

Emergence of “International Environmental Law”: as a new branch of International Public Law.”

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ABSTRACT

The purpose of this paper is to describe and analyze the challenges and opportunities for the development of international environmental law. This article is a brief description of "international environmental law" as a new branch of public international law. Further, it attempts to provide some knowledge on the sources and principles of international environmental law. Environmental problems in the contemporary world are amongst the most urgent that requires an immediate collective response from the states. Since the environment is a transboundary issue, a single country's effort is not enough, but all countries have to collaborate. In this regard, the solution may be twofold: either work together on having an international instrument or at least give similar concern to environmental problems in domestic environmental law. As we all are living together on this planet, the best way is, yet, working together on implementing international environmental law.

INTRODUCTION

The term "environmental law" has become widely used in domestic and international legal literature in recent decades. Due to economic growth and increasing technological advances that have caused significant environmental damage, the international community has been forced to take action, individually or collectively, to prevent and control the different kinds of pollution, as well as protect and conserve the environment.

Despite all the global efforts to develop binding and non-binding legal instruments, environmental concerns, and threats such as global warming, climate change, desertification, deforestation are not only remaining but have also increased. The ecological problems and dangers of today's world go beyond the predictions of the experts and scientists in Stockholm's first environmental Conference in 1972, which presented as a turning point in

international environmental law (Georgetown Law Library, 2010).

1. Definition of International environmental law

Although there are many definitions of "International environmental law," the description given by Alexander Kiss and Dina Shelton is significant. In their view, international environmental law is the newest branch of public international law, the aim of which is to protect the environment (Shelton, 1991). Some also define international environmental law as "a set of rules of international law which the purpose is to prevent environmental pollution and to protect the environment." While the above definitions are positive, they are not exhaustive.

It seems that international environmental law is the collection of non-binding (soft law) and binding (hard

law) legal instruments governing the relations between governmental and non-governmental actors for ecological protection.

2. Sources of International Environmental Law

Based on this definition, international environmental law is contained two types of non-binding (soft law) and binding (hard law) sources.

2.1. Non-binding Sources (soft law)

Soft law is not binding law, which including statements, resolutions, agendas, action plans, and the rules to guide governments without any sanctions.

However, these sources of law have a significant impact on the development of international environmental law. Most notables are the Stockholm Declaration of 1972, the UN Charter of Nature, adopted by the United Nations General Assembly in 1982, the Rio Declaration of 1992, the Johannesburg Declaration of 2002, and finally the Rio + 20, statement of 2012.

The UN General Assembly resolutions and declarations of the UN Environmental Programme (UNEP) and its Board of Governments could also be considered as non-binding instruments. These legal instruments, over time, have been recognized by states and International organizations and became acceptable norms and principals of international environmental law.

The core idea of the soft law approach is to identify the issues for the implementation of national law and to encourage states to agree to reform national legislation and commit themselves to resolve international and intergovernmental disputes.

Soft law is a non-binding legal instrument that does not infringe on the state's international responsibility. It gives states more freedom to adopt non-binding documents, and they are more willing to approve such legal instruments.

2.2. Binding Law (Hard Law)

Hard law, on the other hand, is binding rules and obligations which states are bound to respect them. The spirit of governing Article 38 of the Statute of the

International Court of Justice, recent developments of international environmental law, and the international judicial procedures, as well as principles, have shown the evolution of the sources of international environmental law.

Article 38 of the Statute of the International Court of Justice describes the judicial decisions and legal doctrines (opinions of legal scholars) as subsidiary sources for the determination of legal rules. (Khalatbari, Y., & Poorhashemi, A. 2019).

Since 1945, the Statute of the International Court of Justice, Article 38, generally, the sources of Public international law and, in particular, the sources of international environmental law, have developed extensively. However, it has failed to respond to the dynamics of contemporary international law developments.

Some of the sources that were not mentioned in the Statute of the Court could be considered as the new sources of international environmental law. Such sources could include binding resolutions issued by international organizations in environmental matters.

Expansion of international organizations, especially after World War II, and since then, the development of the role of the United Nations and its pillars led to the emergence of new sources of international law. For instance, mandatory resolutions on human rights have also considered as the new sources of international law. In international environmental law, the mandatory resolutions issued by the United Nations Security Council and the resolutions issued by the Conference of the Parties (COP) are also could be recognized as a hard law.

One of the most important environmental resolutions of the UN Security Council's Resolution is the resolution No.687, (Iraqi's invasion of Kuwait). The resolution provides environmental compensation measures (Council, 2002).

3. Basic Principles of International Environmental Law

One of the most influential models of the analysis of international environmental law is the analysis and

examination of its basic principles and concepts. This model can facilitate the understandings of numerous international environmental treaties. Today, almost all international environmental documents, binding or non-binding, contain or refer to these principles and concepts. In other words, these principles and concepts are the engines of the evolution of environmental law. The other benefit of international environmental principles is their application for all international communities (CHENG, 1953).

The principle of sovereignty is one of the basic principles of Public International Law. However, the concept of sovereignty is not absolute, and it is subject to a general duty not to cause environmental damage (Soto, 1996). As stated in the 1992 Rio Declaration: "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 under their own environmental and developmental 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" (UNEP, 1992).

Aforetime this principle has been part of international environmental law, and there were a number of domestic laws that practiced sovereignty as a principle. The noticeable examples were Iran, France, and ancient Rome. The "principle of sovereignty" became widely known in the 1947 dispute between Canada and the United States over the Trail Smelter case: "*Governments should not use their land in such a way as to cause harm to other countries*" (Trail smelter case, United States-Canada, 1941). Basically, the sovereignty of states is two-fold; to recognize the sovereignty of states in the use of their natural resources and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or areas beyond the limits of national jurisdiction.

International cooperation is another principle of international law, which is the basis of the United Nations Charter¹. The principle is also one of the features of

contemporary international law, which is mandatory and has required by the customary international law.

Due to the transboundary nature of the environment, international environmental law appears to be more prominent because it is an indispensable instrument to protect our environment. It should be reiterated that protection of the environment and dealing with environmental hazards are beyond the power of only one state. The cooperation between states as an international community is required for effective protection of the global environment.

The principle of cooperation is based on the rules of *Erga Omnes*. As opposed to public international law, international environmental law is not founded on the principles and regulations of mutual relations.

In common law, it is one of the old principles of general international law. Based on this principle, states are obliged to cooperate with each other in all circumstances, in good faith, to protect the environment. It can be argued that the principle of cooperation is based on universal obligations and is rooted in customary international law. Therefore, all states are bound to abide by this obligation according to international law.

Precautionary Principle. This principle imposes a duty on states to avoid environmental harm. Under this new rule, a state may be under the obligation to take precautionary measures to prevent damage within its own jurisdiction (Singh, 1986). States should take precautionary measures based on international treaties, statutes of organizations and many other legal instruments. In doing so, global conferences and resolutions of the conferences have also been taken into consideration.

According to this principle, again, what states have to do to take their obligation to avoid harming the environment and give emphasis on precautionary measures. (both in domestic and international levels). In order to ensure the applicability of this principle, states should establish authorization procedures, commitments to environmental

¹Charter of the United Nations was signed on 26 June 1945, in San Francisco, at the conclusion of the United Nations Conference on International Organization, and came into force

on 24 October 1945. The Statute of the International Court of Justice is an integral part of the Charter. For more information: <https://www.un.org/en/charter-united-nations/>

standards, pathways to access information, use of penalties, and the need to carry out environmental impact assessments (Soto, 1996).

Principle of notification. This principle is one of the basic principles that could be traced back to the International Court of Justice in 1949 (Corfu Strait case). In which the International Court of Justice ruled that the Albanian government was obliged to inform the captain of the English ship of the presence of landmines in Albanian territorial waters (Corfu Strait case, 1947). This principle is interpreted as if the government were aware of the danger. If it is likely to put other states in a state of emergency, it is obliged to alert other states to that danger. Apart from emergencies, governments should identify the effects of environmental activities within their jurisdiction and notify other governments, even if these activities are carried out by institutions or non-governmental organizations.

Principle of prevention. According to the experiences, the prevention of environmental hazards is regarded as the "golden rule" for economic and ecological reasons. For example, extinction of plant or animal species, soil erosion, loss of human life and leakage of pollutants into the sea create irreparable damage, in a way that, even when the damage can be compensated, restoring it to its former state is not possible.

4. Basic concepts of international environmental law

Just as the basic principles of international environmental law, the concepts also have had a profound impact on the substantive and formative development of this field of law. If we take "basic principles" that are mandatory (both customary and contractual), they are undoubtedly "basic concepts" in the field of soft law.

One of these concepts is sustainable development, which is one of the main goals of formulating and developing international environmental law. Environmental rights, on the other hand, are important tools for sustainable development monitoring and management. Sustainable development means a development process that, while protecting the environment and taking into account the needs of future generations, meets the needs of the present generation. The most well-known definition of sustainable development was presented by the 1987

Brundtland Commission in a report entitled "Our Common Future," which cited sustainable development as "meeting current needs without forgetting the needs of the next generation"? (Commission, 1987).

The concept of the common heritage of humanity in international law is mentioned in three areas:

- Geographical area (Washington 1959 Convention on the Antarctic).
- Environmental and Human Realm (UNESCO World Declaration on the Human Genome 1997).
- Cultural Heritage (UNESCO 2001 Convention on Underwater Cultural Heritage)

The concept of the rights of future generations, which came from the Stockholm Conference on International Environmental Law, is derived from two principles:

1. Human life and human dependence on the earth's natural resources, including the ecological process and as a consequence the integral dependency of all generations on environmental conditions;
2. Humans are always making changes in the environment. As a result, it has been argued that the people of this generation have a crucial obligation to protect the planet from guaranteeing the rights of future generations.

The concept of Common but Differentiated Responsibilities (CBDR) was mentioned in Principle 7 of the Rio Declaration at the first Rio Earth Summit in 1992. According to this principle, states shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the earth's ecosystem. In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. Based on this concept, the developed countries have the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command (UNEP, Rio Declaration of Environment and Development, 1992).

4. The Characteristics of International Environmental Law

Although international environmental law is one of the subdivisions of Public international law and has been developed in accordance with its principles and rules, it has its own features. Here are some differences:

A. Diverse sources of international environmental law

Public international law's sources are divided into primary and secondary sources under Article 38 of the Statute of the International Court of Justice. Vice versa, in international environmental law, in addition to the classic sources mentioned in Article 38, it could be considered some new sources. For instance, mandatory resolutions of international organizations and the United Nations Security Council's resolutions are considered to be the sources as well.

B. The importance of non-binding sources

Generally, public international law is based on the binding rules (hard law) with guarantees and sanctions. However, in international environmental law, the role of non-binding sources has key importance to the development of this branch of law.

In this perspective, a non-binding Declaration of 1972 is the turning point of international environmental law. In fact, due to the absence of enforcement mechanisms, using non-binding rules for environmental protection is significant. For this reason, states prefer to deal with non-binding sources rather than binding ones.

***Erga Omnes* rules versus *Inter-part* rules**

Basically, the rules of *Erga Omnes* are based on the rules of customary and treaty law. Usually, public international law is founded on the *Inter part* and the principle of reciprocity and mutual benefit. In public international law, preference is given to the rules of the inter part, while international environmental law is usually based on *Erga Omnes* rules, the international obligations of states. Therefore, the requirements of these two disciplines are different.

C. The tendency for soft actors

Although states are considered as major actors and subjects in public international law, international environmental law has also recognized the non-governmental actors. Therefore, the role of NGOs in protecting the environment and achieving sustainable development is important. For this reason, various international documents have identified the participation of these actors. For example, the ratification of the 1998 Aarhus Convention on Access to Information, Public Participation in Decision-Making, and Access to Courts in Environmental Matters is reflecting the tendency of international environmental law to soft law and non-governmental actors.

D. Soft responsibility

The international responsibility of states in international environmental law, unlike public international law, is in keeping with the principle of international cooperation with a preventive approach to environmental protection. Thus, alongside classical legal systems based on subjective and objective of responsibility, the tendency for soft responsibility is also evolving. Increasing the scope of treaties to compensate for environmental damage and establishing various mechanisms for environmental compensation through the establishment of funds and promotion of "insurance contract" is seen as a soft liability approach. In this context, international environmental law does not seek to condemn a state for fault or wrongdoing, but rather it tries to establish precautionary measures and stop damages and, finally, to impose compensation for the environmental damage.

E. Convention Mechanism-Framework

The Convention-Framework Mechanism has been established for two reasons in international environmental law: First, states have not yet reached a full political consensus to cooperate with each other in environmental issues. Secondly, states come to agree on their general framework in the convention and formulate future agreements in the form of upcoming protocols.

Conclusion

Despite the development of international environmental law, there have been different serious obstacles. One of the major obstacles is the unwillingness of states to delegate sovereignty or restrict it to the benefit of environmental organizations. Another limitation that is facing in this field of law is conflicts of interest between developing and developed countries in enforcing international environmental law and regulations. Despite the recognition of the common but differentiated responsibility principle in many sources of international environmental law, the conflict between developed and developing countries is significant both conventional and institutional aspects (Poorhashemi, A, & Arghand, 2013).

The wide range of environmental issues has also hampered the development of international environmental rules and regulations for each of the environmental sectors and zones. Therefore, in order to consider the effective implementation of international environmental law, there is an urgent need for long-term planning for sustainable development, development of scientific and technical capabilities, transfer and exchange of technology, and recognition of the NGOs' role for global environmental protection.

In addition, insufficient development of human knowledge on environmental issues adds to these limitations. The costly environmental protection and lack of financial resources, especially for developing countries, are other obstacles for the future development of international environmental law.

In response to these needs and requirements, international environmental law could reduce the legal gaps caused by the multiplicity of environmental legal documents. In addition, one of the pathways to reduce the existing challenges for protecting the global environment is to adopt an "internationalization" approach to environmental protection and apply the basic principles and concept of international environmental law, as mentioned above.

Therefore, the conceptual and substantive development of international law might be considered as one of the most effective solutions to overcome the constraints and obstacles to international environmental law and, on the

other hand, to "internationalize" environmental protection.

The "institutionalization" of international environmental law also may help the effectiveness of contemporary environmental law. The institutionalization of international law means the establishment and expansion of international organizations and institutions for the effective and efficient protection of the global environment. Also, public participation in national and international levels, including public participation in environmental decision-making processes, the right to information concerning the environment and activities affecting it, and the right of access to justice are crucial in this matter.

Besides, the criminalizing of environmental degradation as "crime against humanity" through the recognition of "crime against future generations" could be considered as a sign of progress for the future development of international environmental law.

In the structural dimension, the reform of the United Nations Environment Program, which is currently limited in capacity building, into a "global organization for environmental protection" with the necessary authority and power could be one step forward to the effective role of the international organization for global environmental protection.

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