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RESEARCH ARTICLE / ARAŞTIRMA MAKALESİ

The Extraterritorial Application of Human Rights Treaties in the Context of Environmental Transboundary Harm

Sınıraşan Çevre Zararı Kapsamında İnsan Hakları Andlaşmalarının Ülke Dışında Uygulanması

Kazım Berkay Arslan*

Abstract

This article treats the issue of jurisdiction under human rights treaties in cases of environmental transboundary harm. It aims to cover the definitions of the environment and transboundary harm as well as the relevant rules under international environmental law applicable to environmental transboundary harm. Thereafter, it analyses the territorial scope of human rights treaties and focuses on the establishment of a jurisdictional link in cases of environmental transboundary damages. It suggests that the classical approach, which is focused on effective control over an area or persons, is not apt in this context. Rather, this article proposes the use of other approaches to jurisdiction, such as the functional approach adopted by the Inter-American Court of Human Rights which is based on an effective control over the activities causing environmental harm and consequent human rights violations. It further argues that the general rule under customary international law which prohibits States from engaging in acts causing transboundary harm could also be applied as a special feature in the context of international human rights law. Finally, this article concludes by pointing out some current challenges that need to be clarified with respect to the obligations of States arising from human rights breaches caused by environmental transboundary damages.

Keywords

Human rights, environmental transboundary harm, jurisdiction, extraterritorial application, IACtHR Advisory Opinion on the Environment and Human Rights (OC-23/17)

Öz

Bu makale sınıraşan çevre zararı hallerinde insan hakları andlaşmaları bakımından yetki konusunu ele almaktadır. Makalede çevre ve sınıraşan zarar terimlerinin tanımları ile uluslararası çevre hukukunun sınıraşan çevre zararına uygulanabilir olan ilgili hükümlerine yer verilmesi hedeflenmektedir. Ayrıca, insan hakları andlaşmalarının ülkesel kapsamı incelenmekte ve sınıraşan çevre zararı hallerinde yetkinin tesis edilmesi konusuna odaklanılmaktadır. Bölge veya kişi üzerinde etkin kontrol kurulmasına odaklanmış olan klasik yaklaşımın bu bağlamda uygun olmadığı ileri sürülmektedir. Bunun yerine, Amerikalılararası İnsan Hakları Mahkemesi tarafından benimsenen ve çevre zararına yol açan etkinlikler ile bu sebeple ortaya çıkan insan hakları ihlalleri üzerinde etkin kontrole dayanan fonksiyonel yaklaşım gibi farklı yetki yaklaşımlarının kullanılması tavsiye edilmektedir. Buna ek olarak, uluslararası teamül hukukundaki devletlerin sınıraşan zarar meydana getiren hareketlerden kaçınmasına ilişkin genel kuralın uluslararası insan hukuku kapsamında bir özel durum olarak uygulanmasının mümkün olduğu iddia edilmektedir. Son olarak, makalede devletlerin sınıraşan çevre zararlarından kaynaklanan insan hakları ihlallerinden doğan yükümlülüklerine ilişkin olarak açıklığa kavuşturulması gereken bazı güncel sorunlara değinilmektedir.

Anahtar Kelimeler

İnsan hakları, sınıraşan çevre zararı, yetki, ülke dışında uygulama, Amerikalılararası İnsan Hakları Mahkemesi Çevre ve İnsan Hakları Danışma Görüşü (OC-23/17)

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The Extraterritorial Application of Human Rights Treaties in the Context of Environmental Transboundary Harm

I. Introduction

Environmental protection requires international cooperation, as the environment does not have borders like States do. The Stockholm Declaration of 1972[1] and the Rio Declaration of 1992[2] contributed significantly to this area but many issues remain to be solved.

The developments in the area of international environmental law have coincided with the evolution of human rights law. Indeed, beginning with the Stockholm Declaration of 1972, there has been an interdependence between the environment and human rights.[3] This nexus between the protection of the environment and human rights has also been acknowledged by the International Court of Justice (ICJ) in its 1997 *Gabčíkovo-Nagymaros (Hungary v. Slovakia)* decision, where it stated that "*the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn*".[4]

Traditionally, legal scholars tend to establish a link between human rights and the environment in the context of the right to a healthy environment.[5] Although this is a topic which is worth exploring, it should not be overlooked that the issues relating to the environment may have broader implications for the protection of human rights. In this context, it is particularly interesting to examine where international law currently stands when it comes to the human rights breaches resulting from environmental transboundary harms[6] – the so-called "*human rights approach to extraterritorial environmental protection*".[7] The extraterritorial application of human rights treaties in cases of environmental transboundary harm presents numerous challenges in this regard.

This article will first analyse **(II)** the concept of environmental transboundary harm under international environmental law and determine the obligations of States in this

1 'Declaration of the United Nations Conference on the Human Environment' (Stockholm, 16 June 1972) UN Doc A/CONF 48/14/Rev.1.

2 'Rio Declaration on Environment and Development' (13 June 1992) UN Doc. A/CONF.151/26. Rev.1.

3 United Nations High Commissioner for Human Rights, 'Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship between Climate Change and Human Rights (Geneva 22 October 2008)' (15 January 2009) UN Doc A/HRC/10/61 18.

4 Case Concerning the Gabčíkovo-Nagymaros Project (Hungary v Slovakia) (Judgment) [1997] ICJ Rep 7, para 53.

5 See for example, J H Knox and R Pajan, The Human Rights to a Healthy Environment (2nd edn, Cambridge University Press 2018).

6 Richard Bilder, 'The Role of Unilateral State Action in Preventing International Environmental Injury' (1981) 14 Vanderbilt Journal of Transnational Law 51, 59.

7 Jorge E. Viñuales, 'A Human Rights Approach to Extraterritorial Environmental Protection? An Assessment' in Nehal Bhuta (ed) The Frontiers of Human Rights (OUP 2016) 178-179; See also Alan Boyle and Michael Anderson (eds), Human Rights Approaches to Environmental Protection (OUP 1996).

regard. Secondly, it will look into **(III)** the territorial scope of human rights obligations. Finally, it will treat (**IV)** the issue of jurisdiction for human rights violations arising from an environmental transboundary harm, before exploring **(V)** other related human rights issues.

II. Environmental Transboundary Harm

In order to understand the term "environmental transboundary harm", it is necessary to **(A)** define the term *environment* and to **(B)** determine the scope of *transboundary harm*. With this understanding it is possible to **(C)** examine the rules of international environmental law relating to environmental transboundary harm.

A. Defining the "Environment"

There is no single definition of the environment under international law. However, it is possible to refer to dictionaries and international conventions to define it.[8] Dictionaries tend to define the environment as "*the objects or the region surrounding anything*"[9] or "*the air, water, and land in or on which people, animals, and plants live*".[10] The first approach is very broad and includes almost anything within the limit of the environment, whereas the second approach tries to limit it with the concept of nature.

International conventions prefer to define the environment as "*human health and safety, flora, fauna, soil, air, water, climate, landscape, and historical monuments or other physical structures or the interaction among these factors*".[11] In particular, the Lugano Convention states that the environment includes "*natural resources both abiotic and biotic, such as air, water, soil, fauna and flora and the interaction between the same factors; property which forms part of the cultural heritage; and the characteristic aspects of the landscape*".[12] This approach does not limit the scope of the environment to nature, as it includes some other structures. Hence, it stands between the two approaches of the dictionary definitions. Accordingly, it is possible to generally define the environment "*as including air, water, land, flora and fauna, natural ecosystems and sites, human health and safety, and climate*".[13]

8 Case Concerning Avena and Other Mexican Nationals (Mexico v United States of America) (Judgment) [2004] ICJ Rep 12, para 84.

9 Compact Oxford English Dictionary (2nd edn, 1991) 523.

10 Cambridge Online Dictionary <https://dictionary.cambridge.org/dictionary/english/environment> accessed 7 August 2021.

11 Convention on Environmental Impact Assessment in a Transboundary Context (adopted 25 February 1991, entered into force 10 September 1997) 1989 UNTS 309 (Espoo Convention) art 1(vii); Convention on the Law of the Non-Navigational Uses of International Watercourses (adopted 21 May 1997, entered into force 17 August 2014) (1997) 36 ILM 700, art 1(2).

12 Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment (adopted 21 June 1993) ETS No. 50 (Lugano Convention) art 2(10).

13 Iron Rhine Arbitration (Belgium v Netherlands) (2005) PCA Case no 2003-02, para 58. This article also adopts this definition.

B. Transboundary Harm

Damage or harm[14] is considered transboundary when the acts originating from the territory of one State have effects on the territory of another State.[15] The examples include long-range air pollution, pollution of watercourses, endangering migratory species or any damage to a shared resource.

The concept of transboundary harm has its legal roots in the *Trail Smelter* case between the United States of America and Canada. The case concerned air pollution problems in Washington, USA, which were allegedly caused by chemicals produced by a smelter located at Trail, Canada. The Tribunal concluded that the transboundary air pollution in question violated international law and laid down the main principle that transboundary harm was illegal under international law.[16]

Regarding the notion of "harm", the so-called *no-harm rule* or *prevention rule* – as explained by the ICJ in its *Corfu Channel (UK v. Albania)* case – dictates that "*every State [has] the obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States*".[17] However, international law has evolved to not consider every transboundary harm as unlawful.[18] Indeed, the ICJ accepted in its 2010 *Pulp Mills (Argentina v. Uruguay)* decision that only transboundary harms, which rise to a level of being "significant" are considered as being against the international legal order.[19] Hence, transboundary harm violates international law only if it can be classified as significant,[20] which may be considered a high threshold.

The question of determining which harms qualify as being significant is a delicate one. The ICJ dealt with this issue in its 2010 *Pulp Mills (Argentina v. Uruguay)* and 2015 *San Juan River (Costa Rica v. Nicaragua)* decisions, however, it did not present any substantive criteria in order to determine the damage as significant. Instead, it pursued a case-by-case analysis. Nevertheless, the court's judgments shed some light on this issue. Although the ICJ did not make a profound analysis in *Pulp Mills (Argentina v. Uruguay)*, it stated that "*significant damage to the other party […] may result from impairment of navigation, the régime of the river or the quality of its waters*" and thus examined the contamination level of the River Uruguay.[21]

14 These two terms are used interchangeably for the purposes of this article.

15 Xue Hanqin, Transboundary Damage in International Law (1st edn, Cambridge University Press 2003) 1.

16 Trail Smelter (USA v Canada) (1938) 3 R.I.A.A. 1905 1933, 1965.

17 Corfu Channel Case (UK v Albania) (Merits) [1949] ICJ Rep 4, 22.

18 ILC, 'Draft articles on Prevention of Transboundary Harm from Hazardous Activities with commentaries' (10 August 2001) UN Doc A/56/10 149.

19 Case Concerning Pulp Mills on the River Uruguay (Argentina v Uruguay) (Judgment) [2010] ICJ Rep 14, para 101.

20 P Sands and J Peel, Principles of International Environmental Law (4th edn, Cambridge University Press 2018) 743-744.

21 Pulp Mills (n 19) paras 103, 229-259.

In *San Juan River (Costa Rica v. Nicaragua)*, the ICJ asserted that States can conduct preliminary assessments to ascertain whether an activity carries a risk of significant transboundary harm.[22] It noted that alternatively "*the nature and magnitude of the project and the context in which it was to be carried out*" should be taken into account for the determination of a risk of significant transboundary harm.[23] The latter conclusion of the Court seems to be more abstract and applicable for each transboundary harm. Accordingly, in order to evaluate whether a transboundary harm is significant or not and the legality of the activity in question under international environmental law, one should look at the context as well as the characteristics of the activity which causes the harm.

C. Obligations under International Environmental Law regarding Transboundary Harm

The obligations of States under international environmental law are often divided into two categories: procedural obligations and substantive obligations.[24] Procedural obligations relate to the obligations of States to comply with certain procedures before carrying out an activity which has a risk of causing significant transboundary harm. Substantive obligations, on the other hand, concern the obligations of States deriving from international conventions or customary international law, which aim the physical protection of the environment.

The procedural obligations concerning transboundary harm under international environmental law are the obligation to carry out an *ex ante* environmental impact assessment,[25] the obligation to notify[26] and to consult and negotiate in good faith[27] with the potentially affected States or populations. These obligations arise in the existence of a risk of significant transboundary harm.[28] The ICJ has affirmed the customary nature of these procedural obligations.[29]

22 Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v Costa Rica) (Judgment) [2015] ICJ Rep 665, para 154.

23 ibid para 155.

24 Pulp Mills (n 19) para 78.

25 ibid para 204; Gabčíkovo-Nagymaros (n 4) para 140; The MOX Plant (Ireland v United Kingdom) (Provisional Measures, Order of 3 December 2001) ITLOS Reports 2001, para 100; Advisory Opinion on the Responsibilities and Obligations of States with respect to Activities in the Area (Advisory Opinion of 1 February 2011) ITLOS Reports 2011, para 145; San Juan River (n 22) para 104; South China Sea Arbitration (Philippines v China) (2016) PCA Case no 2013-19, para 988; The Environment and Human Rights, Advisory Opinion OC-23/17, Inter-American Court of Human Rights Series A No 23 (15 November 2017), para 162.

26 Corfu Channel (n 17) 22; Pulp Mills (n 19) para 115; San Juan River (n 22) para 104; Advisory Opinion on the Environment and Human Rights (n 25) para 189.

27 Lac Lanoux Arbitration (France v Spain) (1957) 24 ILR 101, para 1; North Sea Continental Shelf Cases (Federal Republic of Germany/Netherlands; Federal Republic of Germany/Denmark) (Judgment) [1969] ICJ Rep 3, para 85; Nuclear Tests Case (Australia v France) (Judgment) [1974] ICJ Rep 253, para 46; Gabčíkovo-Nagymaros (n 4) para 112; Pulp Mills (n 19) para 144; Advisory Opinion on the Environment and Human Rights (n 25) para 205.

28 San Juan River (n 22) para 104.

29 ibid. It is also important to note that the ICJ considered satisfaction as the appropriate form of reparation for a breach of a procedural obligation. See Pulp Mills (n 19) paras 269, 275.

Substantive obligations under international environmental law are numerous, however there are certain obligations which are of special interest in the context of transboundary harm. For instance, the Convention on Biological Diversity[30] includes rules for the protection of the environment as a whole, the Convention on Migratory Species[31] concerns the protection of international wildlife, the Ramsar Convention[32] aims at the protection of international wetlands, the UN Convention on Law of the Sea[33] has provisions for the protection of international waters and the Basel Convention[34] governs the transboundary movement of hazardous waste. Under customary international law, the obligation not to cause significant transboundary harm under the principle of prevention (no-harm rule),[35] the precautionary principle[36], and the principle of inter-generational equity[37] may also play a role in the context of environmental transboundary harm.

III. Territorial Scope of Human Rights Obligations

It is possible that various human rights violations may occur as a result of environmental transboundary damages. It is generally accepted that States are only responsible for human rights violations they conduct on their own territories.[38] This may be problematic in case of transboundary harm; however, there could be some exceptions to that general rule.[39] For that reason, it is appropriate to highlight **(A)** the territorial scope of human rights violations in general, before turning to **(B)** the extraterritorial application of human rights treaties.

C. Human Rights Obligations in General

Human rights treaties tend to limit their application by referring to the territory or jurisdiction of a State. The International Covenant on Civil and Political Rights

30 Convention on Biological Diversity (adopted 5 June 1992, entered into force 29 December 1993) 1760 UNTS 79.

31 Convention on the Conservation of Migratory Species of Wild Animals (adopted 23 June 1979, entered into force 1 November 1983) 1651 UNTS 333.

32 Convention on Wetlands of International Importance Especially as Waterfowl Habitat (adopted 2 February 1971, entered into force 21 December 1975) 996 UNTS 245.

33 United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 December 1994) 1833 UNTS 3.

34 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (adopted 22 March 1989, entered into force 5 May 1992) 1673 UNTS 57.

35 Rio Declaration (n 2) Principle 2; Trail Smelter (n 15) 1965; Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion) [1996] ICJ Rep 226, para 29; Pulp Mills (n 19) para 101; San Juan River (n 22) para 108.

36 Rio Declaration (n 2) Principle 15; Southern Bluefin Tuna (New Zealand v Japan, Australia v Japan) (Provisional Measures, Order of 27 August 1999) ITLOS Reports 1999, para 80; Seabed Advisory Opinion (n 23) para 131.

37 Rio Declaration (n 2) Principle 3; UNGA Res 35/8 (1980) UN Doc A/RES/35/8; Supreme Court of the Philippines, Juan Antonio Oposa and others v Fulgencio S. Factoran, Jr, and others, Decision of 30 July 1993, para 22; Nuclear Weapons Advisory Opinion (n 35) para 36; Gabčíkovo-Nagymaros (n 4) para 140; Mayagna (Sumo) Awas Tingni Community v Nicaragua, Inter-American Court of Human Rights Series C No 79 (31 August 2001) para 149.

38 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion) [2004] ICJ Rep 136, para 109.

39 Marko Milanovic, Extraterritorial Application of Human Rights Treaties (1st edn, Oxford Monographs in International Law 2011) 23.

announces in Article 2(1) that a State must respect and protect the rights of individuals "*within its territory and subject to its jurisdiction*".[40] Under Article 1 of the European Convention on Human Rights, States are obliged to secure the rights and freedoms of "*everyone within their jurisdiction*".[41] Similarly, the American Convention on Human Rights states in Article 1(1) that States are under an obligation to respect the rights of "*all persons subject to their jurisdiction*".[42]

In contrast, certain treaties such as the International Covenant on Economic, Social and Cultural Rights,[43] the Convention on the Elimination of All Forms of Discrimination Against Women[44], and the Convention on the Rights of Persons with Disabilities[45] do not contain a clause regarding the scope of its application.[46] Hence, a distinction can be made between the treaties that contain a dedicated provision on territorial application/jurisdiction and the treaties with no provisions on territorial application/jurisdiction.

The term "jurisdiction" is key for determining the scope of human rights treaties. The International Court of Justice,[47] the European Court of Human Rights,[48] the Inter-American Court of Human Rights,[49] the African Commission on Humans and Peoples' Rights[50] and the United Nations Human Rights Committee[51] accept that jurisdiction refers primarily to the responsibility of States for the human rights breaches conducted *within their national borders,* with some exceptions that are to be interpreted restrictively.

40 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, art 2(1).

41 Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 221, art 1.

42 American Convention on Human Rights "Pact of San José, Costa Rica" (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123, art. 1(1).

43 International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3.

44 Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13.

45 Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3.

46 Milanovic (n 39) 17.

47 Wall Advisory Opinion (n 38) para 109; Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda) (Judgment) [2005] ICJ Rep 168, para 216.

48 Loizidou v Turkey (Preliminary Objections) App no 15318/89 (ECtHR, 23 March 1995) para 62; Banković and others v Belgium and others App no 52207/99 (ECHR, 12 December 2001) para 59; Ilaşcu and others v Moldova and Russia App no 48787/99 (ECtHR, 8 July 2004) para 312; Al-Skeini and others v UK App no 55721/07 (ECHR, 7 July 2011) para 131; Catan and others v Moldova and Russia App nos 43370/04, 8252/05 and 18454/06 (ECtHR, 19 October 2012) para 104.

49 Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection, Advisory Opinion OC-21/14, Inter-American Court of Human Rights Series A No 21, para 61; Advisory Opinion on the Environment and Human Rights (n 25) para 73.

50 Mohammed Abdullah Saleh Al-Asad v Djibouti Comm no 383/10 (African Commission on Human and Peoples' Rights, 14 October 2014) para 134.

51 Lilian Celiberti de Casariego v Uruguay Comm no 56/1979 (Human Rights Committee, 29 July 1981) para 10.3; Sergio Euben Lopez Burgos v Uruguay Comm no R.12/52 (Human Rights Committee, 29 July 1981) para 12.1.

Accordingly, in general, human rights treaties apply territorially.[52] It does not matter whether a treaty contains a provision on territorial application/jurisdiction or not.[53]

D. Extraterritorial Application of Human Rights Treaties

Although human rights treaties apply primarily territorially, in certain cases it is possible for human rights treaties to apply extraterritorially.[54] In this regard, it is necessary for a State to exercise jurisdiction outside of its territory.[55]

Jurisdiction in this sense refers to the relationship between an individual and a State and acts as a threshold criterion.[56] As such, it concerns whether a State can be held responsible for violations of an individual's human rights.[57] In this sense, it revolves around the question of whether there has been human rights obligation in a given case rather than whether it has been breached.

According to the *classical approach*, international courts and human rights bodies seek that States either exercise control over an area or over persons outside of their territory in order to apply human rights treaties in an extraterritorial context.[58] The legality of this control is irrelevant for the extraterritorial application of human rights treaties.[59] The examples in this regard include military occupations or interventions,[60] military facilities outside the territory of a State[61] or the exercise of physical power or control over a person abroad.[62]

52 Michał Gondek, The Reach of Human Rights in a Globalising World: Extraterritorial Application of Human Rights Treaties (1st edn, Intersentia 2009) 360.

53 Wall Advisory Opinion (n 38) para 112; Orna Ben-Naftali and Yuval Shany, 'Living in Denial: The Application of Human Rights in the Occupied Territories' (2004) 37 Israel Law Review 17, 60.

54 It should be noted that extraterritorial application of human rights treaties does not fall within the scope of article 29 of the Vienna Convention on the Law of Treaties, which provides that treaties apply on the entire territory of States parties. This provision should not be interpreted in a way to suggest that human rights treaties should be applied strictly on a territorial basis. This is because it tries to deal with the problems of application of international treaties with regard to federal States and States having overseas territories. The commentary of the text also supports this view. As such, article 29 of the Vienna Convention on the Law of Treaties does not prevent extraterritorial application of human rights treaties. See Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, art 29.

55 Wall Advisory Opinion (n 38) para 109.

56 Lea Raible, Human Rights Unbound (1st edn, OUP 2020) 77, 100.

57 Cedric Ryngaert, Jurisdiction in International Law (2nd edn, OUP 2015) 22.

58 Loizidou (n 48) para 62; Banković (n 48) para 70; Ilaşcu (n 48) para 312; Al-Skeini (n 48) para 138; Catan (n 48) para 106; Hassan v UK App no 29750/09 (ECHR, 16 September 2014) para 75; Jaloud v the Netherlands App no 47708/08 (ECtHR, 20 November 2014) paras 133, 138; Advisory Opinion on the Environment and Human Rights (n 23) para 79. Besson argues that jurisdiction means de facto legal and political authority. Although this understanding is slightly different from the classical approach, this article will treat it under this heading due to clarity and its consequences being same for the examination made under this article See Samantha Besson, 'The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to' (2012) 25(4) Leiden Journal of International Law 857, 884.

59 Loizidou (n 48) para 62; Al-Skeini (n 48) para 138; Catan (n 48) para 106.

60 See for example, Loizidou (n 48); Cyprus v Turkey App no 25781/94 (ECtHR, 10 May 2001); Ilaşcu (n 48); Manitaras and Others v Turkey App no 54591/00 (ECtHR, 3 June 2008); Catan (n 48); Pisari v Republic of Moldova and Russia App no 42139/12 (ECtHR, 21 April 2015).

61 See for example, Djamel Ameziane v USA Report no 17/12 (IACHR, 20 March 2012).

62 See for example, Armando Alejandre Jr et al v Cuba Report no 86/99 (IACHR 29 September 1999); Öcalan v Turkey App no 46221/99 (ECtHR, 12 May 2005); Al-Saadoon and Mufdhi v UK App no 61498/08 (ECtHR, 2 March 2010); Al-Skeini (n 48).

The nature of the control that is to be exercised by States in order to establish jurisdiction is debated. Although it has been argued that the test of "overall control" is appropriate in the context of extraterritorial application of human rights treaties,[63] the case law seems to support the necessity of the existence of an "effective control" in order to hold a State responsible for human rights breaches that it conducts outside of its own territory.[64] Thus, the general rule for the extraterritorial application of human rights treaties requires the existence of effective control either over an area or over persons outside of a State's territory.[65]

In response to this classical and rather conservative approach, Marko Milanovic suggests that a distinction should be made between the negative and positive obligations of States under human rights law.[66] He states that since negative obligations require States to refrain from infringing the rights of individuals, there is not a direct link between the control exercised by a State and the violation of human rights in question.[67] Therefore, he argues that the violations of negative obligations should be subject to an unlimited territorial scope.[68] On the other hand, positive obligations demand States take action to ensure the protection of the rights of individuals. Hence, they necessitate "*a far greater degree of control*".[69] For this reason, it is reasonable to analyse whether a State exercises effective control over an area or persons in order to hold it responsible for extraterritorial human rights violations arising from positive obligations.[70]

The Human Rights Committee (HRC) takes the view that "*it would be unconscionable to so interpret the responsibility under article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory*".[71] This view, also referred to as the *functional approach*, focuses on a State's power or ability to affect the enjoyment of rights, rather than its control over territory or persons.[72] In its General Comment No. 31, the HRC refers to power by stating that "*a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party*"[73]

63 United Nations Human Rights Committee, 'Concluding Observations on the Fourth Report of the United States of America' (23 April 2014) UN Doc CCPR/C/USA/CO/4 para 22.

64 Wall Advisory Opinion (n 38) para 112; Armed Activities (n 47) para 216; Ilaşcu (n 48) para 312.

65 James Crawford, Brownlie's Principles of Public International Law (9th edn, OUP 2019) 626.

66 Milanovic (n 39) 209.

67 ibid 210.

68 ibid 215.

69 ibid 210.

70 ibid 216.

71 See for example, Lopez Burgos (n 51) para 12.3.

72 Yuval Shany, 'Taking Universality Seriously: A Functional Approach to Extraterritoriality in International Human Rights Law' (2013) 7 Law & Ethics of Human Rights 47, 64-67.

73 United Nations Human Rights Committee, 'General Comment No. 31: The Nature of the General Obligation Imposed on States Parties to the Covenant' (29 March 2009) UN Doc CCPR/C/21/Rev.1/Add.13 para 10.

and in its General Comment No. 36, it puts the emphasis on enjoyment of rights as it notes that "*a State party has an obligation to respect and to ensure the rights of […] all persons subject to its jurisdiction, that is, all persons over whose enjoyment of the right to life it exercises power or effective control*."[74]. The African Commission on Human and Peoples' Rights also refers to the functional approach in its General Comment No. 3 with a reference to power and enjoyment of rights: "*The nature of these obligations depends for instance on the extent that the State has jurisdiction or otherwise exercises effective authority, power, or control over either the perpetrator or the victim (or the victim's rights), […] or whether the State engages in conduct which could reasonably be foreseen to result in an unlawful deprivation of life.*".[75]

This functional approach to extraterritorial jurisdiction was applied in *A.S. and others v. Malta*[76] and *A.S. and others v. Italy*[77] cases, where the HRC found that migrants in the Mediterranean Sea were within the jurisdiction of Malta and Italy, based on the "*direct and reasonably foreseeable causal relationship*" between the conduct of these States and the concerned individuals.[78] In a similar vein, the Committee on the Rights of the Child also applied the functional test in *L.H. v. France*[79] to find that children with French nationality in Syrian camps controlled by Kurdish forces fell within the jurisdiction of France, as it "*has the capability and the power to protect the rights of the children in question by taking action to repatriate them or provide other consular responses"*.[80]

The European Court of Human Rights (ECtHR) tends to adopt the classical approach seeking effective control over territory or persons in order to establish extraterritorial jurisdiction of a State party. This is prominent in two recent judgments of the court, namely *Ukraine v. Russia* and *Georgia v. Russia (II)*.[81] However, in a few cases the ECtHR seems sympathetic to the application of a functional approach. Take for example *Pad v. Turkey*, where the court found that the victims in Iran killed by gunfire from the Turkish territory were within the jurisdiction of Turkey, although it did not exercise

74 United Nations Human Rights Committee, 'General Comment 36: Article 6 right to life' (30 October 2018) UN Doc CCPR/C/GC/36 para 63.

75 African Commission on Human and Peoples' Rights, 'General Comment No. 3: The Right to Life (Article 4)' (12 December 2015) para 14.

76 A.S. and others v Malta Comm no 3043/2017 (Human Rights Committee, 13 March 2020) para 6.7.

77 A.S. and others v Italy Comm no 3042/2017 (Human Rights Committee, 4 November 2020) para 7.8.

78 See for a critique of these decisions Marko Milanovic, 'Drowning Migrants, the Human Rights Committee, and Extraterritorial Human Rights Obligations' (EJIL:Talk!, 16 March 2021) <https://www.ejiltalk.org/drowning-migrants-the-human-rights-committee-and-extraterritorial-human-rights-obligations/> accessed on 7 August 2021.

79 L.H. and others v France Comm nos 79/2019 and 109/2019 (CRC, 30 September 2020) para 9.7.

80 See for a critique on the Committee's reliance on nationality Marko Milanovic, 'Repatriating the Children of Foreign Terrorist Fighters and the Extraterritorial Application of Human Rights' (EJIL:Talk!, 10 November 2010) <https://www.ejiltalk.org/repatriating-the-children-of-foreign-terrorist-fighters-and-the-extraterritorial-application-of-human-rights/> accessed on 7 August 2021.

81 Ukraine v Russia (Re Crimea) App nos 20958/14 and 38334/18 (ECtHR, 16 December 2020) para 303; Georgia v Russia (II) (Merits) App no 38263/08 (ECtHR, 21 January 2021) para 81.

any control over that area or the victims themselves.[82] In addition – and perhaps more importantly – the ECtHR leaves an open door when applying the classical approach by referring to "special features," which may establish extraterritorial jurisdiction. For instance, the court cited the start of an investigation in *Güzelyurtlu v. Turkey*[83] and the duty to investigate under the procedural limb of the right to life in *Hanan v. Germany*[84] as special features, which would establish extraterritorial jurisdiction.

The Inter-American Court of Human Rights (IACtHR) adopts a functional approach based on the concepts of power and enjoyment of rights. In its *Advisory Opinion on the Environment and Human Rights*, the court concluded that the mere existence of a causal link between the acts and the alleged violations of human rights is sufficient to establish the jurisdiction of a State.[85] This decision will be explained more in detail in the following section, as it illustrates the interplay between human rights and environmental transboundary harm.

IV. Jurisdiction in Cases of Environmental Transboundary Harm

An environmental harm originating from the territory of a State may have multiple effects on the territory of another State and infringe the rights of individuals present on the territory of the latter State. This is because there is a close relationship between the protection of the environment and human rights.[86] For instance, environmental harms may affect the right to life,[87] the right to health,[88] the right to food,[89] the right to water,[90] the right to a healthy environment,[91] the right to property,[92] the right to humane treatment,[93] the right to private life[94] and the right to information.[95] The protection of these rights is equally important in a transboundary context.[96]

82 Pad and others v Turkey App no 60167/00 (ECtHR, 28 June 2007) paras 52-55. For an example, which does not involve an element of proximity, see Carter v Russia App no 20914/07 (ECtHR, 21 September 2021) para 130.

83 Güzelyurtlu v Turkey App no 36925/07 (ECtHR, 29 January 2019) para 194.

84 Hanan v Germany App no 4871/16 (ECtHR, 16 February 2021) para 143.

85 Advisory Opinion on the Environment and Human Rights (n 25) para 101.

86 OHCHR Climate Change (n 3) 18. For a discussion on why environmental law does not apply as lex specialis see, Viñuales (n 7) 190.

87 See for example, Öneryıldız v Turkey App no 48939/99 (ECtHR, 30 November 2004).

88 See for example, United Nations Committee on Economic, Social and Cultural Rights, 'General Comment No. 14 The Right to the Highest Attainable Standard of Health' (11 August 2000) E/C.12/2000/4 para 11.

89 See for example, United Nations Human Rights Council, 'Report of the Special Rapporteur on the Right to Food, Jean Ziegler' (10 January 2008) UN Doc A/HRC/7/5 paras 21-23.

90 See for example, Dzemyuk v Ukraine App no 42488/02 (ECtHR, 4 September 2014).

91 See for example, Yakye Axa Indigenous Community v Paraguay, Inter-American Court of Human Rights Series C No 125 (17 June 2005).

92 See for example, Awas Tingni (n 37).

93 See for example, Moiwana Community v Suriname, Inter-American Court of Human Rights Series C No 124 (15 June 2005).

94 See for example, López Ostra v Spain App no 16798/90 (ECtHR, 9 December 1994).

95 See for example, Taşkın and others v Turkey App no 46117/99 (ECtHR, 10 November 2004).

96 Advisory Opinion on the Environment and Human Rights (n 25) para 104.

A particular connection exists between the positive obligations of States under international human rights law and the precautionary principle under international environmental law. According to the precautionary principle, States are not allowed to rely on scientific uncertainties in order to refrain from adopting appropriate measures to ensure the protection of the environment.[97] This principle can be considered a customary rule of international law.[98] When applied in the context of human rights violations arising from environmental transboundary damages, it could constitute a basis for States to comply with their duties to respect, protect and fulfil.[99]

As explained above, human rights treaties apply to States beyond their national territories only with the establishment of a jurisdictional link.[100] The question of jurisdiction in this context is closely related to the enjoyment of the human rights of individuals and environmental damage.[101]

In almost all previous cases concerning extraterritorial application of human rights obligations, all elements of a violation take place outside the concerned State's territory, such as in cases of military occupation. This means that the perpetrator(s) and the victim(s) and/or the conduct and the breach were all outside the territory of the concerned State.

However, when acts originating from one State and causing damage on the territory of another State violate the rights of individuals in the territory of the latter State, some elements (perpetrators and conduct) are situated within the concerned State's territory, whereas other elements (victims and breach) have an extraterritorial dimension. For instance, imagine a scenario whereby State A fails to prevent dangerous substances from mixing into a river, which continues to flow into State B. The contaminated water harms a habitat, including animals and plants, which are the main source of living and economy of a community living around that river. The destruction of this habitat would force the community to migrate and affect many aspects of their lives, which may result in numerous violations of human rights. Accordingly, this contamination caused by State A's failure – which is an environmental transboundary harm – may deprive a community in State B of their rights. Would the fact that the failure to prevent contamination occurred in State A, whereas the human rights breaches arising thereof took place in State B – instead of all of them occurring in State A or State B – have any effects on the analysis of jurisdiction?[102]

97 Rio Declaration (n 2) Principle 15.

98 Tuna (n 36) para 80. It is disputed whether the precautionary principle can be classified as a customary rule of international law. For a criticism of the precautionary principle see Cass R. Sunstein, Laws of Fear: Beyond the Precautionary Principle (1st edn, Cambridge University Press 2005).

99 OHCHR Climate Change (n 3) 91.

100 Olivier De Schutter, International Human Rights Law (1st edn, Cambridge University Press 2010) 124.

101 Viñuales (n 7) 186-187.

102 Viñuales (n 7) 192.

Although there have been several instances where international courts and tribunals had to deal with the issue of extraterritorial application of human rights obligations, the case law with respect to the extraterritorial application of human rights treaties in the context of environmental transboundary harm remains limited.[103] Thus, the general practice of international fora should be examined in order to provide an answer to this question.

D. The Classical Approach

The ICJ has only had the opportunity to decide on two cases concerning extraterritorial application of human rights obligations, which were in the context of a foreign military occupation. In both cases, it relied on the exercise of an effective control over occupied territories in order to establish a jurisdictional link.[104] Accordingly, the ICJ seems to be in favour of the classical approach explained above.

The ICJ almost had the occasion to pronounce itself on State responsibility for human rights violations arising from environmental transboundary harms in *Aerial Herbicide Spraying (Ecuador v. Columbia)*. The underlying facts concerned Colombia's aerial herbicide spraying programme on coca leaf plantations near its border with Ecuador within the framework of its fight against illicit drugs and the effects that these herbicides had on the environment and people in Ecuador. In that case, Ecuador argued *inter alia* that Colombia's spraying programme near its border to Ecuador was resulting in serious damages both to the environment and to the human rights of Ecuadorians living along the border, such as the right to life and the right to health.[105] Colombia disagreed with Ecuador and maintained that Ecuador's human rights-related arguments relied on a cause and effect notion of jurisdiction which was not accepted under international law. Ultimately, the ICJ did not have a chance to decide on the issue of extraterritorial application of human rights obligations as Colombia agreed to cease its spraying programme and the case was discontinued with the agreement of both parties.[106]

The case-law of the ECtHR could be a guide for determining the territorial scope of human rights obligations in cases of environmental transboundary harm, although the court itself has never decided on a case concerning the protection of human rights in an

103 The ECtHR clarified that the legality of the act which contributes to the establishment of a jurisdictional link is irrelevant. It ruled in numerous cases that regardless of the legal nature of a military occupation, a jurisdictional link may be established based on that occupation. Accordingly, whether an environmental transboundary harm violates international environmental law – i.e., whether it is significant or not – a State may still be liable for human rights violations arising therefrom. See also, Nehal Bhuta, 'The Frontiers of Extraterritoriality – Human Rights Law as Global Law' in Nehal Bhuta (ed) The Frontiers of Human Rights (OUP 2016) 18.

104 Wall Advisory Opinion (n 38) 112; Armed Activities (n 47) para 220.

105 Case Concerning Aerial Herbicide Spraying (Ecuador v Colombia) (Discontinued) Memorial of Ecuador para 9.42.

106 Case Concerning Aerial Herbicide Spraying (Ecuador v Colombia) Order of 13 September 2013.

environmental context.[107] The ECtHR opened the gates for the extraterritorial application of the European Convention on Human Rights with its *Loizidou v. Turkey* decision, where it stated that "*the responsibility of Contracting Parties can be involved because of acts of their authorities, whether performed within or outside national boundaries, which produce effects outside their own territory*".[108] Then, the court took a turn in *Banković v. Belgium and others* and ruled for the absence of jurisdiction when there is an airstrike by denying a "cause-and-effect" notion of jurisdiction.[109] After this turn, the ECtHR started to lower the required level of control in order to establish a jurisdictional link within the meaning of Article 1(1) of the European Convention on Human Rights.[110] It nevertheless stuck to the classical approach, eased with a few other concepts.[111]

As explained above, the classical approach requires States to exercise effective control over territory or persons in order to establish extraterritorial jurisdiction. In cases of environmental transboundary harm, the State from which the acts originate neither controls a portion of the territory of the other State, nor does it exercise any control over the persons of which the rights have been infringed.[112] Accordingly, when applied in the context of an environmental transboundary harm, the classical approach dictates that the human rights victims of an environmental transboundary harm in other States would not fall within the jurisdiction of the State where the environmental harm originates from.

E. Effective Control Over What?

Is the classical approach fit for human rights violations arising from environmental transboundary harm? Should a State be responsible for human rights violations within its own territory but not for the human rights violations in other countries which result from the same environmental harm originating from its own territory and having a transboundary character? These questions may be linked to one of the downsides of the classical approach, namely, that it only focuses on a single element of a human rights violation which is either the breach (effective control over territory) or the victim (effective control over persons).

The three elements of a human rights violation may be formulated as (i) perpetrator, (ii) victim and (iii) victim's right[113] or as (i) conduct, (ii) breach and (iii) causal

107 Council of Europe, Manual on Human Rights and the Environment (2012) 114.

108 Loizidou (n 48) para 62.

109 Banković (n 48) paras 75, 82.

110 See for example, Al-Skeini (n 48) or Jaloud (n 58).

111 Maarten den Heijer and Rick Lawson, 'Extraterritorial Human Rights and the Concept of Jurisdiction' in Malcolm Langford, Wouter Vandenhole, Martin Scheinin and Willem van Genugten (eds), Global Justice, State Duties (Cambridge University Press 2012) 177. See, Georgia v Russia (II) (n 81).

112 Fons Coomans, 'The Extraterritorial Scope of the International Covenant on Economic, Social and Cultural Rights in the Work of the United Nations Committee on Economic, Social and Cultural Rights' (2011) 11 HRL 1, 5.

113 ACHPR General Comment No. 3 (n 75) para 14.

link,[114] depending on one's perspective. Regardless of this difference, the concepts they relate to are very similar: (i) someone makes (or fails to make) something, (ii) which causes harm to another person and (iii) there is a nexus between these two. For the establishment of extraterritorial jurisdiction, the classical approach tends to focus on control over the area where the breach occurs or over the victims – i.e., the second element.[115] This understanding rarely causes any problems, because in traditional cases of extraterritoriality such as military occupations, all elements are within a single State – albeit another State than the State against which human rights violations are claimed. However, in the context of human rights violations arising from environmental transboundary harm, the elements are in two different States: the perpetrator and conduct in one State and the victim and breach in another.[116] Putting the focus solely on the outcome provides little assistance in this scenario.[117]

It may be argued that effective control over any one of these elements would suffice to establish jurisdiction in cases of environmental transboundary harm. This conclusion would indeed be in line with the view expressed by the African Commission in its General Comment No. 3 where it referred to "*effective authority, power, or control over either the perpetrator or the victim (or the victim's rights)*".[118]

As already explained, the classical approach is based on the second set of elements (victim or breach), whereas the functional approach refers to the third set of elements (victim's rights and causal link). As for the first set of elements (perpetrator and conduct), there is no strict "approach", but there have been some cases which seem to focus on them. In *Saldaño v. Argentina*, the Inter-American Commission on Human Rights noted that "*a state party to the American Convention may be responsible under certain circumstances for the acts and omissions of its agents which produce effects […] outside that state's own territory.*".[119] By the same token, the ECtHR held in *Ilaşcu v. Moldova and Russia* that "*the acts of Contracting States performed outside their territory or which produce effects there may amount to exercise by them of their jurisdiction within the meaning of Article 1 of the Convention.*".[120] However, when faced with a similar situation, the ECtHR ruled that it could not establish a jurisdictional link for the alleged human rights violations of Moroccan individuals residing in Morocco due to a cartoon published in Denmark.[121]

114 Advisory Opinion on the Environment and Human Rights (n 25) para 101.

115 Al-Skeini (n 48) para 138; Viñuales (n 7) 197.

116 Note that the third element (victim's right or causal link) are legal concepts which do not take place in neither State. It is perhaps therefore logical to put it in the centre of the functional approach.

117 Raible (n 56) 84-85.

118 African Commission on Human and Peoples' Rights General Comment No. 3 (n 75) para 14 (emphasis added).

119 Victor Saldaño v Argentina Report no 38/99 (IACommHR, 11 March 1999) para 17 (emphasis added).

120 Ilaşcu (n 48) para 314 (emphasis added).

121 Ben El Mahi and others v Denmark App no 853/06 (ECtHR, 11 December 2006), 8. For a criticism of this decision see Karen da Costa, The Extraterritorial Application of Selected Human Rights Treaties (1st edn, Martinus Nijhoff Publishers 2013) 185-187.

Although the classical approach leaves little room for establishing jurisdiction in cases of environmental transboundary harm, the approaches focused on other elements may be used to establish a jurisdictional link.

F. Non-extraterritorial Environmental Transboundary Harm

It has been argued that human rights violations arising from environmental transboundary harm should not be considered as extraterritorial at all, since the acts take place in the State of origin.[122] This view, however, seems to be difficult to support considering the wording of human rights treaties with respect to territory and jurisdiction.[123]

Human rights treaties do not refer to acts within a State's territory or under its jurisdiction; they rather focus on individuals within a State's territory or subject to its jurisdiction.[124] The victims of an environmental transboundary harm are located outside the territory of the State where the harm originates from by definition. As such, it would be unlikely to conclude that environmental transboundary harms do not give rise to extraterritorial human rights issues.

G. The Functional Approach

The functional approach puts the concepts of power and enjoyment of rights at the heart of the extraterritorial jurisdiction analysis. The only judicial decision of international fora regarding the question of how to establish jurisdiction for human rights treaties in the context of environmental transboundary harm, the *Advisory Opinion on the Environment and Human Rights* of the IACtHR, also adopts this approach.

On 14 March 2016, Colombia requested the court to issue an advisory opinion *inter alia* on the interpretation of the term jurisdiction in cases of environmental transboundary harm.[125] In its advisory opinion of 15 November 2017, the IACtHR concluded that "*when transboundary damage occurs that effects treaty-based rights, it is understood that the persons whose rights have been violated are under the jurisdiction of the State of origin if there is a causal link between the action that occurred within its territory and the negative impact on the human rights of persons outside its territory.*" It further explained that jurisdiction is based on the effective

122 Dominic McGoldrick, 'Extraterritorial Application of the International Covenant on Civil and Political Rights' in Fons Coomans and Menno T. Kamminga (eds), Extraterritorial Application of Human Rights Treaties (Intersentia 2004) 52. See also Ralph Wilde, 'The Extraterritorial Application of International Human Rights Law on Civil and Political Rights' in Scott Sheeran and Sir Nigel Rodley (eds), Routledge Handbook of International Human Rights Law (Routledge 2016) 643.

123 John Knox, 'Diagonal Environmental Rights' in Mark Gibney and Sigrun Skogly (eds), Universal Human Rights and Extraterritorial Obligations (University of Pennsylvania Press 2010) 88.

124 See for example, ICCPR (no 40) art 2(1).

125 Advisory Opinion on the Environment and Human Rights (n 25) paras 1-3.

control exercised on the action causing environmental harm and consequent human rights violations.[126]

For the purposes of establishing jurisdiction, the IACtHR first refers to the existence of a causal link, and then confirms this understanding based on the concept of control over activities causing the transboundary harm. In the court's analysis, it seems like the line starts to disappear between jurisdiction for the purposes of extraterritorial human rights obligations and the causal link required under the law of State responsibility.[127] However, jurisdiction is different from causality.[128] Accordingly, the test developed by the IACtHR is best understood as follows: jurisdiction exists in cases of environmental transboundary harm if the State of origin has control over acts causing the environmental harm and consequent alleged human rights violations – i.e. it has the power to prevent these from happening. This, in turn, would ultimately depend on the facts of a concrete case, but also on the State where the environmental harm occurs. This is because that State also has human rights obligations and the interplay between the two States may play a role for the determination of a jurisdictional link.[129]

This concept of jurisdiction introduced by the IACtHR is also susceptible to be used in future cases involving environmental transboundary damages. This approach would also be suitable with the general understanding of the protection of human rights,[130] because if a State exercises control over an activity causing environmental harm to another State, it would only be reasonable to conclude that the State of origin should also be responsible for the consequent human rights violations.[131]

H. Special Features

As explained above, the ECtHR refers to special features in order to support the classical approach of extraterritorial jurisdiction that it adopts. The court abstains from defining the term special features *in abstracto* but refers to it as case-specific facts which may contribute to the establishment of a jurisdictional link in cases involving extraterritoriality. For instance, the ECtHR found jurisdiction of Turkey in *Güzelyurtlu v. Turkey*, even though Turkey did not exercise any form of control. It indicated that the fact that Turkish authorities initiated an investigation for a death occurring outside of its jurisdiction was sufficient as a special feature to establish a jurisdictional link.[132]

126 ibid paras 101, 104(h).

127 Sigrun Skogly, 'Causality and Extraterritorial Human Rights Obligations' in Malcolm Langford, Wouter Vandenhole, Martin Scheinin and Willem van Genugten (eds), Global Justice, State Duties (Cambridge University Press 2012) 257.

128 Viñuales (n 7) 195.

129 Viñuales (n 7) 197-198.

130 Alan Boyle, 'Human Rights and the Environment: Where Next?' (2012) 23 EJIL 613, 640.

131 Knox (n 123) 88.

132 Güzelyurtlu (n 83) para 188.

Can there be any special features which may establish extraterritorial jurisdiction in cases of environmental transboundary harm? The IACtHR responded in part negatively to this question in its *Advisory Opinion on the Environment and Human Rights* – although it did not adopt the special features terminology of the ECtHR. The court stated that special regimes of environmental protection would not establish extraterritorial jurisdiction by themselves.[133] It further noted that the fact that individuals are within a specific environmental protectional area would not suffice to create a jurisdictional link.[134] Instead, "*[a] determination must be made, based on the factual and legal circumstances of each specific case.*".[135]

Although the IACtHR excluded special environmental regimes to be used as special features, the general rule under customary international law requiring States to refrain from acts originating from their territories which cause damage to the territories of other States (no-harm rule) may nevertheless be used in the context of the protection of human rights from environmental transboundary damages.[136] Although the no-harm rule[137] applies in principle in an interstate context, there is not any limitation on the application of this principle in the context of the protection of human rights.[138] Thus, international courts and tribunals may also refer to this principle as a special feature justifying extraterritorial jurisdiction.

In addition, there may be other possible special features that would establish extraterritorial jurisdiction in cases of environmental transboundary harm, as hinted in the case law of the ECtHR. The court found in *Hanan v. Germany* that as a special feature, the obligation to investigate under the procedural limb of the right to life is sufficient to establish Germany's jurisdiction for an airstrike in Afghanistan.[139] When applied in the context of international environmental law, this would mean that procedural obligations such as the obligation to carry out an environmental impact assessment in the presence of a risk of significant transboundary harm could serve as a special feature to establish jurisdiction.

133 Advisory Opinion on the Environment and Human Rights (n 25) para 92.

134 ibid para 93. This approach is in contradiction with the findings of the Human Rights Committee in A.S. and others v. Malta (n 76) where it heavily relied on the fact that the migrants were within Malta's search and rescue area to hold that they were within Malta's jurisdiction.

135 ibid.

136 De Schutter (n 100) 165.

137 As explained above, under international environmental law, a transboundary harm is illegal if it is considered significant. However, it is not relevant for the protection of human rights, whether the original act causing transboundary harm is against international law or not. Hence, even an environmental transboundary harm which is not significant can result in human rights violations in a foreign State and engage the responsibility of the State of origin, if it infringes the human rights of individuals.

138 De Schutter (n 100) 165.

139 Hanan (n 84) para 143. Note that the court also relied on the fact that Afghanistan was prevented from starting an investigation to establish jurisdiction, however it is unlikely that the court's finding would change in the absence of this fact.

V. Current Challenges

Human rights violations caused by environmental transboundary damages might have broader implications, which are not limited by the question of establishing extraterritorial jurisdiction. There remain several issues to be solved which may concern the interplay between human rights and environmental transboundary harm. Some of these issues include **(A)** the effects of climate change and **(B)** State responsibility for private actors.

A. Climate Change

It is now accepted that climate change affects the enjoyment of human rights.[140] Climate change can be defined as a change in the composition of the global atmosphere caused by human activities and observable over a certain time period.[141] In general terms, climate change also qualifies as environmental transboundary harm, since an act, such as increasing CO_2 emission levels – other than contributing to climate change – causes damages to the environment of other States. The difference here is that the damage is caused by and occurs in multiple States. For that reason, it is argued that States should be responsible for human rights violation caused by climate change,[142] even if the effects are produced outside their territories.[143]

The question that arises in this context is to determine which States should be held responsible and here, international law needs to evolve in order to find an answer to human rights concerns with respect to climate change.[144] The jurisdictional concerns with respect to human rights breaches caused by environmental transboundary harms may also play an important role in this respect.[145]

A major development in this area has occurred under the auspices of the United Nations Child Rights Committee (CRC). In 2019, 16 children from 12 countries filed a complaint before the CRC against Argentina, Brazil, France, Germany and Turkey arguing that these five States failed to take necessary actions to prevent climate change, which in turn violated the complainants' rights to life, rights to health and rights to culture. Accordingly, the complaint concerned extraterritorial application of the Convention on the Rights of the Child in the context of climate change.

140 OHCHR Climate Change (n 3) 70.

141 United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107 (UNFCCC) art 1(2).

142 Human Rights Committee General Comment No. 36 (n 74) paras 62-63; Human Rights Committee, 'Concluding observations on the initial report of Cabo Verde' (7 November 2019) UN Doc CCPR/C/CPV/CO/1/Add.1 paras 17-18.

143 Christopher Campbell-Duruflé and Sumudu Anopama Atapattu, 'The Inter-American Court's Environment and Human Rights Advisory Opinion: Implications for International Climate Law' (2018) 8(3-4) Climate Law 321, 336.

144 Boyle (n 130) 640-641.

145 See Sara Seck, 'Climate Justice and the ETOs' in Mark Gibney, Gamze Erdem Türkelli, Markus Krajewski and Wouter Vandenhole (eds), The Routledge Handbook on Extraterritorial Human Rights Obligations (Routledge 2021).

Interestingly, the CRC noted that the case-law of the HRC and ECtHR "*was developed and applied to factual situations that are very different to the facts and circumstance of this case. The authors' communication raises novel jurisdictional issues of transboundary harm related to climate change.*".[146] It found that the criteria established by the IACtHR in its *Advisory Opinion on the Environment and Human Rights* would be appropriate in the context of extraterritorial human rights obligations arising from climate change.[147] The CRC interpreted these criteria to conclude that a victim falls within the jurisdiction of a State if that State exercises effective control over the emissions contributing to climate change, and if there is a causal link between the alleged harm and the concerned State's actions.[148] It further explained that, for a state, there is effective control if it was foreseeable that the alleged harms would occur due to its actions.[149]

Applying these criteria to the concrete case, the CRC considered that the five concerned States had effective control over the sources of emissions and that there was a causal link between the failure to prevent these emissions and alleged human rights breaches.[150] After finding that the complainants were within the jurisdiction of the concerned states, the CRC rejected the complaints due to the non-exhaustion of local remedies.

Although the CRC did not evaluate whether climate change violates human rights, it accepted as a principle that states would have extraterritorial human rights obligations due to climate change. In particular, the CRC noted that although climate change was a global issue, States carry individual responsibility for their own actions.[151] This is an important step in examining what human rights obligations states have in the context of climate change. Nevertheless, the criteria put forward by the CRC need to be explored in future cases.

146 Chiara Sacchi and others v Argentina Comm no 104/2019 (CRC, 22 September 2021) para 10.4; Chiara Sacchi and others v Brazil Comm no 105/2019 (CRC, 22 September 2021) para 10.4; Chiara Sacchi and others v France Comm no 106/2019 (CRC, 22 September 2021) para 10.4; Chiara Sacchi and others v Germany Comm no 107/2019 (CRC, 22 September 2021) para 9.4; Chiara Sacchi and others v Turkey Comm no 108/2019 (CRC, 22 September 2021) para 9.4.

147 Chiara Sacchi and others v Argentina Comm no 104/2019 (CRC, 22 September 2021) para 10.7; Chiara Sacchi and others v Brazil Comm no 105/2019 (CRC, 22 September 2021) para 10.7; Chiara Sacchi and others v France Comm no 106/2019 (CRC, 22 September 2021) para 10.7; Chiara Sacchi and others v Germany Comm no 107/2019 (CRC, 22 September 2021) para 9.7; Chiara Sacchi and others v Turkey Comm no 108/2019 (CRC, 22 September 2021) para 9.7.

148 ibid.

149 ibid.

150 Chiara Sacchi and others v Argentina Comm no 104/2019 (CRC, 22 September 2021) para 10.12; Chiara Sacchi and others v Brazil Comm no 105/2019 (CRC, 22 September 2021) para 10.12; Chiara Sacchi and others v France Comm no 106/2019 (CRC, 22 September 2021) para 10.12; Chiara Sacchi and others v Germany Comm no 107/2019 (CRC, 22 September 2021) para 9.12; Chiara Sacchi and others v Turkey Comm no 108/2019 (CRC, 22 September 2021) para 9.12.

151 Chiara Sacchi and others v Argentina Comm no 104/2019 (CRC, 22 September 2021) para 10.8; Chiara Sacchi and others v Brazil Comm no 105/2019 (CRC, 22 September 2021) para 10.8; Chiara Sacchi and others v France Comm no 106/2019 (CRC, 22 September 2021) para 10.8; Chiara Sacchi and others v Germany Comm no 107/2019 (CRC, 22 September 2021) para 9.8; Chiara Sacchi and others v Turkey Comm no 108/2019 (CRC, 22 September 2021) para 9.8.

B. State Responsibility and Private Actors

States remain the principal subjects of international law, but non-State actors also play an important role in the international plane. One could even argue that the importance of non-State actors is far greater than the importance of States in relation to environmental transboundary harm. Indeed, some research shows that 90 companies alone could be held responsible for 63% of the total emission of CO_2 and methane, which contribute to climate change.[152] Against this background however, the responsibility of States under international law for human rights violations arising from environmental transboundary harms caused by private actors continues to be an unexplored area.

Under international law, States are generally responsible for the actions of private entities if they exercise governmental authority,[153] they are controlled or directed by a State,[154] or their conducts are acknowledged by a State as its own.[155] This responsibility is broader in the field of human rights law, as States are obliged to protect the rights of individuals from inference by third parties.[156]

The positive human rights obligations of States include obligations relating to the protection of individuals from environmental harm,[157] and in particular from transboundary damages.[158] Indeed, the Committee on Economic, Social and Cultural Rights recognised the importance of States to adopt measures for ensuring the conduct of environmental impact assessment by private parties in order to prevent further human rights violations that may arise.[159] In the same vein, the HRC held in *Yassin v. Canada* that "*there are situations where a State party has an obligation to ensure that rights under the Covenant are not impaired by extraterritorial activities conducted by enterprises under its jurisdiction*".[160]

152 Richard Heede, 'Tracing anthropogenic carbon dioxide and methane emissions to fossil fuel and cement producers, 1854-2010' (2014) 122(1-2) Climatic Change 229, 229.

153 ILC, 'Articles on Responsibility of States for Internationally Wrongful Acts' (28 January 2002) UN Doc A/RES/56/83, art 5.

154 ibid art 8.

155 ibid art 11.

156 United Nations Human Rights Office of the High Commissioner, 'Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework' (21 March 2011) UN Doc HR/PUB/11/04 Principle 1 and 2; Länsmann et al v Finland Comm no 511/1992 (Human Rights Committee, 8 November 1994) para 9.8; Länsmann (Jouni) et al v Finland Comm no 1023/2001 (Human Rights Committee, 17 March 2005) para 10.7; Human Rights Committee General Comment No. 36 (n 74) para 63.

157 The Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria Comm no 155/96 (ACHPR, 27 May 2002) para 57; Hatton and others v UK App no 36022/97 (ECtHR, 8 July 2003) para 98; López Ostra (n 94) para 51.

158 Peter Newel, 'Climate change, human rights and corporate accountability' in Stephen Humphreys (ed.), Human Rights and Climate Change (Cambridge University Press 2010) 136.

159 United Nations Committee on Economic, Social and Cultural Rights, 'General Comment No. 24: State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities' (10 August 2017) UN Doc E/C.12/GC/24 para 50.

160 Yassin and others v Canada Comm no 2285/2013 (Human Rights Committee, 26 July 2017) para 6.5.

Following this logic, one could easily conclude that States have an obligation to prevent non-State actors from causing human rights violations in other countries through environmental transboundary harm.[161] A three-step analysis is to be applied in this scenario. First, whether the concerned individuals fall within the jurisdiction of the relevant State should be determined. Second, whether the rights of these individuals were infringed due to the environmental transboundary harm caused by the non-State actor in question should be examined. Finally, whether the State failed to take reasonable and appropriate measures to prevent the violations should be established.[162]

Concerning the first step with respect to jurisdiction, as explained above, pursuant to the functional approach, individuals are considered to be within the jurisdiction of a State based on the concepts of power and enjoyment of rights. In other words, whether a State was in a position to prevent the alleged human rights violation from occurring is examined. Two points are worth mentioning when this examination is carried out in the context of environmental transboundary harms caused by non-State actors.

First, the standard formulation of the jurisdictional test presupposes that it is the State itself that infringes the substantive human rights of the concerned individuals. This is evident from the fact that human rights tribunals and bodies examine whether the *State* was in a position to prevent the events causing the human rights violations from happening in order to determine whether the individuals fell within its jurisdiction.[163] In contrast, positive obligations including those arising from environmental transboundary harm do not concern violations of substantive human rights by States. They rather focus on whether a State adopts the necessary measures to prevent substantive human rights violations.[164] From a factual perspective, this implies the presence of a third person that is the perpetrator of human rights. Evidently, this non-State actor acts as a bridge for the purposes of establishing jurisdiction in that it is through its control over this person that a State would be in a position to grant individuals the enjoyment of their human rights.

Second, and in line with this line of thought, it becomes obvious that there is a resemblance between the first and third steps mentioned above. Namely, the test for establishing jurisdiction is very similar to the examination of whether a State failed to adopt reasonable measures to prevent the violation. This is because the presence of a jurisdictional link is also dependent on a State's ability to affect the enjoyment of an individual's human rights. However, there is a difference between these two tests. Whereas jurisdiction is established if a State exercises control over activities causing

161 Newel (no 158) 136.

162 De Schutter (n 100) 414.

163 See for example, Loizidou (n 48) para 62; Banković (n 48) para 70; Ilaşcu (n 48) para 312; Al-Skeini (n 48) para 138; Catan (n 48) para 106.

164 De Schutter (n 100) 414.

environmental transboundary harm, positive human rights obligations depend on the reasonable measures that a State can take.

In any event, it is clear that States have a duty to not to allow non-State actors to engage in activities which would cause environmental transboundary damage and infringe the human rights of persons abroad. Nevertheless, State practice remains limited in terms of measures adopted by States for this purpose. By the same token, victims of such activities also often choose to litigate these disputes before civil or criminal courts rather than human rights bodies. However, the human rights implications of environmental transboundary harms caused by non-State actors remains another possibility for victims to seek reparations.

VI. Conclusion

Several procedural and substantive obligations have emerged in the field of international environmental law with the aim of providing better protection of the environment. These obligations also apply in the context of environmental transboundary harms. Another implication of environmental transboundary harms is to be seen in the field of international human rights law. An environmental transboundary harm can result in the infringement of human rights of individuals such as the right to life or the right to property. For this reason, it is important to establish the territorial scope of human rights treaties.

Although human rights treaties are applied essentially territorially, international courts and tribunals recognise some cases where States are found responsible for human rights breaches that are conducted outside their national borders. The establishment of a jurisdictional link is necessary in this regard. International courts and human rights bodies adopt different approaches to examine whether a State exercises jurisdiction outside its national borders.

When an environmental transboundary harm occurs, it is very unlikely that the State of origin exercises any control over the area where the damage has occurred or over the persons which suffer from that harm. Thus, the jurisdiction under the classical approach would not exist in the case of an environmental transboundary damage. Accordingly, the restricted view focused on certain elements of a human rights violation is insufficient. A broader analysis is required for cases involving environmental transboundary damages.

Other approaches such as the functional approach are also apt in this regard. In fact, the Inter-American Court of Human Rights suggests that States should be responsible for human rights violations caused by environmental transboundary damages when they exercise an effective control over the activities causing the environmental harm

and the consequent human rights violations. Alternatively, using the no-harm rule as a special feature can also be appropriate to establish jurisdiction.

Moreover, the responsibility of States for human rights violations caused by environmental transboundary damages presents some new challenges in international law. First, it is hard to establish the responsibility of States when it comes to climate change. Second, there are some areas to explore for the responsibility of States for private actors' conduct causing environmental transboundary damage and human rights violations.

In any event, the *Advisory Opinion on the Environment and Human Rights* highlights some of the problems that might arise in the context of human rights and environmental transboundary harm. This remains an area that needs to be explored more in detail and it is now for future case law to build on this decision.

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