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Democratisation

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Emergence of Principle of Sic Utere Tuo Ut Alienum Non-Laedes in Environmental Law and Its Endorsement by International and National Courts: An Assessment

T.R. Subramanya* and Shuvro Prosun Sarker**

Abstract

The maxim of sic utere tuo ut alienum non-laedes (use your own property in such a way that you do not injure that of another) has been recognized as a fundamental principal of law both in Roman and common law systems. In international law, this principle acts as a limitation on the sovereignty of a State. It is a settled principle of international law that a State has the sovereign right to exercise the basic functions of a state.¹ But then the exercise of this right is subject to certain limitations. One limitation is that the state cannot allow certain activities to interfere with the sovereignty of other states. A state will be found liable under international law if the consequences of activities within that state's control seriously injure persons or property of other states. This principle over a period of time has come to be known as the "no harm rule". According to this principle, a state is answerable even for acts of a private person who is under that state's control.² State practices clearly show that the laws governing state responsibility will apply to injuries arising out of hazardous activities which are within a state's control because the risk of consequences posed by such hazardous activities are serious, regardless of their legality within the individual state.³

Trail Smelter Dispute to Indus Waters *Kishenganga*: The Evolution and Development of the Principle by International Courts

No-harm rule regulates states' behaviour especially in international environmental law. This rule, as a whole, represents a careful balance between territorial sovereignty of a state on the one hand, and a wider responsibility towards

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¹ See *Draft Declaration on the Rights and Duties of States*, General Assembly Resolution 375 (IV) adopted on 6 December 1949.

² Gunther Handl, 'State Liability for Accidental Transnational Environmental Damage by Private Persons', vol. 74, *American Journal of International Law*, 1980, pp. 525-527; Gunther Handl, 'Territorial Sovereignty and Problem of Transnational Pollution', vol. 69, *American Journal of International Law*, 1975, pp. 50-55.

³ Gabriel M. Benrubi, 'State Responsibility and Hazardous Products Exports: A Solution to an International Problem', vol. 13, *California Western International Law Journal*, 1983, pp. 135-138.

international community, on the other. Emergence of this sense of responsibility for human health and environment is a natural outgrowth of the principle established in two leading cases, the *Trail Smelter Arbitration*⁴ case and the *Corfu Channel* case⁵. The element of fault is generally regarded as an essential ingredient before determining state liability. To determine whether a state is at fault for the injuries incurred from hazardous activity, the state's duty must be defined. A state will be held responsible for a standard of care in order to ensure that any hazardous activity conducted within its control will not infringe upon other states. Failure to conform to this standard of care amounts to a breach of an international obligation.⁶

In the *Trail Smelter Arbitration* case, emission of Sulphur dioxide fumes from the private consolidated mining and smelting company of Canada Limited, in British Columbia, on the Columbia river, about eleven miles from the industrial boundary, caused harm to timber, crops and fisheries in the state of Washington. The international tribunal, in making Canada responsible for the acts of its subjects, declared that "no state has the right to use or permit the use of territory in such a manner as to cause injury by fumes in or to the territory of another state or the properties or the persons therein"⁷. In the *Corfu Channel* case, the International Court of Justice (ICJ) endorsed the principle that "sovereignty itself embodies the obligation of every state not to allow its territory to be used for acts contrary to the rights of other states."⁸ Similarly, in the *Lake Lanoux Arbitration*, the tribunal held that a state has an obligation not to use its rights to the extent of ignoring the rights of others.⁹

In the *Nuclear Test* cases¹⁰, both the applicants (Australia and New Zealand) claimed to be representing not only their own exclusive interests but also the compatible exclusive common interests of the entire international community. Australia asserted that not only the deposit of radioactive fall-out on its territory is a violation of Australia's own sovereignty and territorial integrity but also a violation of the right of Australia and its people. In common with other states and their peoples, to be free from atmospheric nuclear weapons test by any country and also, the interference with ships and aircraft on the high seas by radioactive fallout, constitute infringements of the freedom of the high seas. In this case, the ICJ was called upon to issue orders concerning interim measures of protection. By 8 votes to 6, the Court instructed France to avoid nuclear tests causing the deposit

⁴ Arbitration Awards, *Trail Smelter Arbitration Case (United States v Canada)*, reprinted in vol. 33, *American Journal of International Law*, 1939, p. 182; vol. 55, *American Journal of International Law*, 1941, p. 684; 'The Trail Smelter Dispute', *Canadian Yearbook of International Law*, 1963, p. 213.

⁵ *Corfu Channel Case (UK v Albania)*, ICJ Rep 244 (15 December 1949), p. 18.

⁶ *Ibid*, p. 135.

⁷ Sanford E. Gaines, 'Taking Responsibility for Transboundary Environmental Effects', vol. 14, No. 4, *Hastings International and Comparative Law Review*, 1991, pp. 781-809.

⁸ *Corfu Channel* (n 5), p.22; Brent Carson, 'Increased Risk of Disease from Hazardous Waste: A Proposal for Judicial Relief', vol. 60, No. 3, *Washington Law Review*, 1985, pp. 546-549.

⁹ *Lake Lanoux Arbitration (France v Spain)*, vol. 53, *American Journal of International Law*, 1959, p. 156 also printed in *International Arbitration Awards*, vol. 12, 1957, p. 281.

¹⁰ *Case Concerning Nuclear Tests (Australia v France; New Zealand v France)*, ICJ Rep 97 (20 December 1974), p. 99.

of radioactive fallout over Australia and New Zealand pending final decisions in its proceedings.

The cases which came before the International Court in the late 1990's have either explicitly or implicitly relied on Rio Principles¹¹ as evidence of existing international law. In the request for an examination of the situation¹², New Zealand asked the Court, *inter alia*, to order that France carry out an Environmental Impact Assessment (hereinafter EIA) in accordance with international law before resuming underground nuclear tests in the Pacific. It further argued that such tests would be illegal unless the EIA showed that no pollution of the marine environment would result in accordance with the precautionary principle. Although the Court found that it had no jurisdiction over the dispute, the dissenting opinions of three judges addressed basic issues under scrutiny. Judge Palmer noted that the trend of development from Stockholm¹³ to Rio has been to establish a comprehensive set of norms to protect the global environment. Judge Weeramantry gave the most comprehensive judgment, finding that there was *prima facie* an obligation to conduct an EIA and to show that no harm would result to the marine environment. Judge Koroma was more emphatic in asserting that "international law requires states not to cause or permit serious damage in accordance with Principles 21 of the Stockholm Declaration of 1972." The no harm rule was endorsed again in 1996 in the Court's *Nuclear Weapons Advisory Opinion*.¹⁴

The Court observed:

...the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn. The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other states or of areas beyond national control is now part of the corpus of international law relating to the environment.¹⁵

However, the Court's most important judgment on environmental law was delivered in the case concerning the *Gabcikovo-Nagymaros Dam* in 1997.¹⁶ In this case, Hungary argued that a treaty to build a series of hydro-electric dams on the river Danube had been terminated on a number of grounds, including ecological necessity. It also alleged that in unilaterally implementing the project, Slovakia had failed to take account of ecological problems or to carry out an adequate EIA. The Court accepted that grave and imminent danger to environment could

¹¹ T.R. Subramanya, 'The Earth Summit: An Overview', vol. 34, no. 45, *Link*, New Delhi, 1992, pp. 4-6.

¹² *Nuclear Tests Cases* (n 10), p. 288.

¹³ *Stockholm Declaration of the United Nations Conference on the Human Environment*, UNGA Res 2994 (XXVII), (15 December 1972) UN Doc A/RES/2994, ILM, vol. II, 1972, p. 1416.

¹⁴ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Rep 94 (8 July 1996), p. 226, para 29.

¹⁵ *Ibid*, pp. 241-242; Justin Thornton & Silas Beckwith, *Environmental Law*, Thompson, London, 2004, pp. 42-44.

¹⁶ *Gabcikovo-Nagymaros Project (Hungary v Slovakia)*, Judgment, ICJ Rep 7 (25 September 1997), p. 31.

constitute a state of necessity although it found no such danger to exist in this case.¹⁷ Again in the *Southern Bluefin Tuna Case*¹⁸ before the International Tribunal for the Law of the Sea, the Tribunal ordered to ensure conservation and promoting the objective of optimum utilization of the stock of fish and biodiversity in that region. Protection of marine environment was seen as a concern of the International Tribunal for the Law of the Sea, in the *Mox Plant Case*.¹⁹ Furthermore, in *Straits of Johor Case*²⁰, it was stated that cooperation is a fundamental principle in prevention of pollution.

The *Pulp Mills Case*²¹ arose as Uruguay authored and started the construction of two pulp mills sited on the banks of River Uruguay- a river which forms the international boundary between Uruguay and Argentina- used for recreation, fishing, drinking water and tourism by both states. In 2006, Argentina filed an application instituting proceedings against Uruguay to the ICJ, when it expressed concerns that the mills posed “major risks of pollution of the river, deterioration in biodiversity, harmful effects on health and damage to fish stocks, as well as a serious consequence for tourism and other economic interests” in addition to the visual pollution and noise which, allegedly, would be caused by the mills.²² The Court stated that: “a state is obliged to use all the means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another state” and further pointed to its own pronouncement in the *Advisory Opinion on the Legality of Nuclear Weapons* in which it established that this obligation was part of the corpus of the international law relating to environment.²³ The Court found that Uruguay was obliged to provide prior information when it was discovered that the project involved a risk of causing significant harm to Argentina, and that it had breached this obligation.²⁴ In order to fulfil the obligations to co-operate and notify, it also

¹⁷ Ibid; P.W. Birnie & A.E. Boyle, *International Law and the Environment*, OUP, New Delhi, 2004, p. 108.

¹⁸ *Southern Bluefin Tuna case (New Zealand-Japan, Australia-Japan)*, Reports of International Arbitral Awards, vol. XXIII (4 August 2000), pp. 1-57.

¹⁹ *Mox Plant Case (Ireland v United Kingdom)*, Order of 3rd December 2001, ITLOS Reports 2001: “The conflict between Ireland and the United Kingdom about the building and operation of the Mox Plant at Sellafield, on the Irish Sea, dates back to 1993. The plant is designed to recycle the plutonium produced during the reprocessing of nuclear fuel. Ireland contested this project since its beginning and requested access to information from the UK about the plant in order to protect the marine environment of the Irish Sea, available at https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_10/Order.03.12.01.E.pdf, accessed on 24 February 2017.

²⁰ *Case Concerning Land Reclamation by Singapore in and Around the Straits of Johor (Malaysia v Singapore)*, Order of 8th October, 2003, ITLOS Reports, 2003. The waters of the Straits of Johor were delimited between Singapore and Malaysia in 1966. Singapore started reclaiming the waters on its side of the Straits since 1966 and finally started the work in 2000. Since 2002 Malaysia started notifying Singapore and the notification for arbitration under UNCLOS was given on 2003, available at https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_12/Order.08.10.03.E.pdf, accessed on 24 February 2017.

²¹ *The Case Concerning Pulp Mills on the River Uruguay (Argentina v Uruguay)*, ICJ Reports 2010, p. 14.

²² Ibid, para 15.

²³ Ibid.

²⁴ Ibid, paras 105-111.

stated that Uruguay was required to conduct environmental impact assessments.²⁵ The Court did however not find that Uruguay had breached any substantive obligations under 1975 Statute or general international law, as Argentina had not proved the presence of any substantial harm besides smell and noise from the mills, which as mentioned above, it found not to fall within its jurisdiction.²⁶ Again, in the *Indus Waters Kishenganga Arbitration*, the Permanent Court of Arbitration stated that it is a rule of customary international law for states to take environmental protection into consideration while developing projects that may cause injury to a bordering state.²⁷

Thus, the jurisprudence of the International Court clearly indicates that the application and endorsement of the *sic utere tuo ut alienum non laedas* from time to time as seen in aforementioned decisions are must. These decisions stand as a testimony for the proposition that a state may not use its resources or property or permit the use of its territory in such a manner as to injure another state.

International Conventions and Application of the Principle

International treaties, conventions, declarations signed and accepted by members of the community of states do recognize the *sic utere tuo ut alienum non laedas* in emphatic terms.²⁸ The following discussion will examine the expression of the principles under various treaties and conventions:

The Paris Convention²⁹ and the Vienna Convention on Civil Liability for Nuclear Damage³⁰ explicitly provide for indemnification by the controlling state if the private operator is unable to compensate the victims. Even the Paris Convention³¹ and Brussels Convention³² have similar provisions for compensation. Above-mentioned treaties treat all nuclear operators – whether government agencies or private corporations – on a similar basis. The Vienna and Paris Conventions have been complemented by the 1971 IMCO Convention, which in its preamble reads: “the operator of a nuclear installation will be exclusively liable for the damage caused by a nuclear accident occurring in the course of maritime carriage of nuclear material”.³³

International Convention on Civil Liability for Oil Pollution Damage, 1969 holds the owner of the ship involved in a spill “liable for a pollution damage caused by oil which has escaped or been discharged from the ships”.³⁴ The Convention

²⁵ Ibid, p. 119.

²⁶ Ibid, paras 236-264.

²⁷ *Indus Waters Kishenganga Arbitration (Pakistan v India)*, 20 December 2013, available at <https://www.pcacases.com/web/sendAttach/48>, accessed on 24 February 2017.

²⁸ Viet Koester, ‘From Stockholm to Brundtland’, vol. 20, No. 1 and 2, *Environmental Policy and the Law*, 1990, p. 15.

²⁹ *Convention Supplementary to the Paris Convention of 29 July 1960 on Third Party Liability in the Field of Nuclear Energy* signed on 31 January 1963, ILM vol. 21, 1962, pp. 685-687.

³⁰ *Vienna Convention on Civil Liability for Nuclear Damage*, 1963, ILM 1963, pp. 727-737.

³¹ *Convention on Third Party Liability in the Field of Nuclear Energy*, Paris, 29 July 1960.

³² *Convention on the Liability of Operators of Nuclear Ships*, Brussels, 1962.

³³ *Convention Relating to Civil Liability in the Field of Maritime Carriage of Nuclear Materials*, 1971, International Legal Materials, vol. 11, 1972, p. 277.

³⁴ *International Convention on Civil Liability for Oil Pollution Damage*, 1969, ILM vol. 45.

establishes maximum amount of liability for the owner³⁵, unless the accident was the result of actual fault of the owner. The Convention recognized and endorsed the principle of strict liability rather than fault based nature of the obligation. Moreover, the Convention requires owners of ships to take sufficient insurance to cover liability under the convention³⁶. It vests jurisdiction for actions based on its violation in the courts of the contracting states³⁷ and includes a waiver of sovereign immunity for ships owned or operated by a state.³⁸ Two other conventions of concern are the Convention on International Liability for Damage Caused by the Space Objects 1972³⁹ and the North Sea Convention on Exploration and Exploitation of 1977.⁴⁰ Of the two, the Space Object Convention takes the seemingly uncompromising position that, “a launching state shall be absolutely liable to pay compensation for damage” caused by its space objects on the surface of the earth or to aircraft in flight.⁴¹

The United Nations Conference on the Human Environment recommended “governments use the best practicable means available to minimize the release to the environment of toxic dangerous substances” and in doing so, take into account the relevant standards proposed”. The Stockholm Declaration, 1972 broadly reflects the Trail Smelter Principles. The Declaration containing a preamble⁴² and 26 general principles “inspire and guide the peoples of the world in the preservation and enhancement of the human environment”. Under the prevailing practice between States, no state can claim an absolute right to ruin its environment in order to obtain some transient benefits. It should think not only of the effect on other people but also about the future of its own people. Prof. Sohn, while commenting on the Stockholm Declaration stated that, “although the Stockholm Declaration is not a binding legal instrument, nonetheless its twenty-six principles may be considered as ‘common convictions’ which reinforce the principles and purposes of the Charter of the United Nation”⁴³. The norms laid down by the Declaration have been incorporated into national laws and subsequent treaties truly assign these principles the status of customary international law.

In the discussions within the General Assembly’s Second Committee on Principle 21 of the Stockholm Declaration, the Mexican Delegate stated unambiguously that “it was the responsibility of all states to avoid activities within their jurisdiction or control which might cause damage to the environment beyond their national frontiers and to repair any damage caused”⁴⁴. The Principle has

³⁵ Ibid, art 5.

³⁶ Ibid, art 7.

³⁷ Ibid, art 9.

³⁸ Ibid, art 11.

³⁹ *Convention on International Liability for Damage Caused by Space Objects*, London, 29 March 1972.

⁴⁰ *North Sea Convention on Exploration and Exploitation*, 1977, ILM, vol. 16, p. 1450.

⁴¹ 1972 Convention (n 39), art 2.

⁴² *Stockholm Declaration of the United Nations Conference on the Human Environment*, UNGA Res 2994 (XXVII), (15 December 1972) UN Doc A/RES/2994, ILM, vol. II, 1972, p. 1416.

⁴³ B. Sohn, ‘The Stockholm Declaration on the Human Environment’, vol.14, *Harvard International Law Journal*, 1973, p. 423.

⁴⁴ Statement of Martinez Gonzales, UN Doc. A/C 2/SR 1470 (1972), p.7; Gunther Handl, ‘The Case for Mexican Liability for Transnational Pollution Damage Resulting from Toxic Oil Spill’, vol. 2, *Houston Journal of International Law*, 1979, p. 231: “Principle 21 of the

received considerable support from states and has guided state practice. Notably, Principle 21 was expressly recommended by a UN General Assembly Resolution as laying down the basic rule governing the international responsibility of states in regard to the environment.⁴⁵ The principle is asserted in Article 30 of the Charter of Economic Rights and Duties of States⁴⁶ and even Article 194(2) of the 1982 UN Convention on the Law of the Sea, which declares:

States shall take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other states and their environment and that pollution arises from incidents or activities under their jurisdiction or control do not spread beyond the area where they exercise sovereign rights in accordance with this convention.⁴⁷

The implications of Principle 21 are further drawn in the World Charter for Nature.⁴⁸ The Charter's general principles read: "Nature shall be respected and its essential processes shall not be impaired" (Paragraph 1) and that

ecosystems and organisms, as well as land.... resources that are utilized by man, shall be managed to achieve and maintain optimum sustainable productivity, but not in such a way as to endanger the integrity of those other ecosystems of species with which they coexist.

As Mexico's delegate observed, the Charter in Paragraph 21 (d) applies the *sic utere* maxim to individuals, groups and corporations such as forestry enterprises or hydroelectric enterprises⁴⁹. Invoking this principle, the European Council of Environmental Law has noted

the Charter is certainly intended to contribute to the creation of binding international law rules concerning the conservation of nature. Systematically applied, the rules it sets out are capable of being transformed into rules of customary international law, like Principle 21 of the Stockholm Declaration enjoying environmental harm beyond the national boundary.⁵⁰

Stockholm Declaration provides that States have the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction."

⁴⁵ *International Responsibility of States in Regard to the Environment*, G.A. Res. 2996, UN Doc A/8901 (1972), pp. 42-43.

⁴⁶ *Charter of Economic Rights and Duties of States*, UN Doc A/Res/3281, 1974, p. 50, International Legal Materials, vol. 14, 1975, p. 251.

⁴⁷ *United Nations Convention on the Law of the Sea* opened for Signature in December 1982, UN Doc. A/CONF.62/122 (1982), reprinted in International Legal materials vol. 21, 1982, pp.1261-1308.

⁴⁸ *World Charter for Nature* adopted on 29 October, 1982 by the United Nations General Assembly by 111 votes in favour and one against (was that of United States). Resolution A/Res/37/7; UNGAOR Supp. (No. 51), UN Doc. A/51, 1982, p. 17.

⁴⁹ See Nicholas A. Robinson, 'Marshalling Environmental Law to Resolve the Himalaya-Ganga Problem', vol. 13, *Delhi Law Review*, 1991, p.4.

⁵⁰ Viet Koester, 'From Stockholm to Brundtland', vol. 20, no. 1 & 2, *Environmental Policy and the Law*, 1990, p. 15.

The World Commission on Environment & Development (WCED), in its Report, reiterates this primary obligation of states in Article 10: to prevent or avoid interference in the environmental integrity of other States or the global commons. It extends the fundamental doctrine *sic utere tuo ut alienum non laedas* beyond physical harm to significant risks of substantial harm.⁵¹ These rules are to a large extent based on the Stockholm Declaration as well as on the World Charter for Nature. The Vienna Convention for the Protection of the Ozone Layer⁵² and the Montreal Protocol on Substances that Deplete the Ozone⁵³ also imposed obligations on signatories to exchange research, cooperate in the formulation of standards, and adopt domestic legal administrative measures to protect human⁵⁴ health and the environment from ozone depleting chemicals. The Montreal Protocol established specific obligations to limit and reduce the use of chlorofluorocarbons⁵⁵. Another major Convention adopted soon after the Chernobyl disaster was a Convention on Early Notification of Nuclear Accident by the International Atomic Energy Agency.⁵⁶ This Convention called upon states to give timely warning of accidents or operational difficulties in nuclear facilities that threaten transboundary environmental damage. The *sic utere tuo ut alienum non laedas* maxim has also been recognized in the Rio Declaration on Environment Protection. In the event of comparison between Principle 21 of the Stockholm Declaration and Principle 2 of Rio, it is worth noting “states own developmental policies” as additional words incorporated in the latter instrument. Prof. Sands, while commenting on this aspect observes “...a careful reading suggests that the additional words merely affirm that states are entitled to pursue their own developmental policies. The introduction of these words may even expand the scope of the responsibility not to cause environmental damage to apply to national developmental policies as well as national environmental policies”.⁵⁷

Thus, many of the conventions adopted after the Stockholm and Rio Declaration point to the international acceptance of the proposition that states are now required to protect global common areas including Antarctica and those areas beyond the limits of national jurisdiction such as the high seas, deep sea bed, and outer space. In recent times, its influence has been especially seen in the 1996 Protocol to the London Convention, 1972 where the dumping state has to prove that its activity is not harmful to the marine environment before it is issued a permit for dumping. Furthermore, the United Nation Convention on the Non-

⁵¹ Sanford E. Gaines, ‘Taking Responsibility for Transboundary Environmental Effects’, vol. 14, no. 4, *Hastings International and Comparative Law Review*, 1991, p. 795.

⁵² *Vienna Convention for the Protection of the Ozone Layer*, 22 March 1985, International Legal Materials, vol. 26, 1987, p. 1516.

⁵³ *Montreal Protocol on Substances that Deplete the Ozone*, Final Act, September 16, 1987, International Legal Materials, vol. 26, 1987, p. 1541.

⁵⁴ Pamela Wexler, ‘Protecting the Global Atmosphere: Beyond the Montreal Protocol’, vol. 14, *Maryland Journal of International Law and Trade*, 2001, p. 6.

⁵⁵ Margot B. Peters, ‘An International Approach to the Green House Effect: The problem of Increased Atmospheric Carbon Dioxide can be Approached by an Innovative International Agreement’, vol.20, no.1, *California Western International Law Journal*, 1989, pp 81-87.

⁵⁶ *Convention on Early Notification of Nuclear Accident*, 1986, International Legal Materials, vol.25, 1986, p.137.

⁵⁷ Sands, *Principles of International Environmental law* cited in W. Birnie and A. E. Boyle, *International Law and the Environment*, Oxford University Press, New Delhi, 2004, p.110.

Navigational Uses of International Water Courses 1997⁵⁸ also involves the duty by a state causing harm to a water course to inform and notify all other concerned riparian and non-riparian states. The same approach is found in Article 2(1) of the 1991 ECE Convention on Environmental Impact Assessment, and in Article 3 of the International Law Commissions (ILC) 2000 Draft Convention on the Prevention of the Transboundary Harm.⁵⁹

Application of the Principle by the Municipal Courts

The courts of various countries have also used the principle in cases related to protection of environment much before the international courts recognized it. In *Vellore Citizens' Welfare* case,⁶⁰ some of the principles and practices of international law were recognised to be customary in nature and therefore capable of being adopted into the domestic legal system such as: the precautionary principle, the polluter pays principle and the principle of sustainable development. In this case, the tannery operating in district of Tamil Nadu was found to be lackadaisical in their attempt to compensate for the contagious effluents that were discharged into the environment (river palar) as a by-product of the manufacture of the tanneries. As a result, an acute shortage engulfed not only the districts involved in tannery production but the vicinity areas as well. The suggestion of construction of Common Effluent Treatment Plants by the state and the Environmental Pollution Control Boards was utterly disregarded. In this case, the Supreme Court, *inter alia*, directed the formation of a green bench to deal with potential environmental legal issues. Sustainable development was given priority despite the court accepting that tannery formed a major source of economy. The court, nevertheless, found that boosting economic benefits could not serve as a justification for polluting the environment. Referring to the Brundtland Commission, the Court stated that the compensation to the harm caused by the inappropriate operation of these industries, the principles of polluter pays and precaution could be made applicable. The court further concluded that these principles have been concluded as part of the law of the land and is also covered under various Articles of the Constitution. The court traced back the source of the inalienable common law right of the clean environment to the commentaries of Blackstone wherein any violation of the principle of *sic utero tuo* has been referred to as an 'actionable nuisance'.⁶¹ The Indian law is also derived from the British Common Law, therefore the principle along with its remedies inalienably forms part of the Indian jurisprudence. Therefore, based on these observations, the court directed several measures to be initiated against these tannery industries. In *M/s. Kanak Kr. & Ashok Kr* case,⁶² the issue arose with respect to the establishment of a Cork Grinding facility in the vicinity of a so called residential area. Allegations that sound and dust nuisances were being committed by the petitioners in course of running the said cork-grinding factory, without any licence under section

⁵⁸ *Convention on the Non- Navigational Uses of International Water Courses*, International Legal Materials, vol.36, 1997, p. 719.

⁵⁹ Report of the International Law Commission, UN GAOR A/56/10(2001)

⁶⁰ *Vellore Citizens' Welfare Forum v Union of India*, AIR, 1996, SC, p. 2715.

⁶¹ William Blackstone, *Commentaries on the laws of England*, Oxford University Press, Oxford, 2016, p. 308.

⁶² *M/s. Kanak Kr. & Ashok Kr. & Anr. V Corporation of Calcutta*, 73 CWN 32, India, Calcutta High Court, 1968.

437(1)(b) of the Calcutta Municipal Act 1951 and that the local residents were complaining against the said factory due to the nuisance which was being created and their health and comfort were labelled in the complainant and petitioners were seeking remedy for the same. The factum of nuisance raised in this case was dealt with much detail with the Magistrate himself visiting the locality and coming to a conclusion regarding the same. It was stated that the concept of nuisance is partly subjective and partly objective in meaning as that what is nuisance for an individual might not be the same for another. Going further into detailing about nuisance, the maxim *sic utere tuo ut alienum non laedas* was brought into fore stating that an individual may never use his property such that it would cause harm or injury to another person. However, to determine the threshold of such a harm, reference must be drawn to the facts of the case and therefore a case by case analysis is to be carried out. With parallels drawn from the Halsbury Report, this so called uncertainty of the test can also be referred to as the elasticity of the said principle. At the same time in this case, it was pointed out that the harm in the form of nuisance must be attempted to be abated first instead of trying to remove, lock, stock and barrel and that this principle has been widely accepted and established. Thereafter, going back to the consideration of the circumstances of the case, the Court found the fact that the factory was established in an industrial region where it was flanked on either sides by industries of the same nature, reduced to a great extent, the contention of nuisance and therefore the case was sent back to the lower court for proper review of the surrounding areas and a subsequent determination of the issue raised.

A South African case, raised before the Cape of Good Hope Provincial Division in *Wayne Alan Laskey* case⁶³, matters that relating to the application of no harm principle was again dealt with regards to the establishment of a theatre-restaurant. The complaint is founded on unacceptable claims of loud noise from the Broadway (the theatre restaurant) on a regular basis. Going by the definition of disturbing noise in the Environment Conservation Act of South Africa, a variable base is essential to determine in which circumstance a noise can be labelled as disturbing. However, the case was further complicated due to the vague distinction of disturbing noise and noise nuisance. Relying on the South African laws, a commonly applied principle was held up which stated that when some regulations are stated in any particular act catering to a person or a class of person, a mere non-compliance of the same is sufficient to bring about a judicial intervention and it is not essential to establish that a harm has been caused in reality or not. Alternatively, if any act is brought into force for the public in general, it is essential that the complainant suffer a substantial harm or apprehends any such form of harm in future so as to obtain interdictory relief. A detailed analysis concluded that Section 25 of the Environment Conservation Act, 1989 clearly stresses that the Act has been formulated for the benefit of the public in general. Aside from the applicability of Common Law, which empowers an individual to utilise his property in whichever way he intends to, the term social utility has also been given exposure to in this case. Elaborating on the same, the judge opined that for the day to day developments, there are certain standards that an average individual is expected to put up with. He further attributed the concept

⁶³ *Wayne Alan Laskey and Ors. V Showzone CC and Ors* [2006], South Africa, ZAWCHC 50.

of reasonability to such standards. As long as there is mutual sacrifice along with the principle of give and take, there might be no reason to label accusations such as these. Several discourses were carried out within this case to determine the distinction between the two forms of torts where in one caused reasonable physical harm and the other caused a mere distress. It was concluded that the major issue in question is any act which is causing discomfort in human existence. Therefore, considering the circumstances of the case, the court ordered an interdict directing the respondents to abate the nuisance. In another English case,⁶⁴ the issue arose regarding a line of houses built along the boundary of a cricket field. Despite having a 6 feet concrete wall, whenever the games were played there were chances that the rear garden or the windows of the houses could be affected. Therefore, a complaint claiming nuisance and action for damages were brought forward. However, in this case, the judge opined that the no harm rule principle was a very incorrect principle to be used in case of nuisance especially when it was regarding the use of land by an individual. The judge further went to elaborate that one can use land in several ways that can be damaging to his neighbour and yet escape the sword of nuisance. There were several attempts made by the club members such as constructing fence wires around the ground to prevent any damage. Therefore, it is a matter of balancing the conflict of interest of the two neighbours. It is also in public interest to protect places such as cricket fields. The Court found that since the ground had been in existence for 70 years and the houses were new, it is expected that the owner should have assessed the conditions and circumstances before making the purchase. Despite such a stance, by a majority of opinion of the judges, in this case, it was determined that the defendants caused both nuisance and negligence to the plaintiffs and therefore, the appeal for injunction was upheld while allowing the defendants a year time-period to seek a ground somewhere else.

The Supreme Court of the United States of America in the case of *Georgia v Tennessee Copper Co.* recognized the principle and asserted that “a state (within a federation) has a right to insist that its territory and inhabitants be not harmed by polluted air from activities in another state. It may seek an injunction to stop such activities or to control them so as to diminish the probability of damage.”⁶⁵ In the *Keystone Bituminous Coal Association* case,⁶⁶ it was claimed that the government’s existing mine subsidence legislation had failed to protect public interest in safety, land conservation, preservation of affected municipalities’ tax bases among others. It was argued by the petitioners that, as a result of this legislation, the lower strata of the coal below the land surface had been extensively reduced and consequently caused devastating effects on the environment such as disruption of farming lands, loss of underground water etc. The Subsidence Act, as further claimed by the petitioners, had also empowered the commonwealth to take away lands from the landholders for mining of coal thereby depriving them of their rights to enjoyment of property due to non-payment of compensation. This act in question was determined to be aimed at the benefit of the public in general. It also stressed

⁶⁴ *Miller and Another v Jackson and Another* 1975 M. No. 173, United Kingdom, Court of Appeals, 1977.

⁶⁵ *Georgia v Tennessee Copper Co.*, 206 U.S. 230 (1907).

⁶⁶ *Keystone Bituminous Coal Association v Pennsylvania Department of Environmental Resources*, 480 US 470 (SC 1987).

on the policy recognised long ago which states that all property in this country (USA) is held under the implied obligation that the owner's use of it shall not be injurious to the community. The claim of the petitioners that they own the coal was further elucidated by the fact that they are the owners of the coal but are not entitled to appropriate the same under the aforementioned Act. However, the same was overruled by citing several other cases wherein the decisions differed from the argument put forward earlier. By again upholding the rule of *sic utero tuo ut alienum non laedas*, the Court confirmed that the state need not pay any form of compensation in case it has diminished the value of a property wherein it has prevented any illegal activity or abated any form of nuisance. It was found that such should be treated as a part of burden of common citizenship. Therefore, the court dismissed the appeal.

In *Bands of the Yakima Indiana Nation*,⁶⁷ the issue raised was whether the county of Yakima, a governmental unit of the state of Washington had the authority to zone free lands owned by non-members of the tribe located within the boundaries of the Yakima Reservation. The nation after ceding vast areas of land to the United States had retained a certain portion for its exclusive benefit and use. In this region, they had divided the land into closed and open land. The closed land had been unavailable to public since a long time while the open land was reserved for certain developments. In due course of time, though whites were not entitled to obtain any land in these regions, several people owing to their ancestry came to hold substantial plots of land in these regions. Two such petitioners who had requested certain developments on their land were opposed by the county of Yakima and they claimed zoning rights over the same. In the case of first petitioner, it was upheld that his planning might jeopardise the economic, social and political integrity of the nation and going by the fact that zoning is mainly a police power of the government and aims to control unprecedented and hazardous development the claim of Yakima County, land was upheld. The concept of zoning was further elaborated under the head of the principle *sic utere tuo u talienum non laedas* stating that that zoning provides the mechanism by which the polity ensures that neighbouring uses of land are not mutually-or more often unilaterally destructive. Going by the claims and determinations, such was only established in case of the first petitioner and not the second as his planning did not seem to be hazardous. A community might therefore reasonably conclude in case if it wants a certain development in its land or not based on the said principle. Therefore, based on such exclusive powers, in order to protect its land, it was held that the county had the power to zone the lands.

The above cases go on to establish with certitude that be it a common law country or otherwise, the no harm principle of international law has gained wide acceptance in the field of environmental law. Although not necessarily outlined by the legislature in many instances, it is the underlying principle that guides various land jurisprudences as well as finds to mention in the constitution of various nations. It is not always essential that this principle be mentioned only in environmental legislations of a nation but can also be included in various complementary statutes in force in the country. All the aforementioned cases

⁶⁷ *Philip Brendale and others v Confederated Tribes and Bands of the Yakima Indiana Nation*, 492 US 408(SC 1989).

depict different circumstances and unique issues and therefore this principle which was developed as an international legal principle has not only evolved to become a norm of customary international law but has also found place into the domestic legislation of several nations as well. It is the varying standard and reasonability criterion accompanying this principle which has helped it gain access into every legal system and establish its universality.⁶⁸

Conclusion

It should be noted that the Trail Smelter arbitration award and Principle 21 of the Stockholm Declaration, together with Principle 2 of the Rio Declaration have become customary rules of International Law through state practice and sufficient *opinio juris*.⁶⁹ Goldie's observation, made as early as 1970, that the *Trail Smelter*, *Corfu Channel* and *Lake Lanoux* cases clearly point to the emergence of strict liability as a principle of public international law proved to be true today as well.⁷⁰ The *sic utere tuo* maxim as expressed in Principle 21 (of the Stockholm Declaration) remained a highly influential in the post-Stockholm development of law and practice in environmental matters, most notably in various UN conventions and resolutions, in UNEP principles and in multilateral treaties. Its influence can be noticed in the 1974 principles concerning trans-frontier pollution of the organization for Economic Cooperation and Development as well as the European Commission Directive of 2004 on Environmental liability.⁷¹ Today, the maxim has become a recognized principle of international environmental law. When such a rule is accepted and practiced by states, any breach of that rule would lead to the obligation or liability to make reparation. Even the work of the International Law Commission (since 1973) affirms this obligation. In addition, the jurisprudence of the ICJ, conventions adopted by international organizations and the practice followed by states on this subject emphasize that human beings are at the centre of concerns for sustainable development.

This paper, thus, has attempted to establish the emergence of customary rule of international law developed by the community of nations in cases related to no harm rule. The cases that were decided in the post-*Trail Smelter Arbitration* era points out the emergence of this customary rule establishing the elements of custom- both material and psychological. In the national sphere, especially in developing countries like India, this principle has been interpreted, applied and implemented more rigorously through the decisions of its apex court. Treaties, conventions and declarations discussed above endorse the customary character in more clear terms. They are of a norm creating character. For instance, the principle of absolute liability, polluter pays principle, precautionary principle, public trust doctrine and environmental impact assessment have been recognized and accepted in both international and domestic sphere.

⁶⁸ The principle has also been recognized in the following cases: *Ohio v. Wyandotte Chemicals Corpn.* 401 U.S. 493 (1971)

⁶⁹ See J. G Starke, *Introduction to International Law*, Aditya Books Pvt. Td, New Delhi, 1994, p. 38.

⁷⁰ See Goldie, 'International Principle of Responsibility for Pollution', vol. 9, *Columbia Journal of Transnational Law*, 1970, pp. 283-306.

⁷¹ Jan Schneider, *World Public Order of the Environment: Towards an International Ecological Law and Organization*, Stevens & Sons, London, 1979, p. 161; See also Justine Thornton and Silas Beckwith, *Environment Law*, Thompson, London, 2004, pp. 90-95.