MD et al. argued that Shell through the activities of its subsidiary had breached its standard of duty of care via contaminating Oruma environment. As a result, the Hague Appeal Court(AC) had to reassess the claims of MD et al. The claims were divided into three categories of the unlawful acts related to the (i)the occurrence of the leakage;(ii)the reaction of


\(^{57}\) Fidelis Oguru, Alali Efanga and Friends of the Earth Netherlands v Shell Petroleum Development Company for Nigeria Ltd. Court of Appeal The Hague, 29 January 2021,200.125.804(case a)+200.126.834(case b);Friends of the Earth is a Non – Governmental Organisation whose objective is the protection of the environment.

\(^{58}\) Cause list number District Court, C/09/365498/HA ZA 10-1677(case a);C/09/330891/ HA ZA 09-0579(case b).
Shell when the leakage happened and (iii) the appropriate decontamination. In addition, MD et al. also filed an order that the AC should make a declaration of law that Shell violated through its actions regarding the three themes (occurrence, reaction and decontamination), the fundamental right of the residents to a clean living environment. Hence the CA assessed the claims of MD et al. based on three themes of 'Occurrence', Reaction and 'Decontamination'. The CA noted that Shell understood that by law, they could have taken measures before the leakage to enable prompt and timely response in the eventuality of leakage. These measures are considered precautionary measures and diligence, which prevents the corporate actor from committing torts.

Establishing the contamination of lands, the grounds for appeal on 'occurrence and reaction were successful. The Court of Appeal overturned the District Court's ruling. It found that: firstly, Shell bears strict liability for damages caused by the oil spills at Oruma on 26 June 2005. Secondly, Shell acted unlawfully by not installing an adequate Leak Detection System (LDS) in/on before that date. It ordered Shell to pay compensation to Oguru and Efanga for damages arising from their breach of duty. In addition, it instructed Shell to install Leak Detection System (LDS) on the Oruma pipeline.

This case highlights Shell's statutory duty of care to the villagers affected by the oil leakage, Shell's duty to ensure due diligence before commencing activities in the environment and adequate reaction after the oil spills. A classic example of the intersection between business and human rights, particularly civil liability of corporate actors for human rights violations. Besides, it also underlines the role of Non-Governmental Organisations (NGOs) in promoting accountability for the degradation of the environment.

The AC ruling is significant because it entrenches statutory duty of care as a metric for activities of corporate actors, which may negatively impact the environment and the quality of life. The environment is the ecosystem of people, and the inhabitants are embedded in the former. The threshold of duty of care serves as a check for the operations of businesses and multinational companies. While the payment of compensation holds the corporate actors accountable, it also signals environmental justice for the affected people. It is worthy of note that compensation is not restitution; nonetheless, it may deter future violation. Perhaps with this development, the 'no harm rule' and due diligence might be used to protect global common areas, given the contribution of the activities of multinational companies to climate change. The obligation created erga omnes for the advantage of the international community. Transboundary damage affects both neighbouring states and the global commons. Pollutions related to this include global warming and depletion of the ozone layers. Since these global commons are not within the exclusive

59 Ibid 56.
60 Ibid 56.
62 Ibid 61.
jurisdiction of any state, they are for the advantage of all states. However, the threshold for a single state to initiate proceedings and seek remedy on behalf of the other injured/affected states is high. An increase in population over the years has had its influence on these common areas. It has been argued that these common areas should be preserved by legislation (in terms of prohibition), but they should also be protected by 'temperance' and 'mutual coercion'. The former might not be easily legislated, while the latter can serve as a kind of self-remedy by the majority of the affected states. Conceivably, the relegation of the global commons will directly impact the environment because climate change triggers the depletion of shared resources.

**Conclusion**

In summary, this paper has established that states can file an action against the neighbouring state responsible for transboundary harm. A plethora of cases has also bolstered this point. The contribution of soft laws and legal frameworks reinforces the need to protect the environment. Therefore, sovereignty is not an excuse to foster transboundary harm. This assertion strikes a balance between the state's sovereignty to exploit its natural resources and the protection of the global environment. For this to be attained, there must be compliance with both substantive and procedural obligations. It is settled that anthropogenic activities cannot be eliminated. However, their impact can be reduced to the minimum in order to achieve a conducive and non-harmful environment. The 'No harm rule' establishes a compromise in ensuring a safe environment. As such, it is a means rather than an end.

The statutory duty of care ensures that corporate actors and multinational companies do not evade human rights violations and climate change accountability. In addition, these decided cases are pointers to civil and criminal liabilities for negligent acts.

Furthermore, more recognition and enforcement of customary international law, treaties and legal frameworks are required to promote a safe environment and global commons. Cooperation amongst state parties to these conventions and adherence to the rules of customary law for non-members would enhance the reduction of environmental pollution. However, since human rights and the environment are interdependent, enforceability is contingent on due diligence.

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63 Ibid 61


66 Ibid 61.


**CASES**


United Kingdom v Albania, ICJ Reports (1949).