The Extraterritorial Application of Human Rights in Cases of Transboundary Environmental Harm

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## Contents

A. INTRODUCTION

B. HUMAN RIGHTS AND THE ENVIRONMENT: HOW STRONG IS THE LINK?  

1. The Adoption of Human Rights Dimensions in International Environmental Law  
2. Environmental Dimensions Adopted by Human Rights Law  
3. The Recognition of Individual Rights under International Environmental Law  
   a. Principles for Recognition  
   b. Formal Recognition of Individual Environmental Rights  
4. Transboundary environmental harm and human rights

C. THE EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS: THE LAW AND ITS JURISPRUDENCE  
1. The extraterritorial application of human rights law  
2. Extraterritorial application of human rights in environmental cases

D. TRANSBOUNDARY ENVIRONMENTAL DAMAGE AND THE EXTRATERRITORIAL APPLICATION OF ENVIRONMENTAL HUMAN RIGHTS  
1. The Models of the Extraterritorial Application of Human Rights in the Environmental Context  
2. The Effect of Recourse to Domestic Courts for the Recognition of Extraterritorial Environmental Rights  
3. The Extraterritorial Application of Environmental Human Rights within International Law  
4. Extraterritorial Human Rights Obligations in Environmental Cases  
5. The Extraterritorial Application of Environmental Rights

E. CONCLUSION

BIBLIOGRAPHY
The Extraterritorial Application of Human Rights in Cases of Transboundary Environmental Harm

A. Introduction

The welfare of human beings depends, among other factors, on the quality of their environment. The conservation and protection of the environment are determinant factors for the full enjoyment of certain human rights. The well being of each individual has a high correlation to the surrounding level of environmental quality; if a person lives in an area that has a high degree of environmental degradation, his or her life and health are put at risk. The majority of cases of environmental harm are related to the contamination of watercourses, air pollution and the destruction of ecosystems. Further, the effects of environmental degradation are not limited to domestic boundaries; such types of nuisances can easily extend extraterritorially and affect the integrity of individuals that reside in areas beyond the territory of the polluter state. At what point does general international law and human rights law provide a platform that allows the victims of transboundary environmental harm to exercise their rights against the foreign polluter state using international judicial forums?

In international law, the normative frameworks that ensure the protection of individuals and of the environment emerged separately. On the one hand, general international law establishes rules and principles that regulate the inter se relationship between states concerning activities that can put the environment at risk. Thus, the treaties in this area of law have an extraterritorial focus. On the other hand, human rights law aims to protect individuals from any activity that could harm them. The developments within these two fields regarding environmental protection are not inclusive, reflecting a lack of an integral and harmonized model in this matter.

This essay aims to critically assess the extent to which human rights apply extraterritorially in cases of transboundary environmental damage. This analysis is carried out through in three sections. The first part assesses the relationship between human rights and the environment, with special attention to the extraterritorial features of this link (B). The second section examines the extraterritorial application of human rights by examining the

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1Shelton, D. (2012). Resolving Conflicts between Human Rights and Environmental Protection: Is there a
2Schwartz, M (1993), 'International Legal Protection for Victims of Environmental Abuse', Yale Journal Of International Law, 18, 1,p 356.
3Ibid.
important international instruments in this area and the case law issued by the each respective international court or tribunal (C). The third section assesses how environmental rights established under general international law and under human rights law can provide accountability to victims of transboundary environmental damage (D). Finally, this paper is intended to show how the current structure of public international law lacks a concrete and harmonized framework that ensures the extraterritorial application of human rights in cases of trans-frontier environmental damage. Nonetheless, the contemporary developments of human rights law and general international law in relation to this matter suggest the emergence a normative structure that regulates this issue.

B. Human Rights and the Environment: How Strong is the Link?

To what extent are human rights and environmental protection intertwined? The relationship between human rights and environmental protection is important because human rights are collaterally affected by environmental damage. Without preventative measures established by states to avoid such widespread negative effects, neither state sovereignty nor territorial borders can stall the spread of environmental harm. The robust relationship between human rights and the environment can be assessed on four different levels: the inclusion of human rights dimensions within international environmental agreements, which recognizes the role of human beings as the centre of environmental protection (1), the incorporation of environmental features in human rights law, which validates that environmental protection is a pre-condition for the enjoyment of several human rights (2), the emergence of individual rights under international environmental law (3), and the implications of transboundary environmental damage to human rights (4).

1. The Adoption of Human Rights Dimensions in International Environmental Law

Both binding and non-binding instruments in international environmental law have integrated and recognized the intrinsic value that human rights play in guaranteeing environmental protection\(^4\). The Stockholm Declaration was the first instrument to acknowledge the importance of environmental preservation and its nexus with human beings\(^5\). This instrument takes an anthropocentric view of the connection between sustainable


development and human beings, with the later as the central pillar of the relationship. It establishes that humans are “entitled to a healthy and productive life in harmony with nature,” recognising environmental protection as a necessary condition for the full enjoyment of human rights. The Stockholm Declaration acknowledges that states have to foresee that the activities carried out domestically must not cause transboundary environmental harm.

After the Stockholm Declaration, the international community adopted the Rio Declaration on Environment and Development, which has influenced the contemporary developments of international environmental law. This instrument is a non-binding document, which considers that human beings must be able to coexist harmoniously with nature, as the centre of sustainable development. Through the used of a mandatory language, the declaration has influenced the development of new multilateral environmental treaties in different areas of international environmental law.

The majority of human rights found in environmental treaties are considered procedural rights. The predominate rights of this type among these agreements are: the right to access information, the right to public participation and the right to environmental justice and redress. First, the right to environmental information was conceived based on the human right to freedom of expression. Second, the right to public participation in the

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6Stockholm Declaration, Principle 1.
7Ibid.
9Stockholm Declaration, Principle 21.
12Aarhus Convention, Article 4; Convention for the Protection of the Marine Environment of the North-East Atlantic (1992) UNTS 2354 (hereinafter OSPAR Convention), Article 9; North American Agreement on Environmental Cooperation, Article 2(1)(a); Convention on Cooperation and Sustainable Use of the Danube River, Article 14; Protocol on Water and Health to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes (1999) UNTS 2331, Article 5(i)
environmental decision making processes\textsuperscript{14} was derived from the human right to participate in public affairs, which is recognized by the majority of human rights conventions\textsuperscript{15}. Third, the right of all individuals affected by environmental harm to have access to justice and redress\textsuperscript{16}. This obligation was founded on the rights to an effective access to justice, a fair hearing in an independent and impartial tribunal, and compensation or reparation of the damage\textsuperscript{17}.

These environmental agreements reflect the integration and implementation of certain features of human rights law within general international law. Also, they suggest a significant change from the traditional state-to-state relationship to a new platform, which incorporates individuals and non-state actors as important participants of the international legal system. While, this constitutes a positive development towards the emergence of an international legal framework that ensures an integral protection of the victims of domestic and transboundary environmental harm, it has not yet been possible to incorporate substantive human rights obligations within international environmental treaties. Thus, individuals affected by environmental nuisances can only bring a claim based on the breach of procedural rights and not for a violation of their substantive rights in the international enforcement and compliance mechanisms.

Despite the increase in protected environmentally related rights, the main limitation of international environmental law is that the majority of rights depend on domestic legal jurisdiction and lack an international forum that allows victims of environmental degradation whose rights have been affected to seek redress for the damage. The Compliance Committee of the Aarhus Convention could become the tipping point that modifies this dimension; this argument is developed on section D of this paper.

The anthropocentricity of human rights law limits the extent to which environmental rights can develop, as the normative frameworks in this field of law are designed to protect the individual \textit{per se} and not the environment\textsuperscript{18}. On the other hand, international environmental law has an eco-centric approach in which the law is based on the intrinsic

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\textsuperscript{14} Aarhus Convention, Articles 6-8
\textsuperscript{15} ACHR, Article 23; ICCPR, Article 25; Universal Declaration of Human Right, Article 21; African Charter, Article 13; American Declaration of the Rights and Duties of Man, Article 20
\textsuperscript{16} Aarhus Convention, Article 9
\textsuperscript{17} 1976 International Covenant on Civil and Political Rights (ICCPR), Article 2(3); UN General Assembly, \textit{Universal Declaration of Human Rights} (1948) 217 A(III), Article 8
\textsuperscript{18} Boyle 615.
value of nature\textsuperscript{19} while also articulating the rights of individuals to ensure harmony between environmental protection and the well being of individuals\textsuperscript{20}. Therefore, it could be argued that the current developments in international environmental law ensure a higher protection to the individuals affected by environmental nuisances in comparison to the human rights framework.

2. \textit{Environmental Dimensions Adopted by Human Rights Law}

The second approach arises when environmental protection is examined from a human rights perspective. Through the adoption of environmental dimensions, human rights law recognizes environmental protection as a pre-condition for the enjoyment of several human rights\textsuperscript{21}. However, the number of human rights treaties that include environmental protection as a human right is limited. The African Charter is the only international instrument that establishes a right to a satisfactory environment\textsuperscript{22}. To a lesser extent, the Protocol of San Salvador to the ACHR determined that everyone is entitled to live in healthy environment\textsuperscript{23}, and therefore states have the legal duty to protect, preserve and improve the environment\textsuperscript{24}. Thus, the Protocol limits the scope of enforcement of this right\textsuperscript{25}. However, the Universal Declaration of Human Rights, the ICCPR, and the ECSCR\textsuperscript{26} have not recognized an environmental human right. The majority of human rights treaties do not establish environmental rights provisions because they were designed before “the emergence of environmental law as a common concern…”\textsuperscript{27} and, thus, they only produced instruments with highly anthropocentric approaches.

Although there is a noticeable absence of an established right to a healthy environment among human rights instruments, this has fortunately not deterred the recognition of environmental rights through the jurisprudence of human rights courts\textsuperscript{28}. The

\textsuperscript{19}Shelton, Resolving Conflicts between Human Rights and Environmental Protection: Is there a Hierarchy? 206.
\textsuperscript{22}African Charter, Article 24.
\textsuperscript{24}Ibid, Article 11(2)
\textsuperscript{25}Ibid, Article 19(6)
\textsuperscript{26}International Covenant on Economic, Social and Cultural Rights [\textit{hereinafter} ECSCR], (1966) UNTS 993.
\textsuperscript{27}Shelton, 'Human Rights and the Environment: What Specific Environmental Rights Have Been Recognized?' 166.
\textsuperscript{28}Knox, J. (2010). Diagonal Environmental Rights. In: Gibney, M, and Skogly, S \textit{Universal Human Rights And Extraterritorial Obligations}. Philadelphia: University of Pennsylvania Press. pp 84; \textit{also see} Boyle 614; \textit{also}
environmental case law developed by the ECtHR and the IACtHR relates to actions affecting the right to life and health through environmental damage. The jurisprudence demonstrates that cases concerning a violation to the right to life are usually based on the governments’ failure to regulate activities that cause environmental damage or their inability to mitigate pollution that poses a risk to health. The jurisprudence of the ECtHR and IACtHR demonstrates that when the right to life has been violated due to environmental nuisances, states have the legal duty to ensure an effective and accurate judicial response. These examples reflect the emerging environmental human rights jurisprudence, which establishes environmental protection as a pre-condition for the enjoyment of the right to life.

Similarly, the right to private and family life has also been used as a method to gain environmental rights under human rights law. The majority of cases relate to how pollution and the lack of environmental protection breach the right to privacy. The ECtHR has recognized that environmental pollution can have a severe effect on the private life of human beings, e.g. by preventing them from enjoying their private properties, without necessarily affecting their health. The expansion of environmental jurisprudence reflects that the current status of human rights law is under a greening transformation process through the expansion of its body of law rather than through the creation of an environmental human right.

There are positive aspects to incorporating environmental protection dimensions within human rights law. First, they help identify actions that produce environmental damage, which could affect the full enjoyment of some existing human rights, such as the right to life, health, property and private and family life. Thus, the proliferation of cases concerning the environment and human rights expands the jurisprudence by enlarging the “...common law of environmental protection”. Second, the expansion of the body of human rights law could be used as a complementary interpretative instrument for the implementation

see Shelton, Resolving Conflicts between Human Rights and Environmental Protection: Is there a Hierarchy? 215.

Boyle 615.

Boyle 615.

Boyle 614.

Ibid 613.

Knox, Diagonal Environmental Rights 85.
of other environmental treaties under public international law. Third, the establishment of environmental protection as a pre-condition for the enjoyment of human rights could lead to the implementation of higher environmental standards and reduce the likelihood of severe environmental damage. Fourth, the greening of human rights imposes a legal duty on states to regulate and control environmental nuisances. A failure to do so makes the state directly accountable for the damage produced. Also, states must provide effective access to justice and redress to the victims whose human rights were breached due to the effects of environmental damage. Finally, the adoption of environmental features among the different human rights courts evidence how these judicial forums tend coordinate their approaches. Thus, the incorporation of environmental features by one court could lead to the harmonization of the entire human rights system in relation to this matter.

On the other hand, there are negative aspects that emerge from the greening of human rights. The anthropogenic nature of human rights law limits the adoption of environmental elements only to situations in which they will ensure the protection of objects and principles based on the interests of human beings. Therefore, filing environmental cases in human rights courts built upon the existing rights does not constitute the most suitable method to enhance environmental protection. Also, the majority of human rights institutions were built based on a high degree of generality and thus did not become the most appropriate forums to regulate or settle environmental conflict. However, these limitations do not diminish the benefits of the incorporation of environmental features within human rights law because they contribute to the development of an international framework that protects individuals from transboundary environmental harm.

3. The Recognition of Individual Rights under International Environmental Law

The establishment of procedural rights under international environmental law has been the most relevant development in this field so far. One of the main reasons for the

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36 Boyle 613.
37 Ibid.
38 Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Merits, Judgment, [2010] ICJ Rep 639, paras 64–68. In this case the ICJ used the existing jurisprudence of the Human Rights Committee, the ECtHR and of the IACHR to corroborate the interpretation given to article 13 of the ICCPR and article 12(4) of the African Charter. Also see Higgins, R (2006), ‘A Babel of Judicial Voices? Ruminations from the Bench’, The International And Comparative Law Quarterly, 4, p. 798; also see Boyle 614.
39 Caesar v. Trinidad and Tobago, Separate Opinion of Judge Trinidade, Inter-American Court of Human Rights, Sers. No. 123 (2005), para 7; also see Boyle 614.
40 Knox, Diagonal Environmental Rights 85.
41 Ibid.
elaboration of these rights was the fact that the only available structure under public international law that provided a set of international legal procedures to obtain redress for the individuals, whose welfare was impacted by environmental degradation by an act or omission of a state, was human rights law. As such, individual environmental rights emerged under international environmental law to provide individuals with such rights and to place obligations on states while also modifying the common state-to-state relationship under this area of public international law.

a. Principles for Recognition

The enforcement mechanisms for individual environmental rights differ from human rights law. These rights fall within the jurisdiction of domestic courts as opposed to international or regional courts. Therefore, the application of environmental rights is limited to the legislative developments of each state and on the effectiveness of their national legal system. This mechanism constitutes part of the civil liability regime, which is highly elastic for the victims of transboundary environmental damage by allowing them to pick the domestic forum of their choice, either in the state that produced the pollution or in the state in which they reside. Thus, within this regime environmental rights have an extraterritorial application.

The main weakness of individual environmental rights is that they only provide a limited number of rights, which are mainly procedural, to individuals. These rights are enforced differently than human rights because they fall within the jurisdiction of domestic courts as opposed to international or regional courts. Therefore, the application of environmental rights is limited to the legislative developments of each state and on the effectiveness of their national legal system.

Environmental rights – the right to environmental information, the right to public participation in environmental matters and access to judicial and administrative
proceedings within general international law are purely procedural. The right to information can be interpreted in two ways; the right to access information or the right to receive information. Either way, right allows individuals to have all the relevant information from public and private entities that could or do affect the environment directly or indirectly. The dissemination of environmental information increases public knowledge, which enhances the participation of the public in the decision-making process. Furthermore, the right to public participation could be interpreted in two different dimensions; “the right to be heard and the right to have affect decisions”. The former refers to the right that allows individuals to give their opinions about any activity that could affect their environment. The later is related to ability of individuals to determine their own environmental future without any type of discrimination. The application of this right depends on the development and implementation of domestic legislation and normative frameworks and their respective enforcement mechanisms. Lastly, the right for justice and redress refers to the obligation of states to provide an equal and effective access to judicial and administrative proceedings and remedies to the individuals whose integrity has been affected by environmental harm. This right must be applied without any type of discrimination. Hence, states have the legal duty to ensure the same legal treatment to domestic and transboundary environmental victims by
removing jurisdictional barriers to civil proceedings\textsuperscript{54}. This allows foreign citizens or non-residents to bring civil proceedings to national courts\textsuperscript{55}.

\textit{b. Formal Recognition of Individual Environmental Rights}

The Aarhus Convention constitutes the most important development concerning environmental procedural rights, and has been ratified primarily by European and Central Asian States\textsuperscript{56}. This instrument was built based on an intergenerational approach; whose purpose is to ensure and enhance environmental protection and the well being of individuals of the present and future generations\textsuperscript{57}. The agreement instituted three fundamental pillars. First, the right to request and access to environmental information allows individuals and non-state actors\textsuperscript{58} to request documentation about any actions related to the environment that could put at risk their welfare. Second, the right to participate in environmental decision-making procedures allows individuals to have a say in processes concerning the creation of legislative, normative or administrative frameworks related to the environment\textsuperscript{59}. The treaty obligates states to inform the public of any activity or decision that could affect their welfare\textsuperscript{60}. These two rights constitute an extension of participatory rights and a legitimization of sustainable development decisions\textsuperscript{61}. The third pillar of the Convention puts an obligation on states to provide an effective and equal access to justice and redress to the individuals whose procedural rights have been breached or ignored\textsuperscript{62}. Each Contracting Party implements these rights through the development of legislative, normative frameworks and enforcement mechanisms\textsuperscript{63}. Moreover, each state has the obligation to ensure the protection of all natural and legal persons, without any type of discrimination\textsuperscript{64}. This provision expands the scope of application of these rights extraterritorially. Hence, the individuals affected by transboundary

\textsuperscript{54}Shelton, 'Human Rights and the Environment: What Specific Environmental Rights Have Been Recognized?' 139-144.
\textsuperscript{55}Ibid 383.
\textsuperscript{57}Aarhus Convention, Article 1.
\textsuperscript{58}1998 Aarhus Convention, Article 4(1)
\textsuperscript{59}Ibid, Articles 6-8
\textsuperscript{60}Ibid, Article 6(2)
\textsuperscript{61}Boyle 622.
\textsuperscript{62}Aarhus Convention, Article 9.
\textsuperscript{63}Ibid, Article 3(1)
\textsuperscript{64}Ibid, Article 3(9)
environmental nuisances originated by a contracting party are also entitled to these procedural rights.

Even though, the Aarhus Convention reflects a major advancement in harmonizing human rights and environmental protection, its application is limited. This treaty does not create substantive rights; instead it is a mere legitimization of procedural and participatory rights\textsuperscript{65} that have already been universally accepted within environmental soft-law instruments\textsuperscript{66}. One the other hand, an interesting development in the Aarhus Convention is the participation of natural or legal persons in public interest litigation\textsuperscript{67}. These actors work as monitor units for the compliance of the treaty and they are empowered to file a communication against a state at the Compliance Committee for a breach or lack of enforcement of the treaty.

The Aarhus Convention strengthens environmental rights and recognizes that environmental protection is a pre-condition for guaranteeing the well being of humans. Even though, the Convention is mainly a regional agreement, it has had a global connotation, influencing the development of greener human rights jurisprudence. In \textit{TaşKin}, the ECtHR echoes the importance of this treaty. The court considered that Turkey, which was not party to the Aarhus Convention, had the obligation ensure the right to public participation, as one of the parameters to comply with Article 8 of the ECHR in cases concerning environmental actions\textsuperscript{68}. This case shows how environmental procedural rights have been incorporated into different bodies of public international law, becoming a new platform that ensures environmental protection to all individuals at the domestic and transboundary levels. Also, this reflects the evolution of the ECHR into a greener judicial forum that adapts to the new developments of international environmental law\textsuperscript{69}. Similar approaches were followed in \textit{Maya\textsuperscript{70} and Ogoniland\textsuperscript{71}} cases at the IACtHR and AfCHPR respectively. The \textit{TaşKin}, \textit{Maya and Ogoniland} cases recognized the important role of environmental procedural and participatory rights in ensuring the protection of human beings and of their environment\textsuperscript{72}.

\begin{table}[h]
\centering
\begin{tabular}{|c|c|c|}
\hline
\textbf{Case} & \textbf{Outcome} & \textbf{Year} \\
\hline
\textit{TaşKin and others v. Turkey}, No. 36220/97, para118-119, ECHR (2005) & Turkey was required to ensure the right to public participation & 2005 \\
\hline
\hline
\textit{Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria ('The Ogoniland Case')}, AfCHPR, Communication 155/96 (2002), paras. 52–53. & Nigeria was found in violation of the AfCHPR & 2002 \\
\hline
\end{tabular}
\caption{Cases Highlighting Environmental Procedural Rights}
\end{table}

\textsuperscript{65}Boyle 622. \\
\textsuperscript{66}Rio Declaration, Principle 10; Stockholm Declaration, Principle 1. \\
\textsuperscript{67}Boyle 625. \\
\textsuperscript{68}\textit{TaşKin and others v. Turkey}, No. 36220/97, para118-119, ECHR (2005); \textit{also see} Boyle 624-625. \\
\textsuperscript{69}\textit{Ibid.} \\
\textsuperscript{70}\textit{Maya indigenous community of the Toledo District v. Belize}, Inter-American Commission of Human Rights, Case No. 12.053 (2004), para 153-155. \\
\textsuperscript{71}\textit{Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria ('The Ogoniland Case')}, AfCHPR, Communication 155/96 (2002), paras. 52–53. \\
\textsuperscript{72}Boyle 625.
Finally, the incorporation of these rights within the human rights jurisprudence illustrates the cross-fertilization between these two areas of international law.

4. **Transboundary environmental harm and human rights**

To what extent does transboundary environmental damage affects human rights? In the context of this paper, transboundary harm refers to cross-border transaction of environmental harm produced by activities related to the exploitation of natural resources or to the pollution created due to the misused of toxic wastes or other pollutants\(^73\). The states involved in this transaction are either the producers of the harm or recipients of the damage. The effects of environmental harm transcend state boundaries, affecting individuals beyond the jurisdiction or territory of the polluter state.

The relationship between transboundary environmental damage and human rights has extraterritorial implications. Thus, the production of harm in one state becomes an environmental nuisance in another. This issue is more likely to arise when the pollution media is either air or water, which can easily expand the damage to areas beyond the jurisdiction of the polluter state\(^74\). The majority of cases concerning human rights violations derived from transboundary environmental damage arise from the inability of states to regulate non-state actors, either by action or omission\(^75\) and due to the lack of monitoring and enforcement mechanisms, to foresee the compliance of the law.

The international community has tried to give a formal recognition to implications that transboundary environmental damage has on human rights. The *Ksentini Declaration* became the first international instrument to assess this relationship\(^76\). Even though, the Human Rights Commission did not adopt the instrument, it has a special value because it recognized the issue of transboundary environmental damage\(^77\) from a human rights perspective\(^78\). Since this attempt, the international community has not showed any interest in drafting a new declaration that explicitly assesses this matter.

On the other hand, the first case of transboundary environmental damage under general international law was *Trail Smelter*. The outcome set an important precedent, the

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\(^75\)*Ibid*, para 67.


\(^77\)Knox, Diagonal Environmental Rights 84.

\(^78\)Ksentini Declaration, Principle 5.
polluters pays principle, which established that when the effects of a domestic activity affects
the environment of another, the state which produced the harm becomes liable for the
nuisance. Furthermore, most of the case law concerning transboundary environmental harm
assessed the wrongdoing as a breach of the state’s sovereignty and are based on the violation
of the sic utere tuo ut alienum non laedas principle, which established that states can make
use of their own natural resources without causing any prejudice to the resources of their
neighbours.

The cases at the international level reflect the traditional state-to-state relationship;
however, transboundary environmental harm can severely affect certain human rights. The
structure of international environmental law does not provide a framework that allows the
individuals affected by extraterritorial environmental harm to seek justice and redress at
international courts. The most influential international judicial forum, the International
Court of Justice (ICJ), does not have jurisdiction to review disputes that includes actors other
than states. Thus, the only method to use this forum is if their State sponsors the claim
based on a breach of general international law. The application of this method could solve
the transboundary environmental conflict without affecting the economic and cultural ties
between the states involved. The international procedures take far less time than many cases
before national courts. Therefore, it could be concluded that the ICJ is the most suitable
forum for states to solve transboundary environmental conflicts.

The Aerial Herbicide Spraying Case constitutes an example of how states could use
international courts to bring cases concerning the extraterritorial application of human rights
in cases of transboundary environmental harm. In this case, Ecuador claimed that aerial
spraying of herbicides conducted by Colombia affected the human health of Ecuadorian
individuals living at the border, as well as their property and environment. The allegation
stated that the spraying also affected animal life and the food crops in the area. According
to the application instituting procedure, Ecuador claimed that Colombia violated international

79Trail Smelter Arbitration (1941) 35 AJIL 684; also see McCallion 429-430; also see Den Heijer, M and Lawson,
van Genuiten, W, and Vandenhole Global Justice, State Duties: The Extraterritorial Scope Of Economic,
Social, And Cultural Rights In International Law. Cambridge: Cambridge University Press. 154.
80Milanovic, Marko. (2011). Extraterritorial application of human rights treaties: law, principles, and policy:
Oxford: Oxford University Press, 2011, p. 127; also see Schwartz 357.
81Connell, J (2007), 'Trans-National Environmental Disputes: Are Civil Remedies more Effective for Victims of
Environmental Harm?', Asia Pacific Journal Of Environmental Law, 10, 1/2, pp. 40.
82United Nations, Statue of the International Court of Justice, (1946) [hereinafter ICJ Statue], Article 34(1)
83Connell 52.
84Aerial Herbicide Spraying, Ecuador v. Colombia (Application Instituting Proceedings) [2008], ICJ, Para 37.
85Ibid, para 18.
customary and conventional law, specifically Article 14(2) of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. The applicant state claimed that Colombia did not comply with its prevention and precaution obligations established by the 1998 UN Convention. Ecuador requested the cessation of the spraying in border areas and indemnification of any damage caused, including any harm caused to the individuals affected. Even though the ICJ has not yet rendered a judgment, if the outcome of this case favours Ecuador, then the court will take a preventive approach and will prohibit Colombia from resuming the spraying. However, this result is highly dependent on the evidence presented by the applicant state.

The four sections assessed in this chapter reflect the intrinsic connection between the environment and human rights. The recognition of procedural environmental rights as pre-conditions for the enforcement of certain human rights constitute the most important development of public international law so far. Many components of this relationship have been clarified over the years, however, there are others that need further expansion like the extraterritorial application of human rights in cases of transboundary environmental harm. The judgment of the Aerial Herbicide Spraying Case could set an important precedent in this matter. The following questions related to this issue are analysed in the next sections of this paper. To what extent are states obligated to respect human rights outside their jurisdiction and territories? Can human rights be applied extraterritorially as a method to seek redress in cases of transboundary environmental harm?

C. The Extraterritorial Application of Human Rights: The law and its jurisprudence

Which obligations arise from human rights law? Who is bound by those obligations? Human rights emerged with the aim to protect individuals from any actions that could put at risk their welfare or the dignity. Human rights law establishes a state-individual relationship,

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86 Aerial Herbicide Spraying, Ecuador v. Colombia (Application Instituting Proceedings) [2008], ICJ, para 37; also see United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances [hereinafter 1998 UN Convention], (1988) UNTS 1582, Article 14 (2): “Each Party shall take appropriate measures to prevent illicit cultivation of and to eradicate plants containing narcotic or psychotropic substances, such as opium poppy, coca bush and cannabis plants, cultivated illicitly in its territory. The measures adopted shall respect fundamental human rights and shall take due account of traditional licit uses, where there is historic evidence of such use, as well as the protection of the environment”.

87 Aerial Herbicide Spraying, Ecuador v. Colombia (Application Instituting Proceedings) [2008], ICJ, Para 38.
in which the state becomes the only duty bearer\textsuperscript{88}, disassociating itself from the bilateral vis-à-vis obligations between states based on reciprocity and predominant within general international law. Human rights law established that each state must respect, protect and fulfil human rights to every individual without any type of discrimination within their territory or jurisdiction\textsuperscript{89}. Consequently, states have the legal duty to comply with two types of obligations: positive\textsuperscript{90} and negative\textsuperscript{91}. The former establishes that states must ensure the protection of human rights from governmental units and other actors by providing preventive and remedial measures. The latter requires the non-interference of the state in order to guarantee the full enjoyment of the right.

1. The extraterritorial application of human rights law

To what extent is human rights law applicable extraterritorially? The majority of human rights treaties established general jurisdictional clauses to define their scope of application either in \textit{ratione personae} or \textit{ratione loci} \textsuperscript{92}. There are instruments though that do not include these types of provisions, thus their application is neither limited nor defined\textsuperscript{93}. The notion of jurisdiction has different meanings within general international law and human rights law. In the former, it refers to the right of states to regulate natural or legal persons an their actions by having the authority to “...allocate States competences and to determine whether a State is entitled to act” \textsuperscript{94}. On the other hand, the definition of jurisdiction under human rights law refers to the degree of authority that each state has over its territory and or of the individuals that live on it\textsuperscript{95}.


\textsuperscript{89}UN General Assembly, \textit{Universal Declaration of Human Rights} (1948) 217 A(III), Articles 1-2; also see Kälin, W, & Künzli, J (2009), \textit{The Law Of International Human Rights Protection}: Oxford: Oxford University Press, 2009, p.77

\textsuperscript{90}Ibid 96-97.

\textsuperscript{91}Ibid.

\textsuperscript{92}ICCPR, Article 2(1); ECHR, Article 1; ACHR, Article 1; Convention Against Torture [hereinafter CAT], Articles 2(1), 5(1)(a), 5(2), 7(1), 11, 12, 13, 16 and 22(1); also see Den Heijer and Lawson 160; also see Milanovic 17-23; also see Coomans, F, & Kaminga, M (2004), \textit{Extraterritorial Application Of Human Rights Treaties}: Antwerp; Oxford: Intersentia, pp 1-7.

\textsuperscript{93}ICESCR; Convention on the Elimination of All forms of Discrimination against Women; also see Den Heijer and Lawson 160.

\textsuperscript{94}Den Heijer and Lawson 158; also see Milanovic 174-176.

The jurisdictional clauses within human rights instruments established limitations to the obligations based on individual or spatial authority and control. The individual jurisdictional model is based on the level of control that a state has on a natural individual. Hence, a state has jurisdiction over a human being only if it has certain degree of control over it, even if the person resides in a foreign territory.

The individual model was established in the text of the ICCPR. In Lopez Burgos, the HRC examined the extraterritorial application of this Covenant. The HRC concluded that the obligations to respect and ensure human rights within the state’s territory and jurisdiction established in Article 2(1), extends to the activities of governmental agents that are conducted in the territory of another state. Therefore, if governmental units breach the rights established in the Covenant in a foreign territory, then the state will be accountable for the extraterritorial wrongdoing. This case instituted an important precedent by highlighting that it is unreasonable to allow a state to conduct activities prohibited by ICCPR at the domestic level in a foreign territory. The jurisprudence of the Committee reflects that the extraterritorial scope of application of the Covenant is based on the level of control over an individual and not of a territory. Therefore, a state becomes internationally liable for a human rights violation committed outside its territory only if the individual who suffered from the action was under the authority and control of the acting state. The ICJ endorsed this approach by recognizing that there are situations in which states can exercise jurisdiction beyond their territories and concluded that the ICCPR has extraterritorial application.

Moreover, the IACtHR took a similar approach concerning the interpretation the jurisdictional clause of the ACHR. The Commission has ratified its competence to review cases regarding the extraterritorial violation of human rights. This Court stated that the
rights in the Convention are subject to the authority and control exercise by each state within their jurisdiction\textsuperscript{107}.

On the other hand, the ECHR establishes a general jurisdictional limitation without making any reference to the territorial dimension\textsuperscript{108}. Thus, the nature of this provision has developed an inconsistent jurisprudence concerning the extraterritorial application of the Convention. In certain cases\textsuperscript{109} the ECtHR adopted the individual jurisdictional model and determined that the obligations of the Convention extend extraterritorially only when the state has authority and control of an individual through its governmental agents. This extraterritorial approach has been applied in the majority of the case law. On the other hand, in \textit{Banković}, the ECtHR gave a different interpretation to Article 1 by considering that the scope of application of the Convention is determined by the “ordinary and essentially territorial notion of jurisdiction”\textsuperscript{110}. The spatial model of jurisdiction adopted by the court is determined by the effective control that a state has over a specific area. Even though the ECtHR established that Article 1 should be interpreted based on spatial terms, the jurisprudence shows the contrary, and the Court has only applied this approach in \textit{Banković}.

2. \textit{Extraterritorial application of human rights in environmental cases}

To what extent is the case law concerning the extraterritorial application of human rights related to environmental cases? The jurisprudence within human rights law does not clarify the extent to which human rights apply extraterritorially. Moreover, none of the cases are related to actions linked to transboundary environmental degradation. Nevertheless, in the event in which a human rights court admits to dealing with an extraterritorial environmental case, the outcome will follow a similar pattern from the previous extraterritorial case law\textsuperscript{111}. For example, if the ECtHR decides to adopt the model based on the effective control of a spatial area, then the Court will not have jurisdiction to admit the extraterritorial claim, given the fact that the polluter state has jurisdiction only over the victims of the damage and not authority and control over the affected area. However, it is more likely that the Court will apply the individual model, which allows the court to review the case because the victims of the trans-frontier environmental damage fall within jurisdiction and control of the polluter state.

\textsuperscript{107}Ibid, para 24.
\textsuperscript{108}ECHR, Article 1.
\textsuperscript{109}Issa and Others v. Turkey, No. 31821/96, para 71, ECHR (2004); also see Isaak v. Turkey, No. 44587/98, ECHR (2008); also see Solomou and Others v. Turkey, No. 36832/97, para 45, ECHR (2008).
\textsuperscript{110}Banković and Others v. Belgium and 16 Other Contracting States [GC], No. 52207/99, para 59, ECHR (2001).
\textsuperscript{111}Knox, Diagonal Environmental Rights 87-89.
Furthermore, in the case of the IACHR, the jurisdictional clause establishes a negative obligation for states to respect the rights of the Convention without establishing any territorial limitation. Thus, the contracting parties to the treaty have the obligation to respect the rights within and outside their jurisdiction. Hence, this provision has an extraterritorial application. The second part of the clause establishes the legal duty to ensure and secure human rights of individuals only under their jurisdiction. Thus, the extraterritorial effects of transboundary environmental damage will clearly breach the obligation to respect human rights. Therefore, if the individuals affected are able to establish a causal link between the production of the harm and the violation of the human rights in the Convention, then the claim could be successful at the Commission.

In general, human rights law states have the obligation to respect human rights under all circumstances, except from situations in which the treaty allows the rights to be limited. However, they do not have the legal duty to ensure or protect the human rights of people that live outside their territory or jurisdiction.

D. Transboundary environmental damage and the extraterritorial application of environmental human rights.

Moving now to the third section addressing which human rights apply extraterritorially in cases of transboundary environmental damage. This chapter analyses how the extraterritorial enforcement of environmental rights established under general international law can provide victims of transboundary environmental damage with accountability and recourse by establishing procedural obligations that have prevention and cessation effects on the trans-frontier nuisance.

To what extent has the relationship between human rights law and general international law benefited the construction of an international legal framework that provides redress to the victims of transboundary pollution? The connection between these two areas of international law in relation to the protection of individuals from trans-frontier pollution has been a complementary one, leading to the emergence of the non-discrimination principle. Although, this principle was developed as a product only from general international law, the international legal literature considered it to also derive from human rights law. The non-discriminatory principle emerged in the 1970s among the states that were parties to the

112 Milanovic 18.
113 Ibid 208-210
114 Ibid 635
OECD[115], who adopted a resolution that recommended the implementation an equal and non-discriminatory regime that enhances environmental protection and clarified the responsibilities of states concerning transboundary pollution[116]. This principle established that individuals who have suffered from transboundary environmental damage must not be treated differently than domestic individuals who have suffered from pollution originating from the same source. Therefore, states must ensure the implementation of this norm through the development of environmental legislation and normative frameworks[117] and they must provide transboundary claimants the same access to domestic courts and remedial mechanisms as those offered to their citizens. Further, this principle establishes an obligation of states to ensure the application of environmental procedural rights at the extraterritorial level[118]. Since its creation, several environmental treaties and international documents have adopted the principle, such as: the International Law Commission (ILC) included in the Draft articles on Prevention of Transboundary Harm from Hazardous Activities[119], the Aarhus[120] and Espoo[121] Conventions.

1. The Models of the Extraterritorial Application of Human Rights in the Environmental Context

Are human rights applicable extraterritorially in cases of transboundary environmental damage? If the analysis is based only on the inconsistency within the extraterritorial human rights case law and the lack of environmental cases, then the answer to this question is negative. Hence, if human rights are not applicable extraterritorially in cases related to transboundary environmental damage, then they lose the capacity to influence the protection of the global environment and of the actors that inhabit it[122]. The lack of jurisprudence in relation the extraterritorial application of human rights law in environmental cases does not become an impediment to analyse a possible application of the law. The human rights courts are likely to follow the same methodology applied in other extraterritorial cases, either based

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[115]Organisation for Economic Co-operation and Development [hereinafter OECD]
[116]OECD Recommendation of Equal Right of Access in Relation to Trans frontier Pollution (1977), Annex B, Article 4; also see Knox, Diagonal Environmental Rights 99; also see Boyle 635.
[120]Aarhus Convention, Article 3(9).
[121]Espoo Convention, Article 2(6)
[122]Boyle 617.
on spatial control or individual jurisdiction. Furthermore, the non-application of human rights in cases to of trans-frontier pollution becomes inconsistent with the mutually complementary relationship between human rights and transboundary environmental protection, whose link is strong enough. The assessment to this question changes if the contemporary developments of human rights law and general international law in relation to the environment are examined in conjunction. The proposed analysis will examine the extent to which the victims of transboundary environmental harm have extraterritorial human rights and if those rights can be exercisable against the polluter state at an international court or tribunal.

Prior to performing this analyses, it is important to address that transboundary environmental human rights claims can be assessed in two models; as an interstate case that involves a limited number countries or as a global claim with a universal character. The former is related to environmental nuisances affecting the quality of the air, land or water of a determined area, which has direct or indirect consequences to the population that lives on its surroundings. Conversely, the second model comprises environmental issues that have a global connotation. Thus, the effects of this environmental nuisance have a global connotation, which could lead to a systematic violation of human rights in several nations at the same time. The issues related to this approach are climate change, ozone depletion and the destruction of biological diversity. The scope of this analysis is limited to the interstate approach. This method allows a narrower assessment of the issue in question because it comprises greater number international instruments and of jurisprudence, minimizing the levels of abstraction that characterizes the global approach.

Additionally, the OHCHR issued a report that clarified the relationship between climate change, which constitutes the main environmental issue in the global model, and the scope of application of human rights. The OHCHR Report examined if climate change violates human rights law and it assessed if states have the legal duty to protect their citizens from the effects of climate change. The document recognized that climate change could affect the full enjoyment of certain human rights like the right to life, health and self-determination.

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123 Knox, Diagonal Environmental Rights 87.
126 Ibid, para 92.
127 Ibid, para 31-34.
Nevertheless, the Report concluded that climate change does not violate human rights law. This assertion was developed based on the fact that it is not possible to attribute the causal link of the production of the emissions to a specific country or to a particular activity. Likewise, it is not possible to denote global warming as the only component of environmental degradation; climate change is one of the several components that could have created the transboundary nuisance. The effects derived from global warming are only forthcoming projections that might or might not occur. Thus, they cannot violate a human right because an action of such type only arises after the creation of the damage.

2. **The Effect of Recourse to Domestic Courts for the Recognition of Extraterritorial Environmental Rights**

General international law establishes that the individuals affected by transboundary environmental harm can exercise their environmental rights extraterritorially at the domestic courts of the polluter state. Environmental treaties established that states have the legal duty to provide transboundary claimants with the same access to environmental information, public participation on decision making processes and access to justice and redress as the ones given to the domestic claimants. Moreover, the individuals affected by transboundary pollution fall within the jurisdiction of the polluter state, even if the state itself does not have effective or overall control of the affected extraterritorial area. Hence, the polluter state will retain the obligation to protect the human and environmental rights of transboundary victims.

National courts can be advantageous in settling transnational environmental disputes in comparison to international courts. In transboundary environmental cases, private actions are initiated based on the exercise of extraterritorial jurisdiction over the victims instead of the jurisdictional competences based on the legal personality of each actor, which is the mechanism applied to solve disputes in public international law. Hence, at national courts, foreign individuals have a higher likelihood of applying environmental rights. Furthermore,
there are few limitations imposed on state courts by private international law to listen to transboundary cases. The majority of the restrictions are related to issues concerning diplomatic immunities. Finally, the majority of cases concerning the application of extraterritorial jurisdiction in civil proceedings rarely generate diplomatic confrontations between states.

The different international environmental liability conventions and the principles of international private law allocated national courts with jurisdiction to hear cases related to transboundary harm. Even though, the concept of international civil litigation is applicable for transboundary environmental cases, how effective is this system in providing redress to the victims of such harm? The lack of methods available within public international law for obtaining redress for the infringement of certain human rights due to transboundary environmental harm has influenced the development of civil liability doctrines at the national legal systems. This regime is founded on a system of compensation, predominantly based on remedial processes grounded in private litigation. The nature of civil litigation provides a higher degree of effectiveness in providing remedies to the victims of transboundary environmental harm as opposed to the international legal system. The enforcement mechanisms within this doctrine are more effective and dynamic in comparison to state-to-state disputes because they rely “…on existing sovereign authority for enforcement and implementation.” Consequently, adjusting national legal systems to manage transboundary issues as ordinary local problems becomes more effective than internationalizing them. The majority of the civil liability doctrines give environmental procedural rights to the transboundary claimants. These developments were built based on international environmental instruments that encouraged states to develop national laws concerning civil liability and compensation for the individuals whose procedural rights have been affected. Finally the main limitation of this regime is that domestic courts might be ill equipped to deal

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139 Ibid.
140 Ibid 54
141 Handl, GG (2007), 'International Accountability for Transboundary Environmental Harm Revisited: What Role for 'State Liability''?, Environmental Policy And Law, 37, 2, pp. 119.
142 Connell 39-41.
145 Handl 118.
147 Sachs 845.
with extraterritorial disputes that emerge from environmental damage. This becomes an issue when the parties involved in the transboundary environmental issue are settled in developing countries, where the judicial infrastructure becomes a barrier to provide an effective and equal access to justice and redress.

3. **The Extraterritorial Application of Environmental Human Rights within International Law**

The literature and the jurisprudence discussed above reflect a strong correlation between the generation of environmental pollution with the lack of enforcement mechanisms to comply with domestic and international environmental laws. The state’s failure to comply or regulate these matters could interfere with the full enjoyment of certain human rights. Thus, if environmental issues affect the integrity of human beings and it can easily expand beyond territorial borders, to what extent do states have the legal duty to ensure the protection of human rights in environmental cases extraterritorially? Are individuals entitled to extraterritorial environmental human rights that can be exercisable against the state that generated the nuisance?

On the one hand, Professor Boyle considers it possible to argue that individuals affected by the transboundary environmental damage fall within the jurisdiction of the polluter state when their human rights have been infringed. There is no precedent that legitimizes this argument, however “…a good case can nevertheless be made for the extraterritorial application of human rights treaties to environmental nuisances.” The inapplicability of extraterritoriality to human rights law further complicates matters. It is futile to demand from national courts that they provide remedies to the victims of transboundary environmental harm if the victims cannot exercise their human rights in international or regional forums. Therefore, simply relying on the human rights framework to encompass cases of transboundary harm is inadequate.

As it was previously discussed in this paper, the majority of environmental claims that have been admitted to human rights courts are based on the failure of governments to comply with their own laws. Therefore, it will make sense for human rights forums to apply the same methodology in extraterritorial cases. Furthermore, if human rights law denies extraterritorial

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148 Connell 39-46
149 Boyle 637.
150 Ibid.
151 Ibid.
152 Ibid 639.
protection to the victims of trans-frontier pollution, then the system itself is not aligned either with principles of non-discrimination or of an equal access to justice\textsuperscript{153}.

On the other hand, Professor Knox takes a conservative approach. First, he considers that extraterritorial application of human rights caused by transboundary environmental harm is an interesting issue but it does not constitute a problem \textit{per se}\textsuperscript{154}. Second, for this legal scholar, transboundary environmental harm does not constitute an extraterritorial issue because trans-frontier pollution does not “…[take] s control of or authority over those affected by it…”\textsuperscript{155}. This argument is based on the notion that the source of the nuisance is generated within the territory of the respondent state and only the effects of such damage are felt extraterritorially\textsuperscript{156}. Knox considers that the interpretation of the language of the jurisdictional clauses of the ICCPR, ECHR and the ACHR implied that having jurisdiction over the site in which the action was conducted does not determines the extraterritorial scope of application of human rights. Instead, the establishment of this type of obligations is based on “…whether the individuals affected by those actions are within its jurisdiction”\textsuperscript{157}. Thus, the fact that a state has spatial jurisdiction over the area in which the harm was generated becomes irrelevant for determining the extraterritorial human rights obligation of states.

Both legal scholars agreed that human rights law does not provide a clear framework for the extraterritorial application of human rights. There is a lack of consistency that is explicit not only among regional courts but also within the same judicial forums\textsuperscript{158}. Even though, the extraterritorial case law is not related to environmental cases, it could be assumed that the international and regional courts will apply the same methodology. Finally, it could be argued that the scope of application of environmental procedural rights extends extraterritorially. The non-discrimination principle ensures the protection of foreign individuals affected by transboundary environmental harm. However, the lack of harmonization among domestic legislation and the lack of efficiency of each domestic legal system decrease the effectiveness of this principle.

4. \textit{Extraterritorial Human Rights Obligations in Environmental Cases}

To what extent do states have the obligation to comply with human rights at the extraterritorial level to prevent or mitigate the effects of transboundary environmental

\textsuperscript{153}Ibid 640.
\textsuperscript{154}Knox, Diagonal Environmental Rights 88.
\textsuperscript{155}Ibid.
\textsuperscript{156}Ibid.
\textsuperscript{157}Ibid.
\textsuperscript{158}Boyle 639; \textit{also see} Knox, Diagonal Environmental Rights 86-99
degradation? International law establishes certain extraterritorial obligations on states towards the victims of transboundary environmental harm because they fall within their jurisdiction and control, even though they are not within their territory. There are scholars that challenge this argument by arguing that the concept of state responsibility does not establish any legal obligation that requires states to compensate nuisances from activities that are not prohibited within international law. Therefore, the traditional approach of international law foresees that states have the legal duty to cease any operation that causes transboundary harm but it does not anticipate any type of compensation for the damage. This concept is correct only if we apply general international law by itself. However, from the perspective of human rights law, in which the state-to-state obligations are not the only relationship, this statement lacks of credibility, given that the idea behind human rights is to protect individuals from the abuses coming from any state, without distinction. Thus, the generation of transboundary environmental degradation constitutes both a breach of general international law and of human rights law.

The Universal Declaration of Human Rights, which has now become international customary law, establishes principle of universality. This norm establishes obligations on states to respect, ensure and protect human rights without any type of discrimination or distinction based on “...political, jurisdiction or international status of the country or territory to which a person belongs...” Hence, all individuals are entitled to human rights. Consequently, the non-applicability of human rights to the victims of transboundary environmental harm constitutes a breach of international custom, attributing liability to the state that originated the nuisance at the international level.

Even though, the term “respect” entails mostly a negative obligation, which requires states to abstain from interfering with the rights of an individual, it certainly imposes particular positive actions to comply with that legal duty. For instance, states must not only regulate and mitigate activities that could cause transboundary environmental harm, they also have to implement preventive measures that guarantee the respect for the integrity of the

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159 Boyle 640
161 Ibid.
162 Boyle 641.
164 UN General Assembly, *Universal Declaration of Human Rights* (1948) 217 A(III), Article 2
individuals that could be affected by the action, at the domestic and extraterritorial levels. Therefore, it is clear that states have the legal duty to respect human rights, hence they have to take all the appropriate measures to prevent any activity that could violate this obligation; this includes activities that can have transboundary effects. However, under the current human rights legal framework states are not legally required to protect and ensure the implementation of substantive human rights to individuals beyond their territory or jurisdiction.

Therefore, human rights law has a major gap concerning extraterritorial obligations, which could be harmonized to some extent by the application of the environmental rights framework established under general international law. International environmental law demands states to comply with procedural rights with all the public concern, leaving a window open to interpret this as a legal duty that extends beyond territorial and jurisdictional thresholds and to be applicable to all the individuals that could be affected by the environmental activity. The implementation and protection of environmental procedural rights at the domestic and extraterritorial level requires states to take positive actions, an omission of these will result in a violation of international environmental agreements.

The recent developments of general international law and of human rights law are forming a framework of extraterritorial human rights obligations, which are owed by states to individuals and non-state actors\textsuperscript{165}. The emergence this framework is fundamentally important because it provides a structure in which the individuals affected by transboundary environmental harm can exercise their rights at the international level against the polluter state. Currently, neither international environmental law nor human rights law provide a far-reaching and uniform model that allows for the implementation of extraterritorial environmental rights\textsuperscript{166}.

However, there are two elements that suggest its development. First, the green jurisprudence in conjunction with the extraterritorial case law developed by human rights courts constitute positive steps towards the establishment of extraterritorial legal duties. Even though, the human rights jurisprudence is inconsistent in this matter, future developments could change this status by eliminating the vertical obligations approach that characterized human rights law. Second, human rights treaties\textsuperscript{167} and certain documents within

\textsuperscript{165} Knox, Diagonal Environmental Rights 88.

\textsuperscript{166}Ibid.

\textsuperscript{167}Letsas, G (2007), A Theory Of Interpretation Of The European Convention On Human Rights: Oxford: Oxford University Press p.p. 65-79; Oxford : Oxford University Press, 2007; for the ECHR see Tyrer v. United Kingdom, No. 5856/72, para 31, ECHR (1978); also see Loizidou V. Turkey (Preliminary
international environmental agreements are considered living instruments, which may be subject to further changes to incorporate the new necessities of the states, legal and non-legal persons. Thus, in the near future these documents can adopt a harmonic and uniform approach that incorporates an extraterritorial focus with the implementation of an environmental dimension, like the ECHR did with the adoption of procedural environmental rights. Similarly, international environmental law has demarcated itself from the common state-to-state relationship by implementing a compliance mechanism under the Aarhus Convention that involves the participation of the public concern. This shows how both areas of law can complement each other in securing environmental protection through the extraterritorial application of human rights. In conclusion, states have positive obligations to prevent and mitigate the transboundary harm that affects human rights. Therefore, the argument, which claims that states do not have extraterritorial human rights obligations, becomes invalid.

5. The Extraterritorial Application of Environmental Rights

The existing procedural environmental rights have an extraterritorial application, however, their application is limited due to a legal characterization problem. Although the majority of environmental law treaties recognize the extraterritorial application of these rights, their transboundary enforcement is highly based on the jurisdiction of domestic courts. Thus, the individuals affected cannot exercise their environmental rights against the polluter state in an international judicial forum. Furthermore, international courts like the ICJ do not have competence to solve conflicts between natural or legal persons and a state; they are limited to inter-state disputes. However, the contemporary emergence of enforcement mechanisms concerning environmental rights within general international law evidences the beginning of the development of a framework that provides redress to the victims of transboundary environmental harm at the international level.

The Compliance Committee of the Aarhus Convention constitutes a pioneering development in comparison to other compliance mechanisms, especially in relation to its

Objections), no. 15318/89, para 71, ECHR (1995); for the IACHR see Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Inter-American Court of Human Rights, Sers No. 79 (2001), para 146
167TaşKin and others v. Turkey, No. 36220/97, para118-119, ECHR (2005)
169ICJ Statue, Article 34(1).
structural and procedural aspects\textsuperscript{172}. The structure of this forum is conformed by members that are nominated by Contracting Parties and NGOs, becoming the first body in allowing an active participation of non-state members within the selection process\textsuperscript{173}. Additionally, the Convention established that the Committee must be conformed by eight seats that are exclusively allocated to independent experts\textsuperscript{174}. This constitutes a major modification because the decisions taken in this body are based on technical dimensions instead of making political decisions, which tend to be the outcome when representative of the parties to the agreement integrates these types of mechanisms. Thus, the outcomes of the Committee are produced according to the law instead of becoming political statements.

On the other hand, the procedural dimension of the Committee is conceptually different from other compliance mechanisms. Any member of the public concern – either legal or natural persons- have the right to file a communication in the Committee against any Contracting State for the non-compliance of Convention\textsuperscript{175}. In order to file a claim, neither the individual nor the organization need to be a citizen or based in the Contracting Party concerned\textsuperscript{176}. The Committee cannot dismiss complaints based on the basis of citizenship, nationality or domicile\textsuperscript{177}. Therefore, any individual seeking to exercise their rights to the Convention must be able to do so, including the victims of transboundary environmental damage. Thus, the individuals affected by transboundary pollution produced by a state different from the one they reside on could request the Committee to review the case. The extraterritorial jurisdiction that the Committee has in terms of reviewing cases related to a breach of environmental procedural and participatory rights constitutes a contemporary progress of general international law. As it was discussed above, the E CtHR case law\textsuperscript{178} shows that the environmental procedural rights established under the Aarhus Convention have become part of its body of law, thus states that are part of the Council of Europe but that are not part of the environmental agreement have the obligation to implement and secure those rights. However, it remains unclear if the application of these procedural environmental rights within the ECHR also extends extraterritorially. The jurisprudence of

\textsuperscript{173}Ibid 10; also see UN Commission for Europe, \textit{Guidance Document on the Aarhus Convention Compliance Mechanism}, pp. 4-6.
\textsuperscript{174}Ibid
\textsuperscript{175}UN Commission for Europe, \textit{Guidance Document on the Aarhus Convention Compliance Mechanism}, pp. 32.
\textsuperscript{176}Ibid.
\textsuperscript{178}TaşKin and others V. Turkey, No. 36220/97, para118-119, ECHR (2005)
this regional court has not provided a defined position on the trans-frontier application of the rights established in this convention. Hence, it will be assumed that the Court will interpret that the scope of application of these rights are also limited by any of the jurisdictional models.

On the other hand, the Compliance Committee of the Aarhus Convention has several limitations. First, this mechanism only oversees if the states are complying with the Convention, the decisions taken in this forum are not binding, and they only constitute recommendations on how to ensure the protection and enforcement of the rights established on the treaty\textsuperscript{179}. Consequently, the outcome produced by the Committee does not guarantees remedies and compensation to the victims of transboundary environmental harm. Even though, extraterritorial obligations established in the Aarhus Convention constitute a major development within the law, its compliance mechanism is not best in terms of ensuring and respecting environmental rights.

Therefore, the victims of transboundary harm will prefer to choose a human rights approach to seek redress. Human rights treaties include substantive and procedural rights that could be exercise by the transboundary claimants, as opposed to the international environmental law framework, which only established procedural obligations. Even though, it is unclear if human rights law extends extraterritorially in environmental cases, certainly there is precedent on this issue in other areas. Thus, it is expected that these types of judicial forums will have a same type of behaviour concerning environmental cases.

Existing environmental rights do not redress the effects of environmental activities \textit{per se} or protect and ensure the well being of the affected individuals. The right to environmental information and public participation constitute preventive measures that could avoid the transboundary environmental nuisance, however, none of them established extraterritorial state obligations to protect and guarantee the implementation of human rights. The right to access to justice and effective remedies in environmental cases at domestic courts is a restorative approach that does not necessarily make the polluter state accountable for its actions and it is highly dependent on the impartiality and effectiveness of each domestic legal system. In short, general international law only creates a normative regime that regulates actions that might have a severe effect on the environment but it does not include an integral preventive approach.

\textsuperscript{179}Kravchenko 48-50.
Finally, the evidence presented in this chapter shows a gap within public international law concerning transboundary environmental issues. Neither human rights law nor general international law established an integral and harmonic framework that guarantees the protection of individuals that have been affected by environmental nuisances at the extraterritorial level. This issue is a product of the uncoordinated development of the law, which arises due to the diversification of international law. However, there are emerging developments in both areas that displayed an integrationist approach. Human rights law has adopted a green case law and expanded its extraterritorial jurisprudence. Similarly, international environmental law adopted extraterritorial environmental procedural rights and incorporated a compliance mechanism open to individuals and non-state actors. Hence, these advancements denote a strong possibility for the emergence of an extraterritorial framework that protects the victims of trans-frontier environmental damage. Its creation, though, is subject to the expansion of the body of international law and on the willingness of politicians and diplomats to build it.

E. Conclusion

A healthy environment is essential for the enjoyment of certain human rights. This relationship has been recognized by public international law. Human rights law has incorporated environmental features, generating a greener jurisprudence, which aims to protect the individuals affected by environmental nuisances. Likewise, environmental treaties under general international law have implemented several human rights aspects. Individual environmental rights constitute one of the most important conceptions of contemporary international environmental law because it integrates the notions of environmental protection and human rights into a unique procedural framework.

The effects of environmental damage can expand beyond territorial boundaries, affecting individuals in extraterritorial areas. Currently, the structure of international law does not provide an integral framework that ensures the protection of transboundary victims at the international level. On the one hand, the existing case law concerning the extraterritorial application of human rights law is inconsistent and there are no cases related to the environment. On the other hand, general international law established procedural environmental obligations to ensure the protection of the public from environmental harm.

The scope of application of these environmental rights extends extraterritorially. Yet, their enforcement depends entirely on national legal systems. Thus, the victims of transboundary environment harm cannot exercise their human rights against the polluter state in an international court.

However, emerging compliance and enforcement mechanisms that foresee the implementation of environmental rights, like the Compliance Committee within the Aarhus Convention, constitute positive advances towards the creation of a structure that provides justice and redress to transboundary claimants. The status of human rights treaties as living instruments facilitates the creation of new developments within the body of law that benefit the individuals affected by trans-frontier pollution. In summary, the current framework of international law does not ensure the protection of the human rights of the individuals affected by transboundary environmental harm. Nevertheless, there are positive developments that may suggest the emergence of an integrated platform.
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