States’ Extraterritorial Jurisdiction for Climate-Related Impacts

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States’ extraterritorial jurisdiction was one of the hot topics decided by the European Court of Human Rights (ECtHR) in *Duarte Agostinho*. Strictly speaking, the “lack of it” led the ECtHR to declare the complaint inadmissible with respect to all defendant States except Portugal. This finding is in line with previous ECtHR case law but highlights a gap in human rights protection and creates a mismatch between the ECtHR’s case law and that of the Inter-American Court of Human Rights (IACtHR) and the UN Committee on the Rights of the Child (UNCRC). As part of the symposium on the climate rulings of the ECtHR, this blog post provides a brief review of the ECtHR’s understanding of States’ extraterritorial jurisdiction in the context of climate change, and explains how and why it expressly ruled out different views that could close the gap between emitters and affected individuals.

The ECtHR’s understanding of States’ extraterritorial jurisdiction

In human rights law, jurisdiction implies, but does not refer to, a State’s competence to prescribe and enforce norms. Rather it refers to the State’s obligation to secure the human rights of specific individuals. In this sense, jurisdiction is the tool that demarcates the pool of rights-holders to whom States bear obligations and, accordingly, the pool of potential applicants and defendants in a case before human rights bodies.

The European Convention on Human Rights (ECHR) states that “The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined . . . in this Convention” (Article 1 of the ECHR). The drafters envisioned a decisive role for jurisdiction but they did not explain what it meant. The reason is simple: they assumed that, where States infringed on human rights, those infringements would be targeted at individuals within the State’s territory, and that exceptions (i.e., where state actions infringed upon the human rights of individuals outside their territory) would be marginal and easily settled by the doctrine of States’ *de facto* control.

In the case law of the ECtHR (see, for instance, here, here and here), this notion of *de facto* control was used to deal with cases relating to an “effective overall control over a foreign territory,” or where State agents exercise authority and control over individuals outside their

territory. Under this latter umbrella, the ECtHR has accepted two sets of cases: (i) when State agents exercise physical power and control over an individual and (ii) when State agents employ force outside their territory with sufficient proximity to the affected individual (e.g., target killings).

In all these cases, the ECtHR emphasized that the state must have 'control over the victim', meaning that the exceptional circumstances envisioned by the ECtHR refer to cases where there is a certain, but qualified, degree of control over the perpetrators *and* the affected individuals alike, even if they are outside the State's territory.

Control over the 'source' but not the 'victim'

Since greenhouse gas (GHG) emissions are transboundary and the climate system is shared globally, the risk and harm produced by GHG emissions have an extraterritorial impact. This means that States effectively control the 'source' of the risk or harm (which is produced from activities within its territory) but may not exercise any control over the victims of such risk or harm. This yields an odd result — there is harmful conduct (i.e., excessive GHG emissions) attributable to a State under the general rules of international law, but this State's jurisdiction cannot be established under the ECHR.

The case law of the ECtHR is crystal-clear and was confirmed in *Duarte Agostinho*: if States lack effective control over the victim, they do not hold extraterritorial jurisdiction for the purposes of Article 1 of the ECHR, irrespective of their level of control over the source of the harm. Since the applicants in *Duarte Agostinho* live in Portugal, the ECtHR concluded that the other defendant States do not have extraterritorial jurisdiction since they do not hold any level of control over the applicants.

As Murcott, Tigre, and Zimmermann wrote here, *Duarte Agostinho* was "the" opportunity for the ECtHR to get inspiration from the Global South adopt a different understanding of States' extraterritorial jurisdiction. The ECtHR could have bridged the gap between emitters and affected individuals by viewing jurisdiction as requiring "control-over-the-source" (but not necessarily control of the victim). That approach was, however, expressly ruled out by the Court.

Different understandings of jurisdiction

The ECtHR's understanding of States' extraterritorial jurisdiction is not written in stone (and much less in the very wording of Article 1 of the ECHR). A view of jurisdiction as "control-over-the-source" is aligned with Principle 21 of the Stockholm Declaration, which mentions that States cannot cause environmental harms beyond their borders. It was espoused by other human rights bodies in relation to similar treaty clauses.

For example, in Advisory Opinion OC-23/17, the IACtHR decided that 'jurisdiction' under Article 1(1) of the American Convention on Human Rights (ACHR) also includes an extraterritorial element and declared that States must prevent the production of environmental harm extraterritorially, *provided the source of that harm lies on their territory* (para. 95-104, emphasis added). Therefore, according to the IACtHR, States' extraterritorial jurisdiction can result alternatively from control over the source *or* control over the victim.

This view of jurisdiction as "control-over-the-source" was also endorsed by the UNCRC in *Sacchi et al. v. Argentina et al.* (para. 10.10) and, afterwards, in the General Comment No. 26 (para. 88 and 108).

The understanding shared by the IACtHR and the UNRCR is not alien to the ECtHR: it explicitly took note of it (para. 210), but added (in a single, short sentence) that "both [bodies] are based on a different notion of jurisdiction, which, however, has not been recognized in the [ECtHR]'s case-law" (para. 212).

Other special or exceptional circumstances were also invoked by the applicants and eventually ruled out by the ECtHR, including the specificity of climate change-related harms *vis-à-vis* mainstream environmental harms (para. 191 ff.), the collective nature of the mitigation effort (para. 202-203), the impact on the applicants' interests under the ECHR (para. 205-208), or the developments in other treaty regimes, namely multilateral environmental agreements (para. 209-213).

Although mindful of these alternative views on States' extraterritorial jurisdiction, the ECtHR found that the ability of a State's decision to impact the situation of individuals abroad is not sufficient in itself to establish jurisdiction for the purposes of Article 1 of the ECHR (para. 184).

What does this mean in practice?

At first glance, it is dismaying that a human rights court would reject States' accountability for the extraterritorial impact of activities taking place within its territory. A more careful look, however, may reveal a different reading of *Duarte Agostinho*.

First, this outcome was predictable in light of the prior case law of the ECtHR. One can just guess what the concerns of the judges are, but their cautious stance might be explained by their fear of opening the ECtHR's gates to almost eight billion potential applicants; or their fear of the impacts of adopting this view of jurisdiction as "control-over-the-source" in other fields (e.g., the use of armed force or cyber-activities).

Second, the mismatch between *Duarte Agostinho*, on the one hand, and Advisory Opinion OC-23/17 and *Sacchi*, on the other hand, is not necessarily that sharp. It is noteworthy that the ECtHR referred to the "*respondent* States' extraterritorial jurisdiction" (para. 213, emphasis added). The court thus emphasized that the States themselves can exercise their

powers to properly regulate and effectively control GHG emissions from their territory, considering the impact on individuals living in other States. Likewise, the Court did not rule out the use of domestic courts by affected individuals abroad if the rules on the international competence of courts are met. In line with *Duarte Agostinho*, therefore, one can detach the notion of States' extraterritorial *primary* obligations, on the one hand, from their justiciability before the ECtHR, on the other hand. This is not expressly stated in the judgment — but the reasoning set out in this judgment was careful enough to accommodate a view of States' human rights obligations towards individuals living in other States, whilst rejecting their enforcement before the ECtHR.

Conclusion

For the time being, *Duarte Agostinho* settled the issue of States' jurisdiction in relation to the extraterritorial impacts of GHG emissions. Following a conception of jurisdiction as "control-over-the-victim," the ECtHR declared the case inadmissible regarding all defendant States except Portugal. This creates a protection gap between emitters and affected individuals. However, this does not mean that States have carte blanche to emit GHG or cause harm to individuals outside their territory. For one thing, since global climate change is caused by the rising concentration of GHGs in the atmosphere, emissions that cause extraterritorial harm are the same emissions that cause harm in the territory of the State (and these were analyzed in *KlimaSeniorinnen*). In addition, non-justiciability before the ECtHR does not imply that States do not bear a primary obligation under the ECHR to avoid the production of extraterritorial environmental harm, which can be enforced through domestic courts.

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