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Reforming the Strasbourg Doctrine on Extraterritorial Jurisdiction in the Context of Environmental Protection

This paper suggests that the post-Bankovic doctrinal development of extraterritoriality has relevance for future cases before the European Court of Human Rights, also within new contexts, such as the environment. The paper summarises the current doctrine and proposes a revised version of it. In particular, a model for future applications of extraterritorial responsibility is illustrated in the environmental context.

(1) Introduction

The doctrines of coherent and consistent interpretation are inherent to the authoritative status of the Strasbourg case-law. The criteria of coherence and consistency do not mean that the doctrines neither develop nor have future potentials which could refine the established interpretation of the ***European Convention on Human Rights*** (the «Convention» or «ECHR»). However, these doctrines have to be considered in light of the general rules of interpretation of international law and in the context of human rights law, thus the emphasis should be placed on the object and purpose of the treaty in question.[1] One of the key aspects for the correct interpretation of the Convention is therefore to take into account its purpose of protecting rights and freedoms of individuals and the Convention's general spirit.[2]

Article 1 of the Convention provides that «[t]he High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention». This does not absolve the Contracting Parties from their responsibility for the consequences happening outside their territorial jurisdiction. This principle was confirmed in a number of extradition and expulsion cases (e.g. *Soering*[3] and *Chahal*[4]). There, ***an interesting doctrinal construction of extraterritorial jurisdiction*** has been developed,[5] i.e. the responsibility of the Contracting Parties could be extended beyond territorial jurisdiction when certain conditions are fulfilled. One of the essential elements behind the extra–territorial doctrine was that treaty provisions were not designed to enable the Contracting States to evade their responsibility while human rights violations were clearly happening under their control.

Inherent to the development of the ***case-law of the European Court of Human Rights («ECtHR»)*** has been referring to the established case continuums for further interpretation. The general extraterritoriality doctrine does not provide an exception to this. Currently, the responsibility of the Contracting Parties for human rights violations happening outside their own territory can be invoked in exceptional circumstances, because of acts of their authorities, whether performed within or outside national boundaries.[6]

The contemporary human rights discourse has approached the jurisdiction doctrine with consistent, but cautious evolution.[7] The *Bankovic* decision determined rather strict criteria for the establishment of the extraterritorial responsibility of the Contracting Parties. The Court approached the concept of jurisdiction by adopting its ordinary meaning rather than interpretation in light of object and purpose of the Convention. In particular, in keeping with the essentially territorial notion of jurisdiction, the Court has held that acts of the Contracting States performed, or producing effects, outside their territories can constitute an exercise of jurisdiction by them within the meaning of Article 1 of the Convention, when the State, through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the Government of that territory, exercises all or some of the public powers normally to be exercised by that Government. It added that the extra-territorial exercise of jurisdiction by a State include cases involving the activities of its diplomatic or consular agents abroad and on board craft and vessels registered in, or flying the flag of, that State.[8] This jurisprudence has subsequently been reinvented and many scholars are describing the current interpretation as *the* ***post-Bankovic era*** in the extraterritoriality continuum.[9] This evolution relates to policy considerations that are particularly important when it comes to grave human rights violations. Rigid treaty interpretation can in fact undermine the role of international human rights institutions.[10] Before the ECtHR, the application of the extraterritorial argumentation was limited to specific contexts of grave violations of Articles 2 and 3 of the Convention in order to protect these

absolute rights in cases of military operations, extraditions and expulsions.[11] Nevertheless, scholars like *Karen Da Costa* have observed that, although the ECtHR continues to consider that the exercise of extraterritorial jurisdiction may apply under Article 1 of the Convention only in exceptional circumstances, it has increasingly found this to occur.[12] One of the key considerations supporting such extended accountability relates back to the object and purpose of the Convention.[13]

This paper suggests that the doctrinal development on extraterritoriality has ***relevance for future cases in new contexts***, for example, in the context of environmental law. This paper analyses every aspect of the general extraterritoriality doctrine. Firstly it discusses the key criteria of extraterritoriality, namely the definition of State actors, exceptional circumstances, effective control and territorial linkage. In addition, the paper analyses how the nature of rights impacts on the establishment of extraterritorial State responsibility. The paper further suggests that the level of intention of the State in question influences the threshold in applying the extraterritoriality criteria. More generally, the paper ***summarises the current doctrine***, ***proposes a revised version*** of it and illustrates a model of future application ***in the environmental context***.

(2) **Reconstruction of the extraterritorial doctrine in the environmental context**

(a) A change in the traditional notion of State actors

The ECtHR has traditionally spoken of States as actors exercising authority and control over individuals through their agents. This has been a crucial element for the application of extraterritorial jurisdiction and the responsibility of the State for human rights obligations. In *Al Skeini and others*, the Court confirmed the test in its current form, by stating: «It is clear that, whenever the State, through its agents, exercises control and authority over an individual, and thus jurisdiction, the State is under an obligation under Article 1 to secure to that individual the rights and freedoms under Section I of the Convention that are relevant to the situation of that individual. In this sense, therefore, the Convention rights can be «divided and tailored»».[14]

The first condition for the extraterritorial application of rights is therefore that the acts are committed by State authorities. This notion encompasses: (a) acts of diplomatic and consular agents, (b) the exercise of authority and control (including judicial or executive functions) over foreign territory by individuals, if the third State allows it through consent, invitation or acquiescence and (c) the use of force by State agents operating outside the territory of the State.[15]

The contexts in which this criterion has been defined are ***primarily related to military actions***. One specific legal question concerns ***the use of private contractors***. The ECtHR recognised in *Ilascu*, the responsibility of a State even in the case of private groups operating under its consent or acquiescence.[16] The ECtHR also confirmed that «[a] State may also be held responsible even where its agents are acting *ultra vires* or contrary to instructions. Under the Convention, a State's authorities are strictly liable for the conduct of their subordinates; they are under a duty to impose their will and cannot shelter behind their inability to ensure that it is respected».[17] The ECtHR restated the existence of State's responsibility for ill-treatment administered by private individuals also in the context of Article 3 rights.[18]

This kind of extended approach to those responsible for human rights violations can provide options for a more flexible interpretation also in other contexts of law. In relation to extraterritoriality, ***the responsibility to control private corporations*** has been discussed in relation to military actions. *Carsten Hoppe* has observed in this respect that the use of positive human rights law obligations in conjunction with humanitarian law, may potentially fulfill the «regulatory gap» in the context of the ECHR in order to comply with the «duty to prevent» doctrine.[19] *Hoppe* has concluded, with some limitations, that: «Where applicable, the ECHR, under Articles 2 and 3, may establish a duty on hiring states to plan any security operation which risks threatening the right to life, where they hire the third party, even if the risk stems from uncontrolled or off-duty conduct of contractors' personnel involved in such operations».[20]

An analogy between the use of private contractors and privatisation of other services can be theoretically built as follows. The State has duty to control private contractors in military context. Likewise, the ECtHR has established that States have obligations to control acts of private parties in relation to activities causing environmental risks.[21] In the landmark case *Lopez Ostra ⁄. Spain*, the ECtHR established for the first time in the environmental context that the failure of a State to control industrial activities gives rise to State re-

sponsibility under Article 8 ECHR.[22] The ECtHR has further ruled, for example *in Moreno Gomez ⁒ Spain*[23] and *Mileva ⁒ Bulgaria*,[24] that passive reactions to complaints concerning clubs' and offices' noise nuisance constitute a basis for State responsibility.

Öneryildiz ⁒ Turkey started a new continuum under Article 2 ECHR by emphasising that *a* ***duty to prevent environmental*** *disasters* could be identified, when expert reports predict the high probability of such harm.[25] The ECHR intends to place effective deterrence to threats to the right to life. Accordingly, it sets up certain elements that are relevant in relation to dangerous activities. The authorities are held accountable for the licensing, setting up, operation, security and supervision of such activities.[26] This development continued in *Budayeva ⁒ Russia* where an environmental disaster such as mudslide gave rise to State responsibility, as the authorities were aware of the risk and failed not only to take sufficient preventive measures, but also to conduct a thorough investigation after the disaster.[27] Such circumstances involving total passivity on the national authorities' side, may also involve a shift in the burden of proof. For example in *Akvidar and others ⁒ Turkey*, where the State failed to undertake investigations and to offer assistance, it became incumbent on the respondent Government to show what it had done in response to the scale and seriousness of the reported matters.[28]

Whilst in the environmental jurisprudence of the ECtHR it is not required that the State hired the corporation, in order to qualify the latter as a State agency for the purpose of extraterritorial State responsibility, the general development introduced by *Hoppe* has focused more on the fulfilment of formal requirements.[29] Thus it is expected ***that the ECtHR would be reluctant to accept loose linkage*** between the corporation and the State in order to establish the responsibility of the latter when the actions are taking place outside its own borders. However, on the basis of the current case-law, if the act committed by private actors causing trans-boundary pollution occurs in the State's own territory, State liability is easier to establish.

(b) Revising the exceptional circumstances terminology

The ECtHR has to be convinced that exceptional circumstances exist for it to conclude for the establishment of extraterritorial jurisdiction under Article 1 of the Convention. In essence, the exceptional circumstances terminology refers to a narrow list of well-established circumstances that constitute acceptable exceptions.[30] For example in *Al-Skeini and Others ⁒ United Kingdom*[31] the ECHR found that the exceptional circumstances criterion was satisfied due to the United Kingdom's assumption of authority for the maintenance of security in the area.

However, there are clear indications from the recent domestic law and practice, such as the UK Supreme Court's judgment in *Smith (and others) ⁒ MOD*,[32] that there is rising awareness that the exceptionality criterion has been ***interpreted too strictly***, while it should not only refer to restricted circumstances. An overly broad interpretation of the notion may however have serious implications, bringing for example to the establishment of a State's responsibility merely on the basis of its prior knowledge of the risks of the situation and its subsequent negligence. In order to expand the notion of exceptionality, yet within acceptable limits, reference could be made to issues such as the widespread impact, length and knowledge of the violations by the State.

In addition, the *Al-Skeini* and *Al-Jedda ⁒ United Kingdom* cases illustrate how exceptional circumstances[33] may shift the interpretation from the cautious and formal *Bankovic* era into an orientated approach in light of the object and purpose of Article 1 of the Convention.[34] Bearing in mind the traditional interpretative principles referring to the use of the ordinary meaning of the terms, the object and purpose of the Article and the context in which the provision can be found,[35] the ECtHR shall also take into consideration «any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation».[36] These two competing principles of interpretation are central to the further development of the concept of exceptional circumstances. While following precedents may help the States to predict the ECtHR's judgments, the progressive and living interpretation of the Convention inherently requires the ECtHR to analyse, what are its object and purpose are in light of present conditions.

Smith and others ⁒ MOD[37] is an example of the interpretation according to which the exceptionality criterion should not be limited to restricted circumstances. There is no particular obstacle, other than the lack of a precedent, to expand the notion of exceptional circumstances to cover also certain serious cross-border environmental problems, especially when the State is aware of the harm that will probably take place as a result of certain eco-

nomic activities.[38] It is not unreasonable to conclude therefore that the exceptional circumstances criteria could be met in environmental extraterritorial cases, thus being within the scope of the object and purpose of the Convention.

In this sense, it is interesting to note what *Human Rights Watch* and *Minority Rights Group International*, interveners in *Chagos Islanders*, have stated: «The *drafters* of the Convention had never intended that States should not be responsible for their extraterritorial actions. It would be unconscionable to permit States to commit acts overseas which they could not perpetrate on their home territory, whether within or outside the regional space of the Council of Europe. Article 1 should be interpreted in line with jurisdiction provisions of other international human rights instruments».[39]

It is in fact inherent to the interpretation in light of ***object and purpose of the Convention*** as a human rights treaty to provide effective protection to the rights of individuals. In the field of environmental protection, this effectiveness principle obviously requires that ***infringements of environmental human rights are not transferred*** to countries, where the environmental human rights standards are lower in order to prevent a circumvention of treaty obligations.

Similarly other types of mechanisms intended to circumvent human rights obligations could be considered incompatible with the object and purpose of the Convention. An analogous situation could be constructed in the context of positive obligations to supervise private corporations in the environmental context, when such supervision is limited to those operating within the national borders, but those operating abroad. This kind of expansion of extraterritorial jurisdiction is in-line with the general approach that no double standards should apply to the Contracting Parties.[40]

(c) The non-centrality of the place where the violation occurs

The extraterritorial obligations may be performed within or outside national boundaries. Early Article 3 ECHR cases concerning extraterritorial engagement, such as *Soering ⁒ United Kingdom*[41] and *Vilvarajah ⁒ United Kingdom,*[42] have so far been related to situations where the applicant is not yet outside the State territory. As maintained by the ECtHR in *Bankovic*, «liability is incurred in such cases by an action of the respondent State concerning a person while he or she is on its territory, clearly within its jurisdiction, and that such cases do not concern the actual exercise of a State's competence or jurisdiction abroad».[43]

The trend of widening the territorial application of the Convention has appeared in cases such as *Sanchez Ramirez ⁒ France* and *Öcalan ⁒ Turkey* concerning the capture of known terrorists outside European borders.[44] The development with respect to previous expulsion cases can be particularly noted in *Hirsi Jamaa* where the ECtHR established the engagement of State responsibility despite the fact that the actions happened outside the State's territory and in international waters.[45] This case is highly significant, because it concluded for the existence of a State responsibility for collective expulsions rather than merely consider the application of treaty obligations solely in light of the individual applicant's circumstances.

Also in the environmental context, extraterritorial harm may be found within or outside national borders. For instance, acts falling within national borders may include chemical catastrophes in areas that are close to another State or floods caused by the failure to sufficiently control and maintain the efficient functioning of dams. It should be noted that failures to regulate and control the acts of private parties in situations involving extraterritorial environmental impact would also constitute in-State action.

The extraordinary rendition cases have recently provided several supporting arguments that could have interesting possibilities for requiring taking appropriate measures and remanding assurances even when the applicant has left the State's territory. In *Al-Nashiri ⁒ Poland*, the ECtHR recalled that it could require the State concerned to «take all possible steps to obtain the appropriate diplomatic assurances from the destination State. Those representations may be required even if an applicant has already been transferred from the territory of the respondent State, but the risk [of being subjected to ill-treatment or of the death penalty being imposed on him] still continues».[46]

More generally, a State's responsibility may be engaged when the authorities failed to take ***reasonable steps to avoid a risk of ill-treatment*** of which they knew or of which they ought to have known.[47]

In the environmental context, the conclusions established in *Hirsi Jamaa* and other cases in the same continuum could be developed further in relation to both environmental refugees and the transferal of heavy polluting industries. *Knox*

has introduced scenarios concerning pollution, namely toxic dumping, that includes circumvention of treaty obligations leading to violations of the right to life, food and health, safety and health in the working environment, etc.[48] Likewise, the State could be held responsible for not having required due assurances, even though the actual responsibility of the operation has been transferred to a State that is not a party to the Convention or even to private corporations working outside of the jurisdiction of the State in question.

(d) The application of the effective control criteria in non-military contexts

The effective control concept currently refers to two alternative situations: the effective control of *a* ***State agent over a person***[49] or alternatively ***over an area***.[50] Examples of the first group include acts of diplomats and consular agents over persons, or exercising physical control through detention or similar actions. Executive or judicial functions within the meaning of international law also fulfil such criteria. In the legal discourse, the two concepts are sometimes divided into effective authority (authority and control) and effective control.[51]

On the other hand, effective control over an area refers ***primarily to lawful or unlawful military actions***. The basic situation is a State occupation, such as, for instance, to what happened in Cyprus.[52] However some scholars, such as *Michal Gondek*, have contended that *Ilascu* amended and expanded the effective control concept from the mere military context to a separatist regime in another State with the political, military, and economic support of another.[53] This development serves as a basis for discussion on whether a corporation, holding a major impact on the local area, can be seen as a comparable situation.

Transnational corporations may in fact have a great influence in a geographic area. When natural resources are located outside the country of registration, corporations may exercise *de facto* extraterritorial powers. The positive obligations' doctrine requires, in certain circumstances, that States closely scrutinise actions undertaken by individuals and private organisations and consider whether these are compatible with human rights obligations. Thus it could be concluded that the general doctrines of extraterritoriality could apply, despite the fact that the actions are not State actions in the traditional sense.

Cases such as *Sanchez Ramirez ⁄. France* and *Öcalan ⁄. Turkey* concerning the capture of known terrorists outside European borders have established that the authorities are under the obligation to ensure the rights of the individual, when a person is under the control of security forces.[54] While the jurisprudence has established States' control in regard to asylum seekers, prisons or ships, there are no legal restrains to interpret that the exclusive control over a factory, could also qualify for the purposes of the concept.

(e) Intention or prior knowledge lowering the threshold for extraterritorial liability

The established jurisprudence on extraterritoriality sets requirements for a State to act with special care. States may infringe the Convention whether they are ignorant of the facts or consciously breach their obligations. In recent judgments, such as in *El-Masri ⁄. The Former Yugoslav Republic of Macedonia, Al-Nashiri ⁄. Poland* and *Hirsi Jamaa and others ⁄. Italy* cases, the ECtHR has applied «particularly thorough scrutiny» considering that the negligent or wilful behaviour of a State where it ought to have known of a serious risk of ill-treatment leads to full responsibility, even beyond the traditional conception of State liability.[55] In these cases, the ECtHR examined ill-treatment falling under the scope of Article 3 ECHR. In *Hirsi Jamaa and others ⁄. Italy*, for instance, the ECtHR's analysis concerned the transfer of asylum seekers in international waters to Libya. The ECtHR concluded that the Italian Government failed to ensure that the person in question would not face a real risk of being subjected to treatment contrary to Article 3 ECHR in the event of repatriation. The ECtHR once again referred to the ***prior knowledge of the authorities*** and stated that «the Italian authorities knew or should have known that there were insufficient guarantees protecting the parties concerned».[56]

In its examination in *El-Masri*, the ECtHR attached ***importance to the reports and relevant international and foreign jurisprudence***. In addition, given the specific circumstances of the case, media articles which showed that worrying interrogation methods had been used in Guantánamo Bay and Bagram (Afghanistan) were used as an evidence of the State's negligent ignorance of easily available information. Furthermore, no assurances from the US authorities were sought to avert of the risk of the applicant's ill-treatment. Thus the ECtHR ruled that the threshold for the establishment of State responsibility was attained as the Italian authorities had failed to take reasonable steps to avoid the risk of ill-treatment of which they knew or ought to have known.[57]

The identical argumentation is present also in *Al-Nashiri*.[58] At the end of October 2002, the applicant was captured in Dubai, in the United Arab Emirates. By November 2002, he was transferred to the custody of the CIA. He was brought first to a prison in Afghanistan known as Salt-Pit, then to another CIA prison in Bangkok, Thailand, code-named «Cat's Eye». He was then transferred to Poland and detained in the «black site» in Stare Kiejkuty (from 4/5 December 2002 to 6 June 2003). During his detention, CIA agents used «Enhanced Interrogation Techniques» on the applicant. After his transfer out of Poland, he was detained in Rabat, Morocco, until 22 September 2003, and was then flown to the US Naval Base in Guantánamo Bay.

The ECtHR found that, «given that knowledge and the emerging widespread public information about ill-treatment and abuse of detained terrorist suspects in the custody of the US authorities, [Poland] ought to have known that, by enabling the CIA to detain such persons on its territory, it exposed them to a serious risk of treatment contrary to the Convention». The ECtHR described that «the Polish State, on account of its ««acquiescence and connivance» in the [High-Value Detainees] Programme must be regarded as responsible for the violation of the applicant's rights under Article 3 of the Convention».[59]

The argumentation used in *El-Masri* and *Al-Nashiri* is extremely relevant to the methodology of examining major human rights violations. It is in fact ***essential to use unconventional methods*** when the facts cannot be gathered and established through official documents. The «emerging widespread public information about ill-treatment» was the vital link in the argumentation. The authorities' complete denial of the events did not prevent the ECtHR from using other material that showed their clear knowledge of the risk of ill-treatment and conditions of detention that would violate the rights under Article 3 of the Convention.

(f) Special set of rights within the extraterritorial doctrine: severe environmental cases

On the basis of the current jurisprudence, conclusions can be drawn that the application of extraterritorial obligation requires a ***certain level of severity*** which is relatively high under Articles 2 and 3 of the Convention if compared to the rights with limitation clauses, e.g. Article 8 of the Convention, which is more often applied in environmental cases. Despite the high threshold, the criteria for the application of Articles 2 and 3 of the Convention have already been met in the environmental cases of *Öneryildiz ⁄. Turkey* and *Budayeva ⁄. Russia*.[60] Both cases concerned deaths and serious injuries. In addition to the severity of the harm, the passivity of the States despite their knowledge of the high probability of the harm has been a determining factor.

However, Articles 2 and 8 of the Convention might not be as far from each other in the jurisprudence focusing on environment as they usually are in other contexts. In *Budayeva ⁄. Russia,* the ECtHR stated that «in the context of dangerous activities the scope of positive obligations under Article 2 of the Convention largely overlaps with those under Article 8».[61] *Pedersen* has noted that this approach was illustrated when the ECtHR transferred Article 2 obligations on an effective administrative and legislative framework (*Budayeva ⁄. Russia*) to the Article 8 claim (*Tatar*[62]).[63] Thus it is not fully excluded that Article 8 could not meet the severity threshold in extraterritorial context.[64]

In addition to the fact that the severity threshold has already been attained in the environmental context in non-extraterritorial cases, environmental harms often involve the circumvention of human rights, which has been a central theme of the extraterritorial jurisprudence under Article 3 of the Convention.[65] The responsibility could be engaged if a State knowingly causes cross-border harm or fails to control private entities conducting extraterritorial actions. Thus, the reasoning based on the circumvention of rights can lower the threshold also in the environmental context.

(3) **Summarising and revising the current extraterritoriality criteria**

The application of extraterritoriality involves the fulfilment of several conditions. However, these conditions are not permanent and are subject to modification. For example, *Da Costa* has noted transformations in the extraterritorial principles in *Issa*.[66] The current jurisprudence on extraterritoriality provides further interpretative principles that are applicable also outside their original context, when interpretation is made in accordance with the object and purpose of the Convention and in light of the Convention as a living instrument. At the same time, certain modifications are required when the extraterritorial doctrine is used in environmental cases due to the special features of the field in question. However, this observation does not only apply to the application of general doctrines to the environmental context, but also in

relation to other special fields as well due to the context specific needs.

The current jurisprudence on the extraterritoriality criteria ***focuses on formalities***, such as the notion of State actors.[67] However, as the positive obligations of the States have widened over time to include also the supervision of the acts of private parties, the form of State actor should not be central.[68]

In relation to acts of private parties, the questions may include the following considerations. Regarding a State whose territory has been exploited in environmental terms, it must be analysed, whether national authorities have taken adequate steps to mitigate the environmental harm. Similarly, the legal question is whether, when the State has control on the private corporation or shareholding on the basis of the real seat theory or incorporation theory, it has certain obligations to prevent the environmentally wrongful actions in another State, when similar actions would be illegal in its own territory. In these cases, rather than focusing on the formal aspects of State actors, the more valid question would be the division of responsibility between the States in question.[69]

Ilascu creates a basis for further development of the effective control criteria.[70] The steps required in the environmental context would demand the use of the criteria also in relation to corporations having *de facto* control over the area or lives of the people in that area. There is no particular reason, why ***corporate actions, when constituting significant control, should not be comparable to military occupation or detention***. If the *Ilascu* criteria are not extended, the alternative approach is to innovatively apply the jurisprudence on detention and similar cases related to individuals.[71]

Instead of focusing too much on the current exceptional circumstances terminology, more central issues should place ***emphasis on the deterrence of the circumvention of rights***. In the environmental context, activities are often carried out despite of reports warning of the severity of the consequences. In these circumstances when there is intention involved, the threshold for responsibility should be lower than in other circumstances. This is the important logic behind the reasoning in *El-Masri*.[72]

The comprehensive application of each criterion as has been made in this research is not essential for the analysis of the extraterritorial harm. For example, the question of whether the act is committed inside or outside the States' border is not more central as the responsibility may be established currently under both circumstances.

(4) **Beyond the prevailing extraterritoriality case-law: further considerations on the environment**

The extension of extraterritorial liability is possible due to the doctrines of ***cross fertilisation of rights*** and of the Convention as a living instrument.[73] The living instrument doctrine ensures that the case-law is dynamic whereas the cross-fertilisation theory impacts significantly on the scope of protection through the dialogue between the ECtHR and the network of human rights law.[74] These doctrines empower applicants and the ECtHR to draw inspiration from each other by opening the «window of opportunity».[75] Building analogies between different subject areas has been typical for the current case-law of the ECtHR. As a consequence, even when the current cases of extraterritoriality are not based upon environmental harm, the doctrine of extraterritoriality can be transferred into new scenarios.

The scope of environmental harm having extraterritorial dimensions is diverse. The scenario includes (a) traditional cross-border harm when the harm is primarily caused in State X, but also has harmful effects in State Y; (b) multinational corporations cause severe environmental problems entailing the violations of the human rights of local communities; (c) environmental refugees, who cannot be returned to their country of origin due to the principle of *non-refoulement*; (d) environmental problems caused by collective global pollution, such as climate change. Among these contexts, scholars such as *Alan Boyle* have stated that when a State fails to control activities within its own territory causing environmental harm extraterritorially, the victims of pollution may fall within the jurisdiction of the polluting State under the framework of the ECtHR.[76] This proposal is in line with the *Trail Smelter Arbitration* case, the significant landmark case establishing State liability in relation to cross-border harm.[77] The case created a basis for the ***polluter pays rule***, according to which the State does not have a right to use or allow the use of its territory so that serious harm for individuals or property will occur outside its territory.[78] This well-established development in international environmental law provides support for the ECtHR to explore the application of extraterritoriality in the environmental context. The *Trail Smelter* case has already inspired several other tribunals.[79]

However, the most legally challenging problems on shared responsibility and extraterritorial obligation include issues such as ***climate change***. The discourse on human rights and climate change has started slowly, especially in regard to the traditional treaty bodies and the human rights courts like the ECtHR.[80] The variance comes from the number of actors contributing to the climate change process. There are, in fact, numerous States and other actors contributing to the problem rather than an identifiable individual culprit. This creates novel challenges for burden of proof and causation.[81]

Another important aspect is the nature of rights used in extraterritorial cases. *Alan Boyle* and *John Knox* have analysed that the greatest potential to create extraterritorial liability in the environmental context would concern procedural rights. Also in certain recent extraterritoriality cases, like *Hirsi Jamaa*, the procedural guarantees are essential and taken into account as part of the ECtHR's reasoning.[82]

The procedural element is relevant in relation to the case-law of ***absolute rights***. The ECtHR has strongly emphasised that the authorities should take necessary steps in order to investigate any situations having led to a deprivation of the right to life or to severe ill-treatment contrary to Article 3 of the Convention. Procedural rights have also been central in the development of the environmental jurisprudence of the ECtHR.[83] Thus there is fruitful ground to consider theoretical probabilities of using procedural rights as a legal basis for environmental extraterritoriality cases in the ECtHR context.

The ECtHR has been encouraged to extend the scope of rights, if the international development supports it. The Aarhus Convention[84] has been a significant instrument on establishment of the ***procedural rights within the environmental law***. Both *Knox* and *Boyle* have considered that Article 3(9) of the Aarhus Convention prohibiting discrimination on the basis of «citizenship, nationality or domicile» in conjunction with the rights related to access to environmental information, participatory rights and access to court provides an example of extraterritorial environmental rights.[85] *Boyle* has drawn conclusions that «in substance the ***Aarhus Convention Rights*** are also ECHR rights, enforceable in national law and through Strasbourg Court like any other human rights».[86] *Boyle* also considers that *Taskin and others ⁄. Turkey* is an example of the most commonly violated set of extraterritorial rights including equal access to information and participatory rights.[87] On the basis of *Taskin*, *Knox* has further continued that the Aarhus Convention would «require equal access to justice in environmental cases generally, not just with respect to cases concerning access to information and participation in decision making regarding specific projects».[88]

Further support for the revision of extraterritoriality doctrine is provided by the so-called ***Maastricht Principles on extraterritoriality*** created by the International Commission of Jurists. Article 9 of the Maastricht Principles includes «situations over which State acts or omissions bring about foreseeable effects on the enjoyment of economic, social and cultural rights, whether within or outside its territory».[89] While the Maastricht Principles are not legally binding, the UN High Commissioner of Human Rights has recognised the value of the instrument[90] and the document can be regarded as an illustration of the ideas from the «invisible college of international lawyers».[91]

In light of the current developments, it is not unlikely to assume that the application of procedural rights under Articles 6 and 8 of the Convention, inspired by the Aarhus Convention and the developments at the UN level, could be acknowledged in future extraterritorial cases. This outcome would be analogous to the *Trail Smelter* case, where the causal link between the act and the cross-border harm was reasonably established. In addition, the extension of the State responsibility would also be easier, when the act is caused by a State actor.

(5) **Concluding remarks**

The current doctrine of extraterritoriality has several conditions that must be satisfied. However, these conditions are subject to revision. The current case-continuum of extraterritoriality focuses on formal requirements, such as the notion of State actors.[92] However, as the positive obligations of the States have been expanded and now cover the supervision of the acts of private parties, ***the notion of State actors should not be deemed as important as it has been so far***.[93] In addition, the comprehensive application of each criterion is not necessarily central for the analysis of the extraterritorial harm. For example, the question of ***whether the act is committed inside or outside State's borders*** is not fundamental and the ***responsibility may be established under both circumstances***.

International developments, such as the ***Maastricht Principles***, ***support the stretching of current extraterritorial case-law into new fields***, including environment law. At the same time the application of procedural rights in the context of ECtHR environmental extraterritorial issues may provide inspiration for future developments and the use of procedural rights also in other contexts. Together with ***the object and purpose oriented approach*** focusing on the prevention of circumvention of treaty obligations, these doctrines make convincing arguments for reforming the established extraterritorial doctrine.

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[1] See *Nussberger*, The Concept of «Jurisdiction» in the Jurisprudence of the European Court of Human Rights, Current Legal Problems, Vol. 65, 2012, pp. 241-268; see especially p. 246.

[2] ECtHR of 7 July 1989, Application no. 14038/88 *Soering ⁄. United Kingdom*, para. 87: «In interpreting the Convention regard must be had to its special character as a treaty for the collective enforcement of human rights and fundamental freedoms (see the Ireland v. the United Kingdom judgment of 18 January 1978, Series A no. 25, p. 90, § 239). Thus, the object and purpose of the Convention as an instrument for the protection of individual human beings require that its provisions be interpreted and applied so as to make its safeguards practical and effective (see, inter alia, the *Artico* judgment of 13 May 1980, Series A no. 37, p. 16, § 33). In addition, any interpretation of the rights and freedoms guaranteed has to be consistent with «the general spirit of the Convention, an instrument designed to maintain and promote the ideals and values of a democratic society» (see the *Kjeldsen*, *Busk Madsen and Pedersen* judgment of 7 December 1976, Series A no. 23, p. 27, § 53)».

[3] ECtHR of 7 July 1989, *Soering ⁄. United Kingdom*, cited above.

[4] ECtHR of 15 November 1996, Application no. 22414/93 *Chahal ⁄. United Kingdom*.

[5] For literature on the extraterritorial doctrine see e. g. *Gondek*, The Reach of Human Rights in a Globalizing World: Extraterritorial Application of Human Rights Treaties, 2009; *Milanovic*, Extraterritorial Application of Human Rights Treaties, Law, Principles and Policy, Oxford University Press, 2011. *Da Costa*, The Extraterritorial Application of Selected Human Rights Treaties, Martinus Nijhoff Publishers, 2012; *Miller*, Revisiting Extraterritorial Jurisdiction: A Territorial Justification for Extraterritorial Jurisdiction under the Convention, in: European Journal of International Law, Vol. 20, No. 4, 2009, pp.1223-1246; *Lawson*, Across the Universe. The Extra-Territorial Application of the European Convention on Human Rights, in: European Yearbook on Human Rights, Vol. 2011, pp.427-444.

[6] ECtHR of 23 March 1995, Application no. 15318/89 *Loizidou ⁄.Turkey*, paras. 134 to 136. For literature see: *Gondek*, The Reach of Human Rights in a Globalizing World: Extraterritorial Application of Human Rights Treaties, cited above, pp. 221-222; *Miller*, Revisiting Extraterritorial Jurisdiction: A Territorial Justification for Extraterritorial Jurisdiction under the Convention, cited above, pp. 1223-1246.

[7] ECtHR of 27 September 1990, Application no. 10843/84 *Cossey ⁄. United Kingdom*, para. 35. The Court normally follows its own precedents, because it is «in the interests of legal certainty and the orderly development of the Convention case-law. Nevertheless, this would not prevent the Court from departing from an earlier decision if it was persuaded that there were cogent reasons for doing so. Such a departure might, for example, be warranted in order to ensure that the interpretation of the Convention reflects societal changes and remains in line with present-day conditions».

[8] ECtHR of 12 December 2001, Application no. 52207/99 *Bankovic and others ⁄. Belgium and 16 NATO countries* (Grand Chamber decision), paras. 71 and 73. See *Gondek* cited above, pp. 169-179 for detailed analysis of *Bankovic* decision.

[9] See the illustration of the post-*Bankovic* era in *Gondek*, The Reach of Human Rights in a Globalizing World: Extraterritorial Application of Human Rights Treaties, cited above, pp. 181 onwards. *Gondek* derives his conclusions from cases such as *Öcalan ⁄. Turkey* and *Issa ⁄. Turkey*.

[10] *Nussberger*, The Concept of «Jurisdiction» in the Jurisprudence of the European Court of Human Rights, Current Legal Problems, cited above, pp. 248-249 and pp. 266-267.

[11] *Miller*, Revisiting Extraterritorial Jurisdiction: A Territorial Justification for Extraterritorial Jurisdiction under the Convention, cited above, pp. 1223-1246.

[12] *Da Costa*, The Extraterritorial Application of Selected Human Rights Treaties, cited above, pp. 252-253.

[13] See e.g. ECtHR of 16 of November 2004, Application no. 31821/96 *Issa ⁄. Turkey*, para. 71: «Accountability in such situations stems from the fact that Article 1 of the Convention cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory».

[14] ECtHR of 7 July 2011, Application no. 55721/07 *Al-Skeini and others ⁄. United Kingdom*, para. 137.

[15] ECtHR of 12 December 2001, *Bankovic*, cited above, paras. 71-73.

[16] ECtHR of 8 July 2004, Application no. 48787/99 *Ilascu and Others ⁄. Moldova and Russia*, para. 318: «In addition, the acquiescence or connivance of the authorities of a Contracting State in the acts of private individuals which violate the Convention rights of other individuals within its jurisdiction may engage the State's responsibility under the Convention». The Court specifically reminded that «[t]hat is particularly true in the case of recognition by the State in question of the acts of self-proclaimed authorities which are not recognised by the international community».

[17] *Idem*, para. 319.

[18] ECtHR of 24 July 2014, Application no. 28761/11 *Al-Nashiri ⁄. Poland*, paras. 509 and 517.

[19] *Hoppe*, Passing the Buck, State Responsibility for Private Military Companies, in *European Journal of International Law*, Vol. 19, No. 5, pp. 989-1014, pp. 1001-1105.

[20] Ibid.

[21] See also for example ECtHR of 16 November 2004, Application no. 4143/02 *Moreno Gomez ⁄. Spain*.

[22] ECtHR of 9 December 1994, Application no. 16798/90 *López Ostra ⁄. Spain*.

[23] ECtHR of 16 November 2004, *Moreno Gomez*, cited above, paras. 57-63.

[24] ECtHR of 25 November 2010, Applications no. 43449/02 and 21475/04 *Mileva and Others ⁄. Bulgaria*, paras. 90-102.

[25] ECtHR of 30 November 2004, Application no. 48939/99, *Öneryildiz ⁄. Turkey*.

[26] Ibid., paras. 89-90.
[27] ECtHR of 20 March 2008, Applications nos. 15339/02, 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02 *Budayeva and others ⁄. Russia*.
[28] ECtHR of 16 September 1996, Application no. 21893/93 *Akvidar and others ⁄. Turkey*, para. 68.
[29] *Hoppe*, Passing the Buck, State Responsibility for Private Military Companies, cited above, pp. 1001-1105.
[30] For example *Miller*, Revisiting Extraterritorial Jurisdiction: A Territorial Justification for Extraterritorial Jurisdiction under the Convention, cited above, pp. 1223-1246.
[31] ECtHR of 7 July 2011, *Al-Skeini and others ⁄. the United Kingdom*, cited above.
[32] UK Supreme Court, judgment of 19 June 2013 *Smith and others (FC) (Appellants) ⁄. The Ministry of Defence (Respondent); Ellis (FC) (Respondent) ⁄. The Ministry of Defence (Appellant); Allbutt and others (FC) (Respondents) ⁄. The Ministry of Defence (Appellant)*, [2013] UKSC 41.
[33] ECtHR of 7 July 2011, *Al-Skeini and others ⁄. the United Kingdom*, cited above, paras. 134-136 and Concurring Opinion of Judge Rozakis; ECtHR of 7 July 2011, Application no. 27021/08 *Al-Jedda ⁄. the United Kingdom*.
[34] *Milanovic*, Extraterritorial Application of Human Rights Treaties, Law, Principles and Policy, cited above, pp. 126-127.
[35] According to Article 31 of the 1969 Vienna Convention on the Law of Treaties, a treaty shall be interpreted «in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose».
[36] See Article 31, para. 3(b) of the Vienna Convention on the Law Treaties.
[37] *Smith and others (FC)*, cited above.
[38] *Knox*, Diagonal Environmental Rights, in: Gibney and Skogly (eds), *Universal Human Rights and Extraterritorial Obligations*, University of Pennsylvania Press, Philadelphia, 2010 pp. 83-84, A/HRC/22/43, paras 7-9, 12-13.
[39] ECtHR of 11 December 2012, Application no. 35622/04 *Chagos Islanders ⁄. United Kingdom*, para. 55.
[40] ECtHR of 23 March 1995, *Loizidou ⁄. Turkey* (preliminary objections), cited above, para. 77. The Court makes arguments against double standards using the reference to the Preamble to the Convention and its wording «to achieve greater unity in the maintenance and further realisation of human rights».
[41] ECtHR of 7 July 1989, *Soering ⁄. United Kingdom*, cited above, para. 87.
[42] ECtHR of 30 October 1991, Applications nos. 13163/87, 13164/87, 13165/87, 13447/87, 13448/87 *Vilvarajah and others ⁄. United Kingdom*.
[43] ECtHR of 12 December 2001, *Bankovic*, cited above, para. 68.
[44] See Commission decision of 24 June 1996, Application no. 28780/95 *Illich Sanchez Ramirez ⁄. France*; ECtHR of 12 May 2005, Application no. 46221/99 *Öcalan ⁄. Turkey.*
[45] ECtHR of 23 February 2012, Application no. 27765/09 *Hirsi Jamaa and others ⁄. Italy*.
[46] ECtHR of 24 July 2014, *Al-Nashiri ⁄. Poland*, cited above, para. 587.
[47] Idem, para. 509.
[48] *Knox*, Diagonal Environmental Rights, cited above, pp. 91-93.
[49] ECtHR of 12 May 2005, *Öcalan ⁄. Turkey*, cited above, para. 91. It is true that the applicant was physically forced to return to Turkey by Turkish officials and was under their authority and control following his arrest and return to Turkey.
[50] ECtHR of 23 March 1995, *Loizidou ⁄. Turkey*, cited above, para. 62: Bearing in mind the object and purpose of the Convention, the responsibility of a Contracting Party may also arise when as a consequence of military action – whether lawful or unlawful – it exercises effective control of an area outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration».
[51] See consolidated version of these principles in *Issa and others ⁄. Turkey*, cited above, paras. 69-71. See also e.g. *Lawson*, Across the Universe. The Extra-Territorial Application of the European Convention on Human Rights, in European Yearbook on Human Rights, Vol. 2011, pp.427-444, p. 434.
[52] ECtHR of 23 March 1995, *Loizidou ⁄. Turkey*, cited above, para. 62.
[53] *Gondek*, The Reach of Human Rights in a Globalizing World: Extraterritorial Application of Human Rights Treaties, cited above, p. 226.
[54] Commission decision of 24 June 1996, *Illich Sanchez Ramirez ⁄. France*, cited above, p. 155.
[55] ECtHR of 13 December 2012, Application no. 39630/09, *El-Masri ⁄. The Former Yugoslav Republic of Macedonia*, and ECtHR of 23 February 2012, *Hirsi Jamaa and others ⁄. Italy*, cited above.
[56] ECtHR of 23 February 2012, *Hirsi Jamaa and others ⁄. Italy*, cited above, paras. 156-158.
[57] ECtHR of 13 December 2012, *El-Masri ⁄. The Former Yugoslav Republic of Macedonia*, cited above, para. 198.
[58] ECtHR of 24 July 2014, Application no. 7511/13 *Husayn (Abu Zubaydah) ⁄. Poland*.
[59] ECtHR of 24 July 2014, *Al-Nashiri ⁄. Poland*, cited above, para. 517; see also ECtHR 24 July 2014, *Husayn (Abu Zubaydah) ⁄. Poland*, cited above, para. 512.
[60] ECtHR of 20 March 2008, *Budayeva and others ⁄. Russia*, cited above. Even though the most extensive assessment on severity has been made under Article 8 cases.
[61] ECtHR of 20 March 2008, *Budayeva and others ⁄. Russia*, cited above, para. 133.
[62] ECtHR of 5 July 2007, Application no. 67021/01, *Tatar*.
[63] *Pedersen*, The Ties that Bind: The Environment, the European Convention on Human Rights and the Rule of Law, in European Public Law, Vol. 16, No. 4, 2010, p. 576.
[64] For the margin of appreciation doctrine, see *Kratochvíl*, The Inflation of the Margin of Appreciation by the European Court of Human Rights, Netherlands Quarterly of Human Rights, Vol. 29/3, 2011, pp. 324-357.
[65] ECtHR of 23 February 2012, *Hirsi Jamaa and other ⁄. Italy*, cited above, paras. 156-158.
[66] ECtHR of 13 December 2012, *El-Masri ⁄. The Former Yugoslav Republic of Macedonia*, cited above.
[67] ECtHR of 16 November 2004, *Issa*, cited above. *Da Costa*, The Extraterritorial Application of Selected Human Rights Treaties, cited above, pp. 174-178.
[68] See ECtHR of 23 March 1995, *Loizidou ⁄. Turkey,* cited above, paras. 134 to 136; ECtHR of 12 December 2001, *Bankovic*, cited above
[69] See also for example ECtHR of 16 November 2004, Application no 4143/02 *Moreno Gomez ⁄. Spain*, cited above; ECtHR of 25 November 2010, *Mileva ⁄. Bulgaria*, cited above.
[70] ECtHR of 21 January 2011, Application no. 30696/09 *M.S.S ⁄. Belgium and Greece*.
[71] ECtHR of 8 July 2004, Application no. 48787/99 *Ila cu and Others ⁄. Moldova and Russia*, para. 318, *Gondek*, The Reach of Human Rights in a Globalizing World: Extraterri-

torial Application of Human Rights Treaties, cited above, p. 226.

[72] Commission decision of 24 June 1996, *Illich Sanchez Ramirez ⁄. France*, cited above; ECtHR of 12 May 2005, *Öcalan ⁄. Turkey*, cited above.

[73] ECtHR of 13 December 2012, *El-Masri ⁄. The Former Yugoslav Republic of Macedonia*, cited above

[74] *Knox*, Diagonal Environmental Rights, cited above, p. 83. See ECtHR of 19 April 2007, Application no. 63235/00 *Vilho Eskelinen and others ⁄. Finland*, para. 56: «While it is in the interests of legal certainty, foreseeability and equality before the law that the Court should not depart, without good reason, from precedents laid down in previous cases, a failure by the Court to maintain a dynamic and evolutive approach would risk rendering it a bar to reform or improvement».

[75] Article 31, para. 3(c) of the Vienna Convention states that account is to be taken of «[a]ny relevant rules of international law applicable in the relation between the parties and thus the development from environmental law should be taken into consideration.

[76] *White*, Judgments in the Strasbourg Court: Some Reflections, in Social Science Research Network, 6/2009, pp. 1-16, p.13.

[77] See *Boyle*, Human Rights and Environment: Where Next?, in European Journal of International Law, Vol. 23, No. 3, 2012. p. 639.

[78] *Shelton*, Equitable utilization of the atmosphere: a rights-based approach to climate change?, in: *Humphreys Stephen (eds)*, Human Rights and Climate Change, Cambridge University Press, 2010, p. 99

[79] Trail Smelter, *USA ⁄. Canada*, *1938* and 1941*, 3 R.I.A.A. 1905*.

[80] See for example, ICJ 1997, *Gabrikovo/Nagymaros Project*, ICJ Rep. 3 (25 September), *Pakootas ⁄. Tech Comino Metals, Ltd*, 452 F.3d 1066 (2006).

[81] *Humphreys (eds.)*, Human Rights and Climate Change, Cambridge University Press, 2010, p. 37

[82] *Koivurova*, International Legal Avenues to Address the Plight of Victims of Climate Change: Problems and Prospects, in Journal of Environmental Law and Litigation, Vol. 22 (2), 2007, pp. 267-299.
See also: *Knox*, Climate Change and Human Rights, in Virginia Journal of International Law Association, Vol. 50, 2009, p. 210. *Wewerinke/Doebbler*, Exploring the Legal Basis of a Human Rights Approach to Climate Change, in Chinese Journal of International Law, Vol. 10, No. 1, pp. 141-160, 2011; *Posner*, Climate Change and International Human Rights Litigation: A Critical Appraisal, in University of Pennsylvania Law Review, Vol. 155, pp. 1925-1945, 2007; *Limon*, Human rights and climate change: constructing a case for political action, in *Harvard Environmental Law Review*, Vol. 33, pp. 439-475, 2009; *McInerney-Lankford*, Climate Change and Human Rights: an Introduction to Legal Issues, in Harvard Environmental Law Review, Vol. 33, pp. 431-437, 2009; *Knox*, Linking Human Rights and Climate Change at the United Nations, in Harvard Environmental Law Review, Vol. 33, pp. 477-498, 2009.

[83] ECtHR of 23 February 2012, *Hirsi Jamaa and other ⁄. Italy*, cited above, para. 185.

[84] ECtHR of 9 June 2005, Application no. 55723/00 *Fadeyeva ⁄. Russia,* para. 105. The ECtHR has focused on the question of «whether the decision-making process was fair and such as to afford due respect to the interests safeguarded to the individual by Article 8 (…) and only in exceptional circumstances may it go beyond this line and revise the material conclusions of the domestic authorities».

[85] The Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, Aarhus, Denmark, 25 June 1998, Entry into force: 30 October 2001.

[86] *Knox*, Diagonal Environmental Rights, cited above, p. 101.

[87] Boyle, cited above, pp. 623 and 635.

[88] Ibid*,* pp. 639-640. Boyle refers also to the EIA (environmental impact assessment) and the Espoo Convention (Convention on Environmental Impact Assessment In a Transboundary Context, done at Espoo (Finland), on 25 February 1991.

[89] *Knox*, Diagonal Environmental Rights, cited above, p. 102.

[90] *De Schutter/Eide/Khalfan/Orellana/Salomon/Seiderman*, Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, in Human Rights Quarterly, 34(4), pp. 1084-1169 (2012).

[91] Report of the United Nations High Commissioner for Human Rights, Analytical study on the relationship between human rights and the environment, A/HRC/19/34, para. 71. The study of environmental degradation and its relation to human rights was presented in 1994 by *Ksentini* (E/CN.4/Sub.2/1994/9). The Ksentini report was the first significant report detailing the interconnection of the two fields. The report concluded that the existing and universal human rights standards and principles already involve environmental rights. These rights are recognised at all levels including the national, regional and international levels.

[92] *Schachter*, Invisible College of International Lawyers, in 72 Northwestern University Law Review, 217, 1977-1978.

[93] ECtHR of 23 March 1995, *Loizidou ⁄. Turkey,* cited above, paras. 134 to 136; ECtHR of 12 December 2001, *Bankovic*, cited above.

[94] See also for example ECtHR of 16 November 2004, *Moreno Gomez ⁄. Spain*, cited above; ECtHR of 25 November 2010, *Mileva ⁄. Bulgaria*, cited above.