



## INTERNATIONAL ENVIRONMENTAL JUSTICE SYSTEM AND ITS ENFORCEMENT

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### Introduction

The environmental issues faced at an international level usually revolve around the situation of global commons like the ozone layer depletion, climate change or global warming, issues with another State like trans-boundary pollution or violation of an environment treaty, international interests like threat of extinction of a particular species or forest fire and natural disasters such as volcanic eruption, earthquakes or cyclones.<sup>1</sup> Even though domestic laws in most of the States are stringent enough to ensure that no major environmental harm is done by human activities, the world environmental issues arise each day and there is little to no liability of the States with respect to the acts done by them, where such acts are done on a larger scale beyond the boundaries of the State.

Global environmental problems have not decreased but increased and it is predicted that global warming will rise exponentially if stringent measures to safeguard the environment are not taken immediately.<sup>2</sup> We

highly disagree with Ole Kristian Fauchald in his conclusion that establishment of international environmental court shall be far down in the list of priorities.<sup>3</sup> With climate change and other similar issues knocking our door, the issue of environmental protection can no longer be kept at back burner and enforcement measures at global level should be formed to ensure that apart from controlling emission of pollution at domestic level, the emission does not take place at the State level as well. Currently, the international environment regime not only lacks a centralised legislative or judicial body with mandatory jurisdiction, it also has no enforcement authority and, therefore, it is important to create one as “without enforcement, the law is but a shallow code riddle with dubious rationalisation”.<sup>4</sup>

This paper examines the current international environment legal framework and identifies the shortcomings in the existing mechanism. The second part of the paper touches the topic of how the issues faced in the current legal framework can be resolved and a proper enforcement system for international environmental law can be formed.

Even though there are criminal sanctions under domestic legal systems for individuals and corporations, when it comes to environmental damages, no similar development has taken place internationally.<sup>5</sup>

<sup>1</sup> DANIEL B MAGRAW, *Global Change and International Law*, Colorado Journal of International Environmental Law & Policy, 1/1 (1990) Pg 3-4

<sup>2</sup> EUROPEAN COMMISSION, *Climate Change and Environmental Degradation*, Knowledge for Policy, available at [https://ec.europa.eu/knowledge4policy/climate-change-environmental-degradation\\_en](https://ec.europa.eu/knowledge4policy/climate-change-environmental-degradation_en)

<sup>3</sup> OLE KRISTIAN FAUCHALD, *Bør etablering av en internasjonal miljødomstol være et prioritert mål?*, Preprint versjon, bør ikke referere, pg 19

<sup>4</sup> ANDREW WATSON SAMAAN, *Enforcement of International Law Treaties: At Analysis*, Vol. 5 Article 1, Fordham Environmental Law Review, (2011), pg 273

<sup>5</sup> STEINER ANDERSEN, *The Role of International Courts and Tribunals in Global Environmental*



### Right to a Healthy Environment

Every human being has a right to a healthy environment free from air and water pollution.<sup>6</sup> A healthy physical environment is a precondition for living a life of dignity and worth.<sup>7</sup> This right of a man has been protected through international human rights instruments. The Universal Declaration of Human Rights (UDHR) protects the right to life<sup>8</sup> and a standard of living adequate for health and well-being<sup>9</sup>, rights from which the right to a healthy environment can be inferred<sup>10</sup>. The right to life is protected in the International Convention on Civil and Political Rights<sup>11</sup> (ICCPR) and the adequate standard of living for oneself and their family including food, clothing and housing<sup>12</sup> and highest attainable standard of physical and mental health<sup>13</sup> in the International Convention on Economic, Social and Cultural Rights (ICESCR). The ESCR Committee clarified through General Comment 14<sup>14</sup>, on the highest attainable standard of health, that Article 12 also includes underlying determinants of health, such as access to healthy environmental

conditions. Even the Human Rights Advisory Panel of the United Nations Interim Administration Mission to Kosovo (UNMIK) expressly voiced its opinion about the right to a healthy environment in the case of N.M. and Others v. UNMIK (H.R. Advisory Panel).<sup>15</sup> While referring to the case of EHP v. Canada (HRC)<sup>16</sup> and Bordes and Temeharo v. France (HRC)<sup>17</sup>, it stated, “the duty to adopt positive measures in order to protect human life in principle applies also to environmental matters, such as those involving the storage of radioactive waste in residential areas or the exposure to radiation stemming from nuclear tests.”

Not only do the United Nations’ bodies recognise a healthy environment as part of human right and, specifically, right to life, other international organisations, like European Union, African Union and Inter American Commission also recognise it as a human right. In the case of López Ostra V. Spain<sup>18</sup>, the European Court of Human Rights held, “Naturally, severe environmental pollution may affect individuals’ well-being and prevent them

*Governance*, ASPJ Africa & Francophonie – 3<sup>rd</sup> Quarter 2016 , pg 72

<sup>6</sup> Subhash Kumar v. State of Bihar, (1991) 1 SCC 598

<sup>7</sup> Virender Gaur v. State of Haryana, (1995) 2 SCC 577

<sup>8</sup> Article 3 of UDHR

<sup>9</sup> Article 25, Para 1 of UDHR

<sup>10</sup> A number of Courts of different States have held that right to healthy environment is part of right to life. See, *Surya Prasad Sharma v. Godavari Marble Industries* [W.P. 35/2049 B.S. (1992)] by Supreme Court of Nepal; *Joseph D. Kessey v. The City Council of Dar es Salaam* [Civil Case no. 299 of 1988] by High Court of Tanzania, Dar es Salaam; *Dr. Mohiuddin Farooqu v. Government of Bangladesh* [22 BLD (HDC) (2002) 534] by Supreme Court-High Court Division of Bangladesh; *Shantistar Builders v. Narayan Khimalal Totame* [(1990) 1 SCC 520] by Supreme Court of India.

<sup>11</sup> Article 6, Para 1 of ICCPR

<sup>12</sup> Article 11 of ICESCR

<sup>13</sup> Article 12 of ICESCR

<sup>14</sup> ESCR Committee, *General Comment No. 14: The right to the highest attainable standard of health*, 22<sup>nd</sup> session, adopted on 11 August 2000 [E/C. 12 /2000/4] Para 11

<sup>15</sup> Case No. 26/08, Opinion, UN Interim Administration Mission to Kosovo (Feb. 26, 2016): 55 ILM 922 (2016)

<sup>16</sup> Communication no. 67/1980, decision of 27 October 1982

<sup>17</sup> Communication no. 167/1984, views of 22 July 1996

<sup>18</sup> Application no. 16798/90, decision of 9 December 1994



from enjoying their homes in such a way as to affect their private and family life adversely, without, however, seriously endangering their health.”<sup>19</sup> In the case of *Zander v. Sweden*<sup>20</sup>, the European Court of Human Rights broadened the scope of Article 6(1) of ECHR to include environmental rights by stating, “the outcome of the dispute was directly decisive for the applicants’ entitlement to protection against pollution of their well by VAFAB. The appeal lodged by the applicants with the Government thus involved a “determination” of one of their “rights” for the purposes of Article 6 para. 1.” The Inter American Commission recognises right to a healthy environment and has noted that: “The realisation of the right to life, and to physical security and integrity is necessarily related to and in some ways dependent upon one’s physical environment. Accordingly, where environmental contamination and degradation pose a persistent threat to human life and health, the foregoing rights are implicated.”<sup>21</sup> Inter-American Court of Human Rights in the case of *Saramaka People v. Surinam*<sup>22</sup> examined the scope of right to property of indigenous people and observed that the logging concessions issued by the State in the Upper Suriname River lands have damaged the environment and the deterioration has had a negative impact on lands and natural resources traditionally used by members of the Saramaka people that are, in whole or in

part, within the limits of the territory to which they have a communal property right recognised under Article 21 of the American Convention of Human Rights.

Under the African system, the African Charter recognises the right to healthy environment favourable for their development.<sup>23</sup> The African Commission on Human and People’s Rights recognises that a clean and safe environment that is closely linked to economic and social rights in so far as the environment affects the quality of life and safety of the individual.<sup>24</sup>

It is well said that “nations have recognised environmental problems as those that concern security, quality of life and even life itself. On the basis of such a revelation, it is equally agreed that international coordination and cooperation is the best, if not the only means by which to achieve the objective of international environmental enforcement while maintaining environmental harmony.”<sup>25</sup>

### Current International Environment Regime

The structure of international environmental governance revolves around conventions, treaties and soft-law instruments. In these conventions and treaties, detailed rules are often included through one or more protocols and the treaties need to be ratified by a

<sup>19</sup> Right to private and family life has been guaranteed under Article 8 of ECHR

<sup>20</sup> Application no. 14282/88, decision of 25 November 1993

<sup>21</sup> INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, *Report On The Situation Of Human Rights In Ecuador*, OEA/Ser.L/V/II.96, Doc. 10 rev. 1, 24 April 1997, (Chapter VIII: The Human Rights Situation Of The Inhabitants Of The Interior Of Ecuador Affected By Development Activities)

<sup>22</sup> IACtHR, (ser. C) No. 172, Judgment of November 28, 2007, para 154

<sup>23</sup> Article 24 of African Charter

<sup>24</sup> Social and Economic Rights Action Center & the Center for Economic and Social Rights v. Nigeria (Communication No. 155/96 decision of 27 May 2002) para 51

<sup>25</sup> ANDREW WATSON SAMAAN, *Supra* Note 4, pg 267



minimum number of States, as stipulated, in order to be binding.<sup>26</sup> These multilateral environmental agreements are, usually, accompanied with a permanent secretariat to facilitate negotiations. Even Global environmental conventions have subsidiary specialised bodies for dealing with issues of scientific advice, implementation and compliance.<sup>27</sup> There are many general and particular rules established under International Environmental Law that govern the conduct of States in respect of the environment, but there is no binding general customary or treaty law obligation on States to protect and preserve the environment *per se*.<sup>28</sup>

Many conventions have been formulated by international bodies for the protection of environment, some in fragmentary manner and others dealing exclusively with issue of environment protection. However, most of the conventions do not create any clearly binding regime.<sup>29</sup> Due to this reason, even though various conventions were made, they were not successful in achieving the principal aim sought to be achieved by them. For example, in the “economies in transition” States in the 1990s, the Kyoto Protocol, which was adopted in the December 1997, was not successful in reduction of emission of greenhouse gasses and in reality the

reduction was caused by economic recession and not due to the Kyoto Protocol<sup>30</sup> or the Convention on Nuclear Safety adopted by International Atomic Energy Agency,<sup>31</sup> which does not provide for any clear binding rule.

It has also been seen that, in case of multilateral international agreements, dispute settlement is hardly utilized and, therefore, has little significance.<sup>32</sup> Also, compliance measures in treaties cannot be said to be sufficient to deter serious breaches as sometimes there is persistent violation of treaties, like in Montreal Protocol.<sup>33</sup>

Another reason why treaties do not provide sufficient enforcement mechanism is because if one State fails to observe a treaty then, as a result, the other State is released from the obligation under the treaty towards the former, as per the principle of equity.<sup>34</sup> Also, enforcement measures like termination of treaties, as given under Montreal Protocol<sup>35</sup>, will not be useful in protecting the environment.<sup>36</sup>

It has been seen that certain treaties do not place any binding obligations on the State. Like, the Long Range Transboundary Air Pollution Treaty (LRTAP)<sup>37</sup>, to which USA is member, does not contain any obligations

<sup>26</sup> STEINER ANDERSEN, *Supra* Note 5 , pg 70

<sup>27</sup> *Id* Pg 70

<sup>28</sup> S.K. VERMA, *An Introduction to Public International Law*, 2<sup>nd</sup> Edition, Satyam Law International (2019 reprint), pg 312

<sup>29</sup> *Id* pg 338

<sup>30</sup> STEINAR ANDERSEN, *Supra* Note 5, pg 69

<sup>31</sup> IAEA - INFCIRC/449 (5 July 1994)

<sup>32</sup> STEINAR ANDERSEN, *Supra* Note 5, pg 72

<sup>33</sup> MARTTI KOSKENNIEMI, *Breach of Treaty or Non-Compliance? : Reflections on the Enforcement of the Montreal Protocol*, Yearbook of international environmental law Yearbook of International

Environmental Law, Vol. 3, p. 123-162, Vol. 3, pg 127-28

<sup>34</sup> *Diversion of Water from Meuse (Netherlands v. Belgium)*, 1937 P.C.I.J. (ser A/B) No. 70 (June 28)

<sup>35</sup> Vienna Convention on the Law of Treaties, opened for signature May 22, 1969, Art 60

<sup>36</sup> MARY ELLEN O'CONNELL, *Enforcement and the Success of International Environmental Law*, 3 Ind. J. Global Legal Stud. 47 (1995-1996), pg 55

<sup>37</sup> Convention on Long-Range Transboundary Air Pollution, Nov 13, 1979, 18 I.L.M. 1442 (entered into force, Mar 16, 1983)



in itself but they are contained in various protocols to which USA is not a party and, therefore, if USA violates LRTAP, the other States that are party to the treaty cannot take any action to enforce the treaty against USA; Climate Change Treaty<sup>38</sup>, Biodiversity Treaty<sup>39</sup> and Desertification Treaty<sup>40,41</sup>

Another source of international law is customary international rules which all the States consider as accepted and binding law due to its constant and uniform usage.<sup>42</sup> Even though it is considered binding, it can be subject to a considerable dispute in the international community, like it has been seen in the Chernobyl case where liability of Soviet Union for transboundary harm remains unclear.<sup>43</sup>

The Chernobyl accident took place in 1986 when a sudden surge of power destroyed a nuclear power station at Chernobyl (part of former Soviet Union) leading to release of massive amount of radioactive material into the environment.<sup>44</sup> Richard E. Levy, in his article<sup>45</sup>, discusses shortfall in the international legal system due to which Soviet Union could not be held liable. He notes that not only is it difficult to prove a practice as an accepted law, customary rules

are also generally vague and slow to develop. Moreover, since most of them are made by the developed nations, they are often objected by the socialist and third world States and for this reason Soviet writers hold that the customary law must be recognized by the States representing each of the major social systems and newly emergent States should be entitled to refuse to recognise a particular customary norm. As a result of this, Soviet Union refused to compensate for injuries caused by the Chernobyl accident as the said customary norm is not binding on Soviet Union.

Customary international laws are also difficult to prove and uncertain as has been seen in the *Fisheries Jurisdiction case (U.K. v. Iceland)*<sup>46</sup> where five judges, in their joint opinion, observed, "There is at the moment great uncertainty as to the existing customary law on account of the conflicting and discordant practice of States. Once the uncertainty of such a practice is admitted, the impact of the aforesaid official pronouncements, declarations and proposals must undoubtedly have an unsettling effect on the crystallization of a still evolving customary law on the subject."<sup>47</sup>

<sup>38</sup> U.N. Conference on Environment and Development: Framework Convention on Climate Change, May 9, 1992, 31 I.L.M. 849.

<sup>39</sup> U.N. Conference on Environment and Development: Convention on Biological Diversity, June 5, 1992, 31 I.L.M. 818.

<sup>40</sup> U.N. Convention to Combat Desertification in Those Countries Experiencing Serious Droughts and/or Desertification Particularly in Africa, opened for signature, Oct. 14, 1994, U.N. Con. A/AC.241/15/Rev.7, 33 I.L.M. 1328.

<sup>41</sup> MARY ELLEN O'CONNELL, *Supra* Note 36, pg 54

<sup>42</sup> Asylum Case: *Columbia v. Peru* [ICJ Reports 1950, p. 266] pg 277

<sup>43</sup> RICHARD E. LEVY, *International Law and Chernobyl Accident: Reflection on an Important but Imperfect System*, (June 1, 1987). *Kansas Law Review*, Vol. 36, No. 81, 1987, pg 85

<sup>44</sup> UNITED STATES NUCLEAR REGULATORY COMMISSION, *Background on Chernobyl Nuclear Power Plant Accident*, NRC Library (August 2018). Available at <[www.nrc.gov/reading-rm/doc-collections/fact-sheets/chernobyl-bg.html](http://www.nrc.gov/reading-rm/doc-collections/fact-sheets/chernobyl-bg.html)>

<sup>45</sup> RICHARD E. LEVY, *Supra* Note 43, pg- 86, 87, 88

<sup>46</sup> 1974 I.C.J. 3, Judgment of 25 July 1974

<sup>47</sup> Joint Separate Opinion of Judges Forster, Bengzon, Jiménez de Aréchaga, Nagendra Singh and Ruda, *Id.* pg 48



Even the United Nations General Assembly is not considered as a true legislative body as it only has right to discuss and recommend and has not been conferred with any legal or substantive binding power and so cannot take binding action of any sort.<sup>48</sup> International Court of Justice (ICJ) is the primary enforcement mechanism for United Nations.<sup>49</sup> However, all States are not willing to accept the jurisdiction of ICJ as their binding adjudication may threaten the State's sovereignty.<sup>50</sup> In 1993 a seven-member permanent environmental chamber was established by ICJ.<sup>51</sup> However, no cases were ever brought before it and it was finally abolished in 2006.<sup>52</sup>

United Nations Environmental Programme (UNEP) was established in 1972 by United Nations General Assembly<sup>53</sup> Before 1972, environment was not seen as an issue and, therefore, the word 'environment' has not been mentioned in the UN Charter.<sup>54</sup> And even now the powers conferred on UNEP are not comparable with other UN specialised

agencies, like ILO.<sup>55</sup> The principal functions of UNEP are to promote coordination and cooperation among nations, recommend environmental policies and provide general policy guidelines and, therefore, it mainly involves assessment and monitoring of global environment, even if we talk about the Earthwatch programme under which information exchange, research activities, monitoring of environmental issues and evaluation of global environment is done periodically.<sup>56</sup> UNEP has not been very successful in the international environmental arena as it lacks implementation and enforcement powers at the national level (ability to create binding international law) and has to rely on its members to implement and comply with its policies and guidelines as it can only study, recommend and adopt non-binding resolutions and charters.<sup>57</sup>

It is clear that under international law enforcement rests on a compliance-based system and not on an enforcement-based

<sup>48</sup> UNITED STATES. CONGRESS. SENATE. COMMITTEE ON FOREIGN RELATIONS. SUBCOMMITTEE ON THE UNITED NATIONS CHARTER, *Review of the United Nations Charter: Hearing Before a Subcommittee of the Committee on Foreign Relations, United States Senate, Eighty-third Congress, Second Session on Proposals to Amend Or Otherwise Modify Existing International Peace and Security Organizations, Including the United Nations*, Volumes 8-12, U.S. Government Printing Office, 1955, pg 1383

<sup>49</sup> 1947 International Court Justice Acts & Documents. Chapter II, Articles 34-38

<sup>50</sup> JS WARIOBA, *Monitoring Compliance with and Enforcement of Binding Decisions of International Courts*, Volume 5: Issue 1, Max Plank Yearbook of United Nations Law Online (9 February 2001) Pg 41-52

<sup>51</sup> TIM STEPHENS, *International courts and environment Protection*, Volume 62, Cambridge University Press (12 Feb 2009) pg 39

<sup>52</sup> ANTONIO CASSESE, *Realizing Utopia: The Future of International Law*, OUP Oxford, 2012. Pg 453

<sup>53</sup> Established by General Assembly resolution 2997 (XXVII) of 15 December 1972, adopted by 116 votes in favour, none against and 10 abstention.

<sup>54</sup> GERMAN ADVISORY COUNCIL ON GLOBAL CHANGE WGBU, WISSENSCHAFTLICHER BEIRAT DER BUNDESREGIERUNG GLOBALE UMWELTVERÄNDERUNGEN (GERMANY), WISSENSCHAFTLICHER BEIRAT GLOBALE

UMWELTVERÄNDERUNGEN, GERMAN ADVISORY COUNCIL ON GLOBAL CHANGE, HANS-JOACHIM SCHELLNHUBER, *World in Transition: New structures for global environmental policy*, Earthscan, 2001. Pg - 137

<sup>55</sup> *Id*, Pg 137

<sup>56</sup> ANDREW WATSON SAMAAN, *Supra Note 4*, Pg 263

<sup>57</sup> *Id*, Pg 263, 264



system.<sup>58</sup> Also, the rules to safeguard the environment, including legal framework, customs, general principles and treaties, are inadequate.<sup>59</sup>

The existing recourses for enforcement of international environmental law remain sparse<sup>60</sup> and are viewed as “unfamiliar network of haphazardly coordinated [agencies] ... a phantom, with mirage-like powers, a creaking and fragmented process for deciding policy, and a surfeit of bureaucratic fiefdoms that consistently muster inadequate resources to meet even the most urgent challenges.”<sup>61</sup>

### **Responsibility of States to Safeguard the Environment**

As per Principle 1 of the Stockholm Declaration<sup>62</sup>, a man has a fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations. However, the emphasis is upon “common action among States.”<sup>63</sup> Rio Declaration<sup>64</sup> gave out 27 principles to guide

the behaviour of nations towards environmentally sustainable patterns of development<sup>65</sup> and makes it is the responsibility of the State to safeguard the environment through its policies, legislations, imposing penalty wherever necessary and cooperation with other States. The African Commission on Human and People's Rights recognises the right to healthy environment guaranteed under Article 24 and right to enjoy the best attainable State of physical and mental health under Article 16 of the African Charter imposes a clear obligation upon the government to take measures to prevent pollution and ecological degradation, to promote conservation, to secure an ecologically sustainable development and use of natural recourses and refrain from doing any acts that directly threaten the health and environment of the citizens.<sup>66</sup> The Commission also noted that Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) requires governments to take necessary steps for the improvement of all aspects of environmental and industrial hygiene.<sup>67</sup> Apart from providing a healthy environment the State

<sup>58</sup> MARY ELLEN O'CONNELL, *Supra* Note 36, Pg 52

<sup>59</sup> KRISTA SINGLETON-CAMBAG, *International Legal Sources And Global Environmental Crises: The Inadequacy Of Principles, Treaties, And Custom*, Vol. 2, ILSA Journal of Int'l & Comparative Law (17 January 1995), Pg 173, 186

<sup>60</sup> CHANTAL THOMAS, *Should the World Trade Organization Incorporate Labor and Environmental Standards*, Vol. 61, Washington & Lee Law Review 347 (2004) pg 357

<sup>61</sup> UNITED NATIONS ASS'N OF THE U.S.A./THE SIERRA CLUB, UNITED NATIONS FOR THE EARTH: AN ENVIRONMENTAL AGENDA FOR THE WORLD COMMUNITY 33 (1990).

<sup>62</sup> UN General Assembly, *United Nations Conference on the Human Environment*, 15 December 1972, A/RES/2994

<sup>63</sup> RALPH C. D'ARGE & ALLEN V. KNEESE, *State Liability for International Environmental Degradation: An Economic Perspective*, Vol. 20 Natural Resources Journal 427 (1980). Pg 427

<sup>64</sup> UN General Assembly, *United Nations Conference on Environment and Development*, 12 August 1992, A/CONF.151/26 (Vol. I)

<sup>65</sup> Dr. P.S. JASWAL, Dr. NISHTHA JASWAL, VIBHUTI JASWAL, *Environmental Law*, Allahabad Law Agency, 4<sup>th</sup> Edition (2018 reprint) pg 105

<sup>66</sup> Social and Economic Rights Action Center & the Center for Economic and Social Rights v. Nigeria, *Supra* Note 24, para 52

<sup>67</sup> *Id* para 52



must also safeguard it and take appropriate measures to prevent any disaster that may degrade the environment.<sup>68</sup>

Moreover the public trust doctrine lays down that resources being a gift of nature, should be made freely available to everyone irrespective of the status in life. The doctrine enjoins upon the Government to protect the resources for the enjoyment of the general public rather than to permit their use for private ownership or commercial purposes. The Doctrine primarily rests on the principle that certain resources like air, sea, waters and the forests have such a great importance to the people as a whole that it would not be justified to make them a subject of private ownership.<sup>69</sup> In *National Audubon Society vs. Superior Court of Alpine County*,<sup>70</sup> the Supreme Court of California observed, “the public trust is more than an affirmation of State power to use public property for public purposes. It is an affirmation of the duty of the State to protect the people’s common heritage of streams, lakes, marshlands and tidelands, surrendering that right of protection only in rare cases when the abandonment of that right is consistent with the purposes of the trust.....”

It is not only the responsibility of the State to ensure clean and healthy environment to individuals within its own jurisdiction but the

State is also under the obligation to protect other States against the injurious acts of individuals within its jurisdiction.<sup>71</sup> The international responsibility of a State arises under the international law when there is a breach of international law by a State.<sup>72</sup>

Therefore, it is well establish that it is that state that is responsible for securing the environment and, if it fails to do so, it shall be held liable under international environmental framework, whether for violation of individuals within its own jurisdiction or violation of rights of another State.

### Need for International Enforcement Mechanism

It has been well said that there is no right without a remedy.<sup>73</sup> This principle is ancient and venerable.<sup>74</sup> In *Ashby v. White*<sup>75</sup>, King’s Bench observed, “If the plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and a remedy if he is injured in the exercise or enjoyment of it; and indeed it is a vain thing to imagine a right without a remedy; for . . . want of right and want of remedy are reciprocal. . . . Where a man has but one remedy to come at his right, if he loses that he loses his right.” Chief Justice Marshall in *Marbury v. Madison*<sup>76</sup> observed, “It is a general and indisputable

<sup>68</sup> *Corfu Channel Case (United Kingdom v. Albania)*; *Merits*, International Court of Justice (ICJ), 9 April 1949, pg 23

<sup>69</sup> *M.C. Mehta v. Kamal Nath*, W.P.(C) No.- 000182-000182/1996 Judgement of 13 decmenber 1996 (Supreme Court of India), pg 20

<sup>70</sup> 33 CAL. 3d 419

<sup>71</sup> *Trail smelter case (United States, Canada)*, Vol. III, Reports Of International Arbitral Awards, pp. 1905-1982, Award of 16 April 1938 and 11 March 1941, Pg 1963

<sup>72</sup> UN INTERNATIONAL LAW COMMISSION, *Draft articles on Responsibility of States for*

*Internationally Wrongful Acts, with commentaries*, Commentary to A/CN.4/L.602/Rev.1 (August 2001) pg 32

<sup>73</sup> *Ubi Jus, Ibi Remedium*- legal maxim which essentially mean that where there is a right, there is a remedy.

<sup>74</sup> DONALD H. ZEIGLER, *Rights, Rights of Action, and Remedies: An Integrated Approach*, 76 Wash. L. Rev. 67 (2001). pg 71

<sup>75</sup> (1703) 92 ER 126; See also, Tracy A. Thomas, *Ubi Jus, Ibi Remedium: The Fundamental Right to a Remedy*, 41 San Diego Law Review 1633 (2004), pg 5

<sup>76</sup> 5 U.S. (1 Cranch) 137 (1803), pg 5 U. S. 163



rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded. . . . For it is a settled and invariable principle in the laws of England, that every right, when withheld, must have a remedy, and every injury its proper redress.”

It has been established that environment is an integral part of human rights and in order to ensure its observation a remedy has to be given in case it is breached. This creates a need to establish an enforcement mechanism. The whole concept of enforcement mechanism, consisting of a legally imposed sanction, is that when there is disobedience of a rule/law, there is punishment for the same and, therefore, the possibility of the punishment deters from such violation in the first place itself.<sup>77</sup>

The enforcement is necessary as individuals and States have to be guided by the rule of law as it is the foundation of friendly and equitable relations between States and the base of fair societies and it includes emerging and critical issues like climate change and the environment impacting on the security and livelihoods of people.<sup>78</sup> Rule of law is a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards.<sup>79</sup>

It has been rightly stated by Andrew Watson Samaan<sup>80</sup>, “Every problem associated with international law affects the issue of enforcement. Until problems and solutions are clearly defined, implementation is effected on a global scale, and the lawmaking process is globally representative, compliance and enforcement will remain elusive goals and the environment will continue to degenerate.”

The formation of an International Environmental Court (IEC) would not only help in faster resolution of disputes and facilitates litigation for international environment disputes at a lower cost but would also provide aid in scientific procedures, enforcement of existing treaties, provide access Non State Actors and private individuals, apart from States, and would establish a compulsory jurisdiction over States as well as give decisions that are in a clear and enforceable language.<sup>81</sup>

#### **What can be done**

The very first step of creating an enforcement mechanism for the international environmental law is to set up an International Environment Court where the States can be held liable for acts done by them and environmental disputes can be resolved amicably. One of the objectives of United Nations is to establish conditions under which justice and respect for the obligations arising from treaties and other sources of environmental law can be

<sup>77</sup> D'AMATO, ANTHONY, *Is International Law Really 'Law'?*, Paper 103, Faculty Working Papers (2010). Pg 9

<sup>78</sup> UNITED NATIONS, *What is Rule of Law?*, United Nations and the Rule of Law, available at

<https://www.un.org/ruleoflaw/what-is-the-rule-of-law/>

<sup>79</sup> *Id*

<sup>80</sup> ANDREW WATSON SAMAAN, *Supra* Note 4, pg 273

<sup>81</sup> STEINER ANDERSEN, *Supra* Note 5, pg 77



maintained<sup>82</sup> and this objective can be achieved when courts and tribunals are set up. A separate court or tribunal is seen to be more effective than International Court of Justice as the specialised court/tribunal would consist of not only judicial officers but also experts of the field as such matters often require scientific and technical expertise as seen in the International Tribunal for Law of the Seas where 21 independent members are elected to the Tribunal among persons enjoying the highest reputation for fairness and integrity and of recognised competence in the field of the law of the sea.<sup>83</sup>

One of the arguments against setting up an IEC is that there is no prior prohibitory rule which could lead to taking up of enforcement action.<sup>84</sup> The efforts of making an enforcement mechanism in the international community would not bring the desirable outcome if only a court is set up; the abolishing of the environmental chamber serves as a good example of that (*supra*). Efforts have to be made towards building a mechanism that not only provides for a court to hold the offender liable but also prohibitory laws, sanction procedure and authority to enforce the decisions of the court in a clear and enforceable language. A number of environmental conventions have been formed since 1954, like the 1973 International Convention for Protection of Pollution from Ships, 1977 Environmental Modification Convention, 1994 Convention on Nuclear safety and so on. Provisions for protection of environment has been given under other Conventions as well, like 1958 Geneva Convention on the High Sea (Arts 24

and 25) which put States under the obligation to take measures and prevent pollution of seas by oil discharge from ships and from dumping of radioactive waste, 1967 Outer Space Treaty (Article 9) which requires the States to avoid harmful contamination and adverse changes in the environment of Earth resulting from introduction of extra-territorial matter, 1989 Convention on Indigenous and Tribal Peoples<sup>85</sup> (Article 7) which puts the Governments under obligation to take measure to protect and preserve the environment of the territories inhabited by indigenous and tribal people, 1949 Geneva Conventions (Article 55 of Protocol I) which relates to the protection of the environment in time of war and various others. Although these conventions provide for adequate measures to safeguard the environment, they do not provide for any clear binding provisions or expressly state the liability in case of breach of these provisions, as is usually given under domestic laws. The provisions should not only limit relief to monetary damages but should also issue injunction to save the environment from further damage. Conventions that are in enforceable language and are clearly binding and provide for sanction shall be made to ensure that the States abide by the international laws and do not take them as mere norms that may or may not be followed. Often environmental damage can be irreversible; therefore, it is important to ensure that such damage does not take place in the first place. Measures have to be taken in order to prevent such environmental

<sup>82</sup> Preamble of Charter of the United Nations (came into force on 24 October 1945)

<sup>83</sup> International Tribunal for law of the Sea available at <https://www.itlos.org/the-tribunal/>

<sup>84</sup> MARY ELLEN O'CONNELL, *Supra* Note 36, pg 53

<sup>85</sup> ILO C-169



damage.<sup>86</sup> This can be done by issuing warning to the State that the regulatory authority has reasons to believe is about to harm the environment, before any damage is caused to the environment.

In most of the Tribunals only States can appear as parties before them. As has been established, environmental right being an integral part of human rights, individuals should be able to take their grievances to the Court or Tribunal, if required. Hence, this concept has to be introduced so that an individual, after exhaustion of their domestic remedies, is able to seek remedy in the international regime to ensure that not only is their right to clean and healthy environment is protected by the international courts but also the commission or omission of acts by the State causing environment degradation can be identified even when they are at a small scale. But this can only done once domestic remedies are exhausted. The object behind the rule is to give first opportunity to the respondent State to correct the harm and to make redress.<sup>87</sup> However, the requirement of exhaustion of remedy is applicable only to a certain extent. This has been clarified under

international human rights laws where exhaustion of domestic remedies is required only to the extent that these remedies are effective and available within the meaning of article 5, paragraph 2 (b), of the Optional Protocol to the International Covenant on Civil and Political Rights.<sup>88</sup>

Another issue with environment enforcement in international regime is that the concept of an *actio popularis* has not yet gained sufficient acceptance in international law.<sup>89</sup> Many independent organizations, mostly non-governmental organizations (NGOs), like International Union for Conservation of Nature and Natural Resources (IUCN), World Wild Fund for Nature (WWF), World Meteorological Organisation (WMO), Greenpeace, etc. play an important role in safeguarding the environment. NGOs, as a representative of civil societies, collaborate with governments to enforce environmental legislations, they push government to introduce concepts of sustainable development and use domestic courts as a tool for prohibiting violation of domestic laws.<sup>90</sup> These independent organizations

<sup>86</sup> Principle 15 of the 1992 Rio Declaration on Environment and Development and Principle 18 of the 1972 Stockholm Declaration on Human Environment provide for 'Precautionary Principle' whereby measures should be taken to avoid and control irreversible and serious environmental damage and lack of scientific certainty shall not be a reason for postponing such action. See, Stockholm Declaration on the Human Environment, in *Report of the United Nations Conference on the Human Environment*, UN Doc.A/CONF.48/14, at 2 and Corr.1 (1972) ; Rio Declaration on Environment and Development, in *Report of the United Nations Conference on Environment and Development*, UN Doc. A/CONF.151/26 (Vol. I), 12 August 1992, Annex I.

<sup>87</sup> UNITED NATIONS ENABLE, *International Norms and Standards Relating To Disability*, (PART

II. The International Human Rights System), available at <https://www.un.org/esa/socdev/enable/comp201.htm>

<sup>88</sup> *Baboeram-Adhin v. Suriname*, Comm. 146/1983 & 148-154/1983, U.N. Doc. A/40/40, at 187 (HRC 1985), para 9.2

<sup>89</sup> CHRISTOPHER GREENWOOD, *State Responsibility and Civil Liability for Environmental Damage Caused by Military Operations*, Volume 69, International Law Studies (Ch XXIII), pg 398

<sup>90</sup> TIBEBE SIRAK ASFAW, VIDA BOTES & LULA G. MENGESHA, *The role of NGOs in corporate environmental responsibility practice: evidence from Ethiopia*. Int J Corporate Soc Responsibility 2, 2 (2017), pg 6



should be allowed to take legal recourse for public good.

Research has found that often times either a State responsible for harming the environment is not a party to a relevant treaty, or the treaty places no binding obligation on the State to prevent damage.<sup>91</sup> In order to solve this issue not only laws outside of the treaty are required to regulate the States but also an organization has to be set up in order to overlook the formation and implementation of treaties between States. Many specialized institutional authorities exist and a new World Environment Organisation can be formed on the same lines to make enforcement mechanism more effective. The International Labour Organisation (ILO) is set up to achieve decent work for all<sup>92</sup> and for this it provides<sup>93</sup> technical assistance to States, sets international labour standards with conventions, gives recommendations, monitors implementation of conventions, adopted Declaration on Fundamental Principles and Rights at Work (1998), strengthens trade unions, has set complaints procedure where it receives complaints. The World Trade Organisation (WTO) was set up with the aim of ensuring that trade flows as smoothly, predictably and freely as possible<sup>94</sup> and for this WTO provides for<sup>95</sup> global trade rules that give the legal foundation for global trade, administers trade agreements, acts as a forum for trade negotiations, settles trade

disputes, reviews national trade policies, builds the trade capacity of developing economies and cooperates with other international organizations. The World Health Organisation (WHO) was set up with the aim of achieving better health and well being for all<sup>96</sup> and for this WHO assists<sup>97</sup> States in strengthening health services, provides for technical assistance to States, provides necessary aid to States and special groups, such as the peoples of trust territories, establishes and maintains administrative and technical services including epidemiological and statistical services, does efforts to eradicate epidemic, endemic and other diseases, promotes the improvement of nutrition, housing, sanitation, recreation, economic or working conditions and other aspects of environmental hygiene, proposes conventions, agreements and regulations, and makes recommendations with respect to international health matters, promotes maternal and child health and welfare and fosters the ability to live harmoniously in a changing total environment, fosters activities in the field of mental health, especially those affecting the harmony of human relations, conducts research in the field of health, promotes improved standards of teaching and training in the health, medical and related professions, assists in developing an informed public opinion among all peoples on matters of health, standardises diagnostic procedures as necessary and develops, establishes and promotes international

<sup>91</sup> MARY ELLEN O'CONNELL, *Supra* Note 36, pg 54

<sup>92</sup> ILO, *Mission and Impact of the ILO*, About ILO, available at < <https://www.ilo.org/global/about-the-ilo/mission-and-objectives/lang--en/index.htm>>

<sup>93</sup> ILO Constitution (Preamble & Articles 19, 22 & 26)

<sup>94</sup> WTO, *WTO in Brief*, What is the WTO, available at <[https://www.wto.org/english/thewto\\_e/whatis\\_e/inbrief\\_e/inbr\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/inbrief_e/inbr_e.htm)>

<sup>95</sup> Agreement Establishing the World Trade Organisation (Article II & III)

<sup>96</sup> WHO, *What we do*, About WHO, available at <<https://www.who.int/about/what-we-do>>

<sup>97</sup> Constitution of the World Health Organisation (Article 2)



standards with respect to food, biological, pharmaceutical and similar products. Although UNEP was formed to perform similar functions but it lacks many powers that have been conferred on other organisations (*supra*). Therefore, even after the formation of UNEP, recommendation for formation of a new institutional authority for decision making and enforcement was made to combat global warming.<sup>98</sup>

The supporters of the idea of a specialised institutional organisation believe that the authority should be able to achieve the following:<sup>99</sup>

- i. collect data and information on matters of environment that are of public concern,
- ii. identify and define legitimate problems by scientific measures,
- iii. should have means of becoming aware of new situations that are environmentally hazardous but were not so previously,
- iv. estimate risk and impact of various activities conducted by States and individuals,
- v. organised, repetitiously collected and standardised data should be evaluated, analyzed and interpreted in order to monitor situations,
- vi. disseminate information in the form of raw statistics and data concerning environmental hazards as well as experiences with application of policies regarding the hazard,
- vii. formulate legally binding treaty and conventions,
- viii. take measures to ensure compliance of these treaties and conventions by examination of State policies, gathering evidence to determine to what extent, if any,

a State is in compliance with a given treaty, validating the evidence, and deciding on appropriate action when they are not in compliance,

- ix. coordinate national and international programmes by identifying proper entities between whom coordination is required based on who will gain from such coordination and who can contribute the most towards such coordination, and
- x. conduct activity on its own (direct operational activities), especially for providing technical and financial assistance to States.

The formation of the institutional organisation along with a specialised court and cooperation with the States provides a system of “checks and balances”, thereby, ensuring a non biased system. This is important because it is often seen that international decisions are influenced by the powerful States. As a result of political compromises made during the formulation of rules of international environmental law, they are often vague and difficult to apply and, therefore, come off as weak.<sup>100</sup> This has been experienced during the formation of UN Charter when the Latin American States wanted Bill of Human Rights to be incorporated in the Charter but due to lack of willingness of Super Powers the Charter only contained general provisions which were vague for promotion and protection of human rights and fundamental freedoms.<sup>101</sup> This system will ensure that such circumstances do not exist, provided that the composition of the court and organization is made in such a manner.

<sup>98</sup> The Hague Declaration on Environment, 11 March 1989, 28 ILM 1308

<sup>99</sup> ANDREW WATSON SAMAAN, *Supra* Note 4, pg 280

<sup>100</sup> STEINER ANDERSEN, *Supra* Note 5, pg 74

<sup>101</sup> Dr. H.O. AGARWAL, *Human Rights*, 6<sup>th</sup> Edition, Central Law Publication (2018 reprint), pg 35



Apart from development of enforcement mechanism, financial resources also have to be provided to the developing States else the enforcement measures may not be successful in achieving its aim.<sup>102</sup> Keeping in mind that the developing States are in need of financial assistance to address their environmental concerns, donors should prioritize developing States with higher environmental needs such as a high concentration of endangered species, high deforestation rate, or insufficient access to safe drinking water and, in addition to the environmental needs of developing States, also take into account their environmental performance (e.g., quality of environmental institutions and policies).<sup>103</sup> This would not only provided the required assistance to the developing nations but also encourage them to improve their environmental performance.

International environment lawmaking process should be able to achieve the following three main goals<sup>104</sup>:

- a. Address the uncertainties that exist in the law and indulge in continuous evolution of the lawmaking process by advancing the knowledge through scientific, technical, environmental and economic expertise.
- b. Encourage participation, especially of the developing countries so that they can be

given required assistance to secure the environment of the earth. This can be done by addressing the interest of special groups, on one hand, and denying benefits arising from the legal framework to those who choose to remain outside the regime, on the other hand.

- c. Resolve the tension of manageability of negotiations by the expert's committees imbedded in the process.

### Conclusion

The environment of the Earth is adversely changing at a very fast rate and the States need to take immediate actions to safeguard the environment.<sup>105</sup> Most of the environment issues being common to all the States<sup>106</sup> have to be addressed by all with cooperation and coordination. This poses an immediate requirement for setting up of an enforcement mechanism to ensure that all the States comply with treaties and conventions that are formulated for protection of the environment. Environment being a right of every individual poses a bigger responsibility on the international community to ensure that each individual is able to enjoy their right to a healthy and clean environment. Under the current international environment regime, though the environmental issues are addressed under human rights legislations when they hamper with the rights of

<sup>102</sup> UNITED NATIONS CONFERENCE ON ENVIRONMENT AND DEVELOPMENT. (1992). *Agenda 21, Rio Declaration, Forest Principles*. [New York], United Nations (3 to 14 June 1992), para 33.1

<sup>103</sup> ZDENĚK OPRŤAL & JAROMÍR HARMÁČEK, *Is Foreign Aid Responsive to Environmental Needs and Performance of Developing Countries? Case Study of the Czech Republic*, Sustainability 2019, 11, 401 (14 January 2019) pg 2of 16

<sup>104</sup> DAVID D. CARON, *Protection of the Stratospheric Ozone Layer and the Structure of*

*International Environmental Law Making* (October 7, 2014), 14 Hastings International And Comparative Law Quarterly 755-780 (1991), pg 777

<sup>105</sup> UNEP, *Press Release of 19 May 2016 (Nairobi)*, News and Stories, available at <<https://www.unenvironment.org/news-and-stories/press-release/rate-environmental-damage-increasing-across-planet-there-still-time>>

<sup>106</sup> UN ENVIRONMENT, *Global Environment Outlook 6 Regional assessments*, Assessment, available at <<https://www.unenvironment.org/resources/global-environment-outlook-6-regional-assessments>>



individuals, there is no binding obligation on the States to ensure protection of the environment. The multilateral agreements are often not complied with and arbitration instruments used after the damage has been done do little to no good in protection of the environment. States do not take environmental agreements as binding laws and exit such agreements whenever they see a benefit in doing so.

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Enforcement mechanism is important and the need of the hour as no law can exist or operate if there is no method of ensuring that such a law will be complied with. Even though many States have domestic laws to ensure protection of the environment from the acts of individuals, there is a lack of international laws that will ensure protection of the environment from the acts of the States. States play the principal role in protection of the environment and, therefore, it is important that they shall be held responsible for non compliance of laws that are formulated to protect the environment under the international environmental regime.

The enforcement mechanism has to be set up in manner that all the existing issues of environmental enforcement are resolved. For an out-and-out enforcement mechanism to protect environment from being damaged, the legal obligations have to be clear, negotiations have to be held, positive inducement has to be made, time to comply has to be given and, finally, coercive measures have to be stipulated.<sup>107</sup>

As Alexander Hamilton has said, “Laws are a dead letter without courts to expound and define their true meaning and operation.”

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<sup>107</sup> MARY ELLEN O’CONNELL, *Supra* Note 36, pg 56