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INDONESIA'S EXTRATERRITORIAL OBLIGATION TO PROTECT THE HUMAN RIGHTS OF INDIVIDUALS FROM TRANSBOUNDARY HAZE POLLUTION

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Abstract

Ever since the late 1980s, forest fires located in Indonesia have resulted in haze pollution which engulfs the Southeast Asian region almost annually. This paper argues that Indonesia is extraterritorially obligated to ensure the human rights of individuals outside its territory as a result of its failure to prevent the haze pollution. It analyzes the extraterritorial application of Article 2(1) of the International Covenant on Civil and Political Rights (ICCPR), arguing that an individual whose human rights have been adversely affected by transboundary environmental harm is deemed 'subject to the jurisdiction' of the originating state. Applying this interpretation, individuals located outside Indonesia's sovereign territory who have been adversely impacted by haze pollution may be deemed "subject to the jurisdiction" of Indonesia for the purpose of Article 2(1) of the ICCPR. Indonesia would thus be obligated by the ICCPR to ensure protect human rights by preventing and mitigating the transboundary haze pollution.

Keywords: *extraterritorial application of human rights treaties, haze pollution, human rights.*

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I. INTRODUCTION

In the month of September 2019, blue skies turned gray as haze blanketed the skies of the Southeast Asian region.¹ The haze crisis in 2019 is the latest occurrence of the Southeast Asian transboundary haze pollution, a problem which has plagued the region for approximately three decades.² This article analyzes the Southeast Asian transboundary haze problem through the lens of international human rights law. It seeks to establish Indonesia's extraterritorial responsibility for violations of the International Covenant on Civil and

¹ "Indonesia haze: Why do forests keep burning?," BBC News, accessed 20 November 2020, <https://www.bbc.com/news/world-asia-34265922>.

² David Seth Jones, "ASEAN and Transboundary Haze Pollution in Southeast Asia," *Asia Europe Journal* 4, no. 3 (2006): 432, doi: 10.1007/s10308-006-0067-1; Daniel Heilmann, "After Indonesia's Ratification: The ASEAN Agreement on Transboundary Haze Pollution and Its Effectiveness As a Regional Environmental Governance Tool," *Journal of Current Southeast Asian Affairs* 34, no. 3 (2015): 96, doi: 10.1177/186810341503400304; Nazia Nazeer and Fumitaka Furuoka, "Overview of ASEAN Environment, Transboundary Haze Pollution Agreement and Public Health," *International Journal of Asia Pacific Studies* 13, no. 1 (2017): 77, doi: 10.21315/ijaps2017.13.1.4.

Political Rights (ICCPR).³

The haze usually occurs during the monsoon months of May to September when winds carry smoke from forest fires located in the Indonesian islands of Sumatra and Kalimantan.⁴ These forest fires are caused by the slash-and-burn method of clearing land, a method used by traditional villagers to open up small patches of rainforest for relocating cultivation.⁵ However, the main culprits are large timber and oil plantation companies who use fires to clear vast areas of land to make way for extensive palm oil plantations and open up access to previously remote areas.⁶ The use of fire to clear land is prevalent in Indonesia since it is regarded as the easiest and most cost effective way converting forest to crop-growing land.⁷ This method is further enabled by the fact that the exploitation of natural resources is a significant contributor to Indonesia's economy, and thus private companies are granted additional land concessions by the Indonesian government.⁸

The haze is transboundary in nature, affecting countries neighboring Indonesia, such as Malaysia and Singapore, causing a considerable decrease in air quality of the affected areas.⁹ This decrease in air quality has had a

³ International Covenant on Civil and Political Rights, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) (ICCPR).

⁴ David B. Jerger, "Indonesia's Role in Realizing the Goals of ASEAN's Agreement on Transboundary Haze Pollution," *Sustainable Development Law & Policy* 14, no. 1 (2014): 35; C. L. Reddington et al., "Contribution of Vegetation and Peat Fires to Particulate Air Pollution in Southeast Asia" *Environmental Research Letters* 9 (2014): 10, doi: 10.1088/1748-9326/9/9/094006; Heilmann, "After Indonesia's Ratification," *Journal of Current Southeast Asian Affairs*, 34(3): 98-99.

⁵ "Clearing the smoke: The causes and consequences of Indonesia's fires", CIFOR, accessed 5 December 2020, <https://forestsnews.cifor.org/37016/clearing-the-smoke-the-causes-and-consequences-of-indonesias-fires?fnl=en>.

⁶ Jones, "ASEAN and transboundary haze pollution," 433-4; Jerger, "Indonesia's Role," 36; Reddington et al., "Contribution of vegetation and peat fires," *Environmental Research Letters* 9, (2014): 1-12, doi: 10.1088/1748-9326/9/9/094006. 10; Sean Sloan et al., "Fire activity in Borneo driven by industrial land conversion and drought during El Niño periods, 1982–2010," *Global Environmental Change* 47 (2017): 106, doi: 10.1016/j.gloenvcha.2017.10.001; H. Purnomo et al., "Forest and land fires, toxic haze and local politics in Indonesia," *International Forestry Review* 21, no. 4 (2019): 487-488, doi: 10.1505/146554819827906799.

⁷ Helena Varkkey, "Patronage politics, plantation fires and transboundary haze," *Environmental Hazards* 12, no. 3-4 (2013): 202, doi: 10.1080/17477891.2012.759524; David B. Jerger, "Indonesia's Role," *Sustainable Development Law & Policy* 14, no. 1. (2014): 35-4, 36; Miriam E. Merlier et al., "Fire emissions and regional air quality impacts from fires in oil palm, timber, and logging concessions in Indonesia," *Environmental Research Letters* 10 (2015): 3, doi: 10.1088/1748-9326/10/8/085005; Janice S. H. Lee et al., "Toward clearer skies: Challenges in regulating transboundary haze in Southeast Asia," *Environmental Science and Policy* 55 (2016): 88, doi: 10.1016/j.envsci.2015.09.008.

⁸ UN Human Rights Council, Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai (28 April 2015), UN Doc. A/HRC/29/25, para. 7; Helena Varkkey, "The Politics of Fires and Haze in Southeast Asia," *Oxford Research Encyclopedia of Politics* (2017): 2, available at: <https://oxfordre.com/politics/view/10.1093/acrefore/9780190228637.001.0001/acrefore-9780190228637-e-262>.

⁹ Jerger, David B., "Indonesia's Role," *Sustainable Development Law & Policy* 14, no. 1. (2014): 35-45; C.L. Reddington, M. Yoshioka, et al., "Contribution of vegetation and peat fires," *Environmental Research Letters* 9 (2014): 1-12, doi: 10.1088/1748-9326/9/9/094006, 10; Volker Röben, "Air Pollution,

negative impact on public health.¹⁰ Populations exposed to the haze are shown to develop health problems including nausea, birth deficiencies, breathing problems, severe growth delays in children, skin allergies, cancer, and respiratory tract diseases.¹¹

While the forest fires are caused by the destructive activities of private actors, we must scrutinize the system in Indonesia which allows these private actors to keep burning. Hence, this article seeks to establish the responsibility of Indonesia as a sovereign state for its failure to prevent and mitigate the haze pollution. Previous articles discussing the issue of haze pollution have sought to establish Indonesia's international responsibility within the scope of international environmental law.¹² This article analyzes the problem through the lens of international human rights law, assessing possible violations of the ICCPR emanating from Indonesia's failure to prevent and mitigate the haze. While the haze pollution may constitute violations of other human rights treaties, such as the International Covenant on Economic, Social and Cultural Rights (ICESCR),¹³ such analysis is beyond the scope of this article.

Due to the transboundary nature of the haze pollution, this article argues that Indonesia is extraterritorially obligated to ensure the human rights of individuals outside its territory whose enjoyment of human rights have been adversely affected as a result of exposure to the haze. As a state party to the ICCPR, Indonesia is obligated under Article 2(1) to respect and ensure the human right of all individuals 'within its territory and subject to its jurisdiction'.¹⁴ Section 2 analyzes the extraterritorial application of Article 2(1), arguing that an individual whose human rights have been interfered

Transboundary Aspects," *Max Planck Encyclopedias of International Law* (2015) para. 15, available at: <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1560?prd=EPIL>; Varkkey, "The Politics of Fires and Haze in Southeast Asia," *Oxford Research Encyclopedia of Politics* (2017), available at: <https://oxfordre.com/politics/view/10.1093/acrefore/9780190228637.001.0001/acrefore-9780190228637-e-262>.

¹⁰ Nazeer and Furuoka, "Overview of ASEAN Environment, Transboundary Haze Pollution Agreement and Public Health," *International Journal of Asia Pacific Studies* 13, no. 1. (2017): 73-94, doi: 10.21315/ijaps2017.13.1.4.

¹¹ *Ibid.*, 84. See also David Set Jones, "ASEAN and transboundary haze pollution," *Asia Europe Journal* 4, no. 3. (2006): 431-446. doi: 10.1007/s10308-006-0067-1, 435.

¹² Alan K. Tan, "Forest Fires of Indonesia: State Responsibility and International Liability," *International and Comparative Law Quarterly* 48, no. 4 (1999): 826-855; Dinarjati E. Puspitasari and Agustina Merdekawati, "Pertanggungjawaban Indonesia dalam Penyelesaian Kasus Transboundary Haze Pollution akibat Kebakaran Hutan berdasarkan Konsep State Responsibility [Indonesia's Responsibility in the Settlement of Transboundary Haze Pollution Disputes as a Consequence of Forest Fires]," *Mimbar Hukum* 19, no. 3 (2007): 471-485, doi: 10.22146/jmh.19077; Y. Gunawan and M. A. Wahyu, "The Responsibility of the State on Transboundary Haze Pollution after the Ratification of AATHP: Case of Indonesia," Conference paper presented at the Proceedings of the 5th International Conference on Law and Society 2016, Thailand, 18-19 Apr. 2016. Available at: <http://repository.ums.ac.id/handle/123456789/12400>.

¹³ International Covenant on Economic, Social and Cultural Rights, opened for signature 19 December 1966, 993 UNTS 3 (entered into force 3 January 1976) (ICESCR).

¹⁴ Article 2(1), ICCPR.

by transboundary environmental harm would be deemed as ‘subject to the jurisdiction’ of the state where the transboundary harm originated. Section 3 then applies this interpretation of Article 2(1) of the ICCPR to the issue of transboundary haze pollution. It establishes Indonesia’s extraterritorial obligation by determining that there exists a causal link between Indonesia’s failure to prevent the transboundary haze pollution, and the negative human health impacts towards individuals in neighboring countries who have been exposed to the haze. Having established Indonesia’s extraterritorial obligation, Section 4 describes the possible violations of the ICCPR caused by the haze pollution.

II. THE EXTRATERRITORIAL APPLICATION OF THE ICCPR BY TRANSBOUNDARY ENVIRONMENTAL HARM

With the increase of globalization and multilateralism, states often conduct activities beyond its own borders, or conduct activities within its territory but produce effects towards the lives of individuals abroad.¹⁵ International human rights law has developed to ensure that a legal vacuum does not occur in respect to the extraterritorial actions of a state by applying human rights treaties extraterritorially. This section analyzes the extraterritorial application of the ICCPR and the threshold of ‘jurisdiction’ within Article 2(1).

A. STATE’S EXTRATERRITORIAL OBLIGATION TO ENSURE HUMAN RIGHTS

1. THE DEFINITION OF ‘JURISDICTION’ WITHIN ARTICLE 2(1) OF THE ICCPR

Article 2(1) establishes the nature of legal obligations imposed upon its state parties, providing that ‘Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant [...]’.¹⁶ The presence of the word ‘and’ within the wording of Article 2(1) gives rise to two separate interpretations of the article: conjunctive or disjunctive.¹⁷

¹⁵ Nicola Wenzel, “Human Rights, Treaties, Extraterritorial Application and Effects,” *Max Planck Encyclopedia of Public International Law* (2008): para. 1, available at: <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e819>; Marko Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (Oxford University Press, 2011), 8; Tilmann Altwickler, “Transnationalizing Rights: International Human Rights Law in Cross-Border Contexts,” *European Journal of International Law* 29, no. 2 (2018): 582-3, doi: 10.1093/ejil/chy004.

¹⁶ Article 2(1), ICCPR.

¹⁷ A. Zimmermann, “Extraterritorial Application of Human Rights Treaties - The Case of Israel and the Palestinian Territories Revisited” in *International Law between Universalism and Fragmentation*, I. Buffard

A conjunctive interpretation of the phrase would require an individual to be *both* located within the state's territory *and* subject to its jurisdiction to be afforded rights under the ICCPR¹⁸ This interpretation would essentially rule out the extraterritorial application of the ICCPR. On the other hand, a disjunctive interpretation of Article 2(1) separates the phrases 'within its territory' and 'subject to its jurisdiction'. Under this interpretation, a state party to the ICCPR is obligated to respect and ensure the human rights of individuals within its territory, and towards individuals subject to its jurisdiction. This removes the territorial requirement for an individual to be deemed 'subject to the jurisdiction' of a state. An individual can be outside a state's territory but still subject to its jurisdiction, hence allowing the extraterritorial application of the ICCPR.¹⁹

Subsequent statements and decisions of the Human Rights Committee (HRC) has supported a disjunctive interpretation of Article 2(1) in favor of its extraterritorial application.²⁰ In *Lopez Burgos*, the HRC underlined that a restrictive interpretation of Article 2(1) would lead to the absurd result '[sic] 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'.²¹ This conclusion was supported by the ICJ in the *Palestinian Wall Advisory Opinion*:

*"[...] in adopting the wording chosen, the drafters of the Covenant did not intend to allow States to escape from their obligations when they exercise jurisdiction outside their national territory. They only intended to prevent persons residing abroad from asserting, vis-à-vis their State of origin, rights that do not fall within the competence of that State, but of that of the State of residence."*²²

If an individual can be outside the territory of a state but still 'subject to its

et al., eds. (Koninklijke Brill NV, 2008), 748; Erik Roxstorm and Mark Gibney, "Human Rights and State Jurisdiction," *Human Rights Review* 18 (2017): 132, doi: 10.1007/s12142-016-0441-3.

¹⁸ Roxstorm and Gibney, "Human Rights and State Jurisdiction," *Human Rights Review* 18. (2017): 129-150, doi: 10.1007/s12142-016-0441-3,132.

¹⁹ *Ibid.*, 132.

²⁰ UN Human Rights Committee (HRC), General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant (29 March 2004), UN Doc. CCPR/C/21/Rev.1/Add.13 (General Comment No. 31), para. 10. See also Zimmermann, "Extraterritorial Application," 751; Nicola Wenzel, "Human Rights, Treaties, Extraterritorial Application and Effects," *Max Planck Encyclopedia of Public International Law* (2008), available at: <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e819>.; Hugh King, "The Extraterritorial Human Rights Obligations of States," *Human Rights Law Review* 9, no. 4 (2009): 523-4, doi: 10.1093/hrlr/ngp028.

²¹ HRC, *Delia Saldias de Lopez v. Uruguay* (1981), Communication No. 052/1979, UN Doc. CCPR/C/13/D/52/1979 (*Lopez Burgos*), para. 12.3.

²² *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (2004), ICJ Reports 2004, 136, at para 109 (*Palestinian Wall Advisory Opinion*).

jurisdiction’, how should ‘jurisdiction’ be defined? Answering this question is imperative, as it serves to determine whether a state party to the ICCPR has treaty obligations to respect and ensure the human rights of an individual in the first place. ‘Jurisdiction’ in human rights treaties is a threshold criterion, the fulfillment of which is a necessary condition to be able to hold a state party responsible for violations of its obligations under the ICCPR.²³

The term ‘jurisdiction’ in human rights treaties has its own meaning and shall not be equated with a court’s jurisdiction to hear a dispute, nor does it mean a state’s jurisdiction under general international law to govern its own territory.²⁴ ‘Jurisdiction’ in human rights treaties is defined as the state’s exercise of actual authority and power, whether exercised lawfully or not, over an area or persons.²⁵ When determining whether a state has jurisdiction for the purposes of establishing its obligation to respect and ensure human rights, this is a question of fact that analyzes *de facto* whether a state indeed exercises control.²⁶ This definition takes away focus from delimitation and the relationship *between* states, but serves to protect individuals from acts of the state that may affect his/her human rights.²⁷

2. THE TWO MODELS OF EXTRATERRITORIAL APPLICATION

A clear threshold to determine whether an individual is ‘subject to the jurisdiction’ of a state party to the ICCPR is required because it would be unreasonable to impose upon a state party the impossible task of guaranteeing the human rights of all persons around the world.²⁸ In the case of *Al-Skeini*, the ECtHR reaffirmed the two most widely accepted models of extraterritorial application, which are: state agent authority and control, and effective control over an area.²⁹ They have also been referred to as the spatial and personal model of extraterritorial application.³⁰ An illustration for the first model may

²³ European Court of Human Rights (ECtHR), *Ilaşcu and Others v. Moldova and Russia* (2004), Application No. 48787/99 (*Ilaşcu*), para. 311; ECtHR, *Al-Skeini and Others v. The United Kingdom* (2011), Application No. 55721/07 (*Al-Skeini*), para. 130. See also Altwickler, “Transnationalizing Rights,” 588.

²⁴ Marko Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy*. (Oxford University Press, 2011).

²⁵ Roxstorm and Gibney, “Human Rights and State Jurisdiction,” *Human Rights Review* 18. (2017): 129-150. doi: 10.1007/s12142-016-0441-3, 143-4.

²⁶ Milanovic, *Extraterritorial Application of Human Rights Treaties*, 39-41; Olivier De Schutter et al., “Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights,” *Human Rights Quarterly* 34 (2012): 1102, doi: 10.2307/23352240.

²⁷ Nicola Wenzel, “Human Rights, Treaties, Extraterritorial Application and Effects,” *Max Planck Encyclopedia of Public International Law* (2008). Available at: <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e819>.para. 12.

²⁸ *Ibid.*, para. 5.

²⁹ ECtHR, *Ilaşcu*, paras 314-8; ECtHR, *Al-Skeini*, paras 136-142; Cedric Ryngaert, “Clarifying the Extraterritorial Application of the European Convention on Human Rights,” *Utrecht Journal of International and European Law* 28, no. 74 (2012): 59.

³⁰ Zimmermann, “Extraterritorial Application of Human Rights Treaties - The Case of Israel and the Pal-

be seen from the HRC's decision in *Lopez Burgos*, in which the author alleged that Uruguay had violated its human rights obligations when members of the Uruguay security and intelligence forces kidnapped and detained the author's husband in Argentina.³¹ Although the arrest and initial detention took place outside of Uruguay's territory, the HRC held Uruguay responsible for violating the ICCPR, noting that Article 2(1) of the ICCPR 'does not imply that the State party concerned cannot be held accountable for violations of rights under the Covenant which its agents commit upon the territory of another State'.³² The second model, effective control over an area, occurs in circumstances of military occupation over an area outside the state's own territory.³³ When effective control has been established, either legally or illegally, the state is obligated to secure the human rights of individuals within the area it has control over either through its own armed forces or through a subordinate local administration.³⁴ In the *Palestinian Wall Advisory Opinion*, the ICJ held that Israel's long-standing military presence in the occupied Palestinian territories meant that individuals located in the occupied territories of Israel were considered to be subject to Israel's 'jurisdiction' within the meaning of Article 2(1) of the ICCPR.³⁵

These two models of extraterritorial application help provide clearly defined circumstances by which an individual located outside a state's territory may be considered 'subject to the jurisdiction' of the state. However, a limitation imposed by these two models is the need for the state authority to be present 'on the ground' where the human rights violations occur.³⁶ Consequently, some key instances where a state effectively impacts the human rights of individuals abroad does not apply. These are instances where the conduct is carried out within the territory of the state but produces *effects* which interfere with the human rights of individuals abroad, such as extraterritorial surveillance or transboundary environmental harm.³⁷

estonian Territories Revisited" in *International Law between Universalism and Fragmentatio*, edited by I. Buffard et al., 747-66. Koninklijke Brill NV, 2008, 530; Milanovic, *Extraterritorial Application of Human Rights Treaties* (Oxford University Press, 2011), 119; Tilmann Altwicker, "Transnationalizing Rights: International Human Rights Law in Cross-Border Contexts," *European Journal of International Law* 29, no. 2. (2018): 581-606, doi: 10.1093/ejil/chy004.

³¹ HRC, *Lopez Burgos*, paras 2.1-8.

³² *Ibid.*, para. 12.3.

³³ ECtHR, *Al-Skeini*, paras 138-139.

³⁴ Zimmermann, "Extraterritorial Application," 757.

³⁵ ICJ, *Palestinian Wall Advisory Opinion*, paras 110-1.

³⁶ Altwicker, "Transnationalizing Rights," 589-90.

³⁷ John H. Knox, "Diagonal Environmental Rights" in *Universal Human Rights and Extraterritorial Obligations*, Mark Gibney and Sigrun Skogly, eds. (University of Pennsylvania Press, 2010), 88; Altwicker, "Transnationalizing Rights," 589-90.

B. INTERPRETING THE EXTRATERRITORIAL APPLICATION OF THE ICCPR TO INCLUDE CASES OF TRANSBOUNDARY ENVIRONMENTAL HARM

Pollution and environmental degradation can have devastating impacts on the enjoyment of human rights of the affected population.³⁸ Recalling that the three models of extraterritorial application require the state to be present on-ground, a legal vacuum is created in the extraterritorial application of human rights treaties where a state may avoid responsibility since only the *effects* are felt abroad.³⁹ Since the effects of pollution and environmental degradation are not limited by state boundaries, international human rights law must develop to ensure that states comply with their human rights obligations extraterritorially.⁴⁰

In 2008, the ICJ was given the opportunity to clarify the threshold of the extraterritorial application of human rights treaties when Ecuador filed an application instituting proceedings against Colombia in respect of a dispute concerning *Aerial Herbicide Spraying*.⁴¹ Ecuador alleged that Colombia's aerial spraying of toxic herbicides at locations near its border had caused significant transboundary harm to the people and natural environment on Ecuador's side of the border.⁴² Among other allegations, Ecuador alleged that the aerial herbicide spraying constituted a violation of the human rights of affected individuals.⁴³ The human rights that were alleged to have been violated included the right to life, the right to health and the right to a healthy environment.⁴⁴

To establish Colombia's extraterritorial obligation to respect the human rights of individuals located within Ecuador's territory, Ecuador argued that the ACHR created a 'common legal space' (*un espace juridique*) which does not allow for a vacuum in the protection of human rights within this geographical area.⁴⁵ Consequently, Colombia has the negative obligation to refrain from frustrating the human rights of populations living directly across

³⁸ UN Conference on Environment and Development, Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration) (1972), UN Doc. A/CONF.48/14/Rev. 1, para. 1; Sueli Girogetta, "The Right to a Healthy Environment, Human Rights and Sustainable Development," *International Environmental Agreements: Politics, Law and Economics* 2 (2002): 174-5.

³⁹ Tilmann Altwicker, "Transnationalizing Rights: International Human Rights Law in Cross-Border Contexts," *European Journal of International Law* 29, no. 2. (2018): 581-606, doi: 10.1093/ejil/chy004.

⁴⁰ Alan Boyle, "Human Rights and the Environment: Where Next?," *The European Journal of International Law* 23, no. 3 (2012): 634, doi: 10.1093/ejil/chs054.

⁴¹ *Aerial Herbicide Spraying (Ecuador v. Colombia)* (2013), Order, ICJ Reports 2013, 278 (*Aerial Herbicide Spraying*).

⁴² *Ibid.*, para. 2.

⁴³ *Aerial Herbicide Spraying (Ecuador v. Colombia)* (2009), Memorial of Ecuador, at 412.

⁴⁴ *Ibid.*, pp. 342-367.

⁴⁵ *Aerial Herbicide Spraying (Ecuador v. Colombia)* (2011), Reply of Ecuador, para. 7.36.

the border in Ecuador.⁴⁶ Ecuador emphasized the object and purpose of the ACHR, stating that the objective protection of the ACHR would be rendered illusory if it allowed Colombia to avoid responsibility for failing to respect the human rights of individuals in Ecuador.⁴⁷ Before the ICJ had the chance to adjudge on these issues, the case was discontinued as the parties had reached an agreement that ‘fully and finally resolves all of Ecuador’s claims against Colombia’.⁴⁸

As of now, the ECtHR has not decided on cases relating to environmental protection which raise extraterritorial and transboundary issues.⁴⁹ However, in the case of *Loizidou*, the ECtHR interpreted Article 1 of the ECHR so that the responsibility of Contracting States can be involved by acts and omissions of their authorities which produce effects outside their own territory.⁵⁰ This passage is important since it does not specify that the acts or omissions of the State need to be conducted outside that State’s territory. It follows that a state party’s responsibility to guarantee human rights extraterritorially would be established if the act or omission produced *effects* outside that state’s own territory, regardless of where the act or omission originated.⁵¹ This is highly relevant to cases of human rights violations arising from transboundary pollution since the act or omission is conducted within the state’s own territory but produced effects abroad. Birnie, Boyle and Redgwell stated that if a state’s failure to control soldiers and judges abroad would entail responsibility then they should also be held responsible for the failure to control transboundary pollution from activities within their territory.⁵² Both activities, deploying soldiers and discharging pollution, are subject to the originating state’s own law and administrative control but *produce an extraterritorial effect*.⁵³

Explicit recognition that human rights treaties apply extraterritorially as a result of transboundary pollution was found in the IACtHR’s *Environment and Human Rights Advisory Opinion*.⁵⁴ Colombia raised a question concerning the interpretation of the term ‘jurisdiction’ in Article 1(1) of the ACHR in the context of compliance with environmental obligations ‘particularly in relation

⁴⁶ *Ibid.*, para 7.49.

⁴⁷ *Ibid.*, para. 7.52

⁴⁸ ICJ, *Aerial Herbicide Spraying*, at 279.

⁴⁹ Council of Europe, *Manual on Human Rights and the Environment*, 2nd edn. (Council of Europe Publishing, 2012), 114, available at: https://www.echr.coe.int/librarydocs/dh_dev_manual_environment_eng.pdf.

⁵⁰ ECtHR, *Loizidou v. Turkey* (1995), Preliminary Objections, Application No. 15318/89, para. 62.

⁵¹ John H. Knox, “Diagonal Environmental Rights,” in *Universal Human Rights and Extraterritorial Obligations*, edited by Mark Gibney and Sigrun Skogly, 82-103, University of Pennsylvania Press (2010), 88.

⁵² Patricia Birnie, Alan Boyle and Catherine Redgwell, *International Law and the Environment*, 3rd edn. (Oxford University Press, 2009), 299.

⁵³ *Ibid.*

⁵⁴ Inter-American Court of Human Rights (IACtHR), 15 November 2017, *Environment and Human Rights*, Advisory Opinion OC-23/17 (2017) Serie A No. 23 (*Environment and Human Rights Advisory Opinion*).

to conducts committed outside the national territory of a State, or with effects beyond the national territory of a State'.⁵⁵ In the advisory opinion, the IACtHR held that:

Regarding transboundary damage, a person is subject to the jurisdiction of the State of origin, if there is a causal connection between the incident that took place on its territory and the violation of the human rights of persons outside its territory. The exercise of jurisdiction arises when the State of origin exercises effective control of the activities that caused the damage and consequent violation of human rights.⁵⁶

The Advisory Opinion further highlighted that the state has a due diligence obligation to take all appropriate measure to protect and guarantee human rights from environmental harm both inside and outside their territories.⁵⁷ There may be arguments against imposing this obligation upon states parties, limiting a state's extraterritorial human rights obligation to prevent transboundary environmental harm only towards conduct that is directly attributable to the state. The reasoning behind this argument is that the obligation to secure or ensure human rights outside a state's own territory would require a far greater degree of control that can only be achieved by establishing effective control over an area.⁵⁸

The authors disagree with such restriction. The extraterritorial application of human rights treaties, such as the ICCPR, should extend to the positive obligation of the state to control private actors from conducting activities that would cause transboundary pollution. The requirement of effective control over an area in cases of transboundary environmental harm is unnecessary since the state already has a high degree of control over activities of private actors which cause environmental damage.⁵⁹ Most of the time the state has made a significant contribution towards enabling such activities, such as granting licenses allowing the business to operate or failing to enforce its own regulations.⁶⁰

⁵⁵ Ricardo Abello-Galvis and Walter Arevalo-Ramirez, "Inter-American Court of Human Rights Advisory Opinion OC-23/17: Jurisdictional, procedural and substantive implications of human rights duties in the context of environmental protection," *RECIEL* 28, no. 2 (2019): 218, doi: 10.1111/reel.12290.

⁵⁶ IACtHR, *Environment and Human Rights Advisory Opinion*, para. 101.

⁵⁷ *Ibid.*, para. 123-5. See also Angeliki Papantoniou, "Rights to life and to personal integrity in environmental matters - environmental rights - extraterritorial jurisdiction - principles of prevention, precaution, cooperation," *American Journal of International Law* 112, no. 3 (2018): 463-4, doi: 10.1017/ajil.2018.54.

⁵⁸ Hugh King, "The Extraterritorial Human Rights Obligations of States," *Human Rights Law Review* 9, no. 4. (2009): 521-556, doi: 10.1093/hrlr/ngp028, 542; Erik Roxstorm and Gibney, "Human Rights and State Jurisdiction," *Human Rights Review* 18 (2017): 129-150, doi: 10.1007/s12142-016-0441-3, 130.

⁵⁹ Alan Boyle, "Human Rights and the Environment: Where Next?," *The European Journal of International Law* 23, no. 3. (2012): 613-642. doi: 10.1093/ejil/chs054, 639-640; Sumudu Atapattu and Andrea Schapper, *Human Rights and the Environment: Key Issues* (Routledge, 2019), 301.

⁶⁰ John H. Knox, "Diagonal Environmental Rights," in *Universal Human Rights and Extraterritorial Ob-*

Limiting the extraterritorial obligation of states only towards conduct attributable to it -its negative obligation to respect- would create a perverse incentive for states to turn a blind eye on the negative human rights effects of its failure to exercise due diligence. Let's alter the facts of the *Aerial Herbicide Case* slightly so that the herbicides were used purely by private actors. If Colombia had foreseen the transboundary human rights violation that the spraying would cause, yet failed to enact and enforce adequate regulation to suppress the spraying, it would be unconscionable that Colombia avoid responsibility for violating the human rights of individuals in Ecuador.⁶¹

To circumvent such a restriction, the threshold of jurisdiction should be determined by assessing the state's 'control over situations'.⁶² According to this interpretation, 'the focus lies on the control of the (harmful) circumstances' and does away with the need for the requirement of physical presence 'on the ground' where the violations are perpetrated.⁶³ This would reasonably extend towards cases where the activity occurs within the state's territory but produces effects outside its borders, such as transboundary environmental damage or cross-border surveillance activities.⁶⁴

This model of application was endorsed by the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights (Maastricht Principles), which was developed by international law experts from all regions of the world with the aim of clarifying the extraterritorial obligations of a state to respect, protect and fulfill economic, social and cultural rights (ESCR).⁶⁵ Principle 9 of the Maastricht Principles defines a state's scope of jurisdiction, providing that the extraterritorial obligation of the state applies to 'situations over which it exercises effective control' and 'situations over which State acts or omissions bring about foreseeable effects on the enjoyment of economic, social and cultural rights, whether within or outside its territory.'⁶⁶

While the Maastricht Principles were created to apply towards ESCR, the author sees no reason why the scope of jurisdiction provided in Principle 9

ligations, edited by Mark Gibney and Sigrun Skogly, 82-103. University of Pennsylvania Press, 2010, 82.

⁶¹ See Boyle, "Human Rights and the Environment: Where Next?," *The European Journal of International Law* 23, no. 3. (2012): 613-642. doi: 10.1093/ejil/chs054, 640; Atapattu and Schapper, *Human Rights and the Environment: Key Issues*, Routledge, 289.

⁶² Tilmann Altwicker, "Transnationalizing Rights: International Human Rights Law in Cross-Border Contexts," *European Journal of International Law* 29, no. 2. (2018): 581-606. doi: 10.1093/ejil/chy004, 590.

⁶³ *Ibid.*

⁶⁴ *Ibid.* See also Ginevra Le Moli, "The Human Rights Committee, Environmental Protection and the Right to Life," *International and Comparative Law Quarterly* 69 (2020): 746, doi: 10.1017/S0020589320000123.

⁶⁵ Maastricht Principles on Extra-Territorial Obligations of States, adopted 28 September 2011 (Maastricht Principles).

⁶⁶ Principle 9, Maastricht Principles. See also De Schutter et al., "Commentary to the Maastricht Principles," 1106-9; Atapattu and Schapper, *Human Rights and the Environment*, 292.

could not also apply to the ICCPR. This is evident in the commentary to the Maastricht Principles, which reference decisions of the HRC numerous times to establish the threshold of a state's 'jurisdiction'.⁶⁷ An objection that may be raised against setting the same standard for the extraterritorial application of ESCR and ICCPR is that the nature of the rights in question are fundamentally different. Article 2(1) of the ICCPR obliges state parties to 'undertake to respect and to ensure' which focuses more on the negative obligation of the states, whereas the nature of the obligations of state parties under the ICESCR as provided by Article 2(1) ICESCR is to undertake to take steps 'to the maximum of its available resources, with a view to achieving progressively the full realization of the rights'.⁶⁸ However, the HRC has reaffirmed that a state's party's obligations under the ICCPR involves the positive obligation to protect human rights, stating in its General Comment No. 31 that the ICCPR requires 'States Parties adopt legislative, judicial, administrative, educative and other appropriate measures in order to fulfil their legal obligations'.⁶⁹ There is no reason why there should be a distinction between the threshold of 'jurisdiction' in treaties guaranteeing ESCR and the ICCPR.

Additionally, the interpretation of the extraterritorial application of Article 2(1) must be consistent with and give effect to the object and purpose of the ICCPR.⁷⁰ The foundational principle of all human rights treaties is that of the universality of human rights, which dictates that all states have direct and enforceable human rights obligations *vis-à-vis* all individuals in the world.⁷¹ When a state consents to be bound by a human rights treaty, they adhere to be bound by its provisions not because of reasons concerning the advancement of its own self-interest (national security and economic advancement), but because each state party has a genuine commitment to the protection of the basic rights of all human beings.⁷² This is derived from the preamble of the ICCPR, which provides that 'recognition of the inherent

⁶⁷ De Schutter et al., "Commentary to the Maastricht Principles," 1106-9.

⁶⁸ Article 2(1), ICCPR; Article 2(1), ICESCR. See also UN Economic and Social Council (ECOSOC), General Comment No 3: The Nature of States Parties' Obligations (Art. 2, para. 1, of the Covenant) (14 December 1990), UN Doc. E/1991/23, paras 9-10; Thomas Buergenthal, "Human Rights," *Max Planck Encyclopedias of International Law* (2007): para. 14, available at: <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e810>; Olivier De Schutter, *International Human Rights Law: Cases, Materials, Commentary*, 2nd edn. (Cambridge University Press, 2014), 18.

⁶⁹ HRC, General Comment No. 31, para. 7.

⁷⁰ Article 31(1), Vienna Convention on the Law of Treaties, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980). See also Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, 2nd revised edn. (N.P. Engel, 2005), 2.

⁷¹ Marko Milanovic, *Extraterritorial Application of Human Rights Treaties*, Oxford University Press (2011), 56; Roxstorm and Gibney, "Human Rights and State Jurisdiction," 136.

⁷² HRC, General Comment No. 31, para. 1; Erik Roxstorm and Gibney, "Human Rights and State Jurisdiction," *Human Rights Review* 18. (2017): 129-150, doi: 10.1007/s12142-016-0441-3, 137; Atapattu and Schapper, *Human Rights and the Environment*, Routledge (2019), 300.

dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world' and that state parties commit themselves to 'to promote universal respect for, and observance of, human rights and freedoms'.⁷³ An interpretation of Article 2(1) ICCPR that allows a state to commit violations of human rights merely because the individuals affected were located abroad would be fundamentally inconsistent with the object and purpose of the ICCPR.⁷⁴ Since the effects of transboundary pollution pose a threat to the enjoyment of human rights, interpreting Article 2(1) so that an individual whose human rights have been affected by transboundary pollution would be 'subject to the jurisdiction' of the originating state is consistent with the object and purpose of the ICCPR.

An argument against the pure application of the universality principle would be the need to achieve the effectiveness of human rights obligations. Effectiveness places weight on the state's actual capacity to ensure the human rights and thus a certain degree of control is required for the state to effectively ensure human rights.⁷⁵ It follows that interpreting 'jurisdiction' by assessing a state's 'control over situations' may deprive the essence of effectiveness.⁷⁶ The authors argue that 'effective control over situations' adequately balances universality with effectiveness. It prevents states from avoiding responsibility for violating the human rights of individuals outside its territory, while at the same time it does not impose an unreasonable or disproportionate burden upon the state. Effectiveness is not disregarded nor compromised. The originating state of the transboundary pollution has the adequate capacity to control the activities which produce the harmful effects since the activity is fully located within its own territory. Thus, an obligation of due diligence is imposed upon the state to ensure that activities occurring within its territory does not produce harmful effects abroad.⁷⁷

C. RECONCILING THE EXTRATERRITORIAL APPLICATION OF THE ICCPR WITH STATE SOVEREIGNTY

States may be reluctant to accept the extraterritorial application of the

⁷³ Preamble, ICCPR; Nowak, *U.N. Covenant on Civil and Political Rights*, 3.

⁷⁴ A. Zimmermann, "Extraterritorial Application of Human Rights Treaties - The Case of Israel and the Palestinian Territories Revisited" in *International Law between Universalism and Fragmentatio*, edited by I. Buffard et al., 747-66, Koninklijke Brill NV, 2008; John H. Knox, "Diagonal Environmental Rights" in *Universal Human Rights and Extraterritorial Obligations*, edited by Mark Gibney and Sigrun Skogly, 82-103, University of Pennsylvania Press (2010).

⁷⁵ Marko Milanovic, *Extraterritorial Application of Human Rights Treaties* (Oxford University Press, 2011), 109.

⁷⁶ Tilmann Altwicker, "Transnationalizing Rights: International Human Rights Law in Cross-Border Contexts," *European Journal of International Law* 29, no. 2. (2018): 581-606, doi: 10.1093/ejil/chy004.

⁷⁷ *Ibid.*, at 602-4; Sumudu Atapattu and Schapper, *Human Rights and the Environment: Key Issues* (Routledge, 2019), 303.

ICCPR, as the notion of “extraterritorial jurisdiction” is more often used within the context of international criminal law and applied within the context of grave breaches of international law, such as crimes against humanity. However, the exercise of criminal jurisdiction for acts that occur beyond a State’s sovereign territory is not a foreign concept within criminal law.

This can be seen in Article 12(2)(a) of the Rome Statute of the International Criminal Court (Rome Statute) concerning the preconditions to the exercise of the International Criminal Court’s (ICC) jurisdiction.⁷⁸ The article provides that the ICC shall have jurisdiction where the crime was conducted on the territory of a State party to the Rome Statute. The formulation of the article reflects the territoriality principle and the sovereignty of a state, which asserts that states have the right to exercise jurisdiction over persons, property and conduct occurring in its territory.⁷⁹ The territoriality principle applies towards transnational circumstances to address crimes that involve more than just one state. It is accepted that a state may invoke the territoriality principle to exercise its jurisdiction where at least part of the conduct takes place within its own territory.

Widespread and consistent state practice divides the territoriality principle into two categories: objective territorial and subjective territorial. According to the objective territoriality principle, the state may assert its territorial jurisdiction if the crime is initiated abroad but completed or finished in the state’s territory. On the other hand, the subjective territoriality principle allows a state to assert its territorial jurisdiction if the crime has been initiated in the state’s territory but was completed abroad.

The objective territorial principle was applied by the Pre-Trial Chamber III of the ICC in its decision to authorize an investigation into the situation in *Bangladesh/Myanmar*.⁸⁰ A jurisdictional hurdle that had to be overcome by the ICC was the fact that Myanmar, where the criminal conduct took place, was not a state party to the Rome Statute and hence the preconditions for the exercise of jurisdiction under Article 12(2)(a) of the Rome Statute had not been fulfilled.⁸¹ However, the ICC relied on the objective territoriality

⁷⁸ Rome Statute of the International Criminal Court, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) (Rome Statute), art 12(2)(a).

⁷⁹ William A. Schabas, Giulia Pecorella, “Article 12: Preconditions to the exercise of jurisdiction” in Otto Triffterer, Kai Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary* (3rd edn, C.H. Beck, Hart, Nomos 2016), 681-682.

⁸⁰ *Situation in the People’s Republic of Bangladesh/Republic of the Union of Myanmar* (Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People’s Republic of Bangladesh/Republic of the Union of Myanmar) ICC-01/19 (14 November 2019) (*Situation in Bangladesh/Myanmar*).

⁸¹ *Ibid.*, para 45.

principle, reaffirming its status as a customary international law.⁸² The ICC thus held that it did indeed have jurisdiction over the matter since the alleged crime of deportation of civilians across the Bangladesh-Myanmar border ‘clearly establishes a territorial link on the basis of the *actus reus* of this crime (i.e. the crossing into Bangladesh by the victims).’⁸³

From the analysis of the territoriality principle, we can see how applying this principle would be useful in the interpretation of ‘jurisdiction’ under human rights treaties as it relates to transboundary environmental harm. Specifically, by applying the subjective territoriality principle to ‘jurisdiction’ under human rights treaties, the originating state of the transboundary environmental harm asserts jurisdiction over individuals located abroad since, although the conduct was initiated within the originating state’s own territory, it produces effects and is thus ‘completed’ abroad.

An obstacle towards the extraterritorial application of the ICCPR, relating to the transboundary haze pollution specifically, is the potential of conflicting obligations with the AATHP. Implementing the extraterritorial application of the ICCPR to the situation of the Southeast Asian haze would scrutinize Indonesia’s sole responsibility to guarantee human rights, as the haze originated from Indonesian territory. However, the spirit of the AATHP emphasizes mutual cooperation and assistance between its State parties.⁸⁴ In pursuing the objectives of the AATHP, Article 4(1) obligates State parties to “Co-operate in developing and implementing measures to prevent and monitor transboundary haze pollution [...] by exchange of information and technology, and the provision of mutual assistance.”⁸⁵ The emphasis on mutual cooperation is also reflected in the establishment of the ASEAN Co-ordinating Centre for Transboundary Haze Pollution Control and the ASEAN Transboundary Haze Pollution Control Fund.⁸⁶ Taking these factors into account, Indonesia and other Southeast Asian countries may be reluctant to apply obligations arising out of the ICCPR toward the haze problem in favour of implementing the obligations of the AATHP.

⁸² *Ibid.*, paras 56-57.

⁸³ *Ibid.*, para 62.

⁸⁴ Daniel Heilmann, “After Indonesia’s Ratification: The ASEAN Agreement on Transboundary Haze Pollution and Its Effectiveness As a Regional Environmental Governance Tool,” *Journal of Current Southeast Asian Affairs* 34, no. 3. (2015): 95-121, doi: 10.1177/186810341503400304.

⁸⁵ ASEAN Agreement on Transboundary Haze Pollution, opened for signature 10 June 2002 (entered into force 25 November 2003) (AATHP), art. 4(1).

⁸⁶ AATHP, arts. 5 and 20.

III. ASSESSING INDONESIA'S EXTRATERRITORIAL HUMAN RIGHTS OBLIGATION ARISING FROM THE TRANSBOUNDARY HAZE

The effects of the haze pollution caused by forest fires in Indonesia are felt throughout the Southeast Asian region.⁸⁷ During the months of June to October, prevailing northerly winds carry the haze to countries neighboring Indonesia such as Malaysia and Singapore, causing health issues and other economic losses to the affected populations.⁸⁸ Examining the haze pollution problem through a human rights perspective may instill further urgency for Indonesia to increase prevention and mitigation efforts. Applying the threshold of 'jurisdiction' elaborated in the last section, this section argues that individuals outside Indonesia whose human rights have been affected by the haze pollution are 'subject to the jurisdiction' of Indonesia as the source of the haze.

A. ESTABLISHING A CAUSAL LINK BETWEEN THE OMISSION OF INDONESIA AND THE DAMAGES INCURRED ABROAD

In the *Environment and Human Rights Advisory Opinion*, the IACtHR emphasized that 'a causal link must exist between the damage caused and the action or omission of the state of origin, taken within its territory or under its jurisdiction', though it did not clarify the extent of this causal link.⁸⁹ The establishment of this causal link is necessary to ensure that the threshold of 'jurisdiction' is not rendered obsolete and so that states are not held responsible for damages they did not cause.⁹⁰ Consistent with the decisions of international courts, a causal link is established where the damages would normally flow from the state's act or omission, taking into account whether the state knew or should have known of the damages from its conduct or lack thereof.⁹¹ Thus, establishing Indonesia's responsibility for failing to comply

⁸⁷ C.L.M. Reddington et al., "Contribution of vegetation and peat fires to particulate air pollution in Southeast Asia," *Environmental Research Letters* 9. (2014): 1-12, doi: 10.1088/1748-9326/9/9/094006, 10; D. V. Spracklen et al., "Industrial concessions, fires and air pollution in Equatorial Asia," *Environmental Research Letters* 10 (2015): 1, doi: 10.1088/1748-9326/10/9/091001.

⁸⁸ Janice S.H. Lee et al., "Toward clearer skies: Challenges in regulating transboundary haze in Southeast Asia," *Environmental Science and Policy* 55. (2016): 87-95, doi: 10.1016/j.envsci.2015.09.008.88.

⁸⁹ IACtHR, *Environment and Human Rights Advisory Opinion*, para. 101; Papantoniou, "Rights to life and to personal integrity," 465.

⁹⁰ Erik Roxstorm and Gibney, "Human Rights and State Jurisdiction," *Human Rights Review* 18 (2017): 129-150, doi: 10.1007/s12142-016-0441-3, 146.

⁹¹ Xue Hanqin, *Transboundary Damage in International Law* (Cambridge University Press, 2003), 178; León Castellanos-Jankiewicz, "Causation and International State Responsibility," (Amsterdam Law School Research Paper No. 2012-56, University of Amsterdam, Dec. 2012), 52, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2039268; De Schutter et al., "Commentary to the Maastricht Principles," 1112-4; Dinah Shelton, *Remedies in International Human Rights Law*, 3rd edn. (Oxford University Press, 2015), 279; Vladislava Stoyanova, "Causation between State Omission and Harm within the Framework

with its extraterritorial human rights obligation to prevent transboundary haze pollution requires analyzing whether there is a causal link between the acts and/or omissions of the Indonesian government, and the damages suffered by individuals affected by the haze.

1. Health Effects Of The Haze Pollution In Neighboring States

The haze pollution that emits as a result of wildfires in Indonesia release fine particulate matter into the air, causing significant air pollution to the affected areas.⁹² The World Health Organization has stated that air pollution represents the biggest environmental risk to health, killing approximately three million people annually with Southeast Asia as one of the most affected regions.⁹³ Air pollution has both short-term and long-term health effects, where breathing unhealthy air could lead to respiratory conditions and even cancer.⁹⁴ Data shows that in Singapore, the decrease in air quality caused by the haze is significantly associated with an increased percentage of upper respiratory tract illness, asthma and rhinitis.⁹⁵ Another study demonstrates a significant association between an increase in air pollutants and the rate of mortality in Singapore owing to ‘an intermix of upper and lower respiratory tract infection and inflammation, allergic and hyperimmune reactions, oncologic implications, cardiovascular diseases, and distributed complications throughout the body, as mechanisms contributing to the degradation of health’.⁹⁶

More severely, a study estimates an additional 11,880 of all-cause premature mortalities due to short term exposure to particulate matter associated with the 2015 haze disaster.⁹⁷ In the long-term, researchers from Harvard and Columbia find that the 2015 haze disaster has caused an estimated 100,300 premature deaths: 91,600 (24,000 – 159,200) in Indonesia, 6,500 (1,700 – 11,300) in

of Positive Obligations under the European Convention on Human Rights,” *Human Rights Law Review* 18 (2018): 314, doi: 10.1093/hrlr/ngy004; Le Moli, “The Human Rights Committee, Environmental Protection and the Right to Life,” *International and Comparative Law Quarterly* 69. (2020): 735-752, doi: 10.1017/S0020589320000123.747.

⁹² C.L.M. Yoshioka Reddington et al., “Contribution of vegetation and peat fires to particulate air pollution in Southeast Asia,” *Environmental Research Letters* 9 (2014): 1-12, doi: 10.1088/1748-9326/9/9/094006

⁹³ World Health Organization, “Ambient Air Pollution: A Global Assessment of Exposure and Burden of Disease,” (2016), 49, available at: <https://www.who.int/phe/publications/air-pollution-global-assessment/en/>.

⁹⁴ Jonathan M. Samet and Sofia Gruskin, “Air Pollution, Health, and Human Rights,” *Lancet Respir Med.* 3, no. 2 (2015): 98-100, doi:10.1016/S2213-2600(14)70145-6; Dana Loomis et al. “The carcinogenicity of outdoor air pollution,” *Lancet Oncol.* 14, no. 3 (2014): 1262-3, doi: 10.1016/s1470-2045(13)70487-x.

⁹⁵ Shanta C. Emmanuel, “Impact to Lung Health of Haze from Forest Fires: The Singapore Experience,” *Respirology* 5, no. 2 (2000): 179-180.

⁹⁶ Andrew F. W. Ho et al., “The Relationship Between Air Pollution and All-Cause Mortality in Singapore,” *Atmosphere* 11, no. 1 (2019): 6, doi: 10.3390/atmos11010009.

⁹⁷ P. Crippa et al., “Population exposure to hazardous air quality due to the 2015 fires in Equatorial Asia,” *Scientific Reports* 6 (2016): 4-5, doi: 10.1038/srep37074.

Malaysia, and 2,200 (600–3,800) in Singapore.⁹⁸

These figures serve as insurmountable evidence that the haze pollution has a negative impact to the health of the affected population in neighboring countries. The existence of this link may trigger Indonesia's extraterritorial obligation pursuant to Article 2(1) of the ICCPR. In the event that affected individuals outside Indonesia's territory are 'subject to the jurisdiction' of Indonesia for the purpose of Article 2(1) of the ICCPR., Indonesia is extraterritorially obligated to guarantee human rights by preventing the haze pollution, and may be held responsible for violations of human rights arising out of the transboundary haze pollution.

IV. POSSIBLE VIOLATIONS OF THE ICCPR ARISING FROM THE TRANSBOUNDARY HAZE POLLUTION

Having established that individuals exposed to the haze pollution are 'subject to the jurisdiction' of Indonesia, the following section analyzes the possible violations of the human rights guaranteed by the ICCPR. In recent years, much attention has been paid to the relationship between human rights and the environment.⁹⁹ Knox and Pejan highlight that 'A healthy environment is necessary for the full enjoyment of human rights and, conversely, the exercise of rights (including rights to information, participation, and remedy) is critical to environmental protection'.¹⁰⁰ This has resulted in the 'greening' of existing fundamental human rights, such as the right to life, the right to health and the right to privacy.¹⁰¹ From excessive exploitation of natural resources to contamination emanating from industrial activities, states are now being held responsible for violations of human rights by failing to preserve the natural

⁹⁸ Shannon N. Koplitz et al., "Public health impacts of the severe haze in Equatorial Asia in September–October 2015: demonstration of a new framework for informing fire management strategies to reduce downwind smoke exposure," *Environmental Research Letters* 11 (2016): 6-7, doi: 10.1088/1748-9326/11/9/094023.

⁹⁹ ECOSOC, Final report prepared by Mrs. Fatma Zohra Ksentini, Special Rapporteur (6 July 1994), UN Doc. E/CN.4/Sub.2/1994/9; A. Kiss & A. C. Trindade, 'Two Major Challenges of Our Time: Human Rights and the Environment' (1995) 21 *Revista IIDH*, pp. 25-34; UN Human Rights Council, Report of the Special Rapporteur on Human Rights and the Environment: Framework Principles on Human Rights and the Environment (24 January 2018), UN Doc. A/HRC/37/59 (Framework Principles).

¹⁰⁰ John H. Knox and Ramin Pejan, eds., *The Human Right to a Healthy Environment* (Cambridge University Press, 2018), 1.

¹⁰¹ Sueli Girogetta, "The Right to a Healthy Environment, Human Rights and Sustainable Development." *International Environmental Agreements: Politics, Law and Economics* 2 (2002), 177; Patricia Birnie et al., *International Law and the Environment* (Oxford University Press, 3rd edn., 2009) 282; John H. Knox, "Diagonal Environmental Rights," in *Universal Human Rights and Extraterritorial Obligations*, edited by Mark Gibney and Sigrun Skogly, 82-103 (University of Pennsylvania Press, 2010), 84-5; Alan Boyle, "Human Rights and the Environment: Where Next?," *The European Journal of International Law* 23, no. 3. (2012): 613-642, doi: 10.1093/ejil/chs054, 614-5; UN Human Rights Council, Framework Principles, para. 12.

environment.¹⁰²

Air pollution constitutes a major threat to the enjoyment of human rights, as shown by evidence linking exposure to air pollution and adverse health effects.¹⁰³ The transboundary haze pollution undoubtedly exacerbates this problem in Southeast Asia, exposing populations to dangerous levels of air pollution during a haze event. The following section will analyze how the failure of Indonesia to prevent and mitigate the haze pollution constitute a violation of its human rights obligation, specifically the right to life under Article 6 and the right to private life and home under Article 17.

Articles 6 and 17 of the ICCPR impose upon its member states a negative obligation, as in the obligation not to arbitrarily deprive one's life or interfere with one's privacy and home, and a positive obligation, in that the state must adopt measures to guarantee the enjoyment of human rights.¹⁰⁴ This positive obligation is found within the wording of both Articles, which provide that these right be protected by law.¹⁰⁵ In 2019, the HRC adopted General Comment No. 36 to clarify a state party's obligation to guarantee the right to life under Article 6 of the ICCPR.¹⁰⁶ The HRC highlights that the right to life encompasses the right to be free from unnatural or premature death, and the right to enjoy a life with dignity, explicitly recognizing that environmental degradation constitutes a threat towards enjoyment of the right to life.¹⁰⁷ Paragraphs 26 and 62 obligate state parties to take appropriate measures to protect the right to life by addressing and preventing environmental degradation.¹⁰⁸

Recently, the HRC issued its decision on *Portillo Cáceres*, which addressed a violation of Articles 6 and 17 of the ICCPR arising from environmental degradation.¹⁰⁹ The case concerned the activities of agribusinesses which had been heavily fumigating its plantations with agrochemicals nearby

¹⁰² ECtHR, *López Ostra v. Spain* (1994), Application No. 16798/90; African Commission on Human & Peoples' Rights, *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria* (2002), Communication No. 155/96; ECtHR, *Öneryıldız v. Turkey* (2004), Application No. 48939/99 (*Öneryıldız*); ECtHR, *Fadeyeva v. Russia* (2005), Application No. 55723/00; ECtHR, *Cordella and Others v. Italy* (2019), Application Nos. 54414/13 and 54264/15; HRC, *Portillo Cáceres v. Paraguay* (2019), Communication No. 2751/2016, UN Doc. CCPR/C/126/D/2751/2016 (*Portillo Cáceres*).

¹⁰³ UN Human Rights Council, Report of the Special Rapporteur on Human Rights and the Environment: Clean Air and the Right to a Healthy and Sustainable Environment (8 January 2019), UN Doc. A/HRC/40/55; David R. Boyd, "The Human Right to Breathe Clean Air," *Annals of Global Health* 85, no. 1 (2019): 146-7, doi: 10.5334/aogh.2646.

¹⁰⁴ Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary*, 3rd edn. (Oxford University Press, 2013), 167.

¹⁰⁵ Articles 2(1) and 6(1), ICCPR. See also Le Moli, "The Human Rights Committee," 745.

¹⁰⁶ HRC, General Comment No. 36 (Article 6: Right to Life) (3 September 2019), UN Doc. CCPR/C/GC/36.

¹⁰⁷ *Ibid.*, paras 3, 26.

¹⁰⁸ *Ibid.*, paras 26, 62.

¹⁰⁹ HRC, *Portillo Cáceres*.

the homes of the authors in violation of domestic environmental laws.¹¹⁰ Pollution emanating from the agrochemicals have caused the contamination of essential crops, livestock and water wells that the authors heavily relied upon which lead to the death of Mr. Portillo Cáceres and the hospitalization of several other inhabitants of the Colonia Yerutí area.¹¹¹ The authors claimed that Paraguay's failure to perform due diligence to adequately control illegal polluting activities constituted a violation of the right to life under Article 6 and the right to privacy, family and home under Article 17 of the ICCPR.¹¹²

The HRC sided with the authors, holding that Paraguay's failure to control illegal polluting activities amounted to a violation of Articles 6 and 17 of the ICCPR.¹¹³ Despite numerous complaints and reports of the threats posed by fumigations on the authors' lives, Paraguay failed to adopt positive measures to protect the authors' human rights and let the fumigations continue.¹¹⁴ This decision affirms that, under Articles 6 and 17 of the ICCPR, state parties are obligated to take appropriate steps to ensure that an individual's human rights are not adversely affected by environmental degradation.¹¹⁵ This is achieved by enacting a legislative and administrative framework to protect the natural environment, as well as ensuring that such measures are properly implemented and that violators are punished as appropriate.¹¹⁶

From the aforementioned decisions and comments made by the HRC, State parties to the ICCPR have a due diligence obligation to protect the rights to life and private life by enacting legislation to prevent environmental degradation. Applying this legal standard to the Southeast Asian transboundary haze pollution, the effects of the haze pollution on the health of the exposed population may very well amount to a violation of Articles 6 and 17 of the ICCPR. Throughout the past decade, Indonesia has taken regulatory measures to prevent fires from occurring on its territory, and ultimately stop any further instances of transboundary haze pollution.¹¹⁷ First, Indonesia has enacted

¹¹⁰ *Ibid.*, paras 2.3.

¹¹¹ *Ibid.*, paras 2.5-.8.

¹¹² *Ibid.*, paras 3.5-6.

¹¹³ *Ibid.*, paras 7.5-8.

¹¹⁴ *Ibid.*, para. 7.5.

¹¹⁵ Ginevra Le Moli, "The Human Rights Committee, Environmental Protection and the Right to Life," *International and Comparative Law Quarterly* 69 (2020): 735-752. doi: 10.1017/S0020589320000123750.

¹¹⁶ HRC, *Portillo Cáceres*, para. 9. See also ECtHR, *Öneryıldız*, paras 89-90; Douwe Korff, *The right to life A guide to the implementation of Article 2 of the European Convention on Human Rights* (Council of Europe, 2006), 61-5, available at: <https://rm.coe.int/168007ff4e>; UN Human Rights Council, Framework Principles, paras 31-5.

¹¹⁷ David B. Jerger, "Indonesia's Role in Realizing the Goals of ASEAN's Agreement on Transboundary Haze Pollution," *Sustainable Development Law & Policy* 14, no. 1. (2014), 36; C.L.M Yoshioka Reddington et al., "Contribution of vegetation and peat fires to particulate air pollution in Southeast Asia," *Environmental Research Letters* 9 (2014): 1-12, doi: 10.1088/1748-9326/9/9/094006.43.

legislation prohibiting the burning of forests.¹¹⁸ For example, Article 69(1)(h) of the Environmental Protection Act bans the clearing of land by burning and imposes a minimum of 3 years in prison and a heavy fine for individuals who violate the provision.¹¹⁹ Second, Indonesia has increased enforcement of such regulations, revoking the licenses held by companies who break environmental regulation and prosecuting lawbreakers before the domestic court.¹²⁰ A recent decision of the Indonesian Supreme Court ordered a plantation company to pay IDR 1 trillion (USD 69 million) in fines for causing forest fires in Riau in 2015.¹²¹ Lastly, as of 2015 Indonesia has ratified the AATHP, being the last ASEAN member state to do so.¹²²

As of early 2022, there have been no major occurrences of the transboundary haze pollution since 2019. Moreover, 2020 saw Indonesia achieve a record low deforestation rate.¹²³ These conditions may serve as evidence of the positive impacts of Indonesia's preventive measures, such as moratoriums on forest clearing and mass revocations of permits.¹²⁴

Despite these positive trends, there are worries that governmental policies aimed at accelerating economic growth may undo the progress that has been made. It must be noted that the obligation of due diligence entails not only the adoption of appropriate rules, but also vigilance in the enforcement of such rules.¹²⁵ There are legitimate worries that recent developments, most notably the enactment of the controversial Job Creation Law, may erode environmental rule of law and accelerate deforestation leading to a high risk of future instances of transboundary haze.¹²⁶ Previous studies indicate that

¹¹⁸ Act of Indonesia No. 41 Year 1999 on Forestry, Art. 50(3)(d); Act of Indonesia No. 32 Year 2009 on Environmental Protection and Management (Environmental Protection Act), Art. 69(1)(h); Act of Indonesia No. 39 Year 2014 on Plantation, Art. 56.

¹¹⁹ Environmental Protection Act, Arts 69(1)(h), 108.

¹²⁰ Janice S. H. Lee et al., "Toward clearer skies: Challenges in regulating transboundary haze in Southeast Asia," *Environmental Science and Policy* 55 (2016): 87-95, doi: 10.1016/j.envsci.2015.09.00891; Helena Varkkey, "In 3 Years We Would Have Solved This": Jokowi, ASEAN And Transboundary Haze," *Jurnal Studi Pemerintahan* 8, no. 3 (2017): 283, doi: 10.18196/jgp.2017.0049.277.

¹²¹ *Kementerian Lingkungan Hidup dan Kehutanan RI vs PT. National Sago Prima* [2018] Supreme Court of Indonesia Decision No. 3067 K/Pdt/2018.

¹²² Daniel Heilmann, "After Indonesia's Ratification: The ASEAN Agreement on Transboundary Haze Pollution and Its Effectiveness As a Regional Environmental Governance Tool," *Journal of Current Southeast Asian Affairs* 34, no. 3. (2015): 95-121, doi: 10.1177/18681034150340030496.

¹²³ Hans N. Jong, "Deforestation in Indonesia hits record low, but experts fear a rebound" (Mongabay, 9 March 2021), available at <https://news.mongabay.com/2021/03/2021-deforestation-in-indonesia-hits-record-low-but-experts-fear-a-rebound/>; UN-REDD, "Record low deforestation rates in Indonesia despite ongoing pandemic" (13 January 2022), available at <https://www.un-redd.org/post/record-low-deforestation-rates-indonesia-despite-ongoing-pandemic>.

¹²⁴ *Ibid.*

¹²⁵ *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, 20 Apr. 2010, ICJ Reports (2010), p. 14, at 101, para. 197.

¹²⁶ Indonesia Center for Environmental Law, "Indonesia Environmental Law Outlook 2021 Proyeksi Keberlanjutan Lingkungan Hidup di Tengah Upaya Pemulihan Ekonomi" (January 2021), 30-33, available at

inadequate institutional capacity has resulted in the weak enforcement of environmental regulations.¹²⁷

Based on these conditions, in the event of future instances of transboundary haze pollution, any allegations of Indonesia's failure to comply with its extraterritorial human rights obligations under the ICCPR will have to carefully scrutinize whether Indonesia has fulfilled its due diligence obligation to prevent the haze from occurring.

V. CONCLUSION

This article has argued that Indonesia, as a state party to the ICCPR, has an extraterritorial obligation to protect the human rights of individuals abroad from the harmful effects of the transboundary haze pollution. Consequently, Indonesia may be held responsible for violating its obligations under the ICCPR by failing to prevent and mitigate the haze pollution. This is achieved through the extraterritorial application of the ICCPR. The *Environment and Human Rights Advisory Opinion* by the IACtHR is groundbreaking in that it recognizes that individuals whose human rights have been affected by transboundary pollution are 'subject to the jurisdiction' of the originating state.¹²⁸ In light of this advisory opinion, as well as the object and purpose of the ICCPR, 'jurisdiction' in Article 2(1) should be interpreted as a state's 'effective control over situations'. This interpretation would address cases of transboundary pollution where the activity occurs within a state's territory but produce effects outside its territory. To render the threshold of 'jurisdiction' effective and non-obsolete, the victim would still need to establish a causal link between the state's act or omission and the damages caused.

Applying these legal standards to the Southeast Asian haze, individuals

https://icel.or.id/storage/kertas_kebijakan/1646642684.pdf.

¹²⁷ Alan K. Tan, "Forest Fires of Indonesia: State Responsibility and International Liability," *International and Comparative Law Quarterly* 48, no. 4. (1999), 844-7; David Seth Jones, "ASEAN and transboundary haze pollution," *Asia Europe Journal* 4, no. 3. (2006), doi: 10.1007/s10308-006-0067-1, 444-5; CIFOR, "Clearing the smoke: The causes and consequences of Indonesia's firesm" accessed 5 December 2020, <https://forestsnews.cifor.org/37016/clearing-the-smoke-the-causes-and-consequences-of-indonesias-fires?fnl=en>; Daniel Heilmann, "After Indonesia's Ratification: The ASEAN Agreement on Transboundary Haze Pollution and Its Effectiveness As a Regional Environmental Governance Tool," *Journal of Current Southeast Asian Affairs* 34, no. 3. (2015): 95-121, doi: 10.1177/186810341503400304, 112-3; Janice S.H. Lee et al., "Toward clearer skies: Challenges in regulating transboundary haze in Southeast Asia," *Environmental Science and Policy* 55. (2016): 87-95. doi: 10.1016/j.envsci.2015.09.008, 88; Helena Varkkey, "The Politics of Fires and Haze in Southeast Asia," *Oxford Research Encyclopedia of Politics* (2017), available at: <https://oxfordre.com/politics/view/10.1093/acrefore/9780190228637.001.0001/acrefore-9780190228637-e-262..9>; Naiza Nazeer and Fumitaka Furuoka, "Overview of ASEAN Environment, Transboundary Haze Pollution Agreement and Public Health." *International Journal of Asia Pacific Studies* 13, no. 1. (2017): 73-94. doi: 10.21315/ijaps2017.13.1.4., 494-495.

¹²⁸ See Section 2.2.

located outside Indonesia's territory who have been affected by the haze pollution may be deemed as 'subject to the jurisdiction' of Indonesia and thus trigger Indonesia's obligation under Article 2(1) of the ICCPR to ensure that their human rights are not violated by haze pollution. Possible human rights violations arising from the haze pollution include the right to life guaranteed by Article 6 and the right to privacy, family, home or correspondence guaranteed by Article 17. The HRC has requested that Indonesia provide information on efforts to prevent and mitigate the effects of climate change and environmental degradation, specifically mentioning efforts to reduce deforestation.¹²⁹

While this article has established the legal arguments for holding Indonesia responsible, an analysis of the forums in which affected states or individuals can file a claim is beyond the scope of this paper. Indonesia may be held responsible through state-to-state dispute settlement, or through transnational litigation, each of which has its own jurisdictional obstacles.¹³⁰ By placing increased international pressure, it is hoped that in the near future Indonesia, through increased individual or joint action, can alleviate the haze pollution which has left Southeast Asia choking.

¹²⁹ HRC, List of issues prior to submission of the second periodic report of Indonesia (2 September 2020), UN Doc. CCPR/C/IDN/QPR/2, para. 10.

¹³⁰ Prisca Listiningrum, "Transboundary Civil Litigation for Victims of Southeast Asian Haze Pollution: Access to Justice and the Non-Discrimination Principles," *Transnational Environmental Law* 8, no. 1. (2018): 119-142, doi: 10.1017/S2047102518000298. See also Patricia Birnie et al., *International Law and the Environment* (Oxford University Press 3rd Edition, 2009), 303; Alan Boyle, "Human Rights and the Environment: Where Next?," *The European Journal of International Law* 23, no. 3. (2012): 613-642, doi: 10.1093/ejil/chs054

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