'SOVEREIGNTY' IN RESPECT TO TRANS-BOUNDARY ENVIRONMENTAL ISSUES: AN ANALYSIS OF UNDERLYING CONCEPTS

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Abstract

With no international uniformity and ambiguity in matters of jurisdiction in cases of cross-boundary environmental issues, the concerns for the same have taken a centre-stage. The need for having a clear perspective and a legal framework on environment related issues specifically in relation to jurisdictional aspect in trans-boundary claims has to be dealt with. But any debate of such nature will touch upon the concept of State Sovereignty. The debate for having a universal jurisdiction is quite new and that of extending it to the cases of environment is even more new and thought provoking. The environmental degrading activities of one State may affect the neighbouring State(s) too, which would thus involve various legal and political consequences. And one such consequence will be in relation to the territorial sovereignty. International law concerns have tried to strike a correct balance between the international responsibility towards environment and the principle of State Sovereignty. This article is an attempt to evaluate the evolving international environmental law jurisprudence in the abovementioned backdrop. In this the responsibility to protect and preserve the environment of the States is to be studied while taking into account the issues relating to sovereignty. It is to be analysed as regards how far obligations can be placed upon a State so as not to undermine the absoluteness of its Sovereignty.

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INTRODUCTION

The international law relating to the trans-border environmental harm is mainly customary. There are instances where States have entered into treaties or other international arrangements relating to trans-boundary environmental issues but these are less in number and the major part of law on this issue is still customary. The customary international law recognises the rights and exclusivity of a state to exploit its natural resources but is silent or does not lay any limits on such rights, when the exploitation by the state results in some environmental harm to the neighbouring states. The limits, if any, or if in restricted sense, are ambiguous and unclear.

In this regard, a customary international law principle comes into picture- *sic utere tuo ut alienum non laedas*, i.e., the property should be used in a way so as not to harm the property of others. And this principle has laid the foundation of 'no-harm rule' or 'prohibition of transboundary environmental harm' which creates an obligation upon the states not to harm the global environment by the activities within their territories. This no harm rule has been crystallised by the International Court of Justice and International Law Commission. There also have been variations of this rule that has been adopted in different treaties relating to the protection of the environment. This obligation upon the states to not to harm the environment of the other states cannot be understood separately from the notion of the sovereignty. The origin of the international environmental law jurisprudence can be understood when one studies it with its conceptual origins that lie in the concept of territorial sovereignty.

Concerns of this nature present an interesting case of striking an optimal balance between the international environmental law jurisdiction and the concept of traditional sovereignty.

TRACING THE ORIGINS OF RESPONSIBILITY TOWARDS ENVIRONMENT

Under the traditional conception of sovereignty, every state is regarded as internally and externally sovereign in their sphere. The State authority is seen as absolute, supreme, indivisible and independent. As Glanville remarks *"..... sovereignty was established sometime around the 17th century and, since that time, states have enjoyed 'unfettered' rights to self-government, non-intervention and freedom from interference in internal affairs."*[1] But this traditional construct of territorial sovereignty, which even was once considered to be "grundnorm of international society"[2], is no more recognised in this sense.[3] The absolute construct of territorial sovereignty no more finds place in international law. Rather, this narrow approach of the states towards sovereignty was carefully modified by the United Nations.

UNDERSTANDNG THE PRINCIPLE OF 'SOVEREIGN EQUALITY'

[1] Glanville L., *The Antecedents of 'Sovereignty as Responsibility'*, European Journal of International Relations, Vol 17:2, 2011, p. 234

[2] Reus-Smit, C., *Human Rights and the Social Construction of Sovereignty*, Review of International Studies, Vol 27, 2001, pp 519-538

[3] See Chopra, J., & Weiss, T., *Sovereignty Is No Longer Sacrosanct: Codifying Humanitarian Intervention*, Ethics & International Affairs, 6, 1992, 95-117. doi:10.1111/j.1747-7093.1992.tb00545.x

The principle of equality has been amalgamated with concept of sovereignty and has been then introduced in the sphere of international law so as to achieve international co-operation and co-ordination among states. The principle of equality as in 'sovereign equality' is an improvised version of the tenet of 'all men are equal' which we find in the philosophical ideas of Hugo Grotius, Thomas Hobbes and John Locke. This is the principle of 'sovereign equality' which is one of the founding principles of the United Nations, whereby every State , regardless of it political structure, socio-economic background, political bargain power, military strength, is equal to all other states of the world. Article 2(1) of the Charter of the Unites Nations states that-

"Article 2- The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles. The Organization is based on the principle of the sovereign equality of all its Members."[4]

Now, since the traditional sovereignty does no longer have a wide scope, so has the scope of the exclusivity of the state over its resources. The absoluteness and exclusivity of a State to exploit the natural resources within its territory- a principal corollary of sovereignty- is restricted by the obligation of not harming the environment of the other neighbouring states as well as the rule of *sic utere tuo ut alienum non laedas.* Krasner states that westphalian sovereignty entails "the exclusion of external actors from domestic authority configurations"[5]. Had there been this conception of traditional sovereignty, the no-harm rule and other protectionist rule for the global environment could not have developed, as traditional sovereignty entailed the exclusive right and autonomy to the state within its territories.

TERRITORIAL SOVEREIGNTY AND THE PRINCIPLE OF PERMANENT SOVEREIGNTY OVER NATURAL RESOURCES

Absolute and sole authority and jurisdiction over a state's territory is understood as territorial sovereignty. A state's sovereignty, in that sense, extends to the geographical limits of a state and includes, Land, Internal waters[6], Territorial waters[7], Air and space over territorial waters and Sea-bed and Subsoil.

As per the traditional view in international law, States were regarded to have an exclusive right to exploit the natural resources within their territories and also to make laws relating to their environment. This view is well reflected in the principle of 'permanent sovereignty over natural resources'. The United Nations General Assembly adopted resolution 1803 on 'Permanent Sovereignty over Natural Resources' in 1962[8]. It provided that the international

[4] Article 2, Charter Of United Nations, 1945
[5] Krasner S. D., *Sovereignty: Organized Hypocrisy*, Princeton: Princeton University Press, 1999, pg 9.
[6] Article 2, Internal waters are the waters between the land territories and out to baseline of the territorial sea including rivers, lakes etc., United Nations Convention on the Law of Sea, 1982.
[7] Article 2, The territorial waters are limited up to 12 nautical miles from the baseline, United Nations Convention on the Law of Sea, 1982.
[8] General Assembly resolution 1803 (XVII) of 14 December 1962, "Permanent sovereignty over natural resolution", 1962

community must respect the rights of peoples and states over their natural wealth and resources. The origin of this principle can be traced back to the times decolonisation in 1950s and 1960s, where it was urged that the for the purpose of liberation of the colonies, full and absolute rights must be given to them over their natural resources.[9]

This principle is often used as a trump card by the states while over-exploiting their natural resources - which, no matter within one's territorial limits, is unsustainable to the world community as a whole - and also disturbing the natural environment of the neighbouring states. This principle of permanent sovereignty has been claimed to have the status of customary international law. This would mean that the states can, under the international law provision, could over exploit their natural resources and can use the resources even in a way that could be detrimental to the environment of other states. In this context, Nicolai Nyland remarks.

"States can also interpret their international environmental obligations narrowed, or completely disregard them. The legal basis for this is the sovereignty principle, which means that states are not subject to the will of other states."[10]

This situation can have serious ramifications. Where, at one hand, on the account of territorial sovereignty, a State cannot be directed not to do such activities within its territories so as to cause any lateral damage to the global environment or the environment of the other states, and on the other, other states' sovereignty could have to said to be seriously damaged by the detriments to their natural environment by the State causing so. And it is the activities in each state, that the states tend to overlook, that has a cumulative effect on the global environment.

"That global environmental degradation is a sum of often each of small state-owned environmental interventions is not caught by current law. Public law has also not taken into account that environmental degradation in the long run could threaten humanity's existence."[11]

A STEP TOWARDS PROTECTION OF GLOBAL ENVIRONMENT: SOVEREIGNTY AS A RESPONSIBILITY

The concept of sovereignty has been interpreted differently across time and space. Of late, it has being shaped as a 'responsibility' of the state towards the international community as a whole- this has now made sovereignty conditional. It essentially means that the states that fulfil their responsibilities in the international arena have the right to enjoy their sovereignty. This philosophy of 'sovereignty as responsibility' has its roots in the doctrine of 'Responsibility to Protect'.

'Sovereignty' that was earlier viewed as a 'control' is now regarded as a 'responsibility'. The

[9] Sands, Philippe and Jacqueline Peel, *Principles of International Environmental Law*, 3rd edition, Cambridge 2012, p. 11
[10] Nyland, N., *Are states internationally committed to protecting the environment*, Doctoral dissertation, University of Oslo, Unipub publisher: ISSN 1890-2375, 2009
[11] Ibid

interpretation of 'sovereignty' in terms of responsibility is constantly gaining strength due to the ever increasing limits of international human rights as well as the expanding dimensions of the concept of human security and global environment. It is the new backdrop for the change in our understanding of the concept of sovereignty.

'Responsibility to Protect' is a global political commitment to check the war crimes, genocides, ethnic cleansing and other cruelties against humanity. The member states of the United Nations have committed to this responsibility. This doctrine has placed limits on the traditional approach to the national sovereignty and has refined its meaning. This doctrine has effectively given a solution to the issue of the competing claims of 'intervention' and 'state sovereignty' that was debated during the 1990s.

In the last decade, the importance of national security faded away and the security of individuals gained its ground. This shift was evident in the thinking of the international community as well. International human rights norms and national accountability towards its citizens was scrutinised internationally. As a result, 'territorial sovereignty' was reconceptualised in the background of the responsibility of a state that it has towards its individuals. And so, sovereignty in the form of a responsibility has gained the status of an international legal norm.

This doctrine has altered the traditional conception of sovereignty in a way so as to make it conditional. The members of the world community are reposed with some responsibilities and it is only after the fulfilment of these responsibilities that they can enjoy their sovereignty. It is a new international security and human rights norm which has indirectly altered the existing concept of sovereignty and it is still yet to influence it even more in the coming decades.

In regard to the environmental law jurisprudence, this philosophy has a larger role to play. From the times where a State had unconditional, absolute and unfettered rights to exploit their natural resources, howsoever detrimental to the global environment it may be, could be advocated to be excused on the grounds of territorial jurisdiction and territorial sovereignty to the times where the state is under a duty or responsibility towards the international community as a whole- there has been a major shift in the philosophy of the role of a state sovereignty in the global environment law regime.

"New understandings of the sovereignty principle and the severity of the environmental degradation issue may also give states less room for narrow interpretations of international environmental rights."[12]

The absoluteness of a state authority over its natural resources is now met with certain restrictions, or we may say, certain responsibilities. These restrictions have been recognised in various cases as well starting from the Trail Smelter Arbitration case[13], where the Court recognised that no state shall use its territory in a way that it causes harm to the territory or

[12] Ibid
[13] *United States* v. *Canada*, Arbitral Trib, 3 U.N. Rep. Int'l Arb. Awards 1905, 1941

property of another state. It was one of the earliest cases in the field of international environment law and it, for the first time, talked about the 'duty' of the states to 'prevent any transboundary environmental harm' by its acts. For the first time, a duty was imposed upon the states towards the international community.

Further, in the celebrated Corfu Channel case, the principle laid down in the Trail Smelter case or the principle of *sic utere tuo* was even more authoritatively upheld by the International Court of Justice. This case brought the concept of limited territorial sovereignty whereby states are under an obligation not to allow their territory for such use that may harm other states.

Many other cases of International Court of Justice, various tribunals, such as Lac Lanoux case[14], and decisions of municipal courts have introduced different interpretations in the concept of sovereignty as to accommodate the claims for protection of the global environment.

CONCLUSION

Sovereignty is one of the basic tenets of international law and politics. It has been the fundamental organising principle in the international law. In classical international law era, absolutist conception of sovereignty dominated the world politics. As the nations were newly born, or newly independent, they wanted to be doubly sure and secure about their independence and this is one of the reasons as to why emphasis was laid on territorial sovereignty. Now, this territorial sovereignty played an important role in the states interpreting their obligations under international treaties relating to the environment protection in a narrow sense.

Territorial sovereignty has long been used by the states to ace up their sleeves and to evade any obligations in the respect of global environment protection. This traditional construct of sovereignty has been, of late, improvised and reinterpreted as a responsibility whereby each sovereign state has certain responsibilities towards the world community. Initially, this philosophy of sovereignty as responsibility was recognised for the areas of international security and human rights' protection, but it can very well be interpreted for the protection of global environment- where every state would have certain obligations to protect the global environment, or at least not to degrade it by the activities within its territorial limits.

The environment law treaties should no longer lose their significance and purpose- for this; the existing concepts of sovereignty are to be reinterpreted in a better and holistic manner. Sovereignty principle can be reinterpreted to meet the ends of the protection of the global environment. Sovereignty can be interpreted in a way that the exclusive use of natural resources within a state shall not be detrimental to the environment of the other states. The concept of sovereignty can be reinterpreted in the backdrop of the principle of sustainable development and the philosophy of sovereignty as responsibility. In the modern international

[14] Affaire du Lac Lanoux (Spain v. Fr.), 12 R.I.A.A. (1957), digested in 53 American Journal of International Law. P.156, 1959

law era, the traditional international law should be progressively interpreted to protect the global environment.