Clean Up Your Mess! (Part 1)

ARE STATES OBLIGED TO REMOVE PLASTIC WASTE FROM GLOBAL COMMONS?

Approximately eight million tons of plastic waste leak into the oceans every year. Our planet is literally drowning in plastic. It is estimated that every year one million birds and 100,000 sea mammals die from eating or getting tangled in plastic (see here). Microplastic debris contributes to the degradation of coral reefs, fosters the melt rate of snow and ice and as small particles in the atmosphere contribute to global warming. Studies have proven the existence of microplastic in Antarctica and in the deep sea. Meanwhile, the amount of microplastic humans consume every week sums up to the equivalent size of a common credit card. To sum up, plastic debris affects fragile ecosystems such as the oceans and the atmosphere, thus, it has a serious impact on the environment - especially on the global commons.

What is the role of international law in this context? Are there only rules on the prevention of future plastic waste or does international law also provide an obligation requiring states to remove plastic waste from global commons? We will concentrate on global commons as areas that fall outside national jurisdictions (e.g. the high seas, Antarctica, outer space) to make use of the spatial independence of the international environmental law. In this context, we assume that waste is the disposal of objects and substances with the aim of not reusing them (cf. Art. 2 (1) Basel Convention).

Do Treaty Provisions Solve This Problem?

Quite a range of international law agreements offer rules concerning waste. As a highly ratified treaty, the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal – shortly Basel Convention – covers the movements of hazardous and other wastes, which are listed in Annex I and II. Even the amendment adopted in 2019 does not cover the majority of plastic types “unless it exhibits specific hazardous properties”. However, an explicit obligation for removal is not involved in the states’ duties under Art. 4 (1) and (2) either. The United Convention on the Law of the Sea (UNCLOS) and the Stockholm Convention on Persistent Organic Pollutants are similarly inaccurate. Thus, they lead to no further findings.

There are only two more precise treaties: The London Protocol (amendment of the London Convention) explicitly obliges the state parties to prohibit the disposal of wastes (including plastics) into the ocean (Art. IV). And the International Convention for the Prevention of Pollution from Ships (MARPOL) refers to the discharge of garbage generated by ships, which in fact represents just a small part of marine plastic waste. In conclusion, there is no primary obligation for states to return plastic waste from the global commons, and to take a look further, the existing regulations will also not lead to any precise obligation to retrieve on the legal consequence side: In case of a breach of the above listed obligations, it will on the one hand be nearly impossible to track and prove violations and on the other hand, it will – if at all enforced – lead to imposed preventive measures only.

Can Soft Law Help?

In fact, there is no effective legal basis to reduce the amount of plastic waste in the environment. An efficient system of plastic retrieval can only be successfully launched within the international community if it is fair for all parties. International environmental law already acknowledges this idea with the principle of common but differentiated responsibilities (Principle 7 of the Rio Declaration): it makes the obligations of each state depend on its socio-economic capabilities and historical contribution. A first step would therefore be to declare the fight against the plastic flood to be a task of the entire international community. The goal would then not be to establish a global prohibition of discharging plastic waste that would lead to reparation in the case of a violation, but rather to create a system that does not depend on individual blame. A possible solution could be to implement a specific key on how much plastic waste every state has to remove from the global commons. Such a key would be based on statistics, where the plastic masses come from (see for example here) and considerations of the historical contribution for polluting the environment in general and the financial and logistical possibilities. The principle of common but differentiated responsibilities itself does not generate binding obligations. Its classification as customary international law is highly controversial and it rather applies to distribute already existing duties than setting new obligations. Still such a soft law principle can support the development of new solution approaches (see here). As soft law principles had a huge influence on the development of the international environmental law we know today, they are able to impose political and moral obligations on states which eventually lead to the establishment of a new agreement.

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How are Human Rights related?

Such an argumentative support for the key idea can also be provided by obligations from other areas of law: The urgent need to take action against the massive health risks of waste can be derived from the human rights regime. Applicable norms could be the right to life under Art. 6 of the International Covenant on Civil and Political Rights (ICCPR) or Art. 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) which builds the basis for a protection of human health and includes further aspects like safe food, safe drinking water and healthy environmental conditions (stated by the ICESCR Committee).

While Art. 6 ICCPR only refers to the most essential human needs, i.e. the ICESCR provision to provide “access to the minimum essential food which is nutritionally adequate and safe” is a core obligation and, thus, legally enforceable. Transferred to waste, this leads to an obligation to protect people from microplastics and toxins in their food. For this kind of prevention, it is not enough to avoid future plastic streams, removing the existing plastic masses is already part of the prevention. Without minimizing the existing amount of plastic in the global commons, negative consequences on human rights cannot be avoided. For the sake of completeness, the human rights consideration does not apply to the outer space, but at least applies to those areas of the global commons that directly affect human health, such as the high seas, Antarctica and the atmosphere. In the case of space debris, the focus is much more on maintaining functionality of space devices, this goes far beyond the plastic problem and is not to be discussed here (for more see here). Again, the enforcement of such a concrete obligation to remove waste is subject to the same problems as in the case of state responsibility: a clear attribution of the plastic debris to a single state will not be possible, so that, for reason of efficiency alone, the states themselves cannot not be called upon as “perpetrators”, but the international community as a whole must take responsibility and become active.

Conclusion and Perspectives

The result of our search for an already existing obligation to remove plastic waste from the global commons is, as expected, sobering. Even though there exist certain obligations to prevent and forbid disposal, although there are several guidelines for states on how to avoid negative impacts of plastic waste on the environment, all these regulations do not go far enough. The proposed key of assigning the removal of a certain amount of plastic waste to states could mark a first step towards the implementation of efficiently cleaning the global commons. A corresponding provision could either be laid down in a new treaty or it could be reasonably placed in an amendment of the Basel Convention since this treaty builds the most comprehensive framework concerning the treatment of waste. Another option would consist in an international organization monitoring the compliance of such a rule. For the reason of a range of private or regional initiatives (for examples see here, here and here) and UNEP resolutions (see e.g. here and here) voting for a solution to the plastic problem, there is at least consensus about the necessity of establishing a clear regulation tackling the plastic flood. The Human Rights Council already has taken a step forward recognizing that having a clean, health and sustainable environment is a human right itself which again underlines the need for a global implementation of a new rule concerning plastic waste.