

Article Written for the Institute for Environmental Security, in the Environmental Security for Poverty Alleviation Programme

Legal Analysis of the Case Concerning Aerial Herbicide Spraying (Ecuador vs. Colombia): Possible Violations of International Environmental Law and International Human Rights Law

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SUMMARY: This article investigates the dispute between the two states, focusing on the violations of international norms. In the first chapter, the possibly occurred violations of the international environmental law are analysed, both under treaty law as well as customary law. The most relevant treaties signed by Colombia were selected and, the most important cases were cited to convey customary norms that may have been breached by Colombian fumigations. In the second chapter, the analysis descends to the violations of the rights of the individuals, namely, the human right to a healthy/satisfactory/clean environment. The referred right is studied by means of international legal instruments, cases and the teachings of the highly qualified publicists. Eventually, several violations are found in both state and individual levels.

KEYWORDS: Ecuador, Colombia, fumigations, spraying, glyphosate, herbicides, transfrontier pollution, transboundary harm, air pollution, international environmental law, biological diversity, desertification, Amazonia, sic utere tuo principle, human right to a healthy/satisfactory/clean environment.

RESUMO: O artigo investiga o conflito entre estes dois Estados, sob acusação de violação de direito internacional. No primeiro capítulo, as possíveis violações da legislação ambiental internacional são analisadas, sob o aspecto normativo dos tratados e do direito consuetudinário. Os tratados mais relevantes, assinados pela Colômbia, foram indicados, assim como os mais relevantes *cases* para tratar do costume que pautou a conduta colombiana. No segundo capítulo, a análise parte para a violação de direitos dos indivíduos, chamados direitos humanos a um meio ambiente satisfatoriamente saudável e limpo. Estes referidos direitos são estudados à luz dos instrumentos internacionais, casos e ensinamentos de mais qualificada doutrina. Eventualmente, diversas violações são encontradas nos dois Estados e em nível individual.

INTRODUCTION

There is little doubt that environmental protection concerns everyone, especially in the case of *transboundary harm* whose consequences are also felt

by others outside the territory of the harming state. Thus, states have international environmental obligations to comply with in order to maintain peaceful international relations with other states. Moreover, due to the indivisibility of the natural environment, everybody – singularly considered – would have the right to enjoy it in its entirety¹. However, delimitating where the sovereignty of one state ends and where the right(s) of the other(s) begin is not always an easy task. In the present case to be analysed, Colombia allegedly caused (severe) harm to the environment within the borders of its neighbour – Ecuador – insisting in the argument of the sovereign right to use its territory to the fullest suggesting a claim of absolute sovereignty².

From the state level to the individual level, more directly affected are those who have in their surrounding natural environment their main/only source of subsistence and less access to the modern litigation apparatus to protect their rights, particularly their human rights. Depending on the nature and intensity of the environmental harm, individuals may suffer from lack of food (crops, livestock etc.), potable water and consequently, have their health and life threatened/affected. Furthermore, individuals within the harmed state have the right to be protected against human rights violations from whichever origin. Thus, an obligation to protect the right to food, water, health, healthy environment, life and others might emerge for Ecuador.

In its application, Ecuador plainly requested, *inter alia*, the Court to *adjudge and declare that Colombia has violated its obligations under international law*. This work will endeavour to identify which obligations under international law were violated as claimed by Ecuador in the case before the International Court of Justice [hereinafter ICJ], legally analysing the facts posed by Ecuador. Recourse to various sources of international law will be the main tool to develop this analysis, utilising the most important international cases of transboundary harm³.

On the individual level, it will be attempted to demonstrate how the human right to the environment may be violated, raising a number of issues including *environmental security*.

This work will not deal specifically with tort law and will limit the human rights analysis to a brief discussion of the human right to a healthy/satisfactory/clean environment based on reports from prominent NGOs, since there's no case pending before international human rights courts until the end of this work.

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- 1 For instance, the European Court of Human Rights has already asserted that there is no such a right from the catalogue of right in that regional system. However, being the individual's environment being negatively affected, recourse to other existing rights may be a solution for nuisances such as the Right to Private Life. See Lopez Ostra vs. Spain, para. 51; Guerra and Others vs. Italy, para. 60.
 - 2 Resembling the arguments of the Harmon Doctrine in the Colorado River case between Mexico and the United States of America.
 - 3 Article 38, para. 1, of the Statute of the ICJ.

FACTS AND HISTORICAL BACKGROUND

There is a lot to be found in the media – Ecuadorian, Colombian and International – about the present case pending before ICJ but, in order to avoid politicisation and in line with the principle of *da mihi factum dabo tibi jus*⁴, the facts analysed here will be restricted to those constant in the Ecuadorian application instituting proceedings before the Court. This delimitation is necessary because those are the facts that need to be proven by the claiming party (Ecuador) and analysed by the Court after the response of the demanded state (Colombia). Considering the facts *prima facie* legitimate, they will serve as foundation for the analysis of the case.

On April 1st 2008, Ecuador instituted proceedings against Colombia concerning the alleged aerial spraying by Colombia of toxic herbicides over Ecuadorian territory. On May 30th 2008, the ICJ fixed the time limits for filing the written pleadings for the parties⁵. The Ecuadorian *Memorial* was presented on March 31st 2008 and Counter-Memorial (from Colombia), is due by March 29th 2010.

According to the *Memorial* (presented by Ecuador), aeroplanes and helicopters have been spraying a strong herbicide to annihilate illicit plantations that would serve to manufacturing narcotics. This frequent action is part of the national “anti-narcoterrorism plan” performed by Colombia, whose aims are here *not* under discussion.

Although the formula of that herbicide has not been revealed by Colombia, it indicated that the main ingredient is *glyphosate*, a non-selective herbicide that kills virtually any plant. Moreover, although it is not yet scientifically certain that this chemical is noxious for human beings, the other substances added to the herbicide’s unknown formula might be. Evidences show that people are having all sorts of health problems in that region. Animals are perishing, not to mention the vegetation that is being devastated. Due to both the proximity to the border and the height from which the herbicide is being launched, part of this poison is being carried by wind over the border, affecting negatively vital natural resources such as the watercourses and the land, as well as the biodiversity of the region. Ecuador is also one of just 17 countries in the world designated by the *World Conservation Monitoring Centre* of the *United Nations Environment Programme* as “mega diverse”, containing the world’s highest biological diversity per area unit, i.e., on average, there are more species per square kilometre in Ecuador than anywhere else in the world⁶. Approximately 25 per cent of its territory is

4 Latin form of “Give me the facts, I will give you your rights” (Translated by the author).

5 A *Memorial* shall contain a statement of the relevant facts, a statement of law, and the submissions, article 49, 1, 1978 Rules of the Court; A *Counter-Memorial* shall contain: an admission or denial of the facts stated in the *Memorial*; any additional facts, if necessary; observations concerning the statement of law in the *Memorial*; a statement of law in answer thereto; and the submissions, article 49, 2, 1978 Rules of the Court.

6 According to the World Resources Institute, it has 302 mammal species, 19.362 plant species, 640 breeding bird species (including 35 per cent of the world’s hummingbird species), 415 reptile species, 434 amphibian species and 246 fish species. In: Application instituting proceedings for the case of Aerial Herbicide Spraying

made up of national parks and protected areas⁷. Furthermore, it is alleged that spraying has also had a negative effect on the health and food security of border populations by polluting their water sources and the aquatic life. Complaints have been made concerning large traces in many rivers⁸.

As far as Ecuador is concerned, the legal issue here is the fact that all the aforementioned damages are happening within its territory but they are apparently caused by the action of Colombian government from within Colombian territory. Thus, this can be considered a case of transboundary air pollution.

As a consequence, Ecuador also contends that Colombia's practice unfolds in many other issues such as: frequent invasion of Ecuador's air space (by those aircrafts carrying out the fumigations); violations of the rights of the individuals geographically concerned due to the adverse health effects, loss of livestock and crops; harshening of life conditions of more vulnerable groups such as the local peasants and indigenous peoples who depend on the land for their subsistence.

Recourse to diplomatic negotiation was taken without much success. Ecuador requested Colombia to respect a 10-Kilometre buffer zone within its side from the border, where another method should be employed to eliminate the illegal crops. Colombia did not accept the request entirely, but only temporarily, suspending the fumigation in that stripe for less than a year in 2005. Then, a bi-national scientific commission was created exclusively for this case in an attempt to show Colombia that the adverse effects taking place in Ecuador were resultant from the application of the referred herbicide. The commission, however, could not come to an agreement. Further, other official attempts were made without any adherence from the Colombian government, exhausting the dialogue for over seven years.

Thus, in the instituted proceedings mentioned, on the basis of the facts and law referred to above, Ecuador requests the Court to adjudge and declare that⁹:

- (A) Colombia has violated its *obligations under international law* by causing or allowing the deposit on the territory of Ecuador of toxic herbicides that have caused damage to human health, property and the environment;
- (B) Colombia shall *indemnify* Ecuador for any loss or damage caused by its internationally unlawful acts, namely the use of herbicides, including by aerial dispersion, and in particular:

(Ecuador vs. Colombia), p. 18, Pending Cases of the International Court of Justice, at WWW <<http://www.icj-cij.org/docket/index.php?p1=3&p2=1&code=ecol&case=138&k=ee>> (consulted 20 July 2009) [hereinafter Application: Aerial Herbicide Spraying (Ecuador vs. Colombia)].

7 Application: Aerial Herbicide Spraying (Ecuador vs. Colombia), p. 18.

8 Application: Aerial Herbicide Spraying (Ecuador vs. Colombia), p. 20.

9 Application: Aerial Herbicide Spraying (Ecuador vs. Colombia), p. 26.

- (i) *death or injury to the health of any person or persons arising from the use of such herbicides; and*
 - (ii) *any loss of or damage to the property or livelihood or human rights of such persons; and*
 - (iii) *environmental damage or the depletion of natural resources; and*
 - (iv) *the costs of monitoring to identify and assess future risks to public health, human rights and the environment resulting from Colombia's use of herbicides; and*
 - (v) *any other loss or damage; and*
- (C) Colombia shall
- (i) *respect the sovereignty and territorial integrity of Ecuador; and*
 - (ii) *forthwith, take all steps necessary to prevent, on any part of its territory, the use of any toxic herbicides in such a way that they could be deposited onto the territory of Ecuador; and*
 - (iii) *prohibit the use, by means of aerial dispersion, of such herbicides in Ecuador, or on or near any part of its border with Ecuador [...].*

The counter-memorial of the Republic of Colombia is due by March 29th 2010.

CHAPTER 1

OBIGATIONS OF THE PARTIES UNDER INTERNATIONAL ENVIRONMENTAL LAW

It can be said that the natural environment is an indivisible system. As far as humankind is able to scientifically understand, the natural environment works by way of ecosystems in an interrelated, renewable and cyclical phenomenon¹⁰. That is how our planet works and it does depend on our collective care. Botkin and Keller explain that:

*Sustaining life on earth requires more than individuals or even single populations or species. Life is sustained by the interactions of many organisms functioning together, in ecosystems, interacting through their physical and chemical environments. Sustained life on Earth, then, is a characteristic of ecosystems, not of individual organisms or populations.*¹¹ (Emphasis added)

10 "An ecosystem is made up of two major parts: non-living and living. The non-living part is the physical-chemical environment, including the local atmosphere, water, and mineral soil (on land) or other substrate (in water). The living part, called the ecological community, is the set of species interacting within the ecosystem." (TURNER, S. The Human Right to a Good Environment – The sword in the stone. *Non-State Actors and International Law* (4), p. 290, 2004, [hereinafter Turner])

11 Turner, p. 290.

Ecosystems clearly know no political borders and thus, human activities may cause transboundary harm. Therefore, states might perform certain actions within their territory and trigger consequences in another's¹².

Sharing a common resource such as a fraction of the natural environment can be a complicated task. At least a demanding one, since not only the interests of one party is involved but those from two or more. By projecting this situation to the state level, one can visualise how troublesome it might be, depending on the quality of their relations (depending on the level of cooperation, exchange of information, making use of prior consult etc.).

In the present case pending before the ICJ, the parties share a common sub-ecosystem in the region of *San Francisco Dos* in the Province of *Sucumbíos*, including the living beings, contiguous international watercourses (e.g. San Miguel River)¹³, a rainforest area (Amazonian jungle) and certainly¹⁴, the atmosphere, most relevant in this case of transboundary air pollution. The counter-narcoterrorist activities performed by Colombia, more specifically the spraying of toxic herbicides in the area, allegedly along and sometimes across the border with Ecuador are problematic both for the relation between those states as well as for their peoples affected in that region.

In order to provide legal basis to show whether there are violations of IEL, an overview of the sources of international law relevant to the case will be given¹⁵.

SECTION 1

OBLIGATIONS UNDERTAKEN UNDER TREATY LAW

A treaty is “an international agreement concluded between States in written form and governed by international law [...]”¹⁶. Colombia and Ecuador are parties to many of these treaties that impose the obligation not to cause harm to each other. In this section such obligations under treaty law will be explored, in an attempt to bring the most relevant international instruments to the circumstances of the case.

As for Colombia, from the vast number of treaties from which it is party, the following list should be of relevancy¹⁷.

12 Where seen territory, please read “within its own territory or another territory under its jurisdiction”.

13 Application institution proceedings by the Republic of Ecuador, para. 13.

14 Application institution proceedings by the Republic of Ecuador, para. 24.

15 The primary sources of international law are treaties, international customs, general principles of law and, as secondary sources, judicial decisions and the doctrine. See Article 38 (1) of the Statute of the International Court of Justice.

16 Article 2 (1) (a), Vienna Convention on the Law of Treaties.

17 The 1972 Convention Concerning the protection of the World Cultural and Natural Heritage, in article 4, established the “duty of ensuring the identification, protection, conservation, presentation and transmission to

The [binding] 1992 *Convention on Biological Diversity* [hereinafter *CBD*] has as its objectives¹⁸, *inter alia*, “the conservation of biological diversity”¹⁹, further explaining its meaning:

Biological diversity means the variability among living organisms from all sources including, *inter alia*, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part; this includes diversity within species, between species and of ecosystems.²⁰ (Emphasis added)

Thus, any variability among living organisms that is hit by the herbicide in an unsustainable manner and without the due care as to prevent unnecessary loss of those species is contrary to the objective above if, as laid down in article 10 (a-e)²¹.

Furthermore, the *CBD* lays down explicitly the obligation for the parties not to cause (transboundary) harm to others, while respecting the sovereign rights of natural resources of each one of the parties²². According to article 4 *CBD*, Colombia would be infringing its obligations towards the biodiversity in two ways: a) within its own territory since the *glyphosate* kills virtually any plant, destroying unsustainably the vegetation that others living organisms need to survive and, b) Outside its territory but due to processes or activities such as aerial spraying of poisonous substance rendering it impossible to Ecuador to protect the biodiversity within its jurisdiction²³.

The [binding] 1994 *United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa* [hereinafter *UNCCD*] sets obligations to combat desertification “through effective action at all levels”, by means of “cooperation”, “consistent with Agenda 21”, aiming at the “sustainable development in affected areas”²⁴. In Ecuador, although not specifically in the region where the herbicide

future generations of the cultural and natural heritage”. However, the geographical area concerned is not/does not contain a site considered a “natural heritage”. The United Nations Educational, Scientific and Cultural Organization, World Heritage Interactive Map, at [www <http://whc.unesco.org/en/254/>](http://whc.unesco.org/en/254/) (consulted 17 July 2009).

18 The 1992 Convention on Biological Diversity, at WWW <<http://www.cbd.int/convention/convention.shtml>> (consulted 20 July 2009).

19 Article 1, CBD.

20 Article 2, CBD.

21 “Each Contracting Party shall, as far as possible and as appropriate: (a) Integrate consideration of the conservation and sustainable use of biological resources into national decision-making; (b) Adopt measures relating to the use of biological resources to avoid or minimize adverse impacts on biological diversity; (c) Protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements; (d) Support local populations to develop and implement remedial action in degraded areas where biological diversity has been reduced; and (e) Encourage cooperation between its governmental authorities and its private sector in developing methods for sustainable use of biological resources.”

22 Article 3, CBD.

23 Article 4, (a) and (b), CBD.

24 Article 2, (1), UNCCD, at WWW <<http://www.unccd.int/convention/text/pdf/conv-eng.pdf>> (consulted 21 July 2009).

is landing, desertification was recognized a few years ago as an environmental problem on the national level, affecting all the provinces of the *Sierra* and three in the Ecuadorian coast. It is noteworthy that it has been estimated that 27% of the countries' surface possesses an *evapo-transpiration potential relation* – precipitation that is equal or less than one – and therefore, constitutes the areas most prone to desertification²⁵.

Moreover, the UNCCD calls for “conservation and sustainable management of land and water resources, leading to improved living conditions, in particular at the community level”, which could hardly be found in the spraying zone. Therefore, regardless Ecuador's own contribution to its small desertification, Colombia would be violating its obligation to combat desertification as the possible causer of the environmental harm²⁶.

The [binding] 1978 *Treaty for Amazonian Cooperation* establishes environmental obligations, on the regional level, for the area where the fumigations took place. The main objective of this treaty is *the promotion of bi-national environmental management of the border zones via projects of integration*, from which other objectives follow. Promoting the environmental management of such areas of Amazonian rain forest by *encouraging its autonomous and sustainable development* and, *preserving the biodiversity of the region* are the two main objectives directly related to this case. Using such a lethal herbicide (for plant life) with such uncontrollable consequences can hardly meet the standards of a sustainable development and²⁷, as seen in the CBD obligations above, it also opposes the conservation of the living organisms in the region. Through a series of bi-national agreements, this treaty was structured to

to encourage environmental management in the region in order to stop the process of ecological decay and spur sustainable development by making good use of its natural resources while recognizing their limitations.²⁸

As one can see in the facts presented in the Memorial, the spraying is in fact contributing to ecological decay, violating such obligation. According to this regional treaty, environmental decay would be only acceptable with appropriate environmental management.

Now, an analysis of the obligations outside of the confines of the voluntarism of treaty law will be taken, turning to the obligations under customary international law.

25 The UNCCD website, at WWW <<http://www.unccd.int/cop/reports/lac/national/2000/ecuador-summary-eng.pdf>> (consulted 30 august 2009).

26 Article 2, (2), UNCCD.

27 See more about Sustainable Development in Section 2.

28 Objectives of the Physical Planning and Management Plan for the San Miguel and Putumayo River Basins, Organisation of American States, at WWW <<http://www.oas.org/usde/publications/Unit/oea49s/ch04.htm#executive%20summary>> (consulted 21 july 2009).

SECTION 2

OBLIGATIONS UNDER CUSTOMARY INTERNATIONAL LAW

Another primary source of international law is the international custom, which binds all states regardless their will to adhere to such a rule. It is so due to the peculiar nature of its creation, differently to treaties. It suffices for an international custom to exist that the conduct of states (*state practice*) is supported by the conviction that such conduct is motivated by a sense of legal obligation (*opinion juris*), no merely of comity²⁹. However, extracting those two elements from the context of the dynamics of states' relations is not an easy task. Certainly, under an assertion of an international court customary international law can be clarified and confirmed (but not created)³⁰.

Conspicuous examples of customary international law on the transboundary context are (i) that states have the duty to prevent, reduce and control pollution as well as environmental harm to other states and, (ii) a duty to co-operate in mitigating environmental risks and emergencies, through notification, consultation, negotiation and, in appropriate cases, presenting an environmental impact assessment³¹. Those obligations will now be supported with legal arguments to demonstrate its customary nature.

Those two examples are expressly mentioned in the [non-binding] 1992 *Rio Declaration on Environment and Development*, demonstrating the opinion of 172 states³², since it was approved by consensus. This declaration is a continuation of the work on developing IEL started with the first world conference dealing with environmental issues, the *United Nations Conference on the Human Environment* in Stockholm, in 1972. More specifically on the duty not to harm – example (i) – *Principle 2* requires states to prevent harm to the environment of other states or of common spaces³³:

Principle 2

States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control *do not*

29 BIRNIE, P.; BOYLE, A. *International Law and the Environment*. second edition. Oxford: Oxford University Press, 2002. p. 16 [hereinafter Birnie & Boyle].

30 There is no issue of judicial legislation. See more in OREBECH, P.; BOSSELMAN, F.; BJARUP, J.; CALLIES, D.; CHANOCK, M.; PETERSEN, H. *The Role of Customary Law in Sustainable Development*. first edition. Cambridge: Cambridge University Press, 2005. p. 385-388 [Hereinafter Orebech and Others].

31 Birnie e Boyle, p. 104.

32 United Nations Conference on Environment and Development (Unced), Rio de Janeiro, 1992, at WWW <<http://www.un.org/geninfo/bp/enviro.html>> (consulted 21 July 2009).

33 Birnie e Boyle, p. 105.

cause damage to the environment of other States or of areas beyond the limits of national jurisdiction. (Emphasis added)

It is worth mentioning that the referred harm must be a *significant harm*, one that affects the neighbour state negatively and substantially³⁴. In dealing with an environmental harm that has already happened, it demands notification and consultation in Principles 18 and 19³⁵.

In the case of state practice, it is hardly possible to maintain that a state is performing the duty “not to harm”, since if performed, no consequences should arise. What can be shown, however, is that states are able to seek their objectives without harming their neighbours while interfering in the environment. One genuine example is the project *Guarani Aquifer*. In 2000, the *Mercosur* nations (Argentina, Brazil, Paraguay and Uruguay) started a joint project aiming at the evaluation, protection and definition of legal and institutional framework for efficient transboundary groundwater management of the reservoir, an immense hydro-geological system that extends over an area of at least 1,200,000km² of those four countries³⁶.

Another source of international (environmental) law is the jurisprudence. It is important to notice that this source is a “subsidiary means for the determination of rules of law” since the decision binds only the parties to the dispute³⁷⁻³⁸. However, the legal arguments put forward by courts can transcend the confines of the specific case and serve as a re-statement of the (customary) international law. In the case of transboundary harm, a number of cases must be mentioned to convey the customary status of the obligation *not to harm*.

34 It is not the factual harm per se that is regarded but the injury to a legally protected interest. The harm in this case would be the real impairment of use of water resulting in a factual consequence upon health, industry, agriculture etc., or a legal consequence, if the impairment lies upon the right to water itself guaranteed for future use. Furthermore, the significance of the harm is the degree in which it causes diminution of quantity, pollution, obstruction of fish migration, erosion, restriction of flow, siltation etc., whose detection demands technical knowledge. Overall, it means that harming is in accordance to the state's right to use the watercourse as long as it does not result in dire consequences to other neighbours. See McCfrey, S. C. *The Law of International Watercourses: Non-Navigational Uses*. New York: Oxford University Press, 2001. p. 346; and Draft Article 3 of the Draft Articles on Prevention of Transboundary Damage from Hazardous Activities.

35 Principle 18 – States shall immediately notify other States of any natural disasters or other emergencies that are likely to produce sudden harmful effects on the environment of those States. Every effort shall be made by the international community to help States so afflicted; Principle 19 – States shall provide prior and timely notification and relevant information to potentially affected States on activities that may have a significant adverse transboundary environmental effect and shall consult with those States at an early stage and in good faith; Rio Declaration.

36 In spite of the lack of specific laws, it is important to mention that states are concerned with the issue and are following the obligation of cooperation. Some legislation have been produced at the local level and special agencies have been created, however there is a need for more institutional cooperation and more commitment of the population in the area. The project is being implemented under the supervision of the World Bank and execution of the Organization of American States (OAS), with support of the International Atomic Energy Agency (IAEA) and German technical assistance (BGR).

37 Article 28 (1) (d), Statute of ICJ.

38 Article 59, Statute of ICJ.

In the *Corfu Channel* case (1949), the ICJ indicated that it was “every state’s obligation not to allow knowingly its territory to be used for acts contrary to the rights of other states”³⁹. British warships exercising their right to *innocent passage* through Albanian territorial waters were damaged and British navy officials died. Albania was held responsible for the failure to warn the Brits of the presence of the sea-mines. Thus, the obligation not to harm applies even when the object harmed belonging to the *harmed state* is located within the territory of the *harming state*.

In the *Gabcikovo/Nagymaros* case (1993), the ICJ called for attention to the possible environmental risks stemming from the construction of a series of hydroelectric dams on the Danube River. The Court held that in implementing the agreement between Slovakia and Hungary and while operating the parts already constructed, the parties were obliged to apply new norms of IEL. Hungary could not abandon the works in its territory as it did, rendering the complete functioning of the bi-national enterprise impossible. Once again, the fact that the action was taken within its territory did not excuse Hungary for the extraterritorial consequences.

In the Advisory Opinion of the ICJ on the *Legality of the Threat or Use of Nuclear Weapons* (1996), the ICJ finally and categorically asserted that:

The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control *is now part of the corpus of international law* relating to the environment.⁴⁰ (Emphasis added)

From that moment and on, there is no doubt that in international law reins the *Limited Territorial Sovereignty*⁴¹. That is a reversal of the absoluteness of the *Principle of Sovereignty* through general principles of international law that serve the cause of IEL. The maxim “*sic utere tuo ut alienum non laedas*” represents that challenge and can be read as “one’s right ends where another’s begins”⁴², that contains the obligation *not to harm* and has been considered a *general principle of law recognized by civilized nations*⁴³⁻⁴⁴⁻⁴⁵.

39 Birnie e Boyle, p. 109.

40 Nuclear Weapons Opinion, p. 241.

41 Amongst others, Principle 19 and 16 respectively, Rio Declaration.

42 The principle furthermore has been included in many multilateral environmental treaties, and received imprimatur in under important soft law documents such as the 1972 Stockholm Declaration (Principle 21) and the 1992 Rio Declaration (Principle 2), the report of the Brundlandt Commission and the Draft Articles of the International Law Commission, which has as its objective the progressive development en codification of international law.

43 Catfish in McCaffrey, p. 350 [hereinafter McCaffrey].

44 See Principle 21 of the Stockholm Declaration of 1972, Principle 2 of the Rio Declaration of 1992, Preamble of the United Nations Framework Convention on Climate Change of 1992, Article 3 of the convention on Biological Diversity, Article 30 of the Charter of Economic Rights and Duties of States 1974 and Principles 1 and 3 of the United Nations Environmental Programme Principles of 1978, Article IV of the Boundary Waters Treaty of 1909, Madrid Resolution of 1911, Salzburg Resolution of 1961, Helsinki Rules of 1966 and Montreal Rules of 1982.

45 This principle is patent in the yet not in force UN Convention on the Law of the Non-navigational Uses of International Watercourses of 1997, article 5.

Turning to the specificity of transboundary air pollution, having clarified that what a state does within its territory resulting in adverse effects on another's is unlawful according to customary law, it is of essence to adequate this norm in the present case. The aerial spraying in Colombia landing in Ecuador resulting in the loss of crops, livestock and severe harm to health seems to fit the rule by means of transboundary *air pollution*.

Air pollution can be defined as the introduction of pollutants into the atmosphere. In the case of transboundary – or “*transfrontier*” – air pollution, pollutants emanate from one territory of one state causing identifiable damage in the territory of another⁴⁶. Their polluting effects mainly take place in and through the lowest level of the atmosphere, called the troposphere. In this type of situation, the source of the pollution is identifiable, the receiving state is identifiable, and the damage is reasonably identifiable, meaning that state responsibility can be easily determined, as well as any liability for specific damages.

In the first case of transboundary air pollution the Arbitral Tribunal – the *Trail Smelter case* (1938) – teaches that the encroachment of USA's territory by Canada prejudiced the former to naturally use its own territory:

Under the principles of international law, as well as the law of the United States, no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequences and the injury is established by clear and convincing evidence.⁴⁷

If based upon the outcome of the *Trail Smelter* arbitration, the ICJ might consider the following (considerable) restrictions as imposed upon Canada: Canada paid the US\$ 350.000,00 to the USA (1930's); The smelter had pollution reduction devices installed; By 1933 the two countries had re-established diplomatic talks due to continued emissions from the Trail Smelter; In 1935, the countries ratified a convention referring the dispute to the arbitral tribunal; Interim decision in 1938 concluded that its emissions had harmed crops and trees in Washington and awarded the USA US\$ 78.000,00 in compensation; In its final decision in 1941, the tribunal held that the Trail Smelter *should avoid air emissions that harm Washington*, that a *detailed pollution control regime should be implemented* at the smelter, and that *Canada would be responsible for paying damages for harm in the USA from future smelter emissions*⁴⁸.

46 OKOWA Phoebe, N. *State Responsibility for Transboundary Air Pollution in International Law*. Oxford University Press, 2000. p. 9.

47 United Nations Reports of International Arbitral Awards, v. 3, p. 1965.

48 For over a century, the Trail Smelter discharged over one hundred tons of contaminants per day, including slag, arsenic, lead, zinc, cadmium, and mercury, into the Columbia River. The U.S. Environmental Protection Agency (EPA) concluded that discharges from the Trail Smelter harmed plants and animals in the Columbia River in the United States and may pose a threat to human health. Members of the Confederated Tribes of the Colville Reservation sued Teck Cominco during the 1980's.

In the present case Colombia is performing activities within its territory, in the pursuit of its own national policies and according to its domestic law but, undeniably causing identifiable transboundary air pollution whose consequences are felt by means of loss of crops and livestock as well as native flora and fauna, with enduring effects such as the annihilation of certain types of crops that no longer grow in the affected area. Local families are forced into exodus since their means of subsistence have been taken from them⁴⁹.

Lastly, based on this repeated reaffirmation of the rule of prohibition of transboundary harm in various important documents as well as evidence of the existence of *opinio juris* by the fact that states do not seem to question such a rule, it can be said that it has already acquired the status of customary international law. Therefore, Colombia would also have violated such a rule by causing harm to Ecuador in the course of fumigations within its borders.

CHAPTER 2

THE RIGHT TO HEALTHY/SATISFACTORY/CLEAN ENVIRONMENT

The referred spraying of herbicides in the present case is indeed harmful, not only at the state level but, most gravely, on the individual level. The ultimate consequences of transboundary air pollution affect the ecosystem, which includes human beings. The previous analysis dealt with the harm to the natural environment, which is protected by public (international) law, imposing obligations to states to respect the rights of other states.

In this chapter, the obligations of states towards individuals will be presented, further analysing whether the consequences of the transboundary pollution caused by Colombian fumigation of herbicide violates the rights of individuals, namely human rights [hereinafter HR]. More specifically, the HR to a healthy/satisfactory/clean environment [HRtoE] will be studied.

Turning to the facts, finding the truth in situations where there is so much at stake can be misleading. The different governments and their respective allies counter-balance each other and politics can outweigh the law and blur the facts. To avoid that, a study on HR must go beyond the scenario presented by the parties for a more transparent fact-finding. Thus, the report submitted by the *Fédération Internationale des Droits de L'homme* [hereinafter FIDH] and other NGOs, entitled "*Observaciones de la misión internacional a la frontera ecuatoriana con Colombia*", incorporates the work of six non-governmental organisations [hereinafter *the mission*], in an independent and comprehensive data collection specifically arranged to observe how the lives of the locals have been worsened by the fumigation. It is worth mentioning that the case before

49 Paragraphs 10-27 and 35-36 of the Application Instituting Proceedings submitted by the Republic of Ecuador.

the ICJ is completely disassociated to HR claims from individuals, staying in the state level. Claims from individuals can be only addressed before national courts or, in the in the international arena, by regional HRs courts (such as the Inter-American Court of Human Rights) or by the quasi-judicial UN Committee on Economic, Social and Cultural Rights. Such claims have not yet been brought before international bodies and, during the research for this work, only one case before US (district) court was found⁵⁰.

It is important to remember that, since HR are supposed to be, not only formally but effectively protected⁵¹, the more vulnerable the victims are, the graver is the breach. Thus, in this case, local indigenous peoples are likely to have their HR violated in a particularly harsher manner due to their dependence on surrounding natural resources. In its *analysis of the situation of indigenous peoples and afro-descendent*, the mission noticed the analysis of the quality of the water from the watercourses in the region undertaken by the Ecuadorian Commission of Atomic Energy, which found 18 types of chemicals contained in herbicides. The locals have neither access to clean water nor to food, since the fisheries – and other animals they hunt for consumption – are dying due to the contaminated water.

For the villagers, under the socio-economic assessment in the border zone on the Ecuadorian side, the mission found that the access to public services is “dramatically poor”⁵². Public transport is scarce and unsafe, hydraulic structure and potable water “practically inexistent” and there are no telephone lines. Some villages in the region count on health centres with a maximum capacity of as little as 6 patients with no contingency whatsoever. In its analysis of health conditions in the regions of *Carchi*, *Esmeraldas* and *Sucumbíos*, in Ecuador, the mission found that from 2003 to 2005, 40 patients per year have been found intoxicated by pesticides although it is still uncertain whether caused by domestic use or by the Colombian fumigations⁵³.

The report also highlights the symptoms that the local population has presented in the border stream, demonstrating an increase on diseases of respiratory nature, as well as digestive, optical and epidermic.

The access to legal remedies is not less alarming. The fear of retaliation maintains the impunity where there is no political will and, there is no enough security for the public prosecutors who have their lives threatened by groups holding interests in the fumigation business. Moreover, the judges who have

50 United States District Court for the District of Columbia, Civil Action nº 01-1908 (RWR), Venancio Aguasanta Arias et al. vs. Dyncorp et al., 2007.

51 Quote GC 01.

52 Observaciones de la misión internacional a la frontera ecuatoriana con Colombia, FIDH-FIAN-RAPAL-OCIM-CEAS-CIF, nº 434/3, 2005, p. 5 [hereinafter FIDH Report].

53 FIDH Report, p. 7.

jurisdiction over the violations in the region are said to be unprepared to deal with environmental matters⁵⁴.

Lastly, if proven that those negative effects are resultant from the fumigation, it is important to remember that the aerial spraying is one of several complementary techniques that can be used for the eradication of coca crops and, Colombia is the only country in the world using aerial spraying for the eradication of coca⁵⁵. There is no evidence of any imperative demanding such a technique in the border zone, which makes the Ecuadorian request to create a 10km-buffer zone sensible. During the diplomatic negotiations with Colombia it unfortunately stopped respecting the buffer after few months.

Now, bearing these facts in mind, an analysis of the alleged infringement of the HRtoE will be developed. Considering HR the inherent rights of every human being, despite the debate on cultural relativism and universality of this category of rights, it becomes less complex to understand why each single individual would have the right to a “satisfactorily and adequately healthy” environment. As observed in Chapter 1, the natural environment is vital to the survival of humankind. The interdependence between the natural environment and human life is a fact, simply because human beings are (still) not able to live outside it and without its resources. Therefore it follows that the environment should be protected as a human right⁵⁶.

Nevertheless, to assume that human beings have inherent rights could be interpreted as defence of a natural law doctrine but as a matter of positive law, HR can be invoked against states parties to the *International Bill of Rights*⁵⁷. For some rights, no adherence to a treaty is necessary for a state to be bound, for instance, the prohibition of torture, of slavery, genocide etc. Those are widely considered peremptory norms – *jus cogens* – for which no derogation is allowed⁵⁸. Rehman explains that, “International HR Law has challenged and jettisoned the traditional rules relating to sovereignty’ and complementary, “gross violations of individual and collective rights cannot be justified on the grounds of sovereignty”⁵⁹.

54 FIDH Report, p. 6.

55 Report, para. 12.

56 Turner, p. 295.

57 The UDHR is a non-binding declaration whereas the two 1966 Covenants are binding. They are the main legal instruments that are together called the International Bill of Rights, the main instruments on international human rights law.

58 Article 53 of the Vienna Convention on the Law of Treaties, Treaties conflicting with a peremptory norm of general international law (“jus cogens”): “A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”, in UN Treaty database, at WWW <http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf> (consulted 28 July 2009).

59 Turner, p. 297 [hereinafter Turner].

In any case, the HRtoE remains undefined. Some international/regional instruments expressly provide for it, whereas others demand a more elastic interpretation of the given catalogue of rights to protect the right of individuals to an environment of certain quality. As Phillip Cullet puts it, it “should take into account the need to preserve the very existence of life on earth necessary for humankind’s survival”. Secondly, “ensure that the conditions of life provided to humans are conducive to a decent quality of life”. However, Cullet points out that:

One should recall that the holders of a right to environment can neither claim a given state of the environment, nor a perfect environment (this has never existed since humans appeared on Earth), nor a local environment similar to other places in the world as the unequal distribution of resources does not allow for the existence of equal environmental conditions everywhere.

The idea of what the HRtoE above could be may serve as a guideline while analysing possible current legal basis for such right.

SECTION 1

POSSIBLE LEGAL BASIS AND REMEDIES – REGIONAL/INTERNATIONAL PERSPECTIVES

Some of the major HR treaties came about prior to the recent intensification of the development of legal international environmental protection, and for this reason, it could not address the environment directly. However, major HR instruments recognise the right to life and many recognise the right to health, both of which can be considered the origin of the reason for protecting the environment⁶⁰. Nevertheless, none of the truly major international HR treaties have gone as far as to specifically include a right as such. On the international level, however, article 25(1) of the 1948 *Universal Declaration of Human Rights* [hereinafter UDHR] affirms:

Everyone has the right to a *standard of living adequate for the health* of himself and of his family, including food, clothing, housing and medical care and necessary social services. (Emphasis added)

Following from the UDHR, article 6 (1) of the 1966 *International Covenant on Civil and Political Rights* [hereinafter ICCPR] guarantees the right to life in the following terms: “Every human being has the inherent right to life”. Whereas article 12(2)(b) of the 1966 *International Covenant on Economic, Social and Cultural Rights* [hereinafter ICESCR] provide for the need to take steps for the “improvement of all aspects of environmental and industrial hygiene”⁶¹.

60 Turner, p. 282.

61 Turner, p. 282.

But more encompassing, however still an indirect protection, the right of an individual to an environment of certain quality can be found in article 12 (1), ICESCR that proclaims:

The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the *highest attainable standard of physical and mental health*. (Emphasis added)

The *right to the highest attainable standard of physical and mental health* [hereinafter HRtoHealth] is corroborated by a number of international and regional instruments⁶², although its content may not be so easy to extract, both in terms of scope as well as justiciability. As a matter of interpretation, it can be said that the doctrine (which is a subsidiary source of international law)⁶³, understood by “the teachings of the most highly qualified publicists of the various nations” encompasses the reports of the UN Special Rapporteurs [hereinafter SR]. In March 2008, the *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health – Preliminary note on the mission to Ecuador and Colombia* was presented at the 7th session of the Human Rights Council. The mission was undertaken with the objective of examining, from the viewpoint of the right to the highest attainable standard of health, the impact of the aerial spraying of glyphosate – combined with additional components – by Colombia along the Ecuador-Colombia border⁶⁴.

The SR reaffirmed that the HRtoHealth includes “access to both medical care and the underlying determinants of health, such as safe water, adequate sanitation and a *safe environment*”⁶⁵. This is so due to the interpretation given in the General Comment n^o 14 [hereinafter GC14].

General Comments are instruments delineated by specialists of the related (specialised) organs of the UN. In the case of economic, social or cultural rights the *Committee on Economic, Social and Cultural Rights* publishes its interpretation of the content of HR provisions, in the form of general comments on thematic issues⁶⁶. In this case, GC14 clarifies that “the highest attainable standard of

62 Additionally, the right to health is recognized, inter alia, in article 5 (e) (iv) of the International Convention on the Elimination of All Forms of Racial Discrimination of 1965, in articles 11.1 (f) and 12 of the Convention on the Elimination of All Forms of Discrimination against Women of 1979 and in article 24 of the Convention on the Rights of the Child of 1989. Several regional human rights instruments also recognize the right to health, such as the European Social Charter of 1961 as revised (art. 11), the African Charter on Human and Peoples' Rights of 1981 (art. 16) and the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights of 1988 (art. 10). Similarly, the right to health has been proclaimed by the Commission on Human Rights, (2) as well as in the Vienna Declaration and Programme of Action of 1993 and other international instruments. See General Comment 14, ECOSOC, at WWW <[http://www.unhcr.ch/tbs/doc.nsf/\(symbol\)/E.C.12.2000.4.En](http://www.unhcr.ch/tbs/doc.nsf/(symbol)/E.C.12.2000.4.En)> (consulted July 24th 2009).

63 Article 38 (1) (d), Statute of ICJ.

64 Report, para. 3.

65 Report, para. 11

66 The Committee on Economic, Social and Cultural Rights (CESCR) is the body of independent experts that monitors implementation of the International Covenant on Economic, Social and Cultural Rights by its

physical and mental health” is not confined to the right to health care. On the contrary, the drafting history and the express wording of article 12(2) ICESCR acknowledge that the HRtoHealth embraces a wide range of socio-economic factors that promote conditions in which people can lead a healthy life, and extends to the *underlying determinants of health*, such as food and nutrition, housing, access to safe and potable water and adequate sanitation, safe and healthy working conditions, and a *healthy environment*⁶⁷.

As presented at the *Human Right Council*⁶⁸, the SR’s preliminary view was that there was credible and reliable evidence that the aerial spraying of glyphosate along the border damages the physical and mental health of people living in certain areas in Ecuador. The SR’s preliminary conclusion was that the evidence provided during the mission was sufficient to call for the application of the *precautionary principle*.

Notwithstanding the fact that the *International Bill of Rights* is a binding body of law to state parties, which includes both Colombia and Ecuador⁶⁹, other legal international legal environmental instruments provide indications that such a right should be protected. Principle 1 of the non-binding 1972 *Stockholm Declaration* introduces language that links environment to the UDHR.

Man has the *fundamental right* to freedom, equality and *adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being*, and he bears a solemn responsibility to protect and improve the environment for present and future generations [...].

Its plea for the fundamental right to an “adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being” could be seen as the element that connects the environment and the UDHR, i.e., human dignity⁷⁰.

States parties. The Committee was established under United Nations Economic and Social Council (ECOSOC) Resolution 1985/17 of 28 May 1985 to carry out the monitoring functions assigned to the ECOSOC in Part IV of the Covenant [The ECOSOC is one of the principal organs of the UN at the same level as the General Assembly, Security Council, Trusteeship Council, International Court of Justice and the Secretariat as defines in article 7(1) of the UN Charter], in Office of the United Nations High Commissioner for Human Rights (OHCHR), at WWW <<http://www2.ohchr.org/english/bodies/cescr/comments.htm>> (consulted 28 July 2009).

- 67 GC14, para. 4. in Office of the United Nations High Commissioner for Human Rights (OHCHR), <[http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/40d009901358b0e2c1256915005090be?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/40d009901358b0e2c1256915005090be?Opendocument)> (consulted 28 July 2009).
- 68 The Council was created by the UN General Assembly on 15 March 2006 with the main purpose of addressing situations of human rights violations and make recommendations on them. It holds a Complaints Procedure mechanism which allows individuals and organizations to bring complaints about human rights violations to the attention of the Council. See more in The UN Human Rights Council, at WWW <<http://www2.ohchr.org/english/bodies/hrcouncil/>> (consulted 28 July 2009).
- 69 See “status of ratifications” of the ICESCR at WWW <<http://www.unhcr.ch/pdf/report.pdf>> and of the ICCPR at WWW <<http://www.unhcr.ch/pdf/report.pdf>> (consulted 28 July 2009).
- 70 Fitzmaurice, M.; Marshall, J. The Human Right to a Clean Environment – Phantom or Reality? The European Court of Human Rights and English Courts Perspective on Balancing Rights in Environmental Cases. *Nordic Journal of International Law* (76), Martinus Nijhoff Publishers, Leiden, p. 109, 2007.

Descending to the regional level, treaties have included the HRtoHealth. The 1981 *African Charter of Human and Peoples' Rights* states in its article 24 that "All peoples shall have the right to a general satisfactory environment favourable to their development". In 2002, Article 24 was used for the first time as the basis for a petition filed by two NGOs before the *African Commission on Human and Peoples' Rights* on behalf of the *Ogoni* people, against the Nigerian Government and Shell Oil Company. The claim was filed on, amongst other grounds, HR grounds such as the right to life and the right to health. An environmental human right was interpreted by the Commission broadly as not only providing a *clean environment and unimpaired access to resources*, but also as containing a duty to conduct *environmental impact assessment* studies prior to any activity which may impact adversely on the environment⁷¹.

In the European system, there have been some significant developments in the jurisprudence of the European Court of Human Rights [hereinafter ECtHR] which has dealt with a number of cases of an environmental nature and shown an "increased willingness to tackle the difficult problems at stake"⁷², although an independent HRtoE is inexistent in the European Convention on Human Rights⁷³. The ECtHR appears to be one the most highly developed of the regional HR tribunals, conclusion that could be reached by extensive number of cases with which it has already dealt with. Therefore, few classic cases are worth mentioning.

In the case of *Lopez Ostra vs. Spain* (1995), the Court held that the effect on a neighbour of severe environmental pollution (noxious fumes) amounted to a breach of Article 8 of the European Convention as it affected the applicant's enjoyment of "private and family life". In the case of *Guerra and Others vs. Italy* (1998) the court stated that the failure of the authorities to provide information relating to the health risks of a nearby chemical plant was also a breach of Article 8. The right to private life is being used to protect the environment in general and therefore seem to require an association with, or an element of, direct danger or harm to humans before they become operational⁷⁴⁻⁷⁵. More recently the case of *Hatton and others vs. The United Kingdom* (2003), the Court appear to be highly reluctant to interfere with the decision-making processes of Contracting-parties and thus permitting governments to have a *wide margin of appreciation*

71 Fitzmaurice e Marshall, p. 108 [hereinafter Fitzmaurice e Marshall].

72 Turner, p. 284.

73 Being the environment affected somehow breaching an individual's right, one can find indirect protection in other rights such as the right to private life. See ECtHR: *Lopez Ostra vs. Spain*, *Hatton I*, *Hatton II*.

74 Turner, p. 284.

75 The ECtHR has however been reluctant to attempt to interfere with state policies and as such, takes account of the arguments relating to broad public and economic interests. In the case of *Greenpeace Schweiz vs. Switzerland* (2002), which concerned the operation of a nuclear power station, the European Commission on Human Rights ruled that only applicants recognised under national law and not those less at risk or NGOs were entitled to invoke particular rights relating to the operations in question. Human Rights complaints must be first analysed and decided by the commission.

in determining what is in the “public interest”⁷⁶. The applicants would, in this case, be obliged to tolerate the nuisance caused by the airplanes’ noises in the surroundings of the Heathrow Airport. The economical benefits for the nation overcame the rights of the individuals to have a surrounding environment free of such disturbances.

Nonetheless, criticism has been launched upon the elastic interpretation of the right to private life in the rulings of the ECtHR. It has been said that by protecting individuals’ environmental rights, the Court announced a “right to a healthy and protected environment” that is neither contained in the European Convention on Human Rights, nor provided for in international law. This argument is furthered by saying that it is problematic because the Court is essentially constructing new HR and that such a reading, even considering the other international instruments, is a matter of subjective interpretation. Some find that such a protection quite alarming because “the ECHR is attempting to govern the environmental policy of sovereign nations”⁷⁷.

Counter-criticism must be opposed to that point made. Considering the reasons for the creation of such a court, the legal structure of the HR system in Europe, the authority given to the Court – endowed by law – critics must tackle the legal arguments of the Court. As a matter of social peace, what matters the most is to have a decision upon a disagreement by an authority under the rule of law and according to democratic precepts. The connection between the human right to private life and the HRtoE can be seen in the following reasoning of the Court:

Naturally, severe environmental pollution may affect individuals’ well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely, without, however, seriously endangering their health.⁷⁸

For a critique to be legally relevant, it should be strong enough to prove that “environmental pollution” does not adversely affect the enjoyment of individual’s “homes in such a way as to affect their private and family life”. It is also true that the right to private life has been considered a “close-gap” right, of a negative definition, in which other rights may fit in. However, to render that argument illegal it would demand either the enactment of a narrower legal definition of that right or, another interpretation of the authority endowed with the power to decide, i.e., the ECtHR. Moreover, to say that the protection of

76 Turner, p. 285.

77 Global Governance Watch, press release from March 13th 2009, “European Court of Human Rights Promotes Emerging ‘Right to Enjoy a Healthy and Protected Environment’”, at WWW < http://www.globalgovernancewatch.org/on_the_issues/european-court-of-human-rights-promotes-emerging-right-to-enjoy-a-healthy-and-protected-environment> (consulted 28 July 2009).

78 ECtHR, Lopez Ostra vs. Spain, para. 51, Application nº 16798/90, judgement of 09 december 1994, Search Portal Hudoc, at WWW <<http://cmiskp.echr.coe.int/tkp197/portal.asp?sessionId=27176176&skin=hudoc-en&action=request>> (consulted 28 July 2009).

the environment surrounding the individual is not provided in international law would mean to ignore the authority of the UN and the general comments of the specialised bodies, and more specifically, to ignore the direct link between the environment and human health.

More relevant for the present case, a collection of regional treaties can be cited in the Americas to explain the HR system of the Organisation of the American States⁷⁹. Together with the 1948 *American Declaration of the Rights and Duties of Man* and the 1969 *American Convention on Human Rights*, the 1989 *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador)* asserts an obligation on states to “protect, preserve and improve the environment” and it grants to everyone the right of individuals to “live in a healthy environment”⁸⁰. States parties, including Colombia and Ecuador, undertake to “promote the protection, preservation, and improvement of the environment”⁸¹.

The rights to life and health, for example, have been found to be violated by means of environmental harm in at least two cases decided by the Inter-American Commission for Human Rights (IACHR)⁸².

In the *Yanomami Case*, the IACHR found that petitioners’ rights to life and to the preservation of health and well being, among other rights, were violated when a motor-road constructed through Yanomami territory in Brazil brought disease to the Yanomami people.

In *Maya Indigenous Communities of the Toledo District vs. Belize*, the IACHR found Belize in violation of the petitioners’ rights to life and health due to:

The failure of the State to engage in meaningful consultation with the Maya people in connection with the logging and oil concessions in the Toledo District, and the negative environmental effects arising from those concessions [...].⁸³

Finally, for the indigenous peoples, there are also international agreements which grant what may be called an indirect right to a clean environment. An example of such an agreement is the 1989 *International Labour Organisation Convention n° 169 Concerning Indigenous and Tribal Peoples in Independent Countries*. This Convention requires its parties to adopt special measures to safeguard the environment for indigenous peoples⁸⁴.

79 Some 16 up to the date. See the complete list at the Inter-American Commission on Human Rights (IACHR), at WWW <<http://www.cidh.oas.org/Basicos/English/Basic.TOC.htm>> (consulted 28 July 2009).

80 Article 11(1) The Protocol of San Salvador, at WWW <<http://www.oas.org/juridico/English/treaties/a-52.html>> (consulted 28 July 2009).

81 Article 11(2) Article 11(1) The Protocol of San Salvador, at WWW <<http://www.oas.org/juridico/English/treaties/a-52.html>> (consulted 28 July 2009).

82 Fitzmaurice e Marshall, p. 105.

83 *Maya Indigenous Communities of the Toledo District vs. Belize*, *supra* note 13 at para. 154.

84 Fitzmaurice e Marshall, p. 109.

Therefore, as seen in the international level with the *International Bill of Rights* and in the regional level with the Inter-American legal instruments and cases, by no means the consequences of the fumigation by Colombia could remain without reprimand. As the Report of the FIDH and the Report of the UN SR demonstrated, direct and indirect effects of the fumigation are causing severe damage to health, well being and threat or breach to individual's right to health due to adverse effects on the environment in that geographical context. This calls for more protection of the environment that, *de facto*, influences a number of HR and, *de jure*, has overlapped protection of several international instruments. Therefore, it could be said that Colombia violated (and will continue to do so) the HRtoE in various levels, right whose existence cannot be denied by Colombia under its international legal obligations.

CONCLUSION

Transboundary environmental harm is a problem whose consequences unfold in a multidisciplinary manner. In this paper, the *case concerning aerial herbicide spraying (Ecuador vs. Colombia)* has been analysed under two different perspectives: under international environmental law and international human rights law. It has been found out that Colombia has violated many obligations under treaty law (CBD, UNCCD and the Treaty for Amazonian Cooperation).

Moreover, based on repeated reaffirmation of the rule of prohibition of transboundary harm in various important documents as well as evidence of the existence of *opinio juris* by the fact that states do not seem to question such a rule, it can be said that the obligation not to harm other states has already acquired the status of customary international law. Therefore, Colombia would also have violated such a rule by causing harm to Ecuador in the course of fumigations within its borders.

That was an attempt to provide a speculation of the possible outcome of the case currently pending before the ICJ through a collection of legal arguments constant in cases, binding and non-binding international instruments and the doctrine.

However, it does seem to be rather remote from the reality of individuals to discuss what states can or cannot do. Notwithstanding time and complexity of these matters, states cannot be compelled to comply with its obligations in the absence of an international central government. Thus, individuals directly affected may pursue the protection of their human rights before national courts to see more tangible results. But on the international level, citizens of the two states involved might file complaint in either Inter-American or, UN human rights system. Although it has not happened until the end of the research done for this work, it can be anticipated that the human right to an environment of certain quality does exist for the Ecuadorian-Colombian judicial context in the Inter-American system, or in the quasi-judicial UN Committee on Economic, Social and Cultural Rights.

In spite the factual direct link between the natural environment and other rights, principally the right to health, legal instruments provide for the right to a healthy/satisfactory/clean environment in the context of the present dispute. Furthermore, the fumigations performed by Colombia are affecting that human right both within and outside its territory. Therefore, although there are difficulties of justiciability of such right that could delay positive changes for the individuals concerned, Colombia is in violation of treaty law under the international human rights law.

BOOKS

BIRNIE, P.; BOYLE, A. *International Law and the Environment*. second edition, Oxford: Oxford University Press, 2002.

MCCFFREY, S. C. *The Law of International Watercourses: Non-Navigational Uses*. New York: Oxford University Press, 2001.

OREBECH, P.; BOSSELMAN, F.; BJARUP, J.; CALLIES, D.; CHANOCK, M.; PETERSEN, H. *The Role of Customary Law in Sustainable Development*. first edition. Cambridge: Cambridge University Press, 2005.

OKOWA PHOEBE, N. *State Responsibility for Transboundary Air Pollution in International Law*. Oxford University Press, 2000.

ARTICLES

FITZMAURICE, M.; MARSHALL, J. The Human Right to a Clean Environment – Phantom or Reality? The European Court of Human Rights and English Courts Perspective on Balancing Rights in Environmental Cases. *Nordic Journal of International Law* (76), Martinus Nijhoff Publishers, Leiden, 2007.

TURNER, S. The Human Right to a Good Environment – The sword in the stone. *Non-State Actors and International Law* (4), 2004.

DOCUMENTS

Application instituting proceedings for the case of Aerial Herbicide Spraying (Ecuador vs. Colombia), p. 18, Pending Cases of the International Court of Justice, at WWW <<http://www.icj-cij.org/docket/index.php?p1=3&p2=1&code=ecol&case=138&k=ee>> (consulted 20 July 2009).

European Court of Human Rights, Lopez Ostra vs. Spain, para. 51, Application nº 16798/90, judgement of 9 december 1994, Search Portal Hudoc, at WWW <<http://cmiskp.echr.coe.int/tkp197/portal.asp?sessionId=27176176&skin=hudoc-en&action=request>> (consulted 28 July 2009).

General Comment 14, in Office of the United Nations High Commissioner for Human Rights (OHCHR), at WWW <[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/40d009901358b0e2c1256915005090be?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/40d009901358b0e2c1256915005090be?Opendocument)> (consulted 28 July 2009).

General Comment 14, ECOSOC, at WWW <[http://www.unhchr.ch/tbs/doc.nsf/\(symbol\)/E.C.12.2000.4.En](http://www.unhchr.ch/tbs/doc.nsf/(symbol)/E.C.12.2000.4.En)> (consulted July 24th 2009).

Global Governance Watch, press release from March 13th 2009, "European Court of Human Rights Promotes Emerging 'Right to Enjoy a Healthy and Protected Environment'", at WWW <http://www.globalgovernancewatch.org/on_the_issues/european-court-of-human-rights-promotes-emerging-right-to-enjoy-a-healthy-and-protected-environment> (consulted 28 July 2009).

Objectives of the Physical Planning and Management Plan for the San Miguel and Putumayo River Basins, Organisation of American States, at WWW <<http://www.oas.org/usde/publications/Unit/oea49s/ch04.htm#executive%20summary>> (consulted 21 July 2009).

Observaciones de la misión internacional a la frontera ecuatoriana con Colombia, FIDH-FIAN-RAPAL-OCIM-CEAS-CIF, nº 434/3, 2005, p. 5 [hereinafter FIDH Report].

The Convention on Biological Diversity, at WWW <<http://www.cbd.int/convention/convention.shtml>> (consulted 20 July 2009).

The Protocol of San Salvador, at WWW <<http://www.oas.org/juridico/English/treaties/a-52.html>> (consulted 28 July 2009).

The Statute of the International Court of Justice.

The United Nations Convention on Combat Desertification, at WWW <<http://www.unccd.int/cop/reports/lac/national/2000/ecuador-summary-eng.pdf>> (consulted 30 August 2009).

The Vienna Convention on the Law of Treaties, in UN Treaty database, at WWW <http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf> (consulted 28 July 2009).

United Nations Conference on Environment and Development (Unccd), Rio de Janeiro, 1992, at WWW <<http://www.un.org/geninfo/bp/enviro.html>> (consulted 21 July 2009).

United Nations Convention on the Law of the Non-navigational Uses of International Watercourses of 1997, article 5.

United Nations Reports of International Arbitral Awards, v. 3, p. 1965.

United States District Court for the District of Columbia, Civil Action nº 01-1908 (RWR), Venancio Aguasanta Arias et al. vs. Dyncorp et al., 2007.