CHAPTER - 2

ENVIRONMENT PROTECTION IN INTERNATIONAL HISTORICAL PERSPECTIVE
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As it appears from the introductory chapter, people of the world community have been suffering lot from hazardous effects of the environmental pollution and people having habitat in India are also facing similar problem and it requires proper save-guard and protection from the environmental pollution for the sake of continuance of human existance in this mother earth. To control the pollution problems various measures have been taken both at national and international level in various forms having its tremendous legal significance and there is no doubt that Indian legal framework has been highly influenced by the international legal regime right from its historical past under the act of Judicial perceiving. Therefore it is essential to discuss the historical perspective of international environment protection movement for tracing the historical background of the international legal regime regarding environment protection including Judicial response to it and this chapter is primarily based on this aspect.

2.1 International Measures during Pre-Charter Period

2.1.1. General Overview

It is the settled principal at international level from the times immemorial, that all human beings are entitled to a healthy and productive life in harmony with nature. It has been also carefully observed even
during historical age, so that such right may not be infringed by any irresponsible and negligent act of any person individual or any group of persons. In this regard, various efforts had been initiated as protective measure at international level since long back. But all of such attempts had been made not through any International Institutional mandate or guideline but it had been made in isolated manner within the domain of different individual state policy and rule of law, because during those days formation of international institution was a day dream and those days had been marked as the days of conflict but not as the international co-operation and understanding.

During historical period, various nation states had formulated their own rules and regulations and plannings to preserve and protect their own natural environment. For example, if any body looks into the history of Greece, it can be found that people of ancient Greek civilization (Mycenaean civilization, 1600 - 1100 BC)¹ use to worship the nature as God and they used to protect their nature as if they protect the existence of the object of worship. They used to maintain the clear and pure water supply for domestic as well as for the cultivation purpose. Similar thing can also be noticed during the period around 750-600 B.C.² in ancient Roman Civilization. There were also tradition of worshiping the nature and natural habitats. During that period there was the tremendous growth and development in its civilization and there had been also excellent town and country planning which was much environment friendly in nature. There was scientific system of reclamation of muddy stream for the purpose of utilization of that stream for cultivation. There was also a system of

divergence of muddy stream into swamps and marshes. Gradually Rome, owing to its favourable natural position and continuous systematic development, became a real city passing through the stages of growth from the tribal community.

This tradition of worshiping nature as God had been followed in almost all the European nations right from that ancient period and ultimately in the Mediavel period, this ancient European tradition had been embeded in the National policy, rules and regulation of the various European states in protecting their nature and preserving their natural resources. In this regard British Parliament had set an example during its very early days, even in 13th Century. In 1273 A.D., an Act of the British Parliament forbade burning of coal in London, as it had been creating huge atmospheric problem at that time. This Act of the British Parliament was followed by a royal proclamation in 1300 under the seal of King Edward-I with the following order: "who so ever shall be found guilty of burning coal shall suffer the loss of his head".

Gradually with the changing time, and with the development of new Scientific and technological invention, people began to exploit the nature with more aggression than earlier. As a result, environment risk had been also increased and pollution problem had been gradually reaching an alarming condition in all over the world and as such attempt had been initiated at the International level to introduce certain controlling measures through international sanctions to combat environmental pollution problems much before the Stockholm conference, even before the emergence of the charter of United nations in 1945. To legalise such sanctions, various

steps had been taken in the form of conventions, resolutions, treaties, agreements, recommendations, international standards, etc. and such steps had occupied the centre stage among all efforts towards global environmental protection and conservation during those days. In this regard various international bodies, forums and organisations had been set up as recommending and policy making agencies to develop international consensus on environmental issues.

Before world war-II, precisely before the charter of United Nations coming into existence in 1945, few international environmental agreements had been existing. There were also very few international institutions in existence to deal with environmental matter and in this regard the distinguished exception was the World (originally International), Meteorological Organization which had been established in 1873 to co-ordinate world weather observations and to promote the understanding of climate. There was also another institution, namely International Council of Scientific Unions which was established in 1919 as International Research Council, to promote and co-ordinate scientific research and development. Actually during this period most of the environmental agreements concentrated for protecting migratory birds and animals, managing transfrontier river basins and boundary waters and conserving marine fish and mammals.

An early example of the pronouncement of a legal principle in support of reasonable water use rule had been found in the 1911. It was Madrid Declaration of the Institute of International Law which embodied the principle — "all alterations injurious to the water and the emptying therein of injurious matter had been forbidden". But much before this Madrid

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declaration as made in 1911, Dutch Ministers were instructed to regard Dutch rights in the Meuse River which was common both to Holland and Belgium, in 1856, in the following terms — "That both parties are entitled to make the natural use of the stream, but at the same time, each is bound to abstain from any action, which might cause damage to the other; they cannot divert it to serve their own needs, whether for purposes of navigation or irrigation."\textsuperscript{5}

2.1.2 Various Activities

2.1.2.a Treaties

The border between Spain and France was settled by the treaty of 1886 signed by them. In addition, an Additional Act recognised existing rights on water-course flowing from one country into the other or forming a boundary and according to this Act, agreement is required between the two states before changing the directions or the volume of the water course by new construction.

In 1909, the United States and Great Britain concluded a treaty concerning the boundary water between the United States and Canada. Under Article IV of that treaty\textsuperscript{SA}, the waters had been defined as boundary water and water flowing across the boundary shall not be polluted on either side to injury of health or property on the other. Under Article VII of that treaty, the contracting parties were agreed to establish an International joint commission having jurisdiction over all cases involving the use or obstruction or diversion of the boundary water. In 1918, the International

\textsuperscript{5} Ibid.
\textsuperscript{SA} For details see Hackworth; Digest of International Law (1940-1944) 8 Vols; also see Moore; Digest of International Law (1906) 8 vols.
joint Commission found that the water of the Detroit and Niagra Rivers were being polluted and it recommended that no untreated sewage from the cities or towns should be discharged into the boundary water. Consequently, a draft treaty was prepared to carry out the said recommendations of the Commission. Later the recommendation of the Commission had been incorporated into a draft treaty based on the principle of 'Sic utero tuo'⁶.

2.1.2.b Conventions

During early part of the 20th century, when business of petroleum imports and exports increased, due to rise in demand for petroleum products, problem of oil pollution in harbours and coastal region became noticeable features. In 1922, Great Britain took first initiative in prohibiting the deliberate discharge of oil in its inland waters and territorial sea. But that was applicable only in case of discharge beyond 3 miles from shore. In 1922, a joint resolution of the congress requested the U.S. president to call a conference of maritime nations to adopt effective means to reduce the pollution of marine water. In 1926, nine European State, and Great Britain, Canada, Japan and United States met in Washington, but they failed to reach any formal agreement. However, consensus opinion had been developed at that conference in this line that a state could declare some areas of its coasts upto 50 miles from the shore, which were susceptible to damage from oil, as fishing grounds and notify other states and in case of breach of agreement by non-nationals, that case would be

⁶. 'Sic utero tuo' — means — no state is allowed to alter the natural condition of its territory to the disadvantage of natural conditions of the neighbouring state, adding that a state is not only forbidden to stop or divert the flow of a river which runs from its own to a neighbouring state, but like wise to make such use of water of the river as causes danger to the neighbouring state, or prevent it from making proper use of the flow of the river on its part — Oppenheim; International Law; Universal Law Publishing Comp. Pvt. ltd., Delhi, 8th Edition, 1955; vol. 1; Page 475;
referred to the flag state of the ship involved in the incident. Infact, no convention had been emerged there. Inspite of existence of some informal understandings between states regarding restrictions of oil discharges in some coastal areas during 1926 to 1939, progress made in reduction of marine pollution had been very slow during these years. In 1934, the British had raised the issue regarding oil pollution before the league of Nations. League of Nations summoned an international conference on such issue, but ultimately it was cancelled due to non participation of Germany, Italy and Japan.

In addition, few international conventions were also held during this period mainly for the protection of natural flora and fauna. One of such conventions was *Convention relating to the preservation of fauna and Flora in their natural state (1933)* as held in London. This convention was held with a purpose to ensuring protection to the natural fauna and flora from ecological disturbance in 'national Park'\(^7\).

As per this convention, hunting, killing and capturing of animals would be taken place under the absolute control of the authority in the 'National Parks'\(^8\) and 'strict natural reserve'.\(^9\) It has been also held through that convention that contracting Government would notify the Government of United Kingdom of Great Britain and Northern Ireland for the establishment

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7. Expression National Park shall denote an area placed under Public control, the boundary of which shall not be altered or any portion be capable of alienation except by the competent Legislative authority..... and in which the hunting, killing capturing of fauna is prohibited except by or under the direction or control of the Park authority.


8. Ibid.

9. The term "strict natural reserve" shall denote an area placed under public control. Through out which any forms of hunting or fishing any undertakings connected with forestry, agriculture or mining, any excavations of.......... any work involving the alteration of the configuration of the soil or he character if the vegetation, any act likely to harm or disturb fauna or flora and the introduction of any species of fauna and flora, whether indigenous or imported, wild or domesticated shall be strictly forbidden........and in which scientific investigation may only be undertaking by permission of these authority — Sinha, P.C. (Dr.) and K., Cherry; *International Encyclopaedia of Environmental Laws*; Anmol Publication Pvt. Ltd., New Delhi; 1st edition, 1996; Vol. 1; Page 2.
of any National Parks or strict National reserves and of the legislation including the methods of administration and controls, as adopted in connection therewith.

Another convention, namely *Convention on nature protection and wild life preservation in the Western hemisphere (1940)* was also held to protect and preserve natural habitat and of their native flora and fauna, including migratory birds, in sufficient numbers within the territories of Governments of American Republic. This convention was also held for the protection and preservation of the scenery of extraordinary beauty, natural objects of aesthetic, historic or scientific value.

**2.1.2.c Agreements**

During those days many activities with possible extra-territorial injurious consequences of environmental pollution had been regulated by multilateral treaties. A great number of bilateral agreements were made either bilaterally or multilaterally at international level. Some good number of bilateral agreements, were made regarding utilization of natural resources of shared lakes or rivers between the contracting states. Bilateral agreements have been also concluded to regulate the transportation of hazardous substances and the conduct of activities affecting the climate and weather. For example, an *agreement between the Government of the United Kingdom of Great Britain and the Government of Kingdom of Norway relating to the transmission of petroleum by pipeline from the Ekofish field and neighbouring areas to the United Kingdom* had been signed on 22nd May, 1937\(^\text{10}\)

\(^{10}\) Padma, (Dr.); *International Environmental Law; Asia Law house, Hyderabad; 1st Edition, 2003; Page 17; for further details see Professor's Parry's Index of British Treaties.
Due to commencement of certain activities and possible ecological disaster, as outcome of such activities, some other bilateral agreements were also made during that period. For example, *convention between the Polish Republic concerning Judicial relations on the States frontier* had been signed on 10th April, 1932.\(^{11}\)

In some bilateral agreements, a joint commission had been constituted to determine the tolerable or intolerable harm. Such type of *agreement had been formed between Norway and Sweden* in a convention held on 11th May, 1929.\(^{12}\)

*General convention concerning the hydraulic system* was concluded and an *agreement was signed between the Kingdom of Romania and the Kingdom of Yugoslavia on 14th December, 1931*, with this resolution that "if either party intended to take certain measures in their frontier water course in its territory which might injuriously affect any interests in the territory of the other State, it shall obtain the agreement of that State".\(^{13}\)

### 2.1.2.d Legislations at International Level

Before World war II, in addition to these international conventions, treaties, agreements, both bilateral and multilateral, there were also certain number of State's law for the protection of environment and for the preservation of natural resources to maintain ecological balance. In this regard, oldest federal statute of United States was the "*Rivers Harbors Act of 1899*" which had been enacted for the abatement of Water Pollution. *Public Health Service Act of 1912* was also enacted for the maintenance of Public Health and hygiene. Thereafter another important legislation was

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11. Ibid Padma (Dr.) at page 32.
12. Ibid at page 35.
13. Ibid.
made and that was *Oil Pollution Control Act, 1924*, as enacted for the protection of environment from oil pollution. Like United States, British Parliament also enacted few legislation during that period. One of such legislations was *Salmon and Fresh water Fisheries Act, 1923* what was the first comprehensive Legislation regarding control of Water Pollution in United Kingdom. In this regard, subsequent legislations were the *Public Health Act, 1936*; the *Public Health (Drainage of Trade premises) Act, 1937*.

Actually these legislations had motivated the World community to come forward and to resolute for creating a consensus international Legal Principles for the protection of environment and prevention of pollution through international conventions, treaties, agreement, etc.

2.2 International Measures During Post-Charter Period:

2.2.1 United Nations Charter

From 1944 onwards there was a surge of institution building process at international level. The Food and Agriculture Organisation (FAO), World Health Organisation (WHO) and United Nations Social and Cultural Organisation were also established between 1945 and 1958. Within a few years, new agreements were concluded protecting the oceans and living marine species, governing Antarctica and banning nuclear Tests under Water, in atmosphere and in outer space and in Antarctica. In addition, the Treaty on principles Governing the activites of the States in
the exploration and use of outer space, including the Moon and other celestial bodies, was signed on 27th January, 1967. Obligated states were engaged in studying or exploring outer space to avoid harmful contamination and adverse changes in the environment of the Earth.

World War II highlighted the importance of consultation and dialogue to identify potential source of friction amongst the nation states to avoid future conflicts. The United Nations Charter (1945) not only established the United Nations itself in 1945, but also contemplated that specialised agencies in economic, social, cultural educational, health and related fields would be linked to it, "with a view to the conditions of stability and well being which are necessary for peaceful and friendly relations among nations"\(^{14}\) and this relation is based on the principle of equal rights and self determination of the people.

The charter also called for the establishment of regional arrangements to further these ends. This charter was also to reaffirm faith in fundamental human rights in the dignity and worth of the human person and to establish conditions under which justice and respect for the obligation arising from treaties and other sources of international Law can be maintained and to promote social progress and better standards of life in Larger freedom. This 1945 charter was framed to achieve International Co-Operation in solving international problems of economic, social, cultural or humanitarian character and in promoting of human rights and in encouraging for protection of fundamental freedom for all without distinction as to race, sex, language or religion. It would also help to develop friendly relations among nations.

Under this charter, various international organs had been also established, such as General Assembly of United Nations, Security Council, Economic and Social Council, Trusteeship council and International Court of Justice. Within the scope of this charter, General Assembly may consider the general principles of co-operations in the maintenance of international peace and security including the principles governing disarmament and regulation of armaments and may make recommendation in these regards. Here security council has been also conferred with the responsibility for the maintenance of international peace and security. Under this charter, security council shall also determine the existence of any threat to the peace, breach of peace or any act of aggression and it can also make recommendation or decide that what measures shall be taken in these regards.

As these international institutions evolved, the specialised organisations and its different programmes had been available to promote the international co-operation which is essential for the preservation of global, as well as transboundary natural resources. The international union for protection (Later conservation) of nature and Natural Resources (IUCN), found in 1948 with both State and non-Governmental members, was charged with protecting natural areas and species. Others, including the International Maritime Organisation (IMO), the International Labour Organisation (ILO) and the World Health Organisation (WHO) had been also there to protect the human environment by ensuring human health and safety.

Between 1944 and 1972, the United Nations system helped to develop a substantial range of activities in connection with the environment protection movement. Like the counterpart national institutions, they
adopted an essentially sectoral approach. FAO was concerned with improving world food security and the conditions of rural people. Along with the development of agriculture and fisheries, FAO also took forestry into its mandate because of the importance of forests to rural populations. WHO focussed on achieving the highest possible standards of human health and inevitably it became concerned with the environment and human health which is very much related with its living conditions and habitat and their role in disease transmission. UNESCO was the parent body for the Intergovernmental Oceanographic Commission (ICO) which performed various research programmes relating to ocean and it also supported major programmes of scientific study through International Council of Scientific Union (ICSU) which helped to organise the International Biological Programme (IBP) between 1964 and 1974. World Meteorological Organisation (WMO) had made an extensive efforts to develop world-wide meteorological and hydrological observations and also to provide understanding of environmental processes in connection thereto and this efforts had long history spreading through the decades.

The United Nations Development Programme (1966) had been initiated with a mission aiming at Promotion of economic and social Development based on sound management of the environment. The world Food Programme (1961), UN Population Commission (1946) and other specialised bodies and the various Regional Economic Commissions and all other regional Institutions had also become involved with environmental protection movement.\textsuperscript{14A}

Along with these institutional developments at international level for

the purpose of environmental protection and maintenance of ecological balance, various other measures had been initiated and such measures include convening various conventions, signing of treaties and agreements, etc.

2.2.2. Various Other Measures

2.2.2.a Conventions and Treaties

Before 1970, various conventions had been convened by the International Agencies. In this regard, International Convention for the protection of Birds (1950) as held in Paris, is being mentioned first. Realising the danger of extermination of certain species of birds and numerical decrease in other species, particularly migratory species and under these circumstances considering the need to amend the international convention for the protection of birds being useful to agriculture, signed in Paris on 19th March, 1902, this convention had been convened. Contracting parties had undertaken that they would gradually to introduce certain legislative measures, designed to prohibit or restrict the use of followings, such as --

"(i) Snares, birdline, traps, hooks, nets;
(ii) All fire arms, other than shoulders arms;
(iii) Use of motor vehicles or air borne machines to drive birds;
(iv) All other methods, designed for the mass capture or killing of birds."

Almost at that same time at Rome for the protection of plant, another convention had been convened. It was International Plant Protection

16. Ibid.
convention (1951). With the purpose of securing common and effective action to prevent the introduction and spread of pests and diseases of plants and plant products and to promote measures for their control, the Governments of the contracting parties to the convention had undertaken in this convention to adopt the legislative, technical and administrative measures. As per this convention, Governments of the contracting parties to that convention shall have full authority to regulate the entry of plant and plant products and to this end, may prescribe restrictions or requirements concerning the importation of plants or plant products.

Another convention, namely *International Convention for the High Seas fisheries of the North Pacific Ocean (1952)* was held in Tokyo, followed by a Protocol. Realising that it was highly desirable to establish an International Commission to promote and co-ordinate the scientific studies which were necessary to ascertain that conservation was required to secure the maximum sustained productivity of the fisheries, this convention had been convened. Governments of the U.S.A., Canada and Japan were the parties to that convention. Convention was held to ensure the maximum sustained productivity of the fishery, resources of the North Pacific Ocean and that each of the parties to the convention should assume an obligation, on a free and equal footing to encourage the conservation of such resources.

Another convention was held on 1954 at London. It was named as *International Convention for the prevention of pollution of the Sea by Oil (1954)*. After the world war II, when resurgence of maritime Trade was taken place and use of petroleum product had been intensified, incidents of deliberate or accidental discharge of oil into the sea from the ship had been increased. In view of those circumstances, the delegates
from 32 states meet in 1954, from 26th April to 12th May, in London to
discuss the issue. From this meeting the first "International Convention
for the prevention of pollution of the sea by Oil", came into existence and
was signed in 1954 and came into force in 1958\textsuperscript{17}.

The Inter-Governmental Marine Consultative Organisation (IMCO) had
held many convention regarding prevention of pollution of the sea by oil
since 1922, when Great Britain took the first step in prohibiting the
deliberate discharge of oil in its inland water and Territorial sea, but the
1954 international convention for the prevention of pollution of Sea by Oil,
had formed the back-bone of International Treaty Law. Until 1973, it was
the only international convention, which dealt with the preventive standard
for oil discharge, responsible for marine water pollution and it had attracted
wide support from all over the world. Desiring to take action by common
agreement to prevent pollution of the sea by oil being discharged from
ships, such convention was held at London.

Next convention, called as the \textit{convention on the High Seas (1958)},
was held for the prevention of pollution on the high seas. Desiring to
codify the rules of international Law relating to the high seas, and
recognising that the United Nations Conference on the Law of the sea,
held at Geneva from 24th February, to 27th April, 1958\textsuperscript{18}, all the participating
nations had adopted few principles as mentioned below.

As per this convention, every state, whether coastal or not, has the
right to sail ships under its flag on the high seas and every state shall take
certain necessary measures for ships under its flag to ensure safety at

\textsuperscript{17} Karkara, G.S. (Dr.); Environment Law; Central Law Publications, Allahabad; 2nd Edition, 2000; Page 181.
\textsuperscript{18} Sinha, P.C. (Dr.) and K., Cherry; International Encyclopaedia of Environmental Laws; Anmol Publication Pvt. Ltd., New Delhi; 1st edition, 1996; Vol. 1; Page 266.
sea. As per this convention, every state shall draw up regulation to prevent pollution of the seas by the discharge of oil from ships or pipelines or resulting from the exploitation and exploration of the seabed and its subsail, taking into account of existing treaty provisions on the subject.

The 1954 oil convention remained the focal point but was incomplete answer for the problem of high sea's oil pollution, because there were many exemption clauses, e.g., public vessels were exempted; and, whenever the master had the reason to believe that safety of life or damage to ship or its cargo were involved, he might forego the provisions of the convention. So from the environmental point of view, 1954 standard had become virtually, useless, since it allowed the tankers to discharge oil lawfully over the high seas. Such 1954 standards was amended in 1962 by adopting two following concepts, as a move to reduce pollution of the high seas by deliberate discharge of oil, such as -

a) The prohibited zones, or zones of the sea within which discharge of oil or oily mixtures was banned; and,

b) The requirement that port states provide facilities within which shippers could dispose of their oily wastes"19

In fact, the amendments to the convention were not ratified by the participating country to the 1954 convention until 1967, by which time the oil companies had developed the Lot system20 for retaining oily slop. However, the Lot system did not met the minimum discharge standards set by the 1962 amendments, which were generally violated. Thereafter again

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20. 'Lot' is a technical solution to oil discharge systems. The Lot solution basically means separating the oil and water or board, discharging the water to sea retaining the oil residues abroad. The next cargo is then, in most situation, loaded on top of the residues - hence the system is christened load on Top — Karkara, G.S. (Dr.); Environment Law; Central Law Publications, Allahabad; 2nd Edition, 2000; Page 181.
in 1969, further amendments were made to 1954 standards, by which concepts of 'Prohibited Zones'\(^{21}\) had been abandoned. The 1969 standard had replaced the old concept of oil discharges being permissible except inside prohibited zones, with the new idea that discharges may be made if the oil is sufficiently dispersed on discharges.

In 1971, the International Governmental Marine Consultative Organisation (IMCO) Assembly once more voted to amend the 1954 oil pollution convention. The 1971 amendments of the 1954 oil convention aimed at limiting the size of the tanks of very large tankers as ordered after January 1, 1972, so that dangers of enormous accidental oil spills might be reduced. But in truth the only law in force by 1973 was the 1954 convention, as amended in 1962, which had been thwarted by the invention of LOT system\(^ {22}\) and as a result that exceeded the minimum discharge standards, since the system was not practically enforced by the flag states in prohibited zones beyond the coastal state territorial sea.

Finally 1954 convention, as amended, was to be replaced by the International convention for the prevention of pollution from ships (1973). The 1973 convention by framing a Regulation has incorporated the amendments to the 1954 convention in the light of new scientific knowledge and technique. The opportunity had come at the 1973 conference to improve the standards relating to operational oil pollution in the sea. The 1973 convention of the international convention for the prevention of pollution from ships, provided for the first time a legal requirement for segregated ballast tanks for every new oil tanker of 70,000 tons dwt. and above and such provision was highly accepted as

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21. See the note Supra 19.
22. See the note Supra 20.
an effective international legal standards for the protection of marine environment. This 1973 standards were established, for certain specially protected region, like Mediterranean sea, Baltic Sea, Red Sea, Persian Gulf, etc.

One convention namely, *Convention on the territorial sea and the contiguous Zones, 1958*, was held and signed at Geneva on April, 24, 1958 and it has been held there that every state shall draw up regulation to prevent pollution of the sea due to discharge of oil from ships of pipe lines. They shall also take measures to prevent pollution of the seas from the dumping of radio-active waste. All the states shall co-operate with the International organisation to take measures for the precaution of pollution of the sea, resulting from any activities with radio-active materials and other harmful substances.

In another convention namely, *Convention on Fishing and conservation of the living resources of the High Seas (1958)* the main issue of discussion was that how development of modern techniques for the exploitation of the living resources of the sea and increasing man's ability to meet the need of the world expanding population for food have exposed some of those resources of sea to the danger of over exploitation. It was also considered in that convention that how such problem was to be solved on the basis of international co-operation.\(^{22A}\)

Thereafter *International Convention relating to intervention of the High Seas in case of oil pollution casualties, 1964, was held*. Since it was felt necessary to take conscious step to protect the interest of the people against the grave consequence of the maritime casualty due to oil

pollution in the High Seas, aforesaid international convention was held at Brussels.

All the participating countries agreed therein to take necessary steps to prevent, mitigate or eliminate grave and imminent danger to their coastline arising out of pollution of sea by oil, followed by maritime casualty or to counter casualty which may be expected to take place as a harmful effect of oil population on high seas.

Another *International Convention for the conservation of Atlantic Tunas* was held in 1966. Considering their mutual interest of all the participating countries in the population of Tuna and Tuna like fishes, found in the Atlantic Ocean, they had decided to co-operate in maintaining the populations of these fishes at the levels which would permit the maximum sustainable catch for food and for other purposes and ultimately they resolved to conclude a convention for the conservation of such natural resources at the Atlantic Ocean after collecting statistics on the Atlantic Tuna fisheries.

In European conventions for the protection of Animals during International Transport (1968) convention, as held at Paris in 1968, each participating country of the European Council signed an agreement for taking necessary measures to avoid or to reduce the suffering of animals to a minimum level aiming to safeguard their common heritage.

Thereafter *European Convention on the protection of the Archaeological heritage (1969)* was held at London. Having regard to the European cultural convention, signed at Paris on 19th December, 1954, and considering the necessities of safeguarding their common

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heritage, the member state of the European Council, participating nations to that convention, have undertaken at that convention that as far as possible they would a) Prohibit and restrict illicit excavation; (b) take necessary measures to ensure that excavation work in all respect would be entrusted upon authorised qualified persons.

Convention on Civil liability in the Field of maritime carriage of Nuclear material 1971 was convened by IMCO to regulate liability in respect of damage arising from the maritime carriage of Nuclear substance. The convention reinforces the principle of exclusive liability of the operator of a nuclear installation. Under the convention, operator of a nuclear installation would be liable, for damage caused by a nuclear incident in course of carriage, but the maritime carrier would not be liable for the same. This convention makes the operator of a nuclear installation liable for damage caused by a nuclear incident occurred in course of maritime carriage of Nuclear material. So as per this convention, the operator of a nuclear installation should be absolutely liable for any nuclear damage arising out of nuclear accident irrespective of their error, as committed.

Thereafter Oslo convention for the prevention of Marine Pollution by Dumping from Ships and Air Craft, 1972 was held. It was a regional convention under which an agreement was signed by 12 Western European States as applied to North East Atlantic and parts of Arctic Ocean. It was the first international agreement to control dumping.

Being convinced that international action to control pollution of the sea by the dumping of harmful substances from ships and air craft should be taken into consideration without any delay, under this convention-
"dumping"\textsuperscript{24} has been explained as deliberate disposal of substances and materials into the sea by or from ships or from air craft other than (a) any discharge incidental or derived from the normal operation of ships and air craft and their equipment (b) The placing of substances and materials for a purpose other than the mere disposal thereof is not contrary to the aim of this convention. Here it may be mentioned that through Oslo convention, regional commission has been established to exercise overall supervison over the implementation of its terms.

The Oslo convention was followed by \textit{London convention on dumping 1972} to apply universally. That is to say, it applies to seas everywhere. London convention on Dumping, applies to high seas and territorial sea, but it exempts internal waters.

Under the conventions, both Oslo and London, the signatories have agreed to take measures to prevent pollution of the sea by dumping of harmful wastes and to harmonise their policies in this regard. Both the conventions made the absolute prohibition of dumping but simultaneously under Article VIII of the Oslo convention and Article V of the London convention have made such prohibitory order, inapplicable in case of 'force majeure'\textsuperscript{25} due to distress of weather or any other cause when the safety of human life or of a ship or air craft is threatened.

In both the conventions, the duty of enforcement had been vested upon the flag states, the port states and the coastal states, under different circumstances. But convention did not depart from the traditional pattern

\textsuperscript{24} Ibid at Vol. 2; page 419; Regarding Liability in dumping See Goldie, L.F.E; International Principle of Responsibility for Pollution; in Columbia Journal of Transnational Law, Vol. 9, No. 3 (1970).

\textsuperscript{25} The expression means some physical or material restraint and does not include a reasonable fear or apprehension of such a restraint, Hackney Borough Council vs. Dore (1922) 1 K.B. 431 — Mitra's Legal Dictionary, Eastern Law House, Calcutta; 2nd Edition, 1976; Page 323.
of preserving the enforcement powers over vessels in the area beyond national jurisdiction to the flag state or state of registry.

Thereafter convention for the protection of the world cultural and natural Heritage (1972) was held. It was administered by the United Nations Educational Scientific and Cultural Organisation (UNESCO). In this convention, it was agreed by the participating countries, that certain natural and cultural sites, part of the world heritage, would be conserved for the present and future generation. As per resolution, as taken in this convention, participating states would nominate their own natural and cultural sites for inclusion on an international list of world heritage sites and states are obligated to protect those listed sites.

In addition to the aforesaid conventions, various other conventions were held and treaties were also signed therein, specially for the prevention of pollution, caused by radio-active substances as discussed below:

The Antarctic Treaty, 1959 prohibits nuclear explosions and disposal of radio-active waste material in Antarctica and provides for inspection of all the areas in the Antarticita by observers of the contracting states. The preservation and conservation of living resources in Antarctica is one of the agreed objectives of the treaty.

In the Treaty Banning Nuclear weapon Tests in the Atmosphere, in outer space and under water, 1963, the Governments of the United States of America, the United Kingdom of Great Britain and Northern Ireland and the then Union of Soviet Socialist Republics, are the original parties.

Determining to put an end to the contamination of man's environment by radioactive substance, each of the parties to this treaty has given
undertaking to prohibit, to prevent and not to carry out any nuclear weapon Test, explosion or any other nuclear explosions, at any place under its jurisdiction. They have also further more given underatking to refrain from causing, encouraging or in any ways participating in carrying out of any nuclear weapon Test explosion or any other nuclear explosion at any where in the environments.

Thereafter the Treaty for the prohibition of Nuclear Weapons in Latin America (Talteloco Treaty), 1967, is an outcome of a growing concern about the danger to integrity of human species caused due to continuous release of radioactive elements by nuclear weapons. Under this Treaty, the contracting parties have agreed to carry out explosions of nuclear devices for peaceful purposes. As per the treaty, it is also to convey the fullest possible information on any possible radioactive fallout and also measures as taken to avoid dangers to the population of flora, fauna and territories of party or parties to the treaty.

Another treaty namely, the treaty on the Non-proliferation of Nuclear Weapons, 1968 encourages further the resolution as taken by the parties to the 1963 Nuclear test ban Treaty seeking to achieve the discontinuance of all test explosions of nuclear weapons for all time and to continue negotiations to this end for the purpose of prevention of wider dissemination of nuclear weapons. In this treaty, State parties have undertaken to fulfil an obligation for not to transfer nuclear weapon and explosive devices and not to encourage, assist or induce any non-nuclear weapon state to manufacture or acquire the same.

Thereafter Nuclear Test Ban Treaty, 1969, provides for putting an end to the contamination of man's environment by radioactive substances
and permits no nuclear explosions in the three parts of the biosphere, namely atmosphere, outer space, and under water including territorial water or the high seas.

Under, the treaty on the prohibition of the Emplacement of Nuclear Weapons and other Weapons of Mass Destruction on the Sea bed and Ocean Floor and in the Subsoil thereof, 1971, the parties to the treaty have made a solemn promise not to implant or emplace any nuclear weapons or any other types of mass destruction or any structures including any launching installations; or facilities for storing, testing or using such weapons on the sea-bed, ocean floor, or subsoil beyond 12 miles from their shore baselines.\textsuperscript{25A}

2.2.2.\textbf{b} Agreements

In addition to these, two other international conventions were also convened, one in 1948 and another in 1960 and in those conventions, agreements on safety of life at seas had been made. Both the conventions, International convention for the safety of life at sea 1948 and International Convention for safety of life at sea, 1960, contain basic international navigational standards at High sea. The International convention, SOLAS for safety of life at sea 1960 had been amended regularly, since its enforcements. This convention had been readopted with other changes in another international convention, Safety Of Life At Sea (SOLAS), 1974.

2.2.2.\textbf{c} Conferences

\textit{Brussels Resolution on International Co-operation concerning pollutants other than oil, 1969.}

This resolution was adopted at the International Legal conference on Marine pollution Damage held under IMCO at Brussels in November, 1969\textsuperscript{26}. While noting that pollution may be caused by agents other than oil, the states, represented at the conference, recognised that the limitation of the International convention relating to Intervention on the High Seas in cases of oil pollution casualties was not intended to shorten any right of a coastal state to protect itself against pollution by any other agent. They favoured the extension of the above international convention to pollution by other agents and desired the IMCO to intensify its work on all aspects of pollution by agents other than oil.

The \textit{International Tanker safety and pollution prevention conference in 1978}. In this conference, Special extra provisions for tankers were set. According to these new provisions, the new and existing tankers of 10,000 tons gross tonnage and above must have two remote control systems for the control of the steering gear, so that if one system fails, the other can be brought into immediate operation. Further, new tankers of 10,000 tons gross tonnage and above shall have in addition to emergency power source, two or more power units for the steering gear so that they can start automatically on the restoration of power after a power failure. These new provisions are added to the international legal standards on accidental pollution prevention with a new enthusiasm.

\section*{2.3 Judicial Response in International Historical Perspective}

\subsection*{2.3.1. Response during pre-charter period.}

Within the domain of International Environmental law, Judiciary had been also responding effectively in dealing with various environmental

\textsuperscript{26} Karkara, G.S. (Dr.); Environment Law; Central Law Publications; Allahabad, 2nd Edition, 2000; Page 225; for Liability see Winfield, The Type of Absolute Liability; in the Law Quarterly Review, Vol. 42 (1926).
issues in International historical perspective.

During pre-charter period, in International perspective, Judiciary had to concentrate in dissolving conflict regarding rights and liabilities amongst States, who had been the parties to the various agreements, either bilateral or multilateral and / or treaties and conventions, in connection with the environmental issues.

There is no doubt that industrial and technological development after industrial revolution as carried on within various states, had some harmful extra territorial consequences and during pre-charter period, i.e. during early twentieth century, State's liability for such consequences was thought to be raised only upon breach of an obligation voluntarily assumed in customary international law or the provisions of a treaty.

The *Trail smelter Arbitration case*²⁷ is generally considered as first Judicial decision at international level where under international liability for damage, caused to the environment of another state due to activities in one state, had been recognised. This particular case between United States and Canada has been referred to an Arbitral Tribunal in view of a convention, signed on April 15, 1935.²⁸

While adjudicating the case, it was held by the Tribunal that both international and United States Municipal law deny any state the right to use or permit the use of its territory in such a manner as to cause injury by fumes in 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. Considering the circumstances of the case,

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²⁸ Dr. Padma; International Environmental Law; Asia Law House, Hyderabad; 1st Ed., 2003; Page 47.
the Tribunal held that the Dominion of Canada was responsible in International law for the conduct of the trial smelter. It was therefore the duty of Government of Canada to see to it that the conduct of the Trail Smelter was in conformity with its obligation under international law as determined by the Tribunal. In this case\(^29\), the Tribunal allowed the American claim as to compensation in part and required the Trail Smelter to refrain from causing any damage through fumes in the State of Washington in future. In effect, the Tribunal emphasised on the age old principle of 'Sic Utero Tuo' or the general principle of obligation to every state i.e. not to use its own resources to cause injuries to another state. While adjudicating the said Arbitration, at last, Tribunal added — "The activities are only prohibited when the cause is one of serious consequence and the injury is established by clear and convincing evidence.\(^{30}\)

So in this Arbitration, it was determined that until 'serious consequences' due to pollution activities of any state could not be proved, and injury, caused to the environment of other state due to such pollution, could not be established by clear and convincing evidence, international liability of such polluting state would not be fixed.

The Arbitral Tribunal had tried to settled the dispute applying the law and practice as followed in the United States of America and also in the International Law and Practice. It was observed by the Tribunal that no state had the right to use or permit to use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein. The decision of this Trial Smelter Arbitration case had established the principle that state had a duty to regulate activities with

\(^{29}\) See the note Supra 27.
\(^{30}\) Ibid at page 1965.
potentially harmful transborder effects and in default, it would be an
obligation of the such offending state to compensate when injury resulted
to other state. In this case, Tribunal had awarded to the United States, $428,000 as damages and imposed specific limits on the Smelter's future emissions and it was suggested that a state might be ordered to limit the harmful activity occurring within its limit.

It may be stated here that similar principle regarding obligation of the state parties as decided in Trial smelter case, had been also applied within the legal system of a Nation State, specially in United States' legal system long before. In *Missouri vs. Illinois* it was considered by the court that before coming into conclusion regarding effect of pollution and its liability, it has been necessary to prove fully and clearly the case to be "of serious magnitude." In similar manner another case, *New York Vs. New Jersey* was decided. New York has lost the case against New Jersey, because it failed to show that New Jersey's proposed sewage disposal plan would corrupt the waters of the bay in such a manner so that it would create a public nuisance by causing offensive odours or unsightly deposits on the surface or that it would seriously add to the pollution of it. In dealing with this case, it was held that "Offensive odours" and "unsightly deposits" could be made the basis of a valid claim if it would be sufficiently proved.

By invoking the principle as settled by the court in Missouri Vs. Illinois, another case was decided in very early stage during pre-charter period. In this case, *Georgia vs. Tennessee Cooper Co.*, it was observed by

31. 200 U.S. 521 (1906)
32. Missouri Vs. Illinois, 200 U.S. 521 (1906)
33. 256 U.S. 313 (1921)
34. New York Vs. New Jersey, 256 US 313 (1921)
35. Ibid;
36. 200 U.S. 521 (1906)
37. 206 U.S. 238 (1906)
the Court — "it is fair and reasonable demand on the part of a sovereign that the air over its territory should not be polluted on a great scale by sulphurous acid gas, that the forests on its mountains ....... should not be further destroyed or threatened by the act of persons beyond its control."

In view of this observation in this case, the argument as extended on behalf of the Georgia that damage had been done to the Georgia's environment due to the act of Tennessee Copper Co., had been accepted by the court and ultimately Georgia won the case.

In another case, Sierra Club vs. Morton which had been decided in much later period, it had been held that the interest alleged to have been injured might reflect the aesthetic, conservational, and recreational, as well as economic values, but, since Sierra club could not shown the connection of injury to the individuals as it presented and had been unable to demonstrate the injury which would have been done to its members by a proposed development of a Scheduled mountain site, the court dismissed the case.

2.3.2 Response during Post-charter period

The principle of State's obligation and liability in case of environmental damage and judicial response to it during pre-charter period, as discussed in the foregoing section, had been remained almost unchanged during post-charter period also. In this regard most glaring example is Corfu Channel case.

Trial Smelter case’s ruling was confirmed and applied by the

39. 405, U.S. 734-35 (1972)
International Court of Justice (ICJ) in Corfu Channel case. In this case, the ICJ had proclaimed the obligation of every state for not allowing its territory to be used for acts contrary to the rights of other states.

Corfu Channel Case involved the dispute between Great Britain and Government of Albania which had failed to notify and warn the British Warships what sustained damage and suffered loss of life resulting from striking a mine in the Corfu Channel at the time of passing through the AlbanianTerritorial water.

In this Corfu Channel case, it was held by the ICJ that Albania was under an obligation to notify and warn the British Warships approaching through the Albanian territorial waters on the basis of elementary considerations of humanity, even more exacting in peace than in war. Under these facts and observations, Albania was found responsible by the ICJ for the damage caused to the British Warships while passing through its Territorial water. While passing the order, it was held by ICJ that it had been the obligation of every State not to allow its territory to be used for acts contrary to the rights of other states.

From the decision of this particular case, the concept of consultation and prior negotiation concerning activities with potential extra-territorial injuries had been established as a legal requirement and such legal requirement had been tested in various other judicial decisions during the post charter regime.

In North Sea Continental Shelf Case, the International Court of
Justice (ICJ) held that prior to the delimitation of the continental shelf unilaterally by any state party, there had been an obligation for the parties to enter into negotiation. It was held by the ICJ that the parties had been under an obligation to enter into negotiations with a view to arriving at an agreement and not merely to go through a formal process of negotiations as a sort of prior condition for the automatic application of a certain method of delimitation in the absence of agreement. It was also held that the parties had been under such an obligation so as to conduct themselves that the negotiations were meaningful which would not be the case when either of them would insist upon its own position without contemplating any modification of it.

This North Sea Continental Shelf Case44 had been come up before the International Court of Justice in connection with the dispute regarding boundaries of the continental shelves amongst the various state parties under agreement. By a series of agreements between the U.K. on the Western side and Norway, Denmark and the Netherlands on the Eastern Side, these State had fixed the respective boundaries of the continental shelves according to the principle, 'median line'. In addition, by the agreements of 1964 and 1965, the Federal Republic established certain partial boundary lines with Denmark and the Netherlands, but the Federal Republic did not make any agreement with Denmark and the Netherlands regarding other boundaries. In this case, ICJ had elaborated on the covenant of the obligation to negotiate and to take into account the circumstances for applying 'equitable principles' and also given emphasis on negotiation for the settlement of dispute between the state parties.

44. Ibid.
This principle of prior negotiation had been also applied in dissolving disputes regarding distribution of shared resources within the domain of the common rights of the state parties in various case. The *Fisheries Jurisdiction (Merits) case*\(^45\), is one of such type of cases where the principle of prior negotiation had been tested and well accepted in dissolving such dispute involved in distribution of shared resources under the common domain. The International court of Justice held that both, the United Kingdom and Iceland had been under mutual obligation to negotiate in good faith for the equitable solution of their differences regarding respective fishery rights involving distribution of shared resources.

It may be mentioned here that in *Lake-Lanoux Arbitration Case*\(^46\), in addition to mere general requirement of prior negotiation for being obligated to the other state who might be injured from environmental point of view due to any act of such obligated state, Arbitral Tribunal recognised the requirement of agreement also for such purpose.

Decision, as given in *Lake Lanoux Arbitration case*\(^47\), is an important international Judicial decision providing the guideline for proper uses of inland waters. Dispute developed when France had made certain construction without any assent of Spain and as a result of it, height of Lake Lanoux was raised and waters for power generation purposes was diverted. Being aggrieved by the diversion of the waters of the Lake as a part of a hydroelectric project, Spain made claim against France. It was the contention of the Government of Spain that international custom required to obtain prior consent or negotiate before under taking any project on water by any state within its territorial limits while such water had been

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\(^45\) I.C.J. Reports, 1974; Page 3.
\(^46\) United States Reports (1957) Page 119.
\(^47\) Ibid.
also flowing into the territory of a neighbouring state. Arbitral Tribunal held in this case\textsuperscript{48} that consent of Spain was not necessary for diversion of water because water quality remained unchanged and as such there had been no diminution of the final flow into Spain.

The decision of this Lake Lanoux Arbitration is based on this notion that when use of internal water of any water course results in no change in water quality volume of such water course, such use of internal water is reasonable and does not interfere with the water's flow into the some water system passing through the other riparian states, and such reasonable use of internal water does not require any prior consent or negotiation with such riparian states.

However, it was further observed by the Tribunal in this Lak Lanoux Arbitration Case\textsuperscript{49} that consultation and negotiation between two states must be genuine and must be in compliance with the rules of good faith and such negotiation and consultation must not be mere formalistic.

So in this way international obligation of the State parties not to cause any injury and damage to the environment and property of other states and their liabilities to compensate those affected states, which sustained injury and damage, had been well established by the judiciary - at international level in historical perspective through various judicial pronouncements, such as \textit{Trail Smelter Arbitration}\textsuperscript{50}, \textit{Corfu Channel case}\textsuperscript{51}, \textit{Lake Lanoux Case}\textsuperscript{52}, etc. as stated above. Finally it has been well confirmed in \textit{Namibia case}\textsuperscript{53} by the International Court of Justice.

\textsuperscript{48} Lake Lanoux Arbitration Case, United States Reports (1957), page 119.  
\textsuperscript{49} United States Reports (1957) page 119.  
\textsuperscript{51} ICJ Reports, 1949, page 22.  
\textsuperscript{52} Lake Lanoux Arbitration Case, United States Reports (1957), page 119.  
\textsuperscript{53} ICJ Reports 1971, page 12.
(ICJ) reiterating that physical control of a territory rather than sovereignty or legitimacy of Title constituted the basis of a State's liability for acts affecting other states. This observation of ICJ clearly expressed this view regarding liability that states are responsible for activities as carried on within their territories, if such activities are to produce detrimental extra territorial effects on the environment of the other states.

For claiming compensation for damage caused by pollution activities of a riparian state, it must be able to identify a suitable party by the aggrieved state party for bringing a legal action. Full recovery of damages depends upon the establishing liability of offending states and its proper identification, otherwise aggrieved state party would be in great difficulty to realise compensation for pollution damage, as it happened in case of Torry Canyon incident. An Liberian supertanker Torrey canyon poured 1,20,000 tons of heavy crude oil onto a 100 miles of British and French coastlines 54, but both the French and British Government had faced great difficulty in obtaining the compensation from the owner of the offending ship.

For establishing liability for damage, the claimant has to prove that the accident is the result of negligence, since liability can be based on fault. In this regard 'reversed burden of proof' as claimed by the alleged offender, the defendant in the claim proceeding, will also be tested. Here, the party, from whom compensation is being claimed, must prove that accident as taken place, was not due to its negligence.

In addition, at the time of determination of liability, if the plea of some specific exception as an "Act of God", the basis of strict liability, as settled

54. Malviya, R.A.; Environmental Pollution and its Control under International Law; Chugh Publications, Allahabad; 1st Edition; 1987; page 1.
in *Rylonds vs. Fletcher case*\(^{55}\), a century old Judicial decision of England, is taken by the defendant in support of its defence, then such plea may be considered by the Court as the defence in strict liability. It may be mentioned here that, principle of strict liability had been successfully invoked in *Trail Smelter*\(^{56}\), *Corfu Channel*\(^{57}\), and *Lake Lanoux Case*\(^{58}\).

In *Gut Dam Arbitration Case*\(^{59}\) more clearly principle of strict liability in the context of environmental injury had been applied. This *Gut Dam Arbitration case*\(^{60}\) had come up for adjudication arising out of the dispute between the Government of Canada and the United States of America. United States had claimed damages for alleged injury caused to the citizen of U.S.A. due to flood and soil erosion, as a result of presence of Gut Dam for some years between Adams Island in Canadian territory and les Galops in U.S.A. before its removal. In dissolving the dispute between the Governments of two countries, the Arbitral tribunal adopted the principle of strict liability, since the tribunal had not been so interested in hearing any argument for or against fault or negligence allegedly involved in planning or constructing the dam or whether Canada knew or ought to have known what injury might cause, ultimately in the light of aforesaid observation of the tribunal both the states settled the issue amongst themselves on the basis of a negotiation and finally the Tribunal approved the said negotiation for payment lumpsum amount to the United States by Canada 'in full and final satisfaction of all claims of United States Nationals for alleged damage caused by Gut Dam'\(^{61}\).

\(^{55}\) (1868) LR 3 HL 330.


\(^{57}\) ICJ Reports, 1949, page 22.

\(^{58}\) Lake Lanoux Arbitration Case, United States Reports (1957), page 119.

\(^{59}\) International Legal Material (1969) page 118.

\(^{60}\) Ibid.

\(^{61}\) Agreement on settlement of Claims Relating to Gut Dam, 18 November, 1968, 6 UST 7863 TIAS No. 6624.
Though, traditionally in most of the legal systems and in maritime laws, liability has been considered as based on fault, but ultimately liability has been regarded as absolute liability regardless of circumstances and this change has been witnessed under the regime of international laws since Torrey Canyon incident.

So, in this way, due to effective judicial intervention in various pollution problems under international historical perspective, a new vista of international justice delivery system regarding environmental issues has been developed.

It emerges from the foregoing discussion that right from pre-charter period, even from historical past, various measures have been taken at international level to control the environmental pollution and those measures, including Judicial response to it, have immense significance in developing effective international legal control for environment protection.