The *Sic Utere* Principle as Customary International Law: A Case of Wishful Thinking?

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INTRODUCTION

It has been consistently maintained by a host of international publicists that there exists a rule of customary international law which prohibits all States from using their territory in a manner which causes harm or injury to other States.[1] Expressed as the *sic utere* principle,[2] or the principle of

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1 See generally: Patricia Birnie and Alan Boyle, *International Law and the Environment* (Oxford, New York: Clarendon Press, Oxford University Press, 1992), 89; I. De Lupis, *International Law and the Independent State* (2nd ed., England: Gower Publishing Company Limited, 1987), 92; G. Goldenman, 'Adapting to Climate Change: A Study of International Rivers and their Legal Arrangements' (1990) 17 *Ecology Law Quarterly* 741, 779; Gunther Handl, 'The Environment: International Rights and Responsibilities' (1989) 74 *American Society of International Law Proceedings* 223, 224; T. Iwama, 'Emerging Principles and Rules for the Prevention and Mitigation of Environmental Harm', in Edith Weiss (ed.), *Environmental Change and International Law: New Challenges and Dimensions* (Tokyo: United Nations University Press, 1992), 108; A. Kiss and D. Shelton, *International Environmental Law* (New York, London: Transnational Publishers, Graham & Trotman, 1991), 106; R. Malavia, 'State Responsibility for Environmental Damage beyond Territorial Limits: A Legal Analysis' (1987) 27 *The Indian Journal of International Law* 30, 36; L. Beesley, 'The Canadian Approach to International Environmental Law' (1973) 11 *The Canadian Year Book of International Law* 3; Louis Sohn, 'The Stockholm Declaration on the Human Environment' (1973) 14 *Harvard International Law Journal* 423, 493; and J. McLoughlin and E. Bellinger, *Environmental Pollution Control. An Introduction to Principles and Practice of Administration* (London, Boston: M. Nijhoff Publishers, 1993), 162.

2 *Sic utere tuo ut alienum non laedas*: use your property in such a manner as not to injure that of another.

good neighbourliness,[3] the acquiescence by many publicists in readily accepting its customary legal status has resulted in the principle receiving only a limited critical evaluation of its legal status. The majority of publicists prefer instead to accept it *ipso facto* as customary international law, predominantly because other publicists are of that view. Environmental awareness or concern for the environment in recent years has seen a plethora of publicists asserting the *sic utere* principle as one basis for attaching international responsibility to States for harm which they may cause to the environment of other States. It is because of this heightened awareness for the environment, and the potential for future dispute, that there exists an urgent need to re-examine the very existence of this rule under customary international law. It is the object of this article to show that contrary to the assertions of many publicists, the evidence on which they rely as establishing the *sic utere* principle as a rule of customary international law does not permit this conclusion, and that the principle remains, at best, merely a moral obligation.

TREATY PROVISIONS AS A SOURCE OF CUSTOMARY INTERNATIONAL LEGAL PRINCIPLES

Within most municipal legal systems, laws will usually be derived from a supreme law-making authority, either in the form of legislative enactments or from authoritative judicial declarations and rulings.[4] Whether or not a legal rule exists in a municipal system can normally be determined from an examination of definite sources of law, and it is this feature which makes municipal legal systems relatively complete.[5] However, the absence of a legislature or law-making authority within the international legal framework makes the creation of international law a much more complex process. The paramountcy of State sovereignty ensures that rules of international law will be created only with the consent of the States which are bound by those rules.[6] Such consent may be express where, for example, a State assumes international obligations by entering into an international treaty or convention. Consent may also be implied from the practice of States.[7] It is this consensual nature of inter-

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3 Both terms are interchangeable.

4 G.M. Danilenko, *Law-Making in the International Community* (Dordrecht, Boston: M. Nijhoff Publishers, 1993), 7; Ian Brownlie, *Principles of Public International Law* (4th ed., Oxford, New York: Clarendon Press, Oxford University Press, 1990), 1; and Arthur M. Weisburd, 'Customary International Law: The Problem of Treaties' (1988) 21 *Vanderbilt Journal of Transnational Law* 1, 2.

5 Weisburd, *supra* n. 4 at 85.

6 Richard Levy, 'International Law and the Chernobyl Accident: Reflections on an Important but Imperfect System' (1987) 36 *University of Kansas Law Review* 81, 85; Danilenko, *supra* n. 4 at 106; and Oscar Schachter, *International Law in Theory and Practice* (Dordrecht, Boston: M. Nijhoff Publishers, 1991), 11.

7 *Ibid.*

national law which has inhibited its overall development, and resulted in continuing debate within the international legal community as to what obligations in fact exist as rules of international law.[8]

The existence of the *sic utere* principle as a rule of international law is one obligation which is far from certain.[9] It is recognised that there exist several multilateral treaties which do specifically prohibit the State parties to those conventions from using their territory in a manner which causes harm to the territory of other States. Typical of such provisions is Article 194(2) of the *Convention on the Law of the Sea* which provides:

> States shall take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment, and that pollution arising from such incidents or activities ... does not spread beyond the areas where they exercise sovereign rights in accordance with this Convention.

Examples formulated in similar terms can readily be found in several other international treaties and other international instruments.[10] Treaties do impose legal obligations on States' parties to them, whereas other instruments, including various declarations and charters, will generally impose only moral obligations.[11] Where the obligation is contained in a convention, then obviously State responsibility will arise where a State which is a party to the particular convention commits an act or omission in violation of the obligation.[12]

The role played by custom in sometimes extending the application of rules contained in a treaty beyond the contracting States is a well-recognised process in international law.[13] A treaty concluded between States may formulate a rule which, if subsequently generally accepted by third States, can become binding on those States as a rule of customary interna-

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[8] Levy, *supra* n. 4 at 85.

[9] K. Hakappa, *Marine Pollution in International Law* (Helsinki: Suomalainen Tiedeakatemia, 1981), 136; Johan Lammers, *Pollution of International Watercourses — Search for Substantive Rules and Principles of Law* (The Hague, Boston: M. Nijhoff Publishers, 1984), 570; B. Conforti, 'Do States Really Accept Responsibility for Environmental Harm', in F. Francioni and T. Scovazzi (eds), *International Responsibility for Environmental Harm* (London: Graham & Trotman, 1991), 179–80; Levy, *supra* n. 6 at 101; and Schachter, *supra* n. 6 at 364–5.

[10] See, for example: *Convention on Long-Range Transboundary Air Pollution* (Geneva, 13 November 1979); *Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matter* (London, 29 December 1972); *World Charter for Nature* (G.A. Res.37/7, 17 U.N.Doc. A/37/51 1983); *Stockholm Declaration of the United Nations Conference on the Human Environment*, adopted 16 June 1972, U.N. Doc.A/Conf.48/14; *Charter of Economic Rights of States* (G.A. Res. 3281(XXIX) 1974).

[11] Brownlie, *supra* n. 4 at 14; Martin Dixon, *Textbook on International Law* (2nd ed., London: Blackstone Press, 1993), 39.

[12] The breach by a State of its obligations under a treaty will render that State responsible for that violation. See, generally, Brownlie, *supra* n. 4 at 603–21.

[13] Karol Wolfke, *Custom in Present International Law* (2nd ed., Dordrecht, Boston: M. Nijhoff Publishers, 1993), 69; Michael Akehurst, *A Modern Introduction to International Law* (6th ed., London, Boston: Allen & Unwin, 1987), 26; and Brownlie, *supra* n. 4 at 12.

tional law.[14] The *Declaration of Paris* (1856) for example, concerning neutrality in maritime warfare, and the *Genocide Convention* (1948) prohibiting absolutely acts of genocide are both generally considered as having generated commensurate rules of customary international law.[15]

However, in no case will a treaty itself impose legal obligations on States who are not parties to it, because all treaties are the outcome of the active will of the States' parties to them, creating exclusive rights and obligations binding only upon those States.[16] A treaty, especially those of a multilateral character with generalisable provisions, may generate separate rules of customary international law which will become binding on third States, but only where the conditions by which customary law is formed have been fulfilled. The most well-known examination of this process was conducted by the International Court of Justice (ICJ) in its decision in the *North Sea Continental Shelf case*, where the court observed that:

> ... [the] process is a perfectly possible one and does from time to time occur: it constitutes indeed one of the recognised methods by which new rules of customary international law may be formed.[17]

Accordingly, the mere fact that the *sic utere* principle exists as an obligation in any number of treaties does not necessarily mean that it exists concurrently as a rule of customary international law. The generation from treaty provisions of rules of customary international law is a result which should 'not lightly be regarded as having been obtained'.[18] There is a tendency amongst publicists who flagrantly assert the existence of the *sic utere* principle as a rule of customary international law to rarely justify their assertions by recourse to the customary law-making process, preferring instead to rely for their authority on other publicists who also make this claim. If, as it is submitted, those authors who assert the customary legal status of the rule are incorrect in their assertion, then this superficial method of scholarly deduction is fatally flawed because it can only serve to perpetuate the error. It is therefore necessary to conduct an examination of the process by which a treaty provision can crystallise into a rule of customary international law, and apply that process to the *sic utere* rule, because only in this way can a more conclusive determination be made as to the customary status of the *sic utere* principle.

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[14] Michael Akehurst, 'Custom as a Source of International Law' (1974–75) 47 *The British Yearbook of International Law* 1, 3; David H. Ott, *Public International Law in the Modern World* (London: Pitman, 1987), 17; Dixon, *supra* n. 11 at 28; Brownlie, *supra* n. 4 at 11; Akehurst, *supra* n. 13 at 26; and Wolfke, *supra* n. 13 at 71.

[15] Brownlie, *supra* n. 4 at 12.

[16] The *Vienna Convention on the Law of Treaties*, 1969, 1155 UNTS 331, Art. 34 provides: 'A treaty does not create either obligations or rights for a third State without its consent.' See, generally, Danilenko, *supra* n. 4 at 58; Wolfke, *supra* n. 13 at 68; Dixon, *supra* n. 11 at 22; and Brownlie, *supra* n. 4 at 12.

[17] (1969) ICJR 42.

[18] *Ibid.*

THE *SIC UTERE* PRINCIPLE AND THE CUSTOMARY INTERNATIONAL LAW FORMATION PROCESS

In its most authoritative pronouncement on the process by which treaty-based provisions can generate rules of customary international law, the ICJ observed in the *North Sea Continental Shelf case, inter alia*:

> [In] the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule, an indispensable requirement would be that within the period in question, short though it may be, State practice ... should have been both extensive and virtually uniform in the sense of the provision invoked; — and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved.[19]

The requirements set out by the court are an obvious application of Article 38(1)(b) of the *Statute of the International Court of Justice* which compels the ICJ, in determining disputes before it, to apply 'international custom, as evidence of a general practice accepted as law'. Thus it is clear, both from the *North Sea Continental Shelf case* and from Article 38(1)(b), that the generation of rules of customary international law are dependent on two essential elements: the general practice of States (State practice), and the recognition by those States that such practice is obligatory (*opinio juris*). Absence of either element will inhibit a finding that a rule, treaty based or otherwise, has crystallised into a rule of customary international law.[20]

Various examples of State practice are regularly relied upon by publicists to support their claims to the existence of the *sic utere* principle in customary international law. Unquestionably, the most often cited example, which many publicists assert is a codification of the customary rule prohibiting transboundary harm,[21] is Principle 21 of the *Stockholm Declaration* which provides:

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[19] *Id.* 44.

[20] *Lotus case* (1927) PCIJ Ser. A No. 10, pp. 28, 60, 96–97; *Asylum case* (1950) ICJR 276–7; *U.S. Nationals in Morocco case* (Second Phase), (1952) ICJR 200; *Nicaragua v United States* (Merits), (1986), ICJ Reports, 98; Akehurst, *supra* n. 14 at 43; Weisburd, *supra* n. 4 at 23; Brownlie, *supra* n. 4 at 5–11; Akehurst, *supra* n. 14 at 31.

[21] See, for example: Birnie and Boyle, *supra* n. 1 at 46; Gunther Handl, 'Environmental Security and Global Change: The Challenge of International Law', in W. Lang, H. Neuhold and K. Zemanek (eds), *Environmental Protection and International Law* (London, Boston: M. Nijhoff Publishers, 1991), 86; A. Kiss, 'The International Protection of the Environment', in R. StJ. Macdonald and D.M. Johnston (eds), *The Structure and Process of International Law: Essays in Legal Philosophy, Doctrine and Theory* (The Hague, Boston: M. Nijhoff Publishers, 1983), 1075; Kiss and Shelton, *supra* n. 1 at 40; Kathy Leigh, 'Liability for Damage to the Global Commons' (1993) 14 *The Australian Yearbook of International Law* 129, 135; Sohn, *supra* n. 1 at 493; S. Williams, 'Public International Law Governing Transboundary Pollution' (1984) 13 *University of Queensland Law Journal* 112, 130; José Sette-Camara, 'Pollution of International Rivers' (1984) *Recueil Des Cours* 116, 164.

> States have ... 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.[22]

Although, because of its declaratory status, it imposes no legally binding obligations on signatory States, much emphasis has been placed on the fact that of the 113 States represented at the Stockholm Conference, 112 States signed the Declaration and the remaining State abstained, suggesting substantial State acceptance of the obligations which it imposed.[23] This, some publicists contend, is a clear example of the practice of States in acknowledging the existence of a *sic utere* obligation, and confirms, or at least indicates, that the principle is a rule of customary international law.[24] This assertion is fatally flawed, however, because even if it evinces extensive State practice, it is not evidence of that other essential element to customary international law — *opinio juris*. The non-binding nature of the *Stockholm Declaration* clearly does not permit a conclusion that the States, when signing the Declaration, held a belief that the obligations contained therein were legal obligations which had to be observed.[25] Therefore, the conclusion that the *Stockholm Declaration* codified a pre-existing customary international *sic utere* obligation cannot be substantiated upon close examination.[26]

Other publicists assert that the *sic utere* principle as expressed in the *Stockholm Declaration*, if not itself a codification of customary international law, has by its inclusion in numerous other international instruments satisfied the stringent requirements for the formation of customary international law.[27] It would appear that for these publicists, the inclusion of a *sic utere* provision in an international instrument is sufficient *per se* to establish both State practice and *opinio juris*, and that nothing further is required. If the mere repetition of a principle in a series of international instruments were sufficient to establish the State practice element in the customary international law formation process, this conclusion might be correct, but the process is not that simple.

The court in the *North Sea Continental Shelf case* was explicit in ruling that for the formation of a new rule of customary international law from

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[22] *Supra* n. 10.

[23] Birnie and Boyle, *supra* n. 1 at 91; and Kiss and Shelton, *supra* n. 1 at 38.

[24] See *supra* n. 21.

[25] Schachter, *supra* n. 6 at 364.

[26] Andrew Darrell, 'Killing the Rhine: Immoral, But is it Illegal?' (1989) 29 *Virginia Journal of International Law* 421, 447; and Leo Bouchez, 'Rhine Pollution: International Public Law Aspects' (1981) 9 *International Business Lawyer* 53, 54.

[27] Meng Qing-nan, *Land-Based Marine Pollution: International Law Development* (London, Boston: Graham & Trotman, 1987), 67–68; B.D. Smith, *State Responsibility and the Marine Environment: The Rules of Decision* (Oxford, New York: Clarendon Press, Oxford University Press, 1988), 74–75; John Ntambirweki, 'The Developing Countries in the Evolution of an International Environmental Law' (1991) 14 *Hastings International and Comparative Law Review* 905, 909; Birnie and Boyle, *supra* n. 1 at 91; and Kiss and Shelton, *supra* n. 1 at 130.

a treaty provision, it would be essential that 'State practice ... should have been both extensive and virtually uniform in the sense of the provision invoked'.[28] If, for example, the majority of all States were a party to some multilateral treaty which contained an obligation prohibiting transboundary harm, then it could be argued that such widespread participation displayed extensive and uniform State practice.[29] The practice would be extensive because of the number of States accepting the obligation, and uniform because they would all be accepting the same obligation.

Unfortunately, there does not exist in contemporary international law any multilateral treaty containing the *sic utere* obligation which enjoys sufficient state participation permitting a conclusive finding of extensive and uniform State practice. The absence of such a treaty has compelled publicists to rely greatly on the obligation being contained in an assortment of bilateral and multilateral treaties enjoying only minimal State participation, as a basis for proving the extensive and uniform State practice element.[30] While this might adequately prove that there exists an extensive practice by States in assuming the obligation not to cause transboundary pollution, it does not necessarily show that this practice has been uniform, a point conveniently ignored by publicists. It is argued that a closer analysis of the treaties which publicists readily rely upon in support of the existence of *sic utere* does not indicate extensive or uniform State practice, but only a limited form of State practice.

So far as concerns the uniformity of State practice, this is very much a matter of appreciation allowing considerable flexibility in determining it.[31] Complete uniformity is not required, but *substantial* uniformity is.[32] In its leading pronouncement on the requirement for uniform State practice, the ICJ observed in the *Asylum case:*

> The party which seeks to rely on a custom ... must prove that this custom is established in such a manner that it has become binding on the other party ... that the rule invoked ... is in accordance with a *constant* and *uniform* usage practised by the States in question.[33]

In the *Asylum case,* the court refused to make a finding that there existed in customary international law a rule by which States could grant

[28] (1950) ICJR 41.

[29] As the ICJ recognised in the *Continental Shelf case,* 'a very widespread and representative participation in the convention might suffice of itself, provided it included the States whose interests were specially affected...' (p. 42).

[30] See, for example, the survey conducted by Lammers, *supra* n. 9, in which extensive analysis was given to the many and varied bilateral conventions governing international watercourses to deduce principles of law.

[31] Brownlie, *supra* n. 4 at 5.

[32] *United Kingdom v Norway, Fisheries case* (1951) ICJR 131; *U.S. Nationals in Morocco case* (1952) ICJR, 200; *North Sea Continental Shelf case* (1969) ICJR, 42; and Ott, *supra* n. 14 at 16.

[33] (1950) ICJR 276–7.

diplomatic asylum because:

> ... there existed so much uncertainty and contradiction, so much fluctuation and discrepancy in the exercise of diplomatic asylum ... so much inconsistency in the rapid succession of conventions on asylum, ratified by some States and rejected by others, and the practice has been so much influenced by considerations of political expediency ... that it is not possible to discern in all this any constant or uniform usage, accepted as law.[34]

These observations by the court are especially relevant to the claim that the *sic utere* principle exists independent of its treaty formulations as a rule of customary international law. The court's analysis as to why the right to grant diplomatic asylum could not exist in customary international law can, almost verbatim, be repeated in respect of the *sic utere* principle. There does exist much uncertainty and contradiction, fluctuation and discrepancy in the obligation not to cause transboundary harm, and there is considerable inconsistency in the rapid succession of conventions which include the obligation.

Reference was made previously to Article 194(2) of the *Convention on the Law of the Sea* which prohibits States from causing transboundary damage by pollution to other States and their environment.[35] A similar prohibition has been included in several other treaties, including the *Convention for the Prevention of Marine Pollution by Dumping from Ships and Aircraft*,[36] the *Convention on Long-Range Transboundary Air Pollution*[37] and the *Convention on the Prevention of Marine Pollution by the Dumping of Wastes and other Matter*.[38] The common element in all these treaties is an obligation not to cause transboundary *pollution*, as opposed to the more general formulation of the *sic utere* rule as an obligation not to cause harm or injury to other States.

Other instruments do contain a more traditionally general formulation of the *sic utere* rule. Article 30 of the *Charter of Economic Rights and Duties of States*,[39] for example, imposes on States the 'responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States'. There are also several Declarations and General Assembly Resolutions which have adopted the *sic utere* principle within their terms.[40]

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[34] *Ibid.*

[35] *Id.* 3.

[36] Oslo, 15 February 1972.

[37] Geneva, 13 November 1979.

[38] London, 29 December 1972. See also *Vienna Convention for the Protection of the Ozone Layer* (1979) 18 ILM 1442; and *United Nations Framework Convention on Climate Change* (1982) A/AC.237.L.14.

[39] G.A. Res. 3281(XXIX) (1974).

[40] These include: *The World Charter for Nature* (1982), Principle 21(d); *Rio Declaration* (1992), Principle 2; Article 3(1) of the *Montreal Rules of International Law Applicable to Transfrontier Pollution*; and *Principles of Conduct in the Field of the Environment for the Guidance of States in the Conservation of Natural Resources*, G.A. Res. 3129 (XXVIII) (1978).

One of the most important factors in determining the customary basis of the *sic utere* principle is the fact that many of these treaties are limited in both geographical application and in the types of transboundary harm which they seek to prohibit. A survey of multilateral treaties currently in existence indicates the regional orientation of many of these treaties, particularly in Europe, Africa and the Americas.[41] This has two consequences. First, it limits the number of parties to the treaties, with very few having more than 20 or 30 parties to them.[42] Second, the treaties tend to target specific geographical areas, as for example the multitude of treaties now governing various aspects of the Rhine River.[43] Further, most are concerned with prohibiting specific types of pollutants, as for example chlorides, industrial contaminants, water salinity and forms of air pollution.[44]

It is from this potpourri of disparate formulations of the *sic utere* rule that scholars have asserted the existence of the rule as customary international law. As stated, there is no one single multilateral treaty or other instrument which enjoys substantial State participation. Very few of the international instruments listed have more than 100 State parties or signatories to them. Thus while State practice might be extensive, it is difficult to assert that an obligation, which changes from region to region and in the forms of harm prohibited, is capable of uniform formulation. It is therefore argued that if certain treaties prohibit transboundary pollution, and other treaties prohibit more generally, transboundary harm, and if they are limited in the number of parties to them and geographical application, it cannot conclusively be said that they have generated State practice with respect to the *sic utere* rule which is both extensive and uniform. If, as is submitted, no extensive or uniform State practice can be discerned, then clearly the customary legal status of the *sic utere* principle must be seriously doubted.

However, even if it were concluded from the multitude of treaty law that State practice was sufficiently extensive and uniform to allow the extraction of an obligation to prevent transboundary harm, it is argued that the principle will still be denied customary legal status because it does not enjoy the necessary *opinio juris* to confer upon it customary legal status. What must be shown to satisfy this second element in the customary law formation process is a general recognition among States that the obligation alleged is in fact obligatory.[45] As the ICJ noted in the *Nicaragua case:*

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[41] For a comprehensive discourse on regional and international treaties which include this obligation, see Lammers, *supra* n. 9.

[42] *Ibid.*

[43] There are several conventions currently in force including: *Bonn Convention for the Protection of the Rhine River against Chemical Pollution*, 3 December 1976; *Bonn Convention for the Protection of the Rhine River against Pollution by Chlorides*, 3 December 1976.

[44] *Ibid.*

[45] James L. Brierly, *The Law of Nations: An Introduction to the International Law of Peace by Humphry Waldock* (6th ed., Oxford: Oxford University Press, 1963), 61; Brownlie, *supra* n. 4 at 7; Weisburd, *supra* n. 4 at 24; and Akehurst, *supra* n. 14 at 43.

> Either the States taking such action or other States in a position to react to it, must have behaved so that their conduct is evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*.[46]

There is such inconsistency in the nature and extent of the obligations imposed on States' parties by the numerous treaties prohibiting transboundary harm, that there is no clear indication that States recognise this prohibition as obligatory.[47] Several treaties which contain the *sic utere* obligation are mandatory in this prohibition against causing transboundary harm.[48] But there are many more treaties that are merely recommendatory in nature, and their prohibitions against causing transboundary harm impose no legal obligations. Article 2 of the *Convention on Long-Range Transboundary Air Pollution*, for example, expresses the prohibition in the following terms: 'The contracting parties shall *endeavour* to limit and, as far as possible, gradually reduce and prevent air pollution including long-range transboundary air pollution.'

Similarly, Article 1 of the *Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matter* obliges contracting States to: 'take all *practicable steps* to prevent the pollution of the sea by the dumping of waste and other matter that is liable ... to damage amenities or to interfere with other legitimate uses of the sea.'

Many other treaties express the obligation in similar terms. They are hortatory or 'soft law' in character,[49] and for this reason, do not evince any *opinio juris* on the part of the States who are signatories to them. If a treaty does not command, but merely recommends that a State act in a particular manner, then any failure by a State to act in the way prescribed will be of little consequence. In not compelling a course of conduct, a State clearly cannot be deemed to have assumed any legal obligation to act in compliance with the obligation, but only that as a party to the treaty, it should so act. Therefore, no *opinio juris* can be derived from these 'soft law' treaties.

The majority of publicists who claim that the *sic utere* principle exists as a separate obligation under customary international law are not selective in their choice of treaties on which they rely to prove their claims. Instead, there is a general tendency amongst them to cite every treaty which contains the prohibition in support of their assertions irrespective of whether the treaty obligation is mandatory or merely recommendatory in character. A reliance on a treaty from which no *opinio juris* can be

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[46] (1986) ICJR 14, 99.

[47] Hakappa, *supra* n. 9 at 137.

[48] For example, Article 194(2) of the *Convention on the Law of the Sea*.

[49] Darrell, *supra* n. 26 at 447; Pierre-Marie Dupuy, 'Soft Law and the International Law of the Environment' (1991) 12 *Michigan Journal of International Law* 420, 428.

derived to substantiate the existence of *opinio juris* is clearly an illegitimate reliance, and renders any conclusion on the issue of the customary status of the rule suspect.

Mention has been made already of the *Stockholm Declaration*, which is commonly cited as establishing the existence of the *sic utere* principle in international law. Other declarative statements, including the *World Charter* and the *Rio Declaration*, are also commonly advanced for the same purpose.[50] But again, these are 'soft law' statements, imposing no legal obligations on the signatories to them.[51] As the ICJ alluded to in the *Asylum case* in respect of diplomatic asylum, States are often influenced by considerations of political expediency in their conduct,[52] and not by any desire to fetter their sovereignty for the betterment of mankind. Perhaps no better example can be given than the *Rio Declaration*. If the mere signing of a Declaration were enough to establish State practice and *opinio juris*, then the *Rio Declaration*, signed by 174 States, stands as the purest example of this process. But none of the States' signatories to the Declaration would have been under the misconception that in so doing they were assuming legal obligations.[53] On the contrary, whether to save face in front of the world community or for some other purpose, for many of the States' signatories, the Declaration was at best an exercise in political expediency. These same criticisms can be levelled at the *Stockholm Declaration*, the *World Charter* and every other declaration or statement of intent emanating from the world community prohibiting transboundary harm.

In the final analysis, it is submitted that there is inconclusive support for the existence of the *sic utere* principle as a rule of customary international law. Publicists have misconstrued the customary law formation process in their efforts to extract State practice and *opinio juris* from treaty law, where clearly none exists. It is conceded that several treaties prohibit transboundary harm, but these are too limited in scope to permit the conclusion that the obligation has generated a rule of customary international law, however desirable this conclusion might be.[54]

Consideration will now be given to the assertion by some publicists that certain judicial decisions also support the customary legal status of the *sic utere* rule.

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[50] Leigh, *supra* n. 21 at 135.

[51] E. Weiss, 'International Environmental Law: Contemporary Issues and the Emergence of a New World Order' (1993) 81 *Georgetown Law Journal* 702; and R. Punjabi, 'From Stockholm to Rio: A Comparison of the Declaratory Principles of International Environmental Law' (1993) 21 *Denver Journal of International Law and Policy* 220–1.

[52] (1950) ICJR 277.

[53] Geoffrey Palmer, 'The Earth Summit: What Went Wrong at Rio?' (1992) 70 *Washington University Law Quarterly* 1005, 1016.

[54] K. Zemanek, 'State Responsibility and Liability', in W. Lang, H. Neuhold and K. Zemanek (eds), *Environmental Protection and International Law* (London, Boston: M. Nijhoff Publishers, 1991), 188.

JUDICIAL DECISIONS AS EVIDENCE OF THE *SIC UTERE* PRINCIPLE

Several judicial decisions exist on which reliance is placed by publicists as supporting their views that the *sic utere* principle is a rule recognised in customary international law. The two cases most often cited are the *Trail Smelter case*[55] and the *Corfu Channel case*.[56] For many publicists, these cases epitomise a long-standing judicial acceptance of the customary legal status of the rule.[57] In the *Trail Smelter case*, heralded as the 'locus classicus of international legal principles on transnational pollution',[58] the Arbitration Tribunal stated that:

> Under the principles of international law ... no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes on 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.[59]

Similarly, in the *Corfu Channel case*, the ICJ, in holding Albania responsible for damages caused to British warships by sea mines, stated:

> The obligations incumbent upon the Albanian authorities consisted in notifying, for the benefit of shipping in general, the existence of a minefield in Albanian territorial waters and in warning the approaching British warships of the imminent danger to which the minefield exposed them. Such obligations are based ... on certain general and well recognised principles, namely ... the principle of the freedom of navigation and every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States.[60]

However, it is argued that a critical examination of both cases indicates that neither case can be relied upon as clear authority for the customary law status of the *sic utere* obligation. On the contrary, both must be seen, at best, as being of very limited precedential value. First, what many publicists conveniently neglect to mention in their discussions of

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55 *U.S. v Canada* (1941) 3 *Reps. Int'l Arb. Awards* 1938.

56 (1949) ICJR 4.

57 A. Rest, 'Responsibility and Liability for Transboundary Air Pollution Damage', in C. Flinterman, B. Kwiatkowska and J.G. Lammers (eds), *Transboundary Air Pollution: International Legal Aspects of the Co-operation of States* (Dordrecht, Boston: M. Nijhoff Publishers, 1986), 309; Peter Ballantyne, 'International Liability for Acid Rain' (1983) 41 *University of Toronto Faculty of Law Review* 63, 64; Yvonne Tharpes, 'International Environmental Law: Turning the Tide on Marine Pollution' (1989) 20 *The University of Miami Inter-American Law Review* 579, 601–3.

58 Gunther Handl, 'Territorial Sovereignty and the Problem of Transnational Pollution' (1975) 69 *American Journal of International Law* 60.

59 (1941) 3 *Reps. Int'l Arb. Awards* 1965.

60 (1949) ICJR 22.

the *Trail Smelter case* is that the Tribunal was called upon to determine Canadian responsibility from the terms of a *compromis* reached between the United States and Canada.[61] At no time was the court called upon to consider whether Canada's conduct violated rules of international law nor whether Canada was liable for violation of those rules, Canada having accepted liability from the outset.[62] The Tribunal's function was only to assess the nature and extent of compensation to be paid by Canada to the United States.[63]

Accordingly, the so-called *locus classicus* statement which is constantly referred to as founding the customary legal status of the *sic utere* principle was in fact merely an *obiter dictum* observation. A second basis for denouncing the precedential value of the case is that the Tribunal handed down its decision in 1941. International law, evinced in either State or judicial practice, had not developed sufficiently by 1941 to indicate the existence of the *sic utere* principle as an obligation owed by States in international law.[64] It is argued that the Tribunal's remarks, in affirmatively pronouncing the existence of the obligation in customary international law, was an act of excessive judicial dexterity, and the pronouncement must in the circumstances be considered extravagant. Thus, contrary to what many international publicists may assert, the *Trail Smelter case* should not be considered as an authoritative pronouncement on the existence of the *sic utere* principle as a rule of international law, but merely as *obiter dictum* with limited foundation.[65]

Similar criticisms can be levelled at the *Corfu Channel case*, which, like the *Trail Smelter case*, does not upon close analysis support the contentions of the many publicists who cite it as authority for a customary *sic utere* rule. First, the ICJ found that Albanian responsibility arose not from its violation of the *sic utere* obligation, but from a breach by it of the duty to warn Britain of the sea mines located in its territorial waters.[66] Again, as in the *Trail Smelter case*, the court's so-called pronouncement on the existence of the *sic utere* principle as a rule of international law was nothing more than an *obiter dictum* statement.

A second criticism against reliance on the *Corfu Channel case* as a precedent for the customary status of the *sic utere* principle is that the

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[61] Canadian responsibility arose pursuant to the *Convention for Settlement of Difficulties arising from Operation of Smelter at Trail, B.C.*, 15 April 1935, U.S.–Canada, U.S.T. No. 893, Can. T.S. No. 20, and not from the violation of some international legal obligation.

[62] Gunther Handl, 'Balancing of Interests and International Liability for the Pollution of International Watercourses: Customary Principles of Law Revisited' (1975) 13 *The Canadian Yearbook of International Law* 156, 167–8; Editorial Comment, 'International Environmental Law' (1991) 104 *Harvard Law Review* 1484, 1500; Darrell, *supra* n. 26 at 444; and Karin Mickelson, 'Rereading Trail Smelter' (1993) 31 *The Canadian Yearbook of International Law* 219, 223.

[63] *Ibid.*

[64] Williams, *supra* n. 21 at 123; S. Williams and A. de Mestral, *An Introduction to International Law* (2nd ed., Toronto: Butterworths, 1987), 271.

[65] Editorial Comment, *supra* n. 62 at 1500–1.

[66] (1949) ICJR 18–22; see generally Handl, *supra* n. 62 at 166.

formulation of the duty adopted by the court makes no reference to the causing of extraterritorial harm, which is an element in every other formulation of the obligation. The whole purpose for asserting the existence of a *sic utere* type of obligation is to curtail the otherwise sovereign right of all States to use their territory in any manner they so choose. Thus a State may utilise its territory and cause as much harm to itself as it desires, and only when its activities transcend its borders and affect the sovereign rights of other States will international law be applicable.

The court in the *Corfu Channel case* alluded only to the obligation imposed on a State not to allow 'its territory to be used for acts contrary to the rights of other States'.[67] To argue that this statement is an affirmation of the *sic utere* principle places a very broad interpretation on the term 'the rights of other States'. Only if the term 'the rights of other States' was construed to include the right of a State not to suffer the harmful effects of activities occurring in another State would the court's statement be capable of supporting the customary existence of the *sic utere* principle. However, it is submitted that no such construction can be put on the statement, and that the right to which the court refers is not a right to be protected from transboundary harm, but on the contrary, a more well recognised international legal right of free passage. This is clearly apparent from the facts of the case.

The right of free passage is a well recognised rule of international law.[68] By allowing sea mines to be located in the Corfu Channel, Albania clearly violated this more specific obligation, not some broader obligation not to cause transboundary harm. Thus when the court speaks of 'the rights of other States', it is alluding to the rights of other States to traverse international waterways free from interference.

What makes the extraction of the *sic utere* principle even more fanciful from the court's remarks, is the fact that the incident which Britain relied upon to establish Albanian responsibility occurred in Albanian waters, and not in the territory of some other State. Therefore, the attempt by publicists to extend the court's statement to transboundary harm, when there was no issue of transboundary harm before the court, is a misinterpretation of the court's judgment.

A further obstacle in relying on the *Corfu Channel case* as supporting the *sic utere* principle is the qualification which the court placed on the duty which it espoused. The court specifically referred to a State 'knowingly' using its territory, a qualification not used in any other formulation of the principle. It is argued that had the court been alluding to the *sic*

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[67] (1949) ICJR 22.

[68] 'It is the opinion of the Court, generally recognised and in accordance with international custom that States in time of peace have a right to send their warships through straits used for international navigation between two parts of the high seas without previous authorisation of a coastal Sstate, provided that the passage in innocent. Unless otherwise prescribed in an international convention, there is no right for a coastal State to prohibit such passage through straits in time of peace.' *Id.* 28.

utere principle in its statement, it would not have qualified its formulation with the extra element of State *scienter*, but would have instead applied the same formulation as used in earlier decisions such as the *Trail Smelter case*. Accordingly, it is argued that the consistent assertion by many publicists that the *Corfu Channel case* represents judicial recognition of the *sic utere* principle as customary international law is questionable when the court's actual remarks are more closely analysed.

Whilst the *Corfu Channel case* and the *Trail Smelter case* are the cases most commonly relied on by publicists to support the existence of the *sic utere* principle, several other cases are also put forward for the same purpose, including the *Lake Lanoux Arbitration*,[69] the *Nuclear Test case*[70] and the *Gut Dam case*.[71] These cases provide no support for the rule. In the *Lake Lanoux Arbitration*, the Tribunal was concerned primarily with interpreting treaty obligations between France and Spain, which required both parties to reach agreement regarding any activity which interfered with each other's use of Lake Lanoux.[72] No issue of transboundary liability under customary international law arose. Similarly, in the *Gut Dam case*, the Tribunal based liability on an indemnification agreement between Canada and the United States, not on customary international law.[73] Finally, in the *Nuclear Test case*, the ICJ held that the French Government's public undertaking to discontinue further testing rendered moot the claims of Australia and New Zealand, and thus never considered the issue of French responsibility or the existence of the *sic utere* principle.[74] Therefore, it is apparent that in none of these cases can it be asserted the final decisions were based on the *sic utere* principle. Any pronouncement by the court as to the existence of a *sic utere* obligation must therefore be considered *obiter dictum*, and will carry only limited precedential value in determining the existence of the principle in international law.

STATE PRACTICE AS PROOF THAT THE *SIC UTERE* PRINCIPLE IS NOT A RECOGNISED RULE OF CUSTOMARY INTERNATIONAL LAW

It has been submitted previously that examination of treaty law as a basis for determining the customary legal status of the *sic utere* rule indicates that the rule enjoys neither the State practice nor the *opinio juris* necessary to permit this conclusion. If further proof is required to corroborate this

[69] *Spain v France* (1956) 12 *Reps. Int'l Arb. Awards* 281.
[70] *Australia v France* (1974) ICJR 253.
[71] *Canada v U.S.* (1969) 8 ILM 114.
[72] Jan Schneider, *World Public Order of the Environment: Towards an International Ecological Law and Organisation* (Toronto: University of Toronto Press, 1979), 270; Editorial Comment, *supra* n. 62 at 1500; and Brownlie, *supra* n. 4 at 272.
[73] *Ibid.*
[74] *Australia v France* (1974) ICJR 271–2.

conclusion, then actual State practice in incidents where transboundary harm has been caused provides perhaps the best basis for determining the actual existence in international law of an obligation not to cause transboundary harm.

On 26 April 1986, the worst accident in the history of nuclear energy occurred at the Chernobyl nuclear power plant in the former Soviet Union.[75] A deliberate experiment, in which technicians at the nuclear facility disengaged the emergency back-up systems before shutting down the reactor's cooling systems, resulted in the reactor core exploding and releasing high levels of radiation into the atmosphere.[76] The fire at the reactor burned for a week. Within two days, radiation from Chernobyl swept over Norway, Finland and Sweden, within one week over most of Europe, eventually contaminating countries as far west as the United States a short time thereafter.[77]

Damage from the Chernobyl accident, direct or indirect, is difficult to quantify in monetary terms. The Polish and Austrian agricultural losses were estimated to be in tens of millions of dollars.[78] West Germany's losses were estimated to be in billions of dollars.[79] In all, over 20 countries suffered significant harm as a result of the Chernobyl accident.[80]

Yet despite the magnitude of the disaster and the massive losses suffered by several countries as a result of the accident, not a single country has ever commenced legal proceedings against the Soviet Union or its Chernobyl successor, the Republic of Ukraine.[81] There were no treaties in force between the Soviet Union and any of the countries affected by the disaster, and thus responsibility for the disaster could only have arisen if the Soviet Union was in breach of some customary legal obligation. Why then, it may be asked, did no country commence an action for the violation of an international obligation not to cause transboundary harm, in circumstances where it would have been expected that at least some of the affected nations would have sought compensation for the substantial injury they incurred? It is argued that the answer is quite simple: there were no rules of customary international law, including the *sic utere* rule,

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[75] For a more detailed discussion of the Chernobyl accident, see David R. Marples, *Chernobyl and Nuclear Power in the U.S.S.R.* (Basingstoke: Macmillan in association with Canadian Institute of Ukranian Studies, University of Alberta, 1986), 1–35; and Philippe Sands (ed.), *Chernobyl: Law and Communication Transboundary Nuclear Air Pollution — The Legal Materials* (Cambridge: Grotius Publications, 1988).

[76] *Ibid.*

[77] Linda Malone, 'The Chernobyl Accident: A Case Study in International Law Regulating State Responsibility for Transboundary Nuclear Pollution' (1987) 12 *Columbia Journal of Environmental Law* 203, 210.

[78] Philippe Sands, 'The Environment, Community and International Law' (1989) 30 *Harvard International Law Journal* 398, 403; and Levy, *supra* n. 6 at 82.

[79] *Ibid.*

[80] *Ibid.*

[81] Sands, *supra* n. 78 at 411; and Pierre-Marie Dupuy, 'The International Law of State Responsibility: Revolution of Evolution?' (1989) 11 *Michigan Journal of International Law* 105, 116.

which the Soviet Union violated. Indeed, all affected countries strongly condemned the Soviet Union's reaction to the disaster and its failure to warn them of the impending dangers.[82] This outrage would indicate that had there been some basis for holding it responsible, some form of action would have been commenced against the Soviet Union.

As significant as the Chernobyl accident, in terms of the resultant harm caused to other countries, was the Sandoz chemical spill in 1986. A fire at the Sandoz Warehouse near Basel, Switzerland, in November 1986 and the subsequent spill of toxic chemicals into the Rhine River had a disastrous impact on the Rhine's ecology.[83] The chemicals that washed into the Rhine River formed a toxic trail 70 kilometres long which swiftly moved downstream.[84] The spill had a devastating effect on the fauna of the Rhine, killing thousands of fish and waterfowl as it made its way downstream.[85] It also affected water supplies, with all water treatment plants in France, the Netherlands, Switzerland, and West Germany processing Rhine water shut down.[86] The accident is widely regarded as Western Europe's worst environmental disaster this century.[87]

Immediately following the spill, the environment ministers of France and West Germany announced their intentions to seek compensation, not only from Sandoz, but from Switzerland as well.[88] However, no such claims were ever made by either country. Although the various riparian States of the Rhine verbally condemned Switzerland's failure to prevent the accident and to warn the downstream States promptly,[89] the failure to seek redress against Switzerland for breaching its international legal obligations does, like the Chernobyl aftermath, indicate that no such obligations exist. Accordingly, it is argued that by failing to call Switzerland to account for its failure to protect the Rhine River, the downstream States have created a normative expectation that States will not be held legally responsible for causing transboundary harm.

Assessing the legal consequences of both the Chernobyl and Sandoz catastrophes, it is apparent that apart from the moral obligations incumbent on all States not to cause harm or injury to their neighbours, this obligation has not transformed into a legal one. In both cases, where neither State was willing to accept responsibility for the harm which they caused, international law should have been invoked to compel them to accept responsibility. Moral condemnation aside, the distinct failure by any affected State in either disaster to seek compensation on the basis of

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[82] Malone, *supra* n. 77 at 206.
[83] Aaron Schwabach, 'The Sandoz Spill: The Failure of International Law to Protect the Rhine from Pollution' (1989) 16 *Ecology Law Quarterly* 443.
[84] *Ibid.*
[85] *Id.* 447.
[86] *Ibid.*
[87] Editorial Comment, *supra* n. 62 at 1499.
[88] Schwarbach, *supra* n. 83 at 455.
[89] Darrell, *supra* n. 26 at 422.

violation of international law is resounding in the message which it sends. If the *sic utere* rule was a rule of customary international law, it would have been invoked. As no reliance was placed by any State on this obligation, this indicates that, at best, the obligation is confined to the treaties in which it is expressed.

CONCLUSION

An assessment has been made of the customary legal status of the *sic utere* principle. Treaty practice, on which many publicists rely to prove its customary legal status, does not on close analysis support this conclusion. On the contrary, the two essential elements necessary for the formation of rules of customary international, State practice and *opinio juris*, are not evident in the treaties which publicists commonly rely on to support their claims. Likewise, judicial decisions, which are also commonly asserted in support of the rule, do not provide any support for the rule. It is not denied that the existence of the *sic utere* rule in customary international law would be highly desirable. But just because something is desired does not mean that it can be derived out of nothing, and this is essentially what proponents of the rule have sought to do. The arguments of those publicists who earnestly support the rule's status as customary must be dismissed as wishful thinking, and as international law presently stands, there is no customary legal obligation by which a State can be held responsible for using its territory in a manner which causes harm to other States.