

No Harm Rules Principle, Developments and Application Model in Claims of State Responsibility for the Impact of Climate Change

Abstract

Utilization of rights to natural resources by a State must not be carried out in ways that are contrary to the rights of other States. This basic principle of international law describes that each State must not harm or violate the rights of other States. Therefore, each State is responsible not to cause damage to the environment of other States, or to areas outside the limits of its jurisdiction. This

article will analyse the development of the no harm rules principle and simulate its application model for claiming state responsibility in preventing environmental damage due to the impact of climate change. The research used normative juridical research. The research specification was descriptive analytical. While the main data was secondary data (primary, secondary and tertiary legal materials). Then, the data was analysed qualitatively. Based on the discussion and simulation conducted, it is concluded that the no harm rules principle can be applied to climate change issues, however, this principle is not satisfactory and has limitations in its application.

Keywords: climate change, development, model, no harm rule, responsibility

INTRODUCTION

International law recognizes that every State has sovereignty over its natural resources. However, the use of rights to natural resources may not be carried out in ways that are contrary to the rights of other States as the basic principles of international law formulate that each State must not harm or violate the rights of other States.¹

This principle is then referred to in international environmental law theory as the principle of good neighbourliness or the principle of *Sic Utere* or No Harm Principle or Nuisance Theory.² Each State is responsible not to cause damage to the environment of other States, or to areas outside the limits of its jurisdiction. This principle arises from the Latin proverb *sic*

utere tuo, ut alienum non laedas, which means that a State is responsible not to carry out, or to permit activities within their territory or public space without regard to or contrary to the rights of other States to protect the environment.³

In the Island of Palmas case, the Arbitration noted that there is an obligation for all States ...to protect within the territory the rights of other states, in particular their right to integrity and inviolability in peace and war.⁴ This obligation is studied in more depth in the case of the Trail Smelter, in which the Arbitration then focuses on the damage or loss suffered by the State of America, Washington due to the presence of harmful fumes, sulphur dioxide emissions from the Smelter located on the Trail, British Columbia Canada. The question posed in this case is whether the Trail Smelter should be asked to stop causing damage to Washington State in the future and, if so, to what extent?⁵ In answering this question, Arbitration is of the opinion, *...that, under the principles of international law, as well as of the law of the United States, no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.*⁶

The above statement can be interpreted that when an activity has serious consequences and the loss occurs clearly with convincing evidence then, no State has the right to use or permit the use of its

¹ Patricia Birnie and Alan Boyle. *International Law and The Environment* (2nd ed). London: Oxford Press, 2002, P. 104.

² Philippe Sands. *Principles of International Environmental Law*. (2nd ed) Cambridge. 2003. P. 239.

³ Patricia Birnie and Alan Boyle. 2002. *Loc.cit.*

⁴ *Island of Palmas* case, (Netherlands/U.S.A.), 2 R.I.A.A. 829 (Permanent Court of Arbitration 1928). P. 839.

⁵ Art. III of the Arbitration Convention between the United States of America and the Dominion of Canada, signed April 15, 1935.

⁶ *Trail Smelter Arbitration* (United States v. Canada) 16 April 1938, 11 March 1941; 3 R.I.A.A. 1907 (1941). p. 1965.

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territory in such a way as to cause damage in or to other areas or property or people in it. According to Sands, this quote is the most widely referenced and has been accepted as a rule of customary international law.⁷ This approach to the Trail Smelter Arbitration case was also used by ICJ in the Corfu Channel case. In the case of Corfu Channel, the ICJ stated that it was *...every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States.*⁸ In the case of the Lac Lanoux Arbitration, it was stated that the state's obligation to consider the rights and interests of other States when exercising their rights.⁹ In this case the Arbitration stated, *France [the upstream state] is entitled to exercise her rights; she cannot ignore the Spanish interests. Spain [the downstream state] is entitled to demand that her rights be respected and that her interests be taken into consideration.*¹⁰

Likewise in the case of the Nuclear Test, the ICJ emphasizes the legal status of general obligations related to the environment as part of international law, stating as follows, *The existence of the general obligation of states to ensure that activities within their jurisdiction and control respect the environment of other states or of areas beyond national control is now a part of the corpus of international law relating to the environment.*¹¹(emphasis added)

Related to the issue of anthropogenic climate change which involves complex

causal mechanisms, it must be separated whether anthropogenic climate change is caused by human activities or caused by nature. Carbon dioxide and Greenhouse Gas (GHGs) emissions are not what cause environmental damage. Carbon dioxide and GHGs emissions only trigger a chain of events, which then causes climate change associated with the damage done. With this understanding, it is difficult to make GHGs the cause of the environmental damage and losses that occur. Therefore, it is necessary to build an argument for linking the relationship between emissions by a State and the damage suffered by other States. So far, the basis of international instruments related to the issue of climate change and the belief that the harmful and damaging effects of climate change only refer to scientific evidence in scientific reports of scientists that are accommodated in the Intergovernmental Panel on Climate Change (IPCC).

In this case, of course, linking the losses experienced by a State due to climate change is difficult to meet the elements contained in the state responsibility regime because it becomes an unrealistic thing to identify damage (injury) on the basis of certain emissions.¹² Therefore, then in relation to direct causal relationships, it must be developed that the damage caused can be proven causally based on the possibility of scientific evidence contained in the scientific data argument as direct evidence.

Based on the description above, the problem raised in this article is how to develop and apply the No Harm Rules

⁷ Philippe Sands. 2003. P. 241.

⁸ *Corfu Channel case* (United Kingdom v. Albania), Judgment of April 9th, 1949, I.C.J. Reports 1949. P. 22.

⁹ *Affair du Lac Lanoux* (Spain vs France) 12 R.I.A.A. 281, Nov. 16, 1957, P. 316.

¹⁰ *Ibid.* See Phiippe Sands. *Op.cit.*, P. 243.

¹¹ *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, I.C.J. Reports 1996. P. 226. Paragraph. 29.

¹² Mada Apriandi Zuhir, "Rethinking Legality of State Responsibility on Climate Change in International Law Perspectives", *Jurnal Dinamika Hukum*. Vol 17, No 2 May 2017, DOI: <http://dx.doi.org/10.20884/1.jdh.2017.17.2.801>. P. 203-214.

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Principle to claim state responsibility for the impacts of climate change. This article does not only discuss the development of the no harm rule principle, but also discusses the constraints and simulates a model for applying the principle in practice. For this reason, this article will be divided into several discussion topics. First, it will discuss the development of the principle of no harm rule in international conventions related to the environment. The second will discuss the Model Application of the No Harm Rule Principle in the Legal Framework of State Responsibilities Related to Climate Change Regulation. At the end, this article will describe the conclusions from the discussion on the previous topics.

RESEARCH METHODS

This study used a normative juridical approach, namely by logically examining the legal aspects that underlie the no harm rule principle, its application in international conventions related to the environment and how it was applied through a model to claim State responsibility for the impacts of climate change. Therefore, the research specification used descriptive analytical. In this study, the main data was secondary data (primary, secondary and tertiary legal materials). Furthermore, the research data obtained were analysed qualitatively.

ANALYSIS AND DISCUSSION

REGIME OF STATE RESPONSIBILITIES IN INTERNATIONAL LAW REGARDING THE IMPACT OF CLIMATE CHANGE

According to Sands, the use of the term State responsibility can lead to misunderstandings in which the use of this term seems as if only

the State is considered a subject of international law, even though there are also supporters of other rights and obligations, such as international organizations and individuals who are also a subject of international law.¹³

One of the basic principles in international law states that a State must not injure and violate the rights of other States. Violation of these rights which are in the legal interest of other parties will have consequences for claims of state responsibility. A State that injures or violates these rights must be held accountable for its actions and therefore is obliged to make compensation for losses suffered by other parties.¹⁴ This responsibility arises both because of the nature of international law and arises from the concept of state sovereignty and equality among the States.¹⁵

In the international law literature, the responsibility of State is divided into two, namely:

1. Liability due to unlawful acts (delictual liability), responsibilities arising from every mistake or negligence of a State towards foreigners in its territory or the territory of another State, for example, responsibilities arising from space exploration, nuclear exploration, or other activities across national borders; and
2. Liability for contractual liability arising from a state's breach of an agreement or contract.¹⁶

There are two theories that underlie state responsibility, namely the theory of risk and the theory of error. The theory of risk determines that a State is absolutely responsible for every activity that causes

¹³ Philippe Sands. *Op.cit.*, hlm. 873.

¹⁴ In some circumstances, a state's actions can be justified if there are reasons for their consent, self-defense, countermeasures in respect of an internationally wrongful act, force majeure, distress and necessity. See Chapter V UNGA Res. 56/83.

¹⁵ Malcolm N. Shaw. *International Law* (6th ed). Cambridge University Press. 2008. P. 778.

¹⁶ Huala Adolf, *Aspek-aspek Negara dalam Hukum Internasional*, Jakarta: CV Rajawali, 1991. P. 180-181 and Malcolm N. Shaw. 2008. *Op.cit.* P. 542-545.

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very dangerous effects (harmful effects of hazardous activities) even though the activity is a legal. This theory then underlies the principle of absolute liability or strict liability or objective responsibility.¹⁷ An example of the application of this theory can be seen in the provisions of Article 2 of the Liability Convention 1972 which states that the launching state is absolutely responsible for paying compensation for losses on the earth's surface or on aircraft that are in flight where the losses and the accident was caused by its space objects.

In the theory of error (fault theory), the responsibility of the state arises when the state's actions can be proven to contain an element of error. An act is said to contain errors if the act is done intentionally (*dolus*) or by negligence (*culpa*) which cannot be justified. This error theory then underlies the principle of subjective responsibility or liability based on fault.¹⁸ The presence of a *dolus* element means that the perpetrator state acts in a certain way, willed or known with the intent to cause injury or harm. The *dolus* element can help determine attribution and infringement issues and the extent of the effect on the injury or loss incurred.

Meanwhile, *culpa* is an action that can be blamed because of an element of error, carelessness or negligence because the steps that should have been taken to avoid an adverse event were not taken. In situations where individual actions that result in damage and loss and those actions are not related to the state, a state may be held liable for failing to exercise oversight.¹⁹ An act of a state that can be blamed according to international law (internationally wrongful act of a state) if;

1. when the act can be attributed to that State (attribution of conduct to a state); and

¹⁷ Huala Adolf, 1991. *Op.cit*, P. 187.

¹⁸ *Ibid*.

¹⁹ Ian Brownlie, *Principles of Public International Law* (2nded), Oxford University Press, London, UK, 1973, Pp. 44-45.

2. when the state's actions have violated its international obligations (breach of an international obligation).²⁰

Until the end of the 20th century, it was still believed that the emergence of state responsibility was not enough with the two elements above, but rather that there must be an element of damage or loss to other parties or States. In its later development, the element of damage or loss is no longer considered a necessity in every case that can result in state responsibility, for example, violations of international law provisions relating to human rights. This violation of human rights is clearly an act that is blamed according to international law, even though it does not harm other parties or States.²¹

Article 24 of the European Convention on Human Rights states that each State party is allowed to file an objection against other Parties without requiring the State that makes the objection to be a victim of human rights violations committed by the State suspected of committing the violation. Likewise, Article 3 of the Annex to the Resolution of the United Nations General Assembly No. 56/83 dated January 28th, 2002 concerning the Responsibility of States for internationally wrongful acts (hereinafter referred to as UNGA Res. 56/83) which eliminates the condition for damages related to acts that can be blamed under international law. Articles of UNGA Res. 56/83 on State responsibility for international wrongful act, provides simultaneously general rules of international law that reflect customary law with rules in the environmental field that arise from treaties and other international rules.²²

In the environmental field, in addition to the articles contained in UNGA Res. 56/83, there are also several non-

²⁰ International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts* 2001.

²¹ Malcolm N. Shaw. 2008. *Loc.cit*.

²² Philippe Sands. *Loc.cit*.

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binding instruments relating to state obligations. Several non-binding international instruments that regulate the obligations and responsibilities of this State, for example the following statement from the Brundtland Commission or the World Commission on Environment and Development (WCED);

*If one or more activities create a significant risk of substantial harm as a result of a transboundary environmental interference, and if the overall technical and socio-economic cost or loss of benefits involved in preventing or reducing such risks far exceeds in the long run the advantage which such prevention or reduction would entail . . . the state which carried out or permitted the activities shall ensure that compensation is provided should substantial harm occur in an area under national jurisdiction of another state or in an area beyond the limits of national jurisdiction.*²³

This statement is also in line with UNEP Principle 12, 1978 which states that states are responsible for fulfilling their international environmental obligations with regard to the use of shared natural resources and that states are subject to obligations relating to the implementation of international law for environmental damage arising from violations against this obligation outside the boundaries of their jurisdiction.²⁴

²³ *Ibid*, P. 874.

²⁴ *Ibid*, P. 873.

²⁵ *Phosphates in Morocco*. Judgment. 1938. PCIJ, Series A/B No. 74, P. 28.

²⁶ Malcolm N. Shaw (2003). *Op.cit.*, P. 781.

²⁷ *Chorzow Factory case*. PCIJ, Series A No. 17. 1928, P. 29.

²⁸ J.Crawford, *The ILC's Articles on StateResponsibility: Introduction, Text and*

Recognition of these practices of international responsibility has existed for a long time and can be seen in decisions of international courts, such as the Permanent Court of International Justice (PCIJ) and the International Court of Justice (ICJ), which state that international responsibility arises immediately after a state commits an act. that violates the rights of other States.²⁵ PCIJ in the case of the Spanish Zone of Morocco claims, stated, *...responsibility is the necessary corollary of a right. All rights of an international character involve international responsibility. Responsibility results in the duty to make reparation if the obligation in question is not met.*²⁶

Likewise in the case of the Chorzow factory (1928), the PCIJ stated that: "it is a principle of international law and even a greater conception of law that any breach of an engagement involves an obligation to make reparation".²⁷ The responsibility of the state for wrongful act according to international law is the most important thing to do is the obligation to stop the act, ensure and properly guarantee that there will be no repetition of the act if there is a possibility of it happening and make full compensation for the losses caused by the wrongful act.²⁸

This obligation for compensation is sometimes called a liability. According to Sands, the term 'liability' in the international legal literature has been widely discussed, for example PM Dupuy and H. Smets provide the definition of liability as an international obligation to provide compensation, while LFE Goldie, gives a broader meaning, namely the consequences

Commentaries (2002). *Report of the ILC*, UN Doc. A/56/10 (2001), J. Crawford, 1st *Report on State Responsibility*, UN Doc. A/CN.4/490 dan Add.1-7 (1998); 2nd *Report*, UN Doc. A/CN.4/498 and Add.1-4 (1999); 3rd *Report*, UN Doc. A/CN.4/507 and Add.1-4 (2000); 4th *Report*, UN Doc. A/CN.4/517 (2001); Philippe Sands. *Loc.cit.*

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of failure to perform duties, or compliance with required performance standards. Therefore, this liability has the connotation of legal compensation, when responsibilities and losses arise from failure to fulfil those obligations.²⁹

This rule is also applied in many cases by the ICJ, for example the Corfu Channel case and the Danube Dam Case (*Gabcikovo-Nagymaros Project*).³⁰ Although the explanation above describes the state's responsibility that arises because of an error, it should also be explained that there is also a state's responsibility that arises without any wrongful act. In this case, the causal relationship between the activity and the damage done leads to an obligation to pay compensation, even though the damage arises from legally valid activities. This is due to the development of science and technology which on the one hand creates great benefits for society, but on the other hand often has a certain level of risk of negative impacts, such as the production of nuclear energy and activities in outer space. Thus, in several international agreements that regulate these activities, regulations concerning special obligations are also contained. For example, in Article III (1) of the International Convention on Civil Liability for Oil Pollution Damage 1969, it is stated that "the owner of a ship at the time of an incident...shall be liable for any pollution damage caused by oil which has escaped or been discharged from the ship as a result of the incident". Likewise, for example at the Paris Convention on Third Party Liability in the Field of Nuclear Energy 1960, the Brussels Convention

supplementary to the Paris Convention 1963 and the Vienna Convention on Civil Liability for Nuclear Damage 1963.³¹

STOCKHOLM DECLARATION 1972

With regard to international instruments on the environment, the 1972 Stockholm Conference agreed on an agreement contained in 26 principles of environmental management called the Stockholm Declaration and produced 109 recommendations as part of its action plan. Although according to Birnie and Boyle, the legal status of the entire instrument of the Stockholm Declaration is still uncertain, but it is often referred to in international treaties, international agreements and other documents and is recognized as evidence of state practice and is an example of soft law of international law.³² One of the important points and the main principle of this Declaration is Principle 21 which formulates;

States have, in accordance with the Charter of the United Nations and the principles 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.

In 1997, the United Nations General Assembly passed resolution 2996, which stated that Principles 21 and 22 of the

compensation for the impacts caused by the activity. In relation to accidents caused by these activities, the compensation given is usually limited to a certain amount of insurance money, where the process of claiming responsibility is in the national court.

³² Patricia Birnie dan Alan Boyle. 2002. *Op.cit.* P. 39.

²⁹ Philippe Sands. *Ibid.*

³⁰ Martin Dixon and Robert McCorquodale. *Cases and Materials on International Law*. Oxford University Press. 2003, Pp. 411-435.

³¹ In general, the agreement that contains the rules regarding this obligation contains civil liability. This means that only the operator or owner of a certain activity is obliged to pay

Stockholm Declaration lay down the basic principles of the environment. Principle 21 includes two basic objectives of international environmental law, namely to stipulate those states have sovereign rights over their natural resources and secondly, the principle of no harm.

This understanding of the no harm principle was then developed not only in other areas, but also in areas outside the boundaries of national jurisdiction.³³ The effect of Principle 21 regarding its normative character is also recognized in Articles 192, 193 and 194 of the United Nations Convention on the Law of the Sea (UNCLOS 1982) and the Convention on the Transboundary Effects of Industrial Accidents) 1992.

RIO DECLARATION 1992

After the Stockholm Conference, 20 years later, the United Nations held a summit in Rio de Janeiro on June 3-4, 1992. This conference was called the United Nations Conference on Environment and Development (UNCED), known as the Earth Summit or Rio Summit. Although not legally binding as is the Stockholm Declaration, the Rio Declaration is an important example of the use of soft law instruments in the process of codification and development of international law. The preamble of the 1992 Rio Declaration explicitly stated that this Declaration was not formally binding by formulating, *...its adoption by consensus of 176 states, after a prolonged negotiation process, and its normative character, make it a particularly important example of the use of soft law instruments in the process of codification and development of international law.*

The main concerns of the Rio Declaration are sustainable development and

³³ *Ibid.*, P. 111.

³⁴ Patricia Birnie and Alan Boyle. 2002. *Op.cit.* P. 105.

³⁵ *Ibid.* P. 502.

the global environment. In the context of environmental transboundary hazards and risks, the Rio Declaration contains important principles formulated in Principles 2, 18, and 19.³⁴ Both Principle 21 of the Stockholm Declaration and Principle 2 of the Rio Declaration state that the no harm rule applies equally to territorial areas and beyond the limits of national jurisdiction.

A MODEL FOR APPLYING THE NO HARM RULE PRINCIPLE TO CLAIM STATE RESPONSIBILITY FOR THE IMPACTS OF CLIMATE CHANGE

The development of the principle of state responsibility starting from the *sic utere* or no harm principle or the principle of good neighbourliness from the Trail Smelter case decision and principle 21 of the 1972 Stockholm Declaration and Principle 2 of the 1992 Rio Declaration has become part of customary international law or even *jus cogens* which legally binding all States regardless of whether a State is a state party or not to an international treaty.

As explained in the previous section, related to climate change, the Earth's atmosphere is a different kind of region. The atmosphere is a layer of air flow that continuously moves in different areas regardless of the jurisdictional boundaries of a state, so it is different from airspace.³⁵ According to international law, the territory of a state consists of three dimensions, namely land, sea and air.³⁶ The traditional concept in international law related to state sovereignty perceives airspace as unlimited (*usque ad coelum*), although later this perception was corrected in air and space

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³⁶ Mochtar Kusumaatmadja and Etty R. Agoes. *Pengantar Hukum Internasional*, edisi II, Cetakan 3. Bandung: PT Alumi, 2012. P. 194.

law that the airspace over the high seas is open to everyone.³⁷

Seas outside the national jurisdiction of States are called high seas. Utilization of the high seas is carried out based on the principle of the common heritage of mankind, which means that the benefits of the high seas, both aspects of navigation and aspects of natural resources in it, must be enjoyed by all mankind and should not be monopolized by one or several state only. This principle gives birth to the general rights and obligations of each state towards the high seas as well as special rights and obligations on the particular high seas, such as providing adequate search and rescue (SAR) facilities, hot pursuits and the preservation of the marine environment.³⁸

As stated by the United Nations General Assembly through Resolution 43/53, Vienna Convention for the Protection of the Ozone Layer 1985 and UNFCCC 1992 that the global atmosphere is a common concern of mankind. According to Birnie and Boyle, the use of this term by giving the label common concern is a form of political compromise, in which the term previously offered is the common heritage of mankind.³⁹ Therefore, the use of the common concern label has a different legal status from the term common heritage of mankind which indicates natural resources such as permanent sovereignty, public property, shared resources, or common heritage.

The term common concern used in the global atmosphere does not then make the atmosphere a public property outside the sovereignty of the state, but because it is treated in the same way as the ozone layer,

the global atmosphere is a common source of the vital interests of mankind.⁴⁰

For this reason, so that the no harm rule principle can be applied to the issue of global climate change, the scope of Principle 21 of the 1972 Stockholm Declaration and Principle 2 of the 1992 Rio Declaration must be developed by expanding the meaning or understanding of the atmosphere extensively or at least the notion of the atmosphere can be analogized with equate it with protection of common areas as applied to the high seas.⁴¹

Thus, if we can make an analogy, then the Preamble to the 1985 Vienna Convention on the Protection of the Ozone Layer which includes Principle 21 of the 1972 Stockholm Declaration in its preamble as well as the intrinsic rules mentioned in the Preamble of the UNFCCC can also be used as a legal basis for applying the principle of good neighbourliness to climate change issues in general and atmospheric issues in general.

In addition, international practice in respecting the rights of other States related to nuclear testing in the atmosphere, as also stated by Birnie and Boyle, can be used as a reference for the application of this principle to the atmosphere.⁴² So then, if there is a State that opposes or does not want to recognize climate change as a common concern of mankind, it is the same as opposing and unwilling to carry out its obligations on climate change as a global common.

In relation to the principle of no harm rule, there are several things that must be considered in its implementation, namely:

a. Obligation to Take Prevention

³⁷ Malcolm N. Shaw (2003). *Op.cit.* P. 463.

³⁸ The provisions regarding the legal regime of the high seas as stated in UNCLOS 1982 are contained in part VII, Articles 86 to 120, applies to all parts of the sea outside the inland sea, territorial sea and EEZ. In essence, these provisions are the same as those contained

in the "Convention on the High Seas" of the 1958 Geneva Convention.

³⁹ Patricia Birnie and Alan Boyle. 2002. *Op.cit.* P. 98.

⁴⁰ Patricia Birnie and Alan Boyle. 2002. *Op.cit.* P. 38.

⁴¹ *Ibid.* P. 516.

⁴² *Ibid.*

This precautionary principle can be found in the formulation of Article 2 of the UNFCCC which states;

*“The ultimate objective of this Convention and any related legal instruments that the Conference of the Parties may adopt is to achieve, in accordance with the relevant provisions of the Convention, stabilization of greenhouse gas concentrations in the atmosphere at a level that would **prevent dangerous anthropogenic interference with the climate system**. Such a level should be achieved within a time-frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner”.* (Emphasis added)

Observing Article 2 of the UNFCCC, it can be said that the formulation of this Article contains an explicit preventive principle as contained in the formulation of the objectives of the Convention which requires state parties to stabilize GHGs concentrations in the atmosphere. This principle states that every State is required to prevent, reduce, limit or control activities that may result in or pose a risk of environmental damage. According to Sands the obligation not to cause harm arises as a limitation to the principle of sovereignty and this principle also applies within the territory of the State that caused it.⁴³ Added by Sands, the purpose of this principle is only one, namely minimizing environmental damage. In the case of the Gabčíkovo-

Nagymaros Project, the ICJ stated that, *in the field of environmental protection, vigilance and prevention are required on account of the often-irreversible character of damage to the environment and of the limitations inherent in the very mechanism of reparation of this type of damage.*⁴⁴

In the Decision, the ICJ emphasized that in the field of environmental protection, vigilance and prevention are needed considering the nature of environmental damage that is often irreversible and the limitations inherent in reparation mechanisms for this type of damage. This principle can also be found in the Trail Smelter Arbitration case through an order to Canada to prevent future injury⁴⁵ and implicitly seen in the Lac Lanoux Arbitration.⁴⁶ This precautionary principle is also supported in most international environmental agreements, which aim to prevent:

1. extinction of flora and fauna species;
2. the spread of occupational diseases, including radioactive contamination to workers;
3. introduction and spread of pests and diseases;
4. pollution of oil in the sea, radioactive waste, hazardous and toxic materials and waste (B3), from land sources, or from any source;
5. river pollution;
6. atmospheric radioactive pollution;
7. harmful environmental modifications;

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⁴³ Philippe Sands. 2003. *Op.cit.* P. 246.

⁴⁴ *Gabčíkovo-Nagymaros Project* case (Hungary/ Slovakia), Judgment, I.C.J. Reports 1997, paragraph. 140.

⁴⁵ *Trail Smelter Arbitration* (United States v. Canada) 16 April 1938, 11 March 1941; 3 RIAA 1907 (1941) Part 4, Section 3.

⁴⁶ Philippe Sands. 2003. *Op.cit.* P. 247.

8. the opposite effect of activities that can prevent the migration of species;
9. air pollution;
10. modification of the ozone layer;
11. degradation of the natural environment;
12. all pollution;
13. significant adverse environmental impacts;
14. transboundary impacts in general;
15. harmful anthropogenic disturbances to the climate system;
16. loss of fisheries and other biodiversity, including as a result of the release of genetically modified organisms; and
17. damage to health and the environment from resistant chemicals and organic pollutants.⁴⁷

a. Liability Over Tolerance Threshold

In addition, related to the principle of no harm rule and the principle of prevention, studies related to the threshold of tolerance are also important because as Principle 21 of the 1972 Stockholm Declaration and Principle 2 of the 1992 Rio Declaration formulate, *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*

Subject to these principles, it is the responsibility of States to take adequate steps to control and regulate

⁴⁷ *Ibid*, P. 248.

⁴⁸ Patricia Birnie and Alan Boyle. 2002. *Op.cit.* P. 122.

⁴⁹ Patricia Birnie and Alan Boyle. 2002. *Op.cit.* P. 124.

transboundary sources of serious or harmful environmental pollution in their territory or subject to their jurisdiction. Interestingly then, apart from stipulating the state's obligation to control so that there is no damage to the environment within their jurisdiction, it also recognizes state sovereignty over natural resources within that jurisdiction. Thus, it is understood that these principles provide limited sovereignty for the state to exploit their natural resources and at the same time it can also be interpreted not to absolutely prohibit environmental damage.⁴⁸ Exploitation of natural resources, like it or not, will definitely have a damaging impact on the environment. Development by exploiting natural resources, on the one hand serves to improve the quality of human life but on the other hand also results in a decline in the quality of human life. Therefore, there must be a tolerance level of damage that is allowed by providing a threshold. This tolerance threshold must be based on certain quality standards. However, until now there are no international rules that specifically regulate this quality standard that can be used in determining what types of environmental damage can be attached to responsibility. Therefore, the obligation to prevent cross-border damage must be attached with minimal (*de minimis*) requirements.⁴⁹ For this reason, legal scholars generally agree that only significant or serious damage can trigger the no harm-rule principle as a preventive obligation.⁵⁰ Trail Smelter Arbitration uses the term standard quality of tolerance threshold with the sentence as serious consequence.⁵¹ Likewise, for example the term used in Article 1.1 of the UNFCCC which contains the

⁵⁰ Philippe Sands. 2003. *Loc.cit.*

⁵¹ *Trail Smelter Arbitration* (United States v. Canada) 16 April 1938, 11 March 1941; 3 RIAA 1907 (1941). P. 1965

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meaning of the adverse effects of climate change by using the term significant deleterious effects. The use of the terms significant, appreciable, substantial, and serious is often used to describe the tolerance threshold in international court decisions and in international agreements related to environmental protection, even though the use of these terms gives quite difficult understanding related to the quantity of damage that occurred.⁵² The quality of this tolerance threshold standard, for example, can be seen from the formulation of Article 1 of the 1979 Convention on Long-Range Transboundary Air Pollution which states that the pollution in question must lead to deleterious effects of such a nature as to endanger human health, harm living resources and ecosystems and material property and impair or interfere with amenities and other legitimate uses of the environment. Due to the absence of a specific standard rule regarding this tolerance threshold, as stated by Shaw that the relativity of the issue at hand and the importance of a particular case must be seen in significant factors.⁵³

b. Absolute Liability

The responsibility not to cause damage as contained in Principle 21 of the 1972 Stockholm Declaration and Principle 2 of the 1997 Rio Declaration above also raises the question of whether this responsibility is an absolute liability or a strict liability. According to Shaw, some experts argue that the appropriate standard for the state to act is a strict liability in the environmental field.⁵⁴ If this opinion is accepted by all, then the state has an absolute obligation to prevent damage and can be held responsible for the damage that occurs regardless of the

fault. However, the formulation of Principle 21 of the 1972 Stockholm Declaration and Principle 2 of the 1997 Rio Declaration is not very clear regarding this issue and neither is international practice such as the Trail Smelter Arbitration, Corfu Channel,⁵⁵ and Gut Dam Arbitration. In the case of the Trail Smelter, which has a very large influence on international discussion and practice regarding the principle of good neighbourliness, especially the principle of no harm, it is not clear whether the responsibility is absolute. Observing the Trail Smelter case, it is difficult to conclude that the responsibility of the state is absolute so as not to cause damage because from the beginning of the case, the Canadian Party has accepted this responsibility. In the case of the Corfu Channel, Albania's liability arising from its failure to alert two British ships and other voyages of mining activity in their territorial waters does not constitute a form of strict liability. Likewise with the case of Gut Dam Arbitration (1968),⁵⁶ construction of a dam for navigation facilities on the river St. Laurence by Canada, has been known by the United States and even the two States have made an agreement that Canada will provide compensation if there are losses from these development activities that have an impact on American citizens. The development of this absolute responsibility theory can then be seen in the problem of damage caused by nuclear activity and damage in space. In Article 2 of the Liability Convention 1972, it is stated that the launching state is absolutely responsible for paying compensation for losses on the earth's surface or on aircraft that are in flight where the losses and accidents are caused

⁵² Malcolm N. Shaw (2003). *Op.cit.* P. 766.

⁵³ *Ibid.*

⁵⁴ *Ibid.* P. 762.

⁵⁵ *Ibid*

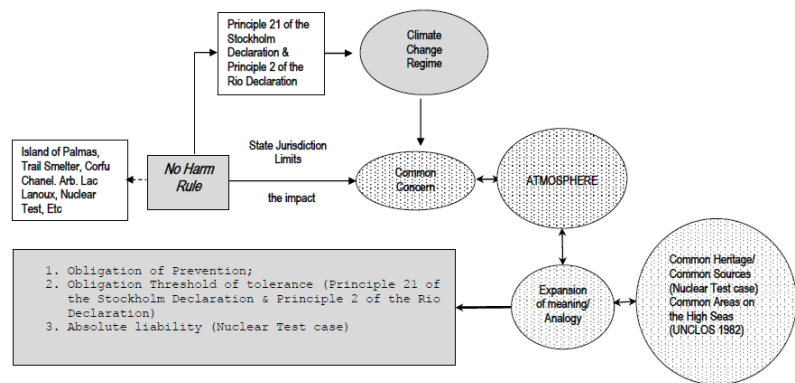
⁵⁶ Gut Dam Arbitration, 8 ILM 118 (1969), Pp. 486–493.

by their celestial objects. In the case of nuclear tests, nuclear test activities will bring about substantial damage even though they are carried out under normal conditions, as well as anthropogenic activities that emit GHGs. If then nuclear test activities are not prohibited, but if damage occurs as a result of these activities, then the state's responsibility is absolute. Thus, as Voigt said, these consequences should also be applied to GHGs emissions that are legally emitted.⁵⁷ In this context then, the case of the Trail Smelter becomes relevant, when the production activity of the Trail Smelter itself is not prohibited, but the emission of sulphur dioxide that exceeds the tolerance limit is carried by the air which then disturbs the environment.

Observing the things that need to be considered in the application of the no harm rule, namely the obligation to prevent, the obligation to the tolerance threshold and in particular the absolute obligation, as Birnie and Boyle said that the principle of no harm can be interpreted as absolute responsibility. However, when discussing aspects of ecology and development, the issue of absolute responsibility will certainly face enormous challenges and resistance from States in the world.⁵⁸

In addition, absolute responsibility focuses on the results, namely the impact and the burden of proof. The results or consequences arising from an activity and the burden of proof are the main issues when discussing claims of state responsibility under internationally applicable regimes. So that these two approaches, both the approach based on the regime of state responsibility and the approach to the principle of no harm rule are not very satisfactory to be used as

the basis for claiming state responsibility for environmental losses and damage due to the impact of climate change. The following figure illustrates how the no-harm principle applies to climate change issues as described above.



Flowchart The Model for Implementing the No Harm Rule on State Responsibilities in the Climate Change Regime

CONCLUSION

Based on the description above, in particular, the ICJ Decision related to the Nuclear Test case, it can be interpreted that the existence of a general obligation of states to ensure that activities within their jurisdiction and control in respect of the environment of other States or areas beyond their national control are currently part of the corpus of international law.

However, related to the development and application model of the No Harm Rule principle as described above, if the focus is on the activity or conduct as formulated in the climate change instruments, not on the results or consequences (impacts), such as in the nuclear test, the No Harm Rule principle is difficult to apply in practice to claim state

Dikomentari [A14]: Why, this writing not to give recommendation at the last.

⁵⁷ Christina Voigt. "State Responsibility for Climate Change Damages", *Nordic Journal of International Law*, Vol. 77. Issue 1, 2008. P. 8.

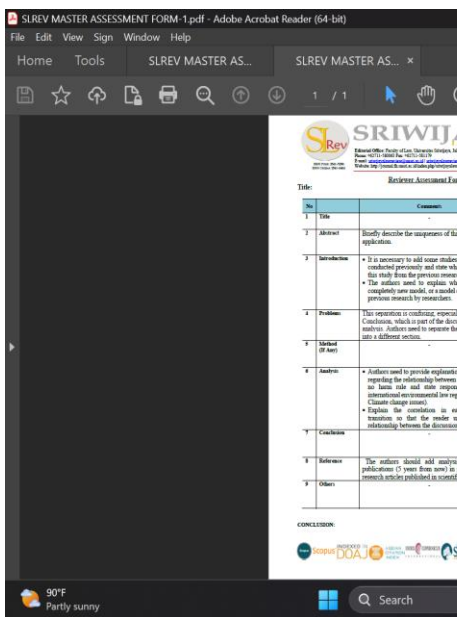
⁵⁸ Patricia Birnie and Alan Boyle. 2002. *Op.cit.* P. 114.

responsibility for environmental losses and damage due to the impacts of climate change because this concept does not look at behavioural activities or actions taken by a State.

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Zuhir, Mada Apriandi, "Rethinking Legality of State Responsibility on Climate Change in International Law Perspectives", *Jurnal Dinamika Hukum*. Vol 17, No 2 May 2017, DOI: <http://dx.doi.org/10.20884/1.jdh.2017.17.2.801>.



No Harm Rules Principle, Developments and Application Model in Claims of State Responsibility for the Impact of Climate Change

Abstract

⁵⁹ Patricia Birnie and Alan Boyle. *International Law and The Environment* (2nd ed). London: Oxford Press, 2002, P. 104.

Utilization of rights to natural resources by a State must not be carried out in ways that are contrary to the rights of other States. This basic principle of international law describes that each State must not harm or violate the rights of other States. Therefore, each State is responsible not to cause damage to the environment of other States, or to areas outside the limits of its jurisdiction. This article will analyse the development of the no harm rules principle and simulate its application model for claiming state responsibility in preventing environmental damage due to the impact of climate change. The research used normative juridical research. The research specification was descriptive analytical. While the main data was secondary data (primary, secondary and tertiary legal materials). Then, the data was analysed qualitatively. Based on the discussion and simulation conducted, it is concluded that the no harm rules principle can be applied to climate change issues, however, this principle is not satisfactory and has limitations in its application.

Keywords: climate change, development, model, no harm rule, responsibility

INTRODUCTION

International law recognizes that every State has sovereignty over its natural resources. However, the use of rights to natural resources may not be carried out in ways that are contrary to the rights of other States as the basic principles of international law formulate that each State must not harm or violate the rights of other States.⁵⁹

This principle is then referred to in international environmental law theory as the principle of good neighbourliness or the principle of *Sic Utere* or No Harm Principle or Nuisance Theory.⁶⁰ Each State is responsible not to cause damage to the

⁶⁰ Philippe Sands. *Principles of International Environmental Law*. (2nd ed) Cambridge. 2003. P. 239.

Dikomentari [A15]: Briefly describe the uniqueness of this modeling application

environment of other States, or to areas outside the limits of its jurisdiction. This principle arises from the Latin proverb *sic utere tuo, ut alienum non laedas*, which means that a State is responsible not to carry out, or to permit activities within their territory or public space without regard to or contrary to the rights of other States to protect the environment.⁶¹

In the *Island of Palmas* case, the Arbitration noted that there is an obligation for all States "...to protect within the territory the rights of other states, in particular their right to integrity and inviolability in peace and war."⁶² This obligation is studied in more depth in the case of the *Trail Smelter*, in which the Arbitration then focuses on the damage or loss suffered by the State of America, Washington due to the presence of harmful fumes, sulphur dioxide emissions from the Smelter located on the Trail, British Columbia Canada. The question posed in this case is whether the Trail Smelter should be asked to stop causing damage to Washington State in the future and, if so, to what extent?⁶³ In answering this question, Arbitration is of the opinion:

...that, under the principles of international law, as well as of the law of the United States, no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is

*established by clear and convincing evidence.*⁶⁴

The above statement can be interpreted that when an activity has serious consequences and the loss occurs clearly with convincing evidence then, no State has the right to use or permit the use of its territory in such a way as to cause damage in or to other areas or property or people in it. According to Sands, this quote is the most widely referenced and has been accepted as a rule of customary international law.⁶⁵ This approach to the *Trail Smelter* Arbitration case was also used by ICJ in the *Corfu Channel* case. In the case of *Corfu Channel*, the ICJ stated that it was "...every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States".⁶⁶ In the case of the *Lac Lanoux* Arbitration, it was stated that the state's obligation to consider the rights and interests of other States when exercising their rights.⁶⁷ In this case the Arbitration stated;

*France [the upstream state] is entitled to exercise her rights; she cannot ignore the Spanish interests. Spain [the downstream state] is entitled to demand that her rights be respected and that her interests be taken into consideration.*⁶⁸

Likewise in the case of the *Nuclear Test*, the ICJ emphasizes the legal status of general obligations related to the

⁶¹ Patricia Birnie and Alan Boyle. 2002. *Loc.cit.*

⁶² *Island of Palmas* case, (Netherlands/U.S.A.), 2 R.I.A.A. 829 (Permanent Court of Arbitration 1928). P. 839.

⁶³ Art. III of the Arbitration Convention between the United States of America and the Dominion of Canada, signed April 15, 1935.

⁶⁴ *Trail Smelter Arbitration* (United States v. Canada) 16 April 1938, 11 March 1941; 3 R.I.A.A. 1907 (1941). p. 1965.

⁶⁵ Philippe Sands. 2003. P. 241.

⁶⁶ *Corfu Channel case* (United Kingdom v. Albania), Judgment of April 9th, 1949, I.C.J. Reports 1949. P. 22.

⁶⁷ *Affair du Lac Lanoux* (Spain vs France) 12 R.I.A.A. 281, Nov. 16, 1957, P. 316.

⁶⁸ *Ibid.* See Philippe Sands. *Op.cit.*, P. 243.

environment as part of international law, stating as follows:

*The existence of the general obligation of states to ensure that activities within their jurisdiction and control respect the environment of other states or of areas beyond national control is now a part of the corpus of international law relating to the environment.*⁶⁹(emphasis added)

Related to the issue of anthropogenic climate change which involves complex causal mechanisms, it must be separated whether anthropogenic climate change is caused by human activities or caused by nature. Carbon dioxide and Greenhouse Gas (GHGs) emissions are not what cause environmental damage. Carbon dioxide and GHGs emissions only trigger a chain of events, which then causes climate change associated with the damage done. With this understanding, it is difficult to make GHGs the cause of the environmental damage and losses that occur. Therefore, it is necessary to build an argument for linking the relationship between emissions by a State and the damage suffered by other States. So far, the basis of international instruments related to the issue of climate change and the belief that the harmful and damaging effects of climate change only refer to scientific evidence in scientific reports of scientists that are accommodated in the Intergovernmental Panel on Climate Change (IPCC).

In this case, of course, linking the losses experienced by a State due to climate change is difficult to meet the elements contained in the state responsibility regime because it becomes an unrealistic thing to identify damage (injury) on the basis of

⁶⁹ *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, I.C.J. Reports 1996. P. 226. Paragraph. 29.

⁷⁰ Mada Apriandi Zuhir, "Rethinking Legality of State Responsibility on Climate

certain emissions.⁷⁰ Therefore, then in relation to direct causal relationships, it must be developed that the damage caused can be proven causally based on the possibility of scientific evidence contained in the scientific data argument as direct evidence.

Based on the description above, the problem raised in this article is how to develop and apply the No Harm Rules Principle to claim state responsibility for the impacts of climate change. This article does not only discuss the development of the no harm rule principle, but also discusses the constraints and simulates a model for applying the principle in practice. For this reason, this article will be divided into several discussion topics. First, it will discuss the development of the principle of no harm rule in international conventions related to the environment. The second will discuss the Model Application of the No Harm Rule Principle in the Legal Framework of State Responsibilities Related to Climate Change Regulation. At the end, this article will describe the conclusions from the discussion on the previous topics.

RESEARCH METHODS

This study used a normative juridical approach, namely by logically examining the legal aspects that underlie the no harm rule principle, its application in international conventions related to the environment and how it was applied through a model to claim State responsibility for the impacts of climate change. Therefore, the research specification used descriptive analytical. In this study, the main data was secondary data (primary, secondary and tertiary legal materials). Furthermore, the research data obtained were analysed qualitatively.

ANALYSIS AND DISCUSSION

Change in International Law Perspectives", Jurnal Dinamika Hukum. Vol 17, No 2 May 2017, DOI:

<http://dx.doi.org/10.20884/1.jdh.2017.17.2.801>. P. 203-214.

Dikomentari [A16]: Several legal studies related to the Principle of No Harm Rules and state responsibility to reduce the impact of climate change have been performed (Ex: Mara Tignino & Christian Bréthaut, 2020; Benoit Mayer, 2016, etc.). What makes this research different from some previous studies?

The authors do not mention related studies and what distinguishes this research from the latest published articles.

Dikomentari [A17]: The title says "Application Model," but the authors do not explain whether this is a completely new model or a model developed from previous researchers' studies.

Dikomentari [A18]: This separation is confusing, especially the Conclusion, which is part of the discussion and analysis. Authors need to separate the Conclusion into a different section.

REGIME OF STATE RESPONSIBILITIES IN INTERNATIONAL LAW REGARDING THE IMPACT OF CLIMATE CHANGE

According to Sands, the use of the term State responsibility can lead to misunderstandings in which the use of this term seems as if only the State is considered a subject of international law, even though there are also supporters of other rights and obligations, such as international organizations and individuals who are also a subject of international law.⁷¹

One of the basic principles in international law states that a State must not injure and violate the rights of other States. Violation of these rights which are in the legal interest of other parties will have consequences for claims of state responsibility. A State that injures or violates these rights must be held accountable for its actions and therefore is obliged to make compensation for losses suffered by other parties.⁷² This responsibility arises both because of the nature of international law and arises from the concept of state sovereignty and equality among the States.⁷³

In the international law literature, the responsibility of State is divided into two, namely:

3. Liability due to unlawful acts (delictual liability), responsibilities arising from every mistake or negligence of a State towards foreigners in its territory or the territory of another State, for example, responsibilities arising from space exploration, nuclear exploration, or

other activities across national borders; and

4. Liability for contractual liability arising from a state's breach of an agreement or contract.⁷⁴

There are two theories that underlie state responsibility, namely the theory of risk and the theory of error. The theory of risk determines that a State is absolutely responsible for every activity that causes very dangerous effects (harmful effects of hazardous activities) even though the activity is a legal. This theory then underlies the principle of absolute liability or strict liability or objective responsibility.⁷⁵ An example of the application of this theory can be seen in the provisions of Article 2 of the Liability Convention 1972 which states that the launching state is absolutely responsible for paying compensation for losses on the earth's surface or on aircraft that are in flight where the losses and the accident was caused by its space objects.

In the theory of error (fault theory), the responsibility of the state arises when the state's actions can be proven to contain an element of error. An act is said to contain errors if the act is done intentionally (*dolus*) or by negligence (*culpa*) which cannot be justified. This error theory then underlies the principle of subjective responsibility or liability based on fault.⁷⁶ The presence of a *dolus* element means that the perpetrator state acts in a certain way, willed or known with the intent to cause injury or harm. The *dolus* element can help determine attribution

⁷¹ Philippe Sands. *Op.cit*, hlm. 873.

⁷² In some circumstances, a state's actions can be justified if there are reasons for their consent, self-defense, countermeasures in respect of an internationally wrongful act, force majeure, distress and necessity. See Chapter V UNGA Res. 56/83.

⁷³ Malcolm N. Shaw. *International Law* (6th ed). Cambridge University Press. 2008. P. 778.

⁷⁴ Huala Adolf, *Aspek-aspek Negara dalam Hukum Internasional*, Jakarta: CV Rajawali, 1991. P. 180-181 and Malcolm N. Shaw. 2008. *Op.cit*. P. 542-545.

⁷⁵ Huala Adolf, 1991. *Op.cit*, P. 187.

⁷⁶ *Ibid*.

and infringement issues and the extent of the effect on the injury or loss incurred.

Meanwhile, *culpa* is an action that can be blamed because of an element of error, carelessness or negligence because the steps that should have been taken to avoid an adverse event were not taken. In situations where individual actions that result in damage and loss and those actions are not related to the state, a state may be held liable for failing to exercise oversight.⁷⁷ An act of a state that can be blamed according to international law (internationally wrongful act of a state) if;

3. when the act can be attributed to that State (attribution of conduct to a state); and
4. when the state's actions have violated its international obligations (breach of an international obligation).⁷⁸

Until the end of the 20th century, it was still believed that the emergence of state responsibility was not enough with the two elements above, but rather that there must be an element of damage or loss to other parties or States. In its later development, the element of damage or loss is no longer considered a necessity in every case that can result in state responsibility, for example, violations of international law provisions relating to human rights. This violation of human rights is clearly an act that is blamed according to international law, even though it does not harm other parties or States.⁷⁹

Article 24 of the European Convention on Human Rights states that each State party is allowed to file an objection against other Parties without requiring the State that makes the objection to be a victim of human rights violations committed by the State suspected of committing the violation. Likewise, Article

⁷⁷ Ian Brownlie, *Principles of Public International Law* (2nded), Oxford University Press, London, UK, 1973, Pp. 44-45.

3 of the Annex to the Resolution of the United Nations General Assembly No. 56/83 dated January 28, 2002 concerning the Responsibility of States for internationally wrongful acts (hereinafter referred to as UNGA Res. 56/83) which eliminates the condition for damages related to acts that can be blamed under international law. Articles of UNGA Res. 56/83 on State responsibility for international wrongful act, provides simultaneously general rules of international law that reflect customary law with rules in the environmental field that arise from treaties and other international rules.⁸⁰

In the environmental field, in addition to the articles contained in UNGA Res. 56/83, there are also several non-binding instruments relating to state obligations. Several non-binding international instruments that regulate the obligations and responsibilities of this State, for example the following statement from the Brundtland Commission or the World Commission on Environment and Development (WCED);

If one or more activities create a significant risk of substantial harm as a result of a transboundary environmental interference, and if the overall technical and socio-economic cost or loss of benefits involved in preventing or reducing such risks far exceeds in the long run the advantage which such prevention or reduction would entail . . . the state which carried out or permitted the activities shall ensure that compensation is provided should substantial harm occur in an area under national jurisdiction of another state or in an

⁷⁸ International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts* 2001.

⁷⁹ Malcolm N. Shaw. 2008. *Loc.cit.*

⁸⁰ Philippe Sands. *Loc.cit.*

area beyond the limits of national jurisdiction.⁸¹

This statement is also in line with UNEP Principle 12, 1978 which states that states are responsible for fulfilling their international environmental obligations with regard to the use of shared natural resources and that states are subject to obligations relating to the implementation of international law for environmental damage arising from violations against this obligation outside the boundaries of their jurisdiction.⁸²

Recognition of these practices of international responsibility has existed for a long time and can be seen in decisions of international courts, such as the Permanent Court of International Justice (PCIJ) and the International Court of Justice (ICJ), which state that international responsibility arises immediately after a state commits an act that violates the rights of other States.⁸³ PCIJ in the case of the Spanish Zone of Morocco claims, stated;

*...responsibility is the necessary corollary of a right. All rights of an international character involve international responsibility. Responsibility results in the duty to make reparation if the obligation in question is not met.*⁸⁴

Likewise in the case of the Chorzow factory (1928), the PCIJ stated that: "it is a principle of international law and even a

⁸¹ *Ibid*, P. 874.

⁸² *Ibid*, P. 873.

⁸³ *Phosphates in Morocco*. Judgment. 1938. PCIJ, Series A/B No. 74, P. 28.

⁸⁴ Malcolm N. Shaw (2003). *Op.cit*, P. 781.

⁸⁵ *Chorzow Factory case*. PCIJ, Series A No. 17. 1928, P. 29.

⁸⁶ J.Crawford, *The ILC's Articles on State Responsibility: Introduction, Text and Commentaries* (2002). Report of the ILC, UN

greater conception of law that any breach of an engagement involves an obligation to make reparation".⁸⁵ The responsibility of the state for wrongful act according to international law is the most important thing to do is the obligation to stop the act, ensure and properly guarantee that there will be no repetition of the act if there is a possibility of it happening and make full compensation for the losses caused by the wrongful act.⁸⁶

This obligation for compensation is sometimes called a liability. According to Sands, the term 'liability' in the international legal literature has been widely discussed, for example PM Dupuy and H. Smets provide the definition of liability as an international obligation to provide compensation, while LFE Goldie, gives a broader meaning, namely the consequences of failure to perform duties, or compliance with required performance standards. Therefore, this liability has the connotation of legal compensation, when responsibilities and losses arise from failure to fulfil those obligations.⁸⁷

This rule is also applied in many cases by the ICJ, for example the Corfu Channel case and the Danube Dam Case (*Gabcikovo-Nagymaros Project*).⁸⁸ Although the explanation above describes the state's responsibility that arises because of an error, it should also be explained that there is also a state's responsibility that arises without any wrongful act. In this case, the causal relationship between the activity and the damage done leads to an obligation to

Doc. A/56/10 (2001), J. Crawford, 1st Report on State Responsibility, UN Doc. A/CN.4/490 dan Add.1-7 (1998); 2nd Report, UN Doc. A/CN.4/498 and Add.1-4 (1999); 3rd Report, UN Doc. A/CN.4/507 and Add.1-4 (2000); 4th Report, UN Doc. A/CN.4/517 (2001); Philippe Sands. *Loc.cit*.

⁸⁷ Philippe Sands. *Ibid*.

⁸⁸ Martin Dixon and Robert McCorquodale. *Cases and Materials on International Law*. Oxford University Press. 2003, Pp. 411-435.

pay compensation, even though the damage arises from legally valid activities. This is due to the development of science and technology which on the one hand creates great benefits for society, but on the other hand often has a certain level of risk of negative impacts, such as the production of nuclear energy and activities in outer space. Thus, in several international agreements that regulate these activities, regulations concerning special obligations are also contained. For example, in Article III (1) of the International Convention on Civil Liability for Oil Pollution Damage 1969, it is stated that "the owner of a ship at the time of an incident...shall be liable for any pollution damage caused by oil which has escaped or been discharged from the ship as a result of the incident". Likewise, for example at the Paris Convention on Third Party Liability in the Field of Nuclear Energy 1960, the Brussels Convention supplementary to the Paris Convention 1963 and the Vienna Convention on Civil Liability for Nuclear Damage 1963.⁸⁹

STOCKHOLM DECLARATION 1972

With regard to international instruments on the environment, the 1972 Stockholm Conference agreed on an agreement contained in 26 principles of environmental management called the Stockholm Declaration and produced 109 recommendations as part of its action plan. Although according to Birnie and Boyle, the legal status of the entire instrument of the Stockholm Declaration is still uncertain, but it is often referred to in international treaties, international agreements and other documents and is recognized as evidence of state practice and is an example of soft law of international law.⁹⁰ One of the important

⁸⁹ In general, the agreement that contains the rules regarding this obligation contains civil liability. This means that only the operator or owner of a certain activity is obliged to pay compensation for the impacts caused by the activity. In relation to accidents caused by these activities, the compensation given is usually

points and the main principle of this Declaration is Principle 21 which formulates;

States have, in accordance with the Charter of the United Nations and the principles 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.

In 1997, the United Nations General Assembly passed resolution 2996, which stated that Principles 21 and 22 of the Stockholm Declaration lay down the basic principles of the environment. Principle 21 includes two basic objectives of international environmental law, namely to stipulate those states have sovereign rights over their natural resources and secondly, the principle of no harm.

This understanding of the no harm principle was then developed not only in other areas, but also in areas outside the boundaries of national jurisdiction.⁹¹ The effect of Principle 21 regarding its normative character is also recognized in Articles 192, 193 and 194 of the United Nations Convention on the Law of the Sea (UNCLOS 1982) and the Convention on the Transboundary Effects of Industrial Accidents) 1992.

RIO DECLARATION 1992

After the Stockholm Conference, 20 years later, the United Nations held a summit in

limited to a certain amount of insurance money, where the process of claiming responsibility is in the national court.

⁹⁰ Patricia Birnie dan Alan Boyle. 2002. *Op.cit.* P. 39.

⁹¹ *Ibid*, P. 111.

Dikomentari [A19]: Authors need to provide explanations and analysis regarding the relationship between the principle of no harm rule and state responsibility in the international environmental law regime (especially Climate change issues).

Dikomentari [A20]: Explain the correlation of this discussion with the previous analysis.

Rio de Janeiro on June 3-4, 1992. This conference was called the United Nations Conference on Environment and Development (UNCED), known as the Earth Summit or Rio Summit. Although not legally binding as is the Stockholm Declaration, the Rio Declaration is an important example of the use of soft law instruments in the process of codification and development of international law. The preamble of the 1992 Rio Declaration explicitly stated that this Declaration was not formally binding by formulating;

...its adoption by consensus of 176 states, after a prolonged negotiation process, and its normative character, make it a particularly important example of the use of soft law instruments in the process of codification and development of international law.

The main concerns of the Rio Declaration are sustainable development and the global environment. In the context of environmental transboundary hazards and risks, the Rio Declaration contains important principles formulated in Principles 2, 18, and 19.⁹² Both Principle 21 of the Stockholm Declaration and Principle 2 of the Rio Declaration state that the no harm rule applies equally to territorial areas and beyond the limits of national jurisdiction.

A MODEL FOR APPLYING THE NO HARM RULE PRINCIPLE TO CLAIM STATE RESPONSIBILITY FOR THE IMPACTS OF CLIMATE CHANGE

The development of the principle of state responsibility starting from the *sic utere* or

no harm principle or the principle of good neighbourliness from the Trail Smelter case decision and principle 21 of the 1972 Stockholm Declaration and Principle 2 of the 1992 Rio Declaration has become part of customary international law or even *jus cogens* which legally binding all States regardless of whether a State is a state party or not to an international treaty.

As explained in the previous section, related to climate change, the Earth's atmosphere is a different kind of region. The atmosphere is a layer of air flow that continuously moves in different areas regardless of the jurisdictional boundaries of a state, so it is different from airspace.⁹³ According to international law, the territory of a state consists of three dimensions, namely land, sea and air.⁹⁴ The traditional concept in international law related to state sovereignty perceives airspace as unlimited (*usque ad coelum*), although later this perception was corrected in air and space law that the airspace over the high seas is open to everyone.⁹⁵

Seas outside the national jurisdiction of States are called high seas. Utilization of the high seas is carried out based on the principle of the common heritage of mankind, which means that the benefits of the high seas, both aspects of navigation and aspects of natural resources in it, must be enjoyed by all mankind and should not be monopolized by one or several state only. This principle gives birth to the general rights and obligations of each state towards the high seas as well as special rights and obligations on the particular high seas, such as providing adequate search and rescue (SAR) facilities, hot pursuits and the preservation of the marine environment.⁹⁶

⁹² Patricia Birnie and Alan Boyle. 2002. *Op.cit.* P. 105.

⁹³ *Ibid.* P. 502.

⁹⁴ Mochtar Kusumaatmadja and Etty R. Agoes. *Pengantar Hukum Internasional*,

edisi II, Cetakan 3. Bandung: PT Alumni, 2012. P. 194.

⁹⁵ Malcolm N. Shaw (2003). *Op.cit.* P. 463.

⁹⁶ The provisions regarding the legal regime of the high seas as stated in UNCLOS 1982 are contained in part VII, Articles 86 to

As stated by the United Nations General Assembly through Resolution 43/53, Vienna Convention for the Protection of the Ozone Layer 1985 and UNFCCC 1992 that the global atmosphere is a common concern of mankind. According to Birnie and Boyle, the use of this term by giving the label common concern is a form of political compromise, in which the term previously offered is the common heritage of mankind.⁹⁷ Therefore, the use of the common concern label has a different legal status from the term common heritage of mankind which indicates natural resources such as permanent sovereignty, public property, shared resources, or common heritage.

The term common concern used in the global atmosphere does not then make the atmosphere a public property outside the sovereignty of the state, but because it is treated in the same way as the ozone layer, the global atmosphere is a common source of the vital interests of mankind.⁹⁸

For this reason, so that the no harm rule principle can be applied to the issue of global climate change, the scope of Principle 21 of the 1972 Stockholm Declaration and Principle 2 of the 1992 Rio Declaration must be developed by expanding the meaning or understanding of the atmosphere extensively or at least the notion of the atmosphere can be analogized with equate it with protection of common areas as applied to the high seas.⁹⁹

Thus, if we can make an analogy, then the Preamble to the 1985 Vienna Convention on the Protection of the Ozone Layer which includes Principle 21 of the 1972 Stockholm Declaration in its preamble as well as the intrinsic rules mentioned in the Preamble of the UNFCCC can also be used

120, applies to all parts of the sea outside the inland sea, territorial sea and EEZ. In essence, these provisions are the same as those contained in the "Convention on the High Seas" of the 1958 Geneva Convention.

as a legal basis for applying the principle of good neighbourliness to climate change issues in general and atmospheric issues in general.

In addition, international practice in respecting the rights of other States related to nuclear testing in the atmosphere, as also stated by Birnie and Boyle, can be used as a reference for the application of this principle to the atmosphere.¹⁰⁰ So then, if there is a State that opposes or does not want to recognize climate change as a common concern of mankind, it is the same as opposing and unwilling to carry out its obligations on climate change as a **global common**.

In relation to the principle of no harm rule, there are several things that must be considered in its implementation, namely:

a. Obligation to Take Prevention

This precautionary principle can be found in the formulation of Article 2 of the UNFCCC which states;

*"The ultimate objective of this Convention and any related legal instruments that the Conference of the Parties may adopt is to achieve, in accordance with the relevant provisions of the Convention, stabilization of greenhouse gas concentrations in the atmosphere at a level that would **prevent dangerous anthropogenic interference with the climate system**. Such a level should be achieved within a time-frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a*

⁹⁷ Patricia Birnie and Alan Boyle. 2002. *Op.cit.* P. 98.

⁹⁸ Patricia Birnie and Alan Boyle. 2002. *Op.cit.* P. 38.

⁹⁹ *Ibid.* P. 516.

¹⁰⁰ *Ibid.*

Dikomentari [A21]: Global common or global concern?

sustainable manner". (Emphasis added)

Observing Article 2 of the UNFCCC, it can be said that the formulation of this Article contains an explicit preventive principle as contained in the formulation of the objectives of the Convention which requires state parties to stabilize GHGs concentrations in the atmosphere. This principle states that every State is required to prevent, reduce, limit or control activities that may result in or pose a risk of environmental damage. According to Sands the obligation not to cause harm arises as a limitation to the principle of sovereignty and this principle also applies within the territory of the State that caused it.¹⁰¹ Added by Sands, the purpose of this principle is only one, namely minimizing environmental damage. In the case of the Gabčíkovo-Nagymaros Project, the ICJ stated that:

*in the field of environmental protection, vigilance and prevention are required on account of the often-irreversible character of damage to the environment and of the limitations inherent in the very mechanism of reparation of this type of damage.*¹⁰²

In the Decision, the ICJ emphasized that in the field of environmental protection, vigilance and prevention are needed considering the nature of environmental damage that is often irreversible and the limitations inherent in reparation mechanisms for this type of damage. This principle can also be found in the Trail Smelter Arbitration case through an order to Canada to

prevent future injury¹⁰³ and implicitly seen in the Lac Lanoux Arbitration.¹⁰⁴ This precautionary principle is also supported in most international environmental agreements, which aim to prevent:

19. extinction of flora and fauna species;
20. the spread of occupational diseases, including radioactive contamination to workers;
21. introduction and spread of pests and diseases;
22. pollution of oil in the sea, radioactive waste, hazardous and toxic materials and waste (B3), from land sources, or from any source;
23. river pollution;
24. atmospheric radioactive pollution;
25. harmful environmental modifications;
26. the opposite effect of activities that can prevent the migration of species;
27. air pollution;
28. modification of the ozone layer;
29. degradation of the natural environment;
30. all pollution;
31. significant adverse environmental impacts;
32. transboundary impacts in general;
33. harmful anthropogenic disturbances to the climate system;
34. loss of fisheries and other biodiversity, including as a result of the release of

¹⁰¹ Philippe Sands. 2003. *Op.cit.* P. 246.

¹⁰² *Gabčíkovo-Nagymaros Project* case (Hungary/ Slovakia), Judgment, I.C.J. Reports 1997, paragraph. 140.

¹⁰³ *Trail Smelter Arbitration* (United States v. Canada) 16 April 1938, 11 March 1941; 3 RIAA 1907 (1941) Part 4, Section 3.

¹⁰⁴ Philippe Sands. 2003. *Op.cit.* P. 247.

- genetically modified organisms; and
35. damage to health and the environment from resistant chemicals and organic pollutants.¹⁰⁵
- 36.

a. Liability Over Tolerance Threshold

In addition, related to the principle of no harm rule and the principle of prevention, studies related to the threshold of tolerance are also important because as Principle 21 of the 1972 Stockholm Declaration and Principle 2 of the 1992 Rio Declaration formulate:

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

Subject to these principles, it is the responsibility of States to take adequate steps to control and regulate transboundary sources of serious or harmful environmental pollution in their territory or subject to their jurisdiction. Interestingly then, apart from stipulating the state's obligation to control so that there is no damage to the environment within their jurisdiction, it also recognizes state sovereignty over natural resources within that jurisdiction. Thus, it is understood that these principles provide limited sovereignty for the state to exploit their natural resources and at the same time it can also be interpreted not to absolutely prohibit environmental damage.¹⁰⁶ Exploitation of natural resources, like it or not, will definitely

have a damaging impact on the environment. Development by exploiting natural resources, on the one hand serves to improve the quality of human life but on the other hand also results in a decline in the quality of human life. Therefore, there must be a tolerance level of damage that is allowed by providing a threshold. This tolerance threshold must be based on certain quality standards. However, until now there are no international rules that specifically regulate this quality standard that can be used in determining what types of environmental damage can be attached to responsibility. Therefore, the obligation to prevent cross-border damage must be attached with minimal (*de minimis*) requirements.¹⁰⁷ For this reason, legal scholars generally agree that only significant or serious damage can trigger the no harm-rule principle as a preventive obligation.¹⁰⁸ Trail Smelter Arbitration uses the term standard quality of tolerance threshold with the sentence as serious consequence.¹⁰⁹ Likewise, for example the term used in Article 1.1 of the UNFCCC which contains the meaning of the adverse effects of climate change by using the term significant deleterious effects. The use of the terms significant, appreciable, substantial, and serious is often used to describe the tolerance threshold in international court decisions and in international agreements related to environmental protection, even though the use of these terms gives quite difficult understanding related to the quantity of damage that occurred.¹¹⁰ The quality of this tolerance threshold standard, for example, can be seen from the formulation of Article 1 of the 1979 Convention on Long-Range

¹⁰⁵ *Ibid*, P. 248.

¹⁰⁶ Patricia Birnie and Alan Boyle. 2002. *Op.cit.* P. 122.

¹⁰⁷ Patricia Birnie and Alan Boyle. 2002. *Op.cit.* P. 124.

¹⁰⁸ Philippe Sands. 2003. *Loc.cit.*

¹⁰⁹ *Trail Smelter Arbitration* (United States v. Canada) 16 April 1938, 11 March 1941; 3 RIAA 1907 (1941). P. 1965

¹¹⁰ Malcolm N. Shaw (2003). *Op.cit.* P. 766.

Transboundary Air Pollution which states that the pollution in question must lead to deleterious effects of such a nature as to endanger human health, harm living resources and ecosystems and material property and impair or interfere with amenities and other legitimate uses of the environment. Due to the absence of a specific standard rule regarding this tolerance threshold, as stated by Shaw that the relativity of the issue at hand and the importance of a particular case must be seen in significant factors.¹¹¹

b. Absolute Liability

The responsibility not to cause damage as contained in Principle 21 of the 1972 Stockholm Declaration and Principle 2 of the 1997 Rio Declaration above also raises the question of whether this responsibility is an absolute liability or a strict liability. According to Shaw, some experts argue that the appropriate standard for the state to act is a strict liability in the environmental field.¹¹² If this opinion is accepted by all, then the state has an absolute obligation to prevent damage and can be held responsible for the damage that occurs regardless of the fault. However, the formulation of Principle 21 of the 1972 Stockholm Declaration and Principle 2 of the 1997 Rio Declaration is not very clear regarding this issue and neither is international practice such as the Trail Smelter Arbitration, Corfu Channel,¹¹³ and Gut Dam Arbitration. In the case of the Trail Smelter, which has a very large influence on international discussion and practice regarding the principle of good neighbourliness, especially the principle of no harm, it is not clear whether the responsibility is absolute. Observing the

Trail Smelter case, it is difficult to conclude that the responsibility of the state is absolute so as not to cause damage because from the beginning of the case, the Canadian Party has accepted this responsibility. In the case of the Corfu Channel, Albania's liability arising from its failure to alert two British ships and other voyages of mining activity in their territorial waters does not constitute a form of strict liability. Likewise with the case of Gut Dam Arbitration (1968),¹¹⁴ construction of a dam for navigation facilities on the river St. Laurence by Canada, has been known by the United States and even the two States have made an agreement that Canada will provide compensation if there are losses from these development activities that have an impact on American citizens. The development of this absolute responsibility theory can then be seen in the problem of damage caused by nuclear activity and damage in space. In Article 2 of the Liability Convention 1972, it is stated that the launching state is absolutely responsible for paying compensation for losses on the earth's surface or on aircraft that are in flight where the losses and accidents are caused by their celestial objects. In the case of nuclear tests, nuclear test activities will bring about substantial damage even though they are carried out under normal conditions, as well as anthropogenic activities that emit GHGs. If then nuclear test activities are not prohibited, but if damage occurs as a result of these activities, then the state's responsibility is absolute. Thus, as Voigt said, these consequences should also be applied to GHGs emissions that are legally emitted.¹¹⁵ In this context then, the case of

¹¹¹ *Ibid.*

¹¹² *Ibid.* P. 762.

¹¹³ *Ibid.*

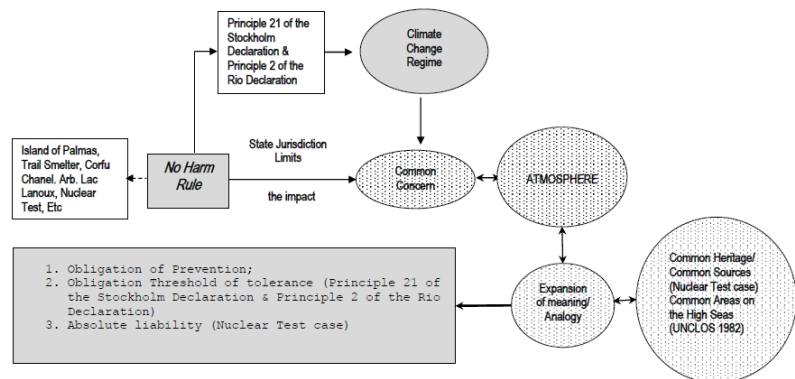
¹¹⁴ Gut Dam Arbitration, 8 ILM 118 (1969), Pp. 486–493.

¹¹⁵ Christina Voigt. “State Responsibility for Climate Change Damages”, *Nordic Journal of International Law*, Vol. 77. Issue 1, 2008. P. 8.

the Trail Smelter becomes relevant, when the production activity of the Trail Smelter itself is not prohibited, but the emission of sulphur dioxide that exceeds the tolerance limit is carried by the air which then disturbs the environment.

Observing the things that need to be considered in the application of the no harm rule, namely the obligation to prevent, the obligation to the tolerance threshold and in particular the absolute obligation, as Birnie and Boyle said that the principle of no harm can be interpreted as absolute responsibility. However, when discussing aspects of ecology and development, the issue of absolute responsibility will certainly face enormous challenges and resistance from States in the world.¹¹⁶

In addition, absolute responsibility focuses on the results, namely the impact and the burden of proof. The results or consequences arising from an activity and the burden of proof are the main issues when discussing claims of state responsibility under internationally applicable regimes. So that these two approaches, both the approach based on the regime of state responsibility and the approach to the principle of no harm rule are not very satisfactory to be used as the basis for claiming state responsibility for environmental losses and damage due to the impact of climate change. The following figure illustrates how the no-harm principle applies to climate change issues as described above.



Flowchart The Model for Implementing the No Harm Rule on State Responsibilities in the Climate Change Regime

CONCLUSION

Based on the description above, in particular, the ICJ Decision related to the Nuclear Test case, it can be interpreted that the existence of a general obligation of states to ensure that activities within their jurisdiction and control in respect of the environment of other States or areas beyond their national control are currently part of the corpus of international law.

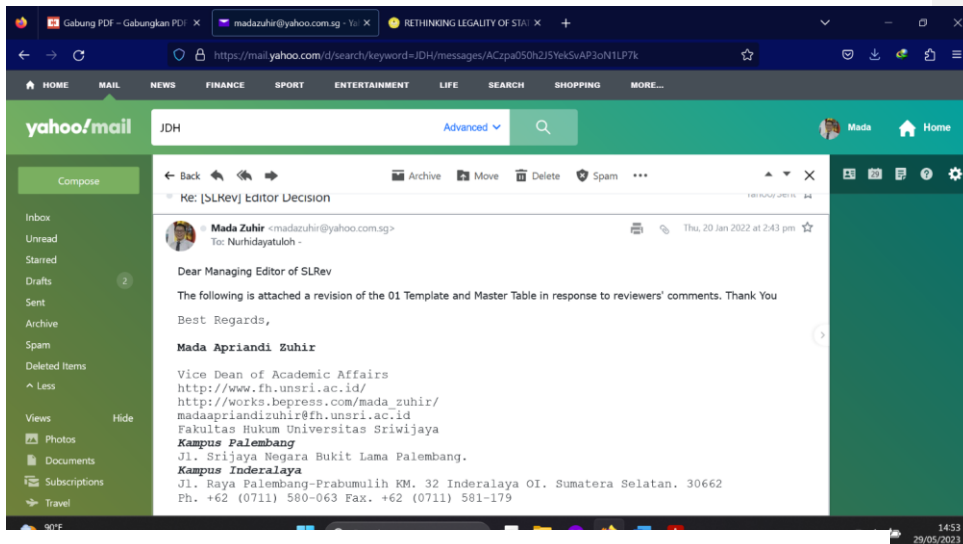
However, related to the development and application model of the No Harm Rule principle as described above, if the focus is on the activity or conduct as formulated in the climate change instruments, not on the results or consequences (impacts), such as in the nuclear test, the No Harm Rule principle is difficult to apply in practice to claim state responsibility for environmental losses and damage due to the impacts of climate change because this concept does not look at behavioural activities or actions taken by a State.

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No Harm Rules Principle, Developments and Application Model in Claims of State Responsibility for the Impact of Climate Change

Mada Apriandi^a, Febrian^a, Murzal Zaidan^a, and Ridwan^a

^a Faculty of Law, Universitas Sriwijaya. E-mail: madaapriandizuhir@fh.unsri.ac.id

Article	Abstract
Keywords: climate change, development, model, no harm rule, responsibility Artikel History Received: Reviewed: Accepted: Published: DOI:	Utilization of rights to natural resources by a State must not be carried out in ways that are contrary to the rights of other States. This basic principle of international law describes that each State must not harm or violate the rights of other States. Therefore, each State is responsible not to cause damage to the environment of other States, or to areas outside the limits of its jurisdiction. This article will analyse the development of the no harm rules principle and simulate its application model for claiming state responsibility in preventing environmental damage due to the impact of climate change. The research used normative juridical research. The research specification was descriptive analytical. While the main data was secondary data (primary, secondary and tertiary legal materials). Then, the data was analysed qualitatively. Based on the discussion and simulation conducted, it is concluded that the no harm rules principle can be applied to climate change issues, however, this principle is not satisfactory and has limitations in its application.

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INTRODUCTION

International law recognizes that every State has sovereignty over its natural resources. However, the use of rights to natural resources may not be carried out in ways that are contrary to the rights of other States as the basic principles of international law formulate that each State must not harm or violate the rights of other States.¹¹⁷

This principle is then referred to in international environmental law theory as the principle of good neighbourliness or the principle of *Sic Utere* or No Harm Principle or Nuisance Theory.¹¹⁸ Each State is responsible not to cause damage to the environment of other States, or to areas outside the limits of its jurisdiction. This principle arises from the Latin proverb *sic utere tuo, ut alienum non laedas*, which means that a State is responsible not to carry out, or to

¹¹⁷ Patricia Birnie and Alan Boyle, "International Law and The Environment (2nd Ed)," in Oxford Press (London: Oxford Press, 2002), 104.

¹¹⁸ Philippe Sands, "Principles of International Environmental Law. (2nd Ed) Cambridge," 2003, 239.

permit activities within their territory or public space without regard to or contrary to the rights of other States to protect the environment.¹¹⁹

In the *Island of Palmas* case, the Arbitration noted that there is an obligation for all States "...to protect within the territory the rights of other states, in particular their right to integrity and inviolability in peace and war."¹²⁰ This obligation is studied in more depth in the case of the *Trail Smelter*, in which the Arbitration then focuses on the damage or loss suffered by the State of America, Washington due to the presence of harmful fumes, sulphur dioxide emissions from the Smelter located on the Trail, British Columbia Canada. The question posed in this case is whether the Trail Smelter should be asked to stop causing damage to Washington State in the future and, if so, to what extent?¹²¹ In answering this question, Arbitration is of the opinion:

...that, under the principles of international law, as well as of the law of the United States, no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.¹²²

The above statement can be interpreted that when an activity has serious consequences and the loss occurs clearly with convincing evidence then, no State has the right to use or permit the use of its territory in such a way as to cause damage in or to other areas or property or people in it. According to Sands, this quote is the most widely referenced and has been accepted as a rule of customary international law.¹²³ This approach to the *Trail Smelter* Arbitration case was also used by ICJ in the *Corfu Channel* case. In the case of *Corfu Channel*, the ICJ stated that it was "...every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States".¹²⁴ In the case of the *Lac Lanoux* Arbitration, it was stated that the state's obligation to consider the rights and interests of other States when exercising their rights.¹²⁵ In this case the Arbitration stated; "France [the upstream state] is entitled to exercise her rights; she cannot ignore the Spanish interests. Spain [the downstream state] is entitled to demand that her rights be respected and that her interests be taken into consideration."¹²⁶

Likewise in the case of the *Nuclear Test*, the ICJ emphasizes the legal status of general obligations related to the environment as part of international law, stating as follows: "The existence of the general obligation of states to ensure that activities within their jurisdiction and control respect the environment of other states or of areas beyond national control is now a part of the **corpus of international law** relating to the environment."¹²⁷ (emphasis added)"

Related to the issue of anthropogenic climate change which involves complex causal mechanisms, it must be separated whether anthropogenic climate change is caused by human

¹¹⁹ Boyle, "International Law and The Environment (2nd Ed)."

¹²⁰ *Island of Palmas Case*, "(Netherlands/U.S.A.), 2 R.I.A.A. 829 (Permanent Court of Arbitration 1928)" (n.d.).

¹²¹ "Art. III of the Arbitration Convention between the United States of America and the Dominion of Canada, Signed April 15" (1935).

¹²² "*Trail Smelter Arbitration (United States v. Canada)* 16 April 1938, 11 March 1941; 3 R.I.A.A. 1907 (1941)" (n.d.).

¹²³ Sands, "Principles of International Environmental Law. (2nd Ed) Cambridge."

¹²⁴ "*Corfu Channel Case (United Kingdom v. Albania)*, Judgment of April 9th, 1949, I.C.J. Reports 1949" (n.d.).

¹²⁵ "*Affair Du Lac Lanoux (Spain vs France)* 12 R.I.A.A. 281, Nov. 16, 1957" (n.d.).

¹²⁶ Sands, "Principles of International Environmental Law. (2nd Ed) Cambridge."

¹²⁷ ICJ advisory on nuclear weapons, "Advisory Opinion on the Legality of Nuclear Weapons," July ICJ Judgement § (1996), <https://www.icj-cij.org/files/case-related/95/095-19960708-ADV-01-00-EN.pdf>.

activities or caused by nature. Carbon dioxide and Greenhouse Gas (GHGs) emissions are not what cause environmental damage. Carbon dioxide and GHGs emissions only trigger a chain of events, which then causes climate change associated with the damage done. With this understanding, it is difficult to make GHGs the cause of the environmental damage and losses that occur. Therefore, it is necessary to build an argument for linking the relationship between emissions by a State and the damage suffered by other States. So far, the basis of international instruments related to the issue of climate change and the belief that the harmful and damaging effects of climate change only refer to scientific evidence in scientific reports of scientists that are accommodated in the Intergovernmental Panel on Climate Change (IPCC).

In this case, of course, linking the losses experienced by a State due to climate change is difficult to meet the elements contained in the state responsibility regime because it becomes an unrealistic thing to identify damage (injury) on the basis of certain emissions.¹²⁸ Therefore, then in relation to direct causal relationships, it must be developed that the damage caused can be proven causally based on the possibility of scientific evidence contained in the scientific data argument as direct evidence.

Based on the description above, the problem raised in this article is how to develop and apply the No Harm Rules Principle to claim state responsibility for the impacts of climate change. This article does not only discuss the development of the no harm rule principle, but also discusses the constraints and simulates a model for applying the principle in practice. For this reason, this article will be divided into several discussion topics. First, it will discuss the development of the principle of no harm rule in international conventions related to the environment. The second will discuss the Model Application of the No Harm Rule Principle in the Legal Framework of State Responsibilities Related to Climate Change Regulation. At the end, this article will describe the conclusions from the discussion on the previous topics.

RESEARCH METHODS

This study used a normative juridical approach, namely by logically examining the legal aspects that underlie the no harm rule principle, its application in international conventions related to the environment and how it was applied through a model to claim State responsibility for the impacts of climate change. Therefore, the research specification used descriptive analytical. In this study, the main data was secondary data (primary, secondary and tertiary legal materials). Furthermore, the research data obtained were analysed qualitatively.

ANALYSIS AND DISCUSSION

REGIME OF STATE RESPONSIBILITIES IN INTERNATIONAL LAW REGARDING THE IMPACT OF CLIMATE CHANGE

According to Sands, the use of the term State responsibility can lead to misunderstandings in which the use of this term seems as if only the State is considered a subject of international law, even though there are also supporters of other rights and obligations, such as international organizations and individuals who are also a subject of international law.¹²⁹

¹²⁸ Mada Apriandi Zuhir, "Rethinking Legality of State Responsibility on Climate Change in International Law Perspectives," *Jurnal Dinamika Hukum* 17, no. 2 (2017): 203–14, <https://doi.org/10.20884/1.jdh.2017.17.2.801>.

¹²⁹ Sands, "Principles of International Environmental Law. (2nd Ed) Cambridge."

One of the basic principles in international law states that a State must not injure and violate the rights of other States. Violation of these rights which are in the legal interest of other parties will have consequences for claims of state responsibility. A State that injures or violates these rights must be held accountable for its actions and therefore is obliged to make compensation for losses suffered by other parties.¹³⁰ This responsibility arises both because of the nature of international law and arises from the concept of state sovereignty and equality among the States.¹³¹

In the international law literature, the responsibility of State is divided into two, namely:

5. Liability due to unlawful acts (delictual liability), responsibilities arising from every mistake or negligence of a State towards foreigners in its territory or the territory of another State, for example, responsibilities arising from space exploration, nuclear exploration, or other activities across national borders; and
6. Liability for contractual liability arising from a state's breach of an agreement or contract.¹³²

There are two theories that underlie state responsibility, namely the theory of risk and the theory of error. The theory of risk determines that a State is absolutely responsible for every activity that causes very dangerous effects (harmful effects of hazardous activities) even though the activity is a legal. This theory then underlies the principle of absolute liability or strict liability or objective responsibility.¹³³ An example of the application of this theory can be seen in the provisions of Article 2 of the Liability Convention 1972 which states that the launching state is absolutely responsible for paying compensation for losses on the earth's surface or on aircraft that are in flight where the losses and the accident was caused by its space objects.

In the theory of error (fault theory), the responsibility of the state arises when the state's actions can be proven to contain an element of error. An act is said to contain errors if the act is done intentionally (*dolus*) or by negligence (*culpa*) which cannot be justified. This error theory then underlies the principle of subjective responsibility or liability based on fault.¹³⁴ The presence of a *dolus* element means that the perpetrator state acts in a certain way, willed or known with the intent to cause injury or harm. The *dolus* element can help determine attribution and infringement issues and the extent of the effect on the injury or loss incurred.

Meanwhile, *culpa* is an action that can be blamed because of an element of error, carelessness or negligence because the steps that should have been taken to avoid an adverse event were not taken. In situations where individual actions that result in damage and loss and those actions are not related to the state, a state may be held liable for failing to exercise oversight.¹³⁵ An act of a state that can be blamed according to international law (internationally wrongful act of a state) if; 1) when the act can be attributed to that State (attribution of conduct to a state); and 2) when the state's actions have violated its international obligations (breach of an international obligation).¹³⁶

Until the end of the 20th century, it was still believed that the emergence of state responsibility was not enough with the two elements above, but rather that there must be an

¹³⁰ "In Some Circumstances, a State's Actions Can Be Justified If There Are Reasons for Their Consent, Self-Defense, Countermeasures in Respect of an Internationally Wrongful Act, Force Majeure, Distress and Necessity" (n.d.). See Chapter V UNGA Res. 56/83

¹³¹ Malcolm N. Shaw, *International Law (6th Ed)* (Cambridge University Press, 2008).

¹³² Huala Adolf, *Aspek-Aspek Negara Dalam Hukum Internasional* (JAKARTA, 1991). and Shaw, *International Law (6th Ed)*.

¹³³ Adolf, *Aspek-Aspek Negara Dalam Hukum Internasional*.

¹³⁴ Adolf.

¹³⁵ Ian Brownlie, *Principles of Public International Law (2nded)* (London, UK: Oxford University Press, 1973).

¹³⁶ International Law Commission, "Draft Articles on Responsibility of States for Internationally Wrongful Acts" (2021).

element of damage or loss to other parties or States. In its later development, the element of damage or loss is no longer considered a necessity in every case that can result in state responsibility, for example, violations of international law provisions relating to human rights. This violation of human rights is clearly an act that is blamed according to international law, even though it does not harm other parties or States.¹³⁷

Article 24 of the European Convention on Human Rights states that each State party is allowed to file an objection against other Parties without requiring the State that makes the objection to be a victim of human rights violations committed by the State suspected of committing the violation. Likewise, Article 3 of the Annex to the Resolution of the United Nations General Assembly No. 56/83 dated January 28, 2002 concerning the Responsibility of States for internationally wrongful acts (hereinafter referred to as UNGA Res. 56/83) which eliminates the condition for damages related to acts that can be blamed under international law. Articles of UNGA Res. 56/83 on State responsibility for international wrongful act, provides simultaneously general rules of international law that reflect customary law with rules in the environmental field that arise from treaties and other international rules.¹³⁸

In the environmental field, in addition to the articles contained in UNGA Res. 56/83, there are also several non-binding instruments relating to state obligations. Several non-binding international instruments that regulate the obligations and responsibilities of this State, for example the following statement from the Brundtland Commission or the World Commission on Environment and Development (WCED);

If one or more activities create a significant risk of substantial harm as a result of a transboundary environmental interference, and if the overall technical and socio-economic cost or loss of benefits involved in preventing or reducing such risks far exceeds in the long run the advantage which such prevention or reduction would entail . . . the state which carried out or permitted the activities shall ensure that compensation is provided should substantial harm occur in an area under national jurisdiction of another state or in an area beyond the limits of national jurisdiction.¹³⁹

This statement is also in line with UNEP Principle 12, 1978 which states that states are responsible for fulfilling their international environmental obligations with regard to the use of shared natural resources and that states are subject to obligations relating to the implementation of international law for environmental damage arising from violations against this obligation outside the boundaries of their jurisdiction.¹⁴⁰

Recognition of these practices of international responsibility has existed for a long time and can be seen in decisions of international courts, such as the Permanent Court of International Justice (PCIJ) and the International Court of Justice (ICJ), which state that international responsibility arises immediately after a state commits an act. that violates the rights of other States.¹⁴¹ PCIJ in the case of the Spanish Zone of Morocco claims, stated; "...responsibility is the necessary corollary of a right. All rights of an international character involve international responsibility. Responsibility results in the duty to make reparation if the obligation in question is not met."¹⁴²

Likewise in the case of the Chorow factory (1928), the PCIJ stated that: "it is a principle of international law and even a greater conception of law that any breach of an engagement

¹³⁷ Shaw, *International Law (6th Ed)*.

¹³⁸ Sands, "Principles of International Environmental Law. (2nd Ed) Cambridge."

¹³⁹ Sands.

¹⁴⁰ Sands.

¹⁴¹ Phosphates in Morocco, "Judgment. 1938. PCIJ, Series A/B No. 74" (n.d.).

¹⁴² Shaw, *International Law (6th Ed)*.

involves an obligation to make reparation".¹⁴³ The responsibility of the state for wrongful act according to international law is the most important thing to do is the obligation to stop the act, ensure and properly guarantee that there will be no repetition of the act if there is a possibility of it happening and make full compensation for the losses caused by the wrongful act.¹⁴⁴

This obligation for compensation is sometimes called a liability. According to Sands, the term 'liability' in the international legal literature has been widely discussed, for example PM Dupuy and H. Smets provide the definition of liability as an international obligation to provide compensation, while LFE Goldie, gives a broader meaning, namely the consequences of failure to perform duties, or compliance with required performance standards. Therefore, this liability has the connotation of legal compensation, when responsibilities and losses arise from failure to fulfil those obligations.¹⁴⁵

This rule is also applied in many cases by the ICJ, for example the Corfu Channel case and the Danube Dam Case (*Gabcikovo-Nagymaros Project*).¹⁴⁶ Although the explanation above describes the state's responsibility that arises because of an error, it should also be explained that there is also a state's responsibility that arises without any wrongful act. In this case, the causal relationship between the activity and the damage done leads to an obligation to pay compensation, even though the damage arises from legally valid activities. This is due to the development of science and technology which on the one hand creates great benefits for society, but on the other hand often has a certain level of risk of negative impacts, such as the production of nuclear energy and activities in outer space. Thus, in several international agreements that regulate these activities, regulations concerning special obligations are also contained. For example, in Article III (1) of the International Convention on Civil Liability for Oil Pollution Damage 1969, it is stated that "the owner of a ship at the time of an incident...shall be liable for any pollution damage caused by oil which has escaped or been discharged from the ship as a result of the incident". Likewise, for example at the Paris Convention on Third Party Liability in the Field of Nuclear Energy 1960, the Brussels Convention supplementary to the Paris Convention 1963 and the Vienna Convention on Civil Liability for Nuclear Damage 1963.¹⁴⁷

STOCKHOLM DECLARATION 1972

With regard to international instruments on the environment, the 1972 Stockholm Conference agreed on an agreement contained in 26 principles of environmental management called the Stockholm Declaration and produced 109 recommendations as part of its action plan. Although according to Birnie and Boyle, the legal status of the entire instrument of the Stockholm Declaration is still uncertain, but it is often referred to in international treaties, international agreements and other documents and is recognized as evidence of state practice and is an

¹⁴³ Chorzow Factory Case, "PCIJ, Series A No. 17" (1928).

¹⁴⁴ J.Crawford, "The ILC's Articles on State Responsibility: Introduction, Text and Commentaries (2002). Report of the ILC, UN Doc. A/56/10 (2001); J. Crawford, 1st Report on State Responsibility, UN Doc. A/CN.4/490 Dan Add.1-7 (1998); 2nd Report, UN Doc. A/CN.4/498 and Ad" (n.d.). ; Sands, "Principles of International Environmental Law. (2nd Ed) Cambridge."

¹⁴⁵ Sands, "Principles of International Environmental Law. (2nd Ed) Cambridge."

¹⁴⁶ Martin Dixon and Robert McCorquodale, *Cases and Materials on International Law* (Oxford University Press, 2003).

¹⁴⁷ "In General, the Agreement That Contains the Rules Regarding This Obligation Contains Civil Liability. This Means That Only the Operator or Owner of a Certain Activity Is Obligated to Pay Compensation for the Impacts Caused by the Activity. In Relation to Ac" (n.d.).

example of soft law. of international law.¹⁴⁸ One of the important points and the main principle of this Declaration is Principle 21 which formulates;

States have, in accordance with the Charter of the United Nations and the principles 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.

In 1997, the United Nations General Assembly passed resolution 2996, which stated that Principles 21 and 22 of the Stockholm Declaration lay down the basic principles of the environment. Principle 21 includes two basic objectives of international environmental law, namely to stipulate those states have sovereign rights over their natural resources and secondly, the principle of no harm.

This understanding of the no harm principle was then developed not only in other areas, but also in areas outside the boundaries of national jurisdiction.¹⁴⁹ The effect of Principle 21 regarding its normative character is also recognized in Articles 192, 193 and 194 of the United Nations Convention on the Law of the Sea (UNCLOS 1982) and the Convention on the Transboundary Effects of Industrial Accidents) 1992.

RIO DECLARATION 1992

After the Stockholm Conference, 20 years later, the United Nations held a summit in Rio de Janeiro on June 3-4, 1992. This conference was called the United Nations Conference on Environment and Development (UNCED), known as the Earth Summit or Rio Summit. Although not legally binding as is the Stockholm Declaration, the Rio Declaration is an important example of the use of soft law instruments in the process of codification and development of international law. The preamble of the 1992 Rio Declaration explicitly stated that this Declaration was not formally binding by formulating; "...its adoption by consensus of 176 states, after a prolonged negotiation process, and its normative character, make it a particularly important example of the use of soft law instruments in the process of codification and development of international law."

The main concerns of the Rio Declaration are sustainable development and the global environment. In the context of environmental transboundary hazards and risks, the Rio Declaration contains important principles formulated in Principles 2, 18, and 19.¹⁵⁰ Both Principle 21 of the Stockholm Declaration and Principle 2 of the Rio Declaration state that the no harm rule applies equally to territorial areas and beyond the limits of national jurisdiction.

A MODEL FOR APPLYING THE NO HARM RULE PRINCIPLE TO CLAIM STATE RESPONSIBILITY FOR THE IMPACTS OF CLIMATE CHANGE

The development of the principle of state responsibility starting from the *sic utere* or no harm principle or the principle of good neighbourliness from the Trail Smelter case decision and principle 21 of the 1972 Stockholm Declaration and Principle 2 of the 1992 Rio Declaration has become part of customary international law or even *jus cogens* which legally binding all States regardless of whether a State is a state party or not to an international treaty.

As explained in the previous section, related to climate change, the Earth's atmosphere is a different kind of region. The atmosphere is a layer of air flow that continuously moves in

¹⁴⁸ Boyle, "International Law and The Environment (2nd Ed)."

¹⁴⁹ Boyle.

¹⁵⁰ Boyle.

different areas regardless of the jurisdictional boundaries of a state, so it is different from airspace.¹⁵¹ According to international law, the territory of a state consists of three dimensions, namely land, sea and air.¹⁵² The traditional concept in international law related to state sovereignty perceives airspace as unlimited (*usque ad coelum*), although later this perception was corrected in air and space law that the airspace over the high seas is open to everyone.¹⁵³

Seas outside the national jurisdiction of States are called high seas. Utilization of the high seas is carried out based on the principle of the common heritage of mankind, which means that the benefits of the high seas, both aspects of navigation and aspects of natural resources in it, must be enjoyed by all mankind and should not be monopolized by one or several state only. This principle gives birth to the general rights and obligations of each state towards the high seas as well as special rights and obligations on the particular high seas, such as providing adequate search and rescue (SAR) facilities, hot pursuits and the preservation of the marine environment.¹⁵⁴

As stated by the United Nations General Assembly through Resolution 43/53, Vienna Convention for the Protection of the Ozone Layer 1985 and UNFCCC 1992 that the global atmosphere is a common concern of mankind. According to Birnie and Boyle, the use of this term by giving the label common concern is a form of political compromise, in which the term previously offered is the common heritage of mankind.¹⁵⁵ Therefore, the use of the common concern label has a different legal status from the term common heritage of mankind which indicates natural resources such as permanent sovereignty, public property, shared resources, or common heritage.

The term common concern used in the global atmosphere does not then make the atmosphere a public property outside the sovereignty of the state, but because it is treated in the same way as the ozone layer, the global atmosphere is a common source of the vital interests of mankind.¹⁵⁶

For this reason, so that the no harm rule principle can be applied to the issue of global climate change, the scope of Principle 21 of the 1972 Stockholm Declaration and Principle 2 of the 1992 Rio Declaration must be developed by expanding the meaning or understanding of the atmosphere extensively or at least the notion of the atmosphere can be analogized with equate it with protection of common areas as applied to the high seas.¹⁵⁷

Thus, if we can make an analogy, then the Preamble to the 1985 Vienna Convention on the Protection of the Ozone Layer which includes Principle 21 of the 1972 Stockholm Declaration in its preamble as well as the intrinsic rules mentioned in the Preamble of the UNFCCC can also be used as a legal basis for applying the principle of good neighbourliness to climate change issues in general and atmospheric issues in general.

In addition, international practice in respecting the rights of other States related to nuclear testing in the atmosphere, as also stated by Birnie and Boyle, can be used as a reference for the

¹⁵¹ Boyle.

¹⁵² Mochtar Kusumaatmadja and Etty R. Agoes, *Pengantar Hukum Internasional*, II (Bandung: PT. Alumni, 2012).

¹⁵³ Shaw, *International Law (6th Ed)*.

¹⁵⁴ "The Provisions Regarding the Legal Regime of the High Seas as Stated in UNCLOS 1982 Are Contained in Part VII, Articles 86 to 120, Applies to All Parts of the Sea Outside the Inland Sea, Territorial Sea and EEZ. In Essence, These Provisions Are the Same A" (n.d.).

¹⁵⁵ Boyle, "International Law and The Environment (2nd Ed)."

¹⁵⁶ Boyle.

¹⁵⁷ Boyle.

application of this principle to the atmosphere.¹⁵⁸ So then, if there is a State that opposes or does not want to recognize climate change as a common concern of mankind, it is the same as opposing and unwilling to carry out its obligations on climate change as a global common.

In relation to the principle of no harm rule, there are several things that must be considered in its implementation, namely:

Obligation to Take Prevention

This precautionary principle can be found in the formulation of Article 2 of the UNFCCC which states;

“The ultimate objective of this Convention and any related legal instruments that the Conference of the Parties may adopt is to achieve, in accordance with the relevant provisions of the Convention, stabilization of greenhouse gas concentrations in the atmosphere at a level that would **prevent dangerous anthropogenic interference with the climate system**. Such a level should be achieved within a time-frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner”. (Emphasis added)

Observing Article 2 of the UNFCCC, it can be said that the formulation of this Article contains an explicit preventive principle as contained in the formulation of the objectives of the Convention which requires state parties to stabilize GHGs concentrations in the atmosphere. This principle states that every State is required to prevent, reduce, limit or control activities that may result in or pose a risk of environmental damage. According to Sands the obligation not to cause harm arises as a limitation to the principle of sovereignty and this principle also applies within the territory of the State that caused it.¹⁵⁹ Added by Sands, the purpose of this principle is only one, namely minimizing environmental damage. In the case of the Gabčíkovo-Nagymaros Project, the ICJ stated that: “in the field of environmental protection, vigilance and prevention are required on account of the often-irreversible character of damage to the environment and of the limitations inherent in the very mechanism of reparation of this type of damage.”¹⁶⁰

In the Decision, the ICJ emphasized that in the field of environmental protection, vigilance and prevention are needed considering the nature of environmental damage that is often irreversible and the limitations inherent in reparation mechanisms for this type of damage. This principle can also be found in the Trail Smelter Arbitration case through an order to Canada to prevent future injury¹⁶¹ and implicitly seen in the Lac Lanoux Arbitration.¹⁶² This precautionary principle is also supported in most international environmental agreements, which aim to prevent: 1) extinction of flora and fauna species; 2) the spread of occupational diseases, including radioactive contamination to workers; 3) introduction and spread of pests and diseases; 4) pollution of oil in the sea, radioactive waste, hazardous and toxic materials and waste (B3), from land sources, or from any source; 5) river pollution; 6) atmospheric radioactive pollution; 7) harmful environmental modifications; 8) the opposite effect of activities that can prevent the migration of species; 9) air pollution; 10) modification of the ozone layer; 11) degradation of the natural environment; 12) all pollution; 13) significant adverse environmental impacts; 14) transboundary impacts in general; 15) harmful

¹⁵⁸ Boyle.

¹⁵⁹ Sands, “Principles of International Environmental Law. (2nd Ed) Cambridge.”

¹⁶⁰ Gabčíkovo-Nagymaros Project case (Hungary/ Slovakia), “Judgment, I.C.J. Reports 1997” (n.d.).

¹⁶¹ Trail Smelter Arbitration (United States v. Canada) 16 April 1938, “11 March 1941; 3 RIAA 1907 (1941) Part 4, Section 3.No Title” (n.d.).

¹⁶² Sands, “Principles of International Environmental Law. (2nd Ed) Cambridge.” P.247

anthropogenic disturbances to the climate system; 16) loss of fisheries and other biodiversity, including as a result of the release of genetically modified organisms; and 17) damage to health and the environment from resistant chemicals and organic pollutants.¹⁶³

Liability Over Tolerance Threshold

In addition, related to the principle of no harm rule and the principle of prevention, studies related to the threshold of tolerance are also important because as Principle 21 of the 1972 Stockholm Declaration and Principle 2 of the 1992 Rio Declaration formulate: “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”

Subject to these principles, it is the responsibility of States to take adequate steps to control and regulate transboundary sources of serious or harmful environmental pollution in their territory or subject to their jurisdiction. Interestingly then, apart from stipulating the state's obligation to control so that there is no damage to the environment within their jurisdiction, it also recognizes state sovereignty over natural resources within that jurisdiction. Thus, it is understood that these principles provide limited sovereignty for the state to exploit their natural resources and at the same time it can also be interpreted not to absolutely prohibit environmental damage.¹⁶⁴ Exploitation of natural resources, like it or not, will definitely have a damaging impact on the environment. Development by exploiting natural resources, on the one hand serves to improve the quality of human life but on the other hand also results in a decline in the quality of human life. Therefore, there must be a tolerance level of damage that is allowed by providing a threshold. This tolerance threshold must be based on certain quality standards. However, until now there are no international rules that specifically regulate this quality standard that can be used in determining what types of environmental damage can be attached to responsibility. Therefore, the obligation to prevent cross-border damage must be attached with minimal (*de minimis*) requirements.¹⁶⁵ For this reason, legal scholars generally agree that only significant or serious damage can trigger the no harm-rule principle as a preventive obligation.¹⁶⁶ Trail Smelter Arbitration uses the term standard quality of tolerance threshold with the sentence as serious consequence.¹⁶⁷ Likewise, for example the term used in Article 1.1 of the UNFCCC which contains the meaning of the adverse effects of climate change by using the term significant deleterious effects. The use of the terms significant, appreciable, substantial, and serious is often used to describe the tolerance threshold in international court decisions and in international agreements related to environmental protection, even though the use of these terms gives quite difficult understanding related to the quantity of damage that occurred.¹⁶⁸ The quality of this tolerance threshold standard, for example, can be seen from the formulation of Article 1 of the 1979 Convention on Long-Range Transboundary Air Pollution which states that the pollution in question must lead to deleterious effects of such a nature as to endanger human health, harm living resources and ecosystems and material property and impair or interfere with amenities and other legitimate uses of the

¹⁶³ Sands.

¹⁶⁴ Boyle, “International Law and The Environment (2nd Ed.)”

¹⁶⁵ Boyle.

¹⁶⁶ Sands, “Principles of International Environmental Law. (2nd Ed) Cambridge.”

¹⁶⁷ Trail Smelter Arbitration (United States v. Canada) 16 April 1938, 11 March 1941; 3 R.I.A.A. 1907 (1941).

¹⁶⁸ Shaw, *International Law (6th Ed)*.

environment. Due to the absence of a specific standard rule regarding this tolerance threshold, as stated by Shaw that the relativity of the issue at hand and the importance of a particular case must be seen in significant factors.¹⁶⁹

Absolute Liability

The responsibility not to cause damage as contained in Principle 21 of the 1972 Stockholm Declaration and Principle 2 of the 1997 Rio Declaration above also raises the question of whether this responsibility is an absolute liability or a strict liability. According to Shaw, some experts argue that the appropriate standard for the state to act is a strict liability in the environmental field.¹⁷⁰ If this opinion is accepted by all, then the state has an absolute obligation to prevent damage and can be held responsible for the damage that occurs regardless of the fault. However, the formulation of Principle 21 of the 1972 Stockholm Declaration and Principle 2 of the 1997 Rio Declaration is not very clear regarding this issue and neither is international practice such as the Trail Smelter Arbitration, Corfu Channel,¹⁷¹ and Gut Dam Arbitration. In the case of the Trail Smelter, which has a very large influence on international discussion and practice regarding the principle of good neighbourliness, especially the principle of no harm, it is not clear whether the responsibility is absolute. Observing the Trail Smelter case, it is difficult to conclude that the responsibility of the state is absolute so as not to cause damage because from the beginning of the case, the Canadian Party has accepted this responsibility. In the case of the Corfu Channel, Albania's liability arising from its failure to alert two British ships and other voyages of mining activity in their territorial waters does not constitute a form of strict liability. Likewise with the case of Gut Dam Arbitration (1968),¹⁷² construction of a dam for navigation facilities on the river St. Laurence by Canada, has been known by the United States and even the two States have made an agreement that Canada will provide compensation if there are losses from these development activities that have an impact on American citizens. The development of this absolute responsibility theory can then be seen in the problem of damage caused by nuclear activity and damage in space. In Article 2 of the Liability Convention 1972, it is stated that the launching state is absolutely responsible for paying compensation for losses on the earth's surface or on aircraft that are in flight where the losses and accidents are caused by their celestial objects. In the case of nuclear tests, nuclear test activities will bring about substantial damage even though they are carried out under normal conditions, as well as anthropogenic activities that emit GHGs. If then nuclear test activities are not prohibited, but if damage occurs as a result of these activities, then the state's responsibility is absolute. Thus, as Voigt said, these consequences should also be applied to GHGs emissions that are legally emitted.¹⁷³ In this context then, the case of the Trail Smelter becomes relevant, when the production activity of the Trail Smelter itself is not prohibited, but the emission of sulphur dioxide that exceeds the tolerance limit is carried by the air which then disturbs the environment.

Observing the things that need to be considered in the application of the no harm rule, namely the obligation to prevent, the obligation to the tolerance threshold and in particular the absolute obligation, as Birnie and Boyle said that the principle of no harm can be interpreted

¹⁶⁹ Shaw.

¹⁷⁰ Shaw.

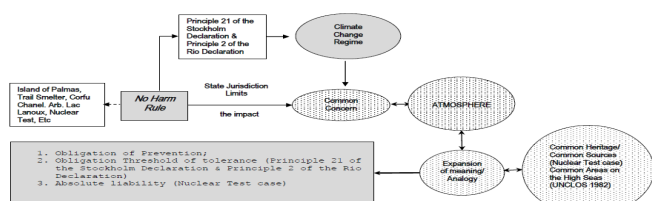
¹⁷¹ Shaw.

¹⁷² Gut Dam Arbitration, "8 ILM 118" (1969).

¹⁷³ Christina Voigt, "State Responsibility for Climate Change Damages," *Nordic Journal of International Law* 77, no. 1 (2008): 8.

as absolute responsibility. However, when discussing aspects of ecology and development, the issue of absolute responsibility will certainly face enormous challenges and resistance from States in the world.¹⁷⁴

In addition, absolute responsibility focuses on the results, namely the impact and the burden of proof. The results or consequences arising from an activity and the burden of proof are the main issues when discussing claims of state responsibility under internationally applicable regimes. So that these two approaches, both the approach based on the regime of state responsibility and the approach to the principle of no harm rule are not very satisfactory to be used as the basis for claiming state responsibility for environmental losses and damage due to the impact of climate change. The following figure illustrates how the no-harm principle applies to climate change issues as described above.



Flowchart The Model for Implementing the No Harm Rule on State Responsibilities in the Climate Change Regime

CONCLUSION

Based on the description above, in particular, the ICJ Decision related to the Nuclear Test case, it can be interpreted that the existence of a general obligation of states to ensure that activities within their jurisdiction and control in respect of the environment of other States or areas beyond their national control are currently part of the corpus of international law.

However, related to the development and application model of the No Harm Rule principle as described above, if the focus is on the activity or conduct as formulated in the climate change instruments, not on the results or consequences (impacts), such as in the nuclear test, the No Harm Rule principle is difficult to apply in practice to claim state responsibility for environmental losses and damage due to the impacts of climate change because this concept does not look at behavioural activities or actions taken by a State.

¹⁷⁴ Boyle, "International Law and The Environment (2nd Ed)."

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- In general, the agreement that contains the rules regarding this obligation contains civil liability. This means that only the operator or owner of a certain activity is obliged to pay compensation for the impacts caused by the activity. In relation to ac (n.d.).
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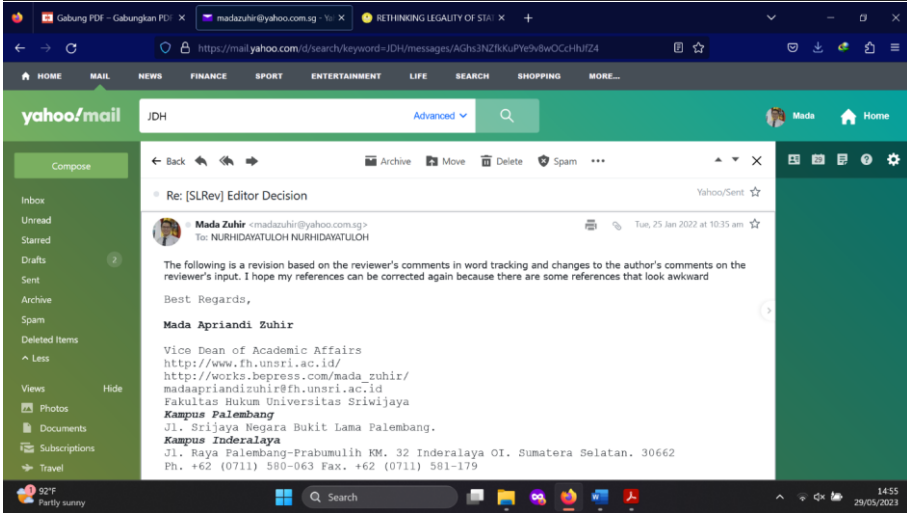
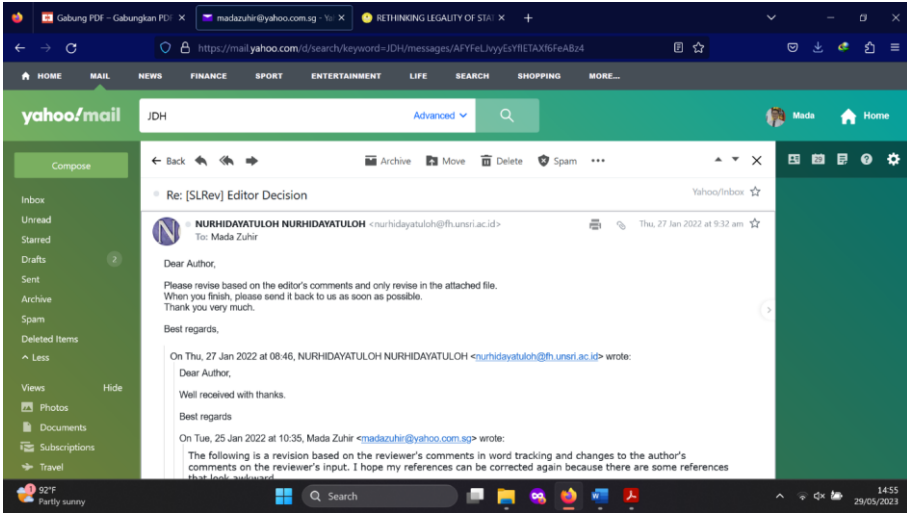
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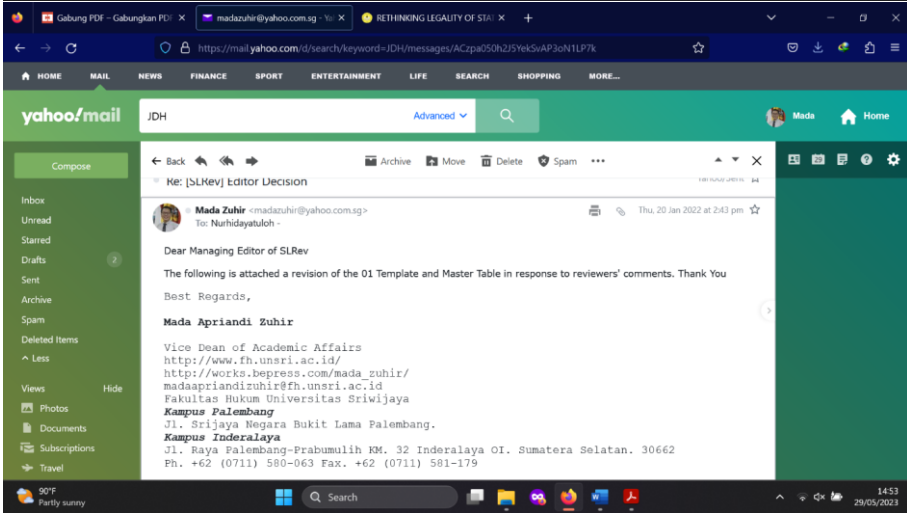
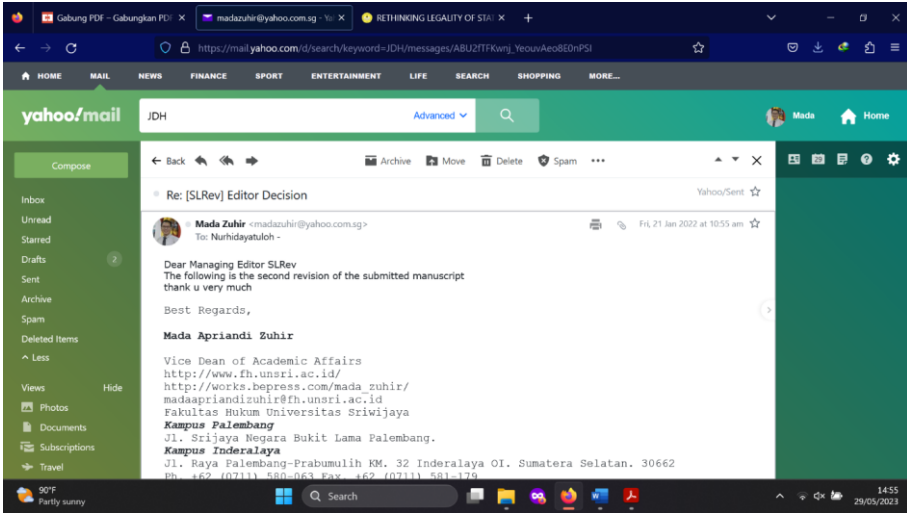
The provisions regarding the legal regime of the high seas as stated in UNCLOS 1982 are contained in part VII, Articles 86 to 120, applies to all parts of the sea outside the inland sea, territorial sea and EEZ. In essence, these provisions are the same a (n.d.).

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