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Commentary on Strasbourg Principle no. 29: extraterritorial jurisdiction for transboundary environmental harm

The European Court of Human Rights (ECtHR) has yet to decide on cases relating to human rights damage resulting from transboundary environmental harm. Previous case law establishing exceptional extraterritorial jurisdiction relate to inherently different factual situations. When assessing this novel issue, at least two factors that must be considered.

First, it is well established under the Charter of the United Nations and customary international law that States have the the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies. However, this right is limited by the due diligence responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction (UNFCCC, Preamble recital 8). The ICJ has expressed the no-harm rule in the following terms:

> The Court points out that the principle of prevention, as a customary rule, has its origins in the due diligence that is required of a State in its territory. It is "every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States" […] A State is thus obliged to use all the means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another State (Pulp Mills on the River Uruguay (Argentina v. Uruguay), § 101)

This rule relates to the responsibility of State vis-à-vis other States, and not State jurisdiction vis-à-vis individuals. However, it would be unduly formalistic not to take into account the raison d'être for this rule, namely that environmental harm like air, water or nuclear pollution recognizes no formal borders, and the activities of States can therefore easily cause transboundary damage.

Second, the reasoning on extraterritorial jurisdiction in environmental cases from other human rights bodies. Although these decisions do not in themselves carry formal weight for the interpretation of the ECHR, the quality and logic of their legal reasoning may indirectly inform the assessment of the ECtHR the same issue. In Advisory Opinion No. 23 from 2017, the Inter-American Court diligently discussed the term jurisdiction in an environmental context in view of international law and the no-harm rule. It concluded that "[w]hen transboundary harm or damage occurs, a person is under the jurisdiction of the State of origin 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 exercise of jurisdiction arises when the State of origin exercises effective control over the activities that caused the damage and the consequent

human rights violation" (§ 104 h). The UN Committee on the Rights of the Child, relying heavily on the Inter-American Court decision, recently held, in Sacchi et al. v. Germany, that individuals or children are under the jurisdiction of the a State 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" (§ 9.7). However, the Committee accepted that for the *purpose of establishing jurisdiction*, it was sufficient that the alleged harm suffered by the victims needs to be "reasonably foreseeable to the State party at the time of its acts or omissions".

Strasbourg Principle no. 29 on extraterritorial jurisdiction for transboundary environmental harm, formulated along similar lines, encompasses these elements. All refer to the environmental effects of the activities within the *effective control* of the State of origin, which may encompass exported combustion emissions from fossil fuels by approving extraction (see e.g. Greenpeace Nordic et al. v. Norway, Plenary of the Supreme Court of Norway, §§ 149, 155). The UN Committee and the Principle no. 29 both hold that for the purpose of establishing jurisdiction, the link between the acts or omissions of the State in question and the negative impact on human rights of persons located outside its territory must be *reasonably foreseeable*, not requiring a causal link. This reflects the positive due diligence obligation under human rights law to protect human rights from damage, regardless of whether the harm could have occurred but-for activities of the State in question (see e.g. Bljakaj and Others v. Croatia § 124). However, only Principle no. 29 refers to both damages caused and the *risk of transboundary damage.* This reflects the principle of prevention and the need to act with due diligence to avoid transboundary harm.

Overall, in my view, Principle no. 29 has a comprehensive approach to extraterritorial jurisdiction which is reasonable in view of the special transboundary nature of environmental harm, already recognized under international law. One example: State A has a factory close to a river on the border with State B, which pollute the river used for drinking water of inhabitants in State B, resulting in the death and hospitalization of many of them. Directly affected inhabitants in State B then initiate court proceedings against State A for causing their death and injury, in alleged violation of the right to life and private life under ECHR Articles 2 and 8. In this situation, it should be recognised a *prima facie* reasonably foreseeable link between the activities in State A and inhabitants in State B that justifies extraterritorial jurisdiction and further assessment of the merit of the case, in view of the raison d'être of the no-harm rule. If not, a State could use its territory for acts contrary to the rights of people residing in other States without limitations, and escape accountability for human rights damage they cause or contribute to. This could ultimately undermine the "special character" of the ECHR as "a treaty for the collective enforcement of human rights and fundamental freedoms" in Europe (Güzelyurtlu and Others v. Cyprus and Turkey § 232).

The ECtHR is presented with the issue of transboundary environmental harm in a climate change context in the case *Duarte Agostinho and Others v. Portugal and Others* (no. 39371/20). It remains to be seen whether the ECtHR will approach the issue along the lines of Principle no. 29 and other human right bodies.

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(Views expressed are of the author and not of the NHRI)