Gábor Bazsó*

All Roads Lead to the Hague? The COVID-19 Pandemic and the No-harm Rule**

Abstract

In this article, the author analyses the no-harm rule under customary international law in order to determine how the rule could be applied in the prevention of transboundary harm caused by the COVID-19 pandemic, as well as in the possible adjudication of such harm. First, the author addresses whether the scope of the no-harm rule extends to transboundary harm caused by pandemics. Second, after examining the components of transboundary harm, the author will argue that the COVID-19 pandemic caused significant transboundary harm to most members of the international community. Third, the article will expand upon the obligation of states, under customary international law, to prevent significant transboundary harm. Finally, the author will provide some concluding remarks and address why the no-harm rule is an effective way of preventing as well as adjudicating transboundary harm caused by the COVID-19 pandemic.

Keywords: COVID-19, state responsibility, pandemics, no-harm rule, transboundary harm, due diligence

I Introduction

The destruction caused by the COVID-19 pandemic has been unprecedented in the 21th century. Besides the soaring death toll,[1] one cannot forget the impact of the pandemic on

* Gábor Bazsó is a junior associate at the litigation and arbitration practice group of Ormai, Papp és Társai CMS Cameron Mckenna Nabarro Olswang LLP Law Firm (email: gabobazso@gmail.com).

** The article was supported by the ÚNKP-20-2 New National Excellence Program of the Ministry for Innovation and Technology from the source of the National Research, Development and Innovation Fund.

[1] Coronavirus Disease (COVID-19) Dashboard. <https://covid19.who.int/?gclid=Cj0KCQiAvP6ABhCjARIsAH37rbS5d77QJeH3nymbmPgZqSHfj1P9xynhg61a_oofodSpRTsez3QdYeoaAgIlEALw_wcB> accessed 7 February 2021.

the global economy, which halted the growth experienced in previous years.[2] While this is the time for solidarity and cooperation, the questions of state responsibility cannot be overlooked.[3] This paper will focus on one of the aspects of state responsibility for the failure to prevent the harm caused by the spread of the virus.

Accordingly, this paper will begin by providing a general overview of the no-harm rule in international law, followed by its specific applicability to the COVID-19 pandemic. It will continue by addressing the criteria for the existence of transboundary harm and the obligation to prevent such harm. Finally, the author will argue that the no-harm rule provides an effective framework for preventing harm caused by pandemics and for adjudicating state responsibility for the violation of preventive obligations.

II The No-harm Rule and Its Applicability to Transboundary Harm Caused by Pandemics

The rule according to which states cannot violate other states' territorial sovereignty due to events and activities on their own territories has been the focal point of many contentious cases before the International Court of Justice ('ICJ') and various other international tribunals since the 1940s. This rule is generally referred to as the no-harm rule in practice,[4] but is also known as the *sic utere tuo ut alienum non laedas* principle ('*sic utere* principle'),[5] and poses a general obligation the prevent transboundary harm. The exact origins of the no-harm rule are subject to debate. Some commentators trace it back to the prohibition of the abuse of rights, while others point to its close ties with the requirement of good neighbourliness.[6]

One crucial step when examining the no-harm rule in the context of the COVID-19 pandemic is its categorisation as a source of law. The no-harm rule is enshrined in a number of international agreements; however, their scope does not extend to zoonotic viruses, such as COVID-19. Additionally, while the object and purpose of the International Health

[2] 'The Global Economic Outlook During the COVID-19 Pandemic: A Changed World' (2020), <https://worldbank.org/en/news/feature/2020/06/08/the-global-economic-outlook-during-the-covid-19-pandemic-a-changed-world> accessed 7 February 2021.

[3] António Guterres, 'This is a time for science and solidarity' (2020) <https://www.un.org/en/un-coronavirus-communications-team/time-science-and-solidarity> accessed 7 February 2021; Massimo Introvigne, 'Coronavirus: CCP Beware, the Lawyers Are Coming' (2020) Bitter Winter <https://bitterwinter.org/coronavirus-ccp-beware-the-lawyers-are-coming/> accessed 7 February 2021.

[4] Attila M. Tanzi, 'The inter-relationship between no harm, equitable and reasonable utilisation and cooperation under international water law' (2020) 20 Int Environ Agreements, 619–629, DOI: 10.1007/s10784-020-09502-7.

[5] See Marte Jervan, 'The Prohibition of Transboundary Environmental Harm. An Analysis of the Contribution of the International Court of Justice to the Development of the No-Harm Rule' 2014/14–17, PluriCourts Research Paper, 1. DOI: 10.1093/law:epil/9780199231690/e1607

[6] Jutta Brunnée, 'Sic utere tuo ut alienum non laedas' (Max Planck Encyclopedia of International Law, OUP 2010) 1.

Regulations ('IHR') is *inter alia* to prevent the spread of infectious diseases, they do not contain a general obligation to prevent harm caused by such diseases.[7] Against this backdrop, these conventions cannot be applied to COVID-19 related harmful events. It follows that, before a detailed analysis of the obligation to prevent transboundary harm, two questions must be addressed; first, whether the no-harm rule is part of customary international law, and second, whether it extends to harm caused by the COVID-19 pandemic.

1 The No-harm Rule as a Rule of Customary International Law

The ICJ first applied the *sic utere* principle in the *Corfu Channel* case in 1949,[8] followed by its *Nuclear Weapons* advisory opinion in 1996.[9] Notwithstanding the fact that there was a noticeable pushback in academia against the recognition of the no-harm rule as a part of customary international law,[10] the ICJ declared it as such in the *Pulp Mills* case in 2010.[11] The ICJ relied on its findings in the *Corfu Channel* case and the *Nuclear Weapons* advisory opinion to support the customary nature of the no-harm rule, confirming that such recognition was supported by decades of steady development of international law, hence the no-harm rule is not the child of mere judicial activism.[12]

2 The Limits of the No-harm Rule

Some commentators argue that, even though the no-harm rule was a part of customary international law, its application is limited to certain types of harm, specifically environmental harm.[13] This theory is supported by the fact that the ICJ, the court with arguably the biggest influence on the development of international law, has directly pronounced the customary nature of the no-harm rule in environmental disputes exclusively. Both the *Pulp Mills* case and the *San Juan* case revolved around pollution of the environment.

However, this certainly does not *ipso facto* mean that the ICJ rejects the wider application of the no-harm rule. In the *Corfu Channel* case, the ICJ did not restrict its applicability to environmental harm. Instead, it applied it as a general rule that extends

---

[7] Bazsó Gábor, 'Államfelelősség és a Nemzetközi Egészségügyi Rendszabályok a COVID-19 világjárvány idején' in Kajtár Gábor, Sonnevend Pál (eds), *A nemzetközi jog, az uniós jog és a nemzetközi kapcsolatok szerepe a 21. században: tanulmányok Valki László tiszteletére* (ELTE Eötvös Kiadó 2021, Budapest).

[8] *Corfu Channel (United Kingdom v Albania) (Judgment)* [1949] I.C.J. Reports, 4.

[9] *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Reports 226, para 29.

[10] See for ex. Greg Lynham, 'The Sic Utere Principle as Customary International Law: A Case of Wishful Thinking?' (1995) 2 James Cook University Law Review, 189.

[11] *Pulp Mills on the River Uruguay (Argentina v. Uruguay) (Judgment)* [2010] ICJ Reports, 14, para 101.

[12] *Pulp Mills,* para 101.

[13] L-A Duvic-Paoli, *The Prevention Principle in International Environmental Law* (Cambridge University Press 2018, Cambridge) 78, DOI: 10.1017/9781108553728.

to various forms of transboundary harm.[14] Since the ICJ has relied on its *Corfu Channel* judgment as a starting point in all subsequent cases where it applied the customary form of the no-harm rule, it stressed that its applicability extends to various fields of international law.[15] However, it must be highlighted that, in accordance with the general principle of *lex specialis derogat legi generali*, the no-harm rule cannot be applied under customary international law if the type of harm is covered by international agreements, such as those for the prevention of terrorism,[16] drug trafficking[17] or nuclear warfare.[18]

The International Law Association ('ILA') goes further, arguing that there is no conflict between the all-encompassing form of the no-harm rule (more specifically the due diligence obligation arising from the no-harm rule) found in the *Corfu Channel* case and its manifestations in different fields of international law, since the broader concept is not operational but only its more specific manifestations.[19] Accordingly, the ILA holds that no conflict of law rules have to be applied in such situations.[20] Even though the ILA acknowledges that the preventive obligation arising from the customary form of the no-harm rule has mostly emerged in environmental disputes thus far, it concurs that its applicability goes beyond international environmental law, even extending to international human rights law.[21]

The Draft Articles on Prevention of Transboundary Harm from Hazardous Activities ('Prevention Draft') adopted by the International Law Commission ('ILC') in 2001 also avoids limiting the applicability of the no-harm rule to the field of international environmental law. The scope of the Prevention Draft extends to '[…] activities not prohibited by international law which involve a risk of causing significant transboundary harm through their physical consequences'.[22] Pursuant to the commentary to the Draft Articles, physical harm encompasses any real detrimental effect on, *inter alia*, human health, industry, property, the environment or agriculture.[23]

---

[14] *Corfu Channel*, 22.

[15] See e.g. *Certain Activities Carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua), Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica) (Judgment)* [2015] ICJ Reports 665 (hereinafter: *San Juan*), para 104.

[16] *Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation*, signed 23 September 1971, 974 UNTS 177 (entered into force 26 January 1973); *International Convention for the Suppression of Terrorist Bombings*, opened for signature 12 January 1998, 2149 UNTS 256. (entered into force 23 May 2001).

[17] *United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, opened for signature 20 December 1988, 1582 UNTS 95. (entered into force 11 November 1990).

[18] *Treaty on the Prohibition of Nuclear Weapons*, opened for signature 20 September 2017, UN Doc A/CONF.229/2017/8 (entered into force 22 January 2021).

[19] International Law Association, *Study Group on Due Diligence, Second Report* (2016) 6.

[20] Ibid.

[21] International Law Association, *Study Group on Due Diligence, First Report* (2014) 14–22.

[22] Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, with Commentaries, 2001, UN Doc A/56/10, art 1.

[23] Ibid 152, para 4.

The preventive obligation on which the no-harm rule is based plays an increasingly prominent rule in international human rights law as well.[24] Besides the obligation to respect and ensure human rights, states parties to human rights treaties are also under the obligation to protect the human rights of people under their jurisdiction.[25] In other words, human rights conventions contain a clear obligation for states to prevent any harm caused by human rights violations. Consequently, the preventive obligation under international human rights law could be interpreted as a manifestation of the broader concept of the no-harm rule.[26]

This obligation of prevention is not limited to state territory; hence it also applies extraterritorially under certain conditions. In the *Wall* advisory opinion, the ICJ famously stated that the scope of the International Covenant on Economic, Social and Cultural Rights, as well as the International Covenant on Economic, Social and Cultural rights, extend to situations where a state exercises effective jurisdiction extraterritorially, meaning effective control over a territory or persons outside its borders.[27] This interpretation of the extraterritorial applicability of these prominent human rights treaties was reiterated by the European Court of Human Rights in relation to the European Convention on Human Rights.[28]

Due to recent developments in international human rights law, this interpretation of the extraterritorial applicability of human rights treaties may become outdated in the not-too-distant future. Notably, the Covenant of Economic, Social and Cultural Rights does not contain a provision on its scope of application,[29] which may support its broader application outside of member states' territories, according to the Committee on Economic, Social and Cultural Rights.[30] Moreover, the Inter-American Court of Human Rights ('IACtHR') stated that the American Convention of Human Rights applies extraterritorially to situations in which a state exercises control over harmful activity causing harm outside of the state's

---

[24] International Law Association (n 21) 14–22.

[25] Radu Mares, '"Respect" Human Rights: Concept and Convergence' (2014) SSRN Electronic Journal, 2. <https://www.researchgate.net/publication/272221718_'Respect'_Human_Rights_Concept_and_Convergence> accessed 7 February 2021, DOI: 10.2139/ssrn.2387345.

[26] Duvic-Paoli (n 13) 79.

[27] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Reports, 136, paras 111—112. Contrast with *Sergio Euben Lopez Burgos v. Uruguay*, HRC, Communication No. R.12/52, 1981, para 12.3.; *Lilian Celiberti de Casariego v. Uruguay*, HRC, Communication No. 56/1979, 1984, para 10.3.

[28] See, for example *Bankovic and Others v Belgium and Others* [2001] App. No 52207/99, ECtHR, para 66.; *Al-Skeini and Others v. United Kingdom*, App. No. 55721/07, ECtHR, 7 July 2011, para 130.

[29] *Wall* Advisory Opinion, para 112.

[30] *International Covenant on Economic, Social and Cultural Rights*, opened for signature 19 December 1966, 993 UNTS 3 (entered into force 3 January 1976), art 2; Committee on Economic, Social and Cultural Rights: General Comment 24, paras 26–28; Committee on Economic, Social and Cultural Rights, 'Statement on the Obligations of States Parties Regarding the Corporate Sector and Economic, Social and Cultural Rights' (2011) para 5.

territory.[31] This is an important development, as the IACtHR based the applicability of a human rights treaty on control over the activity causing the harm, instead of the injured person or territory where the violation occurred. Therefore, the IACtHR draws a clear connection between the rationale of the no-harm rule, which applies in relation to all harmful activities under a state's jurisdiction, and the extraterritorial applicability of human right conventions. Ecuador put forward a similar argument in the *Aerial Herbicide Spraying* case, stating that Columbia violated the human rights of Ecuadorian citizens by polluting Ecuador's air and soil.[32] However, the proceedings were discontinued after the parties settled their dispute amicably. If this theory were to gain wider recognition in practice, human rights conventions, similar to the no-harm rule, could *mutatis mutandis* be applied to adjudge harm caused as a result of the COVID-19 pandemic.

III The Substantive Elements of Transboundary Harm in the Context of COVID-19

An activity under a state's jurisdiction and the harm caused thereby must meet certain requirements to classify as transboundary harm, triggering states' preventive obligations. These requirements are conjunctive; therefore, all of them must be fulfilled to meet the criteria of transboundary harm.[33] Xue Hanquin, former vice-president of the ICJ, laid down four basic requirements in her monograph on the no-harm rule based on the work of Oscar Schachter. The four conjunctive requirements are:[34]

1. the harm must be physical,
2. the harm must be transboundary in nature,
3. there must be a causal link between the harmful activity and the harm,
4. the harm must meet a certain severity.

These four requirements will be discussed in turn to determine whether the harm caused by the COVID-19 pandemic can be categorised as transboundary harm in the application of the no-harm rule.

---

[31] Inter-American Court of Human Rights, *Advisory Opinion OC-23/17* [2017] paras 101–102; See Alan Boyle, 'Human Rights and the Environment: Where Next?' (2012) 23 (3) The European Journal of International Law, 638, DOI: 10.1093/ejil/chs054.

[32] *Case Concerning Aerial Herbicide Spraying (Ecuador v. Colombia) (Memorial of Ecuador)* [2009] 273, para 8.2.

[33] Xue Hanqin, *Cambridge studies in international and comparative law: Transboundary damage in international law* (Cambridge University Press 2003, Cambridge) 4, DOI: 10.1017/CBO9780511494642.

[34] Hanqin (n 33) 6.

1 The Physical Nature of the Harm

The harmful activity must result in material harm, such as degradation of the flora and fauna or loss of human life. It follows that economic loss does not fall into that category. This is also evident from Article 1 of the Prevention Draft, which limits the scope of the draft to events causing harm through their physical consequences. While a serious discussion ensued between states on whether to include both material and immaterial harm to the Prevention Draft, they finally decided on the more limited approach.[35]

Consequently, only the physical effects of the COVID-19 pandemic fall into the category of harm in the application of the no-harm rule, including loss of life, or deleterious health effects. However, the disastrous ramifications of the pandemic on the global economy is outside the purview of transboundary harm, which would certainly have a noticeable effect on the amount of compensation awarded to injured states.[36]

2 The Transboundary Nature of Harm

The obligation to prevent transboundary harm only arises if the harm violates the territorial sovereignty of another state.[37] This only occurs, when the harmful effects materialise within that state.[38] Hanqin holds that the harmful effects can travel through air, water or soil.[39]

In contrast, in the *Iron Rhine* arbitration, the Permanent Court of Arbitration pronounced that the obligation to prevent transboundary harm also arises in cases where a state causes harm through the exercise of a certain right. In the *Iron Rhine* arbitration, this right was Belgium's right of transit through certain territories of the Netherlands.[40] The tribunal declared the following:

> […] where a state exercises a right under international law within the territory of another state, considerations of environmental protection also apply. The exercise of Belgium's right of transit, as it has formulated its request, thus may well necessitate measures by the Netherlands to protect the environment to which Belgium will have to contribute as an integral element of its request.[41]

---

[35] Ibid.

[36] 'Which top economies have suffered worst GDP fall due to COVID-19?' <https://www.businesstoday.in/current/economy-politics/which-top-economies-have-suffered-worst-gdp-fall-due-to-covid-19/story/414683.html> accessed 7 February 2021.

[37] *Lake Lanoux arbitration (Spain v. France)* [1957] RIAA, vol. XII, 306-310; *Trail Smelter Arbitration (U.S. v. Canada)* [1941] 3 U.N. Rep. Int'l Arb. Awards 1905, 1965; *San Juan*, para 174.

[38] Hanqin (n 33) 8.

[39] Hanqin (n 33) 9.

[40] *Iron Rhine Railway (Belgium v. Netherlands) (Award)* [2005] 27 RIAA, para 35.

[41] *Iron Rhine Railway*, para 223.

Through this pronouncement, the tribunal extended the definition of transboundary harm, as, in cases factually comparable to the *Iron Rhine* arbitration, the potential harm and the activity causing such harm would both occur within one state. In *Iron Rhine*, it was only the right of transit enshrined within the 1839 Treaty between Belgium and the Netherlands relative to the Separation of their Respective Territories, which rendered the potential harm transboundary.[42] Henceforth, the view that the harmful event and the harm itself must be separated by boundaries in order to qualify as transboundary harm does not hold up, and the harmful effects do not necessarily need to be transmitted via water, air or soil.

SARS-CoV-2, the virus causing COVID-19, does not travel from one state to another though water, air or soil either. It is mainly spread through airborne exposure, when an infected person speaks, coughs or sneezes.[43] Hence it shows certain similarities to air pollution, which was the subject of the famous *Trail Smelter* arbitration. However, people generally contract COVID-19 when they are approximately 1-2 metres apart from an infected person.[44] For this reason, the spread of COVID-19 is not exactly analogous to air pollution, as the virus cannot travel in the air from one state to another. However, this does not rebut the transboundary nature of COVID-19-related harm. The carrier of the virus is simply not the air, water or soil, but the human body itself, when it carries the virus across borders and eventually spreads it to citizens of different states. Neither the ICJ, nor any other international court or tribunal, has ruled this out as a possible way for the transboundary movement of harmful effects. Consequently, the harm caused as a result of the COVID-19 pandemic is transboundary in nature.

3 The Causal Link between the Harmful Activity and the Harm; Standard of Proof

A state's responsibility cannot be invoked for the violation of the no-harm rule without a sufficient causal link between the harmful activity and the harm itself. In accordance with the practice of international courts and tribunals, such a causal link must be clear and direct.[45] The ICJ has previously stated that a causal link is clear and direct only if the violation of an international obligation would not have happened but for the injurious

[42] See Duvic-Paoli (n 13) 148.

[43] Pál Tibor (ed), *Az orvosi mikrobiológia tankönyve* (Medicina Könyvkiadó 2013, Budapest) 210–211; 'Coronavirus disease (COVID-19): How is it transmitted?' <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/question-and-answers-hub/q-a-detail/coronavirus-disease-covid-19-how-is-it-transmitted> accessed 7 February 2021.

[44] 'Coronavirus disease…' (n 43).

[45] Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, with Commentaries, 2001, UN Doc A/56/10, 151; *San Juan*, para 119; *Pulp Mills*, para 180; *Corfu Channel*, paras 244 and 265; *South China Sea Arbitration (Philippines v China) (Award)* [2016] PCA Case No 2013-19, ICGJ 495, para 971.

activity.[46] This has been referred to as the but-for causal test or *sine qua non* test in academia and practice. However, fulfilling the but-for test would pose an almost insurmountable challenge when it comes to the application of the no-harm rule to the COVID-19 pandemic. It would be unreasonable to require injured states to prove that the sole reason for COVID-19's havoc within their territories was the omission of the other party or parties to the dispute, which would be expected to meet the but-for test. With regard to the COVID-19 pandemic, this would require injured states to prove that the acts or omissions of any other state not party to the dispute, as well as natural contributors – such as changes in temperature – played no direct or indirect part in the deleterious effects of the pandemic within the injured states. Such a requirement would disregard the unavoidable reality that full scientific certainty can almost never be reached where the facts of the case are as deeply complex as those in disputes concerning transboundary harm.[47]

Instead of the but-for test, the application of the necessary element of a sufficient set test ('NESS test') would lead to more reasonable outcomes. Under the NESS test, a causal connection consists of several elements, which are all necessary to reach the outcome. Thereby, causality exists between the cause and each necessary causal element.[48] The NESS test is the appropriate causal test in cases where the cause is the result of several interdependent factors. Such cases include most transboundary harm-related disputes, in which several causal factors, such as wind direction, precipitation levels or the natural life cycles of animals, can all interact with different human activities to influence the outcome. The harm caused by the COVID-19 pandemic also holds these characteristics, as the harmful effects of the pandemic cannot be traced back to the sole act or omission of one state, since its spread could be altered by the appearance of new mutations or temperature fluctuations.[49] Such a causal test was applied by the ICJ in the *San Juan* case, where the ICJ based its decision on just and reasonable inference in appraising the damage rather than looking for the cause without which the damage would not have happened.[50] A form of the but-for test has also been applied in a number of international arbitrations, too. In the *Naulilaa* case, the tribunal applied this test for Portugal's claim for reparation against

---

[46] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia Hercegovina v Serbia and Montenegro) (Judgment)* [2007] ICJ Reports 43, para 462; James Crawford, *State Responsibility: The General Part* (Cambridge University Press 2013, Cambridge), 499, DOI: 10.1017/CBO9781139033060; *Factory at Chorzów (Germany v. Poland) (Judgement on Merits)* [1928] P.C.I.J. (ser. A) No. 17, para 68.

[47] Sulyok Katalin, 'A tudományos bizonytalanság forrásai és szerepe a természet- és környezetvédelmi döntések ökológiai megalapozhatóságában' (2013) 19 Természetvédelmi Közlemények, 62–73.

[48] Anthony Maurice Honoré, 'Causation in the Law' (Stanford Encyclopedia of Philosophy 2010, Stanford) 6, DOI: 10.1017/S0008197300010205.

[49] 'Episode#20 – COVID-19 – Variants & Vaccines' <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/media-resources/science-in-5/episode-20---covid-19---variants-vaccines?gclid=CjwKCAiAjp6BBhAIEiwAkO9WutuS68rvoPaCRVYz4bm9BoY-Qkj__O5uiMseWw8Ry4AMZ2_pgbqhGxoCrTkQAvD_BwE> accessed 13 February 2021.

[50] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) (Judgement on Compensation)* [2018] ICJ Reports 15, para 35.

Germany when evaluating the cause of the loss of livestock as a possible result of Germany's acts of aggression.[51] As Ilias Plakokefalos argues, in the *CME* investment arbitration, the tribunal also seems to have applied the NESS test, as it was looking for 'a cause' rather than 'the cause' of the result.[52] Additionally, a form of the NESS test was applied in the *Methanex* case, where the tribunal stated that causality exists if they are able to 'connect the dots' between the different necessary causal elements.[53]

Applying the NESS test to create a causal link between the harm caused as a result of the pandemic and the conduct of certain states would allow international dispute settlement bodies to take into account all possible causal elements without the infeasible task of pinpointing one single cause of a causation that has affected millions so far.

The standard of proof necessary in the application of the no-harm rule to the COVID-19 pandemic is certainly crucial. Such a dispute would most likely be flooded with expert opinions, all drawing completely contradictory conclusions. The standard of proof applied by the ICJ in disputes involving transboundary harm has commonly been 'clear' or 'convincing' evidence or the combination of the two.[54] The court has also asserted that direct evidence is not always necessary to meet the standard of proof.[55] For example, in the *Corfu Channel* case, the ICJ declared that indirect evidence is also accepted if all direct evidence is under the exclusive control of a state other than the state on which the burden of proof lies.[56] In such cases, the ICJ is more lenient and accepts inferences of fact and circumstantial evidence if they leave no room for reasonable doubt and lead to a logical conclusion.[57]

4 The Severity of the Harm

The severity of harm is also a decisive factor in the application of the no-harm rule. Insignificant harmful effects do not meet the criteria of transboundary harm. In case-law,[58] as well as in the Prevention Draft, the accepted term is 'significant' harm to describe

[51] *Responsabilité de l'Allemagne en raison des actes commis postérieurement au 31 juillet 1914 et avant que le Portugal ne participât a la guerre (Portugal v. Allemagne)* [1930], UNRIAA, vol. 2, 1035. See Ilias Plakokefalos, 'Causation in the Law of State Responsibility and the Problem of Overdetermination: In Search of Clarity' (2015) 26 (2) The European Journal of International Law, 486–487, DOI: 10.1093/ejil/chv023.

[52] Plakokefalos (n 51) 491.

[53] The subject of the Methanex case was harm caused by a chemical, MTBE. See *Methanex Corporation v. United States of America (Final Award of the Tribunal on Jurisdiction and Merits)* [2005] Part III. Chapter B, 2.

[54] *Pulp Mills*, paras 225 and 228; San Juan, para 119.

[55] *Sovereignty over Pulau Ligitan and Pulau Sipadan Islands (Indonesia v. Malaysia) (Judgment)* [2002] ICJ Reports 625, para 90; *Oil Platforms (Islamic Republic of Iran v. United States of America) (Judgment)* [2003] ICJ Reports 161, para 60; *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Rwanda) (Judgement)* [2005] ICJ Reports 168, para 159.

[56] *Corfu Channel*, 18.

[57] Ibid.

[58] *San Juan*, paras 153 and 187; *Pulp Mills*, para 101.

the required seriousness of the transboundary effects.[59] Pursuant to the Prevention Draft, significant harm is more than 'detectable' but does not need to be 'serious' or 'substantial'.[60] It is enough if the activity has a real detrimental effect on people, property or the environment.[61]

With regard to the COVID-19 pandemic, the severity of harm must be assessed in relation to the parties to the potential dispute. While it is beyond the goal of this paper to appraise such severity in relation to each state individually, the ever-growing death toll indicates that the harm caused by the pandemic within the vast majority of the international community greatly surpasses the threshold of 'detectable' harm.[62]

IV The Obligation to Prevent Significant Transboundary Harm

In accordance with the no-harm rule, states are not required to succeed eventually in preventing significant transboundary harm. Hence, the obligation arising from the no-harm rule is an obligation of conduct, as opposed to an obligation of result.[63] It follows that the preventive obligation of the no-harm rule is an obligation of due diligence.[64] This clearly separates state responsibility for the emergence of COVID-19 and state responsibility for its eventual destruction as a pandemic. Attribution could be a decisive factor for the former in determining whether the responsibility of any state could be invoked for the appearance of COVID-19.[65] However, attribution is not an imperative question for the latter, as states must exercise due diligence to prevent harm, regardless of whether the harmful activity within

---

[59] Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, with Commentaries, 2001, UN Doc A/56/10, 152.

[60] Ibid.

[61] Ibid.

[62] 'Coronavirus Disease (COVID-19) Dashboard' <https://covid19.who.int/?gclid=Cj0KCQiAvP6ABhCjARIsAH37rbS-ppjUwAoIgvVmkj4zxn5CXVEWBEIsFt_1CL83yVI3oGQ99-By60YaAr3qEALw_wcB> accessed 7 February 2021.

[63] Timo Koivurova, 'Due Diligence' in Max Planck Encyclopedia of Public International Law (OUP 2010), <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1034> accessed 25 March 2019; *Pulp Mills*, para 101.

[64] Duvic-Paoli (n 13), 199; Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, with Commentaries, 2001, UN Doc A/56/10, p. 154, para 10; *Pulp Mills*, paras 101 and 187.

[65] According to experts, the SARS-CoV-2 is a zoonotic virus that was transmitted from an animal to a human, without any human intervention. See Smriti Mallapaty, Amy Maxmen, Ewen Callaway, '"Major stones unturned": COVID origin search must continue after WHO report, say scientists. Investigation team rules out idea that the coronavirus came from a laboratory leak, but offers two hypotheses popular in Chinese media' (2021) Nature <https://www.nature.com/articles/d41586-021-00375-7> accessed 13 February 2021. While allegations of a potential lab-leak have recently surfaced, this theory has not been substantiated with sufficient evidence as of the writing of this paper. See Amy Maxmen, Smriti Mallapaty, 'The COVID lab-leak hypothesis: what scientists do and don't know' (2021) Nature <https://www.nature.com/articles/d41586-021-01529-3> accessed 27 June 2021.

their jurisdiction is imputable to them. Therefore, even if it is proved beyond any doubt that no member of the international community can be held responsible for the emergence of the disease itself, their obligation to prevent harm caused by it would remain unchanged.

According to the ILA, due diligence obligations are objective, which means that states must do what could be reasonably expected from the international community in general.[66] States' individual capabilities could only be taken into consideration if the specific due diligence obligation expressly so allows.[67] In contrast, some publicists believe that there should be a clear differentiation between states, based on their capacity to deal with activities that may cause transboundary harm. They hold that the approach of common but differentiated responsibilities ('CBDR') – which originates in international environmental law – would lead to more equitable outcomes in examining state responsibility for epidemics.[68] Applying CBDR in the context of the COVID-19 pandemic would mean that all affected states would be under a preventive obligation; however, the extent of that obligation and in turn, states' responsibilities would vary based on their capabilities and their role in the global prevention of the pandemic. Nonetheless, CBDR has never so far been applied in disputes that revolved around the customary obligation to prevent transboundary harm.

It is accepted in case-law that it is not the harm itself that triggers states' preventive obligations, but the risk of harm.[69] The degree of tolerable risk can vary based on the seriousness of potential harm.[70] Therefore, a state can violate the no-harm rule even if the harm has not even materialised. For example, in *San Juan*, the ICJ stated that Costa Rica had not complied with its preventive obligation under general international law to conduct an environmental impact assessment, even though it eventually found that transboundary harm had not occurred.[71] Consequently, states' *ex post facto* conduct would result in a violation of their due diligence obligation to prevent any COVID-19-related harm, given that the threat of harm was identified beforehand. Based on the jurisprudence of the ICJ and other international tribunals, the elements of states' obligation to exercise due diligence are the following:

---

[66] International Law Association (n 19) 13–18.

[67] Ibid.

[68] See, for example Matiangai V. S. Sirleaf, 'Responsibility for Epidemics' (2018) 97 Texas Law Review; Abhimav Verma, 'Adapting Common But Differentiated Responsibility to the Global Cooperation for COVID-19 Response' (2020) Columbia Journal of International Affairs <https://jia.sipa.columbia.edu/online-articles/adapting-common-differentiated-responsibility-global-cooperation-covid-19-response> accessed 7 February 2021.

[69] *San Juan*, para 227. According to the International Law Commission, this is a manifestation of the precautionary principle, which is also enshrined in art 15 of the Rio Declaration. See Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, with Commentaries, 2001, UN Doc A/56/10, 162.

[70] Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, with Commentaries, 2001, UN Doc A/56/10, Article 2.

[71] *San Juan*, para 161–162.

1. the obligation to conduct an impact assessment or risk assessment,[72]
2. the obligation to establish and enforce an appropriate regulatory framework,[73]
3. the obligation to cooperate.[74]

The obligation to conduct an impact assessment or risk assessment originates from environmental disputes such as the *Pulp Mills* case or the *San Juan* case. As the ILA stated, the specific elements of the obligation to exercise due diligence vary based on the facts of the case at hand.[75] Therefore, a state is only obliged to conduct such an assessment if that contributes at any degree to the identification of risk. Discharging this obligation would also have been quite useful in the context of COVID-19, as through conducting thorough risk assessments, China could potentially have identified imminent health risks within its territory that contributed to the appearance of COVID-19 in Wuhan.[76]

The regulation of activities that have a risk of causing transboundary harm is also a principal element of states' prevention obligation.[77] Even though this obligation was analysed in the *Pulp Mills* case as a treaty-based obligation, the ICJ also declared that the establishment and vigilant enforcement of an appropriate regulatory framework is a part of states' due diligence obligation to prevent transboundary harm in general.[78] As such, it is also a component of states' duty of prevention under general international law.

Whether states have introduced and enforced an appropriate level of protection through their regulatory frameworks could indirectly be ascertained from a similar obligation enshrined in the International Health Regulations ('IHR'), which oblige member states to develop, strengthen and maintain their capacities to respond to public health emergencies such as pandemics.[79] As a part of this obligation, the 196 member states of the IHR must create and enforce a regulatory framework to identify and prevent public health risks promptly.[80] The degree to which such capacities are met is monitored by the WHO's specialised bodies. For instance, China is most behind on its core capacity to implement a national health emergency framework (capacity 8), scoring 80% out of 100%.[81] Interestingly,

---

[72] *Pulp Mills*, para 204; *San Juan*, para 104.

[73] *South China Sea*, para 944.

[74] *San Juan*, para 106; *Lake Lanoux*, 307-310.; *North Sea Continental Shelf (Federal Republic of Germany/ Netherlands) (Judgement)* [1969] ICJ. Reports 3, para 85.

[75] International Law Association (n 19) 6.

[76] Smriti Mallapaty, 'Where did COVID come from? WHO investigation begins but faces challenges' (2020) Nature <https://www.nature.com/articles/d41586-020-03165-9> accessed 7 February 2021.

[77] See, for example Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, with Commentaries, 2001, UN Doc A/56/10, art 5.

[78] *Pulp Mills*, para 197. See also *South China Sea*, para 944.

[79] International Health Regulations, 2005, UNTS 2509 (entered into force 15 June 2007), art 13.

[80] Ibid, Annex I.

[81] See <https://extranet.who.int/e-spar/#capacity-score> accessed 27 February 2021; <https://www.euro.who.int/en/health-topics/health-emergencies/international-health-regulations/capacity-building/ihr-core-capacities> accessed 27 February 2021.

China has received the maximum score for the capacity to monitor zoonotic infections (capacity 3), while the global average is only 68%.[82]

The affected states must also cooperate to discharge their due diligence obligation. In *San Juan*, the ICJ declared that states must cooperate by notification and consultation.[83] States are under an obligation to notify potentially affected states of activities under their jurisdiction that have a risk of causing transboundary harm.[84] Such a risk can be identified through any means available, such as an impact assessment or risk assessment. The obligation to notify must be fulfilled *ex ante*, which follows the rationale of the no-harm rule, aiming at the prevention rather than the mitigation of harm. According to the ICJ, the obligation to notify only extends to the potentially affected states; therefore, the population of such states do not need to be notified directly.[85] Notably, the obligation to consult the potentially affected states of the possible steps necessary to prevent harm does not confer veto powers on those states.[86] However, consultations must be carried out in good faith and with a shared goal of reaching a mutually favourable solution.[87]

Some argue that China has deliberately withheld information about the virus, despite the clear obligation of notification under the IHR and customary international law.[88] Therefore, this obligation would play an important role in a possible dispute on the alleged violation of the no-harm rule.

V Conclusion

The COVID-19 pandemic has undoubtedly caused significant transboundary harm within most states, resulting in millions of deaths globally.[89] The no-harm rule is not limited to environmental harm; therefore, it is applicable to disease-induced harm to persons. The spread of COVID-19 is transboundary in nature and its severity meets the necessary requirement of 'significant'. The causal test to be applied in disputes on the violation of the no-harm rule within the context of the pandemic should be the NESS test instead of the but-for test. This would aid in dealing with the extraordinarily complicated way within which the

[82] Ibid.

[83] *San Juan*, paras 106–111.

[84] Ibid, para 168.

[85] *Pulp Mills*, para 216.

[86] *Railway Traffic between Lithuania and Poland (Advisory Opinion)* [1931] PCIJ (ser A/B) No 42, 116; *Pulp Mills*, para 150.

[87] *North Sea Continental Shelf*, para 85; *Pulp Mills*, paras 145–146; *Lake Lanoux*, 307.

[88] See <https://www.reuters.com/article/us-heath-coronavirus-pompeo/pompeo-says-china-still-withholding-coronavirus-information-idUSKBN21B3IH> accessed 21 February 2021.

[89] For statistics, see the official WHO COVID-19 dashboard: <https://covid19.who.int/?gclid=Cj0KCQiAj9iBBhCJARIsAE9qRtCQNqLGZTRRy7gcVVcw9MGGwEJODO0h1qO0BnXfhk6ZZ1C5qfBEKicaAgSDEALw_wcB> accessed 24 February 2021.

virus has spread globally. The responsibility of states for the harm caused hinges upon their obligation to exercise due diligence in the prevention of such harm. However, the application of the no-harm rule in inter-state disputes would certainly not be straightforward. One of the biggest obstacles is the question of jurisdiction, since international courts and tribunals would only be able to adjudicate disputes where the internationally wrongful act is based on an obligation under customary international law, if the parties to the dispute would mutually accept the jurisdiction of the particular dispute settlement body.[90]

In conclusion, the application of no-harm rule to COVID-19 related disputes is an effective way to adjudicate the responsibility of states for possible omissions in handling the pandemic, as well as to prevent the global spread of any future viruses. First, as prevention stands at the centre of the no-harm rule, its objective to avert any harm by requiring due diligence is just as important as the *ex post facto* determination of state responsibility.[91] Second, the due diligence obligation to prevent transboundary harm adapts to the case at hand, which leads to flexible solutions in appreciating the risk of harm as well as in preventing harm. Therefore, the no-harm rule does not provide a 'one size fits all' framework, since the specific preventive obligations depend on the risk, seriousness, and form of the harm respectively.[92] Finally, the no-harm rule would allow an international dispute settlement body to rule on whether any state has failed to prevent transboundary harm caused as a result of the COVID-19 pandemic. This is a significant advantage compared to the IHR, which only contain certain procedural rules and lack any clear obligation to prevent transboundary harm caused as a result of pandemics.

[90] For questions of jurisdiction under the IHR see Peter Tzeng, 'Taking China to the International Court of Justice over COVID-19' <https://www.ejiltalk.org/taking-china-to-the-international-court-of-justice-over-covid-19/> accessed 7 February 2021.

[91] For a more detailed analysis, see Duvic-Paoli (n 13).

[92] Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, with Commentaries, 2001, UN Doc A/56/10, 151–152.