EXAMINING THE RULES AND PRINCIPLES APPLIED BY THE INTERNATIONAL COURT OF JUSTICE (ICJ) IN DETERMINING CASES ON PROTECTION OF MARINE ENVIRONMENT*

Abstract

International environmental law has been marked by two contradictory trends. On the one hand, states and the international community have become aware of the urgent need to protect the marine environment. However, on the other hand, they have been reluctant to enter into international agreements laying down binding obligations, including their specific content and extent. Despite this tension, and in the light of the emerging environmental concerns, any kind of agreements need to be concluded, at least to sooth civil society's pressure. Alongside this process, states started adopting certain types of conduct under the belief that such conduct was necessary in the light of general principles. Thereby, customary international law, general principles of law and normative instruments have advanced a kind of a common law of the environment. International practice shows that states have now accepted a general principle of responsibility for environmental harm, but there are many uncertainties as to the exact content. This study examined the rules and principles being applied by the ICJ in the protection of the marine environment. It appraised decisions of the ICJ where these rules have been applied. The doctrinal research method was adopted as the primary and secondary sources of law were relied upon. This paper found that customary obligations and different regimes of responsibility with respect to the protection of the marine environment. The study recommended that when trying to assess the current status of international environmental law, due regard should be paid to the specific content and extent of the rules and principles in the protection of the marine environment, for they will determine the regime of responsibility to be applied by the International Court of Justice (ICJ).

Keywords: Marine Environment, Protection, International Court of Justice, Rules and Principle

Introduction

There are basic rules, principles and standard of measure which have inured overtime and have attained acceptance by the Nations and States as means and standard for the protection of the human environment generally and marine environment in particular. These principles have attained universally acceptable applicability across the range of activities and in respect of the protection of all aspects of the environment.[1] Principles and rules of Public International Law provide a legal framework within which the various members of the international community may co-operate and establish norms of behaviour for the purpose of resolving their differences.[2] In other words, they constitute the legal norms and standards States must take into account in their dealings to guide individual States pertaining their dealings on the environment aimed at protecting their environments and that of other States which their activities may have adverse effect on the environment of such other States. Some of these principles are so important to the present day development of International environmental protection laws,[3] because most of these principles and rules have been the bases upon which International Court of Justice and Tribunals fall back on when faced with environmental dispute related cases. Since these rules and principles derive their legitimate authorities from the States, it became mandatory that administrative machineries of States ensure that these rules and standard are adhered to, as courts in the course of their adjudicative procedures are bound to apply same. Both the 1958 Genera Convention on the Territorial Sea and Contiguous Zone, Continental Shelf and the United Nations Convention on the Law of the Sea (UNCLOS) 1982 have all in their respective provisions laid down these rules and principles. It is also important to highlight the fact that today there are no real clear cut boundaries in municipal or International environmental matters. This is due to the fact that a polluted marine environment or air in Nigeria may also affect Cameroon, Chad Republic or the Republic of Benin within an

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[1] C A Omaka, *Municipal and International Environmental Law* (Lagos: Lions Unique Concepts 2012)31.

[2] P Sands, *Principles of International Environmental Law* (2nd edn, Cambridge University Press 2004)12.

[3] P Birnie and A Boyle, International Law and the Environment, 1992 Cited by M Sunkin and Others in *Source Book on Environmental Law*.(2nd edn, Cavendish Publishing Limited 2002) 4.

Interval of hours.[4] It is against this background that aviation experts and air travellers doubt whether all these entities called 'Countries', Nations' or States' etc. are not a mere imaginary creation as a look from an airplane down the earth reveals no such demarcation which buttresses that the global environment ought to be one.[5]

2. Principles and Standards Applied by ICJ

Some of these principles and rules of established standard in international environmental protection laws are discussed as follows:

Principles of Permanent Sovereignty over Natural Resources and the Principle to Avoid Trans-Boundary Damage

These principles predate all modern environmental protection law principles. United Nation General Assembly as far back as 1952 adopted the principle of Permanent Sovereignty Over National Resources in line with the age long position of International Courts and Tribunals when in F*ur Seals Arbitration case*, the court rejected the claims of United States to protect an area beyond 3 nautical miles limit of their Territorial Sea and the right to interfere in internal affairs of other States in their enjoyment of their natural resources.[6] The rights of peoples and States to permanent sovereignty over their natural resources and wealth must be exercised in the interest of their national development and the well being of the State concerned.[7] This principle was further given a statutory *imprimatur* by the provision of principle 21 of the 1972 Stockholm Conference:

> States have in accordance with the Charter of the United Nations and the principle of International law the sovereign right to exploit their own natural resources pursuant to their own environmental policies and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or areas beyond the limits of national jurisdiction.[8]

The International Tribunal in *Trial Smelter case* had earlier on upheld same when it held that '…..no State has the right to use or permit the use of its territory in such manner as to cause injury by fumes in or to the territory of another State or of the property or persons there in….'[9] This principle has received further Judicial blessings in a number of cases determined by the ICJ. The court once held that in as much as France was entitled to her sovereign right to divert her international river but it should take cognizance of Spain and its environment.[10] The court also held same view in *Corfu Channel case* where it stated that; 'the principle of sovereignty embodies the obligation of every State not to allow its territory to be used for acts contrary to the rights of other States'.[11]

It has been argued that there are disputes as to the level of standard being used by different States, as developed States are required to apply high standard as against developing States that apply lower standard for obvious economic reasons so as to attract foreign investors making issues of jurisdiction in matters of trans-boundary damages difficult to be resolved conclusively.[12] The provision of principle 21 of the Stockholm Conference has equally not solved this jurisdictional problem of determining precisely the circumstances in which a State may take responsibility or measures outside its territory in relation to conservation of shared resources.[13] The ICJ delivered jurisdiction when Spain challenged the conservation legislation of Canada beyond its Exclusive Economic Zone (EEZ).[14]

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[4] Omaka (n 1) 31.
[5] *Ibid*
[6] Award between the United States and the United Kingdom Relating to the Rights of Jurisdiction of United States in the Bering, Sea and the Preservation of Fur Seals Decision of 15 August 1893 Available at <http://www. Archive.org/details/fursealsarbitraoo.arbigoog> accessed 14 May 2021.
[7] Un General Assembly Resolution (xvii) (1962) Cited in Sands (n 2).
[8] Principle 21 of the Stockholm Conference 1972, and Principle 2 of Rio Convention Cited by Omaka (n24)
[9] *Trial Smelter case (USA v Canada)* (1941) 3 Rep. Int'l Arb. Award ("R.I.A.A.") 1905 at 1963; 3 RIAA 1907 (1941).
[10] *Lac Lanoux case (Spain v France)* (1956) 24 I.L.R. 101.
[11] *Corfu Channel Case* (*UK v Albania*) ICJ Reports 4;12 RIAA 285.
[12] Omaka (n 1).
[13] *Ibid*
[14] Fishery Jurisdiction case (Spain v Canada) ICJ Judgment of 4 December 1998. Available at <https://www.icj.org/docket/index.php.sum> accessed 10 April 2021.

Principle of Preventive Action

Preventive action as a principle of International environmental protection law espouses the need to protect the environment from being degraded by reducing controlling and limiting activities that are capable of giving rise to environmental degradation. This could be best achieved by individual States through their regulatory and administrative authorities.[15] By so doing, an urgent preventive action will be taken to forestall degrading activities which is the main purport of this rule under international environmental law.

It is against this background that some laws in individual States made provision for the protection of the environment as a preventive measure. Section 20 of the Constitution of the Federal Republic of Nigeria 1999 provides that State shall protect and improve the environment and safeguard the water, air, land forest and wild life of Nigeria.[16] There are similar provisions in other countries' Constitutions.

The ICJ appears to have given judicial credence to the Principle of preventive Action when it held that it was mindful that in the field of environmental protection, vigilance and protection is required on account of the often, irreversible character of damage to the environment and the limitations inherent in the very mechanism of reparation of this type of damage.[17] In other words, the action to be taken to prevent damage to the environment requires some steps to be taken at an early stage and if possible before the harm occurs. This principle has been widely adopted in different treaties, Protocols and Judicial decisions. Some of them are Principle 1 of 1972 Stockholm Conference, 1978 UNEP Draft principles, 1989 Lome Convention, the *Lac Lanoux Arbitration case* etc.[18]

Principle of Co-operation

Article 74 of the United Nations Charter on Social, Economic and Commercial Matters[19] has a similar intendment to rules promoting International Environmental Co-operation. This principle could as well be called principle of good neighbourliness. This is evidenced in many treaties that touch on emergency situations and hazardous activities. Stockholm Declaration provided for political commitments of individual States on issues concerning environmental protection.[20] Rio Declaration also states that 'States and people shall co-operate in good faith and in a spirit of partnership in the fulfilment of the principles embodied in the declaration and in the further development of International law in the field of sustainable development'.[21] Information sharing and participation in decision making is the key to the achievement of principle of co-operation. This can be achieved through exchange of information, alert on emergency issues, consultation, notification and trans-boundary enforcement standard over shared natural resources which must be carried out in good faith and in the spirit of good neighbourliness.[22] The 1982 UNCLOS also has similar provisions.[23] In *Mox Plant case*,[24] the Republic of Ireland brought an application against the United Kingdom for failing to Co-operate in line with the provisions of Articles 123 and 197 of UNCLOS by failing to respond to communication and request for information required from them timely or at all. In holding UK liable, the International Tribunal for Law of the Sea (ITLOS) reaffirmed the duty of States to co-operate as fundamental in the prevention of pollution of the marine environment. This decision of the tribunal is in line with the provisions of Part XII, Section 2 of the UNCLOS 1982.[25] Finally, the tribunal ordered exchange of Information with respect to possible consequences for the Irish sea arising from commissioning of Mox Plant, monitor the risk and effect of Mox Plant on Irish Sea and take appropriate measures to prevent pollution likely to occur as a result of the test.[26]

[15] Omaka (n 1).
[16]The Constitution of the Federal Republic of Nigeria 1999 (as Amended)
[17]*Gabcikovo-Nigymaros (Hungary v Slovakia*) ICJ Judgment of 25 September 1997 Reported in Hague Justice Portal. Available at <http:// www.hague justice portal.net/id=2> accessed 12 July 2021.
[18] *Ibid*
[19] *Ibid*
[20] Stockholm Declaration 1972 Principle 24.
[21] Rio Declaration 1992 Principle 27. See also Water Course Conservation 1997, *Industrial Accident Convention* 1992.
[22] *Ibid* Principle 7.
[23]United Nations Convention on the Law of the Sea 1982 Articles 123 and 197.
[24]*Mox Plant Case (Republic of Ireland v United Kingdom)*(2001)ITLOS Case No3, (2003); 126 ILR 310 (2003).
The International Bureau Served as Registry in these Arbitration Proceedings Initiated Pursuant to Annex vii of the 1982 UNCLOS.
[25] UNCLOS (n 23) Articles 197, 198, 199 & 200.
[26] Omaka (n 1) 34

Precautionary Principle

The precautionary principle as the name applies aim at taking precaution to maintain safety in the event whereby there is scientific uncertainty in what is going to be the outcome of a given situation. When there is a suspected risk of causing harm to the public or to the environment, preventive measures are to be taken in case if the suspected event occurs or turns out to be harmful to the environment. There is always an implied duty or responsibility to protect the public and environment from exposure to harm when scientific investigation is not certain, except where there is sound evidence that no harm will occur.[27] The lockdown of social activities around the globe to avert a further spread of Corona virus Pandemic is a form of precautionary measures adopted by different countries on the recommendation of the World Health Organization (WHO) to bring to end the spread of the Virus. In other words, precaution means to take caution in advance in order to avert or ameliorate an impending possible damage in case it occurs.

A number of International Treaties and Conventions have taken precautionary principle into consideration. The 1992 Rio Conference provides that:

> In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there is threat of serious or irreversible damage, lack of full scientific uncertainly shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.[28]

In other words, the principle should be applied where scientific evidence is conclusively uncertain or where preliminary investigation shows that there are reasonable ground for concern that the potential dangerous effects on the environment, human, fauna and flora may be inconsistent with the high level of protection chosen by the European Union or indeed all concerned.[29]

In Nigerian the draftsman that drafted NESTREA Act tends to have precautionary principle in mind when it provided that:

> The Agency shall collaborate with other relevant agencies to embark on programmes for the control of any substance, practice, process or activity which may reasonably be anticipated to affect the stratosphere, especially, ozone in the stratospheres, when such effect may reasonably be anticipated to endanger public health or welfare.[30]

The ICJ in determination of *New Zealand case* relied on Precautionary principle when the court emphases that it is a very widely accepted operative principle in law, and shifted the onus of proof on France to prove that the said test would not give rise to environmental damage.[31] In the case of *EFTA Surveillance Authority v Norway*, the court categorically stated:

> When the insufficiency, or the inconclusiveness, or the imprecise nature of the conclusions to be drawn from those considerations make it impossible to determine with certainty the risk hazard, but the likelihood of considerable harm still persists where the negative eventuality to occur, the Precautionary principle would justify the taking of restrictive measure.[32]

In the *Vollore Citizen's Welfare Forum v Union of India*, in which it was alleged that tanneries were discharging their untreated effluents into the River Palar which happens to be the main source of water for the residence of the area. The Supreme Court of India came down heavily on both central and State governments for their failure to constitute authorities in line with the India Constitution to also take a precautionary measures. The court declared that the authorities so constituted shall implement the precautionary principle and the polluter pay principle.[33] It is important to note that precautionary principle do not anticipate a zero risk but rather aims to achieve a lower or more acceptable risk or hazards that can be managed.

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[27]Wikipedia Encylopedi.1974 Paris Convention where it allows parties to take additional measure scientific evidence we shown that serious hazard may be created by that substance and urgent action is necessary.

[28] Rio (n 21) Principle 15.

[29]1000 European Union Commission Communication on precautionary principle; Cartagena protocol of Bio- safety 29 January 2000.

[30] NESREA Act 2007 s 21(2).

[31] (2001) 2CMLR 47; see also Corfu Channel Case (n 11).

[32]*EFTA Surveillance Authority v Norway* (2001).

[33]*Vollore Citizen's welfare forum v Union of India* (1996) 55CC 665.

Polluter-Pays Principle

The crux of this principle is that whoever that is responsible for the damage to the environment should bear the brunt or cost associated with it, by paying for the harm it has caused. This principle of International environmental law establishes the requirement that the cost of pollution should be borne by the person responsible for causing the pollution.[34] The Organization of economic Co-operation and Development (OECD) Council recommendation in 1972 and 1974 respectively adopted the polluter-pays principle. The slight difference is that the1974 recommendation extended the 1972 OECD Councils' recommendation which allocates the cost of pollution prevention and control measures to encourage rational use of the environmental resources without necessarily distorting of international trade and investment by including that the polluter shall bear the expenses of carrying out the measures deemed necessary by public authorities for the protection of the environment.[35] This principle has further been extended to include accidental pollution by the 1989 Council of the OECD, which provides that the operator of hazardous installations should bear the cost of reasonable measures to prevent and control accidental pollution from the installation introduced by the Public authorities in conformity with their national laws in existence before the accident occurred. This can be achieved by imposing a tax or adjusting fees payable to cover clearing decontamination rehabilitation of the polluted environment.[36] This was what played out in Koko Town in the present Delta State when the Italian Government in the spirit of polluter pays principle paid for the cleaning of the Koko Town environment of the hazardous waste dumped by an Italian company and rehabilitation of some of the Koko inhabitants affected by the pollution. The Supreme Court of India has also held that once an activity carried on is hazardous or inherently dangerous, the person carrying on such activity is liable to make good the loss caused to any other person by its activities.[37]

Principle of Sustainable Development

Both the United Nations Environmental Programme and the Brundtland Report defend sustainable development as 'development that meets the needs of the present without compromising the ability of the future generations to meet their own needs. In other words, it is meant to secure a balance between developmental activities for the benefits of the people and environmental protection guarantee to the present and bequeath to the future generation.[38] This principle of sustainable development has bear in existence as far back as 1893 when United State of America asserted their right in fur seals case.[39] The worlds Trade Organization also acknowledge this principle of sustainable development in its Shrimp Turtle case.[40] ICJ in its advisory opinion on the legality of the threat of use of Nuclear Weapon stated that, 'the environment is not an abstraction but represents the living space, the quality of life and the very health of human being, including generations Unborn.[41] Rio Declaration also acknowledges the principle of sustainable development when the provided that the 'right and development must be fulfilled so as to equitably meet development and environmental needs of the present and future generations.[42] It has been observed that in other to achieve principle of sustainable development, equity and equitable principles are terms that are frequently relied upon.[43] It involves the right of development as means of equitably meeting the development and environmental needs of future generation,[44] by State parties agreeing to be guided on the basis of equity in achieving the objectives of the convention.[45] It has been argued that the issue of sustainable development is an issue that is still evolving as there is gap between the develop States which need to apply the right top development and the developing Nations which need to apply a diluted right by recognizing only a right to promote sustainable development.[46]

[34]Sands (n 2) 279.
[35] Omaka (n 1).
[36] Council for Environmental Legal Action v. Union of India AIR (1996) SC 1446, (1996) SCR 503, 3SCC 212 (1996).
[37]S C Shastri, *Environmental Law* (5th edn Eastern Book Company 2015) 459; Brundtland Report 198, See also (n20) UNEP Report.
[38] *N D Dayal v. Union of India* (2004) 9 SCC 362.
[39] Sands (n 2).
[40] Reported in 2002 Colombia Journal of Environmental Law, 27 Column J. Emmtl. L. 491.
[41] ICJ Advisory Opinion on the Legality of Nuclear Weapon Test.
[42] Rio (n 21) Principle 4.
[43]Montreal Protocol (n313) (Aims at Controlling Equitable Total Global Commissions of Substance that Depletes the Ozone Layer).
[44] Rio (n 21) principle 3.
[45] Convention for Climate Change 1992.
[46] Omaka (n 1) 37.

Principle of Common but Differentiated Responsibility

This principle simply postulates that on the event of any environmental challenges, States shall have common responsibility to protect and conserve the environment but differentiated by each according to its contribution. Principle 7 of the Rio Declaration talks about States having a spirit of global partnership to conserve, protect and restore the health and integrity of the earth ecosystem.[47] This principle includes two fundamental elements: The common responsibility of States for the protection of the environment, or parts of it, at the national, regional and global level which implies that all States shall aim at protecting the environment; and the need to take into account the different circumstances, particularly each State's contribution to the evolution of a particular problem and its ability to prevent, reduce and control the threat. The principle envisaged two situations namely:

1. The principle of common responsibility; which envisage the responsibility of two or more States in the protection of particular environmental resources, taking into account the Physical location, historic importance, native and character of the resources. Irrespective of the fact that the property may be owned by a single State, two or more States or shared natural resource. This proposition could be seen from the activities that are carried out in the outer space, natural and cultural heritage, seabed etc.
2. Differentiated responsibility; which envisages the different standards set for preventing the happening of an environmental hazard. These standards can be deciphered in relation to the States special need, economic development and historical contribution. The 1972 Stockholm Convention, 1992 Rio Deceleration all took into account the special needs/circumstance of the developing countries, the economic and social development/priority.[48]

This principle has resulted in the establishment of special international machinery to provide technical assistance, financial help to developing States to assistance them implement the obligations of specific Treaties.

Principle of Public Trust

This principle is based on assumption that natural resources such as air, water and sea, being gift of nature should not be subject of ownership and should be freely available for the use of everyone as there can be no private ownership of same. Everyone is required to join the State to protect these resources for the benefit and enjoyment of the general public and not permit private ownership over them nor does it permit the State to transfer natural resources to private parties. This principle takes us back to the notion of the freedom of the High Sea which was made popular by Dutch Jurist Hugo Grotius,[49] but earlier been advocated by great writers like Brierly, who pointed out that law can only exist in a society and there can be no society without an organized system of rules of law to regulate the relationship of members of such society.[50] He posited that since the waters of the sea or ocean can neither be ceased nor enclosed by any person, it cannot be made the subject of private ownership by any State rather it must be for the well being of the entire nations.[51] In her reply to the Spanish protest against the Violation of the Spanish trading monopoly, Queen Elizabeth 1 stated that: 'The use of the sea and air is common to all neither can any title to the ocean belong to any people or private man for as much as neither nature nor regard of public use permit any possession thereof.'[52] This declaration of Queen Elizabeth received statutory support by the preamble of the UNCLOS 1982 which states as follows:

> Desiring by the Convention to develop the principle embodied in Resolution 2749 XXV of 17 December 1970 in which the General Assembly of the United Nations solemnly declared inter alia that the area of the seabed and ocean floor and sub-soil thereof, beyond the limits of national jurisdiction, as well as its resources, are common heritage of mankind, the exploration and exploitation of which shall be carried out for the benefit of mankind as a whole irrespective of the geographical location of State.[53]

This principle of law has received judicial blessings in plethora of cases bothering on international environmental protection. In *MC Mehta v Kalmal Nath Spon Motel Ltd*., the Indian Supreme Court held that

[47] Rio (n 21) Principle 7.
[48] Climate Change Convention 1992 art 3(1) Cited in Sands (n372) 285-286.
[49] Montreal Protocol on Substances that Depletes the Ozone Layer 1987 Article 5(1).
[50] H Grotius, *Mare Liberum or The Free Sea* (1909) <https://www.oil.libertyfund.org/index.phd> accessed on 15 June 2021
[51] *B S Lotus* (*France v Turkey* (1927) PCIJ (Ser A).
[52] Queen Elizabeth 1, Available at <chttp://en.Wikiquote.Org/Elizabeth/ofengland> accessed 20 April 2021.
[53] UNCLOS (n 23). The Preamble of United Nation Convention on the Law of the Sea 1982 para.6.

natural resources like river is not owned by the State which is only a trustee of it and the beneficiaries are the people who use the river. The facts of the case are that a private company with whom former Minister Kalmal Nath had family relationship with constructed a Motel at the bank of River Beas. The company had taken illegal possession of the major portion of the forest land which the former Minister Kamal Nath regularized for them in 1993-94 and granted lease of the land to the company. The flow of the River Bea was diverted by use of bull-dozers for the construction of the Spoon Motel and to protect it from flood. A suit was brought against the destruction of the environment and ecological nature of the River Bea. The court held that River Bea cannot be used for private purpose or for selfish interest and that the Minister cannot exact such powers because the government is a mere trustee of the River for the benefit of the masses.[54] In *Formento and Hotels Ltd v. Minguel Martins*, the Indian Supreme Court reiterated that natural resources including forest, water bodies, rivers, sea shores, lakes etc. are the unique gift of nature given to mankind and cannot be made subject of private ownership, hence they are held in trust by the State for the benefit of the people and for the future generation.[55]

3. Conclusion

In the light of the above enumerated and discussed rules of standard, it is trite that the international courts and tribunals hardly determined any marine related disputes without first taking recourse to the principles and rules of standard that govern international maritime boundaries. The reason is that overtime these rules have gained general acceptance amongst comity of States as a yardstick to measure the level of behaviour by States in the course of their relationship with other States. It has also been established that if these rules and principles are strictly applied, there may not be any need for States to have misunderstanding that will warrant them going through a whole lug of litigation before the international courts and tribunal to assert their rights, duties and obligations. It is therefore submitted that rules and principles of maintaining standards of behaviour in the international arena should be domesticated by the individual states to form part of their local legislations which will serve as a check and balance in the course of their relationship with other states. By so doing, the environment will be better protected for the present and future generations.

[54](1997) 1 SCC 388.
[55](2009) 3SCC 571.