

EXTRATERRITORIAL HUMAN RIGHTS OBLIGATIONS AND CAUSATION IN CLIMATE CHANGE LITIGATION

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I. INTRODUCTION

On September 7, 2020, six Portuguese youths came to the European Court of Human Rights (hereinafter “ECtHR”) to sue Portugal and 32 other European Union States for the violation of the human rights obligations under articles 2, 3, 8, and 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms.¹ The six claimants alleged that the 33 respondent states failed to take sufficient action to protect their human rights in the course of climate change mitigation and sought an order requiring the respondents to adopt a more ambitious plan, including an increase in the European Union 2030 reduction target, from 55% to 68%.² Litigating at international, regional, and domestic human rights courts and tribunals has become a major strategy for propelling climate change mitigation and

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1. Duarte Agostinho v. Portugal, App. No. 39371/20, ¶¶ 1–3 (Apr. 9, 2024), <https://hudoc.echr.coe.int/eng?i=001-233261> [hereinafter *Duarte Agostinho*].

2. *Id.*; European Court of Human Rights – Application Form ¶¶ 32–34, *Duarte Agostinho*, https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2020/20200902_3937120_complaint-1.pdf (last visited Feb. 23, 2025).

sustainability transition.³ However, this case proposes a novel strategy in the net-zeroing of state policies: leveraging the extraterritorial application of human rights law to bind states where the claimant does not reside.

The ECtHR struck down the ambitious plan of suing 33 states altogether since the claimants could not establish that they fell under the effective control, hence the jurisdiction, of 32 states, except for Portugal where they reside. However, before this case, in a communication on *Sacchi v. Argentina*, the Committee on the Rights of Children (hereinafter “CRC”) concluded that even though the children were not under the effective control of the non-resident States, they nevertheless fell under the jurisdiction of these States.⁴ The CRC adopted a “cause-and-effect” approach, claiming that “when transboundary harm occurs, children are under the jurisdiction of the State on whose territory the emissions originated . . . if there is a causal link between the acts or omissions of the State in question and the negative impact on the rights of children located outside its territory, when the State of origin exercises effective control over the sources of the emissions in question.”⁵

The two institutions drew completely different determinations on how to establish the extraterritorial jurisdictional link between the state and the victims. On the one hand, the ECtHR was not incorrect in rendering such a ruling, as it followed prior jurisprudence insisting on the element of “effective control.”⁶ On the other hand, due to the unique causation link and the required collective efforts, climate change poses a special risk to the victims, and each and every state could in

3. See Maiko Meguro, *Litigating Climate Change Through International Law: Obligations Strategy and Rights Strategy*, 33 LEIDEN J. INT'L L. 933, 934–35 (2020) (discussing strategies employed by climate litigators to ease access to the judiciary on the basis of international law). See also Konadu Amoakuh, *Climate Change Litigation and Rights-Based Strategies: Why International Human Rights Approaches to Climate Change Are Not Easily Transplanted to the American Legal System*, 41 STAN. ENV'T L.J. 195, 202–04 (2022) (describing the challenges faced by climate litigators).

4. See Human Rights Comm., *Sacchi v. Argentina* (Communication No. 104/209), U.N. Doc. CRC/C/88/D/108/2019, ¶ 10.14 (Nov. 11, 2021) (holding that “the impairment of their Convention rights as a result of the State party’s acts or omissions regarding the carbon emissions originating within its territory was reasonably foreseeable.”) [hereinafter *Sacchi*]. See *International Human Rights Law — Extraterritorial Jurisdiction — Committee On The Rights Of The Child Extends Jurisdiction Over Transboundary Harms; Enshrines New Test — Sacchi v. Argentina*, No. CRC/C/88/D/104/2019 (Oct. 8, 2021), 135 HARV. L. REV. 1981 (2022), for a general comment on the *Sacchi* case.

5. *Sacchi* ¶ 10.7.

6. See *Duarte Agostinho* ¶¶ 168–76, 213 (reiterating the principle of effective control and holding that the Court could not extend the respondents’ extraterritorial obligations against the applicants’ requests).

some way contribute to the harm to the victims.⁷ How can we appreciate the ECtHR's insistence on the "effective control" test in the face of more and more global crises?

In this commentary, four issues will be dealt with: in Part II, a cross-institute comparison will be conducted on how different conventions and courts deal with extraterritorial jurisdiction, with a special focus on the difference between "effective control" test and the "cause-and-effect" test. In Part III, a comparative analysis will be conducted between the Duarte Agostinho and Sacchi. In Part IV, an examination will be conducted on how "causation" is applied in international law and the rationale of its transplant into human rights law. In Part V, the commentary concludes that the rejection of the "cause-and-effect" test is not unpredictable, and the Westphalia system persists in climate change litigation.

II. PRACTICES ON EXTENDING STATES' HUMAN RIGHTS OBLIGATIONS EXTRATERRITORIALLY

As a preliminary remark, jurisdiction under human rights law shall not be confused with judicial jurisdiction, which dictates a court's or tribunal's power to decide and enforce certain cases.⁸ Jurisdiction under international law, particularly human rights law, is derived from the principle of state sovereignty; it is a factual issue of whether a state can extend its power of authority and control over certain territory or individuals.⁹ The states' factual power thus stands at the center of the

7. See Petra Minnerop & Friederike Otto, *Climate Change and Causation: Joining Law and Climate Science on the Basis of Formal Logic*, 27 BUFF. ENV'T L.J. 49, 62–65 (2020) (discussing the presumption of general causation between accumulated emissions and increasing climate change impacts generally in domestic courts). See also Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law, Case No. 31, Advisory Opinion of May 21, 2024, ¶ 252, https://itlos.org/fileadmin/itlos/documents/cases/31/Advisory_Opinion/C31_Adv_Op_21.05.2024_orig.pdf (holding that "it would be difficult to specify how anthropogenic GHG emissions from activities under the jurisdiction or control of one State cause damage to other States.").

8. For an overview of jurisdiction types, see Bernard H. Oxman, *Jurisdiction of States*, MAX PLANCK ENCYC. PUB. INT'L L. (Nov. 2007), <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1436?rskey=bhfcevo&result=4&prd=opil>.

9. See MARKO MILANOVIC, EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES: LAW, PRINCIPLES, AND POLICY 41 (2011) (noting that jurisdiction in human rights treaties "relates essentially to a question of fact, of actual authority and control that a state has over a given territory or persons . . . whether exercised lawfully or not . . .").

inquiry on what might be the margin of accountability for human rights violations that happen extraterritorially.

Two categories of human rights convention shall be distinguished: those that delimit a treaty application outreach and those that do not. An essential example of a convention with such territorial and jurisdictional clauses is the International Covenant on Civil and Political Rights (hereinafter “ICCPR”). Article 2(1) stipulates that “[e]ach State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant”¹⁰ The “within its territory and subject to its jurisdiction” phrasing can also be found in the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.¹¹ Other human rights conventions with the limitation omit the reference to territory and directly use jurisdiction as the limits, including the Convention on the Rights of the Child,¹² the Convention for the Protection of Human Rights and Fundamental Freedoms,¹³ the American Convention on Human Rights,¹⁴ etc. Some other treaties do not have a territorial or jurisdictional limit; the most significant one is the International Covenant on Economic, Social, and Cultural Rights (hereinafter “ICESCR”).¹⁵ In the place of Article 2(1) of the ICCPR, ICESCR prescribes that “[e]ach State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full

10. International Covenant on Civil and Political Rights art. 2 ¶ 1, Dec. 16, 1966, 999 U.N.T.S. 171.

11. *See* International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families art. 7, Dec. 18, 1990, 2220 U.N.T.S. 3 (employing the nearly identical “within their territory or subject to their jurisdiction” language in the context of non-discrimination with respect to rights).

12. *See* Convention on the Rights of the Child art. 2 ¶ 1, Nov. 20, 1989, 1577 U.N.T.S. 3 (omitting the term in favor of the “within their jurisdiction” language).

13. Convention for the Protection of Human Rights and Fundamental Freedoms art. 1, Nov. 4, 1950, 213 U.N.T.S. 221 (omitting the term in favor of the “within their jurisdiction” language).

14. *See* American Convention on Human Rights art. 1 ¶ 1, Nov. 22, 1969, 1144 U.N.T.S. 123 (opting for the variant “subject to their jurisdiction”).

15. *See* International Covenant on Economic, Social and Cultural Rights art. 2, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter *ICESCR*]. The Covenant was the first-ever treaty that omitted such limitation. *See also* Fons Coomans, *The Extraterritorial Scope of the International Covenant on Economic, Social and Cultural Rights in the Work of the United Nations Committee on Economic, Social and Cultural Rights*, 11 HUM. RTS. L. REV. 1, 7 (2011) (arguing that the omission was intended by the drafters to form an “international or transnational dimensions of the realization of esc rights.”).

realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.”¹⁶ Such an omission can also be noted in the African Charter on Human and Peoples’ Rights.¹⁷

Differences in treaty text render different approaches to tackle the outer bound of a state’s extraterritorial obligations. For those treaties with a territorial or jurisdictional limitation, extraterritorial obligations derive from the interpretation of the word “jurisdiction”; in General Comment No. 31 to the ICCPR, the Human Rights Committee interpreted “subject to its jurisdiction” as “within the power or effective control of that State Party, even if not situated within the territory of the State Party.”¹⁸ The ECtHR adopted virtually the same approach and proclaimed that a state exercises “jurisdiction” through “the effective control of the relevant territory and its inhabitants abroad.”¹⁹ Though the “effective control” test seems to be the orthodox of extraterritorial obligations and is maintained by the International Court of Justice,²⁰ several exceptions exist. In the noteworthy Advisory Opinion

16. *ICESCR*, art. 2.

17. See generally African Charter on Human and Peoples’ Rights, June 27, 1981, 1520 U.N.T.S. 217 (excluding territorial and jurisdictional limitations). See also Association pour la sauvegarde de la paix au Burundi / Kenya, Uganda, Rwanda, Tanzania, Zaire (DRC), Zambia, Communication 157/96, Afr. Comm’n H.P.R. (May 29, 2003) (noting that since the African Charter on Human and Peoples’ Rights does not incorporate a territorial and jurisdictional limitation, the Commission directly considered the extraterritorial human rights violation in a collective economic sanction.) Scholars are unsure why the Charter omitted the limitations, but some argue that the Charter shall be subject to the same interpretation of *ICESCR*. See, e.g., Takele Soboka Bulto, *Patching the “Legal Black Hole”: The Extraterritorial Reach of States’ Human Rights Duties in the African Human Rights System*, 27 S. AFR. J. HUM. RTS. 249, 257–59 (2011) (proposing such an argument, since *ICESCR* could potentially serve as “inspirational sources” under the mandate of Article 60 of the Charter).

18. Hum. Rts. Comm., General Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13, ¶ 10 (2004).

19. *Banković v. Belgium*, 2001-XII Eur. Ct. H.R., ¶ 71 (2001) [hereinafter *Banković*].

20. The “effective control” test is introduced in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. ¶ 112 (July 9). For a contrary holding, see the *Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Geor. v. Russ.), Order of 15 October 2008, 2008 I.C.J., ¶ 109 (Oct. 15). The Court observes that there is no restriction of a general nature in CERD relating to its territorial application; the Court consequently finds that these provisions of CERD apply to the actions of a State party when it acts beyond its territory. However, this case only required a *prima facie* existence of violations, but did not specify the requirements to entitlement of human rights obligations. Moreover, this case discussed the extraterritorial conduct by the Russian state organ, in the ECtHR sense of effective control.

rendered by the Inter-American Court of Human Rights (hereinafter “IACtHR”), the Court proclaimed that “when transboundary damage occurs that effects treaty-based rights, it is understood that the persons whose rights have been violated are under the jurisdiction of the State of origin, if there is a causal link between the act that originated in its territory and the infringement of the human rights of persons outside its territory.”²¹ The IACtHR essentially introduced the “cause-and-effect” test into the interpretation of the “jurisdiction,” but does not give further explanation on its decision.

For the ICESCR, an approach similar to the “cause-and-effect” test is adopted in the General Comments. General Comment No. 8 deals with a state’s obligations in designing and implementing economic sanctions; the Committee commented that “[f]irst, these rights must be taken fully into account when designing an appropriate sanctions regime . . . Second, effective monitoring, which is always required under the terms of the Covenant, should be undertaken throughout the period that sanctions are in force . . . Third, the external entity has an obligation . . . to respond to any disproportionate suffering experienced by vulnerable groups within the targeted country.”²² The Committee followed the logic that economic sanctions derive from certain states, and such states have control over their trading policies. Hence, these states shall be held accountable. A similar approach is adopted in General Comments No. 14. To fulfill a state’s obligations, it “should refrain at all times from imposing embargoes or similar measures restricting the supply of another State with adequate medicines and medical equipment.”²³ The most significant document demonstrating such an approach is General Comment No. 24 on State Obligations under the ICESCR in the Context of Business Activities: “[e]xtraterritorial obligations arise when a State party may influence situations located outside its territory, consistent with the limits imposed by international law, by controlling the activities of corporations domiciled in its territory and/or under its jurisdiction, and thus may contribute to the

21. *The Environment and Human Rights*, Advisory Opinion OC-23/17, Inter-Am. Ct. H.R. (ser. A) No. 23, ¶¶ 101–102 (Nov. 15, 2017).

22. *Comm. on Econ., Soc. and Cultural Rts.*, General Comment No. 8, *The Relationship Between Economic Sanctions and Respect for Economic, Social and Cultural Rights*, U.N. Doc. E/C.12/1997/8, ¶¶ 12–14 (1997).

23. *Comm. on Econ., Soc. and Cultural Rts.*, General Comment No. 14, *The Right to the Highest Attainable Standard of Health* (Art. 12), U.N. Doc. E/C.12/2000/4, ¶¶ 39, 41 (2000).

effective enjoyment of economic, social and cultural rights outside its national territory.”²⁴

Both the conventional “effect control” test and the “cause-and-effect” test require a certain level of control; the main differences between the two tests lies in the different stages at which the control is exercised and the different subject at which the control is targeted. The conventional doctrine requires a state’s effective control directly over the victim (or indirectly through effective control over the territory), and the latter requires a state’s effective control over the source of harm (as illustrated in Graph 1).²⁵ The “cause-and-effect” test derives from the customary rule of the “no-harm” principle that a state should not use its territory to cause harm to another state.²⁶ Nevertheless, the element of causation would be paramount since it would be sufficiently easy to establish that the source originated from the territory or jurisdiction of the violating states. Moreover, even for the ECtHR that strictly complies with the “effect control” test, several border cases absorb the rationale of the “cause-and-effect” test.²⁷ In the case of *Andreou v. Turkey*, Turkish soldiers fired behind the Turkish-Cypriot border, but shot the victim within the Cypriot territory.²⁸ The ECtHR concluded that even though Turkey exercised no effective control, the “opening of fire on the crowd from close range” was the “direct and immediate cause” of the injuries.²⁹ Under such a scenario, the victim shall be presumed to be under the jurisdiction of the state.³⁰ However, the ECtHR concluded in subsequent cases that *Andreou v. Turkey*

24. Comm. on Econ., Soc. and Cultural Rts., General Comment No. 24 on State Obligations Under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities, U.N. Doc. E/C.12/GC/24, ¶¶ 27–28 (2017).

25. Armando Rocha, *States’ Extraterritorial Jurisdiction for Climate-Related Impacts*, VERFASSUNGSBLOG ON MATTERS CONSTITUTIONAL (Apr. 12, 2024), <https://verfassungsblog.de/states-extraterritorial-jurisdiction-for-climate-related-impacts/>.

26. *See id.* (noting that “[a] view of jurisdiction as ‘control-over-the-source’ is aligned with Principle 21 of the Stockholm Declaration, which mentions that States cannot cause environmental harms beyond their borders.”).

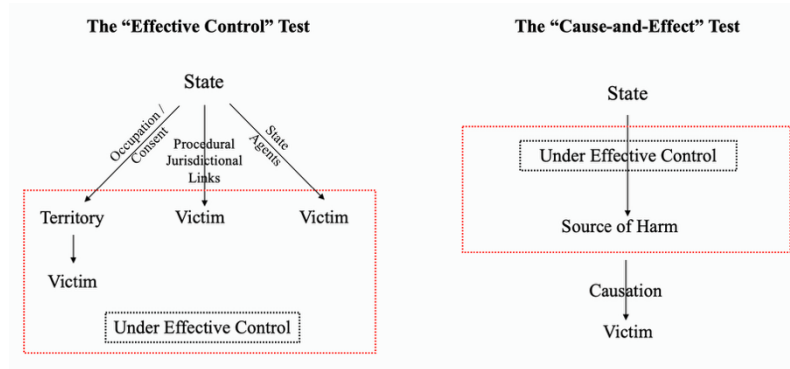
27. *See generally* Conall Mallory, *A Second Coming of Extraterritorial Jurisdiction at the European Court of Human Rights?*, 82 QUESTIONS INT’L L. 31 (2021) (noting that the Court held that extraterritorial jurisdiction could be established in cases of direct shooting across border, firepower from helicopters, shooting at a military check-point and failure to conduct cross-border criminal investigations). These borderline cases demonstrate that jurisdiction could be established under the *Convention for the Protection of Human Rights and Fundamental Freedoms* if the cause is direct and immediate.

28. *Andreou v. Turkey*, 1633 Eur. Ct. H.R. (2009).

29. *Id.* ¶ 25.

30. *Id.*

serves only as one of the few examples of the generally applicable rule.³¹



Graph 1 The Comparison Between the “Effective Control” Test and the “Cause-and-Effect” Test

III. COMPARATIVE ANALYSIS OF DUARTE AGOSTINHO AND SACCHI

The previous section provided a general picture of the legal landscape of the standards to establish the extraterritorial link. In the following section, an analysis of two cases that draw completely different conclusions will be conducted to showcase the difficulties inherent in the application of the “cause-and-effect” test in the context of climate-change-related human rights violations.

The two cases share a similar fact pattern. In *Sacchi*, sixteen children claimed that the state parties failed to respect, protect, and fulfill their rights to life, health, and culture by recklessly “causing” and “perpetuating life-threatening climate change.”³² To sustain their arguments, the authors claimed that the state’s failure has caused foreseeable, life-threatening risks of “heat, floods, storms, droughts, disease, or polluted air.”³³ Moreover, as part of the actual harm, some of the victims suffered from asthma as the result of forest fire and heat-related pollution and from malaria as the result of the spread and

31. See *Georgia v. Russia (II)*, App. No. 38263/08 (Jan. 21, 2021), ¶¶ 130–132, <https://hudoc.echr.coe.int/eng?i=001-207757> (describing the *Andreou* case as one of a few concerning “isolated and specific acts involving an element of proximity.”) [hereinafter *Georgia v. Russia (II)*].

32. *Sacchi* ¶¶ 3.1–3.7.

33. *Id.* ¶ 3.3.

intensification of vector-borne diseases; several children also had their water safety threatened due to drought.³⁴ For the applicants in Duarte Agostinho, they claimed that the children and youth suffered from extreme heat waves, causing “reduced energy levels, difficulty sleeping and a curtailment on their ability to spend time or exercise outdoors”³⁵ Moreover, they suffered both mentally and physically from the recent forest fires. In failing to prevent such occurrences, the claimants claimed that Portugal and the other 32 States failed to comply with their obligations to protect the rights to “life” and to “private and family life”, among others.³⁶ Under the same fact pattern, the central question pondered in both cases was how those states other than the residence state exercised jurisdiction over the children.

The CRC maintained that they considered the jurisprudence of the ECtHR, and they found that the Court addressed completely different factual scenarios.³⁷ The CRC commented that the *Sacchi* case dealt with the jurisdictional issues of “transboundary harm related to climate change.”³⁸ By referring to the IACtHR advisory opinion and the joint statement on human rights and climate change issued in May 2020, the CRC endorsed the “cause-and-effect” test with little explanation.³⁹ The Committee further refuted the government’s argument of collective causation on mitigation, emphasizing each state’s individual responsibility for any potential violation of human rights obligations caused by the source of carbon “emissions originating within its territory.”⁴⁰ Subsequently, the Committee seemed to adopt an oversimplified two-criteria causation test. The CRC first concluded that “by scientific evidence that the carbon emissions originating in the State party contribute to the worsening of climate change and that climate change has an adverse effect on the enjoyment of rights by individuals both within and beyond the territory of the State party (emphasis added).”⁴¹ Then, the CRC followed the “foreseeability element” and concluded that the “State party has known about the harmful effects

34. *Id.* ¶ 3.4.

35. *Duarte Agostinho* ¶ 14.

36. *Id.* ¶¶ 66–70.

37. *See Sacchi* ¶ 10.4 (distinguishing the factual situations underlying the extraterritorial jurisdiction jurisprudence of the Human Rights Committee and the European Court of Human Rights).

38. *Id.*

39. *See id.* ¶¶ 10.5–10.7 (asserting that the inquiry should be whether there “is a causal link between the acts or omissions of the State in question and the negative impact on the rights of children located outside its territory”).

40. *Id.* ¶ 10.10.

41. *Id.* ¶ 10.9.

of its contributions to climate change for decades” and that the harm to the children was therefore reasonably foreseeable.⁴² The Committee’s approach seemed self-contradictory, since it sought to hold a state individually accountable for human rights violations on the one hand, while on the other it failed to link individual state conduct (as against general “scientific evidence”) to the wrongful effect of such conduct.

The ECtHR, on the other hand, rejected the “cause-and-effect” test.⁴³ The Court started with a review of past jurisprudence, particularly, the synthesis in *M.N. and Others v. Belgium*.⁴⁴ In said case, three scenarios might give rise to extraterritorial jurisdiction: “[a] State exerts effective control over an area outside its national territory”; “the use of force by a State’s agents operating outside its territory . . .”; and “specific circumstances of a procedural nature.”⁴⁵ The Court acknowledged that the “special features” may give rise to the exercise of jurisdiction outside a state’s own territorial boundaries and that climate change cases are distinct from other kinds of cases, including those relating to environmental harm.⁴⁶ However, such differences were not sufficient to sustain the adoption of a new test, and the Court refused to develop the existing case law.⁴⁷ The ECtHR explained how the IACtHR advisory opinion and the *Sacchi* case were inapplicable, relying on three grounds: firstly, the UNFCCC and the ILC Draft Articles address environmental protection in general; secondly, the Convention for the Protection of Human Rights and Fundamental Freedoms comprises more than mere reciprocal engagements between Contracting States; and thirdly, the IACtHR advisory opinion and the *Sacchi* case relied on “a different notion of jurisdiction.”⁴⁸ The Court referred to *Georgia v. Russia (II)*, claiming that “a State’s responsibility could not be engaged in respect of ‘an instantaneous extraterritorial act, as the provisions of Article 1 did not admit of a ‘cause and effect’ notion of ‘jurisdiction’,”

42. *Id.* ¶ 10.11.

43. *Duarte Agostinho* ¶ 208.

44. *Id.* ¶ 168; *M.N. v. Belgium*, App. No. 3599/18 (Mar. 5, 2020), <https://hudoc.echr.coe.int/eng?i=001-202468>, ¶¶ 96–109 [hereinafter *M.N. v. Belgium*].

45. *M.N. v. Belgium* ¶¶ 103–107.

46. See *Duarte Agostinho* ¶¶ 184–194 (explaining that “climate-change cases present several specific characteristics distinguishing them from ‘classic’ environmental cases.”).

47. See *id.* ¶ 195 (holding that “these considerations cannot in themselves serve as a basis for creating by way of judicial interpretation a novel ground for extraterritorial jurisdiction or as justification for expanding on the existing ones.”).

48. *Id.* ¶ 212.

and that the cause and effect notion has not been recognized by the ECtHR case law.⁴⁹

The element of “causation” did not disappear from the ECtHR’s judgment in climate-change-related cases. In *Klimaseniorinnen*, the Court distinguished four layers of causations: scientific causation between GHG emissions and the phenomena of climate change; general causation between climate change and the accompanied risk on human rights enjoyment; specific causation between the state’s omission in climate change mitigation and the harm suffered by a person; and more specific causation between a particular state’s omission (relative to other states) and the harm suffered by a person.⁵⁰ Interestingly, the decisions on causation were virtually the same for both *Sacchi* and *Klimaseniorinnen*; both the CRC and ECtHR regraded the scientific and general causation as a matter of fact.⁵¹ Moreover, the same logic also extends to the determination of the victim status that there shall be a certain level of severity for the harm suffered, though the CRC decided based on the requirement of a “significant transboundary harm”⁵² and the ECtHR reasoned the existence of “a real risk of a ‘direct impact’.”⁵³ Regarding the fourth layer of causation on determining the portions of state responsibilities, the Court reiterated its doctrine of causation: there is no need for a strict application of *conditio sine qua non*, rather the inquiry should be whether “reasonable measures which the domestic authorities failed to take could have had a real

49. *Id.*; *Georgia v. Russia (II)* ¶ 124 (quoting *Medvedyev v. France*, App. No. 3394/03 (Mar. 29, 2010), <https://hudoc.echr.coe.int/eng?i=001-97979>, ¶ 64 (citing *Banković*, ¶ 75)). In *Banković*, the Court explained that “the applicants’ notion of jurisdiction equates the determination of whether an individual falls within the jurisdiction of a Contracting State with the question of whether that person can be considered to be a victim of a violation of rights guaranteed by the Convention.” Following *Banković*, *Medvedyev v. France* directly rejected the “cause-and-effect” approach under the ECtHR jurisprudence.

50. *Verein Klimaseniorinnen Schweiz v. Switzerland*, App. No. 53600/20 (Apr. 9, 2024), <https://hudoc.echr.coe.int/eng?i=001-233206>, ¶ 425 [hereinafter *Klimaseniorinnen*].

51. *See id.* ¶ 436 (noting that “the Court will proceed with its assessment of the issues arising in the present case by taking it as a matter of fact that there are sufficiently reliable indications that anthropogenic climate change exists, that it poses a serious current and future threat to the enjoyment of human rights guaranteed under the Convention . . .”). *See Sacchi* ¶ 10.9 (holding that it was “by scientific evidence that the carbon emissions originating in the State party contribute to the worsening of climate change . . .”).

52. *Sacchi* ¶ 10.9.

53. *Klimaseniorinnen* ¶¶ 486–487.

prospect of altering the outcome or mitigating the harm”⁵⁴ The CRC did not discuss the issue, as Sacchi only reached the admissibility stage.

IV. MISPLACEMENT OF CAUSATION?

The above comparative analysis reveals the different approaches toward causation in environmental human rights issues. For the ECtHR, causation does not form an element for establishing extraterritorial jurisdiction but rather an element to determine the victim’s status and to establish a state’s reasonability for its violations. Contrarily, the CRC and the IACtHR transplanted the no-harm and prevention principle into international human rights law and used it to determine the control and jurisdiction over the victims. However, such a test is problematic not only because it goes against the jurisprudence of the ECtHR, but also because the element of causation is misplaced in determining the jurisdiction of a state.

Causation plays an essential role in holding a state accountable for certain harm suffered by the victim.⁵⁵ Causation can be categorized into causation in fact and causation in law.⁵⁶ For the former, a court is called upon to extract the relevant facts from a pool of conditions and find which conditions contribute to the final outcome.⁵⁷ Such a process can be easily completed through a single test of *conditio sine qua non*, that is, a counterfactual inquiry of whether an outcome will be affected if a certain condition does not occur.⁵⁸ However, *conditio sine qua non* cannot conclusively appreciate certain conditions given the interrelated

54. *Klimaseniorinnen* ¶ 444.

55. See Antony Honoré, *Causation in the Law*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY ARCHIVE (Nov. 17, 2010), <https://plato.stanford.edu/archIves/spr2017/entries/causation-law/> (discussing the relation between causation and legal responsibility). See generally H.L.A. HART & TONY HONORÉ, *CAUSATION IN THE LAW* 65 (Oxford Univ. Press, 2nd ed. 1985) (analyzing causal notions as an element of legal responsibility).

56. See Richard W. Wright, *Causation, Responsibility, Risk, Probability, Naked Statistics, and Proof: Pruning the Bramble Bush by Clarifying the Concepts*, 73 IOWA L. REV. 1001, 1011 (1988) (discussing the mistakes and confusion of actual causation and proximate causation). See also BIN CHENG, *GENERAL PRINCIPLES OF LAW: AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS* 245 (1953) (arguing that the principle of proximate causation is to determine the “legal nexus of cause and effect” as different from the factual nexus of cause and effect which shall undergo legal contemplation).

57. See CHENG, *supra* note 56, at 246 (arguing in different terms that legal reasoning shall determine what is the normal consequence of the conduct).

58. See Jane Stapleton, *Unpacking Causation*, in *RELATING TO RESPONSIBILITY: ESSAYS IN HONOUR OF TONY HONORÉ ON HIS 80TH BIRTHDAY* 145, 166–167 (Peter Cane & John Gardner eds., 2001) (using the different term of art “necessary element in a sufficient set” and accordingly, the test of “targeted but-for”).

nature of the world. Causation in law comes into play to determine which condition would be most pertinent to the outcome, and a state shall be held accountable for such a condition.⁵⁹

However, the role that causation plays differentiates depending on the place of legal reasoning a causation connection is examined.⁶⁰ Causation sometimes occurs as part of the primary rule; for instance, under the Outer Space Treaty, a state shall initiate international consultation when it believes that its space objects or activities might cause harm to another state's corresponding interests.⁶¹ Similarly, the ILC codified the customary rule of preventing transboundary harm caused outside the territory of the origin state.⁶² At other times, causation appears to be an essential precondition of rewarding compensation for damages caused as a secondary rule.⁶³ Causation as a test of jurisdiction seems to be a primary rule analysis, given that it likewise denotes the outreach of a state's obligation.

However, this does not necessarily suggest that the transplant from the no-harm principle is justified. The International Court of Justice distinguished the procedural and substantial preventive obligations: procedurally, states shall conduct an environmental impact assessment when there is a risk of transboundary harm and undertake negotiation and consultation; substantially, states shall prevent the

59. See CHENG, *supra* note 56, at 249, 253 (arguing for the combination of the objective and subjective tests).

60. See Ilias Plakokefalos, *Causation in the Law of State Responsibility and the Problem of Overdetermination: In Search of Clarity*, 26 EUR. J. INT'L L. 471, 474 (2015) (explaining that causation can serve as part of the primary rule or secondary rule: "It is not necessary, and probably not possible, to extrapolate through a comparative analysis, which is a common usage of the causal inquiry in the major legal systems. Nor can one look at the international case law and come up with a consistent and clear application of causation.").

61. Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies arts. 8–9, Jan. 27, 1967, 610 U.N.T.S. 205.

62. Int'l Law Comm'n, Draft Articles on Prevention of Transboundary Harm from Hazardous Activities art. 3, U.N. Doc. A/56/10 (2001).

63. See Int'l Law Comm'n, Articles on the Responsibility of States for Internationally Wrongful Acts art. 36, U.N. Doc. A/RES/56/83 (2001) (describing compensation requirements for the State responsible). Causation came into place in the compensation proceedings in the *Diallo* case and the *Armed Activities in Congo* case. See, e.g., Case Concerning Ahmadou Sadio Diallo (Guinea v. Dem. Rep. Congo), Judgment of 19 June 2012, 2012 I.C.J. ¶ 14 (June 19); *Armed Activities on the Territory of the Congo* (Dem. Rep. Congo v. Uganda), Judgment of 9 Feb. 2022, 2022 I.C.J. ¶ 93 (Feb. 9).

harm from happening.⁶⁴ Causation plays different roles in the two types of obligation. For a procedural obligation, the determination of the causation is peripheral to the conclusion, whereas the core is to determine whether there might be some factual circumstances that might give rise to the risk of harm and require the assessment of the risks.⁶⁵ Such considerations include the scale, location, and geographic location of the projects. For a substantial obligation, causation serves as the foundation for establishing a violation but relies on the prior determination of significant transboundary harm.⁶⁶ The substantial rule in fact blurred the line between the determination of the causation under the primary and secondary obligations, that is, only when causation is related to a state's responsibility will there be meaningful legal reasoning.

Causation as an approach to determining jurisdiction is misplaced for two reasons. Firstly, establishing jurisdiction preliminarily precedes any determination of the state's wrongful act or responsibility. If causation is discussed early in the preliminary objection, any later determination of the merits would be moot due to the presumption of harm and a potential violation of a substantial rule.⁶⁷ To avoid such contradiction, the determination of causation could only rest on a finding of causation in fact or a presumption of causation. Secondly, human rights obligations establish a vertical promise that a state gives to the people within its territory or under its jurisdiction.⁶⁸ More than the

64. See *Certain Activities Carried Out by Nicaragua in the Border Area* (Costa Rica v. Nicar.) and *Construction of a Road in Costa Rica along the San Juan River* (Nicar. v. Costa Rica), Judgment, 2015 I.C.J. ¶¶ 101, 104, 113 (Dec. 16) (discussing procedural and substantive obligations concerning transboundary harm).

65. See *id.* ¶¶ 146–162 (describing the alleged breach of the obligation to carry out an environmental impact assessment in this case).

66. See *id.* ¶ 180 (explaining that “[i]n order to pronounce on Nicaragua’s allegations, the Court will first address the Parties’ arguments on the contribution of sediment from the road to the river; then it will examine whether the road-derived sediment caused significant harm to Nicaragua.”)

67. See *Barcelona Traction, Light and Power Company, Limited* (New Application: 1962) (Belg. v. Spain), Preliminary Objections, 1964 I.C.J. 6, 44 (July 24) (with the International Court of Justice pronouncing that “the object of a preliminary objection is to avoid not merely a decision on, but even any discussion of the merits.”); see also JO M. PASQUALUCCI, *THE PRACTICE AND PROCEDURE OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS* 83 (2009) (discussing the same quote by the International Court of Justice).

68. John H. Knox, *Horizontal Human Rights Law*, 102 AM. J. INT’L L. 1, 2 (2008); See also Human Rights Comm., *Lilian Celiberti v. Uruguay* (Comm. No. 56/1979), U.N. Doc. CCPR/C/13/D/56/1979, Individual Opinion of Tomuschat (1981) (noting that the idea of limitation on a extraterritorial obligation is incorporated to “take care of

negative obligations to respect and protect human rights, a state bears the positive obligation to fulfill the human rights enjoyed by the people.⁶⁹ Indeed, the “cause-and-effect” approach is meaningful for negative obligations, since a state may exert its power to address any violation either through the state organ or through the effective control of the perpetrator within its territory. However, fulfillment of human rights can be best realized through states exercising effective control so that they can better allocate the necessary economic and financial resources toward that end.⁷⁰ Extraterritorial fulfillment of human rights relies on international cooperation with other states. As the CESCR noted, “this obligation to fulfil requires States parties to contribute to creating an international environment that enables the fulfilment of the Covenant rights. To that end, State parties must take the necessary steps in their legislation and policies, including diplomatic and foreign relations measures, to promote and help create such an environment.”⁷¹

In addition to the fundamental misplacement of causation, the CRC’s reasoning also raises confusion in the application of the causation rule. Due to such misplacement, the Committee had no choice but to rely on a general categorization of scientific causation to presume that a state has caused and perpetuated climate change, and ultimately caused harm to the victims. If the CRC’s causation is furthered at the preliminary objection stage, a human rights violation will be inevitable without touching on the merits. Moreover, the CRC’s causation analysis also seemed suspicious due to their negligence of individualized causation. The logic might fail even in easily imaginable scenarios: a developing country that gains independence and starts to industrialize for a few decades, or a small island country that still relies on fishing and agriculture, would equally be responsible for certain extraterritorial human rights violations. Such unintuitive deduction can be preliminarily explained by two rationales. First, over-generalized scientific causation does not examine the specific contribution of a state’s contribution to

objective difficulties which might impede the implementation of the Covenant in specific situations. Thus, a State party is normally unable to ensure the effective enjoyment of the rights under the Covenant to its citizens abroad, having at its disposal only the tools of diplomatic protection with their limited potential.”)

69. See David Jason Karp, *What is the Responsibility to Respect Human Rights? Reconsidering the ‘Respect, Protect, and Fulfill’ Framework*, 12 INT’L THEORY 83, 86 (2020) (explaining that the responsibility to fulfill human rights involves providing “each person with access to the objects of his or her human rights.”).

70. See *id.* at 92 (claiming that “[i]n terms of ‘fulfill’: taking human rights seriously may involve choices about when and why not to redistribute, just as often as they involve choices about when and why to do so.”).

71. General Comment 24, *supra* note 24, ¶ 37.

the harm. The CRC should not be able to avoid a careful scrutiny by such an over-generalization, simply claiming that “States parties still carry individual responsibility for their own acts or omissions in relation to climate change and their contribution to it.”⁷² Second, the CRC failed to consider the *conditio sine qua non* or the *Klimasenioren* approach of the “real prospect of altering the outcome.”⁷³ If such a counterfactual or quasi-counterfactual test is conducted, sometimes the answer would be negative, partly due to the state’s low emission compared to others, or due to the global emission despite the fact that said state would still render the harms unavoidable.

V. CONCLUSION

Ideally, emphasizing the extraterritorial application of human rights obligations could help foster regulation and remedy the vacuum for those suffering from the GHG emissions attributed to the global north. However, this strategy seems problematic given that causation is based on state responsibility rather than a preliminary determination of the territorial application of the obligation. Though the IACtHR introduced the “cause-and-effect” test in their advisory opinion, it did not have the chance to apply the approach in contentious cases. Even if the victims make their way through the “cause-and-effect” test, the requirement of exhaustion of local remedy would serve as the second obstacle unanimously agreed on by both the ECtHR and the CRC. The judgment of Duarte Agostinho signifies that the conventional Westphalia system persists, and the bottom-up approach of global climate governance still awaits the development of alternative practices.

72. *Sacchi* ¶ 10.8.

73. *Klimasenioren* ¶ 444.