Transboundary issues, human rights and substantive justice in Ireland

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I. Introduction

(1) This paper examines three related aspects:

i. The current framework for environmental governance in transboundary matters in Ireland;

ii. Where human rights are or can be situated within the existing framework; and

iii. How individuals may litigate to enforce or clarify transboundary environmental obligations.

II. Transboundary environmental concerns

(1) Transboundary concerns have had a long history of adjudication, beginning in territorial disputes between dominant imperial regimes. In the 1928 case of *USA v Netherlands (the Island of Palmas case)*, the Permanent Court of Arbitration (PCA) at the Hague declared:

"Territorial sovereignty cannot limit itself to its negative side, i.e. to excluding the activities of other States; for it serves to divide between nations the space upon which human activities are employed, in order to assure them at all points the minimum of protection of which international law is the guardian."[1]

Thus, sovereignty now had a positive duty – be alive to the possibility of the use made of one's own territory to cause or permit injury to another's territory, and to take steps to protect against such injury.

(2) Environmental concerns did not take long to be considered on a transboundary basis. In the 1938 and 1941 decisions in *USA v Canada*, the dispute involved a Canadian smelter in Trail, British Columbia, which was very close to the international border with the US. Following expansion during the First World War, the smelter in question was pumping out thousands of tonnes of sulphurous gases into the atmosphere and farmers in the area, including American farmers in neighbouring Washington State, complained of crop failures as a result. The PCA found:

"[…] under the principles of international law, […] 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 consequence and the injury is established by clear and convincing evidence."[2]

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[1] 2 RIAA 829, 839

[2] 3 RIAA 1905, 1965.

The 'harm principle' as it has become known[3], that actions should only be limited to prevent harm to others, was now firmly rooted in transboundary environmental law.

(3) While it is important to appreciate that transboundary environmental law has developed largely through bilateral treaties, so that an authoritative set of planet-wide legal obligations concerning environmental governance does not exist, international law has always looked to widely-accepted State practice in order to evolve rules of general application. In that regard, the International Court of Justice (ICJ) recognised for the first time in 2010 that international environmental law now required States to conduct environmental impact assessments where there is a risk of a significant adverse impact in a transboundary context.[4]

(4) Fortunately, in the Irish context, the law does not need to evolve at a glacial pace. Both Westminster and Dublin have ratified the Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention)[5]. Two important aspects of the Espoo regime are important here:

i. The harm principle is enshrined in Article 2(1) and expanded to be a duty to "take all appropriate and effective measures to prevent, reduce and control significant adverse transboundary environmental impact from proposed activities"; and

ii. The detailed and persistent focus on bilateral or multilateral notification, consultation and analysis of any proposed project with a transboundary impact which runs throughout the articles and appendices of the Convention.

(5) The provisions of the Espoo Convention were incorporated into EU law in 1997, and the codified Directive 2011/92/EU (EIA Directive) (as amended in 2014) reflects the notification and consultation elements of the Espoo regime in Article 7 of the EIA Directive. The EIA Directive has in turn become part of the domestic law in Northern Ireland (via the Planning Act (Northern Ireland) 2011 and the Planning (Environmental Impact Assessment) Regulations (Northern Ireland) 2017 (EIA Regulations 2017)) and in the Republic of Ireland (via the Planning and Development Act, 2000 and the Planning and Development Regulations 2001 (as amended)).

(6) Being part of EU law, the incorporated sections of the Espoo Convention are directly effective – meaning that they give rise to enforceable legal obligations within Irish law, North and South. However, it is important to appreciate that EU law has not incorporated Espoo wholesale – for example, Espoo envisions post-project analysis much more commonly[6] than the EIA Directive, which leaves it largely to the discretion of the planning decision-maker.[7]

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[3] First articulated by John Stuart Mill in *On Liberty* (1859) (London: John W Parker & Son) pp 20 – 21.
[4] *Pulp Mills on the River Uruguay (Argentina v Uruguay)* [2010] ICJ Rep 14, 83.
[5] (adopted 25 February 1991, entered into force 10 September 1997) 1989 UNTS 309
[6] *Ibid* Article 7.
[7] Directive 2014/52/EU [2014] OJ L124/1, Annex IV (7).

III. Human rights in transboundary environmental issues

(1) Within the sphere of domestic law[8], human rights intersect with environmental law in two ways: first, via the Charter of Fundamental Rights of the European Union (CFR)[9] and second, via the European Convention on Human Rights (ECHR)[10].

(2) Initially thought inapplicable to domestic law in the UK, the CFR was clarified in 2013 to apply in full[11]. The CFR guarantees a "high level of environmental protection and the improvement of the quality of the environment" in EU policies[12]. It is important to note that this is not an enforceable right from the CFR itself; the particular provision was based on articles in the EU Treaties, and thus any challenge based on environmental protection within the CFR is in reality a challenge based on relevant articles in the EU Treaties[13]. What this means in practice is that the CFR cannot be used to expand environmental competence or protection from the provisions laid down in the EU Treaties and EU legislation. Further, the environmental protection contained in the CFR is likely a principle, rather than a right, and consequently, cannot be directly enforced[14].

(3) Far from being a damp squib, however, the CFR has considerable potential. Even though it is only addressed to Member States when they are implementing EU law, when courts are asked to interpret this implementation of EU law, they must have regard to the CFR. This is the case even where the constitutional traditions and guarantees of a Member State conflict with EU law[15]. In short: if EU law has primacy over national law, so does the CFR when interpreting such laws and enforcing rights within an EU context. This is important as the vast majority of domestic environmental law is EU-derived. Thus, except in certain cases, environmental litigation will engage EU law, and thus, in appropriate circumstances, the CFR.

(4) Looking at the ECHR, by contrast, even though there is no specific right, either to environmental protection or improvement, there exists a rich body of environmentally relevant case law, dealing with a variety of issues such as dangerous industrial activities, waste management and noise pollution.[16]

(5) There are however a number of caveats when considering how human rights and environmental law interact:

i. First, although environmental protection has been generally included in a broad reading of human rights law in countries such as India[17], European and domestic law have yet to take that general leap;

ii. Second, both of the above human rights regimes are self-limited: the CFR by the EU Treaties and the ECHR by its own provisions – neither can escape beyond its own boundaries;

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[8] References to 'domestic law' will refer to Northern Ireland law only.
[9] [2000] OJ C364/01
[10] Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR) (1950)
[11] Case C-411/10, *R(NS (Afghanistan)) v Home Secretary* [2013] QB 102, [120] – [122]
[12] *Ibid* n. 9, Article 37.
[13] See Case C-444/15, *Associazione Italia Nostra Onlus v Commune di Venezia* [61] – [64].
[14] *Ibid* n. 9, Article 52(5).
[15] See Case C-399/11, *Stefano Melloni v Ministerio Fiscal* [55] – [59].
[16] See the factsheet *Environment and the European Convention on Human Rights*, June 2019.
[17] See e.g. *Subhash Kumar v State of Bihar* 1991 AIR 420

iii. Third, human rights law and environmental law have key differences of principle: human rights are limitations on state power and thus challenged when exceeded, whereas environmental law consists of positive state duties, and thus challenged when unfulfilled; and

iv. Finally, relevance is key: a persuasive use of human rights in environmental litigation involves identifying a right which is inextricably linked with the environmental damage at issue in any given case, rather than sitting on the fringes of environmental damage.

IV. Substantive justice: existing frameworks and future challenges

(1) At present, transboundary environmental issues are covered under the amended Article 7 of the EIA Directive and Part 8 of the EIA Regulations 2017, which set out duties in two respects:

i. If a proposed development in NI is likely to have significant transboundary effects on another Member State, then the relevant planning authority (if not the Department for Infrastructure) shall send the development application and environmental statement to the Department for Infrastructure for onward transmission to the relevant Member State – this is followed by engagement with that Member State, including any public opinion of that State; and

ii. If the Department for Infrastructure receives information under Article 7 of the EIA Directive of a proposed development in a Member State which is likely to have significant transboundary effects in NI, it shall engage with the relevant Member State and ensure that the public in NI has a reasonable period (in agreement with the relevant Member State) to make representations to the planning authority of that Member State.

(2) As the law stands, a resident in NI can challenge an omission by a local planning authority not to discharge the duties under Part 8 of the EIA Regulations 2017, just like with any other statutory duty.

(3) If facing a planning authority in another Member State which omits to communicate a likely significant transboundary impact to the Department for Infrastructure, then in theory[18] a NI resident can also challenge that planning authority in the courts of that Member State.

(4) However, Brexit may give rise to new and unforeseeable challenges, depending on whether or not there is a withdrawal agreement and whether, even if there is a withdrawal agreement, the provisions concerning environmental protections in that agreement.

(5) If there is no agreement, then the current position is that the entire gamut of EU-derived law which is domestically applicable will remain domestically applicable as

[18] Subject to the requirements of standing, etc. in that Member State.

"retained EU law"[19]. However, Brexit will sever the link between retained EU law and the EU Treaties which gave rise to this body of law, by repealing the European Communities Act 1972[20] which acts as the gateway for EU law into the UK. The result is one-sided: planning authorities in NI will continue to be obliged by Part 8 of the "retained" EIA Regulations 2017, but because the UK will cease to be a Member State, Article 7 of the EIA Directive will not oblige any EU Member State to notify the Department for Infrastructure of any likely significant transboundary effects.

(6) If there is an agreement, however, precisely how environmental law is woven into such an agreement will determine the extent of UK-EU or NI-EU engagement on transboundary issues. For example, in the current version[21] of the Ireland/Northern Ireland Protocol to the Withdrawal Agreement, environmental provisions are far from clear. Article 11 of the Protocol says, for example:

"Consistent with the arrangements set out in Articles 5 to 10, and in full respect of Union law, this Protocol shall be implemented and applied so as to maintain the necessary conditions for continued North-South cooperation, including in the areas of environment, health, agriculture, transport, education and tourism, as well as in the areas of energy, telecommunications, broadcasting, inland fisheries, justice and security, higher education and sport."

(7) On first blush, the reference to the "full respect of Union law" might be encouragingly read as retaining all current EU environmental law in NI. However, this reference is prefaced with the requirement that there be consistency with Articles 5 – 10 of the Protocol, which are specific provisions for the movement and certification of goods, the application of customs, excise and VAT, the single electricity market, state aid and the protection of the UK single market. The reference to "full respect" is also circumscribed by the requirement that the "necessary conditions" be maintained for North-South cooperation. These issues give rise to two interrelated concerns:

i. The vagueness of general environmental safeguards within the Protocol, in contrast with the specific list of environmental laws which continue to apply in a goods context (Annex 2, 26); and

ii. The undefined nature of "North-South cooperation", in that its protection is not provided for in any of the operable parts of the Protocol, but only in its recitals, so that transboundary environmental engagement may ebb and flow with the tenor of North-South cooperation.

V. Conclusion

(1) Transboundary issues in environmental law have a long antecedence of being the subject of litigation. Although initially piecemeal, international law now recognises the harm principle as being part of state obligations, even where such an obligation has not been explicitly spelled out in a treaty.

(2) The manner in which human rights intersect with transboundary environmental issues, much like how they intersect with environmental law generally, depends on

[19] European Union (Withdrawal) Act 2018, s. 2(1).
[20] *Ibid.* s. 1.
[21] Revised on 17 October 2019.

the underlying facts of any given case. It is therefore a question of nuance and strategy, rather than being a template approach.

(3) While we currently have recourse to enforce transboundary requirements within EU law directly against relevant public authorities, Brexit throws up unforeseeable challenges of approach and application, not least being the loss of an established channel of engagement between relevant Member States as to the impact and mitigation of significant environmental impacts in a transboundary context. While it would not be possible to predict the real impact of this loss on transboundary environments and ecologies, simple logic would dictate that concerns surrounding the legal uncertainty arising out of Brexit is not limited to human beings alone, but marks a reduction, in some respects, to the ever higher standards of environmental protection afforded within the EU legal space.

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