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The Role of International Law in Environmental Protection

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Abstract

Environmental Pollution does not maintain national boundaries. The cause of environmental degradation originates in the sovereign jurisdiction of one nation whilst its effects are felt in the other nation. To proffer solution for the Global pollution problems, the need for regulatory framework for International environmental protection arose. To achieve this fit, searchlight was beamed at the realm of international environmental law.

Although the environment is as old as nature, the protection of the environment had a comparatively late beginning in the world. (Okonkwo, 2003:208). The incessant global technological and economic advancement attracted human interaction and therefore human attention to the global environment. Mankind became threatened by global environmental changes of which all humanity is guilty. Thus, the need for a world-wide concern for the deterioration of the human Environment Atsegbua (2000:94) which was as a result of the above mentioned advancement. As the international environmental advancement receives increasing attention, so does international environmental protection, from bilateral agreements to protect migratory fish and game and to resolve trans boundary pollution disputes, to now, virtually, the entire community of nations are in multilateral agreements to address the global problems.

Environmental pollution as a fact does not maintain national boundaries as some territories affected by the pollution are beyond the sovereign jurisdiction of any one nation. The cause of environmental degradation originates in the sovereign territory of one nation whilst its effects are felt elsewhere, for example, two dramatic incidents which occurred in 1986 have concentrated the minds of the global community on the problem of trans boundary pollution. In that year, an exposition at the Chernobyl nuclear power plant blasted 50 tones of Member fuel into the atmosphere and a north-westerly wind carried radioactive particles across much of

Europe. Also in 1986, a fire in a warehouse in Switzerland caused the release of agricultural chemicals, solvents and mercury, which flowed into the River Rhine, killing millions of fish and threatening the safety of drinking water in Germany and the Netherland.*(* Thornton And Beckwith 2004:30).

The 2011 *Tohoku* earthquake, also known as the Great East Japan Earth quake which occurred on Friday, 11 march 2011 left the environment with its tales of devastation. It was said to be the most powerful known earthquake to have hit Japan, and one of the most powerful earthquakes in the world since modern recordkeeping began in 1900. (Japan Earthquake: 2011) According to the Japanese prime Minister Naoto Kan, "In the 65 years after the end of world war 11," this is the toughest and the most difficult crisis for Japan. The Earthquake moved Japan and Shifted the Earth on its axis by an estimate of between 10cm (4in) and 25cm (10in). The earth shift was said to have led to a number of small planetary changes, including the length of a day of the earth. Flooding entirely destroyed every available land; farmland and crop were washed away. (Zhange, 2011).

According to Mc Nutt, if the surface energy from the earthquake could only be harnessed, it would power a city the size of Los Angeles for an entire year. The total energy released also known as the seismic moment was approximately 600 million times the energy of the Hiroshima bomb. Uranaka, Taiga And Kwon Kijoon(2011) With the above devastation, the land , air and water (the environment) of Japan are no doubt deleteriously affected, the rate of waste production and the effects on the environment can also not be overemphasized, both the generation present and the generation yet to come will feel the impact of this pollution and degradation. To proffer solution for the Global pollution problems, the need for regulatory framework for International environmental protection arose. To achieve this fit, searchlight was beamed at the realm of international environmental law.

What is International Environmental Law?

Caldwell described international environmental law as:

> *the collective body of agreements among states regarding mutual rights and obligations affecting the environment. He notes that it is embodied in conventions among states (treaties) and, to lesser effect, in international declarations, collective principles, opinions of jurists, and generally accepted practices among states. Enforcement of its provisions, customary or specified by treaty, are usually sought through negotiations (e.g. diplomacy) rather than through adjudication. Its boundaries are definable only in broad terms because new scientific findings and enlarging perceptions of man-biosphere relationship have continually if unevenly expanded its frontiers. (Caldwell 1984; 102).*

The International environmental protection law has set rules and custom which seek to protect the environment; such custom enjoins sovereign nations not to use their environmental problems for other sovereign states.

Thus in an arbitration between United States v. Canada **(**1930 &1934**)**, the Arbitral Tribunal observed that: Under the principle of International law… no state has right to use or permit the use of territory in such a manner as to cause injury by fumes in or to the territory of another or property or person therein when the case is of serious consequences and the injury is established by clear and convincing evidence.

The tribunal further noted that a state owes at all times a duty to protect other states against injurious acts by individuals from within its jurisdiction. (Ehiegbelua 2003:230). According to Saba,(1994:1) the most significant starting point which established a benchmark for international Concern on the environment was the United Nations Inter-Governmental Conference on the Human Environment at Stockholm between 5-16 June 1972. The Stockholm Declaration was made by 113 states excluding the USSR, Cuba and few other socialist states. (Dixon and Mccorguodala 1995:521)

Below are some of the important environmental principles agreed upon at the Stockholm Declaration.

Principle 1: Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits life of dignity and well-being and he bears a solemn responsibility to protect and improve the environment for present and future generations. In this respect, policies promoting or perpetuating apartheid, racial segregation, discrimination, colonial and other forms of oppression and foreign domination stand condemned and must be eliminated.

Principle 2: The natural resources of the earth including the air, water, land flora and fauna and especially representative samples of natural ecosystems must be safeguarded for the benefit of present and future generations through careful planning or management, as appropriate.

Principle 3: The capacity of the earth to produce vital renewable resources must be maintained and, wherever practicable, restored or improved.

Principle 4: Man has special responsibility to safeguard and wisely manage the heritage of wildlife and its habitat, which are now gravely imperiled by a combination of adverse factors. Nature conservation including wildlife must therefore receive importance in planning for economic development.

Principle 5: The non-renewable resources of the earth must be employed in such a way as to guard against the danger of their future exhaustion and to ensure that benefits from such employment are shared by all mankind.

Principle 6: The discharge of toxic substances or of other substances and the release of heat, in such quantities or concentrations as to exceed the capacity of the environment to render them harmless, must be halted in order to ensure that serious or irreversible damage is not inflicted upon ecosystems. The just struggle of the peoples of all countries against pollution should be supported.

Principle 7: States shall take all possible steps to prevent pollution of the seas by substances that are liable to create hazards to human health to harm living resources and marine life, to damage amenities or to interfere with other legitimate uses of the sea.

Principle 8: Economic and social development is essential for ensuring a favorable living and working environment for man and for creating conditions on earth that are necessary for the improvement of the quality of life.

Principle 21: States have, in accordance with the Charter of the United Nations and the principle of International Law, the sovereign right to exploit their own 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 of areas beyond the limits of national jurisdiction.(Dixon and Mccorguodala 1995:1)

The United Nations Environment program (U.N.E.P) also held another session in 1982 to rekindle the spirit of Stockholm. In 1987 the report of the world Commission on Environment and Development (WCED), Our common future (known as the Brundtland Report) was published. The Report recommended that relevant regional and global meetings should be held. The recommendation was said to have been relayed to the United Nations (U.N). General Assembly and by its resolution 44/223 of 22 December, 1989, the U.N. decided to hold the United Nation's Conference on Environment and Development in June 1992 in Brazil. This conference was said to be an international forum where strategies to fully integrate the relationship between environment and development into every of economic life and

behavior would be agreed upon. As a result, the two-week United Nations Conference on Environment and Development (UNCED opened in *Rio de Janeiro* on the 3rd of June, 1992.

Before the conference in *Rio de Janeiro Brazil*, environmental protection was seen as an added cost to development by most developing countries including Nigeria. The popular concept among them was that environment protection and management has to wait until 'appreciable' economic development occurs. one of the achievements of the Rio Conference was to place environmental issues high on the agenda of the international community.

International environmental protection agreement comes in different shades, it is either a non binding unilateral declaration of intent or jointly proposed declaration of principles or a firm agreement which creates legal obligation which may attract sanctions where there is no performance of the specific obligation. The international environmental agreement consists primarily of Treaties, Charters, Conventions, Accords, protocols or some other term as a nation could obligate itself in an agreement with an organization. The International agreement on the environment employs a wide range of regulatory arrangement for structuring, monitoring and protecting the environment, such agreement shared concerns such as ocean pollution, endangered species protection, hazardous waste among others. (Dixon and Mccorguodala 1995:105).

Nigeria had singed some International agreements on environment protection aimed at resolving particular environmental problems; they create obligations and norms of behavior for the states, which are parties to them. In principle, these conventions are binding only on the signatory states. Generally, they become binding on states only after they have been ratified (formally adopted) by a certain specified number of states. International environmental protection Conventions, tend to require only a low number of ratification by the required number of states, the obligations become binding on all states who have expressly indicated by signing the treaty, that they wish to be bound by it when it comes into force. (Thornton and Beckwith 2004:31)

As many and laudable the above conventions are, they are faced with problems. Firstly, is the problem of compliance, disputes arising between states are initially subjected to negotiation, and only thereafter is recourse had to international arbitration and the international court of Justice in some cases, for remedy under this system of justice is seen as a politically unfriendly act and it is often difficult to achieve a satisfactory remedy. Hence it is suggested that, to ensure effective compliance, it is important to build into these agreements requirements that state: establish regular meetings to review agreements implementation and revise terms as and when necessary; create administrative agencies to assist with implementation; impose regular reporting obligations, or create monitoring or observer systems, or provide for financial sanctions or rewards as 'carrots and sticks' (Hughes 1992:85)

Secondly, is the fact that developed and the developing nations often have different environmental priorities, "the industrialized nations will consider the agreement in a different light from the poor nations, who sees environmental protection as accelerated exploitation of resources by technologically developed nations and retard industrial development in the developing nations. (Atsegbua 2000:107)

Thirdly, is the doctrine of state Sovereignty. However, this doctrine has been redefined to accommodate the need for environmental protection, but it remains to be seen whether this will lead to any greater protection of the environment, however, this is not in any way suggesting that International environmental protection is not important, according to Lyster(1992:86)

> *there is another overriding factor, which ensures that, by and large, states make, every effort to enforce a treaty once they have become a party to it. It is in the interests of almost every state that order, and not chaos, should be a governing principle of human life and if treaties were made and freely ignored chaos would soon result.*

Some International Environmental Protection Institutions

The United Nations (UN)

After the destruction caused by the Second World War, the United Nations was created as a global organization that will bring the different nations together. This global organization provided among others an institutional framework as a basis for the development of International environmental Protection laws. The United Nation is the main forum for the creation of international legal rules. Apart from its six principal organs' which are: the Secretariat, the General assembly, the Security Council with five "permanent members", the Trusteeship council, the International Court of Justice and the Economic and Social committee, there are also "programs" and "commissions" in place that perform environmental protection role. These include:

i. **The United Nations Environment Program (UNEP)**

This was a creation of the decision reached at the 1972 Stockholm Conference as a body to guide the future development of international environmental protection law. This body with about 58 representatives was to provide general policy guidance to the United Nations for better environmental protection. With the 1992 *Rio* Conference, the body now takes the lead in formulating law and policies, collates and disseminates environmental information and provides scientific advice to the commission on sustainable development.

ii. **The Commission on Sustainable Development**.

This body came to life in the wake of the 1992 *Rio* Conference. It monitors and reviews the implementation of "Agenda 21" which is a comprehensive

international plan agreed on at *Rio* for achieving sustainable development. It is a permanent diplomatic forum for negotiation between governments on environmental issues.

The International Court of Justice (ICJ) ICJR (1997:111)

This was established under the UN charter as 'a principal judicial organ' of the United Nations with its judges from member states for a nine years term. This court settles international disputes and gives 'Advisory Opinions'. However, the International court of Justice seldom addresses environmental protection issues directly. This was seen in the **Nuclear Tests cases** ICJR (1974:253) between Australia and New Zealand against France, where Australia and New Zealand called on France to stop its atmospheric nuclear testing in the South Pacific region. The court based and used trespass rather than on environmental harm in deciding the claim for environmental pollution. Also, in the **Gabeikovo Nagymaros** Case ICJR(1997:7) which concerned a dispute between Hungary and Slovakia about the environmental impacts on the Danube construction work. Although the court has jurisdiction to hear environmental complaints, the court rather depended on an interpretation of the obligation contained in a treaty between the two countries. It is also important to note that since 1992 when a special seven member team for hearing environmental issues was appointed, not a single case has yet come before it.

The Organization for Economic Co-operation and Development (OECD)

This is an organization of industrialized countries with the aim of promoting the economic growth of its members, assist developing states and encourage world trades. Among the committees of the body, is the Environment Committee that carries out assessments of member states' environmental policies and produces recommendations. The major concern of this body, is the problem of Trans-boundary pollution, this necessitated the development of the principle of polluter pays principle. It was also the first international, body to take legal action to control exports and imports of hazardous wastes. The relevant Acts of the OECD Council (which are legally binding on member states have formed the basis of the Basel Convention and an EC Regulation on the shipment of hazardous waste. (OECD Council Regulation 259:93)

The World Bank

This bank assists states with loans for "reconstruction and development" and for projects that will enhance economic growth. With about 22 directors on board, the bank is essentially controlled by the developed states who have the highest capital fund contribution. It has among others, the mandate to finance the building and maintenance projects that are a threat to environmental protection. More recently, it has committed itself to implementing the principles of *Rio* declaration and has established a policy of funding only ecologically sound projects. Borrowing states are now required to submit environmental impact assessments of projects which require the assistance of the bank to execute. Also; 'the Bank also supervises the operation of

the "Global Environmental Policy", which is the fund designed to assist developing countries with the cost of implementing measures to ensure global environmental benefits in the field of climate change, ozone depletion, biological diversity and marine conservation.

The World Trade Organization (WTO)

This organization was established in 1994 to further international trade and for settling disputes arising out of the implementation of the general agreement on tariffs and trade (GATT) and other Trade agreements. The aim of GATT is to facilities with its rules, world trade by reducing tariffs and other barriers to trade which may lead to discriminatory treatment between nations. There is no doubt that the rules of the World Trade Organization and that of International environmental conventions that contain trade are bound to produce conflict. So far, there is no internationally agreed set of principles to deal with the potential difficulties that might arise as a result of the overlap between the GATT rules and the trade provisions of some international environmental conventions. The following cases will illustrate the position better.

In the **Tuna Dolphin Case**(1991:248) where the issue was whether, on a proper interpretation of Article 20 of the GATT, one country was allowed to impose trade sanctions on another that would, in effect, dictate the content of that other's environmental policies. The panel decided that Article 20 could not be used in this way. The US ban was a violation of its obligation not to restrict free trade. Whilst a ban based on the quality of the goods might have been acceptable, a ban based on the methodology which the goods were produced was not. On a proper construction, Article 20 was to be read as merely allowing a country to impose trade restrictions for the conservation of animals within its own territory. The panel concluded that the ban was not "necessary" within the meaning of Article 20, because the US had not exhausted other avenues to secure its conservation objectives, such as negotiating a co-operative agreement with Mexico.

Also, in the **Shrimp Turtle Case** (1998:362) where the issue was the legality of a US trade embargo on Thai Shrimp caught in a way that endangered sea turtles. The panel reiterated their previous assertion that trade restrictions were not an appropriate means of securing conservation. The panel were at pains to point out, however, that they were not deciding that GATT member should not enter into multilateral agreements for environmental purposes, or adopt effective conservation measures. They were simply deciding that measures designed to restrict international trade were not the appropriate means for enforcing environmental policies

Some Principles of International Environmental Protection

Although one cannot authoritatively say how these principle came to be, and thus formed a principle of International environmental protection law, the fact remains that a number of principle have emerged in the globe to secure environmental protection *albeit* at their developmental stages. These principles include the following:

The "No Harm" Rule

This basic principle of international environmental protection is rooted in principle 21 of the Stockholm Declaration and principle 2 of the *Rio* Declaration. This rule regulates state behavior in respect of trans-boundary pollution. The rule is said to be a careful balance between the territorial sovereignty of a state, on the one hand, and a wider responsibility to the international community on the other. The Corfu **Channel Case**, (1949:4) formed the judicial bedrock that further brought the principle to limelight. The International Court of Justice in the said case held that Albania was responsible in international law for failing to inform the United Kingdom about the presence of mines laid in its territorial waters. It was further held, that every state has a duty not to knowingly allow its territory to be used for activities that are contrary to the rights of other states. This rule has dominated several conventions, such as the 1985 Vienna ozone Convention and the 1989 Basel Convention on hazardous Waste to mention but a few. The ICJ in its advisory opinion on the legality of the threat or use of nuclear weapons in 1996 has this to say about the rule, "… the environment is not an abstraction but represent the living space, the quality, of life and the very health of human beings, including generations unborn." ICJR (1996:241-242)

The Principle of State Co-operation

This principle emphasizes the need for state to co-operate in order to achieve maximum environmental protection. This principle is contained in almost all the international environmental agreements. For example, principle 27 of the *Rio* declaration states as follows:"States and people shall co-operate in good faith and in a spirit of partnership in the fulfillment of the principle embodied in this declaration and in the further development of international law in the field of sustainable development".

The "Precautionary Principle"

This principle according to the 1990 Bergen Ministerial Declaration on Sustainable Development means that: environmental measures must anticipate, prevent and attack the causes of environmental degradation. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation. Principle 15 of the *Rio* Declaration states the meaning in the same similar terms to mean;

> *In order to protect the environment, the precautionary principle shall be widely applied by states according to their capabilities. 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.*

The *Rio* declaration in order to limit the amount of weight placed on environmental protection at the expense of other important socio-economic principles, included promises such as "cost effective measures", "according to their capabilities" and "serious or irreversible damage". Although this principle appears in some

international instrument like the 1985 Vienna ozone convention, the level of risk that would necessitate an action is doubtful. This is because, the above convention among others, requires states to act when they have reasonable grounds for believing that activities may cause harm to the environment. Little wonder thus, that Sands has argued that there is sufficient evidence of state practice to support the conclusion that the precautionary principle, as set out in principle 15 of the *Rio* declaration, reflects customary law. The difficulties that have emerged in persuading the United States to take action on climate change, however, indicate that there is no clear international consensus on the requirements of the principle.

This principle is applicable in the nation's Petroleum, Drilling and Refining regulations, section b of the said law, provides thus "no Petroleum shall be discharged or allowed to escape into the waters of the port". Similar provision is also present under section 10(1), (2) and (3) of the Oil and Gas Pipeline Regulations. The implication of these provisions is that they disclose a conscious effort by the legislature to use the instrument of law to introduce a certain reasonable level of precaution and care by the workers and operators of the oil company**.** Okechukwu and Ndukwe (1990:1115)

The "Polluter Pays" Principle

According to Wolf, White and Stanley (2002:16) the principle is one which is aimed at ensuring that the costs of environmental damage caused by polluting activities are borne in full by the person responsible for the pollution. In order words, it is an idea that makes the polluter bear the expenses of carrying out measures decided upon by public authorities as necessary to ensure that the environment is in an acceptable state. This principle was to find support in principle 16 of the *Rio* declaration popularly known as Agenda 21 which provides as follows:

> *National authorities should endeavor to promote the internalization of environmental costs and the use of economic instruments taking into account the approval that the polluter should in principle bear the cost of pollution with due regard to the public interest and without distorting international/internal trade and investment.*

Back here in Nigeria, some statutes have incorporated the polluter pays principle, for example section 11 (5) (c) of the oil pipelines Act provides that:

> *An holder of a (pipeline license) shall pay compensation to any person suffering damage other than on account of his own default or on account of the malicious act of a third person, as a consequence of any ancillary installation, for any damage not otherwise made good.*

The above provision was to receive judicial interpretation in **Elf (Nig) Ltd** v. **Sillo**(1994:269-270) where Ovie-whiskey J. asserted that "the Act made it abundantly clear that the holder of such a license shall pay compensation to any person suffering

damage as a consequence of any leakage from pipeline". Also, the Petroleum (Drilling and Production) Regulations under the Petroleum Act, in its section 23 provides that "if the licensee or lease (oil prospecting/Exploration Firm) exercises the rights conferred by his license or lease in such a manner as unreasonable to interfere with the exercise of any fishing rights, he shall pay adequate compensation therefore to any person injured by the exercise of those first mentioned rights.

Surprisingly, the National Environmental Standards and Regulations Enforcement Agency (Establishment) Act 2007 did not make provision for this principle. One had expected that in the face of the reckless abuse of the environment by the untouchable oil companies, a forward looking enactment (which is what the act should be) ought to have such progressive notion at the back of their mind for an enhanced environmental protection.

Be that as it may, the principle however, does not seek to determine the specific liability for pollution in a particular case, but to generally guide the mind of the court (and the legislature) that the polluter or the owner of a facility involved in high risk industrial operations should pay for whatever it takes to remedy the damage resulting from his operation. Essentially, the spirit behind the polluter pay principle includes the following:

a. To compensate the environment fully in the event of damage caused by pollution.
b. To ensure an effective pre-emptive machinery for the protection of people and the environment.
c. To compensate the victims of pollution for all the damages they suffer.
d. To ensure that all of the cost of such compensation and remedy is unalterably placed on the polluter. (Okechukwu and Ndukwe 1990:103)

It has been suggested that the nation would do well environmentally, if, it is active in the implementation of the above principle which will bring economic, environmental and legal apportionment of costs for pollution damage into an exciting new paradigm. This means that Nigeria would arrive at a situation where the costs of pollution to people and the environment would find a specific allocation upon the industry involved as to the costs. This is environmentally friendly, and would encourage the rational use of environmental resource.[1]

The Principle of "Common but Differential Responsibility"

This principle is premised on the ground that some states have different environmental concerns and responsibilities from others. This much was appreciated under principle 7 of the *Rio* declaration, when it stated that:

> *in view of their different contributions to global environmental degradation, state have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they have in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command.*

For Thornton and Beckwith,(2004) the principle is based on the recognition that developing countries have special need to which priority must be accorded. This position was made clear by the developing nations at *Rio* that they would only participate in international environmental protection measures if they were given an incentive to do so. The *Rio* conference took the view that it was unfair for the economically developed world, which had been able to industrialize at the expense of the environment, to deny the developing world a similar opportunity in the name of environmental protection. This is rightly what the position should be, because the environmental problems of the developing states are often related to poverty, whilst that of the developed states are related to excessive industrialization and high-consumption lifestyles.

There is no doubt, that the developing nations face more pressing environmental problems arising from lack of standard drinking water to clean air, which kills an estimated 4.3 million people yearly. This has caused Dunoff (1995:18) to raise alarm stating that:

> *although global warming has yet to kill a single human being, and may not do so for centuries, it has received enormous attention and resources. At the same time silent emergencies that are killing people every day do not attract the same kind of screaming headlines and well funded action plans.*

The purport of the above principle is made clearer under the *Rio* Convention on climate change, where developed Nations are required under the Convention to limit their green house gas emissions, the developing Nations are required only to limit their emissions in accordance with the extent to which the developed nations fulfill their commitments to transfer finance and technology to the developing countries for that purpose. What this means in blunt terms, is that the developed world must pay the developing world to refrain from polluting activities, the developed countries however, are not comfortable with the above position, and has thus brought about the developing countries foot dragging to attain the required speed and development in the place of environmental protection.

Conclusion

The role of the International Law in the protection of the Environment is impressive as could be deduced from the above presentation. However, there is still much to be done in the area of implementing the standards and rules, for Laws and rules are made to cure defects observed in the society. When these Laws are not implemented the purpose and aim of such Law are defected.

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