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The Scope of the Extraterritorial Obligation to Respect in the Inter-American Human Rights System: An Approach Fully Consistent with the Demands of the Recognition of the Dignity of All Human Beings

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Abstract: The two primary supervisory bodies within the Inter-American Human Rights System, namely the Inter-American Commission of Human Rights and the Inter-American Court of Human Rights, have demonstrated greater consistency than their European counterparts in identifying the basis for extraterritorial jurisdiction and consequently the responsibility of states for violations of their inherent duty to uphold human rights and freedoms. The Inter-American approach to extraterritorial jurisdiction aligns significantly with the 'functional-impact model of jurisdiction.' This model of jurisdiction relies on establishing a direct causal connection between a state's actions beyond its borders and the resulting harm to human rights. This functional, non-spatial approach to extraterritorial jurisdiction is evident in the extensive practice of the Inter-American Human Rights Commission. We argue that the Inter-American Commission's approach to the extraterritorial application of human rights, specifically with regards to the extraterritorial jurisdiction of human rights law a stance also adopted by the Inter-American Court of Human Rights in its jurisprudence is more in line with the fundamental requirements for the unconditional protection of human dignity. Consequently, it can be concluded that the aforementioned extraterritorial approach can serve as a source of inspiration for other human rights courts and monitoring bodies.

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INTRODUCTION

States potentially can, and regretfully sometimes do, engage in conduct that negatively impacts on the enjoyment and exercise of human rights beyond their borders.[1] From

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1 M Gibney, 'The historical development of extraterritorial obligations', in M. Gibney *et al.* (eds), *The Routledge handbook on extraterritorial human rights obligations* (Routledge, London, 2022), Chapter 1; D. Kinley and J. Tadaki, 'From talk to walk: The emergence of human rights responsibilities for corporations at international law' 44 *Virginia Journal of International Law* (2004) 931-1023, at 931 onwards; G. Grisel, *Application extraterritoriale du droit international des droits de l'homme* (Bruylant, Paris, 2010), at 3 and onwards.

the perspective of striving to bring about the non-repetition and reparations of those extraterritorial abuses against human dignity, such a causation of harm ought to engage the responsibility of the State to which the violation is attributable.[1]

In our opinion, this is something that follows from the universality that it is claimed human rights have. Why so? Because it demands the protection of the dignity of *all* human beings. We argue that this must be interpreted as requiring such a protection regardless of the origin of the threat, geographical or otherwise.[2] Hence, an interpretative effort should be made to permit protection from the *authors* of extraterritorial abuses under *lex lata*. And when technicalities get in the way of making remedies against them reasonably accessible, *lex ferenda* considerations would call for a revision of the law.

It is thus important to critically examine how supervisory bodies understand extraterritorial human rights obligations of States and their scope. In this article, we will study what the Inter-American Commission and Court of Human Rights have said on the issue. We advance that their approach is a very protective one that heeds the universality demands we pointed to, embracing what can be called as an impact-based approach to extraterritoriality along with other traditional criteria such as personal and territorial-control based ones, leaving no gaps that could be exploited by abusive States subject to their jurisdiction to elude control and responsibilities, unlike what may happen under other systems.

In this regard, it is worth mentioning that some States and international courts and tribunals have put forth considerations according to which the obligation to respect (i.e., to not adversely impact the enjoyment of) human rights and freedoms has a restricted geographical applicability. In other words, they hold that the duty of States to refrain from violating human rights can exceptionally have an extraterritorial scope, which means in turn that States would supposedly not always be responsible for the negative impacts on human rights they cause when acting beyond or generating effects beyond their borders.

While this approach admits that extraterritorial obligations and the correlated responsibilities of States can sometimes exist extraterritorially, the fact that they implicitly hold that sometimes they do not present a problem, insofar as there would be cases in which individuals would be victimized but there would be an impossibility of bringing about claims against the State that *perpetrated* the violations. From an extra-legal perspective, for victims who find themselves in cases outside the conditions of extraterritoriality, the ensuing situations reeks of unfairness. One need to look at the

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1 Samantha Besson, 'The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to', 25 *Leiden Journal of International Law* (2012) 857-884, at 857 onwards [doi: 10.1017/S0922156512000489].

2 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 N. Carrillo-Santarelli, 'Enhanced Multi-Level Protection of Human Dignity in a Globalized Context through Humanitarian Global Legal Goods' , 13 German Law Journal (2012) 829-873, at 850-851 [doi: 10.1017/S2071832200020782]; Pasquale de Sena,'Dignità umana in senso oggettivo e diritto internazionale', 11 *Diritti umani e diritto* internazionale (2017) 573-586, at 573 onwards [doi: 10.12829/88602].

cases of individuals victimized by drone strikes who have been unable to bring any effective claims or obtain full (and sometimes any) reparations. Certainly, the idea of responsibility comes from the *respondere* need to respond for one's actions,[3] something that is missing at least under some circumstances in the restrictive extraterritorial obligations' model.

Both interpretive and political justifications — which we disagree with, considering what is at stake — may rest behind the reluctance of some individuals and organizations to assert that States always have international legal responsibility actions of their agents taking place or having effects beyond their territories which are inimical to human rights. Politically, some could consider that it would create excessive burdens and logistic difficulties under those Courts tasked with examining their obligations for actions taking place far away, turning them into "world" courts where anyone could apply; or that some political "leeway" ought to be given for foreign affairs.

But such a position reeks, in our opinion, of a nationalistic — or, shall we say, jingoistic — version of utilitarianism that, in the name of giving priority to the nationals, ends up denying the value, agency, and rights of foreigners under some circumstances. And that is unacceptable if one is true to the underlying values of human rights, such as the equal dignity of all human beings. And as to pragmatic considerations, should Courts not be the resort of last hope of those who find no domestic remedies and protection, as the late judge Cançado once said?[4] Moreover, evidence of domestic abuses can sometimes be likewise hard to find, and such considerations are sometimes more cynical than what befits a Court of law, which is *entrusted* with the control of the limits of executive and other action. And human rights speak to us about the inherent worth of every single individual, regardless of identity accidents including those of nationality. We therefore consider that arguments as the following on are *not* in tune with the philosophies inspiring them: "human rights treaties were intended for the protection of citizens from their own Government in times of peace".[5]

Conversely, the underlying rationale of protecting and respecting human dignity demand striving to find ways to close protection gaps in relation to extraterritorial State abuses and pointing them out calling for reforms if and whenever technicalities do not permit to fill them. Seen in light from these parameters, given how it does not suffer from the gaps that could be present in other systems, the Inter-American approach to this issue is one that is fully consistent with what should be expected and offered to human beings, insofar as it does not suffer from the voids that others have. In this sense, as has been perfectly illustrated by the Inter-American Commission on Human Rights, extraterritorial *acts* of the agents of a third State demand the presence of a *correlated* extraterritorial duty to *respect* human rights,[6] as demanded by the logic of human rights

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3 B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Cambridge University Press, Cambridge, 2006), at 163.

4 Concurring Opinion of Judge A.A. Cançado Trindade to: Inter-American Court of Human Rights, *Case of Castillo-Petruzzi* et-al v. *Peru*, Judgment (Preliminary Objections), 4 September 1998, para. 35.

5 Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, International Court of Justice (ICJ), 9 July 2004.

6 Inter-American Commission on Human Rights, *Khaled El-Masri v. United States*, Report No. 21/16, 15 April 2016, para. 24.

law since, otherwise, according to it, "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"[7] (emphasis added).

In our opinion, this is a powerful logic that technical constructions sadly sometimes disregard. We consider that extraterritoriality considerations should flow from the identification 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 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.

Therefore, dissemination of its position can be beneficial for other systems and human rights defenders, who can benefit from the lessons it offers in a comparative approach and provide inspiration for reforms, when needed. Regretfully, its study has been somewhat neglected, with much more studies having been devoted to the convoluted (and perhaps for that very reason) approach of the European Court of Human Rights. This text will explain why we argue this, and we hope that the reasons we provide, citing Inter-American case law, milestones and praxis, can likewise serve the dissemination function we pointed out above. This article thus aims to be both critical and descriptive, engaging mostly with the legal aspects of the debate and practice.

(A) JURISDICTION (AND THE ADOPTION OF A MODEL) AS THE CORNERSTONE OF THE APPLICABILITY OF EXTRATERRITORIAL OBLIGATIONS TO RESPECT HUMAN RIGHTS

From a technical legal perspective, much of the discussion logically rests on the understanding of jurisdiction. This is the result of the fact that the general human rights obligation to respect often pivots on their being applicable and required concerning what happens under a given State's jurisdiction. In this sense, for instance, article 1.1 of the American Convention on Human Rights indicates that States Parties to it commit "to respect the rights and freedoms recognized herein […] to all persons *subject to their jurisdiction* […] without any discrimination" (emphasis added). The European similarly states that Parties to it "shall secure to everyone *within their jurisdiction* the rights and freedoms" enshrined under it (emphasis added). The International Covenant on Civil and Political Rights, in turn, sets forth that a States Party to that treaty must respect the rights it recognizes "to all individuals *within its territory and subject to its jurisdiction*" (emphasis added).

The three aforementioned instruments thus make the obligation of a State to respect human rights dependent on the existence of its jurisdiction. The latter treaty, unlike the others, could be understood as adding an additional requirement, that of territory, which at first glance would be at odds with the extraterritorial possibility. As we will

7 Inter-American Commission on Human Rights, *Danny Honorio Bastidas Meneses and others* v. *Ecuador*, Admissibility, Petition 189 03, Report 153/11, 2 November 2011, para. 21.

remind later in this article, however, that is an alternative rather than an additional requirement for the obligation to respect to be applicable.

Based on the jurisdiction condition, one could then refute those who deny the applicability of human rights duties to respect beyond national borders on the basis or the alleged lack of explicit acknowledgment of that scope under international human rights law (IHRL) provisions in the context of armed conflict and other instances.[8] Why so? Because they would be implicitly covered by the scope of the respect obligation considering the possible presence of extraterritorial *jurisdiction*. On this point, the following passage of the judgment on the merits of the European Court of Human Rights (ECtHR) in the case of *Issa and others v. Turkey* is quite illustrative. This is a case that examined alleged extrajudicial killings of Iraqi Kurds by Turkish security forces in Iraq.[9] In the words of the ECtHR:

> "[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"[10] (emphases added).

Accordingly, we insist that what some could see as an apparent lack of extraterritoriality provisions in general human rights law when it comes to the obligation to respect is just that: apparent. Indeed, the clauses on the scope of State obligations already encompass obligations that are applicable beyond a State's own borders.

As to the questions brought about by some readings of Article 2 (1) of the International Covenant on Civil and Political Rights (ICCPR), which we advanced before, the following can be said. An interpretation that deems territory and jurisdiction as cumulative conditions that must be present for a State to have an extraterritorial obligation to respect human rights would give more leeway to expansive and unfettered State executive discretional powers at the expense of the protection of human rights. This is at odds with their object and purpose, and so the teleological element of the general rule of interpretation, found among others in article 31.1 of the Vienna Convention on the

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8 Amplius see J. Grignon and T. Roos, 'La juridiction extraterritoriale des États parties à la Convention européenne des droits de l'Homme en contexte de conflit armé : analyse de la jurisprudence de la Cour européenne des droits de l'Homme', 33 Revue québécoise de droit international (2020) 1-17; B. Stern, 'Quelques observations sur les régles internationales relatives à l'application extraterritoriale du droit', 32 *Annuaire Français de Droit International* (1986) 7-52; T. E. Jürgenssen, 'La protección de los derechos humanos durante la realización de operaciones militares en el extranjero: un análisis crítico de la reciente sentencia del Tribunal Europeo de Derechos Humanos en el caso «Hanan contra Alemania»', 38 *Anuario español de derecho internacional* (2002) 487-523; M. Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (Oxford University Press, Oxford, 2011).

9 European Court of Human Rights, Second Section, *Case of Issa and others v. Turkey*, Judgment, 16 November 2004, para. 68.

10 For a commentary, see: T. Abdel-Monem, 'The Long Arm of the European Convention on Human Rights and the Recent Development of Issa v. Turkey', 12 *Human Rights Brief* (2005) 9-11; T. Abdel-Monem, 'How Far Do the Lawless Areas of Europe Extend-Extraterritorial Application of the European Convention on Human Rights', 14 *Journal of Transnational Law and Policy* (2005) 159-214.

Law of Treaties, should in our opinion make such an interpretation at least *prima facie* suspect and in need of quite robust confirmation (which does not exist).

To recall, the provision under examination provides that States have positive obligations to respect and ensure human rights without discrimination: "to all individuals within [their] territory and subject to [their] jurisdiction". The question concerning this part is thus whether both territory and jurisdiction conditions are to be simultaneously satisfied in order to consider that a State has an extraterritorial duty to respect human rights.

While a literal interpretation of the text of this Article could be interpreted by some as suggesting that both conditions must be simultaneously met, a systemic interpretation bolstered by the teleological consideration of the goal to protect human dignity in universal and non-discriminatory terms is conducive to the opposite conclusion. After all, that goal demands among others not discriminating on the basis of the nationality or place of residence of someone affected by a given State's conduct. In this regard, it must be considered that all human beings are equal in value, regardless of their identities and location.[11]

Furthermore, supplementary means of interpretation (Article 32 of the Vienna Convention on the Law of Treaties) support this conclusion. In this regard, the *travaux preparatoires* of Article 2, para. 1 of the ICCPR suggest the understanding that the enjoyment of civil and political rights and liberties is to be respected without mediation, and that this is correlated by obligations of States.[12] On the basis of these and other arguments, the ICJ held in its advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* that the ICCPR: "is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory".[13] Interestingly, the Court also concluded that obligations towards economic, social and cultural rights can sometimes be applicable extraterritorially as well.[14]

As the comparison between treaty texts presented at the outset of this section demonstrates, Article 1 (1) of the American Convention on Human Rights (American Convention or ACHR) is drafted in less ambiguous terms, with a clarity that leaves no uncertainties as to the circumstances in which a State has extraterritorial obligations to respect human rights, namely whenever it exercises or has jurisdiction.[15] In this

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11 A. Gattini *et al.* (eds), *Human dignity and international law* (Brill Nijhoff, Leiden, 2021).

12 Doc A/C3/SR1181 in General Assembly Official Records (GAOR) (XVII) Agenda Item 43 237 para 23; Doc A/C3/SR1257 in GAOR(XVIII) Agenda Item 48 238 para 12; Doc A/C3/SR1427 in GAOR(XXI) Agenda Item 62 para 2. See also M. J. Bossuyt, *Guide to the "travaux préparatoires" of the International Covenant on Civil and Political Rights* (Martinus Nijhoff, Boston, 1987), at 10 onwards; D. Møgster, 'Towards Universality: Activities Impacting the Enjoyment of the Right to Life and the Extraterritorial Application of the ICCPR", *EJIL: Talk*!, 27 November 2018, recalling 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".

13 ICJ, *Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *supra* n. 6, para. 111.

14 Ibid., paras. 107-113.

15 Article 1 (1) of the American Convention 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*

sense, unlike Article 2 of the ICCPR, Article 1 (1) does not refer to both territory and jurisdiction in ways that could lend themselves to confusion, but simply to the latter, by indicating that States are obliged to respect human rights "to all persons subject to their jurisdiction".

The key determination to be made is hence what is the meaning of jurisdiction under international human rights law.[16] Whenever it is found to have been exercised or had, the conduct of a State's agents that is inimical to human rights and freedoms, impacting their enjoyment, that State's responsibility will be engaged as a result of the breach of its duty to respect or, in other words, refrain from violating the human rights of individuals under their jurisdiction.

Given that the wording of Article 1(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) closely resembles that of Article 1(1) of the American Convention, these considerations are clearly equally applicable to both. However, the conclusions between their supervisory bodies are far from being identical. This is the result of different case law and interpretations as to precisely what *jurisdiction* means under those instruments. Indeed, despite the similarities between the texts of Articles 1 of the ECHR and of the ACHR, the Inter-American and European Conventions' supervisory organs have adopted different interpretations concerning the extraterritorial application of human rights obligations and extraterritorial jurisdiction.

According to Karen da Costa, the ECtHR's approach to extraterritoriality and to extraterritorial jurisdiction may be seen as an "erratic" one.[17] We concur with such a viewpoint, insofar as the EctHR has changed its position on whether and when the ECHR obligations are applicable extraterritorially. In its decision in the case of *Banković and others* v. *Belgium and others*, a case that concerned the NATO bombing of a Serbian Radio and Television station,[18] the European Court took a position according to which extraterritorial obligations of States, i.e., duties for conduct taking place beyond their borders, would be exceptional. The rationale for this, in its own words, was its understanding that: "the Convention is a multi-lateral treaty operating in an essentially regional context and notably in the legal space (*espace juridique*) of the Contracting States".[19]

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jurisdiction the free and full exercise of those rights and freedoms, without any discrimination" (emphasis added). For a commentary, see: L. Hennebel and H. Tigroudja (eds), *The American Convention on Human Rights. A Commentary* (Oxford University Press, Oxford, 2022), at 20 ff.

16 See also A. Ollino, 'Justifications and Limits of Extraterritorial Obligations of States: Effects-Based Extraterritoriality in Human Rights Law', in Hannah L. Buxbaum and Thibaut Fleury Graff (eds), *Extraterritoriality = L'extraterritorialité* (Brill Nijhoff, Leiden, 2022), at 613 ff.

17 K. da Costa, *The Extraterritorial Application of Selected Human Rights Treaties* (Martinus Nijhoff, Boston, 2013), at 154-155.

18 European Court of Human Rights, Grand Chamber, Judgment, 16 November 2001.

19 For a commentary, see among the others: M. Milanovic, Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy, *supra* n. 9, pp. 208; K. G. Añaños, 'El alcance extraterritorial del Convenio Europeo de Derechos Humanos: análisis del caso Bankovic', LXVIII *Revista de la Facultad* de Derecho de México (2018) 275-306, at 293 [https://doi.org/10.22201/fder.244889336.2018.272-1.67589] (criticizing how the European Court ignored violation effects); D. Benítez *et al.*, 'Jurisprudencia del Tribunal Europeo de Derechos Humanos en 2011: algunos avances, retrocesos y desafíos', *Anuario de Derecho Público Universidad Diego Portales* (2012) 515-539, at 534-537.

Conversely, in some other more recent decisions the EctHR refrained from resorting to the concept of "*espace juridique*". For instance, the Court held that the European Convention was applicable to alleged acts of State party agents in the non-Contracting States' territories of Northern Iraq,[20] Kenya,[21] Iran,[22] and the United Nations buffer zone in Cyprus.[23] Moreover, in the July the 7th of 2011 Grand Chamber's decision in the case of *Al-Skeini* the EctHR's decision may be seen as going beyond *Banković*, considering its argument that, in light of the necessity to prevent a "vacuum" of legal protection which would deprive populations beyond the territories of State parties to the ECHR of effective means to bring claims when domestic remedies are unavailable or not effective, "the importance of establishing the occupying State's jurisdiction […] does not imply […] that jurisdiction under Article 1 of the Convention can never exist outside the territory covered by the Council of Europe member States."[24]

Therefore, although the EctHR didn't formally overrule *Banković*, a decision that the defendant State relied on, there was a clear expansion in the compass of the extraterritorial operation of the ECHR through the personal model of jurisdiction although not fully embracing that model, but rather implementing it only because the defendant State exercised public powers, according to Milanovic.[25] The notion of the *espace juridique* was understood broadly in terms of the impossibility of invoking it to refuse to find jurisdiction beyond the territories of State parties;[26] and accepting that ECH rights and freedoms may be divided and tailored.[27] As to the public powers consideration, Marko Milanovic has said that in the decision in the case of *Al-Skeini* reference to them proved "to be key", insofar as "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)".[28]

It is reasonable to ponder whether some of the positions that have been adopted by the European Court of Human Rights on the issue throughout its history can be attributed, from a judicial realist perspective to a desire to avoid making it an expansive forum or lose State support, given the multiple operations overseas in which European States have found themselves.

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20 European Court of Human Rights, *Issa and Others v Turkey*, Judgment, 16 November 2004.

21 European Court of Human Rights, *Öcalan v Turkey*, Grand Chamber, Judgment, 12 May 2005.

22 European Court of Human Rights, *Pad and Others v Turkey*, Decision, 28 June 2007.

23 European Commission of Human Rights, *Cyprus v Turkey*, Decision, 26 May 1975.

24 European Court of Human Rights, *Al-Skeini and Others v UK*, Grand Chamber, Judgment, 7 July 2011. See also European Court of Human Rights, *Hanan* v. *Germany*, Grand Chamber, Judgment, 16 February 2021. On the case, see K. Pentney, 'Run on the Bank(ović): 18 years later, will the court provide clarity in Hanan v. Germany?' *Leidenlawblog*, 2021.

25 M. Milanovic, 'European Court Decides Al-Skeini and Al-Jedda', *EJIL Talk*, 7 July 2011. Amplius, see P. Stojnić, 'Gentlemen at home, hoodlums elsewhere': The Extraterritorial Application of the European Convention on Human Rights', 10 *The Oxford University Undergraduate Law Journal* (2021) 137-170, at 147 ff.

26 European Court of Human Rights, *Al-Skeini and Others v UK*, Grand Chamber, Judgment, 7 July 2011, para. 142.

27 Ibid., para. 137.

28 M. Milanovic, 'European Court Decides Al-Skeini and Al-Jedda', *EJIL: Talk!*, 7 July 2011. On the spatial (and its shortcomings) and personal (not limited to exercises of "legal power" for it to be robust) models, also see: M. Milanovic, '*Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy*', *supra* n. 9, at 33, 129, 207, 262-263

Conversely, a different, more homogeneous and thus less erratic approach towards extraterritorial jurisdiction is found in the practice of the Inter-American Commission of Human Rights (the Inter-American Commission or the Commission), that in our opinion follows the so-called "impact" or "causal" model of jurisdiction.[29] As clarified by the Inter-American Commission in its decision in the case of *Danny Honorio Bastidas Meneses and others v. Ecuador* of 2 November 2011, while: "jurisdiction usually refers to persons located inside the territory of a State, in certain circumstances it can *also* refer to the conduct with an extraterritorial *locus*, where the person is not present in a State's territory".[30]

The reason why we argue that the Inter-American position is more aligned with an impact-based approach is the following. The practice of the Inter-American human rights bodies indicates that whenever a State *violates* human rights it does so as a result of the *exercised* of its power, and thus that it had jurisdiction. Accordingly, the state always has an obligation to refrain from such conduct, wherever it may take place. We consider that such an approach is, for the reasons presented in the introduction, a more appropriate one from a human rights perspective. Among other advantages, this prevents the manipulation or "identification" of gaps based on technicalities and euphemisms. For example, the Inter-American approach would not endorse arguments that say that a State might have violated a human right but fails to have legal responsibility because of the absence of a "legal space" or some other formality. As we have been insisting, this sort of arguments betray what human rights law's foundation, object and purpose hold dear. In line 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".[31]

We will now turn to briefly describing the impact-based mode of jurisdiction as opposed to spatial or personal ones, to better frame those with which the Inter-American practice, to be described later, rely on. The impact-based approach can be understood as "causality-based", that is to say, as relying on the identification of a human rights violation *attributable to* (i.e., caused by) a State, which is thus understood as having exercised power or jurisdiction and being under a duty to not engage in such an abuse. From a comparative perspective, it is worth noting that somewhat recent developments of the Human Rights Committee coincide with this approach. In this sense, Daniel Møgster has mentioned how the Committee said in its General Comment No. 36 *on article 6 of the International Covenant on Civil and Political Rights, on the right to life* that:

"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.

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[29] See M. G. Giuffré, 'A functional-impact model of jurisdiction: Extraterritoriality before the European Court of Human Rights', Questions of International Law, 30 June 2021.

[30] *Danny Honorio Bastidas Meneses and others* v. *Ecuador*, *supra* n. 8.

[31] D. Møgster, *supra* n. 13.

It replaces the formulation in GC31 § 10 of "power over an individual" (the personal model)".[32]

Møgster bases this observation on paragraph 63 of the General Comment:

> "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]"[33] (emphases added).

Furthermore, the Committee on the Rights of the Child expressly referred to the Inter-American case law and to causation of a negative human rights impact as a basis for finding that there has been jurisdiction in its decision in the case of Chiara Sacchi and others vs. Argentina, where it said that:

> "[T]he appropriate test for jurisdiction in the present case *is that adopted by the Inter-American Court of Human Rights* in its Advisory Opinion on the environment and human rights. This implies that when transboundary harm occurs, children are under the jurisdiction of the State on whose territory the emissions originated for the purposes of article 5 (1) of the Optional *Protocol if there is a causal link between the acts or omissions of the State in question and the negative impact on the rights of children located outside its territory*, when the State of origin exercises effective control over the sources of the emissions in question. The Committee considers that, while the required elements to establish the responsibility of the State are a matter of merits, the alleged harm suffered by the victims needs to have been reasonably foreseeable to the State party at the time of its acts or omissions even for the purpose of establishing jurisdiction"[34] (emphasis added).

Altogether, conduct that affects the enjoyment of human rights preventing their enjoyment and exercise is considered to amount to an exercise of power or effective control that makes the victims fall under the jurisdiction of the respective State.

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32 Ibid.

33 Human Rights Committee, *General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life*, CCPR/C/GC/36, 2019, para. 63.

34 Committee on the Rights of the Child, Decision, communication No. 104/2019, 11 November 2021, para. 10.7.

In other words, extraterritorial State acts that violate human rights amount to a (wrongful) exercise of jurisdiction. Accordingly, they can be evaluated 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. In this regard, it is useful to consider that the Committee referred to the notion of power over individuals as a basis of extraterritorial jurisdiction in prior comments. For instance, its General Comment No. 31 it explained that 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".[35] Therefore, States also breach that obligation under those circumstances, regardless of where the assistance is provided, and the conduct of the perpetrator takes place.

(B) THE INTER-AMERICAN ENDORSEMENT OF IMPACT-BASED JURISDICTION CRITERIA

There is a report adopted by the Inter-American Commission on Human Rights (the Commission), which is a good starting point to assess which of the three models of extraterritorial jurisdiction — the personal, the spatial or the "impact" or "causality"-based — comes closer to its position on the issue. It is the previously mentioned one adopted in the case of *Danny Honorio Bastidas Meneses and others v. Ecuador* of 2 November 2011. In it, the Commission provided the following ideas concerning extraterritorial jurisdiction:

> "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

[35] Human Rights Committee, *General comment No. 31 (2004) The nature of the general legal obligation imposed on States Parties to the Covenant*, CCPR/C/21/Rev.1/Add.13, 26 May 2004, para. 10.

> the American Convention that were said to have been perpetrated by agents of the State of Ecuador"[36] (emphases added).

The highlighted sentences indicate without any doubt that the Commission coincides with our argument regarding the centrality of dignity and how, to be faithful to it, protection must be given against State acts that attempt to act contrary to it. Consistently with such a teleological approach, the notion of jurisdiction handled by the Commission permits to hold States accountable for extraterritorial actions even absent the exercise of identifiable public powers, legal spaces (whatever they may mean according to divergent interpretations), occupation, or other factors.

These arguments are confirmed by the findings of the Commission in the case of *Jose Isabel Salas Galindo and others v. United States*. In the respective report, it held that "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".[37] This is in line with our consideration that impact-based approaches point towards a causality-based analysis of whether a violation was caused or is attributable to a State. This is confirmed by the Commission's consideration that it is necessary to consider whether State 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".[38]

As a result, and as was also held by the Inter American Commission, it is not necessary to identify whether a given violation took place before or after the existence of territorial control in this case, for instance, concerning the invasion of Panama by the United States of America.[39] Conversely, it is sufficient to find that a violation was caused by a State agent or body, regardless of whether the violation occurred after an occupation or invasion.[40] Effective control over an individual or private party can trigger the duty to respect human rights and freedoms.[41]

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36 Inter-American Commission on Human Rights, *Danny Honorio Bastidas Meneses and others v. Ecuador*, Report No. 153/11, Admissibility, 2 November 2011, paras. 19, 22-23.

37 Inter-American Commission on Human Rights, *Jose Isabel Salas Galindo and others v. United States*, Report No. 121/18, 5 October 2018, paras. 309, 313-314. Amplius, see R. Lawson, 'The Concept of Jurisdiction and Extraterritorial Acts of State', in G. Kreijen *et al.* (eds), *State, Sovereignty, and International Governance* (Oxford University Press, Oxford, 2022), chapter 2. See also M. G. Giuffré, *supra* n. 30, recalling that: "In order for the jurisdiction to arise, the State of origin has to exercise effective control over the act that causes the human rights violation, and when performing such act, the authorities of the State have to know, or should have known, 'of the existence of a situation of real and imminent danger for the life of a specific individual or group of individuals, and fail to take the necessary measures within their area of responsibility that could reasonably be expected to prevent or to avoid that danger".

38 Inter-American Commission on Human Rights, *Franklin Guillermo Aisalla Molina, Ecuador v. Colombia*, , Report No. 112/10, 21 October 2010, paras. 99-100.

39 Inter-American Commission on Human Rights, Victims of the Military Dictatorship v. Panama, Report No. 68/15, 27 October 2015, para. 28. For further references see Karen Giovanna Añaños Bedriñana, *El Sistema Interamericano de Protección de los Derechos Humanos y su alcance extraterritorial*, Universidad Internacional de Andalucía, 2012, p. 135 ff.

40 Inter-American Commission on Human Rights, *Victims of the Military Dictatorship* v. *Panama*, *supra* n. 39.

41 Inter-American Commission on Human Rights, *Informe Empresas y Derechos Humanos: Estándares Interamericanos*, para. 150.

Furthermore, it is neither necessary to establish the *length* of time over which State agents operate in a foreign territory for extraterritorial jurisdiction to exist. Formal or *lawful* presence of foreign agents is not required for jurisdiction to exist either.[42] Again, it is sufficient that there is impact over the exercise and enjoyment of human rights or power to affect it for the duty to respect human rights to be applicable.[43] This was indicated in the Commission reports No. 68/15 and 112/10, in which it was 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*"[44] (emphasis added).

It is nevertheless important to clarify that the extraterritorial approach adopted by the Inter-American Commission on Human Rights does not imply that a duty to ensure all human rights necessarily arises because of the exercise of State power abroad.[45] In this sense, according to it, the generation of the duty to respect human rights "[D]oes not necessarily mean that a duty to guarantee the catalogue of substantive rights established in the American Convention may necessarily be derived [...] 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".[46]

It is necessary to clarify that, in light of the Commission's position concerning jurisdiction, a mere link of nationality fails to activate in general terms the extraterritorial obligation to respect beyond national borders.[47] However, it has maintained that sometimes, by virtue of the dynamics related to certain rights, States must guarantee and respect them towards their nationals living abroad.[48] For example, the right to vote abroad generates entitlements of individuals living outside of their States of nationality. As the Inter-American Commission has put it:

> "[T]he 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*

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42 Inter-American Commission on Human Rights, Towards the Closure of Guantanamo, OAS/Ser.L/V/II, Doc. 20/15, 3 June 2015, para. 54.

43 Inter-American Commission on Human Rights, Victor Saldaño v. Argentina, Report No. 38/99, 11 March 1999, paras. 17, 19.

44 Inter-American Commission on Human Rights, *Victims of the Military Dictatorship v. Panama*, *supra* n. 39, para. 28; Inter-American Commission on Human Rights, *Franklin Guillermo Aisalla Molina, Ecuador v. Colombia*, *supra* n. 38, para. 99.

45 Ibidem, para. 100.

46 Ibid.

47 Inter-American Commission on Human Rights, Report 38/99, March 11, 1999, available at: http://www.cidh.org/annualrep/98eng/inadmissible/argentina%20salda%C3%B10.htm

48 Inter-American Commission on Human Rights, Victor Saldaño v. Argentina, Report No. 38/99, 11 March 1999, para. 22.

> *nationals residing abroad, which prevents him from returning to his country, might well engage that state party's responsibility*" (emphases added).[49]

While we have examined the position of the Commission thus far, given the greater number of cases dealing with the issue it has received, the Inter-American *Court* of Human Rights (IACtHR or the Inter-American Court) has in our opinion likewise endorsed the causality-or impact-based approach to extraterritorial jurisdiction. Exemplary, in this sense, is the twenty-first advisory opinion, where the IACtHR held that: "the fact that a person is subject to the jurisdiction of the State is not the same as being in its territory". This explains why, for the Court, 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."[50]

A similar approach to extraterritorial jurisdiction is found in the Court's Advisory Opinion on *The Environment and Human Rights*, where it was of the opinion that: "if there is a causal link between the action that occurred within its territory and the negative impact on the human rights of persons outside its territory', the individuals whose rights have been violated come within the jurisdiction of that State".[51] The Court has also held that the obligation to respect human rights is based on the "attributes of the human personality", regardless of migration or residence status.[52]

It is interesting to note that, in our opinion, the Court's position on extraterritorial jurisdiction is also coincident with the argument that extraterritoriality, in terms of the obligation to respect human rights and freedoms, flows from the non-conditionality of human dignity and its associated universal respect. It is therefore fully in tune with the object and purpose of human rights law and not prone to contradictions with it, unlike might have been the case with other supervisory bodies at both national and regional levels.

(C) THE CONSISTENCY OF THE INTER-AMERICAN CASE LAW ON EXTRATERRITORIALITY

The Inter-American Commission on Human Rights started dealing with extraterritorial issues from early on. This is the result of its examination of cases dealing with abusive operations of State agents that took place beyond their national borders. In this regard, as was studied by Karen Giovanna Añaños Bedriñana, in its 1985 *Report on the Situation of Human Rights in Chile* the Commission condemned killings of Orlando Letelier del Solar and Carlos Prats González at the hands of Chilean agents in the United States of America and Argentina.[53] The Commission even declared that, apart from the heinousness of the

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49 Ibid., para. 22.

50 I/A Court H.R., Rights and guarantees of children in the context of migration and/or in need of international protection. Advisory Opinion OC-21/14 of August 19, 2014. Series A No.21, para. 219.

51 Inter-American Court of Human Rights (IACtHR), The Environment and Human Rights, Advisory Opinion, OC-23/17 (15 November 2017).

52 I/A Court H.R., Rights and guarantees of children in the context of migration, *supra* n. 50, para. 62.

53 K. G. Añaños Bedriñana, *supra* n. 39, at 98-100.

killings, the fact that they took place beyond the frontiers of Chile"[54] added to their seriousness.

Sometimes, the Commission studied cases of a different nature unlike that of agents operating abroad in a territory they do not control. For instance, because of invasions or occupation, at times the Commission has found jurisdiction without discussing the matter, perhaps implicitly considering control over a foreign area as a sufficient basis to find jurisdiction, while at others even absent occupation a mere impact-based approach to the matter has been the basis of its exercise of supervisory powers.

In this regard, it is useful to look at the circumstances under which the Inter-American human rights bodies have found States to be under extraterritorial obligations to. According to Karen Giovanna Añaños Bedriñana's study, these include:

a) Situations of military occupation, such as that in Grenada by the United States of America. The Commission noted in its report No. 109/99 that while none of the parties contested 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" which does not have sovereignty over the territory in which that person is found.[55] These circumstances align with spatial models of extraterritorial jurisdiction.

b) Impact causation, in the sense of the *generation* of harm by State conduct (military or otherwise), such as the downing of airplanes by Cuban authorities (which Bedriñana said is a criterion at odds with the *Bankovic* decision). In its Report 86/99, the Commission argued that foreign State agents have a duty to respect human rights when there is impact or control "through the actions of […] state's agents abroad".[56]

c) Finally, detention of individuals by State agents outside of their territory such as in Guantanamo Bay, because individuals are under the authority and control of those agents in practice.[57] This category aligns with a personal-based model of jurisdiction.

In addition to those three circumstances identified by the cited author, we would like to mention that we believe that there is another fourth set of possible circumstances in which a State may be found to have had extraterritorial jurisdiction. They are based on case law considerations of the Inter-American Court and Commission and include the following. States could also be found responsible in connection with extraterritorial happenings when they acknowledge, acquiesce to, or have effective control over private conduct that is inimical to human rights (elements that the Commission referred to

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54 Inter-American Commission on Human Rights, *Report on the Situation of Human Rights in Chile*, OEA/Ser.L/V/II.66, Doc. 17, 9 September 1985, paras. 80-91.

55 Inter-American Commission on Human Rights, *Coard et al. v. United States*, Report No. 109/99, 29 September 1999, para. 37.

56 Inter-American Commission on Human Rights, *Armando Alejandre Jr., Carlos Costa, Mario de la Peña, and Pablo Morales v. Cuba*, Report No. 86/99, 29 September 1999.

57 K. G. Añaños Bedriñana, *supra* n. 39, p. 113-128.

in its 2019 report on Business and Human Rights)[58] and takes place abroad.[59] Indeed, effective control over an individual or private party is sufficient to trigger the obligation to respect human rights[60] and such actors may well operate extraterritorially.

Altogether, as can be seen from the foregoing classification, impact-based considerations are *not* the only ones handled by the Commission. But the latter is one on which it is always possible to rely, even absent other models pertaining bases of extraterritorial jurisdiction. In other words, because of its adoption of a causality or impact based approach, it is not required for the bodies of the Inter-American system of Human Rights to identify whether a violation perpetrated abroad takes place before or after occupation, invasion, or control of the territory of a third State.[61]

As to when the Commission has addressed the matter of extraterritorial State obligations to respect human rights, it is necessary to add that it has recognized extraterritorial jurisdiction of States both implicitly and explicitly in the exercise of its different functions (contentious jurisdiction, etc.). These include the adoption of country and thematic reports, precautionary measures issued when there is a risk of extraterritorial abuse, and other actions.

An example of a precautionary competence is its Resolution N° 2/06 *On Guantanamo Bay Precautionary Measures*. In it, the Inter-American Commission strongly condemned the failure of the United States of America to "give effect to the Commission's precautionary measures" towards detainees at Guantanamo Bay.[62] No express detailed reference to the matter was found by the authors of this article in the precautionary measures adopted in favor of those detainees. However, it is our understanding that, when considering the adoption of precautionary measures regarding the detainees, the Inter American Commission implicitly found that there was an extraterritorial exercise of jurisdiction by the United States of America. This conclusion is supported by the fact that, in its report No. 17/12, the Commission explicitly stated 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"[63] (emphasis added).

The reasons why the Commission considered that the United States of America exercised jurisdiction over detainees at Guantanamo Bay, and why they coincide with the impact-based approach, are illustrated by the Commission's holding that State human rights obligations exist when there is:

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58 Inter-American Commission on Human Rights, *Informe Empresas y Derechos Humanos: Estándares Interamericanos*, OEA/Ser.L/V/II, CIDH/REDESCA/INF.1/19, 1 November 2019, paras. 67-78.

59 Ibid., paras. 152, 165, 175.

60 Inter-American Commission on Human Rights, *Informe Empresas y Derechos Humanos: Estándares Interamericanos*, para. 150.

61 K. G. Añaños Bedriñana, *supra* n. 39, p. 135.

62 Resolution N° 2/06 *On Guantanamo Bay Precautionary Measures,* available at: http://www.cidh.oas.org/resolutions/resolution2.06.htm

63 Inter-American Commission on Human Rights, *Djamel Ameziane v. United States of America*, Report No. 17/12, 20 March 2012, para. 34.

> "[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"[64] (emphasis added).

Likewise, in its report entitled "Towards the Closure of Guantanamo", the Commission 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.[65] According to Brian D. Tittemore, 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*"[66] (emphasis added).

In light of the previous legal materials, one can conclude that the Commission has acted on the basis of the argument that whenever and wherever State agents behave in ways that have a negative impact on the enjoyment of human rights, their State has had jurisdiction over the affected individuals. This is consistently demonstrated in the outcomes of different manifestations of the functions of the Commission, for example in relation to the adoption of reports in which certain interpretations are found. This very fact 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 Inter-American Commission should not make one think that it is necessarily referring to personal or spatial factors. As argued above, while they are sometimes (albeit implicitly) handled, there is always the fallback option of an impact-based consideration. This is so because what matters for the Commission is the causation of impact by State conduct, a condition which in itself suffices to satisfy the threshold of jurisdiction of the Inter-American standards. This seems to be confirmed by the understanding of other scholars. For instance, according to Diana María Molina-Portilla's analysis based on the Inter-American system, States bear legal responsibility when their agents directly participate in the violation of human rights, which is an event in which the duty to respect those rights is breached.[67]

Another report (No. 38/99), on the *Saldaño v. Argentina* case, further demonstrates the consistency of the Commission's rationales on extraterritoriality throughout the years.

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64 Ibid., para. 30.

65 Inter-American Commission on Human Rights, *Towards the Closure of Guantanamo*, OAS/Ser.L/V/II, Doc. 20/15, 3 June 2015, para. 54.

66 B. D. Tittemore, 'Guantanamo Bay and the Precautionary Measures of the Inter-American Commission on Human Rights: A Case for International Oversight in the Struggle Against Terrorism', 6 *Human Rights Law Review* (2006) 378-402, at 384 [doi: https://doi.org/10.1093/hrlr/ngl008].

67 D. M. Molina-Portilla, 'Sistema Interamericano, empresas transnacionales mineras y Estados de origen: improcedencia de la falta de jurisdicción entre Estados miembros', 29 *International Law, Revista Colombiana de Derecho Internacional* (2016) 57-91, at 73-74 [doi: https://doi.org/10.11144/Javeriana.il14-29.siet].

In this report, 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.[68] 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* […].[69] 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" (emphasis added). [70]

Altogether, the Inter-American Commission on Human Rights does not equate competence with the territory. Rather, it considers how State agents can engage the responsibility of their State because of their conduct when it has effects (transboundary situation) *or* takes place abroad[71] either in the territory of a third State or in international spaces such as the High Seas.[72] This is something that is relevant in respect of migrants' rights, among others. In this regard, it is important to note that the IACtHR has found that there is an extraterritorial scope of *non-refoulement*, as can be read in OC-25/18.[73] In that advisory opinion, it is mentioned that when someone has been recognized as a refugee by a State, such recognition is also valid extraterritorially.[74]

CONCLUSIONS

To conclude, the present study has unraveled the Inter-American's approach to extraterritorial jurisdiction as the approach most in harmony with the basic rationale behind human rights, namely, the protection of the inherent dignity of all human beings. As was very well put by the IACtHR, "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".[75]

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68 Inter-American Commission on Human Rights, Victor Saldaño v. Argentina, Report No. 38/99, 11 March 1999, paras. 17 to 19.

69 Ibid.

70 Ibid.

71 Inter-American Commission on Human Rights, *Informe Empresas y Derechos Humanos: Estándares Interamericanos*, para. 150.

72 Ibid., p. 103, 108-109.

73 I/A Court H.R., The institution of asylum, and its recognition as a human right under the Inter-American System of Protection (interpretation and scope of Articles 5, 22(7) and 22(8) in relation to Article 1(1) of the American Convention on Human Rights). Advisory Opinion OC-25/18 of May 30, 2018. Series A No. 25, paras. 99, 108.

74 Ibid., para. 123.

75 Inter-American Commission on Human Rights, *Danny Honorio Bastidas Meneses and others v. Ecuador*, Report No. 153/11, Admissibility, 2 November 2011, paras. 19, 22-23.

The main reason behind this conclusion is clear: the causality-based model of jurisdiction that the Inter-American human rights bodies adopt and can be used in case that any of the other models fails to be applicable mirrors the recognition of the engagement of responsibility as a result of the attribution of negative impacts on the enjoyment of human rights to States whose agents or actors they have effective control over or whose conduct is otherwise attributable to the States cause violations either abroad or inside State with transboundary and external effects.

Alternative approaches that fail to endorse an impact-based model may end up tolerating and reinforcing situations in which States violate human rights with impunity, offering no hope of remedies if domestic litigation is impossible or ineffective. This would run against the foundations of international human rights law and, in political terms, encourage an unfettered panoply of extraterritorial abuses that scrutiny. But in our world, in which actions abroad, with technological developments or agents being deployed, is ever increasing, international human rights supervision is all the most necessary. Human rights must keep at pace with the practical needs of human beings who need defense from excessive State power. Likewise, environmental degradation calls for checks on State contributions to climate change and crises. The law may be interpreted in ways permitting control over those actions, as the case law of the Inter-American Commission and Court indicate and from which much can be learned. But provisions similar to those on which they rely can also be interpreted in ways inimical to humane needs, with technicalities ending up giving greater *de facto* priority to politics and apparatuses over individuals and their dignity. This would be translated into justice refusals, vacuums of protection, gaps and loopholes, ironically allowing States to get away with negative human rights impacts on the basis of "human rights" law. In such a scenario, victims would be unprotected *vis-à-vis* the State causing violations. That would be unacceptable.

Certainly, the Inter-American approach to extraterritorial jurisdiction is based on the protection of victims, whereas some decisions and judgments of the European Court of Human Rights on extraterritorial obligations and duties seem to, as Roxtrom, Gibney and Einarsen have rightly posited,[76] resemble a system in which "human rights are not owed to human beings *qua* human beings", as cited by Karen da Costa,[77] but only to those individuals who find themselves in specific circumstances, with all others not being truly benefiting from the protection of a system that supposedly seeks to defend all of them without discrimination.

We advance the hypothesis that the impact-based approach to the extraterritorial scope of the duty to *respect* human rights is the most consistent one from a human-centered perspective (instead of a pernicious State-based approach, which may end up giving States undue privileges and leaving victims vulnerable), as well as being the one better reflecting principles and the object of human rights law. This may be the reason why international human rights supervisory bodies such as the United Nations Human Rights Committee have adopted an approach to extraterritorial jurisdiction

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76 E. Roxtrom *et al.*, 'The NATO Bombing Case (*Bankovic et al. v. Belgium et al.*) and the Limits of Western Human Rights Protection', 23 *Boston University International Law Journal* (2005) 55-136, p.. 87-104, 111.

77 K. da Costa, *supra* n. 18, p. 155.

that seems to coincide with the one espoused by the Inter-American Commission and Court of Human Rights.[78] Therefore, carefully looking at the case-law of international human rights supervisory bodies that have been working on the basis of this model of extraterritorial jurisdiction for several years, and which have defined its features and contours, can prove useful for other human rights supervisory bodies, practitioners, and those others who want to advance the prosecution of gross human rights violations outside the country in which they occurred.

Future research beyond the scope of the present work can engage with another, much more complex, question about 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,[79] the Inter-American Commission 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 States may have responsibility: "for conduct that takes place in another country when [their] acts or omissions cause human rights violations and the State in which the conduct has taken place is unable to protect or enforce the human rights in question". The Commission also indicated that it is worrisome that some States have engaged in activities of "*economic diplomacy*" by means of which they have leveraged problematic investments; and that calls to address the abuses that national corporations or individuals perpetrate abroad must be heard.[80] Yet, according to the Commission, unlike the duty to respect human rights:

> "[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".[81]

As can be gleaned from the previous excerpt, allusion to non-binding standards, such as those of social responsibility, refers to the recommendation of adopting strong protections *voluntarily*. The express indication that the Commission considers that there are uncertainties surrounding the possible responsibility of States as a result of the conduct of their nationals (not agents or actors whose conduct is directly attributable to them) abroad reveals that this is an area in which developments are called for both in interpretive terms and *de lege ferenda*.

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78 Cf. D. Møgster, *supra* n. 32.

79 Vid. O. De Schutter *et al.*, 'Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights', 34 *Human Rights Quarterly* (2012) 1084-1169, at 1084.

80 Inter-American Commission on Human Rights, *Indigenous Peoples, Afro-Descendent Communities, and Natural Resources: Human Rights Protection in the Context of Extraction, Exploitation, and Development Activities*, OEA/Ser.L/V/II, Doc. 47/15, 31 December 2015, paras. 79-80.

81 Ibid.

Altogether, issues of extraterritoriality under *human* rights law ought to be guided by a victim-centered approach. This is the way in which the Inter-American Commission (mostly) and Court of human rights have dealt with questions in extraterritorial obligations to respect human rights. Law is a construction that must be used in ways that serve the defense of the dignity of human beings and their dignity. This is the central focus and objective of the branch under examination, and not a problematic approach that ends up bolstering excessive State privileges to the detriment of the enjoyment of human rights.