AGAINST THE SOVEREIGNTY INTRANSIGENCE IN TRANSBOUNDARY ENVIRONMENTAL HARM CASES

Swati Singh Parmar*

Abstract

The pivotal sense in which the environment is quintessential for human existence, environmental concerns have never been the pivot for humans in the similar sense. Environmental concerns— in that sense and gravity—are placed at a low pedestal in epistemological discourse. Environment finds its 'rhetorical' place in some educational degree courses and its 'aesthetic' place in paintings and alike fields. Beyond these, environment has been pushed as a peripheral concern— one that is invoked or surfaces occasionally as conference theme, during natural disasters, or other such sporadic events. When we think of environment at international plane, one is confronted with technical legal issues that make realisation of protection of environment even more complex. International environmental law did not develop with the 'vigour' and at a 'pace' like that of other domains of international law (such as international economic law, trade law, law of seas). It has tangled itself in fundamentally complex questions of jurisdiction in cases of cross-boundary or transboundary issues. Transboundary environmental issues have harnessed a prominent worry among the thinkers as well as state leaders. The concerns of 'state sovereignty' add to its legal and political complexity. The universalised statist view of international environmental law presents a competing ground for state sovereignty and transboundary environmental harm, thereby deflecting a possibility of finding a common ground.

Key words -
Transboundary harms, Development, Sovereignty, State responsibility, universal jurisdiction.

I. INTERNATIONAL BORDERS AND THE ENVIRONMENT: AN INTRODUCTION

Let us assume a situation. State A builds a nuclear powerplant in a province that shares an international boundary with State B. The nuclear powerplant owner flouted the environmental norms and deflated the environmental impact in its Environment impact assessment for a smooth and swift establishment of the plant. The environmentalists of State A alarm the government against this and its serious ramifications in case of any crisis in or by the plant. Due to flouting the safety measure norms and use of sub-standard mitigation gears, one of tankers with radioactive substance explodes, killing two hundred people of State A. Within a week of the explosion, there were unexplained deaths of several people in State B's province that shared its boundary with the province

*Assistant Professor in International Law, Dharmashastra National Law University, Jabalpur.

of State A where the plant was situated. Upon series of thorough enquiries and tests, the government of State B concluded that the water stream of State B was contaminated with the radioactive substance flowing from State A after the date of explosion in the State A's nuclear power plant. Suppose there is no legal principles to govern such environmental harm permanently disparaging a water stream of a State by an act in other State. What recourse do people of State B have? What can State B do? Was there any responsibility on State A to have taken possibly preventive measures? Can State A be held liability for its action/inaction for this? Does an explosion of such magnitude reach the threshold of 'severity' to hold State A liable by State B? If yes, which principle/theory may justify it?

This hypothetical problem lays down the central argument of this paper. The three major concerns to be dealt in this paper include: State responsibility to take preventive measures, state liability in such cases of transboundary harms[1] in the backdrop of thoughtless rampant development.

As a global common[2], environment poses profound challenge on international law and its agencies specifically in cases of transboundary harm. The laws on transboundary environmental harm have largely remained customary. One of the most contested yet widely acknowledged and celebrate principle to check exploitation of 'global commons' is the 'common heritage of humankind' principle[3]. Early scholarship on state sovereignty has considered the environment within a state to be under "absolute" authority of the state to "exploit", but recently transboundary harms are considered as elements of comprehensive security[4]. The state sovereignty's stance poses the strongest resilience to the treatment of environment (within a state's territorial limits) as a "global common".

In this milieu, striking an optimal yet achievable balance between international environmental law and state sovereignty compulsions, in cases of transboundary environmental harm, may be tricky-and this is the motivation of this paper. This paper attempts to showcase the inherent tensions between state sovereignty and transboundary harm. It further aims to search a common ground of co-existence where state sovereignty cedes its territory, with the agency of the 'responsibility' paradigm of sovereignty, to transboundary environmental concerns. This paper is divided into six parts. The first part introduces the transboundary harm and its underlying complexity through a hypothetical situation. The second part brings to the fore the narrative of development with the capitalistic logic and its placement at the centre-stage. The third part traces the sedimentation of the idea of sovereignty in early times, and the ramification of its intransigence of sovereignty on environment. It further analyses the Sovereignty-rooted principle of Permanent Sovereignty over Natural Resources and the concept of 'good neighbourliness'.The fourth part showcases a few incidents of

[1]For a detailed account of perspectives, aspects, kinds, and rules on and of Transboundary harm, see XUE HANQIN, TRANSBOUNDARY DAMAGE IN INTERNATIONAL LAW CUP 2003.

[2]For a nuanced understanding of international law dealings on global commons, see SUSAN J. BUCK, THE GLOBAL COMMONS, AN INTRODUCTION(Island Press 1998).

[3]See generally Karin Mickelson, Common heritage of mankind as a limit to exploitation of the global commons, 30 EJIL, 635-663(2019).

[4]G. Sjöstedt, 'Transboundary Environmental Problems: Risk Analysis and Practical Lessons' in L. HEDEGAARD ET. AL. (eds.), THE NEBI YEARBOOK187 (Springer 1998).

transboundary environmental harm to reveal the intricacies of such environmental harms. The fifth part attempts to find a common ground for the competing claims of state sovereignty and environment. The sixth and final section conclude the issues discussed in the five previous parts.

II. THE DEVELOPMENT NARRATIVE

The idea of development and modernity, through the agency of globalisation phenomena, has pushed the humankind into a developmental race[5]. Globalisation has its supporters, who regard it to be a channel of poverty reduction and betterment of human life, while the globalisation sceptics see it as an agency of capitalism, inequality[6], environmental destruction, and growing poverty[7]. Scholars have revealed the linkages between globalisation and poverty[8], but for States, globalisation remains a eulogized venture to promote capitalist inclinations under the tag of 'development economics.' For instance, a scholar highlights that globalisation "has been facilitated by the reconfiguration of capitalism and by the transmission and reproduction of deeply embedded social hierarchies and prejudices rooted in a past characterized by territorial concepts of belonging and notions of civilization that both generated and were generated by racial inequalities"[9].

The terminology of development, including "poverty reduction", "participation", and "empowerment", create justification and legitimisation for international developmental policies[10]. Arturo Escobar presents a provocative account of how developmental narrative creates a pervasive control apparatus similar in magnitude and tone to colonial counterparts[11]. On a statement by the Department of Social and Economic Affairs, United Nations in 1951, on the necessity of development, Arturo Escobar maintains:

"The statement quoted earlier might seem to us today amazingly ethnocentric and arrogant, at best naive; yet what has to be explained is precisely the fact that it was uttered and that it made perfect sense. The statement exemplified a growing will to

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[5]See generally E CREWE & E HARRISON, WHOSE DEVELOPMENT? AN ETHNOGRAPHY OF AID(Zed Books, 1999).

[6]See generallyGERALD M MEIER, THE IMPACT OF GLOBALIZATION, BIOGRAPHY OF A SUBJECT: AN EVOLUTION OF DEVELOPMENT ECONOMICS (Oxford University Press 2004)

[7]For a brief account of prospects and consequences of globalization, seeGoldin, Ian, 'Globalization and development' in DEVELOPMENT: A VERY SHORT INTRODUCTION, VERY SHORT INTRODUCTIONS (Oxford University Press 2018);

[8]Ann Harrison, 'Globalization and Poverty: An Introduction' in ANN HARRISON (ed.), GLOBALIZATION AND POVERTY (The University of Chicago Press 2007);

[9]Deborah A. Thomas & M. Kamari Clarke, Globalization and Race: Structures of Inequality, New Sovereignties, and Citizenship in a Neoliberal Era, 42 THE ANN. REV. ANTHRO. 305, 305 (2013).

[10]A. Cornwall& K. Brock, What do buzzwords do for development policy? A critical look at 'participation', 'empowerment' and 'poverty reduction',26 THIRD WORLD QUAR. 1043 (2005). doi: 10.1080/01436590500235603.

[11]ARTURO ESCOBAR, ENCOUNTERING DEVELOPMENT: THE MAKING AND UNMAKING OF THE THIRD WORLD (Princeton University Press 2012).

transform drastically two-thirds of the world in the pursuit of the goal of material prosperity and economic progress. By the early 1950s, such a will had become hegemonic at the level of the circles of power."[12]

Despite such compelling accounts revealing the role of development narrative in creating, sustaining, and furthering imperialism, international law and the modern global order continue and preserve this eulogization by evaluating States on the scales of development. Ntina Tzouvala in her pioneer work 'Capitalism as Civilisation: A History of International Law', shows the inexplicable, and often invisiblised, link between capitalism and imperialism[13]. She reveals the links between " 'the standard of civilization' and the spread and consolidation of capitalist relations of production and exchange"[14]. She demonstrates how the 'standard of civilisation' "oscillated between the two logics", "logic of improvement" and "logic of biology"[15]. She argues that "these two logics have co-existed in international legal argumentation since the nineteenth century, mapping the contradictions of imperialism as a specifically capitalist phenomenon of unequal and combined development that tends to generate both homogenisation and unevenness on a global scale[16]."

Despite the sporadic theoretical confrontations, there has been unprecedented industrialization, technological advancement, and agricultural interventions, that have far-reaching, sometimes irreversible, ramifications on the environment. In cases an environmental harm originates where factories and industrial establishments are situated at or near the international borders, the environmental harm is transported to neighbouring states as well-that opens a pandora box of complexity of competing claims of state sovereignty and environment.

III. THE EARLYINTRANSIENCE OF SOVEREIGNTY AND ITS RAMIFICATIONS FOR ENVIRONMENT

The concept of sovereignty, in its earliest and crude sense, accords absolute control over one's territory and its resources to the exclusion of others[17]. It has even been considered as a "grundnorm" of the international society,[18] though now it is not treated as sacrosanct it was earlier[19]. This absolutist conception defies any space to transboundary concerns from other states, rather such an instance might be seen as a transgression of one's sovereignty in early times.In his article, The Antecedents of 'Sovereignty as Responsibility', Glanville argues, ". . . sovereignty was established sometime around the 17th century and, since that time, states have enjoyed 'unfettered' rights to self

[12]Ibid at 4.

[13]NTINA TZOUVALA, CAPITALISM AS CIVILISATION: A HISTORY OF INTERNATIONAL LAW (Cambridge University Press 2020).

[14]Ibid at 44.

[15]Ibid 44-87.

[16]Ibid 45.

[17]This exclusion of other States and actors is a hallmark of Westphalian absoluteness of sovereignty. See S. D. KRASNER, SOVEREIGNTY: ORGANIZED HYPOCRISY 9 (Princeton University Press 1999).

[18]C. Reus-Smit, Human Rights and the Social Construction of Sovereignty, 27 REV. OF INT'L STUD.519 (2001).

[19]See J. Chopra &T. Weiss, Sovereignty Is No Longer Sacrosanct: Codifying Humanitarian Intervention, 6 ETHICS & INTERNATIONAL AFFAIRS 95(1992). doi:10.1111/j.1747-7093.1992.tb00545.x

government, non-intervention and freedom from interference in internal affairs"[20]. The absolute sovereignty thrusts upon the absoluteness of the state authority over its territory, resources or any other.

III. 1. Roots of the 'Permanent Sovereignty Over Natural Resources' principle in sovereignty

The principle of Permanent Sovereignty over Natural Resources, adopted by the United Nations General Assembly Resolution 1803[21] in the year 1962, sediments this position of States in a non-negotiable paradigm. This non-negotiability of the Permanent Sovereignty over Natural Resources principle is a product of the decolonialisation-born out of the fear of recolonisation- when the principle was being ideated. For sustaining the liberation and independence of the decolonised states, the principle of embodies "full and absolute" rights to the States in matters of natural resources over their territory[22]. It legitimises, to an extent, excessive use, and exploitation of one's natural resources, even if it casts serious environmental harm to any other state. If viewed through the lens of a state's sovereignty, environmental harm within its territorial limits has deflated harm. Only a change of lens that projects environmental harm within a State's territorial limits casting harm on other states and hence, globally-would give a better and appropriate panorama. Echoing the same, a scholar highlights,

"Environmental interferences in one state affect ecosystems in other states. We have no exact knowledge of how these chain effects happen or what their consequences are. It is often times very difficult to gain a complete understanding of the cause and effect relationships between environmental intervention and environmental destruction. Environmental interventions are seemingly unproblematic and harmless viewed in isolation."[23]

The interpretation of principles in isolation are not only myopic but also are a disregard to the exact principle of the other neighbouring States, especially in case of a transboundary environmental harm. A narrow interpretation of the Permanent Sovereignty over Natural Resources principle is sustained by its legal status. Nicolai Nyland highlight this, "States can also interpret their international environmental obligations narrowed, or completely disregard them. The legal basis for this is the sovereignty principle, which means that states are not subject to the will of other states."[24]

There have been sincere steps taken by the United Nations and other international organisations to codify the global environmental law into treaties and conventions but

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[20]L. Glanville, The Antecedents of 'Sovereignty as Responsibility, 17 EUR. J. INT'L REL. 234(2011).

[21]United Nations General Assembly Resolution 1803 (XVII) of 14 December 1962, "Permanent sovereignty over natural resolution", 1962.

[22]See PHILIPPE SANDS & JACQUELINE PEEL, PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW 11(Cambridge University Press 2012).

[23]Nicolai Nyland, Ought states to be legally obliged to protect the sustainability of the global environmental system?, 2 NORD. ENV'L. L. J.(2019).

[24]NICOLAI NYLAND, ARE STATES INTERNATIONALLY COMMITTED TO PROTECTING THE ENVIRONMENT, Doctoral dissertation, (University of Oslo, Unipub publisher 2009).

the efforts are still in fluid state. Some nations have arrangements of such nature for environment protection but they are majorly aspirational in nature. Also, most of the decisions of the international environmental law cases have eventually led to the fading of the concept of permanent sovereignty.

III. 2. The 'good neighbourliness' in transboundary environmental harm

Ever since the establishments of the United Nations, the usage of the term 'good neighbours' in its Charter's preamble[25] has rooted the concept of 'good neighbourliness' in international law[26] as a scale of value. It has expanded in its role as a legal obligation expected to be observed in the state conduct[27]. The 'good neighbourliness' principle has a special relevance in international environmental law.

Rüdiger Wolfrum claims that there is a sense of obligation upon the states that transfrontier harm should not be caused[28]. Fitzmaurice and Elias underline its fundamental role in shared resourced between states[29]. Justice Weeramantry in his celebrated dissent in the Advisory Opinion of the *Legality of the Threat or Use of Nuclear Weapons*[30] underscored that the 'good neighbourliness' principle was one of the touchstones of the modern international law and casts a general duty as per the United Nations Charter's words. Hans Kelsen even argued that as a principle of international law, 'good neighbourliness' should have been placed in the explicit wording of the United Nations Charter[31]. Though it did not find place in the Charter as a principle, several state obligations can be traced to the 'good neighbourliness' concept[32].

Though this theoretical relevance of the 'good neighbourliness' concept must be confronted with the realities of the praxis. The concept is regarded as customary rule of international law, but represent Daniel Bodansky's "myth system"[33] as it is seen as 'customary' but does not reflect in the state practice. He argues that in regarding a rule as customary, we focus on an empirical approach than normative-customary rule of international law is descriptive (in the sense it describes the state behaviour) than prescriptive (prescribing the State behaviour as the rest of the international law rules such as treaties and conventions do)[34].

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[25]Preamble, The Charter of the United Nations, 1945. The Preamble reads, "...to practice tolerance and live together in peace with one another as good neighbours".

[26]For a brief account of the principle in international law, see Sompong Sucharitkul, The Principles of Good-Neighborliness in International Law, Paper 559 GLODEN GATE UNIVERSITY PUBLICATIONS (1996).

[27]See C. W. Jenks, Tolerance and Good Neighbourliness: As Concepts of International Law, 9 MALAYA L. REV.1(1967).

[28]Rüdiger Wolfrum, Purposes and Principles of International Environmental Lav, 33 GER. Y.B. INT'L L. 308, 309 (1990).

[29]M. FITZMAURICE ET. AL., WATERCOURSE CO-OPERATION IN NORTHERN EUROPE: A MODEL FOR FUTURE5 (Cambridge University Press 2004).

[30]Advisory Opinion of 8 July 1996 of the Legality of the Threat or Use of Nuclear Weapons, Dissenting Opinion of Judge Weeramantry, ICJ Rep. 1996, p. 505.

[31]HANS KELSEN, THE LAW OF THE UNITED NATIONS: A CRITICAL ANALYSES OF ITS FUNDAMENTAL PROBLEMS 11-13 (London Institute of World Affairs 1951).

[32]C.J. JENKS, LAW IN THE WORLD COMMUNITY 92 (Longmans 1967).

[33]Daniel Bodansky, Customary (And Not So Customary) International Environmental Law, 3 INDIANA J. OF GLO'L LEGAL STUD. 105 (1995).

[34]Ibid at 109.

IV. INCIDENTS OF TRANSBOUNDARY ENVIRONMENTAL HARM

In the celebrated *The Trail Smelter Arbitration*, which the earliest case on global environmental law, the duty of a state towards the global environment was recognised. A State's responsibility was set for the environmental harm even beyond its territorial limits in this case. The arbitral tribunal declared that "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 person therein, when the case is of serious consequence and the injury is established by clear and convincing evidence[35]." Trail Smelter case has harnessed a prominent place in the international environmental jurisprudence. On this, David Bodansky exclaims,

"…most writers on customary international environmental law instinctively assume a state of affairs where third-party dispute resolution is available, and subconsciously address their arguments to legal decisionmakers, such as courts and arbitrators. These legal decisionmakers are the real target audience for the voluminous writings on customary international environmental law. The problem is that courts and arbitral tribunals currently play only a relatively minor role in addressing international environmental issues. Third-party dispute resolution has resolved few environmental problems. That is why Trail Smelter must bear such a heavy load in current scholarship on customary international environmental law[36]."

The tensions between absolute sovereignty and environmental issues have been witnessed by the international community several times. There have been occasions of dispute over international rivers between States, and many a times such disputes have even taken a violent turn. For instance, dispute over the Nile Basin water among eleven countries due to which there were many negotiations between states over the construction of a dam in Ethiopia. Droughts and armed conflict in Somalia due to water crisis was other significant conflict. Public discontent and outrage over water shortage in Yemen took violent turn in terms of political and economic crisis[37]. And in transboundary conflicts like these, states show their trump card of national sovereignty and claim that they can act as per their will within the territorial limits of them, as United States' Attorney General Judson Harmon said, "the rules, principles, and precedents of international law impose no liability on obligations upon the United States." The issue regarding the water diversion of the river Rio Grande by United States in 1895, met with Mexico's protest. In an answer, Harmon advocated,

The fact that the Rio Grande lacks sufficient water to permit its use by the inhabitants of both countries does not entitle Mexico to impose restrictions on the USA which would hamper the development of the latter's territory or deprive its inhabitants of an advantage with which nature had endowed it and which is situated entirely within its territory. To admit such a principle would be completely contrary to the principle that USA exercises full sovereignty over its national territory[38].

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[35]Arbitral Trib., 3 U.N. Rep. Int'l Arb. Awards 1905 (1941).

[36]Supra note 34 at 117.

[37]10 Violent Water Conflicts, RELIEF WEB (Sept. 4, 2024), https://reliefweb.int/report/world/editor-s-pick-10-violent water-conflicts.

[38]PATRICIA BIRNIE & ALAN BOYLE, INTERNATIONAL LAW AND THE ENVIRONMENT 332 (Oxford University Press 2002).

This later became U.S. practice and came to be known as Harmon doctrine. It is often termed as the most notorious[39] of all the doctrines on international water sharing rules. It was soon done away with by the U.S. itself and has little support in state practice in the contemporary times[40].

V. A META-STATIST VIEW OF SOVEREIGNTY AND ENVIRONMENT

V. 1. Evaluating the possibility of a common ground

The theoretical intransigence of State Sovereignty and its preservation by the states through praxis casts a herculean task on the international legal society to ideate on transboundary issues. The early principles on natural resources such as the Permanent Sovereignty over Natural Resources were born with the Westphalian absolutism. There does exist certain limits on this principle, but "the precise extent of these limits remains somewhat unclear and is subject to innumerable local variations as a result of bilateral or multilateral regional practice[41]." Despite the acknowledgment of 'good neighbourliness' concept in the Charter of the United Nations and other international law circles, its status remained customary and therefore, was treated devoid of serious nature unlike any treaty provisions. Even after institutionalisation of international environmental law principles, in a consent-based system that international law is, the States have the choice to enter into a treaty arrangement. To sign and ratify or to not remains the prerogative of the State and therefore, a sovereign decision. In such a situation, whether a common field for the competing claims of state sovereignty and transboundary environmental harm be found? Can we accommodate the competing claims of both? Can state sovereignty cede its territory for the accommodation of transboundary environmental concerns?

If we revisit the hypothetical situation discussed in the beginning of this paper, and assume that State B recognises 'good neighbourliness' as a customary rule of international law, would it make the situation different? Would State B's recognition of it as a customary rule of international law, bind State A? This assumption is a peephole to David Bodansky's[42] concern about customary status of an international law rule. Even if the 'good neighbourliness' concept has a customary status for State B, till it does not enjoy the same status for State A, and reflects the same in State A's and B's practice, it does not apply in this situation and not bind State A.

This tells us a curious case foregrounded in two fundamental problems: first, a customary rule on *transboundary environmental harm* cannot readily apply without the presence of state practice and opinion juris for both or more states involved (like any other customary international law rule); second, as international law is consensual system of law, a treaty or a convention would apply only when it is entered into by the

[39]Steohen C. Mccaffrey, The Harmon Doctrine one hundred years later: Buried, not praised, 36 NATURALRES.J. 549(1996).

[40]Supra note 37 at 301; M.A.S. SALMAN & K. UPRETY, CONFLICT AND COOPERATION ON SOUTH ASIA'S INTERNATIONAL RIVERS: A LEGAL PERSPECTIVE 12 (BRILL 2002).

[41]Aaron Schwabach, 'Transboundary Environmental Harm and State Responsibility: Customary International Law' in AARON SCHWABACH & ARTHUR JOHN COCKFIELD, INTERNATIONAL LAW AND INSTITUTIONS(EOLSS Publications 2009).

[42]Supra note 33.

states concerned. Then, what could be the redressal of such *transboundary environmental harms*?

V. 2. The possibility of a meta-Statist perspective on transboundary environment

A change in the position from where we view state sovereignty could offer a redressal to this situation. State sovereignty has been interpreted across time and space. From absoluteness to a liberal interpretation, state sovereignty has undergone sea change. The major change perception of state sovereignty finds place in the principle of the United Nations embodied in Article 2 (1) of the Charter of the United Nations[43]. It reads, "The Organization is based on the principle of the sovereign equality of all its Members[44]." The embodiment of Sovereign Equality as a United Nations principle altered the construction of Sovereignty.

There exists scholarly intervention showing the linkages between sovereignty and the obligation to not cause transboundary environment harm[45]. Even for the state sovereignty in its rudimentary form, the sovereign rights have corresponding duty, as outlined in the Island of Palmas Case[46]. Arbitrator Max Huber noted, "This right [exclusive right for State activities] has as corollary a duty: the obligation to protect within the territory the rights of other States[47]". Notably, Scholars have also argued that there is no 'conflict' between the Permanent Sovereignty over Natural Resources principle and a duty against causing transboundary environmental harm[48].

A simplistic logical deduction would lead us to these conclusions that place sovereign rights over environment and respect for transboundary environment at the same pedestal. Then why are we compelled to see these two as competing? Why do we see sovereignty and transboundary harm in conflict with each other? Why do we look for co-existence of both? My answer to this would be two-fold.

- First-deduced through praxis-the purported caricature of sovereignty in any transboundary environmental harm case. Through transboundary environmental harm case, a clash is projected between the State sovereignty where the harm originated and other State's environment that is harmed.In majority cases, sovereignty is (mis)used by States to shy away from an obligation towards other States' environment.
- Second-a normative one-any transboundary environmental harm is approached from the Statist view. The term 'transboundary' is entrenched in statist connotations of boundary and borders, and therefore, the view of state self, detached from others.

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[43]See generally Hans Kelsen, The Principle of Sovereign Equality of States as a basis for International Organization, 53 YALE L. J.207 (1944).

[44]The Charter of the United Nations, 1945.

[45]Franz Xaver Perrez, The Relationship Between 'Permanent Sovereignty' and the obligation not to cause Transboundary Environmental Damage, 26 ENVIRON'L L. 1187 (1996).

[46]Island of Palmas Case, 2 RIAA (1949), (23 August 2023) https://pcacases.com/web/sendAttach/714.

[47]Island of Palmas Case, 2 RIAA (1949), pp.829-90. (23 August 2023) https:// pcacases.com /web/sendAttach/714.

[48]Supra note 45.

The second concern is larger, insidious, and complex and, also serves the roots for the first concern. A statist view of international law or its any event is an obvious, normal, and standard approach-one that is so entrenched within the states, furthered by international institutions, that it is not acknowledged, let alone be critiqued. The normalisation of Statist view in international law showcases every entity (from environmental harm to other states) from the eyes of a state. This deflects the possibility of viewing other States' environment as own or as collective. Even with the theoretical presence of concepts around this idea of 'collectivity' such as "global commons", the omnipotence of State overshadows it. Rohini Sen reveals, in a compelling tenor, "the powerful meta image of the state.[49]" In simplest sense, the statist view ensures three non-exhaustive things,

- First(for treaty law on environment), viewing of international law as a choice-based system of law, making entering into a treaty arrangement optional. This optionality operates at a sublime level in altering how a state perceives its obligations towards others.
- Second (for customary law on environment), states' impetus on showing lack of state practice or opinion juris to evade from state responsibility and state liability in cases of harm to other states.
- Third, a battlefield view of state-binaries where one has to defend its obligations. This also leads to a competing and conflicting view between States' rights and duties.

These sureties of statist view operate in a way that codification and progressive development in the field of state responsibility, state liability, and international environmental law in general do not translate into environmental protection. For instance, on lack of clarity on assessing liability and responsibility in case of transboundary environmental harm, Maurizio Arcari highlights, "the conditions for establishing how the critical obligation of States to prevent environmental harm has been breached remain rather obscure. The Articles on the Responsibility of States for Internationally Wrongful Acts, adopted by the UN ILC in 2001, do not help to clarify the issue of whether preventive commitments of States in the field of environmental protection can be classified as obligations of conduct…"[50].

This leads us to my argument of transversing beyond state and created an imaginary meta-state view for international law situations. An exceptional argument is forwarded by Sundhya Pahuja and Luis Eslava in their pioneer work on State[51]. They expose the linkages between state, international law, and economic development. Their compelling argument is even more so in case of transboundary environmental harm, where the role of statist understanding of economic development and statist perspective on environment have an insidious presence.

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[49]Rohini Sen, A Queer Reading of International Law and its anxieties, III GNLU L.& SOCY. REV.33 (2021).

[50]M. Arcari, 'The Breach of the Obligation to Prevent Environmental Harm and the Law of State Responsibility' in M. ARCARI, I. PAPANICOLOPULU, L. PINESCHI (EDS.) TRENDS AND CHALLENGES IN INTERNATIONAL LAW. (Springer, 2022), https://doi.org/10.1007/978-3-030-94387-5_7.

[51]Luis Eslava & Sundhya Pahuja, The State and International Law: A Reading from the Global South, 11 HUMANITY: AN INT'L J. OF HUM. RTS., HUMANITARIANISM AND DEVELOPMENT118 (2020).

A meta-statist perspective on transboundary environmental harm will avoid the legal ontology of 'transboundary', 'responsibility', and 'liability'. It would allow environment to mean 'environment' as a whole and not one state's environment separate from other states' environment. This would in turn bolster the normative framework of viewing environment as a "global common" and ensure its possibility to become a reality. Such a meta-statist view would also disallow viewing other state's environment as a 'responsibility' and 'liability'. It would be an exceptional unlearning and unviewing process to adopt a meta-statist view, and its forecasted ramifications are worth this tedious preceptory change. Besides, this would entail a disordering of international law[52] its dominant, universalised and forced yardsticks that perceive international law in a certain way and allows for negligible spaces to the alternative critical thinking.

VI. CONCLUDING REMARKS

The narrative of development economics has shaped the modern international law discourse. With the terminology of capitalism, it has created a compelled view for states on the scales of development. The logic of development- culminating in the classification of states into the developed, the developing, and the under-developed-has been placed at the centre of all the concerns of the states. States, valuing the economic paradigm of development and overlooking the concerns of environment, enter a race of industrialisation. In this State-centric individualist race for development fuelled by capitalist-imperialist complex, environmental concerns are decentered and displaced.

The absolutist conception of state sovereignty and the Permanent Sovereignty over Natural Resources principle foregrounded in it complicate this picture of State and environment. Transboundary environmental harm concerns, in this milieu, are at impasse, where states do not assume their obligations under customary international law (such as of 'good neighbourliness') and to be bound by treaty arrangement remains a choice-based possibility. These issues are testified by the absence of practical translations of the otherwise extensive institutionalisation of international environmental law. The recent developments in international environmental law, in terms of state responsibility and state liability, do not ensure corresponding value for the states. These and other problems relating to the transboundary environmental harm are rooted in the standard statist view of international law. Political, economic, legal processes viewed by the eyes of state create a state-centric image that sees processes and rules in isolation. This paper presents an argument for an alternative-a meta-statist view. This would ease out the purported tensions between state sovereignty and transboundary environmental issues, but is not limited only to this. Such a view would diffuse several issues in transboundary environmental issues entwined with the state sovereignty and state-centeredness.

[52]Michelle Staggs Kelsall, Disordering International Law, 33 EUR. J. INT'L L.729 (2022).