

Customary Law and Pollution

International Law

Local Action Theme: Pollution

Keywords: Transboundary Pollution | *Opinio Juris* | International Court of Justice

Time: Instructor Prep: 1 hour | Seminar: 1-2 class slots

Learning Outcomes:

- The student can list the key principles and concepts of international customary law
- The student can provide examples of how international customary law can be used in cases of transboundary pollution
- The student can discuss the opportunities and challenges when using international customary law to resolve disputes over transboundary opportunities

INTRODUCTION

This teaching guide is meant to be easily integrated into existing classes in International Law. This guide is created for teachers and professors interested in including environmental issues as examples for students to understand the theory of international law. This particular teaching guide uses **customary law** surrounding **transboundary pollution** to aid students in their comprehension of the sources of international law. It also hopes to create an understanding of the vital role international law can play in the creation of a sustainable future for our planet.

CONCEPTS - CUSTOMARY INTERNATIONAL LAW

Customary international law is a concept arising from established international practices that are not part of formal conventions or treaties. It stems from a mutually agreed sense of legal obligation and often fills the gaps between treaties. Despite not being formal, it is recognised in international courts and tribunals and is seen as binding for states and in some cases non-state actors. Key principles that are often used in customary international law include:

- *The principle of prevention* - which allows action to be taken to protect the environment at an early stage
- *The principle of cooperation* - which highlights countries have the duty to cooperate
- *The principle of due diligence* – which highlights that states need to act diligently and with foresight when it comes to activities in their jurisdiction that may cause significant harm to the environment
- *The precautionary principle* – stipulates that a state is required to take action to prevent environmental harm, such actions need to be taken—if possible—before damage actually has occurred

An essential aspect of customary international law is the concept of *Opinio Juris*. It creates the distinction between practices that are done out of courtesy and tradition and practices that are carried out because of legal obligation. *Opinio Juris* is a subjective element where a court will look at whether a state follows a practice actively believing it is required by international law, or just by tradition, habit or coincidence. In Article 38(1) of the International Court of Justice (ICJ) Statute one can read that in international law disputes, after considering

conventions and treaties, the court will also look at *international custom* and will accept it as evidence of a general practice as accepted by law.

Another key concept is that of *state practice*. This is the actual behaviour of a state as analysed over time and compared to the other states. Combining the two concepts, state practice shows what states do, whereas *Opinio Juris* shows why they do it.

A good example to introduce these concepts are the North Sea Continental Shelf Cases from the ICJ in 1969. In the final judgments, paragraph 73 outlines the time element of state practice, while paragraph 77 essentially establishes *Opinio Juris*.

POLLUTION BASICS

In a sustainability context, pollution can be defined as the introduction of man-made contaminants into the natural environment that cause adverse changes in organisms. Pollution is diverse and includes chemicals (for example pesticides or residues of drugs), particles (for example, microplastics or nanoparticles), or energy (for example, noise, heat, or light). Sometimes these pollutants cause a direct lethal effect, resulting in the death of an organism. But, more commonly, there are sublethal effects, for example, impacts on the development, reproduction, or immune system of organisms.

A core concept related to pollution is risk assessment: the process of determining the risk of pollutants for humans and the environment. Scientists use a range of tools to do this, including lab and field studies. The data collected in risk assessment can be used to protect human health and the environment.

For ease, we have developed several videos that provide basic information on these issues which can be assigned to students. Check out the video's on local-actions.com

CONNECTING THE DOTS

In this lesson plan we will focus on **transboundary pollution** or pollution that crosses national borders. When it comes to transboundary pollution, customary international law plays a crucial role in managing and mitigating environmental impacts that cross national borders. Here are a few examples that illustrate how customary international law ties into cases of transboundary pollution:

- A. The Trail Smelter Case (United States vs. Canada):** This is a classic example where the United States claimed that fumes from a smelter in British Columbia, Canada, caused damage to agriculture and forests in Washington State, USA. The arbitration tribunal held that under customary international law, no state has the right to use its territory to cause harm to the territory of other states.
- B. The Chernobyl Disaster:** The nuclear accident at Chernobyl had widespread effects across Europe, leading to the development of the principle that states must ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or areas beyond national jurisdiction.

- C. **The 1972 Stockholm Declaration:** Although not a binding treaty, the principles laid out in this declaration, particularly Principle 21, reflect that states have the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states. This was

- D. **The 1975 Statute on the River Uruguay:** an international agreement between Uruguay and Argentina that was signed to establish the joint management and use of the River Uruguay, which serves as a natural border between the two countries. The statute became essential in a conflict that arose in the early 2000's when Uruguay gave permission to build a pulp mill at the river Uruguay. The mill was alleged to be polluting the river and Argentina took the case to the ICJ claiming a breach of the 1975 statute.

- E. **The 1992 Rio Declaration:** Similar to the Stockholm Declaration, Principle 2 of the Rio Declaration reinforces that states have the responsibility to ensure that their actions do not cause environmental harm to other states.

These examples show that customary international law evolves through state practice and *Opinio Juris*, reflecting the international community's expectations regarding state behaviour in preventing and addressing transboundary pollution. It's a dynamic process that adapts to new environmental challenges and the need for cooperation among nations to protect the global environment.

LOCAL ACTIONS AND IN-CLASS ACTIVITIES

Local Action: Where does all your plastic go?

- Students first keep track of the plastic waste they produce for one week. This can be a simple spreadsheet.
 - Have them list the plastic item and how they disposed of the waste (was it thrown in the recycling bin, in the general waste, or accidentally lost to the environment).
- Next, students investigate where their plastic waste will end up ultimately: what will stay in their own country (for example for recycling or incineration)? What plastic will be exported for recycling (and where)? Is there a proportion that enters the environment, and if so where will it end up (in our oceans, on land)?
 - Have students dig into this: a lot of plastic that is collected for recycling in high-income nations does ultimately end up in our environment.
- Finally, reflect on how plastic pollution links to transnational pollution and on ways they can limit their plastic footprint.

In-class activity 1: Case Studies and Analysis (30 minutes):

- Use the case studies listed above as examples of transboundary pollution incidents
- Divide students into small groups and assign each group a case study.
- Instruct students to research and analyse how customary international law principles or concepts have been applied or could be applied to resolve the transboundary pollution issues in their assigned case study.
- Each group presents their findings, discussing the customary law principles or concepts involved and the challenges faced in resolving the pollution problem.

In-class activity 2: Customary Law Principles in Action (25 minutes):

- Provide a brief overview of key customary international law principles related to transboundary pollution (the principles of prevention, cooperation, precautionary principle and due diligence).
- Divide students into groups and assign them to a specific principle.
- Instruct students to research real-world examples where the assigned principle has been applied in transboundary pollution disputes.
- Groups presents their findings, discussing the effectiveness and limitations of applying customary law principles in addressing transboundary pollution.

RESOURCES

North Sea Continental Shelf Judgment, I.C.J. Reports 1969, p. 3

Statute of the River Uruguay. Signed at Salto on 26 February 1975. Entered into force on 18 September 1976. United Nations Treaty Series, vol. 1295, I-21425.

Declaration of the United Nations Conference on the Human Environment. Stockholm, 5-16 June 1972. United Nations Document A/CONF.48/14/REV.1.

Rio Declaration on Environment and Development. A/CONF.151/26 (Vol. I). United Nations Conference on Environment and Development. Rio de Janeiro, 3-14 June 1992.

Trail Smelter Arbitration (United States v. Canada). Arbitral Trib., 3 U.N. Rep. Int'l Arb. Awards 1905 (1941).