

Recognition the Principle of State Responsibility in Land based Marine Pollution as a Response to State Sovereignty

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Abstract—*The seas and oceans as the largest eco-system in the world have been rapidly polluted from various sources throughout the history. This global issue is mainly caused by states through land-based sources. Even though there are international rules, regulations and standards to prevent and control marine pollution through land-based sources by states, in the contemporary legal arena, States utilise the principle of sovereignty to escape from their obligation towards land based marine pollution. Since, the states have its own sovereignty within their territory, it has become difficult for the international community to intervene in the activities that cause land based marine pollution. However, Customary International Law has been answered this growing issue of by recognizing that international law also includes States's Responsibility towards other states and the world to protect the environment. Further, this concept of customary law was adopted by the United Nations Convention of the Law of the Sea, 1982, and obligation imposed through the Convention was inadequate to control the said problem. Based on doctrinal research methodology, this study will elaborate international conventions, case laws, law reports and law journals to identify how the international law concept of sovereignty has been re-interpreted by the international customary law concept of State Responsibility. Further this will analyse the insufficiency of the adoption of this concept at the global level and how this lacuna has been well addressed and answered by soft laws and regional legal orders to regulate land based marine pollution activities.*

Keywords - *Land based Marine Pollution, State Sovereignty, State responsibility*

I. INTRODUCTION

Nature as the survivor of the mankind provides every single thing that man needs to live in this planet. In exchange for that man has asked to fulfil one single favour which is to protect and preserve the environment for the sake of the future generations. However, as the sole provider of the human being nature consists with diverse ecosystems such as forests, desserts, Mountains, water resources and oceans. Oceans that cover more than 70% of the earth's surface

plays a vital role in human's lives. Along with the fact that it provides a home to myriad marine species and plants, it also greatly provides many things which needed for the well-being of lots of animals including humans live in the land. Instead of that, oceans and seas contribute to more than 50% of the world's oxygen supply, and also humans use the oceans to transport goods, to extract oil and gas and also it utilizes by many industries those backbones lots of economies.

Despite of the fact that the seas and oceans served mankind throughout the history, unfortunately humans were unsuccessful to regard the sea and its natural resources are limited and inviolable due to its vastness and continue to exploit and pollute the seas though various sources. The historical background of marine pollution illustrates that the marine pollution is a growing episode throughout centuries due to uncontrollable exploitation of sea resources. Throughout the history, seas have been polluted by different sources, mainly by land based sources, vessels, dumping at sea and also by seabed mining.

Marine pollution as a global phenomenon is mainly contributed by, states though land based sources. Nearly 80% of the sea pollution is rapidly originates from land based sources as coastal areas are heavily occupied with harbours, tourist developments, industrialization and urbanization, agricultural activities and deforestation. Further, as 40% of population of the world were living near to the coastal areas also encouraged huge discharge of sewage into the sea and especially in developing areas, nearly 90% of people dispose their waste into water resources and coastal areas.

This caused to migrate Nitrogen based fertilizers, Chemical waste, pesticides, petroleum products through rivers into seas and promote the growth of harmful algae which create adverse environmental conditions; dead zones for marine species: dead zones by mitigating with the production of oxygen. The plastic materials and other waste and sewage have been created large floating garbage patches such as the Pacific Trash Vortex causing fatal effects to marine mammals and birds.

Hence, it is obvious that land based sources have caused a potential impact on coastal and marine environment and it

has been rapidly increasing in the contemporary world as onshore human activities has been increased. However, the way to address the problem globally has not always been clear.

Governing the human activities in coastal areas could not be easily controlled in an environment where States are in charge of managing the discharge of land based waste on seas. Even though the international community has recognized numerous standards and instruments to reduce and control land based marine pollution, the authority of states; the sovereignty power of states, has always been the vital obstacle which controls the international interference. The purpose of this study is first to identify the land based marine pollution, secondly, to discuss the impact of the principle of state sovereignty towards this growing problem. Thirdly this paper will analyse the use of Principle of State Responsibility to ensure the international intervene to control this pollution and the scope of acceptance and implementation of this concept through international instruments and finally this study will provide some recommendations to strength the implementation of this concept in global level.

2. METHODOLOGY

This study has been mainly focused on Black letter approach of research and comparative research based on international conventions and treaties, international judicial decisions, law reports, law journals, and legal principles of customary international law. Based on these sources, this study will analyze how the customary international law concept has been penetrating the international law concept of sovereignty and how the international instruments have been adopted and implemented that legal principle to regulate the land based marine pollution.

3. DISCUSSION AND RESULT

3.1. Land based Marine Pollution

The pollution of Marine Environment as a major environmental degradation has been elucidated in Article 1(4), United Nations Convention on the Law of the Sea (1982) as “...the introduction by man directly or indirectly of substances or energy into the marine environment, including estuaries which results or likely to result in such deleterious effects as harm to living resources and marine life, hazardous to human health, hindrance to marine activities including fishing and other legitimate use of sea...”. In accordance with the definition of UNCLOS, any path that could be causing or likely to cause harm to the marine environment has been recognized as “Marine Pollution”. Hence, land based sources, vessel - based sources, waste dumping at sea and sea bed activities are generally considered to be four main sources that constitute pollution on the marine environment.

Land based source as the largest contributory factor of marine pollution, it (LBMP) has been recognized as a serious problem and it has been defined by several international instruments. Paris Convention for the Prevention of marine Pollution from Land-Based Sources in 1974 as the very first treaty that specifically address this problem has defined Land based marine pollution in Article 3(c) as,

“... the pollution of the maritime area (i) through watercourses, (ii) from the coast, including through underwater or other pipelines, (iii) from man-made structures placed under the jurisdiction of a contracting party within the limits of the area to which the present convention applies...”.

The definition of Paris Convention identified different sources that could cause land based marine pollution including any kind of waste disposal into seabed by a tunnel, pipeline or any other man made structure connected to land, any water resources that carry waste and sewage to the coast and sea, any kind of costal activity dispose harmful substances to the coast and sea areas.(Philippe Sands, 1960) Nevertheless, the Montreal Guidelines has also recognized: sources of land based marine pollution as “municipal, industrial or agricultural sources, both fixed and mobile, on land, discharges from which reach the marine environment, in particular: from the coast, including from outfalls discharging directly into the marine environment and through run-off; and through rivers, canals, or other water-courses, including underground water, ground water courses; and via the atmosphere.” Furthermore, Article 02 of the Convention on the Protection of the Marine Environment of the Baltic Sea Area, 1992 describes, “the Pollution from land based sources means pollution of the sea by point or diffuse inputs from all sources on land reaching the sea, waterborne, airborne or directly from the coast. It includes pollution from any deliberate disposal under the sea bed with access from land by tunnel, pipeline or other means” as land based marine pollution.

Nevertheless, International and regional instruments have defined the land based marine pollution and the sources of marine pollution, to prevent and eliminate pollution from land based sources in order to protect and preserve the marine life in coastal as well as sea areas. Hence, states are obligated to follow and implement those legal regimes in domestic, regional and international level.

However, Even though the oceans are independent and belongs to every person, usually land based sources have a national source (Quing-Nan Meng,1987) and it originates from a place where they have sovereignty power over their territory. It is visible that land based sources could harm another country through the ocean currents. As land based marine pollution originates from a sovereignty state, the

main difficulty for the international community to intervene to those activities is the concept of state sovereignty. States as the main subject of the international community hold sovereignty power over its territory and it has legal authority to govern and regulate its affairs without any foreign interference. That sovereignty power of a State has granted power its nationals to execute any act within its territory without the intervention of the international community. The sovereignty power of a state always extends into its territorial waters as well as its air space. So states are entitled to use their coastal area and territorial waters with respect to their discretion.

The Principle of state sovereignty has become the major inspiration for the rapid growth of land based marine pollution. This power of States, as the traditional subject of international law, led them to commit any act or omission as they preserve within their jurisdiction. However, states began to misuse this principle which is well recognized under the international law and attempted to justify all the environmental polluting actions towards marine environment, originated within its territory. But, gradually with the development of customary international law this concept of international law was penetrated by the international customary law and produce an answer to that lacuna.

3.2. Customary International Law

Customary International Law as a major source of International Law had been introduced an option to prevent the misuse of the concept of sovereignty to justify land based marine pollution. Even though states have sovereignty power over its territory, international customary law stipulated that states have responsibility to not to commit any wrongful act against another state or nationals of another state.

3.2.1. State Responsibility

The concept of state responsibility as a part of the customary international law is the liability of a State to not to pursue any wrongful act which indicates any damage or harm to another State or its nationals under any circumstances (Wallace-Bruce, 1997). This principle emphasizes that the liability arises from a direct violation of international law as well as any breach of obligation, if the breach could be attributed to the State (Shaw, 2023).

This concept of state responsibility was recognized and introduced in different landmark judicial decisions throughout the history

Corfu Channel case

The Corfu channel case (*United Kingdom V. Albania*, 1949) is one of the major cases that international courts have

recognized the importance of the concept of state responsibility. Unfortunately, in 1948 two British war ships were destroyed by mines in Albanian territorial waters in the Corfu strait. The International Court of Justice declared that Albania had failed to uphold its obligation to not to cause any harm to other states by their acts even though Albania argued that they were exercising their sovereignty over its territorial waters where the Corfu strait is located and Britain need their approval to passage through the strait. Further ICJ held that the state is under “*the obligation of every state not to allow its territory to be used for acts contrary to the rights of other states*” and Albania should have warned “the vessels of the danger into which they were running... [and the] grave omissions involve...international responsibility”. Even though, this case was not related to Land based marine pollution, the underlying concept in this case is state responsibility. This imposes an obligation on states to utilize its sovereignty power for anything contrary to the rights of another state as well as to take necessary actions to prevent any kind of damage while they use its sovereignty power if it causes or could cause any kind of damage to another party.

Trail Smelter Arbitration

The Trail Smelter Arbitration (1941) case was placed due to an emission of sulphur dioxide by a Canadian Copper Smelter Company which constituted trans-boundary damage to crops in USA. In this case Arbitral Tribunal held that, “*No state has the right to use or permit to use of its territory in such a manner as to cause injury by fumes in or to the territory of another state*”, hence the arbitral tribunal also emphasized that any state could not use its territory for anything that could harm to another state. Even though this case was also not directly focus on land based marine pollution, this air pollution could also be relevant to other types of pollutions including land based marine pollution. (Hakappa, 1981) However, this case was only dealt with trans-boundary environmental harm or damage, the present it believed that the ‘obligation not to cause environmental damage is no longer solely bilateral in nature, but relates to the protection of the common interests of the international community as a whole’. (Tanaka, Y., 2006)

Apart from these cases the *Gabcikovo-Nagymaros Case* as well as the *Advisory opinion concerning Legality of the Treat or Use of Nuclear Weapons* also recognized the importance of State responsibility to not only protect its environment but also to protect environment beyond its territory.

However, this customary law originated through cases was gradually incorporated to different international instruments in the contemporary legal arena. According to the Article 04 of the Draft Articles on State Responsibility,

“An act of a state may only be characterised as internationally wrongful by international law. Such characterisation cannot be affected by the characterisation of the same act as lawful by internal law”.

Nevertheless, it can be recognized two theories on the principle of state responsibility accordingly; the risk or objective theory and the fault or subjective theory. The risk or objective theory focuses on the responsibility of States after they commit that wrongful act and the fault or subjective theory discusses the states' responsibility for the damage subject to the intention or negligence of that state. (Wallace-Bruce,1997). However, the obligation of States to prevent any environmentally harmful act to another state or nationals of another state, prevent states from abusing its sovereignty power to conduct any act within their territory which could harm to other state.(Crawford,2004) If any State breaches the responsibility of theirs' could be liable for the damage they caused to the extent that the link of damage and casual link has been proven.(Lakshmi,2022)

The principle of State Responsibility has also recognized and elaborated in the principle 21 of Stockholm Declaration in 1972 and it confirmed by the Rio Declaration adopted in the United Nations Conference on Environment and Development, 1992. The Principle 02 of Rio Declaration stipulate, in accordance with the Charter of the United Nations and principles of the international law, States have sovereignty right to utilize its own natural resources to their environmental and development policies and also they have responsibility to ensure those activities within its jurisdiction or to control the damage to the environment of other countries.

However, the concept of state responsibility recognized in these cases and treaties was duly incorporated into international environmental legal order. So the international environmental jurists recognized that “there is a general rule of customary international law that states must not permit their nationals to discharge into the sea matter that could cause harm to the nationals of other states.” (Churchill and Lowe, 1998) This led international community to believe that state responsibility is always coming along with the use of the rights of state sovereignty with regards to environmental disputes. However, finally, international community adopted and incorporated this internationally accepted principle into the United Nations Convention on the Law of the Sea (UNCLOS), 1982.

5. Convention on the Law of the Sea (1982)

The United Nations Convention on the Law of the Sea, 1982 was the first international attempt to achieve protection and preservation of marine pollution. (Charney,1994) As this convention establish “general and comprehensive legal framework” aiming the protection and

preservation of marine pollution, this is the only treaty which provides general obligations to prevent land based marine pollution in international level up to date. While laying a general obligation of States on the protection of the marine environment in Article 192, it also does not imply that the marine environment must be protected only if a state failure to do so may harm other States.(Tanaka,2006) Moreover, Article 194 (1) emphasizes the state responsibility to take all necessary measures to control, prevent and reduce marine pollution from any source in accordance with their capabilities. So apparently the term ‘any source’ also cover the land based marine pollution too. However, the Article 194 (2) stipulates the obligation on States to take all the appropriate measures to ensure the activities under their jurisdiction or control would conduct in non-harmful or non-damageable by pollution to another State or would not spread outside the territory where they enjoy sovereignty rights. In Addition to that this convention provides necessary provisions for alternative plans for environment pollution (Article 200), scientific research, data and information exchanging (Article 201), and scientific criteria for regulations.

The Article 207 of UNCLOS specifically recognized the state responsibility with regards to land based marine pollution and states that “*States shall adopt laws and regulations to prevent, reduce and control pollution of the marine environment from land based sources, including rivers, estuaries, pipelines and outfalls structure, taking into account internationally agreed rules, standards and recommended practices and procedures*”. However, the Article 207 is a general attempt to provide a guidance to States about their responsibility towards marine environmental protection from land based sources and it only asks States to take international rules, regulations and practices into account and establish relevant legal orders in accordance with their national capabilities.

Notably, this article emphasizes three main obligations or responsibilities on States to do as; Take internationally accepted rules, regulations and practices into account, harmonize their policies in regional level in an appropriate manner and to take actions to implement sufficient rules to control land based marine pollution with international organizations and diplomatic conferences cooperatively.

Nevertheless, it does not provide certain directions about the measures that States should take or the international standards that states should take into account while they are empowering the protection against land based marine pollution. Hence the vague and broad language used in Article 207 only encourage States to “endeavour to harmonise their policies at the appropriate regional level” and “to establish global and regional rules, standards and recommended practices” on land based marine pollution.

The section 6 of part XII discusses about the enforcement of legal arena in that part and Article 213 specially focuses on the “enforcement with respect to pollution from land based sources”. Article 213 stipulates that States shall adopt laws and regulations with respect to Article 207 as well as other competent measures to implement applicable international rules and regulations through international organizations and diplomatic conferences.

However, the protection given under the UNCLOS have been heavily criticized due to the no progress it made to the international customary law. As previously discussed the provisions regarding marine pollution by land based sources containing a board meaning terms have merely touched and recognized international customary law concepts such as state responsibility, and it does not carry any serious liability on States behalf of this particular source of pollution. Although it is visible that even though UNCLOS is the only global structure which addresses the marine pollution, the obligations emphasized in the UNCLOS are ‘less onerous and precautionary’ than other regional and non – binding instruments.

3.3. Non-binding and Regional Instruments

After the adoption of UNCLOS, the legal regime relating to marine pollution by land based sources has been controlled by non-binding instruments in the global level. Notably,

- The 1985 Montreal Guidelines for the Protection of the Marine Environment against Pollution from Land-based Sources.
- Agenda 21 of 1992
- The 1995 Washington Declaration on the Protection of the Marine Environment from Land-based Activities.
- The 1995 Global Programme of Action for the Protection of the Marine Environment from Land-based Activities (1995 Global Programme of Action)
- The 2001 Montreal Declaration on the Protection of the marine Environment from Land-based Activities and
- The 2012 Manila Declaration on Furthering the Implementation of the Global Programme of Action for the Protection of the Marine Environment from Land-based Activities.

are the non-binding instruments that have been adopted by international community to regulate this legal arena. In this phenomenon, the 1985 Montreal Guidelines have managed to attract more attention among other instruments due to the prescribed measures that should be taken to prevent, reduce and control land based marine pollution such as; environmental impact assessment, monitoring,

notification, information exchange and consultation, scientific and technical cooperation assistance to developing countries, and development of control strategies. One of the unique features seen in the Montreal Guidelines is the ‘interconnection between the protection of the marine environment and that of international watercourses’. In relation to that the guideline 05(c) requires that “[i]f discharge from a watercourse which flows through the territories of two or more States or forms a boundary between them are likely to cause pollution of the marine environment, the State concerned should cooperate in taking necessary measures to prevent, reduce and control such pollution”. Apart from that, the Montreal Guideline also provides the concept of specially protected areas from land based pollution and Annex I to the guideline provide the strategy of recognizing these specially protected marine environments. These provisions specially indicate obligation on States to inform any modification to such areas to appropriate international organizations.

On the other hand, the Agenda 21 also required the governing council of United Nations Environmental Programme (UNEP) should convene intergovernmental meetings to protect marine eco-systems from land based activities. Furthermore, the global meeting convene under Agenda 21 in Washington, 1995 adopted Washington Declaration 1995 and 1995 Global Programme of Action, and also the global programme action, 1995 ensures the application of precautionary principle regarding this environmental concern and provides measures to uphold the protection of marine environment from these sources.

Moreover, the Montreal Declaration of 2001 also explicitly emphasize the need of taking necessary actions in national and regional level over land based marine pollution and the Manila Declaration, 2012 stressed the representatives of governments and European Commission to implement a global action programme to regulate land based marine pollution at international, regional and also at national levels to uphold the sustainable development.

Even though these non- binding instruments have made an impressing improvement in relation to regulating land based marine pollution, with the nature of these international instruments states do not have a bond to follow the rules and regulations contained in these soft laws. However, as a part of the customary international law these soft laws could also be used to protect marine environment from land based pollution in global level.

However, in the land based marine pollution the most affected would be the neighbouring countries. Therefore, there are effective regional attempts combating this source of pollution. The Baltic Convention of 1974, Mediterranean Sea Convention of 1976, Kuwait

Convention of 1978, West Central African Region Convention of 1981, South East Pacific Convention of 1983 and Red Sea Convention of 1982 could refer as those regional attempts to achieve the protection of marine environment from land based pollution.

In this regard, Baltic Convention and North-East Atlantic Convention introduce some strategies that can be used to protect marine environment from land based pollution. Further, these conventions carry 'international management principles' for example precautionary principle and polluter pays Principle to control land based marine pollution. And these conventions implant obligation on States to "undertake various measures and programmes such as best environmental practice (BEP), best available technology (BAT), and clean technology to implement the conventional provisions. However, the Baltic convention and North-East Atlantic convention create special legal obligations for the protection of marine environment in Northeast Atlantic Sea and Baltic Sea from land based pollution, as well as those encourage public involvement in decision making process relating to marine environment protection to introduce effective and controlled measures. Nevertheless, it is visible that these regional instruments have achieved to establish much more stable and obligatory measures than LOSC as it carries board and weak protection towards marine eco-systems from land based pollution.

Hence, accordingly in order to overcome the shortcomings of the existing legal arena, it can be recommended to introduce a new protocol to the existing UNCLOS incorporating the positive features of other existing softlaws or regional instruments as well as to introduce a new international instrument governing this particular legal regime to promulgate a well structured law to regulate this global disaster; Land based marine pollution to protect the marine eco-system.

4. CONCLUSION

The Land based sources as a main contributory factor for the rapid growing problem of pollution of Marine environment has become a dead end to the marine eco-system. However, the Sovereignty power of States discourage the intervention of international community to reduce, prevent and control State activities within the territorial boundary which could be a contribution to the marine pollution. But, the international customary legal principle of State Responsibility played a major role in controlling the misuse of the sovereignty principle and, that concept was adopted by the Convention on the Law of the Sea 1982 in the international level. However, the UNCLOS has been recognized the problem the acceptance of the concept was not enough. Even though the broad terms used in UNCLOS to introduce the state responsibility towards

marine pollution providing a wide opportunity to consider all the international rules, regulations and standards to implement laws to regulate this legal arena, the broadness and the uncertainty of terms also discourage states as it does not create any serious liability on States. Nevertheless, the non binding instruments as a part of the customary international law and regional instruments have been introduced more stable responsibility on states. According to that, it appears that a uniform global level law is needed to govern the land based marine pollution. Hence, it is more timely to promulgate a new international convention or to introduce a new protocol to the existing Law of the Sea Convention to strengthen the legal order for marine pollution by land based sources.

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To my backbone: My Famiy

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