

**Bojana Čučković\*, LL.D.,**  
Associate Professor,  
Faculty of Law, University of Belgrade

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**STATE RESPONSIBILITY FOR HUMAN RIGHT  
VIOLATIONS IN CASES OF TRANSBOUNDARY  
ENVIRONMENTAL HARM: A NEW CONCEPT OF  
EXTRATERRITORIALITY REGARDING THE APPLICATION  
OF INTERNATIONAL HUMAN RIGHTS TREATIES?\***

**Abstract:** *The paper provides an in-depth analysis of the issue of extra-territorial application of human rights treaties in the specific context of transboundary environmental harm. The classic criteria for extraterritorial jurisdiction established through the landmark judgments of the European Court of Human Rights are revisited and compared with the extensive extra-territoriality threshold introduced by the Inter-American Court of Human Rights in its 2017 advisory opinion on environment and human rights. The author examines the features, requirements and limits of the new extra-territoriality threshold which is based on the effective control over intra-territorial activities that result in extraterritorial human rights' violations. The paper attempts to offer arguments for perceiving the new extraterritoriality threshold as a general standard of international human rights, as well as to examine whether it represents a (mis)interpretation of the duty to prevent transboundary environmental harm as a well-established rule of international environmental law. The author also discusses the prospects of expanding the application of the new jurisdictional threshold to other areas not necessarily linked to environmental degradation.*

**Keywords:** *extraterritorial jurisdiction, transboundary environmental harm, human rights, effective control, Inter-American Court of Human Rights, European Court of Human Rights.*

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\* cuckovic@ius.bg.ac.rs

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## 1. Introduction

In November 2017, the Inter-American Court of Human Rights (the Inter-American Court, IACtHR) issued an advisory opinion on the environment and human rights, outlining the scope of obligations of States parties to the American Convention on Human Rights (the American Convention, ACHR) under international environmental agreements, in the context of the right to life and humane treatment. *Inter alia*, the Court addressed the question of whether Article 1 of the American Convention could be construed as making a State party responsible for violations of human rights of persons outside its territory by reason of the environmentally harmful activities with transboundary effects undertaken in the territory of that State. Reaffirming the possibility of the extraterritorial application of the American Convention, the Inter-American Court has gone a significant step beyond the well-established criteria of the European Court of Human Rights (the European Court, ECtHR). In addition to effective control over the territory or persons, the IACtHR has established effective control over intra-territorial activities causing transboundary environmental damage as a valid criteria for the extraterritorial application of the American Convention.<sup>1</sup> The conclusion adopted by the IACtHR seems to confirm the position advocated by prominent international environmental lawyers: since “nuisances do not stop at borders, it makes little sense to treat the victims differently depending on where they happen to live” (Boyle, 2011: 635).

This broader concept of extraterritoriality will first be examined and revised in comparison with the narrow concept inherent in the European system (2). A meticulous analysis of the concept would follow, focusing on its features and limits (3). Given the lack of effective control over the territory or persons as traditional extraterritoriality thresholds, it will be examined whether the obligation to prevent transboundary damage is the sole basis for the extraterritorial application of the American Convention, or whether a general standard of extraterritorial application of this Convention has been affirmed, based on transboundary effects of acts taken within the territory of the State (4). Finally, the concluding remarks will touch upon future prospects of the new extraterritoriality threshold (5).

## 2. Revisiting the concept of extraterritoriality in the application of international human rights treaties

International human rights treaties may be divided into two categories depending on whether they contain a jurisdiction clause. On the one hand, certain treaties, such as the International Covenant on Economic, Social and Cultural Rights and the African Charter on Human and People’s Rights, do not contain

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1 Advisory Opinion OC-23 [2018], § 102.

provisions dealing with the issue of jurisdiction, suggesting that their extraterritorial application is indisputable. On the other hand, most treaties do contain jurisdictional clauses that may limit their extraterritorial applicability.<sup>2</sup> Despite the fact that extraterritoriality is considered to be “a substantive question of the scope of a treaty” and “not a technique of interpretation” (Crawford, Keene, 2020: 945), the meaning and scope of provisions dealing with the issue of jurisdiction have been the subject of constant interpretation by international human rights courts and bodies; it resulted in an ongoing debate among scholars, some of whom qualify it as a “consistent but cautious evolution” (Heiskanen, Viljanen, 2014: 285; Hathaway, 2011: 390) while others criticize it for being inconsistent (Boyle, 2012: 638; Have, 2018: 96). The basic rule that the jurisdiction is primarily territorial but that it can, in exceptional circumstances, be exercised extraterritorially, has mainly been interpreted in a rather restrictive manner so far, with the ECtHR being at the forefront of such restrictive understanding of jurisdiction. However, the advisory opinion of the IACtHR seems to have introduced a novel, quite extensive interpretation of criteria necessary for establishing State party’s jurisdiction for the purposes of applying the provisions of a human rights treaty extraterritorially.

### ***2.1. Standards applied by the European Court of Human Rights – a restrictive concept of extraterritoriality and its applicability in environmental cases***

The ECtHR case-law dealing with the issue of extraterritorial application of the European Convention on Human Rights has been a subject of considerable debate among scholars (Da Costa, 2013:93-252; Goodwin-Gill, 2010:299-300; Gondek, 2005:356-376; Hampson, 2011:178-180; Hathaway, 2011:405-408; Have, 2018:110-113; Wilde, 2010:333-337; Miller, 2010:1225-1241; Lawson, 2004:95-120), a detailed analysis of which surpasses the scope of this paper. *Grosso modo*, criteria established by the ECtHR encompass the effective control over an area test,<sup>3</sup> the test of effective control or authority over persons<sup>4</sup> and, as a variation

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2 The exact wording may vary from treaty to treaty. For the purposes of this analysis, it is noteworthy to outline the jurisdictional clauses of those international treaties whose interpretation is relevant for considering different issues discussed in this paper. Article 1 of the European Convention on Human Rights provides that States parties “shall secure to everyone within their jurisdiction” the rights and freedoms guaranteed by the Convention. The American Convention on Human Rights obliges the States parties to “ensure to all persons subject to their jurisdiction” the full exercise of the guaranteed rights.

3 *Loizidou v. Turkey (Preliminary Objections)* [1995], § 62; *Cyprus v. Turkey* [2001], § 77-80; *Chiragov and Others v. Armenia* [2015], § 169-171, 186.

4 *Ocalan v. Turkey* [2005], § 91.

of the two – the exercise of public powers normally to be exercised by sovereign government<sup>5</sup>.

None of the cases that have so far served the ECtHR to formulate the relevant criteria for extraterritorial application of the European Convention came even close, both factually and legally, to the situation dealt with by the IACtHR in its advisory opinion. First of all, they all concerned extraterritorial action of States in rather specific areas, such as extraterritorial activities of diplomatic and consular agents,<sup>6</sup> military presence in foreign territory,<sup>7</sup> military, political and economic influence on foreign soil leading to the exercise of effective control,<sup>8</sup> military intervention,<sup>9</sup> extraterritorial acts of state security forces<sup>10</sup> and acts in high seas<sup>11</sup>. The only time when the European Court came close to considering extraterritorial application in environmental cases was in *L.C.B. v. The United Kingdom* and *McGinley and Egan v. The United Kingdom*, in which the Court was to consider the influence of British nuclear testing on the health of service members and their children in the Pacific. However, in both cases, the Court did not consider the issue of extraterritorial application of the European Convention since the applications were declared to be inadmissible for other reasons.<sup>12</sup> Secondly, all of the cases dealing with the issue of extraterritorial jurisdiction of States parties to the European Convention concerned situations in which both the act causing the violation of human rights and the violation itself happened extraterritorially. On the contrary, under the scenario discussed by the Inter-American Court in its 2017 advisory opinion, the action that results in the violation of human rights is exercised intra-territorially whereas extraterritoriality is exclusively the feature of the consequences of such intra-territorial acts. In other words, only one of the two necessary elements happened abroad – the violation of human rights. Thirdly and finally, jurisdiction is conceived by the European Court as a necessary link between the State and the victim. Such link is established either through the effective control of the State over territory beyond its frontiers or through effective control over the victim itself. As rightly noted by certain scholars (Duttwiler, 2012: 152), even the effective control over territory criteria comes down to the control over a particular person since the State actually exer-

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5 *Al-Skeini and Others v. the United Kingdom* [2011], § 149.

6 *M. v. Denmark* [1992].

7 *Manitaras and Others v. Turkey* [2008].

8 *Ilascu and Others v. Moldova and Russia* [2004].

9 *Banković and Others v. Belgium and 16 Other Contracting States* [2001].

10 *Ocalan v. Turkey* [2005].

11 *Hirsi Jamaa and Others v. Italy* [2012].

12 *L.C.B. v. The United Kingdom* [1998]; *McGinley and Egan v. The United Kingdom* [1998].

cises control over persons via control over the area in question. It is, however, difficult to conceive how such close and restrictively defined link between the State and the victim is to be fulfilled in cases of State's effective control over intra-territorial activities with extraterritorial consequences.

## ***2.2. Extensive concept of extraterritorial jurisdiction as established by the Inter-American Court of Human Rights***

By carefully reading paragraphs 101 and 102 of the advisory opinion, it may be concluded that the Inter-American Court requires a double degree link between the State and an individual for the purpose of applying the American Convention to cases of transboundary environmental damage. The first link is causal and relates to connecting the environmentally harmful activity carried out within the territory of a State with the "infringement of the human rights of persons outside its territory".<sup>13</sup> The second link refers to the connection between the harmful activity and the State and relies on the effective control that the State in question had over the activity, and thus the possibility to prevent the transboundary harm.<sup>14</sup> In other words, the effective control over the harmful activities serves as an indirect jurisdictional link between the State and the victim.

Therefore, the position taken by the IACtHR essentially redefines and broadens the traditional effective control test in two aspects. Firstly, it not only encompasses the usual understanding of effective control in international human rights law in the sense of its spatial and personal models but also includes the test of State control over the domestic activities with extraterritorial consequences (Banda, 2018), a test that may have serious repercussions for extraterritorial applicability of human rights treaties in numerous fields not necessarily confined to environmental protection. Such an extensive concept of extraterritorial jurisdiction could therefore hardly be qualified as "subtle" (Feria-Tinta, Milnes, 2018: 77). Secondly and less obviously, the IACtHR introduced a double degree jurisdictional link since the State exercises indirect jurisdiction over a person via effective intra-territorial control over harmful activities that caused the human rights violation, as opposed to a single jurisdictional link which is based on direct effective control exercised by a State over the victim.

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13 Advisory Opinion OC-23[2018], § 101.

14 Advisory Opinion OC-23[2018], § 102.

### ***2.3. Is the extensive concept of extraterritorial jurisdiction a genuine novelty? (Tracing its elements in the case-law of international courts and bodies)***

Through a profound analysis of the abundant case-law of international human rights courts and bodies concerning the issue of extraterritoriality, a hardly noticeable tendency of its gradual widening may be discerned. This leads to a twofold remark. On the one hand, it appears that the extensive concept of extraterritoriality has already been present, at least partially, in the jurisprudence of international courts and bodies that preceded the adoption of the 2017 IACtHR advisory opinion. On the other hand, the concept of extraterritoriality established by the said advisory opinion of the IACtHR could at the same time be considered as a novelty since it actually introduced certain elements that had not been present in the preceding human rights jurisprudence.

The tendency to understand the extraterritoriality threshold in an extensive manner is present both at the universal and regional levels of international human rights protection. The United Nations Human Rights Committee (HRC) held in the 2009 case of *Munaf v. Romania* that “a State party may be responsible for extraterritorial violations of the Covenant, if it is a link in the causal chain that would make possible violations in another jurisdiction”.<sup>15</sup> Whereas the ‘link in the causal chain’ or the so-called effects doctrine appears to be the common feature of the extensive extraterritoriality concept advocated by the IACtHR, it is important to notice that the Committee’s position is not clear with regard to whether it encompasses extraterritorial as well as intra-territorial acts. However, judging by the facts of the case, there is no indication that the Committee had an intention to apply the same threshold to intra-territorial acts with extraterritorial consequences.

When it comes to the American system of human rights protection, the Inter-American Commission on Human Rights has shown a significant level of flexibility with regard to treating cases with extraterritorial dimension in its earlier jurisprudence (Cassel, 2004: 177). Therefore, the advisory opinion may be understood as a tenable continuation of interpreting the provisions of the American human rights instruments in the same manner. The Commission has constantly focused in its analysis on “the State’s control over a specific person *or situation* – not on the State’s control over the territory in which the event occurred” (Hathaway, 2011: 414). In *Saldaño v. Argentina*, the Commission extended the jurisdiction to “acts and *ommissions* of agents *which produce effects* or are undertaken outside that State’s own territory” (italics added by the author).<sup>16</sup>

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15 *Mohammad Munaf v. Romania* [2009], § 14.2.

16 *Saldaño v. Argentina* [1999], § 17.

The relevance of this position, if compared to the one taken by the IACtHR in the advisory opinion, is obvious for two reasons. First, the Commission focuses not only on acts but also on omissions, which is the expected scenario in cases of effective control over environmentally harmful activities with transboundary effects. Namely, State's jurisdiction will most often be established on the basis of its failure to take effective measures that could have prevented the damage to occur in the first place. Secondly and more importantly, the fact that the Commission used 'or' when it mentioned acts and omissions producing effects outside the territory seems to suggest that not only extraterritorial but also intra-territorial acts with extraterritorial consequences count. Despite these similarities between the Commission and the Court in understanding the extraterritoriality threshold, the advisory opinion has definitely brought added value. The extensive concept of extraterritoriality has been specified further by the Court which, on the one hand, explicitly extended its applicability to human rights violations caused by transboundary environmental harm and, on the other, provided more precise requirements to be met for the American Convention to be applied extraterritorially in such specific circumstances.

Last but not least, the traces of the extensive extraterritoriality threshold seem to be present even in the case-law on extraterritoriality of the restrictively oriented ECtHR. The relevant case is *Andreou v. Turkey*, a case that concerned an applicant who was shot, while being in the UN buffer zone, by Turkish Cypriot troops firing from the territory of the Turkish part of Cyprus. Turkey claimed that the applicant was not within its jurisdiction for the purposes of Article 1 of the European Convention. However, the European Court disagreed. The Court found that "even though the applicant sustained her injuries in territory over which Turkey exercised no control, the opening of fire on the crowd from close range, which was the direct and immediate cause of those injuries, was such that the applicant must be regarded as 'within the jurisdiction' of Turkey within the meaning of Article 1".<sup>17</sup> The so-called cause and effect criteria, an element of the extensive concept proclaimed in the IACtHR's advisory opinion is definitely present even in the ECtHR jurisprudence. What is more, the *Andreou* case is the only example in which an intra-territorial act with extraterritorial consequences was considered to meet the threshold necessary to establish jurisdiction of the State over a human rights victim. However, its applicability to transboundary environmental damage is questionable since the Court seems to consider 'close range' of the harmful act and the immediateness as important features of the case. Should this suggest that long-range transboundary harm and harm which is not immediately felt are out of the question?

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<sup>17</sup> *Andreou v. Turkey* [2008], p. 11.

It may be concluded that novel elements introduced by the advisory opinion are three-fold: substantial, content-related and spatial. Substantially, the extraterritoriality concept established by the IACtHR does not require effective control either over the territory or the person, only the effective control over activities which is added to the already present cause and effect requirement. This means that contrary to the scarce examples outlined above, the causal link will not establish extraterritorial jurisdiction in transboundary environmental harm situations unless there is effective control of the State over harmful activities. In other words, both elements need to be cumulatively present in order to establish the jurisdictional link. As regards the type of situations to which the extensive concept may apply, the novelty concerns it being reserved, at least for the moment, to transboundary environmental harm that results in human rights violations. Spatially, with the exception of the *Andreou* case as the only example, extraterritoriality was a feature of the consequences, not the act that caused human rights violations. Therefore, instead of a cumulative extraterritoriality of both the cause and the consequence, according to the new concept it appears to suffice that extraterritoriality relates to consequences only.

### **3. Specificities and limits of the extensive concept of extraterritoriality**

In addition to the features of the extensive concept of extraterritoriality that have just been analyzed in the previous section for the purpose of presenting its basic elements, other specific characteristics of the new concept are identified. The IACtHR's qualification of the new extensive concept as exceptional leaves room for critique since exceptions are to be interpreted restrictively, not extensively.

#### ***3.1. Additional characteristics of the new extraterritoriality concept***

Two additional and mutually inter-related features of the extensive concept of extraterritoriality may be identified. Firstly, the victim of human rights violation is not, at any time whatsoever, under the jurisdiction of the State in the way understood in the current restrictive case-law. As already explained, the victim is located extraterritorially at the moment when the violation happens, whereas the harmful activity takes place in the territory of the State. A parallel may be drawn with the *Soering* type of cases in which the violation of a guaranteed right happens outside State's territory, through the act of refoulement which is decided and executed within State's territory.<sup>18</sup> Although *Soering* type of cases is not considered as an example of the extraterritorial application of human rights treaties (Council of Europe, 2012: 113; Gondek, 2005: 355) but of "extraterritorial effect" (Janik, Kleinlein, 2009: 488-489), the State in question

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18 *Soering v. The United Kingdom* [1989].



becomes responsible for exposing a person to a risk of his guaranteed rights being violated by a third State irrespectively of whether the violation actually happens. What distinguishes such cases from the transboundary environmental harm type of cases is the fact that the victim of human rights violations in the latter case has at no time been in the territory or within direct jurisdiction of the State. The jurisdictional link is indirect and depends on the exercise of State's effective control over the harmful activity. Secondly, there is no exercise of public authority *stricto sensu*, a feature of the jurisdictional link based on either the effective control over persons, which is quite obvious, or, less visibly, the effective control over territory. However, a valid argument may be raised that the State actually did exercise elements of public authority at the very moment when it failed to take appropriate measures to prevent the occurrence of transboundary environmental harm and, consequently, of human rights violations. In other words, failure to effectively control the harmful activities carried out in the territory of the State can be qualified as an indirect exercise of public authority over persons situated outside its territory. Such an interpretation of State's omissions with regard to environmental harm that occurs within the territory of the State is indisputable even in the ECtHR practice (Krstić, Čučković, 2015:173-177).<sup>19</sup> It is not clear why this logic should change if environmental damage crossed national borders.

### ***3.2. Exceptionality v. extensiveness – what are the limits of the new concept?***

Quite curiously, the IACtHR shares the position of its European colleagues that “the situations in which the extraterritorial conduct of a State constitutes the exercise of its jurisdiction are exceptional and, as such, should be interpreted restrictively”.<sup>20</sup> However, the IACtHR departed from the ECtHR by assessing the situation of transboundary environmental damage as satisfying the exceptionality requirement and thus obviously “lowering the exceptional circumstances threshold” (Heiskanen, Viljanen, 2015). The question remains: what are the

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<sup>19</sup> It is indicative that, in *Fadeyeva v. Russia* case, the ECtHR considered the link between the State and the dangerous activity to be irrelevant. In fact, Russia did not own, control or operate the steel plant which was the source of pollution. However, the Court assigned significance to the fact that Russia failed to apply effective measures to protect the rights of persons affected by pollution. *Fadeyeva v. Russia* [2005], § 89. Application of effective measures may depend on the case circumstances. However, it obviously encompasses an assessment of whether the State failed to meet its environmental obligations to govern, set-up, operate and supervise the hazardous activity and to “make it compulsory for all those concerned to take practical measures to ensure the effective protection” of human rights. *Di Sarno and Others v. Italy* [2012], § 106. Acts taken by the State in order to apply environmental regulations, as well as a failure to do so, most certainly imply an exercise of public authority.

<sup>20</sup> Advisory Opinion OC-23[2018], § 81.

limits of the extensiveness of the new concept of extraterritoriality, i.e. how to further interpret an essentially extensive concept in a restrictive manner?

The parameters of the answer are partially provided by the IACtHR itself, and are twofold. One set of limitations is contained in the standard of significant environmental damage, whereas the other is determined according to the violated human rights criterion.

The IACtHR is clear: not every negative impact gives rise to jurisdiction and consequently to responsibility.<sup>21</sup> Taking into account that the entire advisory opinion was tailored under an immense influence of the rules of international environmental law, both customary and conventional, it did not come as a surprise that the IACtHR opted for the significant transboundary harm standard.<sup>22</sup> However, the Court made a number of unexpected and rather venturesome contributions to the interpretation of the said standard. First of all, the Court took the position that “any harm to the environment that may involve a violation of the rights to life and to personal integrity (...) must be considered significant harm”.<sup>23</sup> It goes without saying that such a statement would significantly simplify the otherwise complex process of proving that the significant damage threshold has been reached. Secondly, the Court expanded the notion of significant transboundary damage to encompass not only real but also possible damage.<sup>24</sup> In this regard, the Court was under an obvious influence of the precautionary principle as one of the most relevant guiding principles of international environmental law, a principle that has so far been rather cautiously used before other international courts and bodies (Krstić, Čučković, 2015: 176).

On the other hand, in line with considerations of the ‘tailor and divide’ approach previously discussed in the jurisprudence of the EctHR (Gondek, 2005: 369; Hampson, 2011: 171), the Court thought it pertinent to address the relationship between the extent of jurisdiction and the scope of protected human rights. As stressed by some scholars (Have, 2018: 93), in case a State exercises jurisdiction over a person, the same rights and obligations are owed by the State irrespective of whether the jurisdiction is territorial or extraterritorial. However, in cases of extraterritorial jurisdiction, there may be factors that disable States parties to ensure human rights in the same way as within their territory, just as they may not be in a position to ensure all rights guaranteed by the treaty in question. It is doubtful whether the IACtHR shares that view. It explicitly stated that extensive concept of extraterritoriality applies to the rights to life and personal integrity

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21 Advisory Opinion OC-23[2018], § 102.

22 Advisory Opinion OC-23[2018], § 135-139.

23 Advisory Opinion OC-23[2018], § 140.

24 Advisory Opinion OC-23[2018], § 180.

to which Colombia referred to in its request for advisory opinion, while it did not exclude its applicability to other human rights qualified in the advisory opinion “as being particularly vulnerable in the case of environmental degradation”.<sup>25</sup> Such a position, although criticised for leaving the door wide open for claims dealing with a whole range of rights (Berkes, 2018:3-4), can be explained by the fact that the State actually exercised control over activities carried out within its territory, thus partially equating this situation with circumstances inherent to cases of regular territorial jurisdiction. Therefore, since the State exercised full control over its territory and activities carried out within it, there seems to be no reason to limit the extraterritorial occurrence of transboundary consequences to the violation of certain human rights only.

It may be concluded that the Court does not seem to intend to continue treating extraterritorial obligations and claims as exceptional (Feria-Tinta, Milnes, 2016: 80) but instead perseveres in further expanding the limits of the concept by determining them in rather broad terms.

#### **4. Extraterritoriality within or beyond jurisdiction?**

Effective control over intra-territorial activities with transboundary consequences has been perceived by the legal doctrine both as a new link to establish extraterritorial jurisdiction and as an application of the customary no-harm rule. Although valid arguments can be found to support both stances, it appears that the most acceptable position combines elements of both.

##### ***4.1. The extensive extraterritoriality threshold as a general standard of jurisdiction?***

According to the first position (Banda, 2018; Berkes, 2018: 1), the IACtHR has created a new extraterritoriality threshold based on effective control over intra-territorial activities, in addition to effective control over an area and effective control over persons. However, can it be considered as a general human rights standard?

Certain scholars advocated such an understanding of the term ‘jurisdiction’ contained in jurisdictional clauses of human rights treaties long before the IACtHR’s advisory opinion saw the daylight. Boyle believes that, in cases of transboundary pollution, victims “fall within the ‘jurisdiction’ of the polluting State – in the most straightforward sense of legal jurisdiction”, thus subsuming the effective control over activities criterion within classical thresholds for extraterritorial

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<sup>25</sup> Advisory Opinion OC-23[2018], § 243. The Court included into this list the right to property, right to private life, right to health, water, food, and right not to be internally displaced.

jurisdiction (Boyle, 2012: 638). Besson takes the position that the notion of jurisdiction should not be “conceived differently depending on whether it applies inside or outside the territory of a State party” (Besson, 2012: 866). If this argument is applied to the specific circumstances of environmentally harmful activities, it appears that the State does not exercise direct effective control over persons whose rights are violated as a consequence of pollution even when those persons are located on its own territory. In other words, the necessary link between a State and a particular person whose rights are infringed within that State’s territory is also based on the effective control over harmful activities criterion. Why should a different criterion be applied if the pollution reaches victims beyond borders?

In addition, if the three extraterritoriality criteria are compared, it is obvious that the determinant ‘effective control’ is their common element, whereas they are distinguished by the objects of control, i.e. whether the control is exercised over territory, persons or activities. If control is perceived as “a notion that concerns the enforcement of a State’s directives or orders”, whereas a directive or order are understood as “a means to prescribe” someone’s conduct, it may be concluded that effective control actually refers to “a State’s capacity to enforce its directives”, i.e. its legislation (Duttwiler, 2012: 160). Setting things up this way, there is no crucial difference between the classical effective control over territory and person criteria and a new one having activities as the object of State’s control. The point is that all three are capable of satisfying the necessary link between the State and the victim since in all three cases it is the enforcement of State’s legislation, regulations or orders, either through acts or omissions, that result in the extraterritorial infringement of human rights. Such an understanding is in line with Hampson’s interpretation of the relevant case-law of the ECtHR. Namely, the Court referred to the exercise of all or some of the public powers normally to be exercised by the State as the appropriate threshold to be applied in order for the activity to be an exercise of jurisdiction (Hampson, 2011: 179). Regulating hazardous activities, issuing relevant licenses, as well as supervising them, is, without any doubt, a prerogative of the State; thus, the exercise of public powers through which a victim of their transboundary consequences may be considered to be within State’s jurisdiction.

A valid argument is offered by Boyle who claims that the non-discrimination principle demands that victims of environmental harm, both within and beyond State’s borders, should be treated equally and allowed the protection afforded by international human rights treaties. The author considers that claiming that the State has no obligation to take effective preventive measures, simply because the effects of activities carried out within its territory are extraterritorial, is not compelling (Boyle, 2012: 639-640). Similarly, a State would easily escape

responsibility for human rights violations, although it undertook to respect and ensure them, if the obligation ceases at the national boundaries (Feria-Tinta, Milnes, 2016: 75). Or, in quite abstract terms, it would be a paradox “to accentuate the fundamental, universal, and absolute character of human rights provisions and to simultaneously keep them within the frontiers of the concept of State jurisdiction” (Kanalán, 2018: 59).

#### **4.2. Duty to prevent transboundary environmental damage as a criterion for extraterritorial application of human rights treaties?**

According to the second proposition, the advisory opinion did not establish a new link for extraterritorial jurisdiction; it simply interpreted the due diligence obligation to prevent transboundary environmental harm in a manner to provide an additional, extraterritorial scope of human rights to life and humane treatment, and, at the same time, “effectively conflated the extraterritoriality threshold with the obligation to prevent transboundary damage” (Vega-Barbosa, Aboagye, 2018: 296). This line of reasoning stems from the sentence included in paragraph 102 of the Advisory opinion in which the IACtHR provided that “the potential victims of the negative consequences of such activities are under the jurisdiction of the State of origin for the purposes of the *possible responsibility of that State for failing to comply with its obligation to prevent transboundary damage*” (italics added by the author).<sup>26</sup>

A number of arguments may be raised in favour of this second option, some of which relate to a confusion between criteria for establishing extraterritorial jurisdiction and conditions for establishing State responsibility for internationally wrongful acts.

First of all, the IACtHR is speaking of State responsibility for the violation of the duty to prevent transboundary harm, not the duty to respect and ensure human rights guaranteed by the ACHR. In case this is so, effective control over activities may be qualified as a condition of attribution, as an element of State responsibility, not as a criterion of extraterritorial jurisdiction. However, in cases of transboundary environmental harm, the effective control is not the appropriate condition to be applied for the purposes of attribution since the State is responsible for the conduct of its own organs, not the acts of private entities that actually caused transboundary pollution.

Secondly, there needs to be a specific relationship between a State party and an individual for the application of duties with regard to human rights to arise. In line with this argument, it might be that the IACtHR was “too quick to assimilate

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<sup>26</sup> Advisory Opinion OC-23[2018], § 102.

it to some kind of mere factual power or control test for some, or to a mere capability to respect human rights requirements for other“ (Besson, 2012: 859). As previously noted, the IACtHR requires that the State “is in a position to prevent“ hazardous activities from causing transboundary harm, thus implying that State’s capability is among the conditions for the new jurisdictional threshold. However, Besson believes that “state jurisdiction is not merely about feasibility or capability“ to respect human rights and that the “question of the concrete feasibility of duties only arises once jurisdiction has been established and the abstract rights recognized“ (Besson, 2012: 868). Again, it would seem that the IACtHR conflated the jurisdictional threshold with the other condition for State responsibility – a breach of an international obligation.

Thirdly, not only the effective control and capability but causality as well might serve as an argument in favour of the hypothesis that the Court conflated jurisdiction requirements with conditions for establishing State responsibility. If cause and effect relationship is perceived as a requirement for extraterritorial jurisdiction, it would imply that “every directly and immediately caused harmful result amounts to an exercise of jurisdiction“, which is hardly the case (Duttwiler, 2012: 153-154). As a counterargument, it must also be acknowledged that the IACtHR does not perceive causality as the only extraterritoriality threshold, but requires other conditions to be met cumulatively. In other words, not every act or omission with transboundary consequences would lead to establishing extraterritorial jurisdiction, only those that can be qualified as acts of State authority, whereas the State had at its disposal certain measures to prevent the transboundary effects from occurring.

#### ***4.3. A compromise – combining the elements of the two positions***

As seen from the considerations discussed above, each of the arguments offered in favour of either the first or the second proposition is rebuttable. Therefore, a compromise based on certain elements of both approaches appears to be the most acceptable position.

On the one hand, effective control over intra-territorial environmentally harmful activities does represent a link for establishing extraterritorial jurisdiction of the State over the victim of human rights violations for the purposes of applying the ACHR, in addition to the two already firmly established criteria of effective control over territory and persons. On the other hand, duty to prevent transboundary harm is of relevance, but not in the context of establishing jurisdiction. The IACtHR profitted from the no-harm rule of international environmental law for the purposes of interpreting the content of specific human rights. The Court is quite explicit when it concludes that “although the principle of prevention in

relation to the environment was established within the framework of inter-State relations, the obligations that it imposes are similar to the general duty to prevent human rights violations<sup>27</sup>. In other words, rules of international environmental law provided precise content to human rights by defining very concrete negative and positive environmental obligations of States parties to the ACHR.<sup>28</sup>

However, the two elements are not equally represented in positive international systems of human rights protection. Whereas the additional threshold for the extraterritorial application of international human rights treaties is limited to the inter-American system (at least for the time being), the environmental dimension of human rights has been recognized by both universal and regional systems of human rights protection, all of which (with some minor differences) accept that human rights imply concrete negative and positive environmental duties. The only novelty in this regard, but a very significant one, is the IACTHR's position that positive environmental obligations exist not only in the context of environmental harm caused within but also outside State's borders and, most importantly, that victims of human rights breaches caused by environmental nuisances have the capacity to initiate proceedings before an international court.

## 5. Concluding remarks

First, the question is raised whether the extensive criterion for extraterritorial jurisdiction has the potential to develop into a general standard applicable in other systems of human rights protection, both universal and regional, and to expand to other areas of environmental degradation and even beyond environmental scenarios. Within the ambits of environmental protection, it is sensible to expect its applicability not only with regard to classic examples of cross-border pollution, such as pollution by hazardous substances of rivers or air, but also with regard to damage induced by global environmental threats, i.e. global warming and climate change. Although the causality condition will most surely be difficult to prove in such situations, the third extraterritoriality threshold opens the door towards international mechanisms that have so far been closed for victims of human rights violations caused by climate change.

Next, can it be expected that the effective control over activities criterion expands to other activities beyond the sphere of degradation of the environment? For example, why shouldn't the same principle be applied to situations concerning the use of drones without an exercise of jurisdiction in the classic sense, or surveillance over persons situated abroad by activities carried out in the territory of a State, even the activities of multinational corporations abroad? The HRC's

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27 Advisory Opinion OC-23[2018], § 133.

28 Advisory Opinion OC-23[2018], § 123-241.

Concluding Observations on the fourth periodic report of the United States of America quite curiously demand that the USA should “*take all necessary measures to ensure that its surveillance activities, both within and outside the United States, conform to its obligations under the Covenant, (...) regardless of the nationality or location of the individuals whose communications are under direct surveillance*” (italics added by the author).<sup>29</sup> Though Kanalan understands this position of the HRC to be a confirmation that “human rights obligations of the US exist extraterritorially regardless of the exercise of jurisdiction” (Kalanal, 2018: 52), the HRC’s conclusion can also be interpreted as expanding the threshold for exercising extraterritorial jurisdiction in the manner to encompass effective control over intra-territorial activities.

As already explained, elements of the new jurisdictional link can be found in the case-law of other international courts and bodies, which may suggest that (with the stimulus from the latest developments) its application might expand to other international bodies as well. Besides, there has so far been strong “evidence of convergence in the environmental case law and a cross-fertilization of ideas between the different human rights systems” (Boyle, 2012: 614). In this regard, let us hope that the analyzed advisory opinion would serve as an occasion for further cross-fertilization with respect to the issue of extraterritoriality even before the conservative ECtHR.

## References

Banda, M.L. (2018). Inter-American Court of Human Rights’ Advisory Opinion on the Environment and Human Rights. *ASIL Insights*. 22 (6). Washington DC: American Society of International Law. Retrieved 12 February 2020, from <https://www.asil.org/insights/volume/22/issue/6/inter-american-court-human-rights-advisory-opinion-environment-and-human>

Berkes, A. (2018). A New Extraterritorial Jurisdictional Link Recognised by the IACtHR. *EjilTalk*. [Electronic version]. Retrieved 15 March 2020, from <https://www.ejiltalk.org/a-new-extraterritorial-jurisdictional-link-recognised-by-the-iacthr/>

Boyle, A. (2012). Human Rights and the Environment: Where Next?. *European Journal of International Law*. 23 (3). 613-642

Cassel, D. (2004). Extraterritorial Application of Inter-American Human Rights Instruments. In Coomans, F., Kamminga, M.T. (eds), *Extraterritorial application of human rights treaties*. (175-181). Antwerp: Intersentia

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<sup>29</sup> CCPR/C/USA/CO/4 [2014], 9-10.



- Council of Europe (2012). *Manual on Human Rights and the Environment*, (2012)
- Crawford, J., Keene, A. (2020). Interpretation of the human rights treaties by the International Court of Justice. *The International Journal of Human Rights*. 24 (7). 935-956
- Da Costa, K. (2013). *The Extraterritorial Application of Selected Human Rights Treaties*. Leiden, Boston: Martinus Nijhoff Publishers.
- Duttwiler, M. (2012). Authority, Control and Jurisdiction in the Extraterritorial Application of the European Convention on Human Rights. *Netherlands Quarterly of Human Rights*. 30 (2). 137-162
- Feria-Tinta, M., Milnes, S.C. (2018). The Rise of Environmental Law in International Dispute Resolution: The Inter-American Court of Human Rights Issues a Landmark Advisory Opinion on the Environment and Human Rights. *Yearbook of International Environmental Law*. 27 (1). 64-81
- Gondek, M. (2005). Extraterritorial Application of the European Convention on Human Rights: Territorial Focus in the Age of Globalization? *Netherlands International Law Review*. 52 (3). 347-387
- Goodwin-Gill, G.S. (2010). The Extra-territorial Reach of Human Rights Obligation: a Brief Perspective on the Link to Jurisdiction. In Gowlland-Debbas, V., Boisson de Chazournes, L. (eds), *International law and the quest for its implementation = Le droit international et la quête de sa mise en oeuvre: liber amicorum Vera Gowlland-Debbas* (293-308). Leiden: Brill
- Hampson, F. (2011). The Scope of the Extra-territorial Applicability of International Human Rights Law. In Gilbert, G., Rodley, N. (eds), *The delivery of human rights: essays in honour of Professor Sir Nigel Rodley* (157-182). London: Routledge
- Hathaway, O. (2011). Human Rights Abroad: When Do Human Rights Treaty Obligations Apply Extraterritorially? *Arizona State Law Journal*, 43 (2). 389-426
- Have, N. van der. (2018). *The prevention of gross human rights violations under international human rights law*. The Hague: Asser Press.
- Heiskanen, H.E., Viljanen, J. (2014). Reforming the Strasbourg Doctrine on Extraterritorial Jurisdiction in the Context of Environmental Protection. *European Law Reporter*. 11. 285-295
- Janik, C., Kleinlein, T. (2009). When Soering Went to Iraq....: Problems of Jurisdiction, Extraterritorial Effect of Norm Conflicts in Light of the European Court of Human Rights' Al-Saadoon Case. *Goettingen Journal of International Law*. 1 (3). 459-518

Kanalan, I. (2018). Extraterritorial State Obligations beyond the Concept of Jurisdiction. *German Law Journal*. 19 (1). 43-63

Krstić, I., Čučković, B. (2015). Procedural Aspects of Article 8 of the ECHR in Environmental Cases – The Greening of Human Rights Law. *Annals of the Faculty of Law in Belgrade*. LXIII (3). 170-189

Lawson, R. (2004). Life After Banković: on the Extraterritorial Application of the European Convention on Human Rights. In Coomans, F., Kamminga, M.T. (eds), *Extraterritorial Application of Human Rights Treaties* (83-123). Antwerp: Intersentia.

Miller, S. (2010). Revisiting Extraterritorial Jurisdiction: A Territorial Justification for Extraterritorial Jurisdiction under the European Convention. *European Journal of International Law*. 20 (4). 1223-1246

United Nations Human Rights Committee/HRC (2014), Concluding observations on the fourth periodic report of the United States of America, Adopted by the Committee at its 110th session (10–28 March 2014), CCPR/C/USA/CO/4, 9-10

Vega-Barbosa, G., Aboagye, L. (2018). A Commentary on the Advisory Opinion of the Inter-American Court of Human Rights on the Environment and Human Rights. DPCE on line. [Electronic version]. Retrieved 31 January 2020 from <http://www.dpceonline.it/index.php/dpceonline/article/view/506>. 291-298

Wilde, R. (2010). Compliance with Human Rights Norms Extraterritorially: Human Rights Imperialism? In Gowlland-Debbas, V., Boisson de Chazournes, L. (eds), *International law and the quest for its implementation = Le droit international et la quête de sa mise en oeuvre: liber amicorum Vera Gowlland-Debbas* (319-348). Leiden: Brill

#### *Case law*

EComHR, *Soering v. The United Kingdom*, Application No. 14038/88, Judgment of 7 July 1989

EComHR, *M. v. Denmark*, Application No. 17392/90, decision of 14 October 1992

ECtHR, *Loizidou v. Turkey (Preliminary Objections)*, Application No. 15318/89, Judgment of 23 March 1995

ECtHR, *L.C.B. v. The United Kingdom*, Application No. 14/1997/798/1001, Judgment of 9 June 1998

ECtHR, *McGinley and Egan v. The United Kingdom*, Application Nos. 21825/93 and 23414/94, Judgment of 9 June 1998

ECtHR, *Cyprus v. Turkey*, Application No. 25781/94, Judgment of the Grand Chamber of 10 May 2001

ECtHR, *Banković and Others v. Belgium and 16 Other Contracting States*, Application No. 52207/99, Decision of the Grand Chamber on admissibility of 19 December 2001

ECtHR, *Ilascu and Others v. Moldova and Russia*, Application No. 48787/99, Judgment of the Grand Chamber of 8 July 2004

ECtHR, *Fadeyeva v. Russia*, Application No. 55723/00, Judgment of 9 June 2005

ECtHR, *Ocalan v. Turkey*, Application No. 46221/99, Judgment of the Grand Chamber of 12 May 2005

ECtHR, *Andreou v. Turkey*, Application No. 45653/99, Decision on admissibility of 3 June 2008

ECtHR, *Manitaras and Others v. Turkey*, Application No. 54591/00, Decision on Admissibility of 3 June 2008

ECtHR, *Al-Skeini and Others v. the United Kingdom*, Application No. 55721/07, Judgment of the Grand Chamber of 7 July 2011

ECtHR, *Di Sarno and Others v. Italy*, Application No. 30765/08, Judgment of 10 January 2012

ECtHR, *Hirsi Jamaa and Others v. Italy*, Application No. 27765/09, Judgment of the Grand Chamber of 23 February 2012.

ECtHR, *Chiragov and Others v. Armenia*, Application No. 13216/05, Judgment of 16 June 2015

HRC, *Mohammad Munaf v. Romania*, CCPR/C/96/D/1539/2006, 21 August 2009

IACoMHR, *Saldaño v. Argentina*, Report N. 38/99, Inter-American Commission on Human Rights (IACHR), 11 March 1999

IACtHR, *The Environment and Human Rights (State Obligations in Relation to the Environment in the Context of the Protection and Guarantee of the Rights to Life and to Personal Integrity – Interpretation and Scope of Articles 4(1) and 5(1) of the American Convention on Human Rights)*, Advisory Opinion OC-23/18, Inter-Am. Ct. H.R., (ser. A) No. 23 (Nov. 15, 2017)

**Др Бојана Чучковић,**  
Ванредни професор Правног факултета,  
Универзитет у Београду

**ОДГОВОРНОСТ ДРЖАВЕ ЗА КРШЕЊЕ ЉУДСКИХ ПРАВА  
У СЛУЧАЈУ ПРЕКОГРАНИЧНЕ ЕКОЛОШКЕ ШТЕТЕ –  
НОВО СХВАТАЊЕ ЕКСТЕРИТОРИЈАЛНОСТИ У ПРИМЕНИ  
МЕЂУНАРОДНИХ УГОВОРА О ЉУДСКИМ ПРАВИМА?**

**Резиме**

У саветодавном мишљењу о људским правима и животној средини које је усвојио крајем 2017. године, Међуамерички суд за људска права се бавио питањем да ли држава уговорница Америчке конвенције о људским правима може да одговара за повреде људских права особа које се налазе ван њене територије, а које су настале као последица еколошки штетних активности са прекограничним последицама које су предузете у оквиру територије државе и над којима је држава вршила стварну контролу. Рад пружа детаљну анализу позитивног одговора Међуамеричког суда и пореди га са рестриктивним схватањем критеријумима за заснивање екстериторијалне надлежности које је настало у пракси Европског суда за људска права. Аутор, између осталог, закључује да став Међуамеричког суда редеофинише традиционални тест стварне контроле над територијом или особама и то у неколико аспеката. Нови елементи које уводи Суд се квалификују као тројаки – у суштинском, садржинском и просторном смислу. Предмет анализе је и природа новог концепта. У раду се стога истражује да ли се екстензивни концепт екстериторијалности може сматрати општим стандардом међународног права људских права, или је у питању (не)исправно тумачење обавезе спречавања прекограничне еколошке штете као једног од најважнијих правила међународног еколошког права. Аутор с тим у вези нуди бројне аргументе како у прилог тако и против сваке од две тезе, да би потом, као најприхватљивије, изнео компромисно решење засновано на одабраним елементима оба приступа. Коначно, у раду су размотрени и изгледи за даље ширење екстензивног концепта екстериторијалности на области које нису нужно у вези са заштитом животне средине, као и у друге системе заштите људских права, како универзалне тако и регионалне.

**Кључне речи:** екстериторијална надлежност, прекогранична еколошка штета, људска права, стварна контрола, Међу-амерички суд за људска права, Европски суд за људска права.