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CLIMATE CHANGE, HUMAN RIGHTS AND INTERNATIONAL MIGRATION
CAMBIAMENTO CLIMATICO, DIRITTI UMANI E MIGRAZIONI INTERNAZIONALI

Ricerche giuridiche
Collana diretta da A. Celotto, F. Liguori, L. Zoppoli

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EDITORIALE SCIENTIFICA

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THE DUARTE CASE BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS: SOME OBSERVATIONS ON THE NOTION OF JURISDICTION

SUMMARY: 1. Introduction. – 2. The Duarte case. – 3. A possible different interpretation of jurisdiction also in light of Advisory Opinion no. OC-23/17 of the Inter-American Court of Human Rights and the case of *Sacchi and others* of the Committee on the Rights of the Child. – 4. Some critical remarks on the reasoning followed by the European Court in the Duarte case. – 5. Conclusions.

1. *Introduction*

Environmental degradation and climate change are among the most urgent and serious threats to the ability of present and future generations to enjoy human rights, as recognised in numerous international reports[1]. Hence, there is a growing tendency to assert the existence of state responsibility[2] for breaches of their human rights obligations, before international bodies (judicial and quasi-judicial) as well as national courts.

Within this context, the European Court of Human Rights has recently adopted three decisions on climate change building on its rich case law on environmental issues[3]. As a matter of fact, in recent years,

[*] Associate Professor of International Law, University of Naples L'Orientale.

[1] See *ex multis Sixth Assessment Report - IPCC*, available at https://www.ipcc.ch/assessment-report/ar6/.

[2] On climate litigation, which concerns claims both against states and companies, see *ex multis* J. SETZER, C. HIGHAM, *Global trends in climate change litigation: 2023 snapshot,* Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy, London School of Economics and Political Science, available at https://www.lse.ac.uk/granthaminstitute/publication/global-trends-in-climate-change-litigation-2023-snapshot/.

[3] See V. BASILE, *La giurisprudenza della Corte europea in materia ambientale: un*

the number of claims before the Strasbourg Court concerning human rights violations linked to climate change has increased significantly[4] . In three of these cases, namely *Verein KlimaSeniorinnen Schweiz and others v. Switzerland, Duarte Agostinho and others v. Portugal and 32 others*, and *Carême v. France,* a referral to the Grand Chamber was requested in 2022, on the grounds that they raised a serious question of interpretation of the European Convention on Human Rights. Subsequently, two public hearings were held (on 29 March 2023 in the *KlimaSeniorinnen* and *Carême* cases, and on 29 September 2023 in the *Duarte* case, respectively), with many intervening States and NGOs, legals clinics and scholars as *amici curiae*.

On 9 April 2024, the Court ruled on the three cases, which, although based on very different individual circumstances, "share a common thread: they all concern governmental frameworks regarding climate change mitigation (i.e., systemic mitigation cases) and challenge the overall inadequacy of states' efforts to mitigate GHG emissions, without prejudice of an underlying question regarding adaptation measures".[5]

The three decisions handed down by the Strasbourg Court contain several interesting elements[6]. While the *Duarte* and *Carême* cases were declared inadmissible (as predicted by some academics[7]), in the *Klimaseniorinnen* case the Court adopted a remarkable ruling in which it recognized for the first time that the ECHR provides positive obliga-

breve inquadramento, in F. AMATO, V. CAROFALO, A. DEL GUERCIO, A. FAZZINI, V. GRADO, E. IMPARATO, A. LIGUORI (eds.), *Migrazioni e Diritti al tempo dell'antropocene*, Editoriale Scientifica, Naples, 2023, p. 75 ff. and literature cited therein. Among the more recent cases, see in particular *Cannavacciuolo and Others v Italy*, judgment of 30 January 2025 and J. SOMMARDAL, *A Landmark Judgment: Three Crucial Aspects of Cannavacciuolo and Others v. Italy, in "*ECHR Blog*",* 4 February 2025.

[4] Many other cases are still pending: see https://www.echr.coe.int/documents/d/echr/fs_climate_change_eng.

[5] M. BÖNNEMANN, M. TIGRE*, The Transformation of European Climate Change Litigation. Introduction to the Blog Symposium*, in "Verfassungsblog"*,* 9 April 2024.

[6] See joint blog debate at https://verfassungsblog.de/category/debates/the-transformation-of-european-climate-litigation/.

[7] See, *inter alia*, M. MILANOVIC*, A Quick Take on the European Court's Climate Change Judgments,* in "EJIL: Talk!", 9 April 2024 and A. BUYSE, K. ISTREFI*, Climate Cases Decided Today: Small Step or Huge Leap?*, in "ECHR Blog", 9 April 2024.

tions for States to adopt and effectively implement regulations and measures aimed at mitigating the potentially irreversible present and future effects of climate change. After a long and complex judgment (the longest ever handed down, spanning 260 pages), the Court concluded that the Swiss Confederation had failed to fulfil its obligations under the European Convention on Human Rights, concerning the right to respect for private and family life and the right of access to a court. The Strasbourg Court thus set out a number of general principles on human rights violations linked to climate change, which were explicitly taken up in the other two cases. As Savaresi, Nordlander and Wewerinke-Singh have noted, *KlimaSeniorinnen* "is poised to become a pivotal milestone in the ECtHR's jurisprudence, influencing the court's approach for years to come"[8].

Against this background, the present paper intends to focus on the *Duarte* decision, and in particular on the notion of jurisdiction adopted by the Court in this case. Indeed, the *Duarte* case is the first diagonal claim examined so far by the Court, i.e., a case brought by people (in this case six young Portuguese children) against States other than their own. For this reason, the decision on admissibility was very disappointing, although not unexpected[9].

2. *The Duarte case*

The Duarte case concerns an application lodged with the Court by six young Portuguese nationals (at the time of the application they were all minors) on 7 September 2020, against the Portuguese Repub-

[8] A. SAVARESI, L. NORDLANDER, M. WEWERINKE-SINGH, *Climate Change Litigation before the European Court of Human Rights: A New Dawn,* in "GNHRE Blog", 12 April 2024. In fact, the judgment has been greeted almost humanely with enthusiasm: see, among others, M. BÖNNEMANN, M. TIGRE (*The Transformation of European Climate Change Litigation,* cit.) and C. HERI (*Strasbourg's 'Case of the Century' - Revolutionary Climate Judgment from the European Court of Human Rights,* in "JustSecurity", 10 April 2024), who described it as 'groundbreaking' and 'Case of the Century' respectively.

[9] See A. ROCHA, *States' Extraterritorial Jurisdiction for Climate-Related Impacts*, in "Verfassungsblog", 12 April 2024.

lic and 32 other States[10]. On 28 June 2022, the Chamber to which the case had been assigned relinquished jurisdiction in favour of the Grand Chamber, in the same composition as in the cases of *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* (application no. 53600/20) and Carême v. France (application no. 7189/21). The hearings in the Duarte case took place on 29 September 2023.

The applicants argue in their request that the forest fires affecting Portugal every year since 2017 are directly linked to global warming. They claim that they are exposed to the risk of health problems, and that they have already suffered from sleep disorders, allergies and breathing difficulties, due to these fires. The claimants also express anxiety about these natural disasters and the prospect of living in an increasingly hot climate throughout their lives, which would have repercussions for them and any families they might start in the future, alleging a breach of Articles 2, 3, 8 and 14 of the Convention.

In particular, they complain about the failure of those 33 States to comply with their positive obligations under Articles 2 (right to life) and 8 (right to respect for private and family life) of the Convention, in light of the commitments made under the 2015 Paris Climate Agreement[11]. More specifically, with respect to "a very limited range of positive obligations to take measures within the States' power to regulate and/or limit their emissions", they assert the existence of extraterritorial jurisdiction (par. 123).

However, the court rejected the plaintiffs' arguments in favour of

[10] Austria, Belgium, Bulgaria, Croatia, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Lithuania, Luxembourg, Latvia, the Netherlands, Norway, Poland, Romania, Russia, Slovakia, the Republic of Slovenia, Spain, Sweden, Switzerland, Turkey, the United Kingdom and Ukraine. Preliminary issues addressed by the Court include the withdrawal of the action against Ukraine, requested by the young Portuguese in November 2022 due to the circumstances of the war para. 158), as well as the continuation of the case against the Russian Federation, despite its expulsion from the Council of Europe, by a resolution adopted on 22 March 2022 (paras161-164).

[11] The applicants also alleged a breach of Article 14 (prohibition of discrimination) in conjunction with Articles 2 and/or 8 of the Convention, arguing that global warming was specifically affecting their generation and that, given their age, the infringements of their rights were more pronounced than for previous generations.

the extraterritorial applicability of the Convention vis-à-vis the other states and dismissed the application against Portugal for non-exhaustion of domestic remedies. Both statements have been criticized by scholars[12]. Bearing all this in mind, the present paper will focus on the section of the decision concerning the notion of jurisdiction, which is a crucial point. As observed[13], the Court missed "the opportunity to learn from the Global South" and reconsider its notion of extraterritoriality, taking into account the specificity of the issues at stake and the relevant case law of other international bodies, in particular the Advisory Opinion no. OC-23/17 of the Inter-American Court on Human Rights[14] and the *Sacchi* case of the Committee on the Rights of the Child of October 2021[15].

[12] On the inadmissibility decision for non-exhaustion of domestic remedies see G. LISTON, *Reflections on the Strasbourg climate rulings in light of two aims behind the Duarte Agostinho case*, in "EJIL: Talk!", 7 May 2024.

[13] M. MURCOTT. M. A. TIGRE, N. ZIMMERMANN, *What the ECtHR Could Learn from Courts in the Global South*, in "Völkerrechtsblog", 22 March 2024.

[14] IACtHR, *Advisory Opinion no. OC-23/17, The Environment and Human Rights (State Obligations in Relation to the Environment in the Context of the Protection and Guarantee of the Rights to Life and to Personal Integrity—Interpretation and Scope of Articles 4(1) and 5(1) in Relation to Articles 1(1) and 2 of the American Convention on Human Rights) (15 November 2017).*On this Advisory Opinion see ex multis M. FERIA-TINTA, S. MILNES, *The Rise of Environmental Law in International Dispute Resolution: Inter-American Court of Human Rights issues Landmark Advisory Opinion on Environment and Human Rights*, in "EJIL: Talk!", 28 February 2018; A. BERKES, *A New Extraterritorial Jurisdiction Link Recognized by the IACtHR*, in "EJIL: Talk!", 28 March 2018; M. L. BANDA, *Inter-American Court of Human Rights' Advisory Opinion on the Environment and Human Rights*, in "ASIL Insights", 10 May 2018.

[15] *Committee on the Rights of the Child, Decision adopted by the Committee on the Rights of the Child under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure in respect of Communication No. 107/2019*, CRC/C/88/D/107/2019, October 8, 2021. On this decision see *ex multis* A. NOLAN, *Children's Rights and Climate Change at the UN Committee on the Rights of the Child: Pragmatism and Principle in Sacchi v. Argentina*, in "EJIL:Talk!", 20 October 2021; M. WEWERINKE-SINGH, *Communication 104/2019 Chiara Sacchi et al v. Argentina et al. Between Cross-Border October Obligations and Domestic Remedies: The UN Committee on the Rights of the Child's decision on Sacchi v. Argentina*, in "Leiden Children's Rights Observatory"; M. LA MANNA, *Cronaca di una decisione di inammissibilità annunciata: la petizione contro il cambiamento climatico Sacchi et al. contro Argentina et al. non supera il vaglio del Comitato sui diritti del fanciullo*, in "Sidiblog", 15 Novem-

As a matter of fact, the previous case law of the Strasbourg Court on jurisdiction has been quite puzzling[16], with ambiguous openings toward a functional notion of jurisdiction followed by backward steps. While starting from the premise that the notion that States' human rights jurisdiction is "primarily territorial", the Strasbourg Court later admitted that extraterritorial human rights jurisdiction can arise in instances of effective control over an area or physical control ('spatial' model) and over specific individuals abroad ('personal' control). In addition, despite vigorously denying an approach to a "cause-and-effect" notion of jurisdiction in *Bankovic*, a more 'functional test' has

ber 2021. See also the General comment No. 26 (2023) on children's rights and the environment with a special focus on climate change) CRCC/GC/26, available at https://www.ohchr.org/en/documents/general-comments-and-recommendations/crccgc26-general-comment-no-26-2023-childrens-rights.

[16] On the notion of ECHR notion of jurisdiction see *ex multis* G. GAJA, *Article 1*, in S. BARTOLE, B. CONFORTI e G. RAIMONDI (eds.), *Commentario alla Convenzione europea per la salvaguardia dei diritti dell'uomo*, Padova, Cedam, 2001, p. 28; P. DE SENA, *La nozione di giurisdizione statale nei trattati sui diritti dell'uomo*, Torino, Giappichelli, 2002; R.A. LAWSON, *Life after Bankovic: on the Extraterritorial Application of the European Convention on Human Rights,* in F. COOMANS, M.T. KAMMINGA (eds.), *Extraterritorial Application of Human Rights Treaties*, Antwerp, Intersentia, 2004, p. 86; M. O'BOYLE, *The European Convention on Human Rights and Extraterritorial Jurisdiction: A Comment on "Life after Bankovic"*, in F. COOMANS, M. T. KAMMINGA (eds.), cit; E. LAGRANGE, *L'application de la Convention de Rome à des actes accomplis par les Etats parties en dehors du territoire national*, in "Revue générale de droit international public", n. 3/2008, p. 521 ss.; M. MILANOVIC, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy*, Oxford, Oxford University Press, 2011; R. SAPIENZA, *Article 1*, in BARTOLE, DE SENA, ZAGREBELSKY (eds.), *Commentario breve alla Convenzione* europea, Padova, Cedam, 2012, pp. 13 ss.; S. VEZZANI, *Considerazioni sulla giurisdizione extraterritoriale ai sensi dei trattati sui diritti umani*, in "Rivista di diritto internazionale", n. 4/2018, p. 1086 ff.; S. VEZZANI, *Recenti sviluppi in tema di applicazione extraterritoriale delle convenzioni internazionali sui diritti umani*, in "Rivista di diritto internazionale", n. 3/2021, p. 647 ff. See A. RICCARDI, A. OLLINO, D. MAURI, *Litigating Jurisdiction Before the ECtHR: Between Patterns of Change and Acts of Resistance*, in "Question of International Law", 30 June 2021. The inconsistency of ECHR jurisprudence has been pointed out not only by doctrine but also by some of its own judges, notably Pinto de Albuquerque and Bonello: see on this point C. MALLORY, *A second coming of extraterritorial jurisdiction at the European Court of Human Rights?*, in "Questions of International Law", 30 June 2021.

been applied in a few cases[17] and, more recently, limited extensions of extraterritorial jurisdiction have been introduced with respect to alleged 'special features'[18].

In the Duarte case, the applicants specified that they did not intend to refer purely to a cause-and-effect notion of jurisdiction, but rather to a notion of jurisdiction based on the following "special features of climate change" (par. 126):

"(a) The respondent States exercised control over the applicants' Convention interests, which should be the relevant criterion to be taken into account.

(b) There was a causal link between the respondent States' activities and the effects on the applicants given that the States' emissions and failures to regulate/limit their emissions materially contributed to the risk of global warming[19] ... Moreover, the corresponding impact on the applicants' rights and the multilateral dimension of climate change meant that both the territorial State and the extraterritorial States stood in the same causal relationship with the applicants' rights in terms of the risk of harm caused by their omissions when it came to their emissions levels and mitigation measures;

[17] As in *PAD and others v. Turkey*, decision of June 28, 2007, applic. No. 60167/00; *Andreou v. Turkey*, judgment of October 27, 2009, applic. No.45653/99; *Jaloud v. The Netherlands*, judgment of November 20, 2014, applic. No. 47708/08: on this point see A. LIGUORI, *Migration Law and the Externalization of Border Controls*, New York and London, Routledge, 2019, p. 35-38 and literature quoted therein. More recently see A. RICCARDI, A. OLLINO, D. MAURI, *Litigating Jurisdiction Before the ECtHR,* cit.; V. TZEVELEKOS, A. BERKES, *Guest Post: Turning Water into Wine - The Concealed Metamorphosis of the Effective Control Extraterritoriality Criterion in Carter v. Russia,* in "ECHR Blog", 9 November 2021; Y. SHANY, *Catching Up: The European Court of Human Rights Approximates its Approach to Extraterritorial Jurisdiction Over Digital Surveillance to That of the Human Rights Committee*, in "European Convention on Human Rights Law Review", 2024, p. 182 ff.

[18] The cases in which the Court has relied on this category to justify a departure from the 'traditional' approach to jurisprudence are in fact quite diverse. Among others, *Güzeryurtlu et al. v. Cyprus and Turkey* [GC], Appl. No. 36925/07, decision 29 January 2019, paras. 192 ff.; *Hanan v. Germany* [GC], Appl. No. 4871/16, decision 16 February 2021; *Georgia v. Russia (II)* [GC], Appl. No. 38263/08, decision of 21 January 2021.

[19] Relying, *inter alia*, on the CRC decision in *Sacchi and Others*.

(c) The effects on the applicants' rights had been foreseeable;

(d) The effects on the applicants were still ongoing;

(e) The effects were produced by activities within the territories and/or under the control of the respondent States;

(f) The protection of the applicants' interests required all the respondent States to take measures within their power to regulate/limit their emissions;

(g) A finding of jurisdiction was supported by and harmonious with the relevant rules of international law and approaches of other international human rights bodies.

In its decision, the Court of Strasbourg indeed endorsed some of the applicants' arguments, making interesting admissions, confirming and reinforcing statements of principle already made in the *Klimaseniorinnen* judgment. In fact, the Court affirmed that "States have ultimate control over public and private GHG-emitting activities based on their territories that produce GHG emissions" (para. 192) and "albeit complex and multi-layered, there is a certain causal relationship between public and private activities based on a State's territories that produce GHG emissions and the adverse impact on the rights and well-being of people residing outside its borders" (para. 193). Furthermore, it recognized that climate change poses an existential threat to humanity, which is different from other cause-and-effect scenarios: the extraction or burning of additional fossil fuels anywhere in the world will inevitably increase greenhouse gas concentrations in the atmosphere, thereby exacerbating the global impacts of climate change" (para. 194).

Nevertheless, the Court rigidly referred to its former case law. Specifically, it undertook an extensive review of its previous decisions on jurisdiction (paras. 168-176), but in a particularly selective and restrictive manner, stressing that it had always rejected 'the idea that the fact that a decision taken at national level has had an impact on the situation of an individual abroad may in itself be such as to establish the jurisdiction of the State concerned over the person concerned' (para. 184). However, the revision of its previous jurisprudence seems to be driven by a single purpose, namely, to avoid a broad interpretation of the notion of jurisdiction and does not take due account of developments in national and international law, nor of the continuing pro-

gress in scientific understanding of the impact of climate change on the individual[20]. Therefore, the conclusion that the arguments put forward by the applicants could 'serve neither as a basis for creating, through judicial interpretation, a new ground for establishing extraterritorial jurisdiction, nor as a justification for extending existing grounds' (para. 195) is not surprising but nevertheless disappointing, not only for the outcome, but above all for the reasoning.

Hence, the present paper will focus on some of the Court's most drastic statements, demonstrating that a different interpretation was possible.

Firstly, the Court affirms that existing positive obligations of States in the field of climate change could not be a "sufficient ground for holding that the State has jurisdiction over individuals outside its territory or otherwise outside its authority and control" (para. 198). This is despite the fact that various judicial and quasi-judicial bodies have explicitly expanded the notion of jurisdiction specifically in relation to positive obligations. On the one hand, they have referred to the relationship between the State's control over a harmful activity and the reasonably foreseeable harm (or risk of harm) caused by that activity beyond its borders –, and, on other, to the State's reasonable capacity to act in order to prevent it. As observed[21], "While this approach has

[20] Despite affirming that it had considered the relevance of the UNFCCC Preamble (which states that countries must ensure their activities do not harm the environment of other states or areas beyond national jurisdiction); Articles 1 and 2 of the Articles on Prevention of Transboundary Harm from Hazardous Activities (which define transboundary harm as damage caused in the territory or jurisdiction of a state other than the state of origin) and the Inter-American Court's approach in its Advisory Opinion and the CRC's approach in the Sacchi case (para 210). On this point see also G. PANE, *I climate cases di fronte alla sfida dell'ammissibilità: riflessioni a margine della decisione nel caso Duarte Agostinho*, in "Sidiblog", 10 April 2024, who observes that The absence of recognition of extraterritorial jurisdiction over the transboundary effect of greenhouse gas emissions risks being in direct conflict with two fundamental principles of international environmental law: the principle of common but differentiated responsibilities, enshrined in the Rio Declaration on Environment and Development (Principle 7), and that of the prohibition of transboundary pollution, also recognized numerous times by the International Court of Justice.

[21] C.T. ANTONIAZZI, *Extraterritorial Human Rights Obligations in the Area of Climate Change: Why the European Union Should Take Them Seriously*, in "European

been criticized by some commentators on the basis that it would conflate jurisdiction with the content of obligations (of due diligence), the relevant monitoring bodies do not appear to have reneged on it". Nevertheless, the Court refuses to join this new trend, ignoring not only the precedents set by other national and international bodies, but also some of its own case law, as we will see in the next paragraph.

Secondly, the Court states that "there is no support in the case law for a criterion such as 'control over the Convention interests' as a basis for extraterritorial jurisdiction" and that it is not possible to expand interpretation "in such a manner, which would entail a radical departure from established principles under Article 1" (para. 205). Notwithstanding that *stare decisis* is not inflexible in international law[22], the Court overlooks the fundamental role played by the criterion of evolutionary interpretation in its own jurisprudence (as well as in the *KlimaSeniorinnen* case decided on the same day).

Thirdly, it rejects the proposal to interpret the Contracting Parties' extraterritorial jurisdiction on the basis of the proposed criterion of "control over the applicants' Convention interests" in the field of climate change, arguing that this would "entail an unlimited expansion of States' extraterritorial jurisdiction under the Convention and responsibilities under the Convention toward people virtually anywhere in the world", thus turning the Convention into a global climate-change treaty (para. 208).

This last statement sheds light on what is probably the main reason for the Court's radicalism in refusing to expand its notion of jurisdiction. However, in my view, there is another concern that has not been openly addressed, namely, that an expansive interpretation of jurisdiction could, in the future, be extended to other areas: indeed, the prac-

papers, 2024, p. 495, quoting S. BESSON, *Due Diligence and Extraterritorial Human Rights Obligations - Mind the Gap!*, in "ESIL Reflections", 28 April 2020, and A. OLLINO, *The 'Capacity-Impact' Model of Jurisdiction and Its Implications for States' Positive Human Rights Obligations*, in "Question of International Law", 31 March 2022.

[22] See N. CARRILLO-SANTARELLI, F. IPPOLITO, *Oasis or mirage? Assessing the recent ECHR climate decisions through the lens of IACtHR pronouncements*, in "DPCE online", 2024, p. 1438. See also A. ROCHA, *States' Extraterritorial Jurisdiction,* cit., affirming that "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)."

tice of externalizing migration control is certainly one of these politically sensitive areas of interest[23].

3. *A possible different interpretation of jurisdiction also in light of Advisory Opinion no. OC-23/17 of the Inter-American Court of Human Rights and the case of Sacchi and others of the Committee on the Rights of the Child*

The non-recognition of extraterritorial applicability in the present case and, particularly, the failure to accept for a criterion such as "control over the applicants' Convention interests" as a basis for extraterritorial jurisdiction seems here highly unsatisfactory. This is especially true because, in our view, a different interpretation was possible in light of the positions expressed by various international bodies – both regional and universal –, and in particular by the Inter-American Court and the Committee on the Rights of the Child (paragraph 3.1). Additionally, some of the Court's own precedents support this possibility, given that positive obligations were at stake (paragraph 3.2).

3.1 - Regarding the first aspect, both the Inter-American Court on Human Rights in its Advisory Opinion no. OC-23/17 and the Committee on the Rights of the Child in the *Sacchi and Others* case have adopted an interpretation of the notion of jurisdiction that does not rely on the control over a certain area (the so-called "spatial paradigm") or over a person ("personal paradigm") but rather on the control that a state exercises over the source of the violation, i.e., the activities in its territory that can produce effects outside the territory[24].

[23] In particular, the outcome of an important case concerning the consequences of externalization, the pending case *S.S. and Others v. Italy*, applic. No 21660/18 (see V. MORENO-LAX, "The Architecture of Functional Jurisdiction: Unpacking Contactless Control—On Public Powers, S.S. and Others v. Italy, and the "Operational Model" in G. CATALDI, A. DEL GUERCIO, A. LIGUORI (eds.) *Migration and Asylum Policies Systems Challenges and Perspectives*, 2020, p. 183 ff. and A. FAZZINI, *L'esternalizzazione delle frontiere,* cit., in particular p. 251 ff.), is indeed at risk after the *Duarte* decision.

[24] With some slight differences, see on this point L. MAGI, *Cambiamento climatico e minori: prospettive innovative e limiti delle decisioni del Comitato per i diritti del fan-*

In particular, the Inter-American Court, in its Advisory Opinion of 15 November 2017 on the environment and the human rights[25], adopted at the request of Colombia, first recalls that

"States must ensure that their territory is not used in such a way as to cause significant damage to the environment of other States or of areas beyond the limits of their territory. Consequently, States have the obligation to avoid causing transboundary damage or harm" [26]

and that

"States are obliged to take all necessary measures to avoid activities implemented in their territory or under their control affecting the rights of persons within or outside their territory" [27]

innovatively concluding 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."[28]

Subsequently, a new request has been submitted to the Inter-American Court on climate change and human rights, which is still pending before the Inter-American Court of Human Rights[29]. Given

ciullo nel caso Sacchi et al., in "Diritti umani e diritto internazionale", 2022, p. 160.

[25] Although the Advisory Opinion concerns cross-border environmental damage, "its new test for extraterritoriality is sufficiently broad to encompass climate-related harms, assuming there is sufficient causal nexus and evidence that a state failed in its duty of due diligence": see M. L. BANDA, *Inter-American Court of Human Rights' Advisory,* cit.

[26] Ibid. para 104 lett. f.

[27] Ibid. para 104 lett. g.

[28] Ibid. para 104 lett. h.

[29] *Republic of Colombia and Republic of Chile, Request for an advisory opinion on the Climate Emergency and Human Rights submitted to the Inter-American Court of*

the positions taken by the aforementioned Court in its opinion on Environment and Human Rights, it is not unlikely that the Inter-American Court will confirm its interpretation with regard to the issue of extraterritorial jurisdiction in the context of climate change as well.

Similar conclusions to those of the Inter-American Court were later reached in 2021 by the Committee on the Rights of the Child in *Sacchi et al. v. Argentina, Brazil, France, Germany, and Turkey*, in response to a complaint filed in 2019 by 16 young people of 12 nationalities[30], including well-known Swedish activist Greta Thunberg. The case specifically addressed the impact of climate change on the enjoyment of human rights under the Convention on the Rights of the Child.

The Committee first recalls the Court's position, pointing out that:

"In cases of transboundary damage, the exercise of jurisdiction by a State of origin is based on the understanding that it is the State in whose territory or under whose jurisdiction the activities were carried out that has the effective control over them and is in a position to prevent them from causing transboundary harm that impacts the enjoyment of human rights of persons outside its territory. The potential victims of the negative consequences of such activities are under the jurisdiction of the State of origin for the purposes of the possible responsibility of that State for failing to comply with its obligation to prevent transboundary harm"[31]

and concludes

"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

*Human Rig*hts, 9 January 2023, available at www.corteidh.or.cr.

[30] Applicants are from Argentina, Brazil, France, Germany, India, Marshall Islands, Nigeria, Palau, South Africa, Sweden, Tunisia and the United States.

[31] Par 10.5 of the Decision recalling paragraphs 101-102 of the *Advisory Opinion*. Extraterritorial jurisdiction is, therefore, admitted in connection with the violation of a positive obligation.

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".[32]

3.2 - Regarding the second aspect, as previously mentioned, in para. 198 the Court stated that "it does not find it possible to consider that the proposed positive obligations of States in the field of climate change could be a sufficient ground for holding that the State has jurisdiction over individuals outside its territory or otherwise outside its authority and control". This reasoning overlooks the fact that, in some previous cases, – although not numerous – the Court appeared willing to accept a lower threshold for jurisdiction, disentangled from effective control over an area or a person in claims related to positive obligations. As observed by scholars[33], some cases (in particular *Ilascu and Others v. Moldova and Russia*[34], *Manoilescu and Dubrescu v. Romania*

[32] Para. 10.7.

[33] See H.P. AUST, *Complicity and the Law of State Responsibility*, Cambridge, Cambridge University Press, 2011, p. 404; M. DEN HEIJER, *Europe and Extraterritorial Asylum*, Oxford, Hart Publishing, 2012, p. 48; H. DUFFY, *The Practice of Shared Responsibility in Relation to Detention and Interrogation Abroad: The 'Extraordinary Rendition' Program*, in SHARES Research Paper 78, 2016, p. 16; C. ROZAKIS, *The Territorial Scope of Human Rights Obligations: The Case of the European Convention on Human Rights*, in *The Status of International Treaties on Human Rights*, Strasbourg, Council of Europe Publishing, 2005, p. 70 ff.; V. TZEVELEKOS, E. KATSELLI PROUKAKI, *Migrants at Sea: A Duty of Plural States to Protect (Extraterritorially)?*, in "Nordic Journal of International Law", 2017, pp. 427 ff. See also V. TZEVELEKOS, A. BERKES, *Guest Post: Turning Water into Wine*, cit, who affirm that "it seems that effective control is not indispensable for positive human rights obligations to extend extraterritorially" (adding as examples *Rantsev v. Cyprus and Russia*, para. 289; *Romeo Castaño v. Belgium*, paras. 37-43; *Zoletic and Others v. Azerbaijan*, para. 191). Similarly, with specific reference to positive obligations at stake in the context of externalization of border controls, see V. MORENO-LAX, M. GIUFFRÉ, *The Raise of Consensual Containment: From Contactless Control to Contactless Responsibility for Migration Flows*, in S.S. Juss (ed.), *Research Handbook on International Refugee Law*, Edward Elgar Publishing, 2019; A. LIGUORI, *Migration Law and the Externalization of Border Controls*, New York and London, Routledge, 2019; A. FAZZINI, *L'esternalizzazione delle frontiere e la responsabilità degli Stati europei: il caso Italia-Libia*, Napoli, Editoriale Scientifica, 2023.

[34] *Ilascu and others v. Moldova and Russia* [GC], judgment of 8 July 2004, App no 48787/99.

and Russia[35] and *Treska v. Albania and Italy*[36]), could support the conclusion that a State's duty to take preventive or other positive action regarding extraterritorial human rights violations originates first and foremost from the influence it exercises in a particular situation, irrespective of effective control over an area or a person. The Court, however, does not mention any of these cases, focusing instead on the much-criticized *M.N. v. Belgium* case[37] and refusing to align itself with the most recent achievements of other regional and universal human rights bodies. These bodies have embraced a more functional notion of jurisdiction[38], such as the capacity-impact model, the control over rights doctrine, the control over the source of harm, etc. In particular, the abovementioned IACtHR Opinion and CRC Sacchi decision have affirmed the existence of extraterritorial jurisdiction in all cases where

[35] *Manoilescu and Dubrescu v. Romania and Russia*, decision of 3 March 2005, Applic. no 60861/00.

[36] *Treska v. Albania and Italy*, decision of 29 June 2006, Applic. no 26937/04.

[37] See J.Y. CARLIER, L. COOLS, E. FRASCA, F. GATTA, S. SAROLEA, *Humanitarian visa: does the suspended step of the stork become a hunting permit?*, in "Cahiers de l'EDEM", June 2020; C. DANISI, *A "formalistic" approach to jurisdiction in the European Court of Human Rights' decision on humanitarian visas: Was another interpretation possible?*, in "Sidiblog", 27 May 2020; T. GAMMELTOFT-HANSEN, N. F. TAN, *Adjudicating old questions in refugee law: MN and Others v. Belgium and the limits of extraterritorial refoulement, Adjudicating old questions in refugee law: MN and Others v Belgium and the limits of extraterritorial refoulement*, in "EUmigrationlawblog", 26 May 2020; A. SCHIAVELLO, M. STARITA, *M.N. e altri c. Belgio: qualche osservazione dissenziente*, in "Diritti umani e diritto internazionale", 2021, p. 555 ff; A. LIGUORI, *Two Courts but a Similar Outcome -no humanitarian visas*", in G. CATALDI, A. DEL GUERCIO, A. LIGUORI (eds.), *Migration and Asylum Policies Systems,* cit., p. 167 ff.

[38] In addition to doctrine cited in the footnotes 15 and 16 see *ex multis* M. DEN HEIJER, R. LAWSON, *Extraterritorial Human Rights and the Notion of «Jurisdiction»*, in M. LANGFORD and others (eds.), *Global Justice, State Duties: the Extraterritorial Scope of Economic, Social, and Cultural Rights in International Law*, 2013, Cambridge, Cambridge University Press; D. DESIERTO, *The ICESCR as a Legal Constraint on State Regulation of Business, Trade and Investment: Notes from CESCR General Comment No. 24*, in "EJIL: Talk!", 13 September 2017; M. MILANOVIĆ, *Drowning Migrants, the Human Rights Committee, and Extraterritorial Human Rights Obligations,* in "EJIL: Talk!", 16 March 2021; A. FAZZINI, *L'applicabilità extraterritoriale degli obblighi positivi in materia di diritti umani: il rimpatrio dei familiari dei foreign fighters francesi,* in "La Comunità Internazionale", 2023, p. 323 ff.

a State exercises control over the activity causing the violation (or the risk of violation).

Moreover, accepting the plaintiffs' proposed interpretation of positive obligations of prevention as "control over the exercise of rights" is surely the one that best reflects the universalist approach that Shany effectively outlined in his article "Taking Universality Seriously"[39]. According to Shany, jurisdiction " is about states having the potential (or functional capacity) to comply with or violate [international human rights] obligations"[40], as "states should protect human rights whenever in the world they operate, whenever they may reasonably do so"[41].

Had the European Court accepted the plaintiffs' argument that jurisdiction exists in cases where the state has the *power* to regulate and limit emissions generated in its territory or by activities under its jurisdiction, because in that case it is in fact exercising "control over the exercise of [their] rights or interests protected by the Convention," it would undoubtedly have opted for an interpretation more in line with the universal nature of human rights and more consistent with the principle of evolutionary interpretation[42].

Indeed, the Court has often resorted to an evolutionary interpretation, based on the consideration that the Convention, whose essential purpose is the protection of human rights, is a 'living instrument' and, therefore, evolves with international society. In contrast, such an approach[43] is entirely lacking in *Duarte*, although the Court had imple-

[39] Y. SHANY, *Taking Universality Seriously: A Functional Approach to Extraterritoriality in International Human Rights Law*, in "Law & Ethics of Human Rights", 2013.

[40] Ibid, p. 66.

[41] Ibid, p. 67.

[42] Shany openly criticizes both demarcations of extraterritorial applicability of human rights based on "degrees of control over individuals or areas" and the nature of the obligations at stake. However, aware of the argument that a functional notion without limits would render the notion of jurisdiction meaningless, he rejects "a one-size-fits-all approach" to extraterritoriality in favor of a contextual application". Indeed, the plaintiffs, in proposing an expansion of jurisdiction, refer to a multiplicity of "special features".

[43] Which according to the doctrine constitutes an established interpretive approach; see *ex multis* W. KÄLIN, J. KÜNZLI, *The Law of International Human Rights Protection*, Oxford, 2019, p. 34; R. PISILLO MAZZESCHI, *International Human Rights Law, Theory and Practice*, Turin, 2020, p. 57 ff.

mented it in the judgment adopted on the same day in the *Klimasen-iorinnen* case[44]. In the latter case, in fact, the Court affirmed

"[T]he interpretation and application of the rights provided for under the Convention can and must be influenced both by factual issues and developments affecting the enjoyment of the rights in question [...] the Convention should be interpreted, as far as possible, in harmony with other rules of international law [...] a failure by the Court to maintain a dynamic and evolutive approach would risk rendering it a bar to reform or improvement"[45].

However, although the Court admits that non-evolutionary interpretations can hamper human rights protection, failing to acknowledge the evolving dynamics of climate change and choosing to adopt such a limited notion of extraterritorial jurisdiction "would often entail the impossibility of victims bringing claims -considering their places of residence and the economic and other hurdles of bringing claims abroad-, favoring impunity."[46]

3.3 – Along the same lines, the acceptance of a broader notion of jurisdiction, where States exercise control over the source of harm and where the criteria of foreseeability and reasonable ability are met, does not imply an unlimited responsibility toward anyone adversely affected by an act attributable to a State Party, anywhere in the world. It rather entails that a State would incur responsibility for the failure to exercise its due diligence *within its territory,* as observed by Berkes with reference to the new link adopted by the Inter-American Court in its 2017 Opinion[47]. Indeed, most of the commentary that Berkes provides on this opinion may offer useful guidance in support of the alternative interpretation we are proposing, because the Inter-American Court has been the first human rights body to identify "a new extraterritorial ju-

[44] N. CARRILLO-SANTARELLI, F. IPPOLITO, *Oasis or mirage?,* cit.

[45] *Verein KlimaSeniorinnen Schweiz and others v. Switzerland*, judgment of 9 April 2024, para. 455,

[46] N. CARRILLO-SANTARELLI, F. IPPOLITO, *Oasis or mirage?,* cit., p. 1440.

[47] A. BERKES, *A New Extraterritorial Jurisdiction Link*, cit.

risdictional link based on control over domestic activities with extraterritorial effect."[48]

In its commentary, Berkes also highlights that the Inter-American Court did not distinguish between State actions and omissions that cause an adverse extraterritorial effect (e.g. par. 103), thus introducing what is described by the author as "the most important novelty," that is "to expect from States not only negative, but positive obligations in an extraterritorial situation"[49]. Even though Berkes considers the construction of a jurisdictional link based on due diligence to be a positive development, he nevertheless points out an important shortcoming in OC-23/17 Opinion, namely, the fact that the court did not define the limits of this test, *inter alia*, with reference to the nature of the causal test. In fact, the court refers merely to "causality" in paras 101 and 103, although this might be "an oversimplification to describe the often complex factual link between the State's omission and its extraterritorial consequences, especially in case of a multiplicity of States contributing to the human rights violation."[50]

As observed[51], causation by omission is more difficult to establish, as it implies a "counterfactual and speculative analysis," given that "The omission by the state might be just one factor contributing to the occurrence of the harm". Turning more specifically to causation in

[48] Ibid.

[49] Italics added.

[50] Ibid. Causality is a complex issue which, until a few years ago, had received little attention from the viewpoint of international law. See F. RIGAUX, *International Responsibility and the Principle of Causality*, in M. RAGAZZI (ed), *International Responsibility Today. Essays in Memory of Oscar Schachter*, Boston, 2005, 81 ff; I. PLAKOKEFALOS, *Causation in the Law of State Responsibility and the Problem of Overdetermination: in Search of Clarity*, in "European Journal of International Law", 2015, p. 471 ff.; L. LAVRYSEN, *Human Rights in a Positive State*, Cambridge, 2016, 137 ff; V. Stoyanova, *Causation between State Omission and Harm within the Framework of Positive Obligations Under the ECHR*, in "Human Rights Law Review", 2018, p. 309 ff.; T. DEMARIA, *Le lien de causalité et la réparation des dommages en droit international public*, Paris, 2021; V. LANOVOY, *Causation in the Law of State Responsibility*, in "British Yearbook of International Law", 2022; A. OLLINO, G. PUMA, *La causalità e il suo ruolo nella determinazione dell'illecito internazionale*, in "Rivista di diritto internazionale", n. 3/2022, p. 313 ff.

[51] V. STOYANOVA, *Causation between State Omission and Harm*, cit. p. 309.

climate litigation, it is significant that a recent essay by Nollkaemper on the subject is entitled "Causation puzzles in international climate litigation"[52]. Indeed, the fact that climate change is due to greenhouse gas emissions caused by multiple factors, and that its consequences affect humanity as a whole (although unequally), highlights a particularly thorny problem of causation. As Keller and Heri have interestingly pointed out, "Climate change may be a 'death of a thousand cuts' that is difficult to attribute to any one state's emissions"[53]. The specificity of the climate change phenomenon leads, *inter alia*, to great uncertainty as to the measures that various actors should take to mitigate climate change and "could leave climate change victims seeking redress empty-handed, as respondents could argue that it is scientifically impossible to determine which State is responsible for climate harm"[54]. Furthermore, states often rely on the "drop in the ocean" argument, according to which the GHG emissions of a particular project or activity are "too small" to be considered significant in the context of the global GHG emissions that, cumulatively, are responsible for the rise in average global temperatures and the resulting climate effects. On this point, Nollkaemper observes that, in some cases, international and domestic judicial and quasi-judicial bodies have nevertheless evaded "unsolvable puzzles of cause-effect relations based on factual causation", either by basing their decisions on general rather than specific causation (between a particular conduct or emission and a particular damage), or by relying on obligations that incorporate less demanding causality tests (*inter alia*, positive obligations to protect respect for private and family life). In other words, in cases where there is omissive conduct at stake (as is often the case with breaches of positive obligations), the causal link could not be that of direct and exclusive causation (*conditio sine qua non*) but rather that of adequate causation, which, on the basis of a "foreseeability test", would require that "the

[52] A. NOLLKAEMPER, *Causation puzzles in international climate litigation*, in "Italian Yearbook of International Law", Vol. 33, 2023, p. 25 ff.

[53] H. KELLER, C. HERI, *The Future is Now: Climate Cases before the ECHR*, in "Nordic Journal of Human Rights", 2022, p. 167.

[54] A. NOLLKAEMPER, *Causation puzzles,* cit., p. 32.

occurrence constitutes the outcome of conduct that could reasonably have been expected according to a normal succession of events."[55]

Indeed, such a criterion of appropriate causation seems to have been used by the European Court in *Klimaseniorinnen v. Switzerland*. In that judgment, although it did not explicitly deal with extraterritorial jurisdiction (being an action brought by four plaintiffs residing in Switzerland and an association with its registered office in that state), the Court nevertheless attempted to systematize the complex issue of causation for the first time. As a matter of fact, it devotes several paragraphs to the question of causation (paras. 424-444) and identifies four dimensions of causality: 1) the link between GHG emissions and climate change; 2) the link between the various adverse effects of climate change and present and future risks to the enjoyment of human rights; 3) the link, at the individual level, between damage or the risk of damage and the acts or omissions of the authorities of a given State; 4) the link between a given State and the adverse effects of climate change, in view of the fact that multiple actors contribute to GHG emissions.

For the purpose of the subject of this contribution[56], some statements (which, in our opinion, could also apply *mutatis mutandis* to identifying causation for the purpose of establishing jurisdiction) regarding the third profile (concerning the question of causation and positive obligations in the climate-change context) and the fourth profile (concerning the question of the State's share of responsibility) are particularly interesting.

In relation to the third profile, the Court first recalls that positive obligations in environmental matters necessitate measures to protect

[55] See S. VEZZANI, *Recenti sviluppi*, cit. p. 671 ff. and A. FAZZINI, *L'esternalizzazione delle frontiere*, cit, in particular p. 221 ff. as well as the observations of B. CONFORTI, *Exploring the Strasbourg Case-Law: Reflections on State Responsibility for the Breach of Positive Obligations*, in M. FITZMAURICE, D. SAROOSHI (eds.), *Issues of State Responsibility before International Judicial Institutions*, Oxford, Hart Publishing, 2004, p. 135.

[56] On the question of causality in *Klimaseniorinnen* see A. NOLLAKAEMPER, *Causation puzzles*, cit.; V. STOYANOVA, *KlimaSeniorinnen and the Question(s) of Causation*, in "Verfassungsblog"*,* 7 May 2024; A. LIGUORI, *La Cour européenne se prononce sur les trois premières affaires relatives au climat: quelques observations sur la question de la causalité*, in "Diritto Pubblico Europeo Rassegna online", n. 2/2024, p. 56 ff.

individuals from risks linked to dangerous activities; complaints in such cases often involve alleged failures by authorities to meet these obligations aimed at preventing or reducing harm; the required measures for effective protection can vary significantly depending on the severity of the impact on an applicant's Convention rights and the burden such obligations place on the State, specifying that "In any event, for a State's positive obligations to be engaged there has to be evidence of a risk meeting a certain threshold. There must be a relationship of causation between the risk and the alleged failure to fulfil positive obligations." Significantly, the court adds immediately afterwards

> "*In the context of climate change, the particularity of the issue of causation becomes more accentuated.* The adverse effects on and risks for specific individuals or groups of individuals living in a given place arise from aggregate GHG emissions globally, and the emissions originating from a given jurisdiction make up only part of the causes of the harm. *Accordingly, the causal link* between the acts or omissions on the part of State authorities in one country, and the harm, or risk of harm, arising there, *is necessarily more tenuous and indirect* compared to that in the context of local sources of harmful pollution" and therefore "the causal link cannot be determined on the basis of a strict *conditio sine qua non* requirement."[57]

This excerpt appears crucial because it shows that the Court is aware that the specificity of the climate phenomenon must and can lead to a different interpretation, resulting in the need for a less stringent causality test than that of direct causation.

The conclusions of the Court's rejection of the 'drop in the ocean' argument are also particularly striking in this respect:

> "Concerning, finally, the 'drop in the ocean argument implicit in the Government's observations – in other words, the question of the capacity of any particular State to influence global climate change – it should be noted that, *in the context of the positive obligations* incumbent on a State under the Convention, the Court has consistently said that there is no need to establish

[57] Para. 439. Italics added.

with certainty that things would have turned out differently if the authorities had adopted a different course of conduct. The relevant analysis does not require it to be shown that, in the absence of a failure or omission on the part of the authorities, the damage would not have occurred. What is important and sufficient to engage the liability of the State is rather the finding that reasonable measures that the domestic authorities refrained from taking would have had *a real prospect of changing the course of events or mitigating the damage caused*."[58]

Therefore, while addressing the issue of causation with respect to the nexus between the risk of violation and a state's omissive conduct, the Court admits the need for a particular criterion that takes into account the specificity of climate change, going so far as to accept an adequate causation rather than direct causation. Why, then, does the Court refuse to address the issue of causation relating to jurisdiction with the same perspicacity? Accepting a functional notion of jurisdiction through the lens of adequate causation would undoubtedly be preferable, as it would allow the Court, on the one hand, to remain consistent with the postulate of the universality of human rights and, on the other, to avoid unlimited extraterritorial application. Furthermore, an openness toward a notion of adequate causation was already present in the aforementioned *Ilascu* case: "a state's responsibility may also be engaged on account of acts which have *sufficiently proximate repercussions on rights guaranteed by the Convention*, even if those repercussions occur outside its jurisdiction" (para. 317), which, however, the Court does not mention in *Duarte*.

4. *Some critical remarks on the reasoning followed by the European Court in the Duarte case*

In any case[59], it would have been appropriate if the court had ar-

[58] Para. 444. Italics added.

[59] As was also noted by those who agreed with the Court's conclusion on inadmissibility, see A. OLLINO, *Qualche riflessione sul caso Duarte Agostinho e sulla nozione di giurisdizione come 'controllo sull'esercizio dei diritti umani'*, in "Diritti umani e diritto

gued its denial more broadly. In fact, there are no valid arguments in the Court's reasoning for not resorting to an evolutionary interpretation of the concept of jurisdiction that would take due account of the developments in international law. These developments, in fact, have already concurrently occurred both at the level of climate change obligations and at the level of jurisprudence, particularly regarding the notion of jurisdiction. Indeed, neither what is stated in para. 202 (namely, that "jurisdiction should be differentiated from the issue of responsibility, which constitutes a separate matter to be examined, if appropriate, in relation to the merits of the complaint": sub paragraph 4.1), nor the argument put forward in para. 212 ("As regards the Inter-American Court's approach in its Advisory Opinion and that of the CRC in Sacchi and Others ...the Court notes that both are based on a different notion of jurisdiction, which, however, has not been recognized in the Court's case-law": sub paragraph 4.2) are convincing.

4.1 - With regard to the first argument, it appears to resonate – albeit in an elliptical manner – with the position previously advanced by the Netherlands before the Court. In essence, the Netherlands contended that the notion of jurisdiction as 'control over the exercise of rights' could not be accepted because the notion of jurisdiction "[is] logically prior to any question of a State's substantive obligations." This statement, in turn, reflects an argument advanced by part of the doctrine for which "[t]he capacity-impact model conflates the test marking the substance of human rights due diligence obligations in a given case with the test establishing their existence"[60], as " the capacity-impact model is premised upon relevant facts – 'power over' or 'capacity to influence' certain situations, knowledge of specific human rights risks, proximity, foreseeability and reasonableness – which are normally used to harness the substance of States' due diligence obligations"[61]. However, as convincingly argued[62], it could be objected to this statement that the finding of a causal link between the conduct of

internazionale", 2024, p. 414 ff.

[60] A. OLLINO, *The 'capacity-impact' model*, cit., p. 100.

[61] Ibid., p. 82.

[62] A. FAZZINI, *L'esternalizzazione delle frontiere,* cit., p. 224.

the State and the injury to the protected legal interest does not necessarily imply that such conduct is actually found to be unlawful. Since due diligence obligations are considered obligations of conduct and not of result, State liability does not arise if the State takes all necessary and reasonably foreseeable measures to prevent the harmful event. Moreover, there is nothing to preclude opting for greater flexibility in interpreting the scope of positive obligations and applying less stringent criteria regarding the extraterritorial jurisdiction, thereby admitting jurisdiction even in the case of a weak causal link, in so far as the extension of the jurisdiction corresponds to a greater rigour in establishing the lack of due diligence[63]. In this respect, it seems relevant to recall a similar argument made in the literature in relation to the decision of the Committee on the Rights of the Child in the *Sacchi* case. In commenting favourably on the expansive interpretation of jurisdiction adopted by the Committee (through a particularly broad interpretation of the requirements of causation and foreseeability), it was convincingly affirmed[64] that nothing precludes the possibility that the standards relating to causation and foreseeability would have been interpreted more strictly in the examination of the merits.

4.2 – Nor do we find persuasive the argument put forward by the Court to disregard the jurisprudential developments of the Advisory Opinion and the CRC decision in the *Sacchi* case.

As anticipated, in para. 212 the European Court states that "As regards the Inter-American Court's approach in its Advisory Opinion and that of the CRC in Sacchi and Others ...the Court notes that both are based *on a different notion of jurisdiction*[65] which, however, has not been recognized in the Court's case-law" (para. 212). However, both the Inter-American Court and the CRC Committee did not propose a different notion of jurisdiction, but rather a different *interpretation* of the notion of jurisdiction[66]. Therefore, it would have been more ap-

[63] Ibid. p. 225 e Vezzani, *Recenti sviluppi*, cit., p. 681.

[64] M. LA MANNA, *Cronaca di una decisione*, cit.

[65] Italics added.

[66] See also N. CARRILLO-SANTARELLI, F. IPPOLITO, *Oasis or mirage?,* cit. observing that " ...we are speaking of one same concept, i.e., jurisdiction, which the three bodies

propriate for the European Court to have further substantiated its position vis-à-vis these bodies with legal arguments rather than mere apodictic statements. Without an in-depth reasoning of its positions, the European Court of Human Rights risks exposing itself to criticism for formalism and a conservative attitude, as pointed out.[67]

Will this be the last word from the Strasbourg Court? As optimistically observed[68], in its caveat in paragraph 213 - where the Court affirms that it is "also mindful of the constant legal developments at national and international level and global responses to climate change, together with the ever-increasing scientific knowledge about climate change and its effects on individuals - the Court seems willing to leave open the possibility of adjustments to adapt to forthcoming developments[69]. Nevertheless, the current decision remains unsatisfactory both in terms of the outcome and the reasoning and will regrettably influence upcoming decisions on pending cases.

5. *Conclusions*

The Strasbourg Court's decision to declare the case inadmissible, while foreseeable, was not inevitable[70].

As we have tried to argue, another interpretation was possible, one that would accept a functional notion of jurisdiction based on 'control over the applicants' Convention interests, at least in relation to the

the ECHR refers to-itself, the IACtHR, and the United Nations Committee on the Rights of the Child-have to interpret and apply."

[67] A. OLLINO, *Qualche riflessione sul caso Duarte*, cit., p. 416.

[68] M. DE BELLIS, *Transnational climate litigation: Emergence and limits of a diagonal protection of fundamental rights*, in "Italian Journal of Public Law", 2024, p. 456.

[69] A few weeks after the decision in the Duarte case a remarkable Advisory Opinion was adopted by ITLOS: see C. VOIGT, *ITLOS and the importance of (getting) external rules (right) in interpreting UNCLOS,* in "Verfassungsblog", 29 May 2024 and G. CATALDI in this volume. A request for an Advisory Opinion is still pending at the time of writing before the International Court of Justice: see on this point M. WEWERINKE-SINGH, ibid.

[70] See C. HERI, *On the Duarte Agostinho Decision*, in "Verfassungsblog", 15 April 2024.

positive obligations invoked in the present case[71]. This interpretation could be supported by some of the Courts' own precedents and by recent developments in international climate law, as well as in other international bodies, particularly but not exclusively, the Inter-American Court and the Committee on the Rights of the Child.

While attempting to justify its rejection of this broader concept of jurisdiction, the Court appears inconsistent and contradictory. Inconsistent because it does not resort to the interpretative criterion of the evolutionary interpretation applied in several other cases, including the *Klimaseniorinnen* case adopted on the same day; contradictory because, given the nature of climate change as "truly existential for humankind", what other "special features" should have persuaded the Court to recognize a jurisdictional link in the situations at stake?[72]

Moreover, it does not seem to us that the risk of a large number of appeals can constitute a sufficient argument. This is both because the concrete possibility of action is already limited by the restrictive criteria for the status of victim that emerge from the *Klimaseniorinnen* judgment[73], and because, as argued above (sub paragraph 3.3), the acceptance of a broader notion of jurisdiction, where States exercise control over the source of the damage and where the criteria of foreseeability and reasonable ability are met, does not imply unlimited responsibility towards anyone adversely affected anywhere in the world. Moreover, as pointed out[74], "an analogy to the establishment of the *pilot judgment* procedure to manage the Court's docket could have served as an inspiration" to prevent an unmanageable number of cases.

A broadening of the notion of jurisdiction would instead have made it possible to comply more convincingly with a universalistic ap-

[71] A different interpretation would also have been possible in the case of M.N. v. Belgium (concerning visas for asylum seekers at the embassy); see *supra,* note n. 38. On the different position expressed by the Inter-American Court in its Advisory Opinion OC-25/18, see A. DE LEO, J.L. RAMOS, *Comparing the Inter-American Court opinion on diplomatic asylum applications with M.N. and Others v. Belgium before the ECtHR*, in "EUmingrationlawblog", 13 May 2020.

[72] A. OLLINO, *Qualche riflessione sul caso Duarte*, cit., p 416.

[73] See on this point M. MILANOVIC, *A Quick Take,* cit.

[74] C. HERI, *On the Duarte Agostinho Decision*, cit.

proach to human rights, offering an effective forum, albeit on a subsidiary basis after exhaustion of domestic remedies, even to those who are currently suffering more than others from the consequences of climate change, but are located in countries outside Europe[75]. This is especially important considering that these countries have historically contributed less to greenhouse gas emissions and may lack the capacity to take appropriate mitigation and adaptation measures.[76]

[75] See also R. RAIBLE, *Priorities for Climate Litigation at the European Court of Human Rights*, in "EJIL: Talk!", 2 May 2024, who affirms that "The narrow approach to the territorial scope of the Convention all but excludes applications from the Global South".

[76] Due to their wealth, technological know-how, etc.