ENVIRONMENTAL PROTECTION: AN APPRAISAL OF STATE RESPONSIBILITY UNDER INTERNATIONAL LAW*

Abstract

Sovereignty, as a principle of international law, connotes both rights and responsibilities. Environmental protection is a responsibility of states and has been so recognized under customary international law, which leaves states without the right of pre-emption. An environmental performance index, conducted in 2022, however, indicate that many states, including Nigeria, have been paying lip-service to environmental protection. This paper aims at appraising international instruments and principles that promote the protection of the environment. Its objective is to evaluate the response of the Nigerian government towards its responsibility to the environment and ultimately the people. The paper adopted the doctrinal methodology that enabled the writer do an in-depth critical analysis of the extant international legal instruments and principles. The paper found that state parties who were committed to their obligations under international law performed better in the recent performance index and the reverse is the case for poor performing countries. Following the findings, the paper concluded that the lack of sanction for non-compliance with treaty obligations is the major reason for default by nation states rand recommended that treaty obligations be made mandatory to state parties, at the risk of sanctions. It also recommended that individuals whose rights are violated by the non-compliance of their states be empowered to seek legal redress to enforce compliance by their states.

Keywords: State, Sovereignty, Environmental Protection, Responsibility

1. Introduction

It was Guruswamy who defined environmental law as a branch of public international law 'created by states for states to govern problems that arise between states'.[1]In the recent case between Costa Rica and Nicaragua, brought before the International Court of Justice in 2010 by Costa Rica against Nicaragua for the unlawful incursion, occupation and use of Costa Rican territory as well as serious damage to protected areas, the ICJ in 2018 held that 'damage to the environment and the consequent impairment or loss of the ability of the environment to provide goods and services, is compensable under international law. This, in other words is a reiteration of the responsibility of states to protect the environment from pollution, occasioning degradation. The state, which is a creation of international law, is at once clothed with sovereignty, as well as responsibility to its citizens to ensure that resources are deployed for their development and benefit as well as protection, and also to its neighbours to ensure that activities within its territory do not lead to the pollution of their territories. This work analyses some of these principles and examines the scorecard of performance of states, including Nigeria, in the area of environmental protection.

2. Conceptual Framework

The State in International Law

The Montevideo Convention on the Rights and Duties of States[2] stipulates that states in international law are 'equal sovereign units, consisting of a permanent population, defined territorial boundaries, a government and an ability to enter into agreement with other states'.[3] They are the primary, but not the only focus of international law and are credited with the greatest range of rights and obligations.[4] A state exists independent of recognition by other states or the international community and has the right to defend its independence and integrity, 'to provide for its conservation and prosperity and consequently to organise itself as it sees fit…'.Also, 'to legislate upon its interests, administer its services and to define the jurisdiction and competence of its courts', the exercise of these rights being only limited by that of other states under international law.[5] The convention also provides for non-interference in the internal or external affairs of a state.[6] These rights of states are premised on the age-long principle of 'sovereignty'.

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[1] Lakshman D. Guruswamy, *International Law in a Nutshell*, (West, 5th ed. 2017)
[2] An agreement signed at Montevideo, Uruguay on the 26th of December 1933 and entered into force the following year.
[3] Article 1
[4] Malcom Shaw, *International Law*, [13 November, 2019], Encyclopedia Britannica www.britannica.com/international-law accessed 21 September, 2021.
[5] Article 3
[6] Article 8

Sovereignty

Sovereignty is a principle that according to Francis Lieber, denotes 'the right, obligation and power which human society, or the state has, to do all that is necessary for the existence of man in the society'.[7]It has also been defined as 'control over people and geographic space, usually invested in a set of institutions and persons authorised to manage the affairs of the state.[8]The principle of sovereignty implies both positive and negative rights. It is increasingly viewed as comprising a dual set of state responsibilities consisting of an external duty to respect the sovereignty of other States, as well as an internal duty to respect the dignity and basic rights of all people within the State.[9] Though the origin of the concept is in doubt and has been a subject of disagreement amongst scholars, both as to the origin and as to the meaning and implication of the concept,[10] there is little disagreement amongst them as to the fact that 'the existence of a sovereign power in a hierarchically arranged and clearly determined order, is an essential element for the maintenance of serenity and orderliness in society.[11]

Permanent Sovereignty over Natural Resources

The United Nations Commission on Human Rights (UNCHR), at its 10th session on Human Rights, when the draft of the International Covenant on Human Rights was completed, got a request from the General Assembly for recommendations relating to the procedural development for the achievement of respect for the rights of the people to self-determination.[12]Sequel to that, the commission recommended that the GA establish a commission to conduct a survey on the rights of the peoples and nations to permanent sovereignty over their natural wealth and resources.[13]That became the foundation for the principle of Permanent Sovereignty over Natural Resources. Following that development, at its 13th session held in 1958, after the consideration of the draft resolution, a resolution was adopted[14] based on the recommendation of the Commission on Human Rights, which established the UN Commission on Permanent Sovereignty over Natural Resources. The commission had the task, among other things, to conduct a full survey, with a focus on the 'rights and duties of states under international law, and the importance of encouraging international cooperation in the economic development of underdeveloped countries.[15]It also had the task of determining the nature and manner in which the right should be exercised, as well as the measures to be taken into account in international law.

The culmination of the work of the Commission was the adoption of UN Resolution 1803 of 1962 on Permanent Sovereignty of Nations over their Natural Resources,[16] which provides that '(t)he right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the State concerned'. It went on to say that '(t)he free and beneficial exercise of the sovereignty of peoples and nations over their natural resources must be furthered by the mutual respect of States based on their sovereign equality'.[17] The principle found international affirmation in the case of *Congo v. Uganda*, where the International Court of Justice (ICJ) affirmed the importance of the principle in international relations.[18]

It is trite that resolutions of the United Nations are not legally binding instruments. It has been argued however that in practice many of them have had tremendous effects on international law generally and are considered a reliable source of 'state practice as a measure of the acceptance of any principle' in international law.[19] It is worthy

[7] Merriam Jr. C.E. 'History of the Theory of Sovereignty since Rousseau', in Thomas Prehi Botchway, 'International Law, Sovereignty and the Responsibility to Protect: An Overview', [November, 2018] 11(4) *Journal of Politics and Law*. www.researchgate.net accessed 24 September, 2021.

[8] Thomas Prehi Botchway, 'International Law, Sovereignty and the Responsibility to Protect: An Overview', [November, 2018], 11(4) *Journal of Politics and Law*. www.researchgate.net accessed 24 September, 2021.

[9] Rebecca Bratspies, 'State Responsibility for Human-Induced Environmental Disasters', [Jan. 2012] *German Yearbook of International Law* www.researchgate.net accessed 20 October, 2020

[10]Some scholars like Hobbes believe that the sovereign has absolute and limitless power

[11]Ibid.

[12]General Assembly Resolution 637 C (VII) and 738 (VIII) of 14 December 1952 and 28 November 1953 respectively.

[13]General Assembly Resolution 1803 (XVII) Permanent Sovereignty Over Natural Resources, United Nations Audiovisual Library of International Law, 2012 www.un.org/law/avl accessed 27 September, 2021.

[14]Resolution 1314 (XIII) of 12 December, 1958.

[15]General Assembly Resolution (n443)

[16]Yolanda T. Chekera and Vincent O. Nmehielle, 'The International Law Principle of Permanent Sovereignty Over Natural Resources as an Instrument for Development: The Case of Zimbabwean Diamonds', [2013] 6 *African Journal of Legal Studies* www.brill.com accessed 27 September, 2021

[17] UN Resolution 1803 (XVII) of 14th December, 1062 titled 'Permanent Sovereignty Over Natural Resources', Paras 1 & 5

[18]Armed Activities on the Territory of the Congo (*Democratic Republic of the Congo v. Uganda),* Judgment, I.C.J. Reports 2005, p. 168, paras. 243-246.www.icj-cij.org accessed 2 October, 2021.

[19]Yolanda T. Chekera & Vincent O. Nmehielle, 'The International Law Principle of Permanent Sovereignty Over Natural Resources as an Instrument for Development: The Case of Zimbabwean Diamonds', [2013] 6 *African Journal of Legal Studies* www.brill.com accessed 27 September, 2021

to note that the principle of sovereignty over natural resources is a right accruing to states and not to individuals or groups. This is evident when the provisions of the United Nations Declaration on the Rights of Indigenous People are considered. Article 26 of the declaration gives recognition to the right of the people to 'the lands, territories, and resources which they have traditionally owned, occupied or otherwise used or acquired', imposing an obligation upon States to "give legal recognition and protection to these lands, territories and resources', which recognition should be in accordance and 'with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned'. Further to the above provision, article 28 of the declaration vests the right of redress to Indigenous peoples,' for the lands, territories, and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.' A clear reading of the provisions cited above and others makes it expressly clear that indigenous peoples or groups do not have a sovereign right over their natural resources in international law, only the right of consultation and possible compensation.[20]

Over the years the debate on resource sovereignty has both broadened and deepened. It broadened by extending its scope to include natural wealth and marine resources. It deepened by increasing the number of resource-related rights, including those relating to foreign investment, and subsequently—and more hesitantly—by identifying duties emanating from the principle.[21]

Sovereignty and Responsibility

The rights associated with statehood under international law also imply responsibilities. Thomas Hobbes had a very expansive idea of the powers available to the sovereign. According to him, the sovereign, being the state (the artificial man) has limitless powers and can do no wrong, absolute power having been yielded to him by the governed. [22]He, however, admitted to an exception to the principle of absolute power, when he stated that

> The office of the sovereign, (be it a monarch or an assembly,) consist in the end, for which he was trusted with the sovereign power, namely the procuration of the safety of the people, to which he is obliged by the law of nature, and to render an account thereof to God, the author of that law, and none but him. But by safety here, is not meant a bare preservation, but also all other contentment of life, which every man by lawful industry, without danger, or hurt to the commonwealth, shall acquire to himself'.[23]

To that effect, states are responsible for direct violations of international law or treaty obligations; for breaches committed by its internal institutions; by persons and entities exercising governmental powers and authority, and for the private activities of persons, but to the extent that they are subsequently adopted by the state.[24] The principle of state responsibility, especially concerning the protection of the environment is expressly stated in the principles of international environmental law. The principles that make such provisions include:

3. Principles of Environmental Protection in International Law

The Precautionary Principle

The precautionary principle features as principle 15 of the Rio Declaration, which emanated from the United Nations Conference on Environment and Development held in Rio De Janeiro, Brazil in 1992. The principle states that 'where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation'.[25] The precautionary principle is considered a fundamental tool for the promotion of sustainable development as well as an 'authority to take public policy decisions covering environmental protection in the face of uncertainty and functions at both international and national levels.'[26]It has been described as one of the most 'prominent and possibly controversial

[20]Nicolaas Schriver, 'Self Determination of Peoples and Sovereignty over Natural Wealth and Resources', in book, United Nations Human Rights, *Realising the Right to Development* (UN Ilibrary 2013) www.un-ilibrary.org accessed 2nd October, 2021.

[21]Nicolaas Schriver, 'Self Determination of Peoples and Sovereignty over Natural Wealth and Resources', in book, United Nations Human Rights, *Realising the Right to Development* (2013) UN Ilibrary www.un-ilibrary.org accessed 2 October, 2021.

[22]In Leviathan originally published in April, 1651, alternate title – The Matter, Form and Power of a Common Wealth, Ecclesiastical and Civil.

[23] Luke Glanville, 'The Antecedents of Sovereignty as Responsibility', [2010] Vol.17 (2) European Journal of International Relations (EJIR) www.journals.sagepub.compdf> accessed 22 September, 2021.

[24] Malcom Shaw (n434)

[25]C. Gollier, N. Triech, 'Resources', [2013] *Encyclopedia of Energy and Environmental Economics*www.sciencedirect.com accessed 8 October, 2021.

[26]Gitanjali Nain Gill, 'The Precautionary Principle, its Interpretation and Application by the Indian Judiciary: 'when I use a Word it Means just what I choose it to mean – neither more nor less' Humpty Dumpty', [2019] Vol 21(4) *Environmental Law Review* <www.journals.sagepub.com> accessed 8 October, 2021

developments in modern International Environmental law.'[27] One of the most controversial elements, according to Pinto-Bazurco, relates to the burden of proof, which hitherto was on the person alleging harm. The principle makes a reversal of the principle, placing the burden of proof on the person or entity proposing,[28] thereby promoting proactiveness in environmental regulatory actions, which ultimately averts the environmental crisis. This is in direct contrast to traditional regulatory practices which are rather reactive.[29]

The precautionary Principle has been considered one of the most popular principles in Environmental law and Article 3 of the UNFCCC[30] is a practical application of the principle among others.[31] Environmental impact assessment is another precautionary principle[32] aimed at preventing environmental harm. The principle states that '…environmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority' Historically, the precautionary principle was said to have been first mentioned at the international level at the 1982 World Charter for Nature[33] and later at the Vienna Convention for the Protection of the Ozone Layer, which was held in 1985.[34]

Polluter Pays Principle

This has been a dominant concept in environmental law since the 1970s, particularly among regional organisations, especially within Europe.[35]It is a principle of environmental law and accepted practice that provides that the authors of pollution should fund its management for the prevention of damaging effects to the environment or human health.[36] In other words, 'the cost of pollution be borne by those who caused it'.[37] The principle was first recognized in international law in the International Convention on Oil Pollution Preparedness, Response and Cooperation (OPRC) held in 1990, which is an agreement entered into by the IMO. It was reaffirmed and featured as Principle 16 of the Rio Declaration in 1992.[38]

The principle performs four functions, according to Olumuyiwa, viz. redistributive, precautionary or preventive, redemptive or curative, and punitive.[39] The redistributive function allows polluters to internalize the cost of pollution control activities and pay the appropriate price while continuing their activities. The preventive is directed at the abatement of pollution by urging those engaged in pollution-generating activities to reduce their emissions rather than pay the price; the curative function is that which requires that polluters be responsible and accountable for the damage done to the environment through their activities by restoring or cleaning up the damaged site, as well as compensating victims of such pollution. The punitive function of the principle is that which acts as a deterrent, which may range from prison sentences to punitive fines for defaulters, aimed at making pollution unattractive.[40] It is now a widely acknowledged principle and accepted by international institutions and national governments and has formed part of their laws, policies, and regulations. [42]Oftentimes, the principle is implemented in the form of a tax, where the government levies per unit of pollutant emitted into the air or water, which theoretically reduces pollution as organisations are forced to reduce the number of pollutants emitted in

[2727]Jose Felix Pinto-Bazurco, 'The Precautionary Priniple' [October, 2020] IISD www.iisd.org>articles> accessed 8 October, 2021.

[28]Ibid

[29]See Harpreet Kaur, 'Precautionary Principle' February 4, 2015 Academike www.lawctopus.com accessed 9 October,2021

[30]Which in summary, enjoins parties to protect the climate system for the benefit of present and future generations in accordance with their common but differentiated responsibilities and respective capabilities and taking precautionary measures to combat climate change.

[31]Hargreet Kaur (n459)

[32]Principle 17 of the Rio Declaration

[3333]The Charter stated that '(d)ischarge of pollutants into natural systems shall be avoided and …(s)pecial precautions shall be taken to prevent discharge of radioactive or toxic wastes'.

[34]Which included a recognition of the precautionary measures adopted by parties in protecting the Ozone layer and also extended to the Montreal Protocol where parties were determined to take precautionary measures aimed at controlling the emission of substances that deplete the ozone layer.

[35]Salem Ozkan, 'Turkey: Principles of International Environmental Law and Effects of Electric Vehicle', [30 July, 2020] Mondaq www.mondaq.com accessed 9th October,2021; it was first adopted by the OECD in a seminar held in 1971 and further expanded in 1974

[36]LSE (London school of economics and political science), 'what is the Polluter Pays Principle", [11 May, 2018], Grantham Research Institute on Climate Change and the Environment www.ise.ac.uk accessed 11 October, 2021.

[37]Julien Francois Gerber, 'Polluter Pays Principle', [2013] *Environment Justice Organisation Liabilities and Trade* www.ejolt.org2013/05> accessed 9 October, 2021

[38]Olayinka Oluwamuyiwa Ojo, 'Polluter Pays Principle under Nigerian Law', June 2021 26(3) *ENV. LIABILITY,* www.researchgate.net accessed 11 October,2021

[39]Nicolas de Sadeleer, *Environmental Principles: From Political Slogans to Legal Rules* (OUP, 2002) 36

[40]All Answers Ltd 'Polluter Pays Principle Case Study' UKEssaays.com [April, 2021] www.ukessays.com/essays/environmental studies accessed 11 October, 2021

order to reduce cost.[41] The principle was applied in the Exxon Valdez case where over 300,000 barrels of crude oil were discharged into Alaskan waters when an oil tanker bearing the product ran aground. Exxon was directed to pay the sum of USD 125 million to the government of the United States and the state of Alaska. In addition to other funds, they were also required to effect the clean-up of the shoreline to restore it to the status quo.[42] The principle was also incorporated into the National Policy on Environment of the federal government of Nigeria, which was first promulgated in 1988 and revised in 1999 and 2016. The policy was aimed at achieving 'environmental protection and the conservation of natural resources for sustainable development'.[43] The policy adopted the polluter pays principle, as well as the precautionary principle as part of its guiding principles for the achievement of its goals. The challenge, however, has always been the increasing rate of free trade treaties which give the capitalists the opportunity to exploit environmental resources with limited responsibility for damages resulting from such exploitation.[44]

The Principle of Prevention

The principle of prevention in the international environmental context was introduced in Principle 21 of the Stockholm Declaration on the Human Environment, which was adopted at the UN Conference on the Human Environment held in 1972: 'States have the sovereign right to exploit their own resources . . . and 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] The principle was affirmed *ipso verbis* in Principle 2 of the Rio Declaration.[46]

It is worthy to note that the principle has also been reaffirmed by other international legal instruments. Article 193 of the United Nations Convention on the Law of the Sea ('UNCLOS')[47] provides that 'States have the sovereign right to exploit their natural resources pursuant to their environmental policies and in accordance with their duty to protect and preserve the marine environment'. This provision is preceded by a general obligation, under Article 192, to 'protect and preserve the marine environment', and followed by a more specific statement (Article 194(2)), which recalls the formulation of Principle 21 of the Stockholm Declaration. Article 3 of the Convention on Biodiversity as well as the Preamble of the United Nations Framework on Climate Change (UNFCCC) also makes reference to the expanded version of the Prevention Principle.[48] The principle is a positive obligation to anticipate harm to protect and preserve the environment'.[49]'What Principle 21 seeks to highlight is less the protection of the interests of other States than that of the environment per se'.[50]It requires that measures be taken 'to anticipate and avoid environmental damage before it happens.[51]It has been recognized as a cornerstone of international environmental law.[52] The prevention principle is the bases for laws regulating the management of hazardous wastes, including their generation, storage, transportation, treatment and disposal.[53]

The aim of most international environmental instruments is, to a large extent, the prevention of environmental harm, whether it relates to the pollution of the sea, inland waters, soil, atmosphere, protection of human life or other living resources.[54] The concept can be considered 'an overarching aim that gives rise to a multitude of legal mechanisms, including prior assessment of environmental harm, licensing or authorization that set out the conditions for operation and the consequences for violation of the conditions, as well as the adoption of strategies and policies'.[55] It is now widely recognised in treaty and customary law that the duty to prevent environmental harm must be performed by reference to several other internationally recognised duties of a procedural nature,

[41]Garber (n467).
[42]Ibid.
[43]National Policy on Environment (Revised 2016) www.extwprigsI.fao.org pdf> accessed 24 October, 2021
[44]Ubleble Benjamine Akande and Gbenemene Kpae, 'A Criticnon Nigeria National Policy on Environment: Reasons for Policy Review', [2017] Vol. 3 (3) *IIARD* www.iiardpub.org accessed 24 October,2021
[45]Principle 21 Declaration of the United Nations Conference on the Human Environment www.docenti.unimc.itfiles> accessed 13 October, 2021.
[46]Adopted at the UN Conference on Environment and Development in held in Brazil in 1992.
[47]United Nations Convention on the Law of the Sea, 10 December 1982, 1833 UNTS 397 ('UNCLOS'), Art. 136.
[48] 'The Principles of International Environmental Law' www.edisciplinas.usp.brC...> accessed 14th October, 2021
[49]Leslie –Ann Duvic – Paoli, 'The Prevention Principle in International Environmental Law' (CUP, May, 2018)
[50] 'The Principles of International Environmental Law (n 478)
[51]Client Earth, 'What are Environmental Principles', 12th March, 2019 www.clientearth.orgstories> accessed 13 October, 2021.
[52]Ibid.
[53]Britannica, 'Principles of Environmental Law', www.britannica.com accessed 12 October, 2021.
[54]InforMEA, 'Principles and Concepts of International Environmental Law' (Part 2) www.globalpact.informea.org..> accessed 14 October, 2021.
[55]ibid

including those to notify, consult, co-operate, seek the prior informed consent of the parties concerned or conduct an environmental impact assessment.[56]

No Harm Principle

The 'no harm principle/rule' is a well-known and recognised principle of customary international law. It is a rule that burdens states with the responsibility to 'prevent, reduce and control the risk of environmental harm to other states'.[57] The principle which enjoins states to ensure that 'activities within their jurisdiction do not cause significant cross-boundary environmental damage constitutes the cornerstone of international environmental law'.[58]It is founded on the principle of good neighbourliness and the sovereign rights of states.[59] In order to understand the origin and content of the 'no harm' principle, it is useful to recall its historical development. The classic formulation of the no harm principle in an environmental context appears in the Trail Smelter Case (United States v. Canada), where the tribunal stated that:[60] 'no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in, or to the territory of another, or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.' [61] The ICJ confirmed the customary nature of this principle in 1949, in the Corfu Channel Case (United Kingdom v. Albania), referring to the existence of 'certain general and well-recognised principles, namely . . . every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States'.[62]In both cases, this principle was used as a primary norm in order to determine the responsibility of a State for damages caused to another State.[63]

The *Trail Smelta* case has been said to have established the parameters for the invocation of the no-harm rule. The first is that it only applies to serious harm; the second is that it applies to only transboundary harm to the territory of other states. And the third is that any state wishing to invoke the rule must provide 'clear and convincing evidence of harm'.[64] At this stage of the development of the rule, it was considered an expression of the rights of states, especially with regard being had to the ruling of the ICJ in the Corfu Channel cases, rather than a tool for environmental protection. This was more or less affirmed in the Lake Lanoux arbitration,[65]where Spain brought an action against France's proposal to divert water along a shared waterway for electricity generation. The tribunal in its ruling stated that the proposed diversion would not affect Spain's rights, as the water so diverted would still return in the same volume.

The next phase of the development of the no-harm rule was connected to the emergence of concerns and anxieties over the consequences of human activities in the environment as expressed earlier in the 1960s.[66] The commencement of the phase was marked by the adoption of the 1972 Stockholm Declaration, especially Principle 21 supra, which placed emphasis on environmental protection, thereby reformulating the rule to include the obligation to include the duty to prevent not only transboundary harm, but also harm to the global commons.[67] This was affirmed in Principle 2 of the Rio Declaration. The next and present phase in the development was marked by the International Law commission's (ILC) Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities, which resulted from over 20years of work for the clarification and codification of international law regarding transboundary harm.[68] The rule was reformulated with focus on the prevention, upon the rationale that prevention is preferable than compensation for harm done. In other words, it prescribed due diligence in order to minimise transboundary harm. The Draft Articles, even though not binding on states, is likened to the work of publicists which falls within the sources of law as found in article 38 (1) of the Statute of the International Court of Justice.[69]

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[56]'The Principles of International Environmental Law', (n479)

[57]Ian Brownie, *Principles of Public International and Environmental Law*, (7th ed.) In UNEP, 'Environmental Rule of Law: No Harm Rule' LEAP www.leap.unep.org accessed 15 October, 2021.

[58]Benoit Mayer, 'the Relevance of the No-Harm Principle to Climate Change Law and Politics', [2016] *Asia Pacific Journal of Environmental Law*. www.elgaronline.com accessed 15 October, 2021.

[59]Philippe Sands and Jacqueline Peels, Principles of International Environmental Law, (CUP, 2012) 197

[60]Ibid.

[61]Trail Smelta case (United States v Canada), 3 UNRIAA, P. 1905, 1952.

[62]Corfu Channel – United Kingdom v Albania, Judgment Compensation (1949) ICJ REP 244 ICGJ 201 (ICJ 1949) 15TH December 1949, UN ICJ.

[63] 'The Principles of International Environmental Law', (n437)

[64]Kerryn Anne Brent, 'The Certain Activities Case: What Implications for the No-Harm Rule?' August 2017 Asia Pacific Journal of Environmental Law www.elgaronline.com accessed 17 October, 2021.

[65](1957) 24 ILR 101.

[66] Kerryn Anne Brent (n495)

[67]ibid

[68]ibid

[69]Ibid.

The ICJ in the *Certain Activities case* held that the responsibility to prevent harm to the environment is closely linked to the Environmental Impact Assessment obligation, which gives substance to the exercise of due diligence for the prevention of transboundary harm. Where the EIA indicates the existence of risk, the court held that the country proposing the activity further owes the duty of notification and consultation with the country to be affected by the proposed activity, with regard to the measures to be adopted to mitigate the risk.[70] In the area of compensation for environmental damage, the court held that under international law, 'the impairment or loss of the ability of the environment to provide goods and services is also compensable'.[71] The court had held in an earlier case (the Pulp Mills case) that 'due diligence and the duty it of vigilance and prevention… would not be considered to have been exercised, if a party planning works liable to affect the regime of the river or the quality of its waters did not undertake an environmental impact assessment on the potential effects of such works.[72]

4. States Performance In Environmental Protection

As stated earlier, states in international law are clothed with sovereignty, a corollary of which is responsibility. It is the responsibility of states *inter alia,* to protect its environment from harm and external aggression, as well as ensure that harmful effluents/ substances do not migrate from within its territories across its boundaries to those of its neighbours, applying the principles above. It is obvious, from recurrent environmental disasters around the world that the development of international environmental law notwithstanding, the deterioration of the environment has continued.[73] Scientists across the world have made available new evidence as well as a clear understanding of the challenges faced by the global community with regard to the environment, which challenges are present at the international, national and local levels.[74] The 2022 Environmental Performance Index (EPI), which is a data-driven summary of sustainability index around the world, carried out by the Yale Centre for Environmental Law and policy, in conjunction with others, provides an sight into the performance of states vis-à-vis environmental governance.

In the summary which ranked 180 countries, 'using 40 performance indicators across 11 issue categories', the countries were ranked with regard to climate change efforts, ecosystem vitality and environmental health.[75] Top ranking countries like Denmark, United Kingdom and Finland which ranked first, second and third respectively, exhibited longstanding as well as continuing investments in policies geared towards environmental health, biodiversity preservation, natural resources conservation, among others.[76] It is insightful to note that the United States ranked 43, which low ranking was occasioned by their pulling out of the Paris Accord during the Trump administration. Nigeria ranked 162 out of the 180, India ranked lowest. The performance index only evidences the fact that even though the principles of environmental protection have more or less evolved into customary norms in the international arena, most states have paid lip service to implementation, some even despite the enactment of domestic policies. The Environmental Committee of the Club des Juristes, in its report presented in 2015 made suggestions as to how to make the laws effective. According to the report, civil society needs to take ownership of environmental laws and states compliance ought to be the concern of all citizens.[77] Individuals are affected by the terms of international treaties which help guarantee their rights, therefore individuals ought to actively monitor states compliance and be given the locus to refer the states to court to enforce compliance.[78]

5. Conclusion and Recommendations

It is evident that all states have passionately embraced the rights accruing from the international principle of sovereignty, but some at best, reluctantly accepted the responsibilities also emanating therefrom. The results of the recent Environmental Performance Index are indicative of the benefits to be gained from strict compliance with international obligations to the environment and people of a state. Not only is the environment safe from

[70] Certain Activities case, 2015 para 104

[71] Mara Tignino & Christian Brethaut, 'The Role of International Case Law in Implementing the Obligation not to Cause Significant Harm', [October 2020] 20 Int. Environ Agreements www.link.springer.comarticl> accessed 20 October, 2021.

[72] Pulp Mills on the River Uruguay (Argentina v Uruguay) ICJ GL No. 135

[73] The Club des Juristes, 'Increasing the Effectiveness of International Environmental Law: Duties of States, Rights of Individuals', [November, 2015] report from the Environmental Committee www.globalpactenvironment.org accessed 30th August, 2022

[74] Yale Centre for environmental Law and Policy, Centre for International Earth Science, Information Network Earth Institute, Columbia University, with support of McCall MacBain Foundation, 'Environmental Performance Index' [2022] www.epi.yale.edu accessed 30th August, 2022

[75] ibid

[76] ibid

[77] The Club des Juristes, 'Increasing the Effectiveness of International Environmental Law: Duties of States, Rights of Individuals', [November, 2015] report from the Environmental Committee www.globalpactenvironment.org accessed 30th August, 2022

[78] ibid

degradation, the state is also safe from external aggression that occurs if pollutants travel beyond the boundaries of the state, thereby compromising security. The ranking of Nigeria in 162 positions out of 180 countries speaks volumes. It evidences the fact that the Nigerian state has not been committed to her treaty obligations, even those domesticated and binding. The case of the United States, whose low ranking was occasioned by her pulling out of the Paris Agreement, is another case in point. This state of affairs is only possible because there are no penalties for default of treaty obligations. It is high time the rules of the game were changed. The consequences of environmental irresponsibility/rascality – climate change, ozone layer depletion, etc, affect, not just the culprit state, but travel across international boundary lines to the rest of the world. So long as compliance to treaty obligations, especially those relating to environmental protection are not made mandatory at the risk of sanction for default, states will continue to default and the world will always be worse off for it. This paper therefore makes the following recommendations: state compliance to treaty obligations should be made mandatory, at the risk of sanctions for default. Again, poor performing states, whose poor performance is occasioned by inadequate resources should be encouraged by the provision of aids for better performance. On the other hand, high performing states should be further encouraged through tax/tariff reduction or waiver/exemption on international trade. Finally, individuals whose rights are violated by their states following non-compliance to treaty obligations should be empowered to enforce compliance through legal redress.