UNIVERSITEIT VAN PRETORIA
UNIVERSITY OF PRETORIA
YUNIBESITHI YA PRETORIA
Faculty of Law

THE AMERICAN CONVENTION ON HUMAN RIGHTS FINDS EXTRATERRITORIAL APPLICATION

A CRITIQUE OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS' 2017 ADVISORY OPINION ON HUMAN RIGHTS AND THE ENVIRONMENT

by

KEKETSO GIFT KGOMOSOTHO

STUDENT NUMBER: 12189601

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at the University of Pretoria

Supervisor: Professor Dire Tladi

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Chapter 1: Introduction

International human rights law is founded on the principle of universality. This principle is articulated most clearly in the Universal Declaration on Human Rights, and has been reiterated and affirmed by innumerable scholars, courts, treaties, declarations and resolutions.[1] In fact, the very history of human rights, coupled with the practice and ideology of the United Nations and other regional human rights systems personify this principle of universality. All member States that form part of the global and regional human rights systems have, through the very act of joining this global project, committed themselves to the principle of universality of human rights. Further, when a State signals its intention to be bound by ratifying a human rights treaty, it creates for itself legal obligations to respect, protect and to fulfil the human rights thereunder – thereby giving further and more tangible expression to the principle of the universality. It follows then, that a human rights treaty such as the American Convention on Human Rights[2] confers a legal interest on all member States, in the compliance by other member States, with obligations under them.[3]

[1] Ramcharan, Bertrand G. "Universality of Human Rights, The." Review: International Commission of Jurists, 58, 1997, p. 105-117; UN General Assembly, Vienna Declaration and Programme of Action, 12 July 1993, A/CONF.157/23, available at: https://www.refworld.org/docid/3ae6b39ec.html; Amnesty International, What is the Universal Declaration of Human Rights and why was it created? Available at https://www.amnesty.org/en/what-we-do/universal-declaration-of-human-rights/; Report of the Committee of Experts on the Application of Conventions and Recommendations; International Labour Conference, 63rd Session, 1977, para.31; South Asian Judiciary Task Force Appeal signed by Justice M.N.Bhagwati (Former Chief Justice of the Supreme Court of India), Chairperson of the Task Force; Justice Dorab Patel (Former Justice of the Supreme Court of Pakistan) and Justice K.M. Subhan (Former Justice, Appellate Division of the Supreme Court of Bangladesh), in Bangkok on 29 March 1993; UN Sub-Commission on the Promotion and Protection of Human Rights, Report of the Sub-Commission on the Promotion And Protection of Human Rights on its Fifty-First Session Geneva, 2-27 August 1999, Rapporteur: Mr. Paulo S. Pinheiro, 10 November 1999, E/CN.4/2000/2 E/CN.2/1999/54, available at: https://www.refworld.org/docid/3b00f4ac4.html; Application of the International Convention on the Elimination of All Forms of Racial Discrimination, Georgia v Russian Federation, Order on provisional measures, [2008] ICJ Rep 353, ICGJ 348 (ICJ 2008), at para 109.

[2] Organization of American States (OAS), American Convention on Human Rights, "Pact of San Jose", Costa Rica, 22 November 1969, available at: https://www.refworld.org/docid/3ae6b36510.html [Hereafter American Convention].

[3] Separate Opinion of Judge Simma, Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Rwanda), International Court of Justice (ICJ), 2002.

However, human rights treaties, as with all other treaties, are negotiated and drafted by State and government representatives who have an inherent interest in limiting universal protection of human rights in circumstances where this would engage their own international responsibility.[4] For this reason, the obligations contained under the various human rights treaties are limited both in respect of the material substance of the State's obligation, as well as the beneficiaries to whom the obligation is owed. Most ratified human rights treaties create human rights obligations for member States *only within the territory* of a member State - with the exception of extraterritorial application of the treaty qualified by a member State's exercise of "jurisdiction" over foreign territory or a person.[5]

This concept of treaties finding application outside the immediate territory of a member State a number of practical challenges since this principle operates counter to the fundamental principles of State sovereignty, non-interference and territorial integrity.[6] Specifically, it raises the critical question of what circumstances are necessary under international law to give rise to a treaty's extraterritorial application. Concerned with this very question in the context of the Inter-American human rights system, the Republic of Colombia petitioned the Inter-American Court of Human Rights (IACtHR) for an Advisory Opinion regarding environmental obligations of States that constitute the Inter-American Human Rights System - specifically in light of the Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region (Cartagena Convention), and customary international law.[7] Specifically, Colombia's enquiry was whether and to what extent the interpretation of the threshold of "jurisdiction" at Article 1.1

[4] Health and Human Rights Working Paper Series No 3

[5] Aust, A. (2013). Modern Treaty Law and Practice. Cambridge: Cambridge University Press, 96; Menno T Kamminga, Extraterritoriality, Max Planck Encyclopedia of Public International Law [MPEPIL] 2012 available at https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1040

[6] *Corfu Channel* (United Kingdom of Great Britain and Northern Ireland v Albania), Merits, Judgement, ICJ Reports (1949), at page 35 (hereinafter *Corfu Channel)*; *Military and Paramilitary Activities in and against* Nicaragua (Nicaragua v United States of America), Merits, Judgement*,* ICJ Reports 1986,at 213 (Hereinafter, *Nicaragua*-Case); Hollis, D. B. (2012). *The Oxford guide to treaties*. Oxford, U.K: Oxford University Press, at 29.

[7] Request for Advisory Opinion OC-23, Inter-American Court of Human Rights (March 14, 2016), available at http://www.corteidh.or.cr/solicitudoc/solicitud_14_03_16_ing.pdf [Hereafter "Colombia's Request"].

of the American Convention[8] would trigger extraterritorial obligations of a member States for conduct committed within the member State's territory, but producing negative environmental harm on the territory of another member State.[9]

Given that the ICJ had recently redrawn the borders between Colombia and its neighbour Nicaragua,[10] Colombia's request for an Advisory Opinion was motivated by a need for legal certainty about possible consequences of planned offshore activities in the Caribbean Sea.[11] In particular, the request responds to the recent development of largescale "infrastructure projects in the Wider Caribbean Region that, owing to their dimensions and permanence in time, could cause significant ham to the marine environment and, consequently, to the inhabitants of the coastal areas and islands located in this region, who depend on this environment for their subsistence and development.[12]

In November 2017, the IACtHR obliged, and issued its Advisory Opinion which, for the first time in an international tribunal, upheld the right to a healthy environment as an autonomous human right.[13] Claimants in the Inter-American human rights system no longer need to demonstrate that environmental harm negatively impacts their right to life, personal integrity, water, or any other associated right. Instead, claimants can now claim directly that their right to a healthy environment has been violated. The advisory opinion

[8] Organization of American States (OAS), *American Convention on Human Rights, "Pact of San Jose", Costa Rica*, 22 November 1969, available at: https://www.refworld.org/docid/3ae6b36510.html [accessed 16 June 2019].

[9] 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), available at http://www.corteidh.or.cr/docs/opiniones/seriea_23_esp.pdf(in Spanish) [hereinafter Columbia Advisory Opinion].

[10] Territorial and Maritime Dispute, Nicaragua v Colombia, Judgment, ICJ GL No 124, ICGJ 436 (ICJ 2012), 19th November 2012, International Court of Justice [ICJ].

[11] There are also material political motives for Colombia's request, these will be discussed at Chapter 3.

[12] Colombia's Request, para 39.

[13] 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), available at http://www.corteidh.or.cr/docs/opiniones/seriea_23_esp.pdf(in Spanish) [hereinafter Columbia Advisory Opinion].

came at a when the United Nations Special Rapporteur on human rights and the environment, David Boyd called on the UN to recognize the right to a healthy environment, noting that recognition of the right in an international agreement "would raise awareness of and reinforce the understanding that human rights norms require protection of the environment and that environmental protection depends on the exercise of human rights."[14] It was not surprising then to see that the Advisory Opinion was welcomed to the extent that it, for the first time, highlighted this link between human rights and the environment, and articulated key legal consequences of transboundary environmental harm and its impact on the enjoyment of human rights.[15]

Nevertheless, the Advisory Opinion does present a few novel approaches to the question of extraterritoriality of the American Convention. The first novelty is in its reinterpretation of the threshold of "effective control" in the context of extraterritorial application of treaties. The IACtHR departs sharply from the traditional understanding of extraterritoriality which regards "effective control" as the threshold for extraterritorial application of treaties.[16] Instead, the IACtHR contends that *effective control over the source* of environmental harm alone may be sufficient to trigger a member State's obligations extraterritorially, on condition that there is a *causal relationship* between the activity in a member State's territory on the one hand, and the violation of the human rights of persons residing outside its territory.[17]

[14] Human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, 73rd Session, General Assembly, 19 July 2018, A/73/188, Available at https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23782&LangID=E

[15] Maria L. Banda Inter-American Court of Human Rights' Advisory Opinion on the Environment and Human Rights, Volume: 22 Issue 6 May 10, 2018 Available at https://www.asil.org/insights/volume/22/issue/6/inter-american-court-human-rights-advisory-opinion-environment-and-human; Giovanny Vega-Barbosa and Lorraine Aboagye, Human Rights and the Protection of the Environment: The Advisory Opinion of the Inter-American Court of Human Rights, Ejil Talk 2018, Available at https://www.ejiltalk.org/human-rights-and-the-protection-of-the-environment-the-advisory-opinion-of-the-inter-american-court-of-human-rights/

[16] López Burgos v. Uruguay, para. 12.2; Al-Skeini and Ors v. United Kingdom, Judgment, App. no. 55721/07 (ECtHR, 7 July 2011) paras. 75, 76, 77, 78, 81, 137; Armed activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment, ICJ, 19 December 2005, para. 216.

[17] Clàudia Baró Huelmo, Protection of The Environment In International Courts: Recent Decisions Open New Avenues For Mass Claim Processes, LaLive, Public International law, 2017, available at https://www.lalive.law/data/document/e-newsletter_Environment_March_2018.pdf

The second novelty of the IACtHR's advisory opinion is that it conflates due diligence (a primary obligation), and effective control as the standard for extraterritorial application of treaties.[18] Here, the IACtHR articulates its new jurisdictional link by applying the general international principle of due diligence.[19] Particularly, the IACtHR concludes that

> "…the obligation to prevent environmental transboundary damage is an obligation recognized by international environmental law, by virtue of which States can be held responsible for significant damage caused to persons located outside their territory as a result of activities originating in their territory or under their authority or effective control…In any case, there must always be a causal link between the damage caused and the act or omission of the State of origin in respect of activities within its territory or under its jurisdiction or control".[20]

While the Court did not give any clarity concerning the requirement for a causal connection, the standard of due diligence or the extent of States' extraterritorial obligations, the conclusion that a State can, under the Convention, incur responsibility even for a failure to prevent transboundary environmental harm on account of a State's "effective control" over only the domestic activities in question will undoubtedly have

[18] *Trail Smelter Arbitration* (U.S. v. Canada) 1938/1941, R.I.A.A. 1905 (Mar. 11); *Corfu Channel* (United Kingdom of Great Britain and Northern Ireland v Albania) (Judgment) (1949) ICJ Rep 4 ("Corfu Channel"), para 22; Antal Berkes contends that by doing so, the IACtHR followed the numerous recommendations of UN treaty monitoring bodies, requiring the States not only to respect human rights abroad, but to prevent third parties from violating human rights in other countries, if they are able to influence these third parties - including CESCR, General comment Nos. 14, 15, 24; CRC, General comment no. 16 or HRC, Draft General comment No. 36); Antal Berkes, A New Extraterritorial Jurisdictional Link Recognised by the IACtHR, EjilTalk, Available at https://www.ejiltalk.org/a-new-extraterritorial-jurisdictional-link-recognised-by-the-iacthr/

[19] *Trail Smelter Arbitration* (U.S. v. Canada) 1938/1941, R.I.A.A. 1905 (Mar. 11); *Corfu Channel* (United Kingdom of Great Britain and Northern Ireland v Albania) (Judgment) (1949) ICJ Rep 4 ("Corfu Channel"), para 22; Antal Berkes contends that by doing so, the IACtHR followed the numerous recommendations of UN treaty monitoring bodies, requiring the States not only to respect human rights abroad, but to prevent third parties from violating human rights in other countries, if they are able to influence these third parties - including CESCR, General comment Nos. 14, 15, 24; CRC, General comment no. 16 or HRC, Draft General comment No. 36).

[20] Colombia Advisory Opinion, Para 103.

significant implications under international law.[21] The decision may well have an impact on how mega-infrastructure projects in the Americas are approved, monitored, and executed; and may make way for transboundary climate litigation given that its new test for extraterritoriality is sufficiently broad to include climate-related environmental harms – on condition that there is a causal nexus and evidence that a State failed in its duty of due diligence.[22] The IACtHR's findings here will likely influence the practice of other human rights tribunals and domestic courts.

The dissertation will takes the form of an academic, desk-based investigation premised on the traditional sources of international law.[23] The dissertation will first give a comprehensive overview of the rules of international law governing the extraterritorial application of treaties. This is coupled with a close examination of the practice of other international and regional courts on extraterritoriality of treaties. This is followed by an in-depth discussion on the IACtHR's Advisory Opinion and its key findings. Next, the dissertation engages critically with the key findings, concluding that the IACtHR's findings depart from the internationally-accepted threshold for the extraterritorial application of treaties; that the IACtHR failed to provide critical guidance on the required "causal nexus" and conduct's proximity to the harm; that the IACtHR failed to give guidance on the minimum level of environmental degradation sufficient to trigger extraterritoriality, and on how the test will operate in relation to different human rights violations and finally that the advisory opinion conflates effective control and due diligence.

[21] Geetanjali Ganguly, Joana Setzer, Veerle Heyvaert, If at First You Don't Succeed: Suing Corporations for Climate Change, Oxford Journal of Legal Studies, Volume 38, Issue 4, Winter 2018, Pages 841–868, https://doi.org/10.1093/ojls/gqy029

[22] Maria L. Banda Inter-American Court of Human Rights' Advisory Opinion on the Environment and Human Rights, Volume: 22 Issue 6 May 10, 2018 Available at https://www.asil.org/insights/volume/22/issue/6/inter-american-court-human-rights-advisory-opinion-environment-and-human

[23] Primarily, those listed in article 38(1) of the ICJ Statute.

Chapter 2: The normative framework regulating the extraterritorial application of treaties under international law

In order to critically engage with the IACtHR's approach to extraterritoriality, this dissertation will consider as a matter of first instance, international law rules governing the application of treaties. In this Chapter, the dissertation investigates the normative framework regulating the extraterritorial application of treaties under international law and starts by defining jurisdiction under international law, as primarily territorial competence of States. Next, it is argued that extraterritoriality operates as an exception to the general rule of the primarily territorial nature of treaties. The dissertation then demonstrates that there is neither a rule or presumption under international law for or against the extraterritorial application of treaties, and in light of this paucity, the dissertation turns to rulings of courts and other human rights monitoring bodies to demonstrate a consistent and coherent approach to the extraterritorial application of human rights treaties – that a treaty find extraterritorial application only on condition that the member State in question exercises "effective control" either over the territory in question, or over the victim of the alleged human rights violation.

A. Jurisdiction under international law is primarily territorial

As a general rule, international law provides for circumstances under which a State may lawfully exercise its "jurisdiction."[24] Jurisdiction here is understood generally as the power of State under international law to regulate or otherwise impact upon persons, property and circumstances and reflects the basic principles of State sovereignty, equality of States and non-interference in domestic affairs.[25] According to Malcolm Shaw,

[24] United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI (Hereinafter, UN Charter), Article 2(4); 1970 Declaration on the Principles of international Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations (GAR 2625) (Hereafter Resolution 2625), Article 1. 1975 Helsinki Conference on Security and Co-operation in Europe, Final Act, (Hereinafter Helsinki Act), Article IV; SS Lotus-case, PICJ Series A, no 10 (Hereinafter, SS Lotus-case) at page 18.

[25] C. E. Amerasinghe, Jurisdiction of International Tribunals, The Hague, 2003; Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes under International Law (ed. S. Macedo), Philadelphia, 2004; M. Akehurst, 'Jurisdiction in International Law', 46 BYIL, 1972–3, p. 145; R. Y. Jennings, 'Extraterritorial Jurisdiction and the United States Antitrust Laws', 33 BYIL, 1957, p. 146.

"[j]urisdiction is a vital and indeed central feature of state sovereignty, for it is an exercise of authority which may alter or create or terminate legal relationships and obligations. It may be achieved by means of legislative, executive or judicial action. In each case, the recognised authorities of the State as determined by the legal system of that State perform certain functions permitted them which affect the life around them in various ways."[26]

It is universally accepted, however, that a State's jurisdiction under international law is, as general rule, limited to a State's own territory. When the European Court of Human Rights (ECtHR) interpreted the ordinary meaning of the term "within their jurisdiction" in Article 1 of the European Convention,[27] the Court accepted that "…from the standpoint of public international law, the jurisdictional competence of a State is primarily territorial. While international law does not exclude a State's exercise of jurisdiction extraterritorially, the suggested bases of such jurisdiction (including nationality, flag, diplomatic and consular relations, effect, protection, passive personality and universality) are, as a general rule, defined and limited by the sovereign territorial rights of the other relevant States."[28]

In *Bankovic* the ECtHR accepted that "it is only in exceptional cases that acts of the Contracting States performed, or producing effects, outside their territories can constitute an exercise of jurisdiction by them within the meaning of Article 1 of the Convention."[29] The ECtHR was of the view that "Article 1 of the Convention must be considered to reflect this ordinary and essentially territorial notion of jurisdiction, other bases of jurisdiction being exceptional and requiring special justification in the particular circumstances of each case."[30] Similarly, in its *Soering* case the ECtHR confirmed that "Article 1 sets a limit, notably territorial, on the reach of the Convention. In particular, the engagement

[26] MALCOLM N. SHAW, INTERNATIONAL LAW, Sixth Edition, Cambridge, 2008, at 645.
[27] Article 1 the European Convention provides that each member State "shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention."
[28] Application no 52207/99, Decision on Admissibility, 12 December 2001, para 59; Mann, "T*he Doctrine of Jurisdiction in International Law, Twenty Years Late*r", RdC, 1984, Vol. 1.
[29] *Bankovic,* para 67.
[30] *Bankovic*, para 61.

undertaken by a Contracting State is confined to 'securing' ('*reconnaître*' in the French text) the listed rights and freedoms to persons within its own 'jurisdiction'".[31]

The ICJ, too, in its *Legal Consequences of the Construction of a Wall* Advisory Opinion observed "that while the jurisdiction of States is primarily territorial, it may sometimes be exercised outside the national territory."[32] Here the ICJ makes clear that while jurisdiction is primarily territorial, there is scope for the exercise of jurisdiction extraterritorially in exceptional cases. This position was affirmed again by Rosalyn Higgins when she highlighted that indeed a State's ability to exercise its jurisdiction over its own nationals abroad is limited by its and other State's territorial competence, and that it is only in exceptional circumstances that jurisdiction will be exercised extraterritorially.[33]

Further, the Inter-American Commission of Human Rights in the 1999 *Coard* case[34] held that "… the Commission finds it pertinent to note that, under certain circumstances, the exercise of its jurisdiction over acts with an extra-territorial locus will not only be consistent with, but required by, the norms which pertain…. While this most commonly refers to persons within a state's territory, it may, under given circumstances, refer to conduct with an extraterritorial locus where the person concerned is present in the territory of one state, but subject to the control of another state – usually through the acts of the latter's agents abroad. In principle, the inquiry turns not on the presumed victim's nationality or presence within a particular geographic area, but on whether, under the specific circumstances, the State observed the rights of a person subject to its authority and control." It follows logically then, that the extraterritorial application of treaties is an exception to the general rule that treaties find application only in relation to the territory of the member State. I turn now to this principle of extraterritoriality and the matter in which it operates as an exception to the general rule.

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[31] *Soering v. The United Kingdom*, 1/1989/161/217, Council of Europe: European Court of Human Rights, 1989, para 86.
[32] *Wall* Advisory Opinion, para 109.
[33] Turns, D. (1995), Rosalyn Higgins, Problems and Process: International Law and How We Use It. The Modern Law Review, 58: 767-770. doi:10.1111/j.1468-2230.1995.tb02051.x, at 73; Nguyen Quoc, Dinh, Patrick Daillier, and Alain Pellet. 1999. Droit international public. Paris: L.G.D.J., at 500.
[34] Report No. 109/99, case No. 10.951, *Coard et al. v. the United States*, 29 September 1999, at paras 37, 39, 41 and 43.

Notably in the *Coard* case[35] the Inter-American Commission of Human Rights refers vaguely to the notation that the assessment of whether or not a person, territory or situation is under the jurisdiction of a member State centres around the relationship between the member State and person or territory. Court and other human rights monitoring bodies agree that the member State's level of control over the territory or person must rise to the level of "effective control." The dissertation will turn to this focal question shortly.

B. Extraterritorial jurisdiction under international law

Extraterritorial jurisdiction or extraterritoriality refers to "the competence of a State to make, apply and enforce rules of conduct in respect of persons, property or events beyond its territory. Such competence may be exercised by way of prescription, adjudication or enforcement."[36] The author Milanovic notes crucially that the extraterritorial application of treaties is not necessarily triggered by State conduct beyond its own boarders or beyond territory over which it has effective control, but rather that it is sufficient that the (injured) person concerned is located outside the State's territory or outside territory over which it has sovereignty or effective control, while the violation of the person's human rights may well take place within the offending State's territory.[37]

Thus, if properly understood, extraterritorial application of treaties as a phenomena is about States' *de facto* control over territory or person, and not about sovereignty or title over territory.[38] This fact is most clearly illustrated by the fact that the relevant human rights treaties, with the exception of the ICCPR, do not make title or sovereignty over territory a precondition or threshold for their applicability. The distinction is crucial. Jurisdiction is about the actual exercise of control and authority by a member State, while

[35] *Coard et al. v. the United States*, paras 37, 39, 41 and 43.
[36] Menno T Kamminga, *Extraterritoriality,* Max Planck Encyclopedias of International Law, November 2012, at 1. [Own Emphasis].
[37] Milanovic, M., Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy. : Oxford University Press (2011), at 8. Retrieved 1 Oct. 2019, from https://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199696208.001.0001/acprof-9780199696208
[38] Milanovic, M., Extraterritorial Application of Human Rights Treaties, at 6.

title and sovereignty over territory establishes a State's right under International Law to exercise such authority over a defined territory.[39] To illustrate this point, consider the example of Guantanamo Bay – where in fact it is Cuba that has the title over that territory, but it is the United States that exercises actual authority and control over the territory. Accordingly, it would follow that the United States would bear the obligation to ensure, respect and protect the human rights of detainees in Guantanamo Bay.[40]

Therefore, States, by virtue of that very fact, are entitled under international law to exercise jurisdiction over their territory, and over persons within or subject to their jurisdiction. In other words, if a member State exercises jurisdiction over the territory of another State, or exercises jurisdiction over a person, the treaty will find application on the basis of such exercise of jurisdiction. This begs the crucial question of when is a person or territory "subject to" or "within" the jurisdiction of a member State. At section D and E below, this dissertation argues that a person or territory is subject to the jurisdiction of a member State if and when that member States exercises effective control over either the relevant territory or person.

C. Treaty law regulating extraterritorial application of treaties

The law of treaties is silent on treaties' extraterritorial scope of application. Although the 1969 Vienna Convention on the Law of Treaties is silent on the *ratione materiae* and the *ratione personae* application of treaties, Article 29 titled "Territorial scope of treaties" is the only provision that speaks to the *ratione loci* application of treaties. Article 29 of the Vienna Convention make clear that "[u]nless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire

[39] Milanovic, M., Extraterritorial Application of Human Rights Treaties, at 8; United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI (Hereinafter, UN Charter), Article 2(4); 1970 Declaration on the Principles of international Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations (GAR 2625) (Hereafter Resolution 2625), Article 1. 1975 Helsinki Conference on Security and Co-operation in Europe, Final Act, (Hereinafter Helsinki Act), Article IV.

[40] U.N. Comm. Against Torture, Consideration of Reports Submitted by States Parties under Article 19 of the Convention, Second Periodic Report of States Parties due in 1999, United States of America, 150, U.N. Doc. CAT/C/48/Add.3 (June 29, 2005).

territory."[41] When interpreting draft Article 25 of the then Draft Article on the Law of Treaties, the Special Rapporteur Sir Humphrey Waldock, conceded that the Article is silent on the extraterritoriality of treaties, and was not intended to address the application of treaties beyond State's territories. This question, the ILC notes, has been deferred to treaty law outside the Vienna Convention.[42]

From a reading of the ILC's commentaries to the draft Article 25, it is clear that the ILC at the very least considered the inclusion of a provision regulating extraterritorial application of treaties. In fact, certain Governments contended that the draft Article was flawed, as it suggested that a treaty binds a member State in respect of nothing but its entire territory, that the application of a treaty is necessarily confined to the territory of the parties.[43] The governments proposed that the Article be revised with the aim of dealing with the question of the extraterritorial application of treaties. The ILC declined, and instead concluded that its preferred response was to modify the title and the text of the Article so as to make precise the limited nature of the rule.[44] The title was changed from "Application of treaties to territory" to "Territorial scope of treaties"; while the text was changed from "[u]nless a different intention appears from the treaty or is otherwise established, the application of a treaty extends to the entire territory of each party" to "[u]nless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory."[45]

"In [its] view, the law regarding the extra-territorial application of treaties could not be stated simply in terms of the intention of the parties or of a presumption as to their intention; and it considered that to attempt to deal with all the delicate problems of extra-

[41] United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331, available at: https://www.refworld.org/docid/3ae6b3a10.html [accessed 1 July 2019].
[42] Report of the Commission to the General Assembly, A/6309/Rev.l, *Yearbook of the International Law Commission*, 1966, vol. II, at 213.
[43] Milanovic, M., Extraterritorial Application of Human Rights Treaties, at 10.
[44] Report of the Commission to the General Assembly, A/6309/Rev.l, *Yearbook of the International Law Commission*, 1966, vol. II, at 214.
[45] Report of the Commission to the General Assembly, A/6309/Rev.l, *Yearbook of the International Law Commission*, 1966, vol. II, at 213; 1969 Vienna Convention on the Law of Treaties, Article 29. [Own Emphasis].

territorial competence in the present article would be inappropriate and inadvisable."[46] What becomes clear here is that the ILC's commentary does not preclude the possibility of a treaty finding extraterritorial application, rather, the commentaries simply make clear that Article 29 does not govern such an application, deferring the matter to the law of treaties that lies beyond the Vienna Convention.[47]

Thus, in circumstances where there is no clear indication in the treaty itself as to its extraterritorial application, there is no general norm of international law on which to rely – neither a presumption for, or against extraterritorial application.[48] Accordingly, recourse must be had to the object and purpose of the relevant treaty to determine the parties' intention as regards that treaty's extraterritorial application. In *Georgia v Russia*, Georgia alleged that Russia was responsible for various human rights violations occurring on Georgian territory at the hands of Russian armed forces. Relying on the lack of a general or Article-specific restriction in the text of the treaty relating to its territorial application, the ICJ concluded that "the provisions of CERD generally appear to apply, like other provisions of instruments of that nature, to the actions of a State party when it acts beyond its territory."[49] The ICJ noted correctly that it is the nature of human rights treaties, their foundation in universality, that requires a justification for the territorial limit on their scope, but as a consequence of their object and purpose, not of some kind of formal presumption.[50]

The ICJ reiterated this latter position in the *Wall* advisory opinion, concluding that "while the jurisdiction of States is primarily territorial, it may sometimes be exercised outside the national territory. Considering the object and purpose of the International Covenant on Civil and Political Rights, it would seem natural that, even when such is the case, States

[46] Report of the Commission to the General Assembly, A/6309/Rev.l, *Yearbook of the International Law Commission*, 1966, vol. II, at 214.
[47] Syméon Karagiannis, Treaty Application, 12 The Territorial Application of Treaties, The Oxford Guide to Treaties, Oxford Scholarly Authorities on International Law, 2012, at 10.
[48] Milanovic, M., Extraterritorial Application of Human Rights Treaties, at 10.
[49] Application of the International Convention on the Elimination of All Forms of Racial Discrimination, Georgia v Russian Federation, Order on provisional measures, [2008] ICJ Rep 353, ICGJ 348 (ICJ 2008), at para 109.
[50] Georgia v Russian, at 110.

parties to the Covenant should be bound to comply with its provisions."[51] This position is further supported by the *travaux préparatoires* of the ICCPR which confirms that "the drafters of the Covenant did not intend to allow States to escape from their obligations when they exercise jurisdiction outside their national territory.[52] The drafters only intended to prevent persons residing abroad from asserting, *vis-à-vis* their State of origin, rights that do not fall within the competence of that State, but of that of the State of residence.[53]

Since the Vienna Convention on the law of treaties is silent on treaties' extraterritorial scope of application, this dissertation turns now to other rules of international law that lie beyond the Vienna Convention. What is clear at this point is that most human rights treaties impose on member States conventional obligations in respect of everyone "Within" or "subject to" a member State's jurisdiction. Indeed Article 1(1) of the American Convention, in so far as relevant, similarly provides that "[t]he States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons *subject to their jurisdiction* the free and full exercise of those rights and freedoms…."[54] The dissertation turns now to the interpretation of this threshold question by international courts and human rights monitoring bodies.

D. "Within" or "subject to" a State's jurisdiction

While human rights treaties that govern international crimes including genocide or torture, may impose clear and direct extraterritorial obligations on State Parties, most human rights treaties contain varying provisions on the extent of the treaty obligations, or a jurisdictional clause. For instance, Article 1 the European Convention makes clear that each member State "shall secure to everyone *within their jurisdiction* the rights and

[51] Legal Consequence of the Construction of a Wall in the Occupied Palestinian Territory, (Advisory Opinion) (2004) ICJ. Rep. 136, 111 (July 9) [Wall Advisory Opinion].

[52] United Nations, *Officia1 record of the General Assembly, Tenth Session, Annexes,* Al2929, Part II, Chap. V, para. 4 (1955); Commission on Human Rights, ElCN.4lSR.194, para. 46.

[53] Wall Advisory Opinion, para 109.
[54] Own Emphasis.

freedoms defined in Section I of this Convention."[55] The same approach is followed in the wording of Article 2 of the International Covenant on Civil and Political Rights (ICCPR),[56] Article 1 of the American Convention,[57] as well as Article 1 of the Convention on the Rights of the Child.[58] While African Charter does itself not contain a jurisdictional clause, it does however provide that "[t]he Member States of the Organization of African Unity parties to the present Charter shall recognize the rights, duties and freedoms enshrined in this Chapter and shall undertake to adopt legislative or other measures to give effect to them."[59]

Notably, the key phrase "subject to their jurisdiction" in the American Convention mirrors the wording of the European Convention."[60] It is submitted that there is no substantive difference in the meaning between "subject to their jurisdiction" and "within their jurisdiction." For this reason, and other things held constant, the interpretation of one should be deemed as the interpretation of the other. In the *Wall* advisory opinion, the ICJ, when determining whether Israel had extraterritorial conventional obligations in terms of the Convention on the Rights of the Child (CRC), the ICCPR and the ICESCR on account of its occupation of Palestinian territory, the Court drew no adverse conclusions from the distinctive use of "within its territory and subject to its jurisdiction" in the ICCPR,[61] and "within their jurisdiction" in the CRC.[62] The Court found that Israel did have Conventional obligations in respect of both – relying here on the same logic for both regardless of the slight difference in wording.[63]

[55] European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter European Convention]; Own emphasis.
[56] International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].
[57] American Convention on Human Rights, Nov. 22, 1969, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123 [hereinafter American Convention].
[58] Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC].
[59] Organization of African Unity (OAU), African Charter on Human and Peoples' Rights ("Banjul Charter"), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), Available at: https://www.refworld.org/docid/3ae6b3630.html
[60] Own Emphasis.
[61] Article 2.1.
[62] Article 2.1.
[63] Colombia Advisory Opinion, para 113.

Similarly, the ECtHR in *Bankovic* reached the conclusion that the European Convention found extraterritorial application after employing logic for the extraterritorial application of the ICCPR – even though the former used "within its territory and subject to its jurisdiction" and the latter used "subject to its jurisdiction".[64] Thus, in order to meaningfully determine the scope and reach of Article 1 of the American Convention, recourse must be had to the interpretation of phrases of a similar meaning.[65]

The drafting history of Article 1 of the European Convention evidence that prior to the current draft, the Expert Intergovernmental Committee voted to replace the phrase "all persons residing within their territories" with the current phrase "within their jurisdiction". According to the *Travaux Préparatoires* of the Convention, "…[i]t seemed to the Committee that the term 'residing' might be considered too restrictive. It was felt that there were good grounds for extending the benefits of the Convention to all persons in the territories of the signatory States, even those who could not be considered as residing there in the legal sense of the word. The Committee therefore replaced the term 'residing' by the words 'within their jurisdiction' which are also contained in Article 2 of the Draft Covenant of the United Nations Commission."[66] The *travaux préparatoires* further show that the Expert Intergovernmental Committee's amendment to the wording of the draft Article to include the phrase "within their jurisdiction" did not attract any objections, and that the text as it stands today was summarily adopted without further amendment. This, according to the ECtHR is clear confirmatory evidence of the ordinary meaning[67] of Article 1 of the European Convention, or specifically, the phrase "within their jurisdiction."[68]

Consequently, in order for a treaty to find application territorially or extraterritorially, the relevant person must be "within" or "subject to" the jurisdiction of a member State, and effective control over the person or territory has always been the threshold for any such

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[64] *Bankovic,* para 26.
[65] *Bankovic,* para 65.
[66] Collected edition of the *'Travaux Préparatoires'* of the European Convention on Human Rights, Vol. III, The Hague: Martinus Nijhoff Publishers, 1975-85, p. 260; *Bankovic*, para 19.
[67] Article 32 of the Vienna Convention which provides that when interpreting the terms of a treaty, words must, as far as possible, be given their ordinary meaning.
[68] *Bankovic,* para 65.

extraterritorial application.[69] Human rights bodies have in a number of cases held that in certain circumstances where the State exercises some measure of authority or control over a person or territory that State may incur responsibility for the alleged human rights violation because such person or conduct occurring in such territory falls within the "jurisdiction" of that State for the purposes of its human rights obligations.[70] The scope of such extraterritorial jurisdiction has been defined through case law – thereby making clear that jurisdiction in the form of effective control over the person or territory is an indispensable requirement for the extraterritorial application of treaties.[71] The dissertation will now demonstrate that effective control over the person or territory is the accepted threshold for the extraterritorial application of treaties.

E. Effective Control as a threshold for extraterritorial application

There is an overwhelming degree of coherence and consistency on this question of jurisdiction in the form of effective control as an indispensable precondition for the application of human rights treaties. Equally unassailable is the fact that a member State must exercise such effective control over the relevant territory or individual.[72] The ECtHR first highlighted the weight "effective control" as a precondition for the exercise of jurisdiction extraterritoriality in its 1995 *Loizidou v Turkey* case.[73] The applicant, Mrs Titina Loizidou, was a Cypriot citizen filed suit against Turkey before the European Commission

[69] *Wall* Advisory Opinion, Para 103 to 111; Human Rights Committee, General Comment No. 31, para. 11; Al-Skeini and others v. UK, Judgment, para. 138; Daragh Murray, The Extra-Territorial Applicability of International Human Rights Law.

[70] *Legal Consequences of the Construction of a Wall in the Occupied Palestian Territory* (Advisory Opinion) (2014) ICJ Rep 136; *Al-Skeini and Others v. United Kingdom*, Application no. 55721/07, Council of Europe: European Court of Human Rights, 7 July 2011, available at: https://www.refworld.org/cases,ECHR,4e2545502.html [accessed 31 June 2019] para 133-140.

[71] *Bankovic and Others v. Belgium and 16 other Contracting States*, Admissibility Decision, App. no. 52207/99 (ECtHR, 12 December 2001) para. 73 [hereafter *Bankovic*]; Hirsi Jamaa and Others v. Italy, Judgment, App. no. 27765/09 (ECtHR, 23 February 2012) paras. 76–82; Loizidou v. Turkey, Preliminary Objections, App. no. 15318/89 (ECtHR, 13 March 1995) para. 62; Georgia v. Russia (I), Judgment, App. no. 13255/07 (ECtHR, 3 July 2014) paras. 159 and 163; Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ, 9 July 2004, paras. 108–12; Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment, ICJ, 19 December 2005, para. 216; Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ, 9 July 2004, paras. 108–11.

[72] *Loizidou v Turkey* (Merit Judgment) (ECtHR) Reports 1998-IV 1807.

[73] *Loizidou v Turkey* para 78.

on Human Rights. She alleged that her right to the peaceful enjoyment of her possessions had been affected as a result of the continued occupation and control of the northern part of Cyprus by Turkish armed forces which have on several occasions prevented her from gaining access to her home and other properties there.[74] As a matter of first instance, the ECtHR had to determine first whether the applicant came under the jurisdiction of Turkey, the respondent State who at the time was occupying parts of northern Cyprus.

The ECtHR concluded that owing to the large number of troops involved in active duties in northern Cyprus, Turkey, through its armed forces, exercised "effective control" over the relevant part of the island either in a direct fashion through its armed forces or indirectly through subordinate local administration. As regards the question of imputability, the ECtHR held that

> "… under its established case-law the concept of "jurisdiction" under Article 1 of the Convention (art. 1) is not restricted to the national territory of the Contracting States. Accordingly, the responsibility of Contracting States can be involved by acts and omissions of their authorities which produce effects outside their own territory. Of particular significance to the present case the Court held, in conformity with the relevant principles of international law governing State responsibility, that the responsibility of a Contracting Party could also arise when as a consequence of military action - whether lawful or unlawful - it exercises effective control of an area outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention, derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration."[75]

[74] *Loizidou v Turkey* (Preliminary Objections) (ECtHR) Series A No 310, at 53.
[75] *Loizidou v Turkey* (Merit Judgment), at 52.

The ECtHR's approach remained consistent throughout its jurisprudence, including in the cases of *Bankovic v Belgium, Al-Saadoon v United Kingdom*[76] and *Medvedyev v France*.[77]

In its 2011 *Al-Skeini v. the United Kingdom* judgement, however, the ECtHR articulated, in clear and specific terms, the circumstances under which the European Convention will find extraterritorial application,[78] in light of Article 1 of the European Convention, which provides that "[t]he High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention."[79] The ECtHR noted that "whenever the State through its agents exercises control and authority over an individual, and thus jurisdiction, the State is under an obligation under Article 1 to secure to that individual the rights and freedoms under section 1 of the Convention that are relevant to the situation of that individual."[80] This case involved a human rights claim against the United Kingdom by the family of Iraqi civilians who were killed in military operations involving the United Kingdom's troops. The Court summarised its jurisprudence concerning extraterritoriality of the European Convention and concluded that there are three principles that are necessary for determining whether a person is within the jurisdiction of a State for the purposes of Article 1 of the European Convention.

Firstly, the territorial principle – the rights and obligations in question must be applicable on the member State's own territory. Second, the member State must exercise "effective control" over an area outside of its own national territory, through lawful or unlawful military action. This control may be exercised directly, through the State's own armed forces, or indirectly, through a subordinate local administration. Finally, extraterritoriality

[76] *Al-Saadoon and Mufdhi v. United Kingdom*, Application no. 61498/08, Council of Europe: European Court of Human Rights, 30 June 2009, available at: https://www.refworld.org/cases,ECHR,4a5360060.html
[77] *Medvedyev and Others v. France*, Application no. 3394/03, Council of Europe: European Court of Human Rights, 29 March 2010, available at: https://www.refworld.org/cases,ECHR,502d45dc2.html
[78] Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5, (Hereafter European Convention) available at: https://www.refworld.org/docid/3ae6b3b04.html [accessed 30 June 2019].
[79] Article 1, European Convention.
[80] *Al-Skeini and Others v. United Kingdom*, Application no. 55721/07, Council of Europe: European Court of Human Rights, 7 July 2011, available at: https://www.refworld.org/cases,ECHR,4e2545502.html [accessed 31 June 2019] para 133-140.

can be triggered by State agent authority and control where a State, through its agents, exercises control and authority over an individual. [81]

The jurisprudence of the ICJ, too, demands that a member State exercise jurisdiction that takes the form of effective control in order to trigger extraterritorial obligations under human rights treaties. In *Georgia v Russia*, the ICJ applied "effective control" as the threshold for Russia's jurisdiction under the Convention on the Elimination of all forms of Racial Discrimination (CERD). Georgia alleged that Russia was responsible for various human rights violations occurring on Georgian territory at the hands of Russian armed forces. Finding in favour of Georgia on this point, the ICJ held that owing to its exercise of effective control through its armed forces, Russia's obligations under CERD extend to conduct attributable to Russia which occurred within Georgia's territory. Relying on the lack of a general or Article-specific restriction in the text of the treaty relating to its territorial application, the ICJ concluded that "the provisions of CERD generally appear to apply, like other provisions of instruments of that nature, to the actions of a State party when it acts beyond its territory."[82]

Similarly, in its Advisory Opinion on *the Construction of the Wall* case, ICJ again confirmed that both the ICESCR and the CRC found extraterritorial application when it found that Israel indeed had conventional obligations on the Occupied Palestinian Territory on account of Israel's exercise of effective control over the territory in question.[83] In relation to the ICESCR which does not contain a jurisdictional clause, the ICJ made clear that this does not exempt the Covenant from applying both to territories over which a State party has sovereignty and to those over which that State exercises territorial jurisdiction, and accordingly found that Israel had Covenant obligations in terms of the

[81] Daragh Murray, The Extra-Territorial Applicability of International Human Rights Law, in Practitioners' Guide to Human Rights Law in Armed Conflict (Elizabeth Wilmshurst, Françoise Hampson, Charles Garraway, Noam Lubell, Dapo Akande), Oxford Scholarly Authorities on International Law, 2016, at 3.28.
[82] Application of the International Convention on the Elimination of All Forms of Racial Discrimination, Georgia v Russian Federation, Order on provisional measures, [2008] ICJ Rep 353, ICGJ 348 (ICJ 2008), at para 109.
[83] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ, 9 July 2004, paras. 108, 109.

ICESCR.[84] Specifically, the ICJ noted that "…the drafters of the Covenant did not intend to allow States to escape from their obligations when they exercise jurisdiction outside their national territory. They only intended to prevent persons residing abroad from asserting, vis-à-vis their State of origin, rights that do not fall within the competence of that State, but of that of the State of residence …"

The ICJ's conclusion here is consistent with the Human Rights Committee's General Comment No.24 which confirmed that "States Parties are required by Article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party....This principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained…."[85]

In relation to extraterritorial obligations for conduct occurring in a State's own territory, but producing effects on another State's territory, the Human Rights Committee made clear that in addition to effective control over territory or the person as a precondition, the harm or violation produced must have been a necessary and foreseeable consequence of that State's conduct.[86] In its 2009 *Mohammad Munaf v Romania* case, the Human Rights Committee considered the circumstances under which a member State would incur obligations extraterritorially under the ICCPR. The applicant, a dual citizen of Iraq and the United States was kidnapped along with three other journalists and subsequently released by the kidnappers. Immediately after, they were detained by the Romanian Embassy in Baghdad, then handed over to the US military on charges of co-conspiring in

[84] *Wall* Advisory Opinion, para 103 to 111.
[85] E/C.12/GC/24 (General Comment No. 24 (2017): State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities, 10 ("ICESCR GC. 24"); Fons Coomans, The Extraterritorial Scope of the International Covenant on Economic, Social and Cultural Rights in the Work of the United Nations Committee on Economic, Social and Cultural Rights, (REV. 1, 8, 11 HUM. RTS. L 2011).
[86]

the kidnapping. He claimed to have been tortured at this point. The US military later handed him to the Iraqi government where criminal proceeding were instituted against him and he was sentenced to life imprisonment.[87] The Committee's assessment of the relationship between Romania and the complainant with respect to an ICCPR right turned on whether or not Romania "exercised effective control in a manner that exposed him to a real risk of becoming a victim of violations of his rights under . . . the Covenant [when he was released into US military custody]."[88]

The Committee confirmed that "a State party may be responsible for extra-territorial violations of the Covenant, if it is a link in the causal chain that would make possible violations in another jurisdiction."[89] In addition, the Committee added that the risk of harm that produced outside a State's territory "must be a necessary and foreseeable consequence and must be judged on the knowledge the State party had at the time."[90] It was undisputed that at the time of his release to the US military, the applicant was under Romania's effective control and thus under its jurisdiction. However, the applicant subsequently failed to prove that the subsequent violations he suffered at the hands of the US and Iraqi governments respectively, were in fact reasonably foreseeable, thus failing to establish a causal link "between the action of the agents of a State and the subsequent alleged acts.

The ECtHR further contends that "[i]t is a question of fact whether a Contracting State exercises effective control over an area outside its own territory. In determining whether effective control exists, the Court will primarily have reference to the strength of the State's military presence in the area."[91] In *Ilaşcu* the ECtHR considered the extent to which Russia's military, economic and political support for the "Moldavian Republic of Transdniestria" (a separatist secessionist movement in Moldova) provided the Russian Federation with influence and control. The ECtHR concluded that due to significant

[87] *Mohammad Munaf v Romania*, CCPR/C/96/D/1539/2006, UN Human Rights Committee (HRC), 21 August 2009, available at: https://www.refworld.org/cases,HRC,4acf500d2.html
[88] *Mohammad Munaf v Romania,* para 119.
[89] *Mohammad Munaf v Romania,* para 120.
[90] *Mohammad Munaf v Romania,* para 120.
[91] *Al-Skeini and Others v United Kingdom*, para 139.

financial and military support to the Moldavian Republic of Transdniestria for its military operations on Moldovan territory, Russian Federation had effective control, or at least decisive control over the Moldavian Republic of Transdniestria, and thus was exercising jurisdiction extraterritorially over parts of Moldova that were controlled by the separatist movement.[92]

There is overwhelming consensus on two important points: First, a treaty will find extraterritorial application in the limited circumstances where a member State exercises jurisdiction in the form of effective control. Second, member States must be exercising such effective control over either foreign territory, or over a person affected by the member States' conduct.[93] Perhaps the most beguiling of the IACtHR's findings is that for the extraterritorial application of the American Convention, it is sufficient that a member State exercises effective control only over the domestic activities on their own territory that gave rise to transboundary environmental harm on another State's territory, provided that there is a causal relationship between the harm and the domestic activities.[94] Thus, the IACtHR's approach to jurisdiction in this context differs materially from the approach of other international courts and human rights monitoring bodies. The dissertation will turn now to the IACtHR's advisory opinion.

[92] *Ilaşcu and Others v. Moldova and Russia*, Judgment, App. no. 48787/99 (ECtHR, 8 July 2004), para. 392
[93] *Bankovic* case, para. 73; Hirsi Jamaa and Others v. Italy, Judgment, App. no. 27765/09 (ECtHR, 23 February 2012) paras. 76–82; Loizidou v. Turkey, Preliminary Objections, App. no. 15318/89 (ECtHR, 13 March 1995) para. 62; Georgia v. Russia (I), Judgment, App. no. 13255/07 (ECtHR, 3 July 2014) paras. 159 and 163; Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ, 9 July 2004, paras. 108–12; Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment, ICJ, 19 December 2005, para. 216; Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ, 9 July 2004, paras. 108–11.
[94] Colombia Advisory Opinion, paras 80, 81.

Chapter 3: A critique of the IACtHR's Advisory Opinion in the context of existing substantive international law rules governing extraterritorial application of treaties and Effective Control.

A. Understanding the IACtHR's Advisory Opinion to Colombia

a. Factual background

On 14 March 2016, Colombia petitioned the IACtHR pursuant to issue an advisory opinion regarding environmental obligations of States that constitute the Inter-American Human Rights System - specifically in light of the Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region (Cartagena Convention), and customary international law.[95] Given that the ICJ had recently redrawn the borders between Colombia and its neighbour Nicaragua,[96] Colombia's request for an Advisory Opinion was motivated by a need for legal certainty about possible consequences of planned offshore activities in the Caribbean Sea. In particular, the request responds to the recent development of largescale "infrastructure projects in the Wider Caribbean Region that, owing to their dimensions and permanence in time, could cause significant ham to the marine environment and, consequently, to the inhabitants of the coastal areas and islands located in this region, who depend on this environment for their subsistence and development.[97]

One such project is Nicaragua's construction of an inter-oceanic canal and offshore drilling."[98] The author Luis Viveros correctly argues that this advisory opinion should be analysed as part of Colombia's "integral strategy" to respond to Nicaragua's expansionist approach which is evidenced further by, among other things, Nicaragua's declared

[95] Request for Advisory Opinion OC-23, Inter-American Court of Human Rights (March 14, 2016), Available at http://www.corteidh.or.cr/solicitudoc/solicitud_14_03_16_ing.pdf

[96] Territorial and Maritime Dispute, Nicaragua v Colombia, Judgment, ICJ GL No 124, ICGJ 436 (ICJ 2012), 19th November 2012, International Court of Justice [ICJ].

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[98] Maria L. Banda Inter-American Court of Human Rights' Advisory Opinion on the Environment and Human Rights, Volume: 22 Issue 6 May 10, 2018.

interest in securing a the ICJ's pronouncement on its continental shelf extending beyond 200 nautical miles(nm).[99] Immediately after the ICJ's decision in the 2012 *Territorial and Maritime Dispute* case,[100] the country's President decried the ruling and announced the implementation of what he called an "integral strategy".[101] In *Territorial and Maritime Dispute*, the ICJ had to decide whether a number of islands in the San Andrés Archipelago fell under Colombia or Nicaragua's sovereignty; and in what way should the maritime boundary between the overlapping maritime entitlements of Nicaragua and Colombia be delimitated. The ICJ further had to decide whether Nicaragua's request for a delimitation of its continental shelf beyond 200nm was admissible, and whether its continental margin extended far enough to overlap with Colombia's 200nm continental shelf.[102] The decision favoured Nicaragua's claim to the extent that waters 75,000 Km2 in extension belong to Nicaragua. While the islands of San Andres, Providencia and Santa Catalina, and other features in the region remain Colombian, the ICJ declined to pronounce on Nicaragua's request for a delimitation of its continental shelf extending beyond 200 nautical miles.

Colombia's "integral strategy" entailed the deliberate non-implementation of the ICJ's 2012 judgement, and the prevention of future international litigation related to it by firstly invoking Article 101 of its Constitution (which provides that boundaries may only be effected through treaty) and secondly, by summarily denouncing the Pact of Bogota which is one of the strongholds of the Inter-American human rights system and interestingly, the jurisdictional basis for the Nicaraguan cases against Colombia before the ICJ.[103] Colombia failed on this latter front, since Nicaragua was able to file two new applications against Colombia to the ICJ one day before the denunciation of the Pact of Bogota

[99] Luis Viveros, A Critical Assessment of Colombia's Advisory Request before the IACtHR – and Why It Should Be Rejected, October 2016, Available at https://www.ejiltalk.org/a-critical-assessment-of-colombias-advisory-request-before-the-iacthr-and-why-it-should-be-rejected/

[100] Territorial and Maritime Dispute, Nicaragua v Colombia, Judgment, ICJ GL No 124, ICGJ 436 (ICJ 2012), 19th November 2012, International Court of Justice [ICJ].

[101] Colombia presenta su Estrategia Integral frente al fallo de La Haya, Available at, https://www.cancilleria.gov.co/newsroom/news/colombia-presenta-su-estrategia-integral-frente-al-fallo-la-haya

[102] 2012 Territorial and Maritime Dispute, at [29].

[103] Luis Viveros, A Critical Assessment of Colombia's Advisory Request before the IACtHR – and Why It Should Be Rejected.

became effective.[104] In 2016, the ICJ handed down Preliminary Objections judgements in both matters – predominantly rejecting Colombia's claims.

According to Viveros, Colombia's Request for an advisory opinion is connected to its "integral strategy" because it aligns with Colombia's assertion that, "as a matter of domestic constitutional law, the ICJ's 2012 decision – and by implication an eventual delimitation beyond 200 nautical miles – is inapplicable." Viveros' argument is indeed supported by the fact that in its request to the IACtHR, Colombia emphasised the need to for the IACtHR to define the duty to perform Environmental Impact Assessments from an extraterritorial prism.[105] Therefore, interpreted in this context of the historic disputes between Nicaragua and Colombia, the question before the IACtHR would be whether Nicaragua has extraterritorial human rights duties with an environmental content in relation to persons in Colombian territory, and if so what are the necessary conditions for such extraterritorial application.[106]

Viveros opines persuasively that Colombia's third question to the IACtHR, which requires the IACtHR to define conditions under which Nicaragua may exercise rights declared to it by the ICJ, is an attempt at diminishing Nicaragua's entitlements declared by the ICJ in *Territorial and Maritime Dispute,* or any other eventual favourable results in the two matters pending before the ICJ.[107] In the event that Nicaragua elects to exercise its rights and entitlements declared to it by the ICJ (for instance by proceeding with the infrastructure projects in the Wider Caribbean Region, it should have to carry out an EIA as a matter of international environmental law. However, due to the extraterritorial implications of the projects, and in light of the IACtHR's advisory opinion, any such EIA

[104] Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast (Nicaragua v. Colombia) Pending before the ICJ; and Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia) Pending before the ICJ.
[105] Colombia's 2016 Request for an Advisory Opinion.
[106] Luis Viveros, A Critical Assessment of Colombia's Advisory Request before the IACtHR – and Why It Should Be Rejected.
[107] The following two cases involving Colombia and Nicaragua are pending before the ICJ: Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast (Nicaragua v. Colombia); and Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia).

must necessarily entail Colombia's participation and cooperation. The third question presented by Colombia to the IACtHR refers to the undertaking of an EIA as a precondition for complying with "[the] obligation to prevent environmental damage which could restrict or preclude the effective enjoyment of the rights to life and personal integrity [under the American Convention]." In particular, the third question enquires about this obligation's implications in relation to "cooperation with the States that could be affected".

B. Colombia's Request for an advisory opinion

In its request for an advisory opinion, Colombia took pains to persuade the IACtHR that the threat of severe environmental harm of the Wider Caribbean Region is one which "not only affects Colombia to the extent that parts of its population live on the islands that form part of the Archipelago of San Andres, Providencia and Santa Catalina and, therefore, depends on the marine environment for its economic, social and cultural survival and development;" but also that it "affects all coastal Member States in the Wider Caribbean Region whose coastal and insular population may be directly affected by the environmental damage suffered by this region."[108] Due to its immense fragility, coupled with its well-recorded ecological and oceanographic interconnectivity,[109] Colombia argued that the Wider Caribbean Region is already sensitive in its response to the environmental threat posed by human conduct. Importantly, Colombia further argued that such damage is likely to also constitute a threat to the way of life of coastal and island inhabitants in the region.[110] Due to these projects' scale and permanent character, Colombia was rightly concerned about the risk of significant environmental harm that could very easy pervade national borders.[111]

For these reason, Columbia formulated its request to the Court as follows:

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[108] Colombia's Request for Advisory Opinion, at 13.

[109] UNEP, "Specially Protected Areas and Wildlife of the Wider Caribbean Region: a regional biodiversity protocol, July 2000.

[110]

[111] Papantoniou, A. Advisory Opinion on the Environment and Human Rights. American Journal of International Law, 112(3), 460-466. doi:10.1017/ajil.2018.54

> "Pursuant to Article 1(1) of the Pact of San José, should it be considered that a person, even if he or she is not within the territory of a State Party, is subject to the jurisdiction of that State in the specific case in which the following four conditions are met cumulatively?
>
> 1. that the person resides or is inside an area delimited and protected by a treaty-based environmental protection regime to which that State is party;
>
> 2. that said treaty-based regime establishes an area of functional jurisdiction, such as the one established by the Convention for the Protection and Development of the Marine Environment in the Wider Caribbean Region;
>
> 3. that, in this area of functional jurisdiction, State parties have the obligation to prevent, reduce and control pollution as the result of a series of general and/or specific obligations, and;
>
> 4. that, as a result of damage to the environment or the risk of environmental damage in the area protected by the given convention, and which can be attributed to the State party – both to the convention and to the Pact of San José –, the human rights of the person in question have been violated or are threatened."[112]

The Court, in turn, exercised its discretion and reformulated the scope of the advisory request to extend to "general environmental obligations arising out of the obligations to respect and ensure human rights."[113] The IACtHR interpreted the request to enquire whether "[i]n accordance with article 1.1. of the [American Convention] and in assessing compliance with the State's environmental obligations, should it be considered that an individual, although not within the territory of a State party, may be subject to the jurisdiction of that State?"[114]

[112] Colombia's Request for Advisory Opinion OC-23.
[113] Colombia Advisory Opinion, para 35.
[114] Colombia Advisory Opinion, para 37.

In other words, and for purposes of this discussion, the central question that the IACtHR had to answer is whether the American Convention finds extraterritorial application for member States when considered through the prism of a treaty-based environmental protection system to which that State is a party. In the event that it does find extraterritorial application, what are the legal implications in relation to the elements of state responsibility which govern attribution of conduct to States and breaches of primary rules of international law. Of course, intimately linked to this first issue is the question of whether International Human Rights Law is capable of functioning as a vehicle for the extraterritorial application of International Environmental Law.

C. A critique of the IACtHR's key findings

The IACtHR unsurprisingly held that under Article 1.1 of the American Convention, a person can be subject to the jurisdiction of a State when (a) the person is physically present in that State's own territory, or (b) the person is under that State's control, authority or responsibility.[115] The first novelty of the IACtHR's advisory opinion is in its reinterpretation of the threshold of "effective control" in the context of extraterritorial application of treaties. The traditional understanding of the "effective control" as a threshold for extraterritorial application of treaties concerns the victim of the harm or violation, and more implicitly, the source of harm or the violation.[116] Essentially, a member State must have effective control over the person, or over the territory in question.[117] Departing sharply from this understanding, the IACtHR held instead that effective control over the source of environmental harm alone may be sufficient to trigger a member State's obligations, on condition that there is a causal relationship between the activity in a

[115] Advisory Opinion oc-23/17 of November 15, 2017 requested by the Republic of Colombia, official summary issued by the Inter-American court [Hereafter Colombia Advisory Opinion] paras 75, 76, 77, 78, 81.

[116]

[117] See Chapter 2 on effective control.

member State's territory or territory under the control on the one hand, and the violation of the human rights of persons residing outside its territory.[118]

Here the IACtHR accepted that it is sufficient that "the State of origin exercises effective control over the activities carried out that caused the harm and the consequent violation of human rights"[119] Effectively, the IACtHR stretches the concept of extraterritoriality by creating a new jurisdictional link that departs from the traditional threshold of effective control over "territory" or "persons."[120]

a. The IACtHR's findings on the threshold for extraterritorial application depart from the internationally-accepted threshold

A careful reading of the IACtHR's findings on the threshold has their way, the test for "effective control" would now centre around a State's control over the offending domestic activities in question as understood in international environmental law (specifically its failure to fulfil its due diligence obligation), rather than control over a person or territory.[121] This is a striking departure from the internationally accepted test for extraterritorial application of treaties which demands that a member State exercise effective control over territory or the person (instead of only the domestic activities which caused transboundary environmental harm). The requirement of international law for the attribution to States of acts performed by private individuals is that the State exercises effective control over the individuals or territory.[122] Therefore effective control must necessarily be exercised over the affected person (as was the case in the 2009 *Mohammad Munaf v Romania* case), or over territory (as was the case in *Loizidou v Turkey*, in 1986 *Nicaragua*, in the *Wall*

[118] Clàudia Baró Huelmo, Protection of The Environment In International Courts: Recent Decisions Open New Avenues For Mass Claim Processes, LaLive, Public International law, 2017, available at https://www.lalive.law/data/document/e-newsletter_Environment_March_2018.pdf [own emphasis].
[119] Colombia Advisory Opinion, para 104(h).
[120] Colombia Advisory Opinion, paras 95, 101 & 102.
[121] Colombia Advisory Opinion, para 77.

[122] Iran-United States Claims Tribunal and the European Court of Human Rights: *Yeager,* p. 103; *Starrett Housing Corporation* v. *Government of the Islamic Republic of Iran*, Iran-U.S. C.T.R., vol. 4, p. 122, at p. 143 (1983); *Loizidou* v. *Turkey, Merits, Eur. Court H.R., Reports*, 1996–VI, p. 2216, at pp. 2235–2236, para. 56, also p. 2234, para. 52; *Preliminary Objections, Eur Court H.R., Series A, No. 310*, p. 23, para. 62 (1995).

advisory opinion, in *Georgia v Russia*, in *Bosnia Genocide* and in *Ilaşcu v Moldova and Russia*)[123] Thus, the IACtHR impermissibly, and for the first time in international law, makes effective control over only the harm-causing domestic activities sufficient to legitimately trigger extraterritorial application of the American Convention.

The author Berkes correctly notes that "[w]ith the new jurisdictional link, the Court opens the door to extraterritorial jurisdiction in various scenarios where a State is factually linked to extraterritorial situations, without physical control over territory or persons, and where it has the knowledge on the risk of wrongful acts and the capacity to protect due to its effective control over activities within its territory."[124] Thus, if the IACtHR's logic is taken at its highest, this means that a home State will incur international responsibility for the extraterritorial violations committed by multinational companies operating in their territory; it means that a member State that imposes arbitrary sanctions which adversely impact the human rights of a population of another State may similarly be held responsible for those human rights violations. In the same way, the unrelenting emissions of substances causing transboundary harm, or more generally, climate change could be a violation of the extraterritorial human rights obligations of the emitting member State.[125]

Even when the ECtHR loosely recognised that "…acts of the Contracting States performed, or producing effects, outside their territories can constitute an exercise of jurisdiction within the meaning of Article 1 only in exceptional cases" it has never applied it as an independent premise for the establishment of a member State's extraterritorial jurisdiction.[126] The Human Rights Committee in its 2009 *Mohammad Munaf v Romania* case also dealt with the question of extraterritorial obligations for conduct occurring in a State's own territory, but producing effects on another State's territory.[127] Even in this case, the Committee made clear that over and above the exercise of effective control as

[123] See Chapter 2 Generally.
[124] Berkes, Antal, Extraterritorial Responsibility of the Home States for MNCs Violations of Human Rights (February 8, 2018). Research Handbook on Human Rights and Investment, Y Radi (ed) (2018 E Elgar), Forthcoming. Available at SSRN: https://ssrn.com/abstract=3120800
[125] Clàudia Baró Huelmo, *Protection of The Environment In International Courts*.
[126] Al-Skeini and Others v. United Kingdom, para 131; *Bankovic,* para 67.
[127] *Mohammad Munaf v. Romania*, 9.3, 9.4.

a precondition, the effects or the harm produced must have been a necessary and foreseeable consequence of that State's conduct. Although the applicant's claim for lack of a causal relationship between Romania's conduct and the human rights he suffered, the enquire proceeded from the otherwise indispensable premise that Romania had effective control over the applicant at the time in question.[128]

According to this extended formulation, a State's "jurisdiction" is triggered on the sole basis that the State has "effective control" over those domestic activities that caused the harm, and is in a position to prevent such harm.[129]

b. The IACtHR failed to provide critical guidance on the required "causal nexus" and conduct's proximity to the harm.

As it stands, the IACtHR's broad formulation fails to give guidance on how causality can be interpreted in the exceptional situation of extraterritorial application of the American Convention.[130] As one of the key requirements for the extraterritorial application of treaties in the face of transboundary environmental harm, the IACtHR prescribes that a causal relationship must exist between the harm-causing conduct in a member State's own territory on the one hand and the negative transboundary *effects* on human rights produced in another States' territory.[131] At paragraph 103, the IACtHR makes clear that "[f]or the purposes of the ACHR, it is understood that the person whose rights have been breached fall within the jurisdiction of the State of origin if there is a causal link between the facts occurring in its territory and the violation of the human rights of person outside its territory."[132]

In this regard, the author Villarreal notes correctly that a double chain of command needs to be established whenever the enquiry concerns persons' physical integrity or health. As

[128] *Mohammad Munaf v. Romania*, para 16.
[129] Colombia Advisory Opinion, para 102.
[130] Colombia Advisory Opinion , paras 81, 104(d).
[131] Colombia Advisory Opinion, para 101; see also Maria L. Banda Inter-American Court of Human Rights' Advisory Opinion on the Environment and Human Rights, Volume: 22 Issue 6 May 10, 2018 Available at https://www.asil.org/insights/volume/22/issue/6/inter-american-court-human-rights-advisory-opinion-environment-and-human
[132] Colombia Advisory Opinion, Paras 101, 102, 103.

he explains it, the enquire first has to establish a link between conduct (which in this instance might well include examples cited by Colombia in its request to the IACtHR[133] - petroleum exploration and exploitation through offshore drilling, maritime transportation of hydrocarbons, port construction and maintenance, or the construction, maintenance and expansion of shipping canals, and the environmental harm suffered in each case. However, the enquiry cannot end there. Villarreal notes that an addition causal link is required - one between the transboundary environmental harm as a result of the activity.[134] In relation to the former, that is, establishing a causal link between the transboundary harm to the environment itself, the competence would fall squarely under the jurisdiction of other international courts.[135] While the second instalment in the causal link lies completely in the competence of the IACtHR. Article 23 of the Cartagena Convention provides arbitration as the only alternative to the jurisdiction of the ICJ in case of disputes related to its provisions.

Further, the IACtHR has elsewhere been criticised for a lack of guidance concerning the necessary causal link, especially as to the required proximity.[136] States are only responsible when the damage suffered is the *proximate cause* of the State's act.[137] To satisfy the proximate cause test, there are two cumulative requirements that must be met: *firstly* there must exist a clear and unbroken connection between the act complained of and the loss suffered,[138] and *secondly* that the latter must be either a normal or foreseeable consequence of the former.[139] However, the IACtHR indeed offers not

[133] Colombia's Request, para 28.
[134] Colombia Advisory Opinion, para 109.
[135] Pulp Mills on the River Uruguay, Argentina v Uruguay, Order, Provisional Measures, ICJ GL No 135, [2006] ICJ Rep 113; Certain Activities carried out by Nicaragua in the Border Area; Construction of a Road in Costa Rica along the San Juan River, Costa Rica v Nicaragua, Order on Provisional Measures, [2013] ICJ Rep 354.
[136] Dr. Pedro A. Villarreal, Streching Abstract Reasonnog to the Limit.
[137] Shelton, Remedies in International Human Rights Law, 1999, 10; Verzijl, International Law in Historical Perspective, Martinus Nijhoff, 1973, 735; Plakokefalos I, 'Causation In The Law of State Responsibility And The Problem of Overdetermination: In Search of Clarity' (2015) 26 European Journal of International Law at page 487.

[138] *Administrative Decision No. II*, U.S.-German Mixed Cl.Comm., 7 RIAA, 1923, 30; Dix Case, U.S.-Venez. Mixed Cl. Comm., 1902, In: Ven. Arb. 1903, Ralston and Doyle eds., 9; Brownlie, 223-27.

[139] Lighthouses Arbitration, PCA, 12 RIAA, 1956, 217-18; Naulilaa Case, Portugo-German Arbitration, 2 RIAA, 1930, 1032; Life Insurance Claims, German-US Mixed Cl.Comm., In: Opinions and Decisions,

guidance here. The IACtHR's advisory opinion refers only to a link of causality,[140] "possible" significant harm[141] or "plausible" factors of the risk.[142]

Notably however, other international courts and monitoring bodies have provided more guidance as to the standard required for conduct to meet the causal nexus text. The ECtHR requires a "direct and immediate link" in cases concerning an Article 8 obligation.[143] In the case of *Andreou v. Turkey*,[144] it provided that conduct of a State will only be the proximate cause of the result in question if it is the "direct and immediate cause," while in *Ilaşcu v Moldova and Russia*[145] it set the standard as "sufficiently proximate repercussions," and as "real and immediate risk" in *Rantsev v Cyprus and Russia*.[146] The Human Rights Committee's Draft General Comment No. 36 similarly articulated the test as requiring "a [direct], significant and foreseeable impact on the right to life of individuals". In its defence the IACtHR did make brief reference the threshold of **"**real and immediate risk**.**"[147] However, the Court invoked this threshold only in relation to conduct which impacts on the protection of the right to life.

c. *The IACtHR failed to give guidance on the minimum level of environmental degradation sufficient to trigger extraterritoriality, and on how the test will operate in relation to different human rights violations.*

The advisory opinion further failed to provide critical guidance as to what gravity-level is required. It refers to a "significant" or "serious" transboundary impact on the environment

January 1, 1933-October 30, 1939, 1930, 133-4; Beha Case, German-U.S. Mixed Cl.Comm., 1928, In: Opinions and Decisions, January 1, 1933-October 30, 1939, 1940, 901; Heirs of Jean Maninat Case, Fr.-Venez. Mixed Cl.Comm, 10 RIAA, 1905, 55; Samoan Claims, (Joint Report No. II of August 12, 1904) MS., U.S. Department of State, National Archives, 210 Despatches, Great Britain, Ambassador Choate to Secretary Hay, August 18, 1904, No. 1429, enclosure, 1904.

[140] Colombia Advisory Opinion, paras, 101, 103.
[141] Colombia Advisory Opinion, paras, 189.
[142] Colombia Advisory Opinion, paras, 180.
[143] Article 8 of the European Convention deals with the right to respect for private and family life.
[144] Andreou v. Turkey (45653/99) Admissibility decision, 2008, para 110.
[145] *Ilaşcu and Others v. Moldova and Russia*, Judgment, App. no. 48787/99 (ECtHR, 8 July 2004), para. 390.
[146] *Rantsev v. Cyprus and Russia*, Application no. 25965/04, Council of Europe: European Court of Human Rights, 7 January 2010, available at: https://www.refworld.org/cases,ECHR,4b4f0b5a2.html
[147] Colombia Advisory Opinion, para 120.

as a result of the a State's failure to exercise due diligence.[148] The IACtHR concluded simply that the standard is "any damage to the environment that may entail a violation" of the right to life.[149] However, it remains unclear what gravity the human rights violation must first reach in order to give rise to a claim under the new jurisdictional link. Customarily, the IACtHR did provide that the gravity-level will depend on a case-by-case analysis, however, it would have been more useful for the court to have set a minimum threshold, similar to what was done by the ILC Special Rapporteur on the protection of the atmosphere, ILC Special Rapporteur on the protection of the atmosphere, in his report.[150] He concluded that there must be a minimum level of environmental degradation to be able to amount to a human rights violation - "[t]he assessment of that minimum standard is relative and depends on the content of the right to be invoked and all the relevant circumstances of the case, such as the intensity and duration of the nuisance, and its physical or mental effects".

What is further unclear is whether or not a member State's non-compliance with its due diligence obligation is sufficient to found its extraterritorial jurisdiction only in relation to the "more important" human rights such as the right to life and the right to personal integrity, or whether it would found a member State's extraterritorial jurisdiction in relation to any rights under the American Convention.[151] From a careful reading of the cited conclusions of the Advisory Opinion certainly implies the latter.

This broad approach present a number of challenges, particularly in the context of economic, social and cultural rights at Article 26 of the American Convention. These of course generally impose upon member States an obligation to progressively realise these rights. This way, the threshold of due diligence will resultantly be different for each member State. A further, equally critical question that the IACtHR should have addressed is whether a court will assess the threshold of economic, social and cultural rights in the

[148] Colombia Advisory Opinion, para 140.
[149] Colombia Advisory Opinion, para 140.
[150] Fourth report of the Special Rapporteur, Mr. Shinya Murase (69th session of the ILC (2017), A/72/10, Chapter VI, paras. 57–67.
[151]

State of origin or in the "injured" State where the environmental harm took place. This expansive range of human rights that could potentially be affected by transboundary environmental harm begs a series of new questions that the Advisory Opinion failed to address.[152]

Finally, it worth noting that the IACtHR does not draw a distinction between a member State's actions and omissions that cause transboundary environmental harm.[153] The IACtHR imposes on member States not only negative obligations in an extraterritorial situation, but it imposes positive obligations as well – a first for any international court or monitoring body.[154] The concern here is that the IACtHR may be placing an unreasonable burden on States. However, this remains to be proven in subsequent cases, as the answer will centre around where the IACtHR places the limits to its new jurisdictional link.

d. The IACtHR's Advisory Opinion conflates effective control and due diligence

The second novelty of the IACtHR's advisory opinion is the conflation of the environmental law principle of due diligence, and effective control.[155] The IACtHR articulates its new jurisdictional link by applying the general international principle of due diligence.[156] The IACtHR concluded here that the due diligence obligation to prevent transboundary harm is the only standard used to determine the extraterritorial application of the American Convention. No additional threshold if offered for the activation of a member State's exercise of extraterritorial jurisdiction. [157]

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[152] [152] Antal Berkes, A New Extraterritorial Jurisdictional Link Recognised by the IACtHR, EjilTalk, Available at https://www.ejiltalk.org/a-new-extraterritorial-jurisdictional-link-recognised-by-the-iacthr/

[153] Colombia Advisory Opinion, para 103.

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[155] Antal Berkes, A New Extraterritorial Jurisdictional Link Recognised by the IACtHR, EjilTalk, Available at https://www.ejiltalk.org/a-new-extraterritorial-jurisdictional-link-recognised-by-the-iacthr/

[156] *Trail Smelter Arbitration* (U.S. v. Canada) 1938/1941, R.I.A.A. 1905 (Mar. 11); *Corfu Channel* (United Kingdom of Great Britain and Northern Ireland v Albania) (Judgment) (1949) ICJ Rep 4 ("Corfu Channel"), para 22; Antal Berkes contends that by doing so, the IACtHR followed the numerous recommendations of UN treaty monitoring bodies, requiring the States not only to respect human rights abroad, but to prevent third parties from violating human rights in other countries, if they are able to influence these third parties - including CESCR, General comment Nos. 14, 15, 24; CRC, General comment no. 16 or HRC, Draft General comment No. 36).

[157] Giovanny Vega-Barbosa, Lorraine Aboagye, A Commentary on the Advisory Opinion of the Inter-American

Specifically, the IACtHR held that"

> "The obligation to respect and ensure human rights requires States to abstain from impeding or rendering more difficult the compliance of the obligations of the Convention by other State parties. The activities undertaken in the jurisdiction of one State party shall not deprive other States of their capacity to ensure that persons under their jurisdiction enjoy their rights under the Convention. The Court considers that States have an obligation to avoid transboundary environmental damage that may affect the human rights of persons outside their territory. For the purposes of the ACHR, it is understood that the person whose rights have been breached fall within the jurisdiction of the State of origin if there is a causal link between the facts occurring in its territory and the violation of the human rights of person outside its territory. The exercise of jurisdiction by a State of origin in relation to transboundary damage is based on the understanding that it is the State in whose territory or in whose jurisdiction these activities are undertaken, who has effective control over them and is in a position to prevent the causation of transboundary damage that may affect the enjoyment of human rights of individuals outside its territory. The potential victims of the negative consequences of these activities should be deemed to be within the jurisdiction of state of origin for the purposes of any potential state responsibilities for failure to prevent transboundary damage. In any case, not every injury activates this responsibility"[158]

The IACtHR's point of departure here is premised on the jurisprudence of the ICJ affirming that as a matter of customary international law, States have a due diligence obligation to ensure that activities within their jurisdiction or control do not cause damage to the territory of other States or areas beyond the limits of national jurisdiction.[159] This obligation to

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Court of Human Rights on the Environment and Human Rights, Note e commenti – DPCE on line, 2018/1 ISSN: 2037-6677.

[158] Colombia Advisory Opinion, Paras 101, 102, 103.

[159] *Nuclear Tests* (Australia v France) (Judgment) (1947) ICJ Rep 253, [29]; *Case concerning the Pulp Mills on the River Uruguay* (Argentina v. Uruguay) (Judgment) (2010) ICJ. Rep. 14 [101] ("Pulp Mills"); (United States v. Canada) (1938 and 1941) 3 R.I.A.A. 1905 ("Trial Smelter Arbitration"); *Corfu Channel* (United

prevent was articulated in the ICJ's very first decision in *Corfu Channel* where the Court held that Albania was responsible to the United Kingdom for its own failure to take all necessary steps to warn approaching ships of the danger of mines in Albanian territorial waters.[160] While in *Tehran Hostages* the same Court concluded that the responsibility of Iran was entailed by the "inaction" of its authorities which "failed to take appropriate steps" in circumstances where such steps were evidently called for.[161] The due diligence obligation is a primary obligation owed to all States.

Therefore, as far as the IACtHR is concerned, "…it is possible to conclude that the obligation to prevent environmental transboundary damage is an obligation recognized by international environmental law, by virtue of which States can be held responsible for significant damage caused to persons located outside their territory as a result of activities originating in their territory or under their authority or effective control…In any case, there must always be a causal link between the damage caused and the act or omission of the State of origin in respect of activities within its territory or under its jurisdiction or control".[162]

By relying solely on the obligation to prevent transboundary environmental damage as the content of effective control, the IACtHR conflated the obligation to prevent transboundary damage and the extraterritoriality threshold of effective control – rendering the latter illusory.[163] The obligation to prevent exists independent of "effective control" and the inverse is equally true. The distinction between primary and secondary rules of international law was first made clear by former Special Rapporteur, Robert Argo, in his

Kingdom of Great Britain and Northern Ireland v Albania) (Judgment) (1949) ICJ Rep 4 ("Corfu Channel") 22.

[160] Corfu Channel [22-23].

[161] Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran); Order, 12 V 81, International Court of Justice (ICJ), 12 May 1981 [63, 67]. See also Legality of the threat or use of nuclear weapons, Advisory Opinion, 8 July 1986, para 29; Pulp Mills on the River Uruguay Case [Argentina v. Uruguay], 20 April 2010, paras 101, 204

[162] Colombia Advisory Opinion, Para 103.

[163] Giovanny Vega-Barbosa and Lorraine Aboagye, Human Rights and the Protection of the Environment: The Advisory Opinion of the Inter-American Court of Human Rights, Ejil Talk 2018, Available at https://www.ejiltalk.org/human-rights-and-the-protection-of-the-environment-the-advisory-opinion-of-the-inter-american-court-of-human-rights/

Second Report to the ILC,[164] and again by James Crawford in first report on State Responsibility.[165] While the obligation to prevent is a primary obligation the violation of which may generate State responsibility, “effective control” is on the other hand a secondary rules of international law concerned with the responsibility of States for internationally wrongful acts.[166] On this point, the law is clear. Effective control for purposes of attributing wrongful conduct of non-State actors to a particular State requires “instruction,” “direction,” or “control” over the conduct in question.[167]

[164] Report of the International Law Commission, 1970, A/CN.4/SER.A/1970/Add 1, para 66(c) available at: http://legal.un.org/docs/?path=../ilc/publications/yearbooks/english/ilc_1970_v2.pdf&lang=EFS [accessed 10 September 2019]

[165] UN General Assembly, Report of the International Law Commission, 23 July 1999, A/54/10, at para 12, available at: https://www.refworld.org/docid/3ae6af970.html [accessed 10 September 2019]

[166] Crawford, J. (2013). Key concepts. In State Responsibility: The General Part (Cambridge Studies in International and Comparative Law, pp. 45-92). Cambridge: Cambridge University Press; UN General Assembly, Report of the International Law Commission, 1970, A/CN.4/SER.A/1970/Add 1, para 66(c) available at: http://legal.un.org/docs/?path=../ilc/publications/yearbooks/english/ilc_1970_v2.pdf&lang=EFS [accessed 10 September 2019].

[167] Military and Paramilitary Activities in and against Nicaragua (Nicaragua/U.S.), Merits, 1986 I.C.J. 14; Articles on the Responsibility of States for Internationally Wrongful Acts [ARSIWA], (I.L.C. Yearbook 2001-I); Commentaries to the Draft Articles on State Responsibility (I.L.C. Yearbook 2001-II).

Chapter 4: Conclusion

On an overall assessment, the IACtHR's approach to "jurisdiction" at Article 1(1) of the American Convention lacks legal rigour, and requires further clarification. As it stands, a number of critical issues remain unclear. From the onset, there were inherent limits to the Court's answers to Colombia's questions which were posed in the abstract. The foremost challenge here is that IACtHR was not capable of foreseeing all the factual details of future occurrences, in the abstract. Since the Court was not able to do this without an actual factual dispute before it, the question then becomes whether the Court was could formulate a "blueprint" for complex circumstances with sufficient detail and sensitivity to facts.

While the Court did not give any clarity concerning the requirement for a causal connection, the requisite standard of due diligence or the extent of States' extraterritorial obligations, the conclusion that a State can, under the American Convention, incur responsibility even for a failure to prevent transboundary environmental harm on account of a State's "effective control" over only the domestic activities in question will undoubtedly have significant implications under international law.[168] The IACtHR itself noted that "the advisory jurisdiction of the Court is 'an alternative judicial method' for the protection of internationally recognized human rights, which shows that this jurisdiction should not, in principle, be used for purely academic speculation, without a foreseeable application to concrete situations justifying the need for an advisory opinion."[169] Thus, the decision may well have an impact on how mega-infrastructure projects in the Americas are approved, monitored, and executed; and may make way for transboundary climate litigation given that its new test for extraterritoriality is sufficiently broad to include climate-related

[168] Geetanjali Ganguly, Joana Setzer, Veerle Heyvaert, If at First You Don't Succeed: Suing Corporations for Climate Change, Oxford Journal of Legal Studies, Volume 38, Issue 4, Winter 2018, Pages 841–868, https://doi.org/10.1093/ojls/gqy029

[169] Restrictions to the Death Penalty (Articles 4(2) and 4(4) American Convention on Human Rights), Inter-American Commission on Human Rights, Advisory Opinion, Advisory Opinion OC-3/83, IACHR Series A no 3, IHRL 3399 (IACHR 1983), 8th September 1983, Inter-American Court of Human Rights, para 43.

environmental harms – on condition that there is a causal nexus and evidence that a State failed in its duty of due diligence.[170]

The IACtHR has effectively left it to individual applicants and possibly member States themselves to tease out the potential of the new jurisdictional link and thereby define its limits.[171] In light of the Court's departure from the accepted approach to effective control as the threshold for extraterritoriality,[172] and without much needed guidelines concerning key issues, one has to wait for subsequent case-law and perhaps State practice to offer further guidance on the material content and scope of this very relevant Advisory Opinion.

[170] Maria L. Banda Inter-American Court of Human Rights' Advisory Opinion on the Environment and Human Rights, Volume: 22 Issue 6 May 10, 2018 Available at https://www.asil.org/insights/volume/22/issue/6/inter-american-court-human-rights-advisory-opinion-environment-and-human

[171] https://www.ejiltalk.org/a-new-extraterritorial-jurisdictional-link-recognised-by-the-iacthr/

[172] *Al-Skeini and Others v. United Kingdom,* para 138; *Wall* Advisory Opinion, para 109; Armed Activities, para 216; Cyprus v Turkey, 25781/94, Council of Europe: European Court of Human Rights, 10 May 2001, available at: https://www.refworld.org/cases,ECHR,43de0e7a4.html [accessed 31 July 2019], para 76; Loizidou v. Turkey, 40/1993/435/514, Council of Europe: European Court of Human Rights, 23 February 1995, available at: https://www.refworld.org/cases,ECHR,402a07c94.html [accessed 31 July 2019], para 52.