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The Impact- or Causality-Based Extraterritorial Obligation to Respect Human Rights: A Consistent and Humane Approach of the Inter-American Human Rights System

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The main bodies of the Inter-American Human Rights System, namely the Commission and the Court, have been much more consistent than their European counterpart when it comes to the basis of extraterritorial jurisdiction and the responsibility of States in relation to the duty to respect human rights. We find evidence of this in its consistent case law, as reflected in precautionary measures regarding the rights of Guantanamo detainees, merits reports in contentious-jurisdiction cases, and reports, among other precedents. In turn, the Inter-American Court of Human Rights has held that human rights standards apply outside of the borders of States, which are bound by their respective obligations in these areas. While there may be some controversy concerning extraterritorial positive human rights obligations, we posit that the Inter-American approach to extraterritorial obligations to respect human rights is the most consistent for the protection of human dignity. We provide a comparative legal analysis of the developments in Inter-American case law and how it could provide inspiration in other systems.

***Keywords*:** extraterritorial obligations, international human rights law, Inter-American system of human rights, transboundary harm

Introduction

It is an undeniable reality that States often engage in conduct that negatively impacts the enjoyment and exercise of the human rights and liberties of individuals who are located outside of the territory of those States, just as they regretfully also perpetrate abuses within their borders. Accordingly, at first glance, one can be tempted to say that violations doubtlessly engage the responsibility of States regardless of where they commence or take place, as demanded by the respect of human rights in universal geographical terms, considering that their rationale, which is the protection of human dignity – contemporarily accepted as the foundation of international human rights law (Sensen, 2011; Villán-Durán, 2006, pp. 63, 92; Schachter, 1983, p. 853; Andorno, 2009, pp. 227-236; UN General Assembly, 1986; Conference on Security and Co-Operation in Europe, 1975) –, would require that they ought to be respected anywhere and everywhere.[1]

Nevertheless, and in a baffling way, some international supervisory bodies and States have sometimes argued that negative obligations of States, namely the duty to respect or to refrain from negatively affecting or preventing the enjoyment of human rights[2], have a somewhat limited scope, which supposedly makes them operate only inside the borders of the State whose conduct is examined; and that, allegedly, such obligations exist extraterritorially, only in a truly exceptional manner. In this sense, the European Court of Human Rights has held in several cases, such as that of *Issa and others v. Turkey*, that:

> "[T]he concept of "jurisdiction" within the meaning of Article 1 of the Convention is not necessarily restricted to the national territory of the High Contracting Parties […] In exceptional circumstances the acts of Contracting States performed outside their territory or which produce effects there ("extra-territorial act") may amount to exercise by them of their jurisdiction within the meaning of Article 1 of the Convention." (European Court of Human Rights, 2004, para. 68)

An example of a position contrary to extraterritorial human rights obligations can be found in the arguments presented by Israel before the International Court of Justice (ICJ) concerning the latter's advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*. As the ICJ itself pointed out, "[t]he participants in the proceedings before the Court also disagree whether the international human rights conventions to which Israel is party apply within the Occupied Palestinian Territory." (International Court of Justice, 2004, para. 102). The ICJ also described how:

> "Israel denies that the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, both of which it has signed, are applicable to the occupied Palestinian territory. It asserts that humanitarian law is the protection granted in a conflict situation such as the one in the West Bank and Gaza Strip, whereas human rights treaties were intended for the protection of citizens from their own Government in times of peace." (International Court of Justice, 2004, para. 102)

In this article, we aim to describe the position of the main bodies of the Inter-American human rights system as to the existence and scope of an extraterritorial obligation to respect human rights. But before engaging in full with such a study, we will now turn to a very brief comparative legal analysis on how different international supervisory bodies have conceived extraterritoriality, always bearing in mind the similarities to and differences from the Inter-Americans standards and approach.

A succinct and critical view of extraterritorial obligations to respect human rights from a comparative legal perspective: erratic and diverse approaches on the models of jurisdiction and power

The debate in the analysis of the ICJ in the aforementioned advisory opinion was to a great extent determined by the fact that the *Covenant on Civil and Political Rights* mentions, in article 2, that States have obligations to respect and ensure human rights without discrimination "to all individuals within [their] territory and subject to [their] jurisdiction". Thus, it remained to be determined whether both territory and jurisdiction conditions had to be simultaneously met in order to consider that States had extraterritorial obligations. Contrary to this idea and relying on the case law of the Human Rights Committee, the *travaux préparatoires* and teleological considerations, the Court considered that the Covenant in question "is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory," and that obligations concerning economic, social and cultural rights can sometimes also be applicable extraterritorially (International Court of Justice, 2004, paras. 107-113).

Contrasting article 2 of the *Covenant on Civil and Political Rights* with article 1.1 of the *American Convention on Human Rights* (hereinafter, also the American Convention) must lead to the conclusion that extraterritorial obligations also exist in the Inter-American human rights system. Moreover, such existence should be clearer still in this regional system insofar as, unlike

what happens in the Universal treaty-based system, the American Convention does not refer to territory and jurisdiction, but only to the latter. Hence, and interpreting jurisdiction in international legal terms as the exercise of State power (Milanovic 2011b, pp. 33-34; Brotóns *et al.*, 2007, pp. 98, 130-134; Human Rights Committee, 2018, para. 63), one would (rightly) conclude that whenever and wherever it is exercised in a manner inimical to the enjoyment of human rights, State responsibility is triggered due to the breach of a duty to respect or refrain from acting so. Indeed, the aforementioned article 1.1 reads as follows:

> "The 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, without any discrimination".

That being said, it is worth considering that the *European Convention for the Protection of Human Rights and Fundamental Freedoms* has a similar provision in its very first article, not mentioning territory either, but simply indicating that the "High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms" (emphasis added) found in the Convention and its Protocols.

Therefore, both the European and Inter-American regional systems work on the basis of a similar treaty text on obligations. Hence, it is worth analyzing if, from an international comparative legal perspective – which is always relevant and permits to shed light on differences concerning the interpretation of international legal standards that one may not be aware of if such an analysis fails to be performed (Roberts, 2017), they have reached similar conclusions, or, if conversely, their case law does not resemble that of the other, especially since both systems have sometimes cited or considered what the other has decided.[3] In our opinion, in looking at European case law, it is possible to describe it as erratic (da Costa, 2013, pp. 154-155) in regard to extraterritorial jurisdiction, considering the changes it has undergone and how the Court has sometimes refrained from finding that such a jurisdiction exists, as happened in the (in)famous and criticized Grand Chamber decision on admissibility in the *Banković* et al. case. In this case, the Court found the application to be inadmissible – from a judicial or legal realist point of view, it can be pondered whether political considerations on holding States responsible in connection with a NATO operation some saw as legitimate, or on the possibility of having to deal with politically-sensitive cases, has played a role, to a greater or lesser extent, in the outcome of cases as that one (Milanovic, 2011b, pp. 208; Añaños, 2018, p. 293 (criticizing how the European Court ignored violation effects); Benítez *et al.*, 2012, pp. 534-537; Ratner, 2007). Interestingly, in its decision the European Court of Human Rights argued that:

> "[T]he applicants' notion of jurisdiction equates the determination of whether an individual falls within the jurisdiction of a Contracting State with the question of whether that person can be considered to be a victim of a violation of rights guaranteed by the Convention. These are separate and distinct admissibility conditions, each of which has to be satisfied in the afore-mentioned order before an individual can invoke the Convention provisions against a Contracting State." (European Court of Human Rights, 2001, p. 75)

On the contrary and following what may be labeled as an impact-based approach to extraterritorial obligations, the Inter-American bodies do seem to consider that whenever a State *violates* human rights, it has *exercised* jurisdiction (wrongly, of course) in a manner contrary to the respect owed to them, and that therefore, the obligation it has to refrain from engaging in such a conduct leads to its responsibility. Such an approach is, to our

mind, a more appropriate one. This is so because it avoids the manipulation or 'identification' of gaps based on technicalities and euphemisms – is saying that a State did violate a human right but failed to have legal responsibility because of the absence of a 'legal space' or some other formality not ironic, one might wonder?… This, in turn, betrays what human rights law stands for in regard to its foundations, objects, and purposes. Perhaps coinciding with this idea, Daniel Møgster has said that:

> "[T]here is no reason that the State would not be responsible for breaches of the negative duty to respect human rights even where it does not exercise jurisdiction in the spatial or personal sense described above. Rather, the State should respect human rights irrespective of the traditional notion of jurisdiction to the extent that it can." (Møgster, 2018)

On top of this, the case law of the Inter-American Commission has been more consistent throughout its history in regard to extraterritorial obligations than that of the European Court of Human Rights, as will be explored in the next sections of this article.

In doctrine, some have suggested that extraterritorial jurisdiction and the ensuing obligation to respect may be considered, by some Courts, to exist on the basis of either a personal or spatial model. Those bases, in our opinion, have been relied on in contradictory *obiter dicta* and *ratio decidenda* on the subject matter found in the case law of the European Court of Human Rights. As an example of this, one can cite how Marko Milanovic argued that, in his mind, in the decision on the case of *Al-Skeini*, the following happened:

> "Note the Bankovic reference to 'public powers' , which prove to be key later in the judgment, but which the Court actually (purposefully) misplaces. Para. 71 of *Bankovic* was *not* about jurisdiction as authority and control over individuals (personal model), but about jurisdiction as effective control over territory (spatial model)" (Milanovic, 2011a)[4]

On the other hand, a study of the case law of the Inter-American Commission of Human Rights permits to infer that such regional supervisory body has not endorsed either of those two models, but instead has aligned itself with a third criterion that can be described as 'impact'- or (with a more Inter-American nomenclature) 'causality-based.' According to Daniel Møgster, in recent developments to the position of the Human Rights Committee found in its General Comment No. 36 on article 6 of th*e International Covenant on Civil and Political Rights, on the right to life*:

> "Impact' as a ground for the application of the ICCPR is considered a form of exercise of power by the State, one of two forms of exercise of extraterritorial jurisdiction. It replaces the formulation in GC31 § 10 of "power over an individual" (the personal model)" (Møgster, 2018)

The passage on the basis of which the cited author makes his observations is found in paragraph 63 of the General Comment, which will be cited extensively:

> "In light of article 2, paragraph 1, of the Covenant, a State party has an obligation to respect and to ensure the rights under article 6 of all persons who are within its territory and all persons subject to its jurisdiction, that is, all persons over whose enjoyment of the right to life it exercises power or effective control. [261] This includes persons located outside any territory effectively controlled by the State, whose right to life is nonetheless impacted by its military or other activities in a direct and reasonably foreseeable manner. [262] States also have obligations under international law not to aid or assist activities undertaken by other States and non-State actors that violate the right to life. [263] Furthermore, States parties must respect and protect the lives of individuals located in places, which are under their effective control, such as occupied territories, and in territories over which they have assumed an international obligation to apply the Covenant. States parties are also required to respect and protect the lives of all individuals located on marine vessels or aircrafts registered by them or flying their flag, and of those individuals who find themselves in a situation of distress at sea, in accordance with their international obligations on rescue at sea. [264] Given that the deprivation of liberty brings a person within a State's effective control, States parties must respect and protect the right to life of all individuals arrested or detained by them, even if held outside their territory. [265]" (Human Rights Committee, 2018, para. 63)

In its essence, particular sentences of this citation confirm that the Committee equates different conduct with an impact *outside* of a State's territory with a violation of the right to life or, in other words, as conduct affecting its enjoyment, and as amounting to an exercise of power or effective control. Accordingly, it constitutes a (wrongful) exercise of jurisdiction that can be examined in light of the obligation to respect human rights. Likewise, aid or assistance to, or complicity in, violations of the same right also amount to a breach of the duty to refrain from negatively impacting the enjoyment of human rights. Having said this, the Committee had referred to the notion of power over individuals as a basis of extraterritorial jurisdiction before –its General Comment No. 31, for instance, a State must respect the human rights of "anyone within the power or effective control of" that State, "even if not situated within [its] territory" (Human Rights Committee, 2004, para. 10). Therefore, they also breach that obligation, regardless of where the assistance is provided and the conduct of the perpetrator takes place. We will now turn to a detailed examination of the Inter-American position.

The identification and features of a causality- or impact-based extraterritorial duty to respect human rights in the Inter-American system

As was indicated above, in this article we argue that the Inter-American system has long aligned itself with the 'impact' or 'causal' model, which is therefore not a novelty in it, but rather a constant and longstanding criterion in this system. Therefore, recent developments in other systems may be seen as coinciding with the Inter-American one – which does not necessarily mean that the American approach inspired them or was consciously taken into account in other systems. In this section, we will describe when an extraterritorial duty to respect exists in the Inter-American system, and why we deem it as the most consistent approach with a human dignity-based regime, and its scope.

It is worth taking a look at a somewhat recent report adopted by the Inter-American Commission on Human Rights – hereinafter, also the Commission –, in order to figure out which of the three models – the personal, the spatial or the 'impact' or 'causality'-based – is the one more that resembles the Commission's position the most. In that regard, it is useful to say that in its admissibility report in the case of *Danny Honorio Bastidas Meneses and others v. Ecuador* of 2 November 2011, the Commission provided the following ideas concerning extraterritorial jurisdiction, which we cite *in extenso* due to their relevance and the light they shed on the issues discussed in this article:

> "Although jurisdiction usually refers to the authority over persons located inside the territory of a State, human rights are inherent to all human beings and are not based on their nationality or location. Under Inter-American human rights law, every State is bound, as a result, to respect the rights of all persons in its territory and of those persons present in the territory of another State but subject to control of its agents. This position matches that of other international organizations […]
> Because individual rights are inherent to the human being, all American States are required to respect the protection rights of any person subject to their jurisdiction. Although this usually refers to persons located inside the territory of a State, in certain circumstances it can refer to the conduct with an extraterritorial *locus*, where the person is not present in a State's territory. In that regard […] it must be determined whether or not there is a causal connection between the extraterritorial conduct of a State and the alleged violation of the rights and liberties of a person […] the investigation does not refer to the nationality of the alleged victim or to his presence in a given geographical area, but rather to whether or not, under those specific circumstances, the State observed the rights of a person subjected to its authority and control. In view of the above, the Commission shall consider, when examining the merits of the case, evidence regarding the participation of the agents of the Ecuadorian State in the incidents, regardless of whether the incidents took place outside its territory. Because of the above, the Commission concludes that it is competent *ratione loci* to hear this petition because the petition claims violations of the rights protected under the American Convention that were said to have been perpetrated by agents of the State of Ecuador." (Inter-American Commission on Human Rights, 2011, paras. 19, 22-23)

Notice how some sentences in the previous extract address the question of whether there is *ratione loci* competence of the Inter-American body. For it to rule on this, the Commission had to examine when, and if, defendant States can have compliance with the duty to respect examined in relation to events that take place outside their borders. Importantly, almost at the very beginning of its analysis, the Commission provides a teleological reason that cannot be ignored: indeed, if all human beings are entitled to fundamental entitlements inherently, they must be protected *anywhere* and *from* any and all threats against them, whatever their origin –including geographical considerations.

This is an argument that one of the authors of this present article has defended in the past, in the sense that if human dignity is not conditional, its protection and recognition cannot be made dependent on the presence of accidental factors (Carrillo-Santarelli, 2017, pp. 5, 20, 35, 41, 46-49). This is also related to the universality of the protection of human rights, which we referred to in the introduction. This being said, we are aware of the fact that article 31 of the *Vienna Convention on the Law of Treaties* (VCLT) ended up placing the object and purpose on the same level as the contextual and literal interpretation techniques, within the general rule of interpretation (Klabbers,, 2013, pp. 53-54; Remiro Brotóns *et al*, 2007, pp. 597-599). Still, a reading of article 1.1 of the American Convention does not suggest that jurisdiction and human rights obligations of States are restricted to the territory of those States. Instead, a confluence of the elements of the general rule of interpretation support the Commission's position, which is none other than what has been termed as the 'impact' basis. This is revealed, for instance, by the allusion to the *causality* between an extraterritorial conduct of State agents and the enjoyment or violation of human rights – event in which the obligation to respect is applicable.

In an in-depth study on extraterritorial obligations in the Inter-American system, Karen Giovanna Añaños Bedriñana explained how the Inter-American system has identified the existence of extraterritorial jurisdiction based on a notion of control by a foreign State if there are/is: a) situations of military occupation – e.g. in Grenada by the United States of America, with the Commission having noted in its report No. 109/99 that while none of the parties contended about the extraterritorial application of the American Declaration, such application is called for and required when a person is "subject to the control of another state" different from the one with sovereignty over the territory in which that person is found (Inter-American Commission on Human Rights, 1999b, para. 37); b) impact, in the sense of the *causation* of harm by State conduct (military or otherwise), such as the downing of airplanes by Cuban authorities (which the cited author having said that this is a criterion at odds with the *Bankovic* decision), considering that there is a duty to respect by foreign State agents when there is impact or control "through the actions of […] state's agents abroad", as argued in report No. 86/99 (Inter-American Commission on Human Rights, 1999a); or c) detention of individuals by State agents outside of their territory – as happens in Guantanamo Bay, considering that individuals are under the authority and control of those agents in practice (Añaños Bedriñana, 2012, p. 113-128). In the end, we consider that her classification is but an acknowledgment of *some* of the *situations* in which the causation of a violation can be found to take place extraterritorially, all being based on the same causality criterion. Therefore, we argue that they are not to be seen as different criteria of extraterritorial jurisdiction. Due to the adoption of a causality- or impact-based finding of State jurisdiction, as is well indicated by Ms. Añaños Bedriñana, the Commission does not have to make efforts to identify whether alleged violations take place after or before the existence of territorial control by a third State – e.g. in relation to the invasion of Panama by the United States of America (Añaños Bedriñana, 2012, p. 135). Indeed, it suffices to find that a violation was caused by a State, being it unnecessary under this approach to figure out whether it happened after an occupation or invasion or not, among other possibilities. Altogether, the position of the Inter-American Commission of Human Rights can be summarized in the sense that in:

> "[I]nternational law in a broader sense […] the bases of jurisdiction are not exclusively territorial, but may include other criteria as well […] each State is obligated to respect the rights of all persons within its territory and of those present in the territory of another State but subject to the control of its agents […] at the time of examining the scope of the American Declaration's application, it must be ascertained whether there is a causal connection between the extraterritorial conduct of a state through the actions or omissions of its agents and/or persons who have acted under its orders or acquiescence and the alleged violation of the rights and freedoms of an individual." (Inter-American Commission on Human Rights, 2018, paras. 309, 313-314)

Furthermore, it must be added that there is no requirement as to a minimum *length* of time over which State agents are present or operate in a foreign territory for extraterritorial jurisdiction to exist; nor is a formal or *lawful* presence required. Indeed, it suffices that there is impact or power over the enjoyment of human rights for the duty to respect to be applicable. In this sense, in its reports No. 68/15 and 112/10, the Inter-American Commission on Human Rights indicated that:

> "[T]he following is essential for the Commission in determining jurisdiction: the exercise of authority over persons by agents of a State even if not acting within their territory, without necessarily requiring the existence of a formal or structured legal relation over time to raise the responsibility of a State for acts committed by

its agents abroad." (Inter-American Commission on Human Rights, 2015b, para. 28; Inter-American Commission on Human Rights, 2010, para. 99)

It is also worth commenting that while there is an obligation of State "agents to respect […] human rights, in particular […] to life and humane treatment" when those agents "interfere in the lives of persons who are on the territory of [another] State" and there is a "causal nexus between the extraterritorial conduct of the State and the alleged violation of the rights and freedoms of an individual" (Inter-American Commission on Human Rights, 2010, paras. 99-100) – thus reiterating the impact- or causality-based approach to extraterritoriality –, such a situation does not imply that a duty to ensure all human rights necessarily arises. According to the Commission, the emergence of the duty to respect:

> "[D]oes not necessarily mean that a duty to guarantee the catalogue of substantive rights established in the American Convention may necessarily be derived from a State's territorial activities, including all the range of obligations with respect to persons who are under its jurisdiction for the (entire) time the control by its agents lasted." (Inter-American Commission on Human Rights, 2010, para. 100)

In sum, extraterritorial control can exist by virtue of the existence of certain extraterritorial *acts* of the agents of a third State – which demand the presence of a *correlated* extraterritorial duty to *respect* human rights (Inter-American Commission on Human Rights, 2016, para. 24). This is explained by the logic of human rights law and the object and purpose of protecting all victims. As the Inter-American Commission very well pointed out, "[o]therwise, there would be a legal loophole regarding the protection of the human rights of persons that the American Convention is striving to protect, which would be contrary to the purpose and end of this instrument." (Inter-American Commission on Human Rights, 2011, para. 21). This teleological consideration, which we raised at the outset of this article, is worth remembering. The Inter-American *Court* of Human Rights, in turn, has likewise endorsed the causality- or impact-based approach. In this sense, for instance, in its twenty-first advisory opinion it argued that "the fact that a person is subject to the jurisdiction of the State is not the same as being in its territory," reason why, among others, the principle of non-devolution can be invoked by "any alien over whom the State in question is exercising authority or who is under its control, regardless of whether she or he is on the land, rivers, or sea or in the air space of the State" (I/A Court H.R., 2014, para. 219). It merits mentioning that the UNHCR has similarly stated that the obligation of non-devolution has an extraterritorial scope (UNHCR, 2007, p. 14). Interestingly, the Court has considered that the respect due to human rights, such as those analyzed in its advisory opinion, is based on the "attributes of the human personality," regardless of migration or residence status (I/A Court H.R., 2014, para. 62) – which is consistent with our argument that extraterritoriality, in terms of the obligation to respect, flows from the non-conditionality of human dignity and the universal respect owed to it. It should be noted that the extraterritorial scope of *non-refoulement* was confirmed in advisory opinion OC-25/18 (I/A Court H.R., 2018, paras. 99, 108); and that the Court has said that when someone has been recognized as a refugee by a State, such recognition is valid extraterritorially as well (I/A Court H.R., 2018, para. 123).

Responsibility arising from (environmental or other) transboundary harm in the Inter-American system

As Añaños Bedriñana has pointed out, the Commission does not equate competence with territory. Rather, it takes into account how State agents can engage the responsibility of their States as a result of their conduct when it has effects – transboundary situation – or takes place abroad, not only in the territory of a third State, but also in international spaces (I/A Court H.R., 2018 para. 103, 108-109), such as the High Seas. Daniel Cerqueira, has explained how the Inter-American Commission on Human Rights has upheld the existence of extraterritorial jurisdiction on the basis of both the American Convention and the *American Declaration on the Rights and Duties of Man*, when acts or omissions of State agents have an impact abroad – which is relevant when examining transboundary harm, as will be succinctly explained further on – and when violators are under the effective control of a State (Cerqueira, 2015, p. 20) – or when their conduct can be otherwise attributable to it. Doctrine has thus pointed out how, in addition to a duty to respect, which emerges when State agents operating abroad can have a causal negative impact on the enjoyment of human rights –which triggers the obligation to refrain from causing or contributing to it – in the Inter-American human rights system it has been said that States can also be held responsible for the negative human rights impacts they cause in the territory of third countries as a consequence of conduct of their agents that takes place inside their own borders. This can be seen quite conspicuously in the recent landmark advisory opinion OC-23/17 of the Inter-American Court of Human Rights on *The Environment and Human Rights*. In it, the Court held that:

> "[T]he jurisdiction of a State is not limited to its territorial space (para. 74). The word "jurisdiction," for the purposes of the human rights obligations under the American Convention as well as extraterritorial conducts may encompass a State's activities that cause effects outside its territory […] States also have the obligation to avoid any transboundary environmental damage that can affect the human rights of individuals outside their territory. For the purposes of the American Convention, when transboundary damage occurs that effects treaty-based rights, it is understood that the persons whose rights have been violated are under the jurisdiction of the State of origin, if there is a causal link between the act that originated in its territory and the infringement of the human rights of persons outside its territory […]
>
> In cases of transboundary damage, the exercise of jurisdiction by a State of origin is based on the understanding that it is the State in whose territory or under whose jurisdiction the activities were carried out that has the effective control over them and is in a position to prevent them from causing transboundary harm that impacts the enjoyment of human rights of persons outside its territory. The potential victims of the negative consequences of such activities are under the jurisdiction of the State of origin for the purposes of the possible responsibility of that State for failing to comply with its obligation to prevent transboundary damage […] the obligation to prevent transboundary environmental damage or harm is an obligation recognized by international environmental law, under which States may be held responsible for any significant damage caused to persons outside their borders by activities originating in their territory or under their effective control or authority. It is important to stress that this obligation does not depend on the lawful or unlawful nature of the conduct that generates the damage, because States must provide prompt, adequate and effective redress […] there must always be a causal link between the damage caused and the act or omission of the State of origin in relation to activities in its territory or under its jurisdiction or control." (I/A Court H.R., 2017, paras. 95, 101-103)

A close reading of the previous transcription permits us to identify the main elements of the responsibility arising from the causation of transboundary harm in the Inter-American human rights system: firstly, in regard to *environmental* harm, a significant damage is required. This is due to the fact that such kind of harm is the one that triggers international responsibility, as discussed in OC-23/17.

Accordingly, it is not necessary to identify a significant harm when other human rights are affected abroad as a result of action taking place inside a State. Instead, one should simply identify a violation of human rights. Secondly, when transboundary harm results in the violation or prevention of the enjoyment of human rights, responsibility can arise regardless of whether the conduct that caused it is considered as lawful or illicit under domestic law. Third, and as suggested in the preceding consideration, for a State to be held responsible, regarding causality between conduct attributable to it –either because its agents carried it out, or because the State had effective control over the pertinent private conduct or the latter was otherwise attributable to the State –, there must be a nexus of causality between the relevant action (or omission) and the violation or harm. Needless to say, these elements can also be taken into account when conduct attributable to the State takes place outside of its borders –after all, in doctrine, both responsibility arising from transboundary harm/violations and from conduct outside of State borders in accordance with Inter-American standards have been jointly studied, as follows from the references made at the outset of this subsection.

The impact-based approach as a constant criterion in Inter-American case law through the years and in the exercise of different supervisory functions (contentious, precautionary, promotion)

In a study by Karen Giovanna Añaños Bedriñana, she pointed out that even as far back as 1985, in its *Report on the Situation of Human Rights in Chile*, the Commission condemned killings of individuals – Orlando Letelier del Solar and Carlos Prats González – at the hands of Chilean agents that took place in the United States of America and Argentina (Añaños Bedriñana, 2012, pp. 98-100). The Inter-American Commission even declared in that report that "[t]he seriousness of these events lies in the method used in the respective crimes and in the fact that they took place beyond the frontiers of Chile" (Inter-American Commission on Human Rights, 1985, paras. 80-91). Accordingly, and in spite of the legal justification of the condemnation not having been spelled out in detail back then, we can thus identify a constant train of thought, harking back to many years ago, that is based on the consideration according to which impacts that are inimical to human rights and are attributable to agents are contrary to the State obligation to respect said rights, regardless of where they take place. In addition to the foregoing considerations, it is worth indicating that the impact-based approach has been consistently held by the Commission throughout many years and in the exercise of its different competences.

In regard to the explicit or implicit handling of the causality criterion in the exercise of different mandates and functions of the Commission, one can identify country or thematic reports; precautionary measures adopted when there is a risk of extraterritorial abuse, and other initiatives. It is possible to mention, for example, in connection with the precautionary function of the Commission, Resolution Nº 2/06 *On Guantanamo Bay Precautionary Measures*. In it, the Inter-American Commission condemned the failure of the United States of America to "give effect to the Commission's precautionary measures" towards detainees at Guantanamo Bay. While no express detailed reference to the matter was found by the authors of this text in precautionary measures adopted in favor of those detainees, it is our understanding that, when examining the adoption of precautionary measures regarding them, the Commission implicitly considered that there was an extraterritorial exercise of jurisdiction by the United States of America. Otherwise, it probably would not have adopted those measures. This conclusion is supported by the fact that, in its report No. 17/12, the Commission explicitly indicated that:

> "[T]he issuance of precautionary measure MC 259-02 in 2002, directed at all prisoners detained in the Guantanamo Bay Detention Facility at that time, reflects the IACHR's understanding that Guantanamo Bay falls under the jurisdiction of the United States" (Inter-American Commission on Human Rights, 2012, para. 34)

As to the reasons why the Commission considered that the United States of America exercised jurisdiction over detainees at Guantanamo Bay, and why they coincide with what the so-called impact-based approach stands for, it can be said that they are illustrated by what the Inter-American Commission on Human Rights held in the sense that there are State human rights obligations when there is:

> "[C]onduct 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 these cases, the inquiry turns on whether the alleged victim was subject to the authority and control of the acting State" (Inter-American Commission on Human Rights, 2012, para. 30)

Likewise, in its report entitled "*Towards the Closure of Guantanamo*," the Inter-American Commission on Human Rights argued that it is empowered to examine the compatibility of extraterritorial State actions with human rights obligations "when the victim is subject to the effective authority and control of the agents of" a State (Inter-American Commission on Human Rights, 2015b, para. 54). In light of the previous legal materials, one can conclude that the Commission has consistently acted on the basis of the argument that whenever and wherever State agents behave in ways that have an impact on the enjoyment of human rights, there is jurisdiction over the affected individuals –this is not only consistent in the different manifestations of the functions of the Commission, e.g. adopting reports to promote interpretations, but also highlights the importance of the Commission having a variety of competences that permit it to attempt to influence human rights practices in ways that go beyond what contentious jurisdictional actions (can) do.

On the other hand, the allusion to "control" in the case law of the Commission should not make one think that personal or spatial models are the ones being followed by it, because what matters for the Commission is the causation of impact by State conduct, condition that suffices to satisfy the threshold of jurisdiction of the Inter-American standards – needless to say, in General Comment No. 36, explored in section one of the present article, the Human Rights Committee also referred to control, but clearly came closer to the impact-based approach to extraterritorial jurisdiction. This is how academics have also considered the case law of the Inter-American system to stand on the issue of extraterritorial jurisdiction. In this sense, and concerning how doctrine has analyzed the position of the Commission, it can be mentioned that Brian D. Tittemore has found that, in regard to the Guantanamo Bay precautionary measures, the Commission:

> "Determined that the United States was responsible for ensuring the fundamental rights of the detainees at Guantanamo Bay because they clearly fell within the authority and control of the United States, regardless of whether they could be said to have been detained within US territory." (Tittemore, 2006, p. 384)

In doctrine, authors have argued that the Inter-American system has followed a model of extraterritorial State obligations, the contours of which coincide with the logic of the impact-based approach. In this regard, for instance, Diana María Molina-Portilla has considered that States bear legal responsibility when their agents directly participate in the violation of human rights, even in which the duty to respect is breached (Molina-Portilla, 2016, pp. 73-74). Indeed, this is a powerful logic that, to our mind, should flow from the consideration that human rights are founded upon a

non-conditional human dignity and that States are forbidden to disrespect them: if such disrespect were allowed abroad, or impunity were to be upheld by – paradoxically – international human rights law, the general principle that whoever harms must respond would be thwarted, and the rationale of human rights law would be trampled upon, as was argued *supra*.

In another report (No. 38/99), on the *Saldaño v. Argentina* case – adopted in 1999, and thus further demonstrating the consistency of the Inter-American rationales on extraterritoriality throughout the years –, the Commission relied on the same and constantly invoked causality or impact criterion by indicating that all States have an obligation to respect the human rights of individuals, both inside and outside their borders, when those individuals are subject to the power of State agents. In the words of the Commission:

> "The Commission does not believe, however, that the term „jurisdiction" in the sense of Article 1(1) is limited to or merely coextensive with national territory. Rather, the Commission is of the view that a state party to the American Convention may be responsible under certain circumstances for the acts and omissions of its agents which produce effects or are undertaken outside that state's own territory […] This understanding of jurisdiction--and therefore responsibility for compliance with international obligations--as a notion linked to authority and effective control, and not merely to territorial boundaries, has been confirmed and elaborated on in other cases decided by the European Commission and Court." (Inter-American Commission on Human Rights, 1999a, paras. 17, 19)

The limits of the scope of the extraterritorial duty to respect human rights, and duties arising from the dependence of some rights on extraterritorial State action

Precisely because an extraterritorial duty to respect exists whenever a State can have a negative impact on the enjoyment of human rights causally attributable to the conduct of its agents, in accordance with Inter-American standards, States cannot have legal responsibility for any and all violations that their nationals suffer abroad. Indeed, absent the power of the agents exercised in a way inimical to human rights, there would be no extraterritorial jurisdiction under the criterion explored in this article. That condition is precisely something that was acknowledged in report 38/99, which concluded with the Commission declaring the petition inadmissible for these reasons. In the case that was examined, the petitioner complained about her arrest, trial and sentencing in a third State, with those actions having been carried out by that third State's agents, and with no action or control over the alleged victim having been performed by the agents of the State of nationality, i.e. Argentina. According to the Inter-American Commission:

> "The Commission also finds the petitioner's reliance on the bond of nationality between the Argentine State and Mr. Saldaño insufficient to sustain her legal claims. The mere fact that the alleged victim is a national of Argentina cannot, in and of itself, engage that state's responsibility for the allegedly wrongful acts of agents of another state performed wholly within their own national territory […] neither the drafting history of the American Convention, nor the decisions of the Inter-American Court or this body, supports the proposition that state parties to the Convention assumed an obligation to protect their nationals against violations committed abroad by another state. In addition, the petitioner has failed to show any act or omission by Argentine authorities that implicate that state in the alleged violations arising out of Mr. Saldaño's prosecution in the United States so as to subject him to Argentina's jurisdiction within the meaning of Article 1(1) of the American Convention." (Inter-American Commission on Human Rights, 1999a, para. 22)

Notwithstanding, in spite of nationality being in itself an insufficient link to demonstrate the existence of extraterritorial jurisdiction, the Commission has added the idea that, sometimes, by virtue of the dynamics related to their exercise, some human rights of persons living abroad must be respected and even ensured by their national States. This happens when their content precisely generates entitlements in relation to States of nationality even and *when* individuals are living outside of their territories – one could think, for instance, of the right to vote abroad, or the possibility of acquiring a passport in order to be able to exercise the freedom of movement and residence (art. 22 of the American Convention). According to the Commission:

> "This Commission also recognizes that the nationals of a state party to the American Convention are subject to that state's jurisdiction in certain respects when domiciled abroad or otherwise temporarily outside their country or State and that a state party must accord them, when abroad, the exercise of certain convention based rights. For example, a state party is obliged to accord such persons, based on their nationality, the right to enter the country of which they are citizens (Article 22(5)) and the right not to be arbitrarily deprived of one's nationality or of the right to change it (Article 20(3)). Thus, the capricious refusal of a state party's consular official to grant or renew a passport to one of that state's nationals residing abroad, which prevents him from returning to his country, might well engage that state party's responsibility for violation of the American Convention." (Inter-American Commission on Human Rights, 1999a, para. 20)

Conclusion

The study of how the extraterritorial duty to respect the enjoyment of human rights has been interpreted in the Inter-American system sheds light on several aspects that merit consideration. Firstly, and from a comparative legal perspective, the fact that it has been consistent, unlike what has happened in the European system of the Council of Europe, should make one pause and ponder if the latter has changed its position, or if it has been quite unclear and puzzling for some analysts, because of the fact that, perhaps, political considerations may have played a role out of a desire to attempt to recognize extraterritoriality while avoiding certain politically-uncomfortable criticisms the Court could have faced. Not only has the Inter-American position been consistent through the years – at the very least since the 1980s, as the research reflected in this article indicates in regards to the position of the Commission against Chilean abuses overseas –, but we also argue that it is the approach most consistent with the acknowledgment of what human rights law stands for and requires. Indeed, the causality-based system does nothing but recognize that negative impacts on the enjoyment of human rights that are attributable to States –because their agents or actors they have effective control over, or, otherwise have conduct attributable to the State, engage in problematic conduct abroad or inside State borders but with transboundary and external effects –, and also the fact that those impacts should be deemed to be illicit. Otherwise, not only would gaps and loopholes exist, but States would be allowed –because of none other than human rights law (!), which is quite ironic – to get away with the negative impact of their conduct. In such a scenario, victims would be left unprotected *vis-à-vis* the responsible State – the one that precisely engaged in a conduct that should be deemed to be illicit.

Certainly, the Inter-American approach is based on the protection of victims, whereas some decisions of the European Court of Human Rights on extraterritorial obligations seem to, as Roxtrom, Gibney and Einarsen have posited, resemble a system in which "human rights are not owed to human beings *qua* human beings" – as has been cited by Karen da Costa (2013, p. 155).

We advance the hypothesis that probably it is because of those considerations related to the impact-based approach to the extraterritorial scope of the duty to *respect* human rights as being the most consistent with a human-centered approach (instead of a pernicious State-based one, which may end up giving it undue privileges, leaving victims vulnerable), the principles and foundations of human rights law, and its object and purpose, that bodies such as the Human Rights Committee have recently adopted an approach that seems to greatly coincide with the one espoused by the Inter-American Commission and Court of Human Rights. Therefore, studying the case law of bodies that have been working on the basis of this theory for many years, and which have defined its features and contours, can prove highly useful from a comparative legal perspective for those other bodies and for practitioners and those who want to access the universal treaty-based system or promote changes or adjustments in it and others.

Future research beyond the scope of this research can engage with another, quite complex, question: that of the existence of an extraterritorial duty to *ensure* human rights. Indeed, while experts have come up with initiatives such as the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, the Inter-American Commission on Human Rights indicated, in its report on *Indigenous Peoples, Afro-Descendent Communities, and Natural Resources: Human Rights Protection in the Context of Extraction, Exploitation, and Development Activities*, that while it is clear that States have responsibility "for conduct that takes place in another country when [their] acts or omissions cause human rights violations," it must be acknowledged that some States have engaged in activities of "*economic diplomacy*" or have been called by civil society and other actors to respond for the abuses that national corporations (or individuals, one might add) perpetrate abroad. Yet, according to the Commission, unlike what happens with the respect to duty:

> "[T]his is an emerging and evolving area, now the subject of deep discussion […] the IACHR continues to urge foreign states of origin to put mechanisms in place voluntarily to secure better human rights practices of their corporate citizens abroad […] the IACHR notes with appreciation that the state of Canada has given assurances at hearings, in discussions with the Commission and even publicly, that it intends to strengthen, voluntarily, its existing corporate social responsibility rules for its companies operating abroad." (Inter-American Commission on Human Rights, 2015c, paras. 79-80)

As can be gleaned from the previous excerpt, allusion to non-binding standards as those of social responsibility, reference the recommendation of adopting strong protections *voluntarily*, and the express indication that the Commission considers that there are uncertainties surrounding the possible responsibility of States arising as a result of the conduct of their nationals (not agents or actors whose conduct is directly attributable to them) abroad, evince a lack of legal clarity and the idea of a work in progress. These connected issues should be guided by a victim-centered approach, just as the examination of the extraterritorial State duty to respect has, fortunately and correctly, been guided by in the Inter-American human rights system. Human rights law, after all, exists for the sake of human beings and their dignity, and they are thus and should be seen as their protagonists, not the States.

ENDNOTES

1. Tellingly, the Vienna Declaration and Programme of Action not only mentions the goal of securing "full and universal enjoyment" of human rights, but also states that there is a commitment towards "universal respect for, and observance and protection of, all human rights and fundamental freedoms for all." We propose that the link between universality and respect can be understood in terms of respect being owed in the different situations in which the enjoyment of rights and freedoms may be imperiled. On universality as requiring protection from all threats, also see: Carrillo-Santarelli (2012, pp. 850-851).
2. I/A Court H.R. (1988, para. 169): "[w]henever a State organ, official or public entity violates one of [the human] rights, this constitutes a failure of the duty to respect the rights and freedoms".
3. Groppi and Lecis Cocco-Ortu (2014). This very interesting article explores both the implicit and express mutual references and cross-fertilization between the Inter-American and European Courts of Human Rights, and the reasons for doing or refraining from doing so, including legitimacy and case law expertise considerations.
4. On the spatial (and its shortcomings) and personal (not limited to exercises of "legal power" for it to be robust) models, also see Milanovic (2011b, pp. 33, 129, 207, 262-263).

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