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Hazhar Jamali*

EXTRATERRITORIAL JURISDICTION AND CLIMATE HARM: RETHINKING THE ECTHR'S APPROACH IN *DUARTE AGOSTINHO*

Abstract

This article analyses the judgment of the European Court of Human Rights (ECtHR) in Duarte Agostinho and Others v. Portugal and Others, which addressed the question of whether States can be held accountable under the European Convention on Human Rights (ECHR) for extraterritorial climate-related harm caused by their greenhouse gas (GHG) emissions. The Court rejected the applicants' call to expand jurisdiction beyond Portugal, reaffirming a traditional, control-based interpretation of Article 1 that ties jurisdiction to effective authority over individuals or territory. Through a close reading of the Court's reasoning and the applicants' arguments, the article highlights the structural limitations of the ECtHR's current jurisdictional framework when applied to the transboundary and systemic nature of climate change. It argues that while the Court's cautious approach preserves doctrinal consistency, it risks rendering the Convention ineffective in addressing one of the most pressing human rights challenges of our time. The article proposes a narrowly scoped recalibration of jurisdiction that remains within the Convention's legal framework while allowing for meaningful accountability in exceptional climate harm cases.

* Postdoctoral researcher, Institute for International Law and Comparative Constitutional Law, Faculty of Law, University of Zurich, Switzerland. Email: Hazhar.jamali@gmail.com; https://orcid.org/0000-0002-3756-3718. This work was supported by the UZH Candoc/Postdoc Grant, Verfügung Nr. FK-25-009.

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Introduction

Amidst the worsening climate crisis and the persistent political inertia surrounding it, litigants are increasingly turning to international human rights courts and bodies to seek justice for alleged rights violations linked to environmental harm.[1] This novel approach seeks to hold States accountable for their contributions to global climate change and its diverse effects on the enjoyment of human rights.

> One of the key legal challenges in such cases lies in the question of jurisdiction – particularly regarding the violation of human rights resulting from transboundary environmental emissions. A key example is the case of *Duarte Agostinho and Others v. Portugal and Others*,[2] in which a group of Portuguese young people filed a complaint against 33 high-emitting Council of Europe Member States, including their own. The applicants claimed that these States collectively bear responsibility for the climate-related harms they are experiencing in Portugal and thus are in violation of their human rights obligations under Articles 2, 3, 8 and 14 of the Convention.[3]

At its core, the case raised a fundamental legal issue: are States bound by their human rights obligations under the ECHR when their emissions have adverse effects beyond their own national borders? More specifically, does the ECtHR have jurisdiction to adjudicate climate-related complaints involving extraterritorial elements?

In its landmark judgment of 9 April 2024, the Grand Chamber of the ECtHR declared the application inadmissible.[4] It found no basis to

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[1] For an overview of cases, see Climate Litigation Database, CRRP Blog, available at: https://climaterightsdatabase.com/database/ [last accessed 10.1.2024].

[2] *Duarte Agostinho and Others v. Portugal and 32 Others*, Application no. 39371/20, Judgment of 9.4.2024.

[3] *Ibid*., para. 66.

[4] *Ibid*., para. 214.

assert jurisdiction over the respondent States other than Portugal, emphasizing the territorial character of the Convention system. The Court rejected the notion that the Convention could serve as a basis for generalized extraterritorial liability for climate change impacts, warning that such an interpretation would amount to an 'unlimited expansion' of States' jurisdictional responsibilities.[5]

The ECtHR's reasoning has significant implications for the broader legal discourse around 'extraterritorial jurisdiction' – a concept that lies at the heart of this article. While scholars remain divided on the scope of extraterritorial human rights obligations in the climate context, the Court's judgment signals a cautious and conservative stance. This debate continues to spark sharp disagreement among legal scholars. Benoit Mayer, for example, argues that expansive interpretations of extraterritorial jurisdiction risk distorting the meaning and purpose of human rights treaties.[6] Samantha Besson has similarly critiqued such interpretations as forms of 'human rights imperialism.'[7] In contrast, Helen Keller and Corina Heri contend that restrictive approaches fail to meet the urgency of the climate crisis and undermine the protective function of human rights law.[8]

Although academic discourse has extensively examined the theoretical possibilities of extraterritorial human rights application,[9] the

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[5] *Ibid*., para. 208.

[6] B. Mayer, "Climate Change Mitigation as an Obligation Under Human Rights Treaties?", *American Journal of International Law*, 2021, vol. 115, pp. 428 and 451.

[7] S. Besson, "Due Diligence and Extraterritorial Human Rights Obligations – Mind the Gap!", *ESIL Reflections*, vol. 9(1), 2020, available at: https://esil-sedi.eu/esil-reflection-due-diligence-and-extraterritorial-human-rights-obligations-mind-the-gap/ [last accessed 22.1.2025].

[8] H. Keller and C. Heri, "The Future Is Now: Climate Cases Before the ECtHR", *Nordic Journal of Human Rights*, 2022, vol. 40, p. 159.

[9] R. Wilde, "The Extraterritorial Application of International Human Rights Law on Civil and Political Rights", in S. Sheeran and N. Rodley (eds), *Routledge Handbook of International Human Rights Law*, Routledge, 2013; Keller and Heri, *supra* note 8; Mayer, *supra* note 6; L. Raible, *Human Rights Unbound: A Theory of Extraterritoriality*, Oxford University Press, 2020; C. Mallory, *Human Rights Imperialists: The Extraterritorial Application of the European Convention on Human Rights*, Hart, 2020; A. Venn, "Rendering International Human Rights Law Fit for Purpose on Climate Change", *Human Rights Law Review*, 2023, vol. 23(1); H. Duffy, "Climate Change and the Extra-Territorial Scope of Human Rights Obligations: Global Threats and Fragmented Responses", in T. Blokker, G. Dam

ECtHR's judgment in *Duarte Agostinho* provides the first concrete indication of how the Court views its role in addressing transboundary climate harm. Notably, despite hundreds of environmental cases, the Court has never previously ruled on the question of extraterritorial emissions – until its judgment in the *Duarte* case.[10]

Against this backdrop, the present article revisits the question of extraterritorial jurisdiction in light of the ECtHR's decision in *Duarte Agostinho*. Section two outlines the historical evolution of the Court's jurisprudence on extraterritorial jurisdiction. Section Three discusses the unique situation of climate change and the challenges associated with

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and M. v. Prislan (eds), *Furthering the Frontiers of International Law: Sovereignty, Human Rights, Sustainable Development*, Brill, 2021; V. Bellinkx et al., "Addressing Climate Change through International Human Rights Law: From (Extra)Territoriality to Common Concern of Humankind", *Transnational Environmental Law*, 2022, vol. 11; L. Raible, "Between Facts and Principles: Jurisdiction in International Human Rights Law", *Jurisprudence*, 2021, vol. 13(1); R. Lawson, "Life after Bankovic: On the Extraterritorial Application of the European Convention on Human Rights", in F. Coomans and M.T. Kamminga (eds), *Extraterritorial Application of Human Rights Treaties*, Intersentia, 2004; D. Palombo, "Extraterritorial, Universal, or Transnational Human Rights Law?", *Israel Law Review*, 2023, vol; M. den Heijer and R. Lawson, "Extraterritorial Human Rights and the Concept of 'Jurisdiction'", in M. Langford et al. (eds), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social, and Cultural Rights in International Law*, Cambridge University Press, 2012; İ. Karakaş and H. Bakırcı, "Extraterritorial Application of the European Convention on Human Rights: Evolution of the Court's Jurisprudence on the Notions of Extraterritorial Jurisdiction and State Responsibility", in A. van Aaken and I. Motoc (eds), *The European Convention on Human Rights and General International Law*, Oxford University Press, 2018; L. Raible, "Expanding Human Rights Obligations to Facilitate Climate Justice? A Note on Shortcomings and Risks", *EJIL: Talk!*, 15 November 2021, available at: https://www.ejiltalk.org/expanding-human-rights-obligations-to-facilitate-climate-justice-a-note-on-shortcomings-and-risks/ [last accessed 18.1.2025]; B. Miltner, "Revisiting Extraterritoriality after Al-Skeini: The ECHR and Its Lessons", *Michigan Journal of International Law*, 2012, vol. 3; Y. Shany, "Taking Universality Seriously: A Functional Approach to Extraterritoriality in International Human Rights Law", *The Law & Ethics of Human Rights*, 2013, vol. 7; C. Heri, "Climate Change before the European Court of Human Rights: Capturing Risk, Ill-Treatment and Vulnerability", *European Journal of International Law*, 2022, vol. 33; H. Keller and A.D. Pershing, "Climate Change in Court: Overcoming Procedural Hurdles in Transboundary Environmental Cases", *European Convention on Human Rights Law Review*, 2022, vol. 3(1); R. Luporini and A. Savaresi, "International Human Rights Bodies and Climate Litigation: Don't Look Up?", *Review of European, Comparative & International Environmental Law*, 2023, vol. 32.

[10] Keller and Heri, *supra* note 8, p. 159.

understanding jurisdiction on territorial bases. Section four examines the arguments advanced by the applicants and the reasoning adopted by the Court. Section five situates the Court's position within the broader landscape of international human rights adjudication, including comparative approaches taken by other human rights bodies and the recent advisory opinion of the International Court of Justice (ICJ). The last section concludes.

I. The ECtHR's Evolving Interpretation of Jurisdiction

In international human rights law, jurisdiction is not merely a procedural threshold – it is the foundational criterion that determines whether a state bears human rights obligations toward individuals, forming the legal basis for responsibility and accountability.[11]

Under the ECHR, Article 1 imposes on States the obligation to 'secure to everyone within their jurisdiction the rights and freedoms defined in Section I of [the] Convention.'[12] This clause has consistently been interpreted as a prerequisite for activating any of the Convention's substantive guarantees. Without the establishment of jurisdiction, no individual may assert Convention-based rights, and no State can be held accountable for failing to uphold them.

Traditionally, jurisdiction has been closely tethered to the principle of territorial sovereignty.[13] In this classical view, a State's obligations under the Convention are confined to individuals located within its geographical boundaries. This interpretation aligns with the historical logic of international law, which has long resisted the notion of universal obligations owed beyond borders.

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[11] L. Raible, "States' Extraterritorial Jurisdiction in Relation to GHG Emissions After *Duarte Agostinho v. Portugal*", *European Convention on Human Rights Law Review*, 2025, p. 4; see also S. Besson, "The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts To", *Leiden Journal of International Law*, 2012, vol. 25, p. 863.

[12] Council of Europe, *European Convention on Human Rights*, as amended by Protocols Nos. 11, 14 and 15, ETS No. 005, 4 November 1950, art. 1.

[13] Raible, *supra* note 11.

However, the ECtHR's jurisprudence over the past two decades has reflected a gradual, albeit uneven, shift toward more functional understandings of jurisdiction. Rather than treating territory as the sole determinant, the Court has increasingly looked at effective control – whether over individuals or areas – as a basis for jurisdiction. This development has resulted in a body of case law that is rich, complex, and at times doctrinally inconsistent.[14]

The foundational case in this evolution is *Banković v. Belgium*, where the Court rejected a claim brought by relatives of individuals killed in a NATO bombing of Belgrade.[15] The applicants alleged violations of Articles 2, 10, and 13 ECHR by participating NATO States. The Grand Chamber, however, ruled that the Convention was "not designed to be applied throughout the world, even in respect of the conduct of Contracting States,"[16] and emphasized that jurisdiction under Article 1 is "essentially territorial."[17] It articulated a narrow set of exceptions, including: (i) situations of extradition or expulsion;[18] (ii) acts of state agents abroad involving direct personal control;[19] (iii) effective control over foreign territory;[20] and (iv) jurisdiction grounded in diplomatic or consular authority.[21]

Yet *Banković* was not the final word. In *Issa v. Turkey*, [22] the Court appeared to soften its earlier stance, suggesting that Turkish forces might have exercised jurisdiction over Iraqi nationals during military operations in Iraq. Although the claim was ultimately dismissed on evidentiary grounds, the judgment acknowledged that jurisdiction could arise from a State's authority over individuals, even in the absence of full territorial control.[23]

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[14] L. Raible, "The Extraterritoriality of the ECHR: Why *Jaloud* and *Pisari* Should Be Read as Game-Changers", *European Human Rights Law Review*, 2016, Issue 2, p. 161.

[15] *Banković and Others v. Belgium and Others*, Application no. 52207/99, Decision on Admissibility of 12.12.2001.

[16] *Ibid*., para. 80.

[17] *Ibid*., para. 61, 63, 67.

[18] *Ibid*., para. 68.

[19] *Ibid*., para. 69.

[20] *Ibid*., para. 70.

[21] *Ibid*., para. 73.

[22] *Issa v. Turkey*, Application no. 31821/96, Judgment of 16.11.2004.

[23] Ibid., para. 71–75.

This relational model of jurisdiction was further developed in *Öcalan v. Turkey*,[24] where the Court held that Turkey had exercised jurisdiction over Abdullah Öcalan when it captured him in Kenya. Despite the absence of territorial control, the decisive factor was the effective authority exercised by Turkish agents over the applicant at the time of arrest.[25] This marked a critical departure from *Banković*'s rigid territorialism, affirming that jurisdiction can be person-based and situational.

The Court consolidated this trend in *Al-Skeini v. United Kingdom*, a landmark case concerning the British military presence in Iraq.[26] The Court held that individuals who died in UK-controlled areas of Basra fell within British jurisdiction due to the degree of authority and responsibility exercised by British forces.[27] Here, the Court moved beyond territorial control and adopted a more functional test grounded in factual authority.

Later, in *Hanan v. Germany*, [28] the Court found jurisdiction based on Germany's duty to investigate under the ECHR following a deadly airstrike in Afghanistan. Even though Germany did not control territory or individuals in the conventional sense, its legal obligation under a Status of Forces Agreement to conduct effective investigations was enough to trigger jurisdiction under Article 1.[29]

As we see, even as the Court has accepted more **functional and relational understandings** of jurisdiction, it has maintained an emphasis on **control over the rights holder** – whether direct (e.g., through arrest or detention) or indirect (e.g., through military occupation). In the next section, I discuss the challenges associated with a territorial understating of jurisdiction in respect of climate change crisis.

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[24] *Öcalan v. Turkey*, Application no. 46221/99, Judgment of 12.5.2005.

[25] *Ibid*., para. 91.

[26] *Al-Skeini and Others v. United Kingdom*, Application no. 55721/07, Judgment of 7.7.2011.

[27] Ibid., para. 108 and149-150.

[28] *Hanan v. Germany*, Application no. 4871/16, Judgment of 16.2.2021.

[29] Ibid., para. 132–145.

II. The Challenge of Jurisdiction in Climate Harm Cases

The GHG emissions, the main driver of anthropogenic climate change,[30] do not respect borders. Their effects – rising sea levels, extreme weather, droughts, and floods – disrupt lives and ecosystems far from the point of origin.[31] These harms interfere with the enjoyment of human rights such as life, health, housing, and private life.[32] Applying human rights law to such harm seems intuitively appealing. Yet the ECHR – and international human rights law more broadly – does not recognise harm alone as sufficient. A violation arises only when a **duty-holder fails to act or refrain from acting** in line with a specific obligation. [33]

This requirement leads us back to the concept of jurisdiction. For a state to be held accountable under the ECHR, it must be **both factually in a position to fulfil its duties and normatively expected to do so**.[34] Jurisdiction, then, functions as both a **practical** and a **justificatory** threshold. As we have seen in the previous section, the ECtHR has largely framed this through the lens of **control over individuals** or **territory**, making it difficult to extend Convention obligations to cross-border environmental harms.

GHG emissions resist this framework. While emissions can be traced, quantified, and even allocated to specific States, as acknowledged in the recent Advisory Option of the ICJ,[35] their impact is non-

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[30] Intergovernmental Panel on Climate Change (IPCC), *Climate Change 2021: The Physical Science Basis*, p. 426.

[31] Raible, *supra* note 11.

[32] Keller, Heri Future is now, *supra* note 8, p. 153.

[33] Raible, *supra* note 11., pp. 3-4.

[34] *Ibid*., p. 4.

[35] See para. 429 of the Advisory Opinion in which the Court notes that "while climate change is caused by cumulative GHG emissions, it is scientifically possible to determine each State's total contribution to global emissions, taking into account both historical and current emissions". International Court of Justice, *Advisory Opinion on the Obligations of States in Respect of Climate Change*, 23 July 2025, available at: https://www.icj-cij.org/sites/default/files/case-related/187/187-20250723-adv-01-00-en.pdf [last accessed 31.7.2025].

linear, global, and collective.[36] The logic of jurisdiction under Article 1 ECHR, which requires a form of personal or territorial control, does not easily accommodate causation models that are statistical, probabilistic, or based on **global carbon budgets**.[37] Victims of climate harm are not "under the control" of emitting States in any legally recognisable way.

What is also matter is that much of the emissions originate not from States directly, but from **non-state actors** such as private companies or corporations.[38] Human rights law typically frames State duties in such contexts as **positive obligations** –[39] to regulate private actors, mitigate foreseeable harm, and take reasonable measures. These obligations are different from **negative obligations**, which prohibit direct interference with rights. This distinction matters. Positive obligations allow for a wider margin of discretion and multiple implementation pathways, whereas negative obligations are stricter and subject to proportionality review.[40]

As ***Verein KlimaSeniorinnen Schweiz v. Switzerland*** illustrates, the ECtHR has begun to recognise that States may have **positive obligations** to prevent foreseeable climate harm, including through GHG mitigation.[41] But how these obligations interact with **jurisdictional thresholds** remains unsettled. Some legal scholars argue that positive obligations should only apply where the State has control over the rights holder or territory; others suggest a broader approach that includes **control over the source of harm**.[42]

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[36] Raible, *supra* note 11, pp. 4-5.

[37] *Ibid*.

[38] Hundreds of cases are filed against corporations and private companies. For further information see A. Langford, "Sharp Rise in Number of Climate Lawsuits Against Companies, Report Says", *The Guardian*, 27 June 2024, available at: https://www.theguardian.com/environment/article/2024/jun/27/sharp-rise-in-number-of-climate-lawsuits-against-companies-report-says [last accessed 22.7.2024].

[39] Heri, *supra* note 9; Raible, *supra* note 11.

[40] Raible *supra* note 11, pp. 5–6.

[41] *Schweiz and Others v. Switzerland*, Application no. 53600/20, Judgment of 9.4.2024, paras 544–554.

[42] M. Murcott, M.A. Tigre, and N. Zimmermann, "What the ECtHR Could Learn from Courts in the Global South", *VerfBlog*, 22 March 2022, available at: https://verfassungsblog.de/what-the-ecthr-could-learn-from-courts-in-the-global-south/ [last accessed 18.7.2025].

In sum, there is a **fundamental tension** between the ECtHR's current approach to jurisdiction – premised on control over the rights holder – and the nature of climate change, which implicates **dispersed causes, delayed effects, and global interdependence**.

III. The Case Duarte Agostinho and Others v. Portugal and Others

1. The Applicant's Arguments

Six young Portuguese people brought the application, alleging that Portugal and 32 other European States had failed to adopt adequate measures to mitigate climate change, thereby violating their rights under Articles 2, 3, 8, and 14 of the Convention. [43] The case forced the Court to confront a fundamental and pressing question: can the human rights obligations of States under the ECHR extend extraterritorially to harms caused by their GHG emissions, even when those harms manifest beyond their national borders?

The applicants advanced a novel interpretation of extraterritorial jurisdiction under Article 1 of the ECHR, tailored to the exceptional and transboundary nature of climate change. They acknowledged that the facts of the case did not fall within any of the established categories of extraterritorial jurisdiction as previously defined in the Court's case law, including *Banković*,[44] *Al-Skeini*,[45] and *H.F. and Others v. France*.[46] However, they contended that the exceptional circumstances of climate change required the Court to revisit and expand its approach to jurisdiction, based on underlying principles rather than rigid categories.[47]

The applicants contended that extraterritorial jurisdiction could be established in **exceptional circumstances**, where there existed a **suffi-**

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[43] *Duarte Agostinho, supra note 2,* paras 3, 66.

[44] *Banković, supra note 15.*

[45] *Al-Skeini, supra note 26.*

[46] *H.F. and Others v. France*, Application nos. 24384/19 and 44234/20, Grand Chamber, Judgment of 14.9.2022.

[47] *Duarte Agostinho, supra note 2.*, para. 121.

cient factual and/or legal connection between the State and the individual concerned. They argued that it was well established that acts of a State producing effects outside its territory could engage its jurisdiction, [48] citing the Grand Chamber judgment in *M.N. and Others v. Belgium*, where the Court reiterated that extraterritorial jurisdiction may arise where a State's acts or omissions have effects beyond its borders.[49] They emphasized that while climate change had not yet been included in the existing categories of exceptional cases, those categories were not exhaustive and were capable of evolving[50] – an approach consistent with the Court's reasoning in *Georgia v. Russia*.[51]

Central to their argument was the notion that the **sufficient connection** required for jurisdiction arose from the cumulative impact of various factors. These included the foreseeability and knowledge of the harmful effects of climate change, the long-term duration of those effects, the capacity of the States to act, and their failure to adequately regulate greenhouse gas emissions.[52] The applicants asserted that they had invoked jurisdiction only in relation to a limited set of positive obligations: namely, the duty of States to take measures within their power to regulate and limit emissions.[53]

The applicants also identified several **special features of climate change** that, in their view, weighed in favour of recognising extraterritorial jurisdiction. These included the inherently **multilateral nature** of the climate crisis, the **severe and escalating risks** posed by global warming, the **lack of any alternative accountability mechanisms**, and the **urgency of emissions reductions** needed by 2030 to avoid catastrophic impacts.[54] These arguments were framed within the broader principle of avoiding a protection gap in the "Convention legal space" – a concept recognised in *Banković*, but refined in later cases to reflect evolving circumstances.

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[48] *Ibid*., para. 122.

[49] *M.N. and Others v. Belgium*, Application no. 3599/18, Grand Chamber, Decision on Admissibility of 5.5.2020, para. 113.

[50] *Duarte Agostinho, supra note 2,* para. 122.

[51] *Georgia v. Russia (II)*, Application no. 38263/08, Judgment of 21.1.2021, para. 114.

[52] *Duarte Agostinho, supra note 2, Ibid*., para. 123.

[53] *Ibid*.

[54] *Ibid*., para. 124.

They also maintained that allowing the case to proceed solely against Portugal would be inadequate, given Portugal's relatively limited share of global emissions and the unequal distribution of climate impacts and vulnerabilities across Europe. They argued that the time-sensitive nature of the crisis made it unrealistic and insufficient to wait for suitable applicants from every State to bring comparable applications.[55]

The applicants elaborated on the factors constituting a sufficient connection between the respondent States and the applicants. They stressed that their argument was not based solely on a cause-and-effect model, but rather on the **special features** of climate change and their cumulative legal relevance.[56] These included the States' control over their emissions, the causal link between those emissions and increased risks to the applicants, and the foreseeability of these effects – elements acknowledged as relevant by the Court in *H.F. and Others v. France*.[57] They also relied on the UN Committee on the Rights of the Child's reasoning in *Sacchi and Others*,[58] where it found that States could bear human rights obligations for transboundary environmental harm in circumstances where their emissions materially contributed to the alleged harm.

Thus, in their oral submissions, the applicants summarized these points by highlighting seven cumulative factors justifying extraterritorial jurisdiction: (a) the multilateral dimension of climate change; (b) State control over both emissions and the Convention rights at stake; (c) a causal link between emissions and the rights impact; (d) foreseeability of harm; (e) the limited capacity of Portugal alone to address the issue; (f) the importance of avoiding a protection vacuum within the Convention system; and (g) consistency with developments in international law and human rights jurisprudence addressing environmental harm.[59]

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[55] *Ibid*., para. 125.

[56] *Ibid*., para. 126.

[57] *H.F. and Others v. France*, supra note 46, para. 202.

[58] *Sacchi and Others v. Argentina and Others*, Decision of 23.9.2021, CRC, Application no. CRC/C/88/D/108/2019.

[59] *Duarte Agostinho, supra note 2*, para. 127.

2. The Court's Findings

In response to the applicants' argument for extending extraterritorial jurisdiction to the thirty-one respondent States other than Portugal, the Court began by applying its well-established Article 1 framework. It confirmed that the two main categories of extraterritorial jurisdiction – **effective control over an area** and **State agent authority and control** – were not applicable. None of the respondent States exercised control over any territory outside their borders relevant to the applicants, nor did they exercise direct authority or control over the applicants themselves.[60]

The Court also dismissed the possibility of a **procedural jurisdictional link**, such as that recognised under Article 2 where States are obliged to investigate extraterritorial deaths. As the applicants had not initiated any domestic proceedings in the respondent States, that line of argument was considered inapplicable.[61]

While the applicants urged the Court to ground jurisdiction in the exceptional nature of climate change,[62] the Court rejected this novel approach. Referring to its earlier decision in *M.N. and Others v. Belgium*, the Court clarified that its mention of "exceptional circumstances" did not establish a new basis for extraterritorial jurisdiction. Rather, such language was tied to traditional tests of authority or control, not an independent basis for jurisdiction.[63]

While acknowledging the applicants' concerns about climate change, the Court firmly reiterated its established case-law: a State's actions taken within its own territory – despite any extraterritorial effects – do not, in themselves, establish jurisdiction. The Court emphasized that this applies not only to decisions actually taken by national authorities, but also to arguments based on a State's capacity to affect individuals abroad.[64]

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[60] *Ibid.*, paras 181–182. In this respect the Court made reference to the case of *Ukraine and the Netherlands v. Russia*, §§ 565–572.

[61] *Ibid.*, para. 183. The Court did reference to its finding in case of *Ukraine and the Netherlands v. Russia*, §§ 573–575).

[62] *Ibid.*, paras 121–126, 186.

[63] *Ibid.*, paras 187–188.

[64] *Ibid.*, para. 184.

The Court recognised that climate change differs from classic environmental cases. It noted States' control over emissions sources, international commitments under the Paris Agreement, and the existence of a causal relationship – albeit diffuse – between emissions and harm.[65] However, it stressed that these considerations, though serious, **could not justify judicially creating a new category of extraterritorial jurisdiction**.[66]

In particular, the Court rejected the applicants' proposal to link jurisdiction to the **content of the positive obligations** they sought to impose. It reaffirmed that jurisdiction is a **threshold issue** – a *conditio sine qua non* under Article 1 – and must be addressed before the Court can assess the merits of any alleged substantive obligations.[67] Nor could the **gravity** or urgency of the climate crisis, on its own, suffice to override these jurisdictional limits.[68]

On the argument that Portugal's limited share of emissions made it insufficient as the sole respondent, the Court was unequivocal: **jurisdiction and responsibility are distinct concepts**, and a lack of broader jurisdiction does not create a protection vacuum under the Convention.[69]

The applicants had also advanced a novel test based on **"control over Convention interests"** rather than control over persons. The Court rejected this outright, reaffirming that Article 1 requires control over individuals themselves – not their interests – and warning that accepting such a test would lead to a **lack of legal foreseeability** and potentially **unlimited extraterritorial reach**.[70]

The Court further emphasized that **GHG emissions originate from routine human activities** that are deeply embedded in domestic life – such as industry, housing, transport, and agriculture – and that their effects are **diffuse, cumulative, and temporally remote**. In this light, extraterritorial jurisdiction would be **impossible to delimit** and would

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[65] *Ibid.*, paras 191–194.
[66] *Ibid.*, para. 195.
[67] *Ibid.*, paras 196–197.
[68] *Ibid.*, para. 198.
[69] *Ibid.*, para. 202.
[70] *Ibid.*, paras 205–206.

risk transforming the Convention into a global climate regime – something the Court explicitly declined to do.[71]

Finally, the Court addressed the **international instruments** cited by the applicants, including the UNFCCC, the CRC's ruling in *Sacchi and Others and the Advisory Opinion of the* Inter-American Court of Human Rights *(IACtHR)*. While acknowledging their relevance, the Court concluded that these materials either did not reflect the Convention's model of jurisdiction or operated under **different legal regimes** – most notably those governing inter-State responsibilities rather than individual rights claims.[72]

In sum, the Court found **no grounds in existing case-law or public international law** for expanding extraterritorial jurisdiction under Article 1 in the manner proposed by the applicants. It concluded that **only Portugal**, as the territorial State, had jurisdiction in this case. As a result, the complaint against the other thirty-one respondent States was declared **inadmissible**.[73]

IV. Jurisdictional Limits and Climate Change in *Duarte Agostinho*

The ECtHR's judgment in *Duarte Agostinho* reflects a deep tension between the doctrinal architecture of the ECHR and the structural realities of climate change. While the applicants sought to ground extraterritorial jurisdiction in the respondent States' contributions to climate-related harm in Portugal, the Court rejected this approach, adhering instead to its longstanding requirement that jurisdiction under Article 1 of the ECHR hinges on effective control over individuals or territory.[74]

Despite acknowledging the urgency and global nature of climate change, the Court declined to adapt its jurisdictional framework to ad-

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[71] *Ibid*., paras 207–208.

[72] *Ibid*., paras 209–212.

[73] *Ibid*., paras 213–214.

[74] H. Jamali, "Climate Justice Denied? European Court of Human Rights Rules Against Portuguese Youth Climate Case", CRRP, 9 April 2024, available at: https://climaterightsdatabase.com/2024/04/09/climate-justice-denied-european-court-of-human-rights-rules-against-portuguese-youth-climate-case/ [last accessed 22.8.2025].

dress transboundary environmental harm. It warned that doing so could risk an "unlimited expansion" of Convention obligations, undermine the "principle of legal certainty," and effectively transform the Convention into a climate treaty.[75]

The GHG emissions carry risk beyond national borders, meaning that States exercise control over the **source** of harm, rather than over the **victims** directly. It is increasingly argued that such emissions can be scientifically traceable and statistically attributable to specific States – a point recently acknowledged by the ICJ in its July 2025 Advisory Opinion.[76] These causal linkages could satisfy the Convention's formal requirement of "control" – something which is denied by the ECtHR.

The ECtHR has consistently emphasized that jurisdiction must rest on a factual nexus of authority – not merely on the foreseeability of harm, as claimed by the applicants.[77] Their appeal to the idea of "control over their Convention interests" was thus deemed insufficient, as Article 1 has never been interpreted to allow jurisdiction based solely on the extraterritorial effects of State conduct.[78]

Doctrinally, this position aligns with prior jurisprudence.[79] The Court has generally refused to extend jurisdiction based on global regulatory failures – even where foreseeability and harm are established[80] – as seen in *M.N. and Others v. Belgium*[81] and *H.F. and Others v. France*.[82] Positive obligations – such as regulating emissions or setting national carbon targets – are only triggered where the State has a clear legal and territorial nexus to the affected individual. While the ECtHR recognised such positive duties under Article 8 in *Verein KlimaSeniorinnen Schweiz*,[83] that case involved applicants residing within the respondent State's ju-

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[75] *Duarte Agostinho, supra* note 2, para. 208.

[76] International Court of Justice, *supra* note 35, para. 429.

[77] *Duarte Agostinho, supra* note 2, paras 188, 198.

[78] *Ibid*., para. 205.

[79] A. Rocha, "States' Extraterritorial Jurisdiction for Climate-Related Impacts", *VerfBlog*, 12 April 2024, available at: https://verfassungsblog.de/states-extraterritorial-jurisdiction-for-climate-related-impacts/ [last accessed 21.7.2025].

[80] *Duarte Agostinho, supra* note 2, para. 184.

[81] *M.N. and Others v. Belgium*, Application no. 3599/18, Grand Chamber, Decision on Admissibility of 5.5.2020, paras 102–113.

[82] *H.F. and Others v. France*, *supra* note 46.

[83] *Verein KlimaSeniorinnen, supra* note 41, paras. 544–554.

risdiction, allowing the Court to remain within the bounds of traditional territoriality.

However, several legal scholars have argued that the Court could have taken inspiration from Global South jurisprudence to adopt a more functional understanding of extraterritorial jurisdiction in the *Duarte* case.[84] The Court could have bridged the gap between emitting States and affected individuals by reconceiving jurisdiction as requiring "control over the source" of the harm, rather than control over the victim.[85] This approach was explicitly rejected by the Court.

Yet, the *Duarte* judgment is not without merit. Had the Court expanded its notion of extraterritoriality to encompass transboundary climate effects, it might have triggered significant spillover consequences. The Court indirectly acknowledged this concern by warning against transforming the Convention into a climate treaty and risking an unlimited expansion of its scope.[86] This suggests the Court may fear that adopting a causal or contribution-based jurisdictional test could open the door to similar claims in other complex transnational domains – such as military intervention, cyber warfare, surveillance, or corporate accountability – where attribution and control are often contested. Cases involving drone strikes, arms exports, or transnational corporate misconduct could become justiciable under principles analogous to climate jurisdiction, creating institutional strain and political backlash.

These concerns are not hypothetical. The Court has previously provoked strong backlash from States – particularly in areas like migration[87] and prisoner voting rights[88] – prompting the adoption of additional protocols to the ECHR that emphasize subsidiarity and State margin of appreciation.[89] Just as the *KlimaSeniorinnen* decision stirred domestic

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[84] Murcott, Tigre, Zimmermann, *supra* note 42.

[85] Rocha, *supra* note 79.

[86] *Duarte Agostinho, supra* note 2, para. 208.

[87] J. Hartmann, "A Danish Crusade for the Reform of the European Court of Human Rights", *EJIL: Talk!*, 14 November 2017, available at: https://www.ejiltalk.org/a-danish-crusade-for-the-reform-of-the-european-court-of-human-rights/ [last accessed 18.7.2025].

[88] Ø. Stiansen and E. Voeten, "Backlash and Judicial Restraint: Evidence from the European Court of Human Rights", *International Studies Quarterly*, 2020, vol. 64(4), pp. 770–784.

[89] Ibid., p. 772. For a comprehensive analysis see A. Jamali, "Human Rights Courts Under Attack: Analysis of Resistance Against Regional Human Rights Courts in Europe,

backlash,[90] *Duarte Agostinho* could have invited further resistance had the Court been seen as overstepping its judicial role in matters of climate, security, or economic regulation.

Nonetheless, this doctrinal caution comes at a cost. By refusing to recognise even narrow grounds for extraterritorial jurisdiction in climate cases, the Court has created a jurisdictional vacuum – leaving victims of cross-border climate harm without legal recourse. This reveals a growing disconnect between the transboundary nature of environmental degradation and the territorially anchored structure of human rights adjudication. While the Court emphasized that the applicants could still hold Portugal accountable, this reasoning fails to reflect the multilateral nature of climate change, where responsibility and mitigation burdens must be shared. As the applicants rightly argued, focusing solely on the territorial State – especially one with relatively low emissions – ignores the collective dimensions of the crisis and the need for a global response.[91]

Comparative and international legal developments offer alternative visions. The IACtHR, in its Advisory Opinion,[92] and the UN Committee on the Rights of the Child in *Sacchi et al*.,[93] have endorsed functional, contribution-based models of jurisdiction. These frameworks hold States accountable for transboundary harm when conduct within their territory foreseeably and substantially affects rights abroad. They also incorporate environmental principles – such as the no-harm rule and the precautionary principle – into human rights law, making them better suited to the systemic nature of climate change. Notably, they reject the "drop in the bucket" defence, affirming that even minor contributors to global emissions have enforceable obligations.

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the Americas, and Africa", PhD Thesis, Palacký University Olomouc, 2023, pp. 65–70, 86–88.

[90] I. Foulkes, "Swiss Parliament Defies ECHR on Climate Women's Case", *BBC News*, 12 June 2024, available at: https://www.bbc.com/news/articles/cl55ggjqvx7o [last accessed 31.7.2025].

[91] *Duarte Agostinho, supra* note 2, para. 125.

[92] Inter-American Court of Human Rights (IACtHR), Advisory Opinion OC-23/17 concerning the interpretation of Articles 1(1), 4(1), and 5(1) of the American Convention on Human Rights, adopted on 15.11.2017.

[93] *Sacchi, supra* note *55*.

In addition, the ICJ's 2025 Advisory Opinion on Climate Change[94] may help bridge the legal gap, though it stopped short of affirming extraterritorial human rights obligations. Still, the Court endorsed the view that States have duties under both treaty and customary international law to reduce emissions,[95] regulate private actors,[96] and engage in international cooperation.[97] It also acknowledged that causation in climate harm cases can be established through an *in concreto* assessment,[98] thereby rejecting overly rigid requirements of direct control. Although the ICJ did not directly engage with *Duarte Agostinho*, its broader framing supports a move toward recognising shared responsibility for transboundary environmental harm – an approach that could, over time, inform regional human rights jurisprudence.

Importantly, evolving the ECtHR's approach does not require abandoning doctrinal coherence. The Court has previously applied extraterritorial jurisdiction in limited contexts, as discussed earlier.[99] It also expanded the concept of standing for associations in *KlimaSeniorinnen*, setting out strict criteria specifically tailored to climate change,[100] demonstrating that legal adaptation is possible without compromising the Convention's structure. The ECtHR could similarly develop narrow, context-sensitive criteria for climate cases – such as requiring clear foreseeability, attribution grounded in climate science, proven regulatory failure, and rigorous standing and evidentiary thresholds – while restricting such expansion strictly to the climate context and staying within the Convention's legal space.

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[94] International Court of Justice, *supra* note 35.

[95] *Ibid*., para. 403.

[96] *Ibid*., para. 428.

[97] *Ibid*., para. 364.

[98] *Ibid*., para. 438.

[99] See section two of the article.

[100] See generally V. Sefkow-Werner, "Consistent Inconsistencies in the ECtHR's Approach to Victim Status and Locus Standi", *European Journal of Risk Regulation*, 2025, vol. 16(2).

Conclusions

The *Duarte Agostinho* judgment represents a defining moment in the evolving relationship between human rights law and the global climate crisis. Confronted with the challenge of addressing diffuse, cumulative, and transboundary environmental harm, the ECtHR chose doctrinal continuity over innovation. Its firm adherence to a territorial conception of jurisdiction may align with existing case law, but it exposes the structural limitations of the Convention system when faced with planetary-scale threats.

This article has argued that the Court's reasoning reflects not only jurisprudential restraint, but also deeper anxieties around institutional legitimacy, judicial overreach, and geopolitical backlash. While concerns about an "unlimited expansion" of jurisdiction are understandable, the refusal to adapt to the distinct nature of climate harm – marked by shared responsibility, scientific foreseeability, and regulatory capacity – risks rendering the Convention increasingly unfit for the anthropocene. In preserving procedural coherence through a state-centric model of jurisdiction, the Court has sacrificed normative relevance.

In contrast, international bodies such as the IACtHR and CRC have begun to articulate more flexible models. These frameworks recognise that States may bear extraterritorial obligations when they have regulatory control over emissions that foreseeably and materially contribute to rights-impairing environmental degradation. Such approaches represent, not jurisdictional overreach, but legal realism – grounded in interdependence, environmental responsibility, and the indivisibility of human rights and ecological integrity.

This article does not argue for boundless jurisdiction. Rather, it calls for a context-sensitive recalibration of the ECtHR's approach – what may be termed a "closed-box" model of extraterritoriality. This model would remain narrow in scope, grounded in clear evidentiary thresholds, causal attribution, and regulatory authority, and would be limited solely to the legal framework of the Convention in the context of the climate change crisis. It would retain the structural safeguards of Article 1 while enabling the Court to respond meaningfully to the systemic threats posed by climate change.

The stakes are considerable. As climate impacts intensify, the inability of human rights institutions to engage with transboundary harm risks fostering a jurisprudence that is formally coherent, but substantively hollow. If the Convention system cannot address environmental degradation that directly threatens life, health, and dignity, it fails in its foundational mission to ensure effective rights protection.

The ECtHR need not transform itself into a "climate court." But it must not remain a bystander to one of the greatest human rights challenges of our time. By carefully evolving its jurisdictional doctrine – drawing on comparative jurisprudence and principled reasoning – the Court can stay true to its mandate while responding to the urgent realities of a changing legal and ecological landscape. Jurisdiction, after all, is not merely about legal boundaries – it is about shared responsibility.