

Citizenship beyond national borders? Identifying mechanisms of public access and redress in international environmental regimes

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Introduction

Citizenship has traditionally been understood to denote shared membership of a political community defined by national identity and the geographical borders of the state. Of course, national communities and state membership rarely overlap neatly: it is the historic achievement of modern liberal democracies to have assigned citizenship status on the basis of equal rights of political participation and communication, rather than common ethnic ties or national beliefs. The crucial move here was the conferral of a set of rights and obligations on all members of the state who, in democratic political systems, are assumed to have consented to this form of association. As free and equal individuals, they have access to processes of political representation and communication which accord legitimacy to their governments (and, at least in principle, hold them to account). As citizens, that is to say, their membership of – and identity with – the political community is formally bound up with its democratic construction. To be sure, their formal affiliation is still to a territorial state, which, under the enduring principle of sovereignty, is afforded both supreme domestic authority and legal recognition in the international arena. But in democratic states this ruling authority is understood to derive from the popular self-determination of the citizens.

Insofar as these states have addressed fairly and (reasonably) effectively the general concerns of their constituent populations, there has been little need to question their exclusive determination of citizenship rights, for democratic entitlements and obligations have aligned comfortably with state membership. But this happy correspondence of citizen self-determination with a national government has been upset by the increasing willingness of states to share sovereignty in order to address new economic, environmental and security interdependencies. The ‘unbundling’ of functional governance from fixed territories has seen citizens give up their formal approval of key policy decisions in exchange for a more remote, indirect say in supra- or international decision-making bodies (Hilson 2001: p 336). Efforts to address growing transnational flows of ecological harm are at the forefront of these governance transformations, as is evident in the proliferation of multilateral environmental agreements (MEAs) over the past three or four decades. For citizens in countries facing transboundary ecological risks, the incapacity of their home states unilaterally to reduce these threats represents a potential breach of a core citizenship entitlement – the right to protection from injury caused by activities taking place beyond the territorial borders of their home country. Both the authority of a state over its citizens and their identification with it *as* citizens are deeply unsettled by such a *protection failure*: their state is exposed as incapable of preventing damage to their lives and vital interests (Jones 1999: pp 217-22). The pooling of sovereignty within MEAs may be the only realistic way for states to seek to prevent an ecological protection failure, yet the indeterminacy of international rule-making processes and outcomes clouds further the traditionally clear lines of political accountability running between citizens and their governing representatives.

If we accept that freedom of self-determination – founded on equal opportunities for participation – is at the heart of democratic citizenship, then the need to regulate transboundary (and global) environmental risks creates realms of public concern

across and beyond nation-state borders. These communities of shared fate are multiple and dynamic: they expose the political shortfall of the entitlement of citizens to have an influence on decisions significantly affecting their interests, as many such decisions are now taken outside the reach of their home states. Transnational notions of citizenship invoke the right of democratic governance for individuals affected by extra-territorial institutional orders and actors. In the first place this is a moral appeal that holds all persons to be entitled to equal standing with regard to the defence of their vital interests. Not surprisingly, the most obvious source of such universal moral regard is human rights protection, for violations of basic rights commonly elicit feelings of indignation amongst distant onlookers as well as co-nationals (Habermas 2001: pp107-8). Some accounts of cosmopolitan obligations have emphasized the central role of human rights in determining participation rights in decision-making, as well as principles of distributive justice. From this cosmopolitan perspective, safeguarding individual well-being is paramount, and there has been some recognition that this protection may well extend beyond personal integrity and autonomy to encompass vital ecological conditions of existence (Jones 1999: pp 229-30; Mason 1999: pp 58-63).

The subject of this paper is less the moral justification of a cosmopolitan citizenship than the identification of legal norms supporting perhaps its most relevant duty for environmental protection – the prevention of significant harm to non-national affected publics. There is an emerging body of international law which, although state-centred in its formulation and implementation, is attuned both to safeguarding collective ecological interests and to allowing at least some input from public actors in administering its constituent environmental obligations. The cosmopolitan scrutiny of sovereign state relations according to democratic criteria of interest representation and communication has, not so far, examined the existing regulation of sources of transnational environmental harm (eg Held 1995; Linklater 1998). Yet it is the intersection of individual rights and responsibilities with (inter)state obligations that offers concrete possibilities for citizen participation in global decision-making. In this paper I begin by surveying customary and treaty-based law in order to highlight general obligations to prevent cross-border environmental harm, and show that these are not exclusively owed by and to states. This is followed by consideration, first, of those procedural public entitlements which support substantive environmental protection rules and, secondly, of nascent methods of public compliance and enforcement in international environmental law. Albeit slow, the emergence of access opportunities for individuals and non-governmental organizations (NGOs) in these regulatory domains raises the question, addressed in the concluding discussion, of what type of cosmopolitan responsibilities fall on individuals and groups as the counterpart of new environmental entitlements.

Environmental harm prevention

The prevention of harm is a core justification for the exercise of political authority in liberal democratic states and, in a more arbitrary or selective way, in illiberal states. Domestically, states first developed harm protection rules to regulate the behaviour of their citizens, while the experience of war prompted the emergence of international harm conventions to protect vulnerable groups (eg prisoners of war, civilians) from injury. Andrew Linklater (2001) observes behind the growth of ‘cosmopolitan harm conventions’ not just the mutual interest of states in regulating force but also the

accumulating influence of transnational norms which attach moral consideration to individuals and groups whatever their national citizenship status. The international military tribunals hosted in Nuremberg (1945) and Tokyo (1946) are commonly recognized as the historic watershed marking the onset of new cosmopolitan obligations on governments towards all persons within and outside their borders – moral requirements to protect human dignity which have, over time, become legally embedded in, for example, international conventions on genocide (1948), apartheid (1973), torture (1984) and terrorist bombings (1997) (Ratner and Abrams 2001). Of course, the preoccupation of humanitarian and human rights rules is with safeguarding the bodily integrity of human beings, and some commentators (eg Barry 1995) have noted that the liberal no-harm principle has been deeply anthropocentric from the start, blocking its application to non-human nature. However, state practice indicates otherwise: the growth of environmental regulation within and between countries attests to the widespread extension of harm prevention rules to non-human species and, more recently, the broader policy objective of ecological sustainability.

What merits attention here is the challenge to democratic frameworks of accountability arising from the nature of transnational environmental harm. Linklater contrasts the *abstract* forms of harm associated with environmental damage to the concrete injuries inflicted on fellow human beings by violators of human rights. Not only is the former type of harm often more diffuse in its generation and impacts, often making the determination of responsibility problematic, it typically entails the unforeseen consequence of routine market freedoms – liberties to produce and consume – being fostered by economic globalization (2001: pp 269-71). Growing market interdependencies and material transactions across state borders generate numerous environmental effects, rendering impractical and politically unfeasible any blanket prohibition of ecological harm. The international preference, instead, has been for states collectively to agree to prevent or restrict activities generating effects likely to exceed a set threshold level of environmental harm. Difficulties in disaggregating individual culpability for much transboundary harm has reinforced the existing propensity on international law to apportion responsibility for extra-territorial injury to *states*, so the duty to prevent harm to non-nationals has primarily been imposed on governments. States are deemed to be legally responsible if they have breached relevant treaty rule or customary obligations: whether there is a *cosmopolitan* citizen entitlement to the prevention of abstract environmental harm rests on the scope of its embodiment in international rule protecting general ecological interests (ie for everyone).

The International Law Commission (ILC) – the United Nations (UN) body charged with the codification and development of international law – has, in its work on state responsibility, concluded that there are indeed duties on states to cease and make reparations for wrongful injury (‘material or moral damage’) to collective interests. To be sure, these duties are attributed solely to states, but they entail remedying damage that may extend beyond injured states and the national publics represented by them. In its draft articles on state responsibility recommended to the UN General Assembly for development as an international convention, the ILC proposes, under Article 48(1), that any state other than an injured state is entitled to invoke the responsibility of another state if:

- (a) The obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or
- (b) The obligation breached is owed to the international community as a whole (International Law Commission 2001: p 56).

Applied to state environmental responsibility, the first type of breach might typically refer to an action of a treaty state that undermined a collective ecological interest protected by a MEA that it had ratified (eg a biodiversity conservation convention or a transboundary pollution convention); while the second type of breach would entail damage to vital ecological interests at such a level of seriousness that all states have a legal interest in preventing this happening. Such universal obligations to the international community (termed obligations *erga omnes*) are widely acknowledged in the human rights domain (eg prohibitions against acts of aggression, genocide and racial discrimination). A few environmental obligations have arguably received such recognition: these include deliberate massive pollution of the marine environment and atmospheric nuclear testing (Ragazzi 1997: pp 154-62; Peel 2001).

This shortfall in significance compared to human rights obligations reflects in part the historical novelty of international environmental rule-making beyond established relations of good neighbourliness between states. The seminal international statement on extra-territorial environmental harm prevention is commonly taken to be Principle 21 of the 1972 Stockholm Declaration on the Human Environment, where it serves as a limit to the exercise of state sovereignty over natural resources:

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 policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

As a declarative principle expressed in general terms, its legal force is by no means clear-cut; indeed, it has been argued to constitute a foundational ‘myth’ of international environmental responsibility at odds with state practice (Knox 2002). Yet the sustained influence of Principle 21 on UN General Assembly Resolutions and numerous MEAs suggests that this criticism is overstated. Significantly, the international community chose to embrace it again at the 1992 UN Conference on Environment and Development, where it became, slightly amended, Principle 2 of the Rio Declaration.

Principle 21 is also clearly reflected in paragraph 29 of the advisory opinion on the legality of the threat or use of nuclear weapons issued in 1996 by the International Court of Justice at the request of the UN General Assembly:

The Court recognizes that the environment is under daily threat and that the use of nuclear weapons could constitute a catastrophe for the environment. The Court also recognizes that the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn. 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.

There is some restraint here on the force and geographical scope of Principle 21: the term 'respect' is weaker than the requirement not to cause damage, while the application of the obligation to activities within the jurisdiction *and* control of states (instead of 'jurisdiction or control') limits its extra-territorial reach. Nevertheless, as Brown Weiss (1999) asserts, the advisory opinion represents an authoritative recognition that general environmental obligations exist in international law. Moreover, the cosmopolitan value of the obligation in question is reinforced by the court: not only does it have a global force purchase across space, the mention of 'generations unborn' admits of a universal application into the future.

Substantive endorsement of a general obligation on states to prevent damage to the environment is evident in a wide array of MEAs, including ones addressing air and marine pollution, climate change, biodiversity conservation, the spread of pests and diseases, radioactive contamination and hostile environmental modification techniques (Sands 1995: pp 194-97). Alongside its proposed state responsibility rules, the ILC has also recommended a draft convention on the prevention of transboundary harm from hazardous activities, which encompasses environmental degradation (International Law Commission 2001: pp 370-77). From this progressive development of international law, is it plausible to claim that, as inhabitants of a shared, vulnerable planet, we are all equal addressees – as cosmopolitan citizens – of the obligation on states of preventive action? Formally of course, states are the legal addressees as centres of sovereign authority, so that our cosmopolitan entitlement to ecological well-being is mediated through national political representatives: it is a right and responsibility, in other words, of state citizenship. However, this exclusive inter-state understanding is certainly disrupted by notions of common environmental responsibility. In its conservative form, this denotes the 'common concern of mankind' affirmed, for example, in the preambles to the 1992 Biological Diversity and Climate Change Conventions; but there is also the more radical principle of 'common heritage' first advanced at the UN in 1967 in relation to use of the deep seabed. As eventually embodied in Articles 136 and 137 of the 1982 Law of the Sea Convention, the common heritage principle suggests an obligation of common trusteeship for which the addressees are not just states but 'mankind as a whole', and while this legal framing of shared ownership has faced political opposition (notably from the United States), claims that it also applies to such spaces as Antarctica and the global atmosphere are morally justifiable in cosmopolitan terms (Franck 1995: pp 393-405; Taylor 1998: pp 258-97).

The general obligation of preventive action is one of conduct rather than result: states are not required to be guarantors against *any* environmental harm, only 'to take all necessary measure as may be expected of a reasonable government in all circumstances' (Okowa 2000, p 81). What is known as the requirement of due diligence enables an appreciation of context in the application of harm prevention rules, encompassing the likelihood and seriousness of the damage, the determination of causation, the governmental capacity of the source state and the cost-effectiveness of relevant regulatory measures. In allowing for differentiated responsibility, it can result in separate as well as diluted legal obligations; for example, in the implementation allowances and technical assistance targeted at developing countries

under the ozone protection and climate change regimes. Given diverse circumstances and needs, the notion of ‘common but differentiated responsibility’ is of course consistent with cosmopolitan environmental duties; although the typical focus on the special situation of poorer countries has sometimes deflected attention from the reverse side of this differentiation – that affluent states, with their far-reaching complicity in economic institutions producing systemic environmental injury, have a responsibility to meet more onerous obligations of harm prevention.

Where there is a threat of serious or irreversible damage, precautionary norms are increasingly invoked in international environmental law to shape what is expected of states under due diligence. As expressed by Principle 15 of the Rio Declaration on Environment and Development, the lack of full scientific certainty about potential effects should not be used as a reason for postponing cost-effective measures to prevent environmental degradation; and this principle, explicitly or implicitly, is endorsed in treaties on climate change, air pollution, marine pollution, transboundary movements in hazardous wastes and the conservation of biological diversity. Birnie and Boyle (2002: pp 115-21) suggest that the main effect of the principle is to lower the standard of proof before preventive action is required. As the environmental consequences of some activities are often difficult to establish, particularly over the long-term, then the legal duty on responsible states is to acknowledge potentially dangerous effects for which there are reasonable scientific grounds for concern. Again, an absolute prohibition of the current or proposed activity is not necessarily implied; but the expectations of diligent regulation are raised for the relevant obligations of conduct – environmental standard-setting, transboundary impact assessment, international cooperation, the adoption of clean production methods, systems of prior notification or authorization and so on.

Of course, such obligations often pertain to the behaviour of non-state actors, which raises the question whether private individuals or companies have a direct duty to cosmopolitan citizens to prevent environmental harm. Insofar as the conduct of private actors causes ecological damage outside their home state, that state has ‘secondary’ obligations to prevent that injury by means of the diligent regulation of their activities. The global reach of this requirement is most fully established in responsibility rules for the marine environment, where states have clear duties to prevent national vessels from polluting other national maritime areas and also the high seas environment (Smith 1988: pp 72-94). Yet these are still obligations where the home state of the harm producer is ultimately answerable for any damage caused. It is only where physical damage has actually taken place, where costs have been borne, that states have been willing to step back in order to pass the compensation burden onto private operators, accepting only residual responsibility (ie when, for whatever reason, the private operator is able to escape the full burden of compensation for environmental damage).

A less state-centred development of *private* environmental obligations is most evident, therefore, in the growing influence of cross-border *liability and compensation rules*; for example, in liability treaties on marine pollution, nuclear damage and the transboundary movement of hazardous wastes. The private responsibility rules in operation here rely on the harmonization of national civil liability systems through international agreements. Following innovations in the oil pollution liability regime, compensation obligations on private operators have been extended beyond personal

injury and property damage to environmental damage (Mason 2003). This rule development is part of a wider shift in global governance towards hybrid public-private forms of regulation where, because of political and technical challenges to state authority, countries have proved willing to accept standard-setting (eg radiation protection, food quality) and licensing procedures (eg vessel seaworthiness) shaped to a large degree by transnational networks of experts (Sand 1999; Falkner 2003). However, as these techniques move towards self-regulation, the clear lines of accountability found in state responsibility rules become blurred; and the cosmopolitan principle of equal respect for all interests is eroded by authority structures and legal mechanisms inaccessible to resource-poor individuals or groups.

In contrast to these private environmental governance initiatives, recent developments in international criminal law hold more cosmopolitan promise, at least for the prevention of severe harm. The 1998 (Rome) Statute of the International Criminal Court has established an institution with universal jurisdiction over what are agreed to be the most serious crimes of concern to the international community – genocide, crimes against humanity, war crimes and the crime of aggression. By departing from the previously exclusive right of states to determine the criminal law for their national citizens, the International Criminal Court feeds into what has been labelled the ‘individualization of responsibility’ for human rights violations; that is, the emergence of legal obligations of direct (individual) accountability alongside existing state responsibility rules (Nollkaemper 2003: p 631). Breaches of ‘peremptory norms’ are deemed to be of such grave concern to the international community and all peoples that culpable individuals (as well as states) are confronted directly with the consequences of their acts. Significantly, the Rome Statute empowers the Court with jurisdiction for intentional ‘widespread, long-term and severe damage to the natural environment’ as a result of planned or large-scale acts of war excessive in relation to their military objectives (Articles 8(1) and 8(2)(a)(iv)). While currently restricted to a category of war crimes, this seminal recognition of universal criminal responsibility for individuals carrying out massive trans(national) ecological destruction may well become a necessary sanction in a world facing the spread of weapons of mass destruction.

Procedural environmental entitlements

Since the end of the Cold War, the collective right of peoples to democratic governance has acquired growing legal recognition across the world. As evident in the extensive involvement of international organizations in monitoring multi-party elections and, more exceptionally, the use of UN Security Council-sanctioned military intervention to restore freely elected governments deposed by military coups (eg Haiti in 1994 and Sierra Leone in 1998), the external legitimacy of domestic systems of government is increasingly wedded to their realization of democratic entitlements for their citizens. The customary behaviour of states and their mutual interpretation of treaties (eg through rules of voluntary consent, transparency and ratification by national legislatures) is also entrenching democratic norms in international law, including of course for MEAs. This wave of democratization has invited both celebration and scepticism from commentators – one side invoking a positive spiral of popular self-determination and the other citing the selective, instrumental endorsement of democracy by powerful western states (see Fox and Roth 2000). Without entering this debate, we can nevertheless acknowledge the global spread of

the right of citizens to elect and hold accountable representative governments; and note that this creates the widespread expectation, for transboundary ecological problems, that the concerns of affected publics should be incorporated fairly in international rule-making.

Understood in cosmopolitan terms, the democratic entitlement can be expressed as a right for all those significantly affected by a political decision to have an equal opportunity to influence the making of that decision – *wherever that decision is made*. For Thomas Pogge, this human right to equal opportunity for political participation extends to international ecological regulation because of the significant harms and risks now placed on outsiders by the activities of national citizens (2002: pp 183-89). A common source of identity, as cosmopolitan citizens, for otherwise unrelated individuals is their shared experience of the cross-border ecological effects of material activities over which they typically have had little or no involvement. To recognize themselves together as transnational or even global publics, the reflexive move is that they perceive these consequences as adversely affecting their interests and therefore in need of regulation. Procedural rights and duties in support of such joint problem-solving would be expected to enable open assessments of ecological risks, inclusive deliberation among all relevant parties and consideration of the interests of those unable to contribute discursively – notably non-humans and future generations. Their lasting contribution to a ‘greening’ of citizenship would be to facilitate mutual learning about ecologically adaptive ways of living (Barry 1999: pp 226-36).

Principle 10 of the Rio Declaration, as endorsed by 176 states and the UN General Assembly, is the most widely supported international statement on procedural environmental obligations:

Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.

The focus on individual entitlements at the national level is in deference to established state sovereign powers and citizenship rights, yet there is also the acknowledgement that public participation may be needed at other scales of decision-making.

In its draft constitution on the prevention of transboundary harm from hazardous activities, the ILC, recalling in its preamble the Rio Declaration, codifies the relevant procedural obligations judged to have currency in international environmental law – prior authorization of risk-bearing activities, risk assessment, notification and information exchange, consultation of preventive measures and dispute settlement measures. Significantly, there is an explicit acceptance that states originating significant risk-bearing activities are required to inform and register the concerns of all affected publics, regardless of nationality. Article 13 stipulates that states shall ‘provide the public likely to be affected by an activity within the scope of the present

articles with relevant information relating to that activity, the risk involved and the harm which might result and ascertain their views (International Law Commission 2001: p 375). As with the other procedural articles, this provision essentially sets out a standard of diligent conduct expected of states to conform to agreed objectives for transboundary harm prevention.

Of course, these are all (inter)state obligations, but aside from any claim to equitable treatment between national publics, in Article 15 the ILC also expressly recognizes equal participation opportunities for individuals exposed to the risk of significant transboundary harm. Under the obligation of *non-discrimination*, these persons are to be granted access to judicial or administrative procedures of redress regardless of their nationality, residence or the place where the injury might occur. The non-discrimination principle embodies, at least for specified areas of application, the cosmopolitan ambition of individuals receiving equal access across borders to procedures with which they can protect their interests. As first formulated in the 1970s by the Organization for Economic Cooperation and Development, it calls on states to accept the transboundary effects of ecologically harmful activities located in their territories as potentially having the same legal significance as domestic effects. Explicit treaty obligations to that effect are not common - examples include Article 3 of the 1974 Nordic Convention on the Protection of the Environment and Article 9(3) of the 2001 Convention the Transboundary Effects of Industrial Accidents – and the principle is generally regarded as not being well developed in international environmental law (Birnie and Boyle 2002: pp 147-8, 269-70).

Nevertheless, procedural rights realizing non-discrimination goals are clearly in evidence in conventions addressing transboundary environmental impact assessment. The most comprehensive treaty in this area is the 1991 (Espoo) Convention on Environmental Impact Assessment in a Transboundary Context, negotiated under the auspices of the UN Economic Commission for Europe (ECE). Its central substantive requirement on parties is to take all appropriate and effective measures to prevent, reduce and control significant adverse transboundary impacts from proposed national activities. As noted by Knox (2002: pp 302-04), the procedural obligations in support of this goal directly apply norms of non-discrimination: parties are required to consider transboundary effects in their domestic environmental assessment procedures, and to open these procedures to affected non-national publics and their representatives. Like the draft ILC convention on prevention of transboundary harm, publics in affected states are entitled to notice of, and consultation on, the proposed activity, with the final decision required to take due account of their comments (albeit with no duty to refrain if the affected parties are still unhappy with the project). The positive obligation on states to conduct impact assessments for transboundary environmental effects is also found, outside the Espoo Convention, in issue-specific and regional MEAs; for example, the Nordic Environmental Protection Convention, the Law of the Sea Convention (Articles 204 to 206), the 1994 Convention on Nuclear Safety (Article 17), and the Convention on Biological Diversity (Article 14) (Sands 1995: pp 579-91; Okowa 2000: pp 132-36).

It would be misleading to presume that these state obligations to inform and consult non-national publics necessarily create cosmopolitan citizenship rights for all individuals under the protection of contracting states. Information provision, consultation and notification requirements within international environmental law are

found in numerous treaties, but have traditionally centred on inter-state obligations or, in terms of reporting and compliance monitoring, the legal relations between states and international organizations. Treaty obligations are highly significant, as in spite of declarative statements like Principle 10 of the Rio Declaration, there is evidence that, absent specific treaty commitments, states do not generally notify or consult other states before embarking on activities that generate transboundary environmental risks (Okowa 2000: p 169). Instruments like the Espoo Convention therefore set down detailed rules to ensure that the concerns of affected third parties are taken into account. The shift the Espoo Convention makes in treating the public of the affected party as having separate entitlements from state representatives is pushed further by MEAs vesting explicit procedural rights in legal or natural persons. Seminal treaty obligations here include the individual access to information rights in the 1992 (Paris) Convention for the Protection of the Marine Environment of the North-East Atlantic (Article 9) and the 1993 (Lugano) Convention on Civil Liability for Damage Resulting From Activities Dangerous to the Environment (Chapter III).

The 1998 (Aarhus) Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, developed like the Espoo Convention by the UNECE, is the most important elaboration of Principle 10 to be found in treaty law. Here procedural entitlements in environmental decision-making move beyond information rights to an expansive notion of public participation (covering specific activities, plans, programmes, policies and other legally binding instruments) and accessible review procedures. Much has been made of the ambition of the Aarhus Convention to increase citizen participation, which has clear cosmopolitan potential: a non-territorial notion of the 'public concerned' refers to those natural or legal persons affected or likely to be affected by, or having an interest in, the relevant decision-making (Article 2(4)). Under this definition, crucially, environmental NGOs are accorded a legal interest in participation and access to justice. Moreover, the non-discrimination principle is invoked in Article 3(9), stating that the provisions of the Convention apply to concerned publics whatever their nationality or domicile. To be sure, concern has been expressed that the Convention is too permissive in its treatment of public participation, deferring frequently in its provisions to 'national law requirements' (Lee and Abbot 2003). In force since October 2001, it is still too soon to judge whether this will turn out in practice to be a major weakness, although the embrace of the Convention by the European Union and member states has already induced strong regional rule development designed to implement it effectively.

Northern European states have, within the UNECE, championed the Aarhus recognition of environmental NGOs as legitimate bearers of procedural rights on behalf of affected publics. The European Eco-Forum network of environmental NGOs, which has received funding from most of these countries (eg Denmark, Finland, Germany, Norway, the Netherlands), participated in the UNECE conferences charged with drafting the Convention and is actively involved in assisting its monitoring and implementation. This input builds on the now established practice for NGOs, as observers, to attend meetings of the parties of environmental treaties, typically permitted unless at least one-third of member states object – a (non-voting) participation right first set out in Article 11(7) of the 1973 Convention on International Trade in Endangered Species, and one since included in a sizeable number of MEAs, including those on stratospheric ozone protection, transboundary management of hazardous wastes, climate change and the conservation of biological

diversity (Birnie and Boyle 2002: pp 216-17). It also reflects the wider consultative status accorded to NGOs by the UN in its international conferences and other decision-making mechanisms (eg the UN Human Rights Committee). And environmental NGOs have themselves of course campaigned vigorously for international recognition of environmental protection norms across numerous issue areas. If research has shown that their political influence on environmental treaty-building is often reliant on international negotiating contexts where NGOs still lack international legal personality (Arts 1999; Corell and Betsill 2001), the Aarhus Convention nevertheless endows them with novel entitlements in its implementation.

The transnational scope of such procedural rights has been reinforced by the UNECE in its recent sponsoring of a Protocol on Strategic Environmental Assessment to the Espoo Convention. Acknowledging in its preamble the Aarhus Convention, the 2003 Kiev Protocol conjoins the public participatory intent of the former – including its requirements for contracting parties to recognize and support environmental protection groups – with the prescribed consideration of the significant environmental effects of plans, programme and policies. The Protocol reaffirms the Espoo Convention provision that its public entitlements should be exercised without discrimination to national citizenship status (Article 3(7)). As with all UNECE treaty instruments, the geographical reach of this non-discrimination cannot extend beyond member states in Europe, North America and Central Asia; but geopolitical changes now mean that an unprecedented number of states could become signatories. The innovative development of environmental norms within the UNECE is rooted in a historical context of Western European security cooperation. With the post-Cold War emergence of democratic governance for countries in transition, the potential currency of these environmental protection rules has expanded considerably. Furthermore, the Executive Director of the UN Environment Programme has argued that these norms have a universal moral appeal warranting consideration of their legal codification outside the UNECE region (Economic Commission for Europe 2002: p 4).

Compliance and enforcement entitlements

As noted above, the expectation that non-state actors can effectively contribute to the implementation of international environmental obligations is embodied in the principle of non-discrimination – expressed in Principle 10 of the Rio Declaration, the ILC draft convention on the prevention of transboundary harm and, explicitly or implicitly, in a number of MEAs. Opening up judicial and non-judicial remedies to affected persons create at least the potential for more cosmopolitan interest representation. It also reveals an unwillingness to rely solely on state-centred mechanisms of compliance and dispute settlement in international environmental law. In part this reflects the inherent limitations of traditional compliance and enforcement procedures at this scale. Non-compliance of a state with its treaty obligations triggers a need to determine responsibility and possible remedies, yet typically this assessment requires the consent of the state in breach – a condition that holds for international adjudication more generally. Aside from grave criminal acts, only a state that has accepted the jurisdiction of an international enforcement mechanism is subject to its judgements. Assigning responsibility for transboundary environmental harm may be difficult enough within these constraints, when the causal connection between particular activities and injuries suffered may be contested between two states. When *multiple* source states are involved, encompassing disparate polluting activities and

numerous affected parties, these problems are obviously compounded; and traditional state responsibility rules for settling disputes are found even more wanting (Okowa 2000: pp 195-97).

It is not surprising, therefore, that intergovernmental environmental litigation is rare. In cases of cross-border damage caused by high-risk activities (eg ship-source oil pollution, nuclear contamination, hazardous waste transport and disposal), states have tended to opt for national civil remedies and other private law arrangements, such as insurance settlements and out-of-court payments to individual claimants. As already mentioned, the role here of international treaties has been to promote consistency in environmental compensation rules. And we need not impute altruistic motives to such state behaviour: even-handed, predictable treatment respects established norms that victims of significant transboundary harm should have their interests taken into account, but is also crucial for foreign trade and investment decision-making. Indeed, while private liability remedies are usually articulated in terms of non-discrimination, their origin in personal injury and property law reinforces the legal identification of victims as economic claimants defending individual welfare rather than citizens protecting shared ecological well-being. An innovative effort to recognize the latter role - that is, to graft public participation rights onto an international civil liability framework - is the 1993 Lugano Convention. In addition to its seminal information access provisions mentioned above, Article 18 of the treaty enables environmental protection organizations to request national courts to issue prohibition, prevention or reinstatement orders against operators of ecologically dangerous activities (Sands 1995: pp 673-77). Yet states have not rushed to ratify this treaty and, over ten years since it was opened for signature, the Lugano Convention has still to enter into force.

Furthermore, the existence of a non-discrimination principle within an MEA is not, by itself, sufficient to secure effective access for victims to compensation (or other remedies) for environmental damage received. Requiring the assessment of environmental compensation to be carried out in terms as favourable to non-national injured parties as domestic victims rests on national rules of protection already being adequate. It is significant that the first treaty to feature non-discrimination for environmental damage claims - the Nordic Environmental Protection Convention - does not include substantive rules on liability: it establishes for affected persons only a *right of action* against those parties in another contracting state claimed to be causing them significant environmental harm. This presumes compatible environmental damage valuations and liability coverage amongst the member states (Denmark, Finland, Norway, Sweden), so that the transnational legal entitlement to seek compensation is basically a geographical extension of existing citizenship rights. For transboundary environmental risks unlikely of be confined to regions with shared liability norms, specific compensation standards acceptable to many states become necessary. As is evident in the environmental damage provisions of international liability regimes, such standards consequently tend to be modest in their coverage.

Where the causal links between risk sources and affected publics become more remote in space-time (eg stratospheric ozone depletion and anthropogenic climate change), civil liability systems may no longer be feasible, but problems also with invoking traditional state responsibility rules in these cases has prompted a recent emphasis in international environmental regimes on so-called 'soft compliance'. Rather than favouring judicial remedies against states in breach of their MEA

obligations, the preference of many treaty bodies has been for fact-finding and practical assistance, especially where lack of technical capacity rather than intentional wrongdoing is regarded as the source of non-compliance (as is often the case with countries in transition and developing countries). Soft compliance entails recourse to non-binding commitments alongside binding targets differentiated according to state capabilities and past or present culpabilities for damage. It has also opened up spaces for NGOs and expert networks to undertake limited oversight and implementation functions. There are precedents for such input; for example, environmental NGOs have been allowed access to annual review meetings under the 1979 UNECE Convention on Long-Range Transboundary Air Pollution, while transnational wildlife NGOs are directly involved in the trade monitoring mechanisms of the Convention on International Trade in Endangered Species. The shift to non-confrontational implementation instruments is offering environmental NGOs opportunities for more sustained input, although they do not always have the resources or inclination to take these (Raustiala and Victor 1998: pp 663-69; Andersen and Sarma 2000: pp 343-44).

The soft compliance mechanism of the Aarhus Convention creates even more scope for the participation of relevant non-state actors when non-judicial and consultative methods are employed. Article 15 of the Convention, on the review of compliance, expressly allows for 'appropriate public involvement', which may include 'the option of consideration of communications from members of the public on matters related to this Convention'. The public entitlement to participate in compliance was elaborated on at the first meeting of the parties to the Aarhus Convention in October 2002 in Lucca: it includes the right of members of the public to nominate (but not vote on) candidates to the Compliance Committee, as well as the right to submit to this body allegations of non-compliance by any party and thereafter be entitled to participate in the discussions of the Committee. These are obligations clearly flowing directly towards citizens of contracting states which, given the Convention's definition of affected publics, include environmental NGOs as addressees. The novelty of these procedural entitlements was highlighted at the Lucca meeting by the US: attending as an ECE member state, but not a signatory to the Aarhus Convention, the American delegation issued a strong statement of concern about the proposed public compliance measures. They charged the participation and communication rights accorded to individuals and NGOs as an unwise 'inversion of traditional treaty practice', placing on record that the US would not recognize the compliance regime as precedent. The explicit public compliance entitlements were nevertheless adopted by acclamation at the meeting, strongly supported by European Union states (Economic Commission for Europe 2002: pp 8-9, 19-20).

Reinforcing these compliance rights, the Aarhus Convention also includes access to justice provisions for members of affected publics in the national enforcement of environmental regulations. Article 9 enables public access to legal review procedures to challenge, firstly, alleged violations of the treaty's access to information and public participation obligations and, secondly, private persons and public authorities claimed to be in contravention of national environmental laws. Again, environmental NGOs recognized by member states are, alongside members of the public, deemed to have a 'sufficient interest' in 'rights capable of being impaired', thus empowering them to initiate judicial proceedings (Article 9(3)). Lee and Abbot (2003: p 195) caution that this provision may not comprise a 'citizen suit' entitlement as such, as deference to national review procedures means that a contracting state could accept, as sufficient to

meeting its obligations, merely allowing citizens the opportunity to make complaints to a relevant prosecutor or regulatory authority. The transnational reach of the provision also remains untested: would the Aarhus Convention commitment to non-discrimination and a wide access to justice enable an environmental NGO representing foreign victims of damage to gain standing in the source states even if its national environmental laws had not been contravened? This seems unlikely.

Endowing public actors with direct enforcement rights is a necessary step in realizing ecological citizenship: it represents a political commitment to secure effective citizen involvement in policy compliance. The Aarhus Convention illustrates that, even with the progressive development of international environmental enforcement, the goal is no more than forging common national standards open to equal consideration of the interests of non-nationals. As there are great variations between countries in the enforcement rights afforded to environmental NGOs, any international acknowledgement that they have a legitimate public interest role is noteworthy. The Council of Europe - responsible for developing the Lugano Convention - has, like the UNECE, proved receptive in its treaty-drafting to importing civic participation norms from its liberal democratic member states into international rule-making on the environment. Building on the public enforcement provisions of the Lugano treaty, the Council of Europe has identified rights for environmental NGOs to participate in criminal proceedings under Article 11 of its 1998 (Strasbourg) Convention on the Protection of the Environment through Criminal Law. This attempted harmonization of criminal measures between states recognizes that serious environmental harm violates basic interests shared by peoples. Enabling NGO access is particularly ambitious given that criminal sanctions are an unquestioned prerogative of state sovereign authority; yet the Council of Europe cites the proven capability of environmental NGOs to represent collective ecological concerns as justifying their involvement in criminal proceedings on behalf of affected persons (Council of Europe 1998: p 17). As the criminal jurisdiction of contracting parties includes extra-territorial offences committed by their nationals, NGOs have at least a legal basis for seeking domestic criminal remedies against responsible individuals or corporations for serious environmental damage caused beyond their home country.

Article 11 of the Strasbourg Convention empowers public enforcement action, but this entitlement is at the discretion of individual member states within *national* criminal jurisdictions. There is no question of individuals or NGOs having access to criminal proceedings against the wishes of their home states. The direct access of affected parties to international environmental enforcement bodies is thus truncated - an underdevelopment of cosmopolitan rights unsurprising in the light of the potential in this area for sanctions against states. Under international law, only states have the right to bring a claim for redress before an international tribunal with compulsory jurisdiction. Even for states, there must be sufficient legal grounds to support such an action, which largely depend on the nature of the alleged breach of an international obligation and the particular remedy sought. Typically, it would have to be demonstrated that a right had been violated, which could refer, for example, to significant physical damage (eg from transboundary air or marine pollution) or a failure to uphold a procedural environmental duty (eg an obligation to consult over the use of shared natural resources) (Smith 1988: pp 5-8; Okowa 2000: pp 209-10). These are general rules of state responsibility: their application to environmental harm encompasses numerous duties within and outside treaties. What is clear is that states

are entrusted with the sovereign right exclusively to represent the interests of their national publics in contentious judicial proceedings between countries.

Again, it is the propensity for soft implementation in international environmental regulation that is providing opportunities for the engagement of non-state actors. While they have no authority to become parties to contentious international proceedings, such as those at the International Court of Justice, the preference of states for less confrontational forums has created openings for NGOs across a range of institutional settings. These include international arbitration (eg the environmental arbitration provided by the Permanent Court of Arbitration in the Hague) and consensual proceedings (such as those available under the International Tribunal of the Law of the Sea). This relaxation of legal standing rules brings environmental enforcement closer to the structure of legal proceedings in the field of human rights (Birnie and Boyle 2002: pp 223-24). They reflect, therefore, the growing currency of the cosmopolitan notion that, where vital interests are at stake, the concerns of affected publics may be legitimately represented by NGOs.

Indeed, the precedent to grant standing for individuals or NGOs to initiate environmental enforcement measures by an international treaty body predates the Aarhus Convention compliance rights by a decade. Under the citizen submission provisions of the 1993 North American Agreement on Environmental Cooperation, any member of the public (an individual or NGO) in Canada, the US or Mexico has the right to claim that a member state is failing to enforce its environmental laws effectively. Subject to at least a two-thirds majority vote of the treaty's governing council, its secretariat can request the development of a factual record on the alleged deficiencies in enforcement. The factual record is non-binding, which has provoked strong criticism from environmentalists. Nevertheless, the opening of an international treaty body to direct public access may be judged as a positive step in the growth of transnational environmental accountability (Fitzmaurice 2003). And this provision has influenced the formulation of soft enforcement measures elsewhere; for example, the access afforded to non-state actors, at the Organization of Economic Cooperation and Development, to raise alleged breaches by its member states of its 2000 Guidelines for Multinational Enterprises.

Conclusion

From the brief survey above of international environmental regulation, several summary observations are possible on public mechanisms of access and redress. Firstly, international cooperation on transboundary ecological problems, while constrained by the principle that sovereign states alone legally represent their national publics, is not closed to the notion that all persons have equal standing when their vital ecological interests are threatened. Core state environmental obligations articulated in terms of harm prevention commonly register duties to humanity which have general scope beyond territorial borders and into the future. The legal obligations of MEAs constitute collective group interests safeguarding the well-being of all citizens in contracting states from selected sources of ecological harm. Where environmental damage is deliberate and massive, affected publics have a right to protection that is, at least in some circumstances, universal – legally empowering *any* state to defend this entitlement on behalf of the international community. Secondly,

the evolution of procedural rights in international environmental decision-making has created some openings for non-national affected publics. Linked to the global diffusion of democratic norms of civic participation, these opportunities are most evident in the application of the non-discrimination principle in international environmental regulation, particularly in treaties developed by the UNECE. However, these procedural entitlements are not common nor, thirdly, are public compliance and enforcements rights. The latter have slowly emerged in MEA soft implementation mechanisms and the legal access for non-nationals permitted in internationally harmonized domestic civil liability rules. Individuals and NGOs still cannot pursue environmental legal claims involving the compulsory jurisdiction of international courts.

Overall, then, we can observe that the prevention of significant environmental harm to non-national parties is well established as a regulative norm in international governance, but that the direct participation of affected parties in realizing the relevant rules is at best embryonic. To explain this state of affairs would of course require an in-depth examination of norm development across different issue areas, with a focus on the interplay of environmental protection values with territorial norms and institutions. The ‘social fitness’ thesis put forward by ‘constructivist’ international relations scholars to account for norm selection offers a promising starting-point for research, highlighting some of the political path dependencies already alluded to in this paper. Here, the truncated cosmopolitan character of international environmental obligations can be understood in the context of a dominant ‘norm-complex’ of liberal environmentalism favouring market-based policies and justifications, yet institutionalized within an international governance system still centred on sovereign state authority (Bernstein 2001; also Finnemore and Sikkink 1998). *Citizen* environmental entitlements expressed *across territorial boundaries* might seem doubly disadvantaged by this norm-complex, yet their modest progress attests to some countervailing tendencies. These include, I suggest, the resonance of cosmopolitan environmental rights with the harm prevention and equality of opportunity norms of democratic liberalism, and also the presence of international legitimating institutions receptive to more cosmopolitan public participation (eg UNECE, Council of Europe).

The preoccupation in this article has been, less ambitiously, with clarifying the nature of new public entitlements in international environmental law. Obviously, this leaves open the question of which counterpart cosmopolitan obligations fall *on* individuals and groups. In a world of strong ecological, economic and political interdependencies, cosmopolitan environmental duties on individuals are more than a responsibility not to engage in private activities likely to degrade ecological conditions vital to their nationals and foreigners. These are important direct duties, and the processes of intercultural communication by which we may agree on their transnational content and application warrant sustained attention. Even more challenging, perhaps, is the determination of cosmopolitan responsibilities based on the indirect role of individuals in supporting political and market-based institutions which produce transboundary environmental degradation. As set out by Pogge in his discussion of responsibilities for world poverty, under a human rights outlook individuals have a negative duty not to cooperate in upholding institutions causing significant harm to others. That all humans are now participants bound up in institutional orders with global effects renders this duty cosmopolitan. However, Pogge argues, the

institutional responsibility of citizens in the more powerful, affluent countries is accentuated by their governments' role in designing and maintaining economic and political ground rules which generate systemic harm. Their collective responsibility is all too apparent in the many ways in which citizens in these countries have benefited, and continue to benefit, from activities imposing environmental (and social) costs on non-nationals (Pogge 2002: pp 169-77; Paterson 2000: pp 35-65).

Whether or not we accept our cosmopolitan duties here rests on the political and social influence of this moral interpretation of environmental problems. Transnational or global citizenship action in broad agreement with it is concerned, firstly, with openly communicating this understanding by all forms of media across diverse networks of human association. And secondly, by realizing as far as possible the rights to public participation already located in human rights and environmental law in order to hold to account governments and international institutions for the harmful effects of activities carried out with our implicit endorsement. This second move is but one area where cosmopolitan public entitlements meet their corresponding duties on individuals and groups. Of course, legal instruments, compromised by hierarchical power relations, may only marginally enable citizen action in pursuit of common environmental needs. Global citizenship as political participation has its own autonomy, expressed in numerous campaigning and activist practices (Gaventa 2001). Affirmation of the cosmopolitan notion of equal respect for all persons informs these social and ecological activist networks (eg People's Global Action, International Forum on Globalization), but it can also serve as a moral standard by which their own constituencies, decision-making and protests can be judged. Other organizational forms – states, international organizations, multinational corporations – all make claims to act in the global public interest. The extent to which any of these actors addresses the basic environmental needs of transnational publics is ultimately judged by how far they create and/or promote conditions for egalitarian decision-making and effective, socially just problem-solving (Brunkhorst 2002).

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