Joint Nordic Master in International and Environmental Law (NOMPEL)

Master's Thesis

Climate Change Litigation Before the European Court of Human Rights: What Hurdles and Legal Avenues?

JUR-3920, May 2022

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Abstract:

This thesis aims at exploring in details the four climate cases brought before the European Court of Human Rights (ECtHR) in light of the Court's precedent environmental case law. As those four cases are the first one of this type, many legal questions arise. More specifically, the thesis will first explore the way these climate-based lawsuits compare with case law developed by the Court on the relationship between human rights and the environment. It will then investigate the way the climate litigation cases have been framed to pursue climate objectives. Finally, the thesis will address the question of whether the European Convention on Human Rights (ECHR) can provide the legal remedies to challenge the alleged breach of fundamental rights due to a lack of climate mitigation policies from States. The thesis will argue that most solutions are to be found in the already existing case law of the Court, and that the Court has all the keys to deliver a groundbreaking judgment that could serve as an example to other human rights jurisdictions and beyond.

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1 - Introduction

1.1 - General introduction

In a truly moving book, the lawyer Luke Cole described the relationship between the climate case he was defending and his clients, the claimants in the case, in these terms "*…a lawsuit is the only way they have of expressing themselves in the environmental justice process…it's inadequate, it's a blunt tool, it's the only tool they have left*".[1] This statement reflects the complexity of litigating climate-related issues before Courts.

Climate legal action has started in the United States at the end of the 1980s and has since grown significantly and spread world wide. Databases maintained by the Grantham Research Institute on Climate Change and the Environment, and the Sabin Center for Climate Change Law, show that in May 2021, 1841 climate change-related cases were ongoing or concluded around the world. This type of legal action is now commonly referred to as 'climate change litigation', which has been defined as '*cases brought before administrative, judicial and other investigatory bodies that raise issues of law or fact regarding the science of climate change and climate change mitigation and adaptation efforts*'.[2] Yet, this litigation has many facets. The most recent one tends to seek recognition of the human rights dimension of climate change. This is what some academics have called the 'rights turn in climate litigation'.[3] As this movement has really gained momentum since the signing of the Paris Agreements, we will have to wait a little longer to determine the effectiveness of this new litigation strategy. Its success will depend on the receptivity of the Courts, because as any new societal issue, climate change will challenge national and international jurisdictions.

Human rights-based climate change litigation (HRCCL) has reached the European Court of Human Rights (ECtHR) in September 2020. Four cases are currently pending before the jurisdiction. Leaning on the Court's case law on environmental matters, the applicants claimed that the lack of action from their government to take climate mitigation measures is interfering with their fundamental rights, triggering the application of the European convention on Human

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[1] Shearer Christine, 'Kivalina: a climate change story', Haymarket Books, 2011.

[2] United Nations Environment Programme (UNEP), 'Global Climate Litigation Report: 2020 Status Review', 26 January 2021. <https://www.iucn.org/sites/dev/files/content/documents/2021/unep_global_climate_litigation_report_-_2020_status_review.pdf>

[3] Peel, Jacqueline, et Hari M. Osofsky. 'A Rights Turn in Climate Change Litigation?' Transnational Environmental Law, 7:1 (2018), pp. 37–67.

Rights (ECHR). The most high-profile case is *Duarte Agostinho and Others v. Portugal and 32 Other States*, which was filed on September 2, 2020 by six young Portuguese against 32 Respondent States (originally there were 33 Respondents, but Russia was excluded from the Council of Europe following the war in Ukraine[4]).[5] No proceedings have been initiated before national courts. The applicants alleged that by failing to agree on emission reductions that will keep temperature rise below 1.5 degrees Celsius, the Respondents have breached their substantive rights to life (Article 2 ECHR), to privacy and family life (Article 8 ECHR) and their right not to experience discrimination (Article 14 ECHR). The case was granted priority treatment by the Court on February 4, 2021, after it rejected the motion made by the defendant States to overturn its fast-tracking decision and only hear the admissibility arguments of the case.[6]

The second case was filed in November 26, 2020 by an association of senior women from Switzerland who, after having exhausted all the available domestic remedies, asked the ECtHR to recognise that the Swiss government's inadequate climate policies are breaching their human rights.[7] More specifically, the Articles invoked in this case were Article 2 (right to life), Article 8 (right to privacy), Article 6 (the applicants alleged that their right to a faire trial was breached because the Swiss Federal Supreme Court rejected their case on arbitrary grounds) and Article 13 (right to an effective remedy, as it was pointed out that their application had not been dealt with in its substantive content). The case was also granted priority status.

The third case was filed on March 25, 2021 after having exhausted all national remedies by an Austrian citizen who suffers from a temperature-dependent form of multiple sclerosis.[8] He filed a case against its government arguing that its lack of effective climate measures was violating his right to life and to privacy provided for in Articles 2 and 8 ECHR. He also invoked

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[4] Council of Europe's Newsroom, 'Exclusion of the Russian Federation from the Council of Europe and suspension of all relations with Belarus', 17 March 2022, <https://www.coe.int/en/web/cdcj/-/russian-federation-excluded-from-the-council-of-europe.>

[5] Duarte Agosthino and Others v. Portugal and 32 Other States, Application no. 39371/20, 7 September 2020.

[6] Paul Clark, Gerry Liston and Ioannis Kalpouzos, 'Climate change and the European Court of Human Rights: The Portuguese Youth Case', EJIL: Talk! Blog of the International and European Law, October 6, 2020, <https://www.ejiltalk.org/climate-change-and-the-european-court-of-human-rights-the-portuguese-youth-case/>.

[7] Union of Swiss Senior Women for Climate Protection v. Swiss Federal Council and Others, Application n°53600/20, 26 November 2021.

[8] Mex M. v. Austria, Application form to the ECtHR, 25 May 2021. <https://www.michaelakroemer.com/wp-content/uploads/2021/04/rechtsanwaeltin-michaela-kroemer-klimaklage-petition.pdf>

the breach of Article 13 as he argued that the Austrian law does not provide the opportunity to challenge administrative or legislative inaction regarding the climate crisis.

Finally, the fourth case was filed on June 15, 2021 by two Norwegian NGOs and six citizens from the same nationality.[9] They argued that the issuing of license from the government to explore new deep-sea oil and gas drilling in the Barents Sea was breaching their fundamental freedoms, as it would bring new fossil fuels to market from 2035 and beyond. Once again, the applicants invoked the breach of Articles 2 and 8 of the ECHR as well as Article 13.

The legal strategy of these cases relies heavily on the Court's jurisprudence regarding environmental litigation, which was developed even though the ECHR does not guarantee a substantive right to a healthy environment.[10] However, despite the Court's existing case law on violations to the Convention stemming from adverse environmental factors, the Court has yet to address the specific and unprecedented human rights violations originating from climate impacts. It is now greatly encouraged to rule on the subject.[11] Indeed, '*as cases addressing climate impacts and concomitant violations of rights increase, domestic European courts could greatly benefit from this Court deciding such a case*'.[12] Thus, just like human rights law has been used as a tool to address environmental issues,[13] it is now sought to be used to address climate change mitigation.

But how do these cases compare with the established case law developed by the Court on the relationship between human rights and the environment, and how have they been framed to pursue climate objectives? Furthermore, what scope does the ECHR provide for giving applicants the legal remedies to challenge the lack of climate mitigation measures from their governments? The thesis will be structured around these research questions.

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[9] Greenpeace Nordic Ass'n v. Ministry of Petroleum and Energy, Application n° 34068/21, 15 June 2021.

[10] Natalia Kobylarz, Sustainable Management of Natural Resources *Legal Instruments and Approaches* , pp. 99 - 120, Cambridge University Press, 2019.

[11] For instance, in its third party intervention to the Duarte Agosthino case, the European Commissioner stated that '*the crucial notion of the Convention as a 'living instrument', combined with the Court's own existing case-law, provide a solid legal framework to protect and address the plight of those who are suffering because of environmental degradation and climate change*'. By making a clear link between the environment and climate change, the Commissioner encourages the Court to continue to interpret the rights promulgated in the ECHR in a proactive manner based on its environmental precedents.

[12] Klimaseniorinnen v. Switzerland, (note 7).

[13] Since the 1960s, the ECHR organs have examined over 270 applications related to the protection or the degradation of the natural environment (note 10).

1.2 - Methodology

The research is concerned with the law stemming from the ECHR, as interpreted by the ECtHR. Consequently, the thesis takes an internal approach to law, because the legal system stemming from the ECHR is not only the subject of the inquiry, it also provides the normative framework for analysis.[14] The investigation wishes to adopt the point of view of the legal practitioner by having as a working support the petitioners' application forms. The thesis will also use legal doctrinal research to reflect the normative complexity of the law stemming from the ECHR. This doctrinal research will follow a methodology modelled on the three main goals of the legal doctrine developed by Smits,[15] which can be described as follow. First, the purpose is to describe the existing law, namely the environmental jurisprudence of the Court, to analyse the concepts, categories, principles and obligations that follow. In a second time, the research will analyse the way the main trends in HRCCL can interact with these principles, concepts and categories of environmental litigation. This is the 'prescriptive aim' that consists in 'feeling out the system',[16] which here translates into assessing whether precise human rights obligations of States to mitigate climate change and prevent the dangerous effects thereof can be inferred from the ECHR. The third aim of legal doctrine mentioned by Smits is that it can serve as justification for, on one hand, the existing law, but it can also, on the other hand, legitimise new solutions if the system needs adjustments. This is what the thesis aims to discuss in its last part, as it will argue that adjustments are needed for the admissibility requirements if the legal system developed by the ECtHR wishes to play its part in the fight against climate change.

The thesis will lean on the body of literature that provides for a systematic analysis of the HRCCL patterns,[17] as well as the one that analyses the human rights approach to environmental

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[14] Christian Atias, 'Ce que savent les juristes: les états du droit', *Revue Trimestrielle de Droit Civil* 2013, 315, no. 3; Pauline C. Westerman, 'Open or Autonomous?', in: Mark Van Hoecke (ed.), *Which Kind of Method for What Kind of Discipline?*, Oxford (Hart) 2011, 87.

[15] Smits, Jan M. 'What is Legal Doctrine? On the Aims and Methods of Legal-Dogmatic Research', s. d., 17.

[16] Ibid.

[17] Savaresi, Annalisa, et Joana Setzer. 'Rights-Based Litigation in the Climate Emergency: Mapping the Landscape and New Knowledge Frontiers', s. d., 25; Rajamani, Lavanya. 'Human Rights in the Climate Change Regime: From Rio to Paris and Beyond'. In *The Human Right to a Healthy Environment*, édité par John H. Knox et Ramin Pejan, 1re éd., 236‑51. Cambridge University Press, 2018; Peel, Jacqueline, et Hari M. Osofsky. 'A Rights Turn in Climate Change Litigation?' *Transnational Environmental Law* 7, (2018): 37‑67; Rodríguez-Garavito, César. 'Litigating the Climate Emergency: The Global Rise of Human Rights-Based Litigation for Climate Action'. *SSRN Electronic Journal*, 2021.

affairs.[18] Based on this work, the research will take the specific angle of the case-study of the 4 climate lawsuits pending before the ECtHR in the light of the Court's environmental case law, to glimpse the obstacles and consider legal avenues. While some of the doctrine has studied the substantive and procedural arguments of these new cases and made the link with precedents related to environmental protection developed by the Court,[19] it has not been done in a systematic way for the four cases along with a detailed analysis of the Court's jurisprudence on environmental law.

The scope of the thesis is delimited by the notion of States' obligations to mitigate climate change before the ECtHR in the light on the Court's environmental case law. Adaptation or corporate duties are beyond the scope of the thesis. Furthermore, the thesis is limited to the arguments, and thus point of view, of the petitioners and third parties of the four HRCCL cases. The reason to this is that the defences of the Respondents have not been made public for any of the cases.

1.3 - The Nordic perspective

The Nordic perspective is covered through the thesis by the fact that, on one hand, all the Nordic countries are party to the ECHR. As such, the future decisions of the Court will *de facto* concern those countries. On the other hand, one of the four climate-related cases pending before the ECtHR is directly concerned with Norway. More specifically, the ruling concerning *Greenpeace Nordic Ass'n v. Ministry of Petroleum and Energy* could potentially have far reaching consequences concerning future oil and gas drilling exploration in the Barents Sea. Yet, Norway is not the only country to covet the resources in the subsoil of this area. Indeed, Sweden oil company Lundin has become '*the biggest partner along with Equinor in what will be the next*

[18] Theil, Stefan. 'Towards the Environmental Minimum: Environmental Protection through Human Rights', Cambridge University Press, 2021; Anton, Donald K., et Dinah Shelton 'Environmental Protection and Human Rights', Cambridge: Cambridge University Press, 2011; Gouritin, Armelle. 'EU Environmental Law, International Environmental Law, and Human Rights Law: The Case of Environmental Responsibility', Brill Nijhoff, 2016.

[19] Hartmann, Jacques, et Marc Willers Qc. 'Protecting Rights through Climate Change Litigation before European Courts', s. d., 21; Karlsson Niska, Therese, 'Climate Change Litigation and the European Court of Human Rights - A Strategic Next Step?' The Journal of World Energy Law & Business 13, (2020): 331–42; Leijten, Ingrid. 'Human Rights v. Insufficient Climate Action: The *Urgenda* Case'. Netherlands Quarterly of Human Rights 37, (2019): 112–18; Setzer, Joana, et Lisa C. Vanhala, 'Climate Change Litigation: A Review of Research on Courts and Litigants in Climate Governance', WIREs Climate Change 10, (2019).

major project in the Barents Sea' after increasing its ownership in the Wisting project in Norway's Barents Sea from 10 percent to 35 percent by buying ÖMV.[20]

2 - Comparative analysis of the human right dimension to climate change litigation and the human right approach to environmental affairs before the ECtHR

The expression of a 'right-turn' of climate litigation was used by J. Peel et H.M. Osofsky in an article that analyses the '*emerging body of pending or decided climate change-related lawsuits that incorporate rights-based arguments*', in an effort to have the human rights dimension of climate change recognised.[21] This movement seems to have gained momentum after the adoption of the Paris Agreement, which incorporated the terms 'human rights' into its preamble after controversial debates.[22] The culmination of this movement in Europe was the judgment of the Dutch Supreme Court on 20 December 2019 in the *Urgenda* case. Apart of being the first ruling in Europe delivered by the highest domestic judiciary body to establish that a State has a duty to reduce its emissions, it confirmed that the risks of climate change fall within the scope of the ECHR, enshrining the human rights dimension of the climate crisis. The applicants of the four climate-related cases pending before the ECtHR followed the path opened up by the judgment of the Dutch Supreme Court, which itself relied on the environmental case-law of the ECtHR.

The rights-based climate litigation brought before the ECtHR will be analysed in this Chapter throughout a comparative analysis with the human rights approach to environmental affairs that has been systemised by the doctrine.[23] The human right approach to environmental protection before the ECtHR can be divided in two main categories. The first one consists in employing existing substantive human rights to achieve environmental protection needs - through the 'indirect' or 'direct' application of human rights to environmental cases. The second

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[20] Atle Staalesen, 'Sweden's Lundin Energy invests in new Barents oil project', in Artic Today, 1 November 2021. <https://www.arctictoday.com/swedens-lundin-energy-invests-in-new-barents-oil-project/.>

[21] Peel, Jacqueline , et Hari M. Osofsky, (note 3).

[22] Rajamani, Lavanya, 'Human Rights in the Climate Change Regime: From Rio to Paris and Beyond', *The Human Right to a Healthy Environment*, 236−51. Cambridge University Press, 2018.

[23] Gouritin, Armelle, 'EU Environmental Law, International Environmental Law, and Human Rights Law: The Case of Environmental Responsibility' Brill Nijhoff, 2016.

approach makes the link between human rights and environmental protection through procedural right.

2.1 - Achieving environmental or climate related interests through the mobilisation of existing substantive human rights

2.1.a - Application to environmental litigation

Although the ECHR does not enshrine a right to the environment as such,[24] the Court has developed case law in the environmental field. Indeed, the exercise of some of the rights guaranteed by the Convention may be impaired by environmental degradation and exposure to environmental risks. The ECHR provides several categories of substantive rights which have been mobilised to achieve environmental interests in different ways.[25] The application of substantive human rights to environmental affairs has been done in a 'indirect' and a 'direct' way in the Court's case law.

2.1.1.a - Indirect mobilisation of substantive rights

The indirect application of human rights to environmental affairs consists in a 'traditional' application of human rights, in the sense that the human right provision is mobilised as such, without seeking to extrapolate its scope. The link between the provision and the environment is therefore indirect, and it is the context that provides the environmental dimension. Within the framework of the ECHR, the typical examples are the mobilisation of the right to freedom of expression (Article 10) or the right to freedom of assembly and association (Article 11). For example, in the case of *Vides Aizsardzības Klubs v. Latvia*,[26] the applicant (an environmental association) had published a paper in a regional newspaper to the attention of the competent authorities expressing its concern about the preservation of a sensitive coastal area. The paper

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[24] Atapattu, Sumudu. « The Right to a Healthy Environment and Climate Change: Mismatch or Harmony? » In *The Human Right to a Healthy Environment*, édité par John H. Knox et Ramin Pejan, 1re éd., 252‑68. Cambridge University Press, 2018.

[25] The classification of fundamental rights in the Convention is often made as follows: on one hand, civil and political rights - also called first generation rights; and on the other economic, social and cultural rights - also known as second generation rights.

[26] ECtHR, *Vides Aizsardzības Klubs v. Latvia*, application no. 57829/00, 27 May 2004.

pointed out, inter alia, that the mayor of the municipality had promoted illegal construction in this area. The mayor brought an action for defamatory allegations and the applicant was ordered by the national courts to publish a public denial. The ECtHR found a violation of Article 10 of the Convention, noting in particular that the main purpose of the resolution at issue had been to draw the attention of the competent public authorities to a sensitive issue of public interest, and that this was the role of the environmental association.

With regard to Article 11, the applicant in the case *Costel Popa v. Romania*[27] claimed a violation of his right of freedom of association following the Romanian courts' refusal to register his environmental association without giving him the opportunity, provided for under national law, to rectify any irregularities in the procedure. The ECtHR found a violation of Article 11, finding that the reasons given by the Romanian authorities for refusing to register the association were not guided by any '*pressing social need*', nor were they convincing and compelling.

Thus, in the above mentioned cases, the provisions invoked were applied *per se*, giving the cases a dimension that is much more focused on human rights than on environmental protection, even if the objective of protecting environmental interests was ultimately achieved.

2.1.1.b - Direct mobilisation of substantive rights

The direct application of human rights in environmental affairs consists in shifting the focus on the environmental dimension of the claim.[28] The exercise consists of interpreting the human right provision broadly to extend its scope and encompass the environmental dimension of it. It is this interpretation work that creates the direct link between the environment and human right provisions. It requires an active role of the judiciary, to extract the implicit environmental relevance of the established human rights standards through a rigorous judicial development.[29]

The ECtHR undertook such an exercise, in particular to recognise the environmental dimension enshrined within the right to life (Article 2) and the right to family life and privacy (Article 8). In its famous case *Lopez Ostra v. Spain*,[30] the Court found a violation of Article 8 by the competent authorities because of nuisance caused by a waste-treatment plant close to the

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[27] ECtHR, *Costel Popa v. Romania*, application no. 47558/10, 26 April 2016.

[28] Gouritin, Armelle (note 22).

[29] Anton, Donald K., et Dinah Shelton. *Environmental Protection and Human Rights*. Cambridge: Cambridge University Press, 2011.

[30] ECtHR, Lopez Ostra v. Spain, application no. 16798/90, 9 December 1994.

housing of the applicant. The ECtHR stated that « *severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely, without, however, seriously endangering their health* ».[31] The court therefore reinterpreted the scope of Article 8 of the Convention to include an environmental component, from which emerged a positive duty for the State to « *take reasonable and appropriate measures to secure the applicant's rights* ».[32] In *Öneryıldız v. Turkey*,[33] the Court extended the scope of Article 2 of the Convention to the context of dangerous industrial activities operated under the authorities' control. The Court stated that its approach to the interpretation of the provision was « *guided by the idea that the object and purpose of the Convention as an instrument for the protection of individual human beings requires its provisions to be interpreted and applied in such a way as to make its safeguards practical and effective* ».[34] This sums up the Court's desire to allow the direct link between the human rights provisions of the Convention and environmental concerns. This is made possible by the living instrument doctrine, a method of judicial interpretation developed and used by the ECtHR to interpret the provisions of the ECHR in a way that reflects the evolving standards and contemporarily realities.[35]

This dynamic interpretation of substantive human rights in the context of environmental affairs has also been used by the Court for the provisions of Article 3 (prohibition of inhuman or degrading treatment or punishment) [36] and Article 1 of Protocol n°1 to the Convention (protection of property) [37]. Hence, in its approach of mobilising the provisions in environmental cases, the Court has developed a clear duty for States to take preventive measures to avert human rights violations associated with environmental harms, applying and extending the tools and principles of human rights. With the arrival of the four human-rights based climate change cases, the Court is asked to adapt once more the scope of the substantive provisions of the Convention.

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[31] ECtHR, Lopez Ostra v. Spain, § 51.

[32] Ibid, § 51(2).

[33] ECtHR, *Öneryıldız v. Turkey,* application no. 48939/99, 30 November 2004.

[34] ECtHR, *Öneryıldız v. Turkey*, § 69.

[35] George Letsas, 'The ECHR as a Living Instrument: Its Meaning and Legitimacy', *Constituting Europe*: *The European Court of Human Rights in a National, European and Global Context* (Cambridge University Press 2012) pp 106-141.

[36] ECtHR, *Florea v. Romania*, application no. 37186/03, 10 July 2010.

[37] ECtHR, *Papastavrou et others v. Greece*, application no. 46372/99, 10 April 2003.

2.1.2 - Application to climate change litigation

The substantive human rights provisions invoked in the climate cases are the ones that have been used to pursue environmental interests, namely the right to life and the right to private and family life. Article 14 (prohibition of discrimination) has also been invoked although it has not played a major role in environmental litigation. It is part of a strategy seeking to emphasis the vulnerability or disproportionate burden of climate change on certain groups based on their age. The role of this provision in climate litigation before the ECtHR will not be further developed, as it has no precedent in environmental case law.

2.1.2.a. Climate litigation's main trends

The difference between the direct or indirect application of human rights to environmental matters lies on the weight given to the environment in the case. This can be compared to the categorisation made by the literature on climate litigation according to the role that climate and human rights concerns play in applicant's pleadings.[38]

Climate concerns have been described a being 'central' when climate law or policy is at the heart of climate litigation application. They are 'peripheral' when the application deals with climate change but alongside other matters. Finally, they are described as 'incidental' when climate law or policy is not explicitly mentioned but the matter at stake still concerns emissions, for instance in cases dealing with deforestation.

As for human rights concerns, they are 'central' when the climate litigation application places them at the heart of the case, and 'peripheral' when human rights provisions are used in the climate litigation alongside other sources of law. Human rights concerns are central in all of the four climate cases pending before the ECtHR. This stems from the fact that the petitioners filed their request before an international human rights jurisdiction, and as such can only rely on the ECHR to formulate alleged violations of their fundamental freedoms.

With regard to the role that climate plays in these applications, the literature on the subject has shown that climate concerns tend to be predominantly central in HRCCL. This trend is confirmed before the ECtHR, as 3 out of 4 cases have climate law or policy at the heart of

[38] Savaresi, Annalisa, et Joana Setzer. 'Rights-Based Litigation in the Climate Emergency: Mapping the Landscape and New Knowledge Frontiers', Journal of Human Rights and the Environment, 2021.

their application. Indeed, the cases *Duarte Agosthino*, *Klimaseniorinnen v. Switzerland* and *Mex M. v. Austria* all allege that Respondents have failed to protect their enjoyment of human rights because of their insufficient actions to combat dangerous climate change. Climate law and policy is at the heart of the applications, as the whole litigation strategy for those cases tend to demonstrate that those policies are insufficient. The Norwegian case differs from the others as the litigation focuses on an exploration licence granted for new gas and oil drilling, which would inevitably lead to to further GHG emissions. In this case, climate concerns are peripheral.

2.1.2.b - Human rights dimension of climate litigation

Whether climate concerns play a central or a peripheral role, all the applications are asking the ECtHR to make a direct link between human rights enjoyment and climate change. This request echoes a statement of the Special Rapporteur in which he asserts that « *States have obligations to protect the enjoyment of human rights from environmental harm. These obligations encompass climate change* » [39]. It further developed the content of these obligations based on the ECtHR's case law. The substantive part of the obligations consist of a positive duty for States to adopt and enforce adequate measures, including legislation, concerning climate change, and the negative duties to refrain from authorising activities and from themselves undertaking activities that contribute to human rights violation related to climate change.

The content of this report supports the claims made in the climate lawsuits. It provides legitimacy to the petitioners' demand that States take efficient measures to tackle futur and present harm of climate change. The request that States adopt and implement such measures to combat climate change in the name of the rights to life, to family life and the prohibition of discrimination is central to the strategy of three out of four of the climate cases pending before the ECtHR. Those three cases are the ones for which climate concerns are central. Concerning *Greenpeace Nordic Ass'n v. Ministry of Petroleum and Energy,* the focus is more on the negative duty to prevent human rights violations, that is to say the State's duty to refrain from authorising activities that contribute to human rights violation in relation to climate change.

2.2 - Achieving environmental or climate related interests through the mobilisation of existing procedural human rights

[39] Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment (OHCHR 2016) A/HRC/31/52, § 33.

Through the development of its environmental jurisprudence, the Court has relied more and more on procedural rights and obligations. In a general manner, procedural environmental rights are often concerned with the observance of certain procedures by States before permitting the conduct of activities that may cause environmental harm.[40] But they also fulfil an other function, namely to promote a participatory approach through democracy and informed environmental debates. Procedural rights and obligations can therefore provide an effective way of securing environmental protection. We will first analyse the way the Court has developed procedural safeguards in environmental cases, before surveying the role they might play in climate litigation.

2.2.1 - Application to environmental litigation

Within the framework of the ECHR, such rights and obligation have been interpreting by the Court as stemming from specific procedural provisions (such as Articles 6 and 13) or are revealed from the content of a substantive existing right.

2.2.1.a - Mobilisation of procedural provisions

The Court has considered procedural environmental rights to be part of already established procedural provisions, such as the right to a fair trial (Article 6) and to an effective remedy (Article 13). The right to a fair trial is one of the most litigated rights of the Convention.[41] On a civil limb it entails the right to a reasoned judgment, [42] the right to a fair trial conducted on fair

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[40] Phoebe Okowa, 'Procedural Obligations in International Environmental Agreements' (1997) 67 BYIL 275.

[41] Council of Europe, 'Manual on the Human Rights and the Environment Containing Principles Emerging From the case law of the European Court on Human Rights and the Conclusions and Decisions of the European Committee of Social Rights', 3rd Edition.

[42] ECtHR, *Hadjianastassiou v Greece,* Application no. 12945/87, 16 December 1992.

application of the relevant procedure, [43] the right to access to a court in cases concerning the violation of civil rights [44] and to enforcement proceedings [45].

Applying to environmental matters, the Court has for instance held that Article 6§1 includes the right of landowners to have the government's decision authorising the construction of a railway line on or near their land fully reviewed by a court.[46] In a different context, the Court has ruled that even though Article 6 does not allow *actio popularis*, it is applicable in cases where the litigation is initiated by an association, although of general interest, that also defends the particular interest of its members.[47] However, this Article is not always easy to invoke in environmental cases, in particular because its applicability depends primarily on the content of national law.[48] Furthermore, the criteria establishing the standings of Article 6 for environmental claims are strict. Indeed, the dispute must be '*real and serious*'[49] and there must be a direct link between the environmental project at stake and the applicant's rights.[50] If these thresholds are met, Article 6 may be invoked if the danger reaches a degree of probability which makes the outcome of the proceedings directly decisive for the rights of the concerned individuals.[51]

Article 13 secures the granting of an effective remedy before a national authority to everyone whose Convention rights and freedoms have been violated.[52] In relation to environmental affairs, the Court ruled in *Hatton and Others v. United Kingdom [53]* that the limited scope of review of the excessive noise caused by night flights entailed a violation of Article 13 in the light of Article 8. The case law principles on the right to an effective remedy apply without significant particularity to cases in an environmental context. However, here again, the

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[43] ECtHR, *Al-Dulimi and Montana Management Inc. v. Switzerland*, Application no. 5809/08, 26 November 2013.

[44] ECtHR, *Golder v. the United Kingdom*, Application no. 4451/70, 21 February 1975.

[45] ECtHR, *Kyrtatos v. Greece,* Application no. 41666/98*,* 22 May 2003.

[46] ECtHR, *Karin Andersson et Others v. Sweden*, (Application no. 29878/09, 25 September 2014.

[47] ECtHR, *L'Erablière as bl v. Belgium,* Application no. 49230/07*,* 24 February 2009.

[48] ECtHR, *Association Greenpeace France v. France,* 2011 - Article 6 may be used in environmental matters if there is an infringement of a right guaranteed under national law.

[49] ECtHR, *Kyrtatos v. Greece,* Application no. 41666/98*,* 22 May 2003.

[50] ECtHR, *Balmer-Schafroth and others v Switzerland*, Application no. 50495/99, 26 August 1997.

[51] Ibid, para 40.

[52] Guide on Article 13 of the ECHR - Right to an effective remedy, <https://echr.coe.int/Documents/Guide_Art_13_ENG.pdf> Last update: 31.12.2021.

[53] ECtHR, *Hatton and Others v. United Kingdom,* Application no. 36022/97*,* 8 July 2003.

thresholds have been strictly interpreted by the Court. Indeed, even though it is not necessary for a violation of a right to have been established, the grievance invoked must be an 'arguable' one in terms of the Convention. Yet, this concept has not been defined by the Court as it prefers to evaluate the criteria '*in the light of the particular facts and the nature of the legal issue or issues raised*'[54]. Furthermore, the scope or extent of the field of action of the obligation under Article 13 will vary depending on the nature of the complaint under the Convention,[55] or the nature of the right relied upon[56]. In this respect, it is interesting to note that the Court adopts a stricter approach to the notion of '*effective remedy*' in situations concerning, inter alia, the right to life.[57] This is of interest for environmental litigation as in these cases, applicants may typically seek remedies under Article 13 for alleged breaches of the right to life, the right to respect for private and family life or the right to protection of property.[58]

2.2.1.b - Procedural safeguards stemming from material law

In *Taskin et al v Turkey* and *Giacomelli v. Italy*, the Court held that the right to respect for privacy and family life also includes a right for the individuals concerned to appeal to the courts environmental decisions, act or omission where they consider that their interests or comments have not been given sufficient weight in the decision-making process.[59] This emphasises the importance of the right of access to a court in the context of Article 8, which qualifies the high thresholds of Article 6 by requiring a fair decision-making process in environmental matters. In *Grimkovskaya v. Ukraine*, the Court clarified the scope of this procedural obligation under Article 8. In this case, the applicant had access to an independent complaints authority, but the reviewing of his claimed has been ruled by the Court as prematurely dismissed and not sufficiently reasoned. Hence, the Court found a breach of Article 8. Finally, the procedural

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[54] ECtHR, *Boyle and rice v. The United Kingdom*, Application no. 9659/82, 27 April 1988, § 55.

[55] ECtHR, *Paul and Audrey Edwards v. the United Kingdom*, Application no. 46477/99, 14 Marc 2002, § 96.

[56] ECtHR, *Hasan and Caush v. Bulgaria*, Application no. 30985/96, 26 October 2000, § 98.

[57] ECtHR, *Kayak v. Turkey*, Application 158/1996/777/978, 19 February 1998, § 107.

[58] Council of Europe, Manual on Human Rights and Environment, <https://rm.coe.int/manual-environment-3rd-edition/1680a56197>.

[59] Academy of European Law (ERA), *Participatory and Procedural Rights in Environmental Matters*, Module 4: Access to Justice in international law – Regional international agreements and documents Europe, <https://ec.europa.eu/environment/legal/law/3/module_4_3.htm>

environmental obligation under Article 8 has been interpreted by the Court has including the right to receive information on environmental projects.[60] The Court has been more inclined to use this positive obligation under the framework of Article 8 than to recognise a right to information under Article 10, confirming its reluctance to recognise generic procedural rights related to the environment.[61]

As regard to Article 2, the procedural limb of the provision stems from the recognition by the Court that the right to life entails the obligation to put in place an appropriate legislative and administrative framework including the making of regulations to compel institutions, whether private or public, to adopt appropriate measures for the protection of people's lives.[62] For this right to be efficient, the Court ruled that Article 2 also includes the obligation for the State to ensure an adequate response (judicial or otherwise) to ensure that the legislative and administrative framework established for the protection of life is effectively implemented, so that any violation of the right to life is punished and sanctioned.[63] For instance, in the case *Öneryildiz v. Turkey*, the Court found that Turkish criminal law had not been properly applied following an accident at a waste dump for which the authorities were responsible. The court therefore found a violation of Article 2 in its procedural aspect, because of the absence, in the face of an accident caused in the course of a dangerous activity, of adequate protection by law to safeguard the right to life or to prevent its infringement in the future.[64] Although the breach of the procedural limb of Article 2 may have consequences on the rights protected under Article 13, the Court has specified that these two obligations are distinct and can give rise to independent findings of interference.[65]

The approach taken by the ECtHR to unveil procedural obligations from substantive provisions has been described by some scholars as an '*environmental technical standard approach*', according to which environmental regulation creates rights.[66] Indeed, regulation seems to be one of the main way for the Court to make the link between environmental affairs

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[60] ECtHR, *Guerra and Others v. Italy*, Application no14967/89, 19 February 1998.

[61] Indeed, in *Guerra v. Italy,* the Court found Article 10 on the right to information inapplicable and preferred to discuss this procedural right under the ambit of Article 8.

[62] ECtHR, *Nicolae Virgiliu Tănase v Romania*, Application no 41720/13, 25 June 2019.

[63] *Öneryıldız c. Turquie,* (note 33), § 91

[64] Ibid, §§ 111-118.

[65] ECtHR, Silih v. Slovenia, Application no. 71463/01, 9 April 2009, §§ 153-154.

[66] Gouritin, Armelle (note 24).

and rights. This is illustrated by the case *Tatar v. Romania* [67], in which the Court sanctioned the lack of appropriate regulation from the State to supervise dangerous activities. But this duty does not only apply to dangerous activities. Indeed, in the same case, the Court considered that « *this obligation must be construed as applying in the context of any activity, whether public or not, in which the right to life may be at stake, and a fortiori in the case of industrial activities, which by their very nature are dangerous* ». This duty entails governing the licensing, setting up, operation, security and supervision of the activity.[68] Finally, this regulation must not only exist but also be enforced.[69]

2.2.2 - Application to climate change litigation

2.2.2.a - Access to justice and to effective remedies

The four climate cases pending before the ECtHR have raised procedural human rights obligations developed by the ECtHR in its environmental case law. The right to access to justice has been logically invoked before the Court as the applicants must have previously exhausted all the domestic remedies, which means that lawsuits before national courts have failed. Articles 6(1) ECHR was thus invoked in *Klimaseniorninnen v. Switzerland* and *Max M. v. Austria.* In the first case, the applicants argued that there has been a violation of their right to an effective access to the Court because none of the domestic courts ruled the cases on their merits. It is alleged that the national jurisdictions applied standing requirements '*arbitrarily*' and dismissed the applicants without the case being examined on the substance of the complaint.[70] The national jurisdictions did not, allegedly, assess the vulnerability of the applicants to heat waves or whether Switzerland's legislative and administrative framework is appropriate to protect the applicants' rights. The petition was rejected as the applicants have been considered by the domestic courts as not '*particularly*' affected by the climate crisis.

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[67] ECtHR, *Tatar v. Romania*, Application no. 67021/01, 27 January 2009, § 112.

[68] ECtHR, *Kolyadenko and Others vs. Russia,* Applications nos. 17423/05, 20534/05, 20678/05, 23263/05, 24283/05 and 35673/05, 28 February 2012.

[69] ECtHR, *Öneryildiz v. Turkey*, Application no. 48939/99, 30 November 2004.

[70] *Klimaseniorinnen v. Switzerland*, (note 7), § 61.

In *Max M. v. Austria*, the argument surrounding the invocation of Article 6(1) was similar, as the applicants alleged that the Austrian Supreme Court has had an '*overly formalistic approach*', which did not give the opportunity to examine the merits of the case.[71]

In *Greenpeace Nordic Ass'n v. Ministry of Petroleum and Energy,* Article 6 was not directly alleged. Rather, the applicants mentioned indirectly access to justice through the mobilisation of Article 14.[72] Based on the ECtHR's case law, they emphasised that access to justice should be facilitated for youth and young adults in relation to climate change, in order to secure an effective legal avenue to protect their rights.[73] They further alleged that the reasoning of the Norwegian Supreme Court has shown that 'no prospect of success' is possible for young people in relation to climate cases. Therefore, the young applicants are left with no effective remedy.

Finally, the case of *Duarte Agosthino* does not invoke Article 6 either. This can be explained by the fact that the applicants did not go before the national jurisdictions of the Respondents before ceasing the ECtHR. They asserted that no adequate domestic remedy was 'reasonably available'.[74] Thus, they too raise the issue of access to justice in the context of the climate crisis. In their view, this fundamental notion should be assessed in light of the urgency of the situation (and therefore the limited time) combined with the number of States that are presumed to be responsible for the harm they suffer. The ECtHR is also asked to consider these arguments in the light of the fact that the victims are children, in line with the reasoning of the Norwegian case.

Article 13 was invoked in conjunction with Articles 2 and 8 in the Swiss and Norwegian cases as a logical continuation to the claim that the national courts did not rule the cases on their substance. Consequently, no effective remedy was provided to applicants because the courts refused to consider them as victims of the climate change. The applicants of the *Greenpeace Nordic* case also alleged a breach of Article 13 in conjunction with Articles 2 and 8 because « *the Norwegian Supreme Court's determination that emissions reductions may be deferred to the PDO stage failed to meet the obligation of promptness which guarantees an effective remedy* ».[75]

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[71] Max M. v. Austria, (note 8), § 62.

[72] *Greenpeace Nordic v. Norway*, (note 9), §62.

[73] ECtHR, *Kosa v. Hungary,* Application no. 53461/15, 21 November 2017, § 57

[74] Duarte Agosthino and Others, (note 5), § 62.

[75] Ibid (note 71).

Regarding the case of *Mex M. v. Austria*, the argument concerning Article 13 is the most detailed, as it tries to demonstrate a systemic protection deficit of the Austrian system. Indeed, it is claimed that no effective national remedy is available within the legal system of the applicant regarding its arguable claim before a competent national authority. Consequently, the administration's omission to prevent climate change, as established in the Austrian Climate Protection Act, is argued to be unchallengeable even though infringing the applicant's right, which does not allow the Respondent to be held accountable. Finally, Article 13 is absent of the application of *Duarte Agosthino*, because here again the logic is that this argument be invoked if there has been an earlier unsuccessful procedure before the national courts.

2.2.2.b - Public participation

The Norwegian case is the only one to rely on the procedural obligation stemming from Article 8 to allow for public participation in environmental decision-making. It mentioned the decision-making process of the licensing in relation to the younger generation, who did not participate in the process but will nevertheless have to bear the consequences. The Court is therefore asked to assess the State's margin of appreciation of the licensing decision in the light of the younger generation's interests. The applicants of this case also invoked a breach of the obligation to assess the environmental risks to which individuals could potentially be exposed and make this environmental information public. In particular, they point to the fact that the impact assessment of the licenses did not assess the full climate effects of the future emissions, depriving the applicants of the possibilities to be informed and to participate in the public discourse about new oil and gas drilling and the climate crisis.

This development suggests that a link can be done between the role that climate concerns play in the human rights-based climate cases pending before the ECtHR and the use of procedural human rights obligations. Indeed, the *Duarte Agosthino* case, which embraces the climate issue with the greatest breadth, hardly relies on procedural obligations. On the other hand, the *Greenpeace Nordic* case is the only one for which climate concerns are peripheral, and relies a lot more on procedural obligations. This can be explained because procedural requirements seem more relevant to use to challenge decisions such as the granting of a permit. The logic is quite different in cases such as *Duarte Agosthino*, where the aim is not necessarily

the outcome of the trial but rather the debate that emerges from it, particularly through media coverage.[76] The idea is to make the law evolve in its substantive content.

2.3 - Partial conclusion

This chapter aimed to provide an overview of the ECtHR's approach on environmental matters. It showed that the Court expended the scope of the ECHR by first interpreting Articles 2 and 8 as including a positive obligation to take concrete actions to prevent the encroachment of the right to life or to private and family life in environmental-related situations. Thus, when there is a known, real and imminent threat, such as in the event of a dangerous activity, the State has the duty to take measures to prevent a potential infringement of the rights guaranteed under Article 2 and 8 as far as possible. This guarantee was subsequently supported by the development of environmental procedural obligations, putting an emphasis on the decision-making process related to activities that might have an adverse effect to the environment. In this process, States must strike a fair balance between all the interests involved. The four human rights-based climate litigation applications have drawn heavily on these developments. However, the question remains about how exactly can this jurisprudence be applied to human right-based climate litigation. The next chapter will try to provide an answer by looking at the way the applicants argued their case in order for environmental obligations to apply to climate litigation.

3 - Framing of the substantive human right-based climate cases before the ECtHR

For a situation to be considered an environmental threat likely to violate individuals' rights, it must meet certain thresholds. Hence, the climate litigation strategy before the ECtHR consists of demonstrating that the risks generated by the inaction of States to reduce their greenhouse gas emissions meet those thresholds. In their substantive arguments, applicants relied on Articles 2 and 8 of the ECHR as interpreted by the Court in environmental matters to argue that the absence of efficient mitigation measures constitute a real and serious threat to their right to life and their right to private and family life. This Chapter will first demonstrate that the use of the right to life in the climate applications is more symbolic (3.1), as the applicants greatly focused on the right

[76] Setzer J and Byrnes R (2020) *Global trends in climate change litigation: 2020 snapshot*. London: Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy, London School of Economics and Political Science.

to health developed by the ECtHR in its environmental case law concerning Article 8 (3.2). Hence, as this Article is at the heart of the litigation strategy for climate dispute before the ECtHR, its invocation and application requirements will be discussed in more detail to capture the way they have been apprehended by the climate applicants.

3.1 - The mobilisation of Article 2 ECHR by the climate cases: a more symbolic than strategic contribution

It is now well established in the Court's jurisprudence that the right to life as enshrined in Article 2 ECHR does not only concern deaths directly resulting from agents of the State's action. It also lays down a positive obligation for the States to take appropriate steps to safeguard the lives of the people that are under its jurisdiction.[77] This has been translated by the Court into a positive obligation for States to put in place a legislative and administrative framework designed to provide effective deterrence against threats to the right to life.[78] Thus, whenever a State authorises dangerous activities, it must ensure through a system of rules and through sufficient control that the risk is reduced to a reasonable minimum.[79] This positive obligation has also been recognised by the Court as applying in the event of natural disasters, even though they are as such beyond control.[80]

The climate cases all recalled this obligation and invoke Article 2, except for the Norwegian case. In *Duarte Agosthino*, the applicants argued that the Respondents are breaching their obligation to provide an efficient control to reduce to a minimum the threat to life stemming from emissions that are not regulated enough by the States. It is argued that these emissions contribute greatly to the global warming scenario that leads to more and more recurrent heatwaves. Yet, the heatwaves are a major driver of wildfires, the last of which killed 120 people in Portugal in 2017. In *Klimaseniorinnen*, it is argued that the applicants are more likely to suffer heat related death and die prematurely because of their older age. This risk is argued to be directly linked to climate change, as a temperature rise from 1.5° to 2°C would significantly increase the risk of heat related mortality. According to the petitioners, staying within the Paris

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[77] Manual on Human Rights and the environment, (note 41).

[78] *Oneryildiz v. Turkey*, (note 32).

[79] ECHR, *Mucibabic v. Serbia,* Application no. 34061/07, 12 July 2016.

[80] ECHR, *Budazeva and Others v. Russia*, Applications no. 15339/02, 21166/02, 20058/02, 11673/02, 15343/02, 22 March 2008, § 135.

limit temperature would prevent at least 1550 heat-related deaths per year according to the application. As such, the Respondent is continuously violating these rights by failing to comply with its obligation to take all the necessary measures to protect the applicants effectively, that is to say to do everything in its power to do its share to prevent a global temperature increase of more than 1.5°C. In *Mex M. v. Austria*, the claimant relied on the IPPC's report which sets out clearly that people with chronic diseases face a higher risk a premature mortality due to the climate crisis.

However, it seems unlikely that the Court would find a violation of Article 2 in these three climate cases. Indeed, precedents show that the ECtHR has tended to handle environmental claims under Article 2 ECHR restrictively. The extent of the positive obligation under Article 2 depends on factors such as the harmfulness of the dangerous activities and the foreseeability of the risks to life.[81] This last element is particularly important, and may explain why the Court has been somewhat reluctant to find a violation of the right to life in environmental cases.[82] Indeed, even though this provision has been interpreted as not requiring death to occur,[83] it was still applied in situations of environmental harms where death or at least a mortal health risk occurred. This is evident from the fact that only 6 cases brought under Article 2 have been considered by the Court in environmental cases.[84] In *Oneryildiz v. Turkey*, a methane gas explosion at a public waste disposal site on the outskirts of Istanbul caused a landslide, as a result of which 39 people died, including nine relatives of the applicant. In *Budayeva and Others v. Russia*, several people have also died after the accident at issue. Last but not least, in the case of *Kolyadenko and others v. Russia*, the Court found a violation of Article 2 of the Convention in its procedural aspect on account of the lack of an adequate judicial response by the authorities to the flood that had occurred. Although no deaths was reported, the lives of the applicants had clearly been at risk as a result of a sudden large-scale evacuation of water from a reservoir and the ensuing flooding in the area around the reservoir. Hence, the case law shows that the threshold to trigger the application of Article 2 in environmental matters is high. As a result, as stressed in the Manual on Human Rights and the Environment, « *cases in which issues under Article 2 have arisen are exceptional* ».

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[81] ECHR, *L.C.B. v. the United Kingdom*, Application no. 14/1997/798/1001, 9 June 1998, §§ 37-41)

[82] Theil, Stefan, 'Towards the Environmental Minimum: Environmental Protection through Human Rights', Cambridge University Press, 2021.

[83] *Oneryildiz v. Turkey*, (note 33), §§ 71, 89-90)

[84] Manual on Human Rights and the Environment, (note 41).

Thus, the use of this Article by the climate litigants seems to be more symbolic. This is supported by the fact the applicants focused more on demonstrating the risk that climate change causes to health and well-being rather than an immediate threat to life, as will be further explained in the next part. Moreover, Article 2 is never invoked on its own, but rather in the same column as Article 8. In *Max M. v. Austria*, the provision is even raised explicitly as being subsidiary to Article 8. This is in line with the view of a part of the doctrine that the ECtHR has established Article 2 as l*ex specialis* to Article 8 in its environmental jurisprudence.[85] According to Theil S., the Court engages with the right to life only if the applicant is exposed to a serious threat to his life or is deceased. If the thresholds are not met, then the Court will consider the application under Article 8, which is apparently broader in its scope.

Nevertheless, as highlighted in the Norwegian climate case, « *the reality and urgency of this threat to life and wellbeing must be understood in context of the obligation undertaken in the Paris Agreement ».* An invitation is thus made to the court to possibly extend its jurisprudence on the subject based on international standards. Many Third Parties intervention went along with this line of thought. For instance, in their Amicus Brief to the case Duarte Agosthino, the UN Special Rapporteurs recalled that the ECtHR '*applied and extended the tools and principles of human rights law*' when it opened its doors to environmental cases in the 90s. They believe that the climate crisis and the emerging climate litigation offer a similar opportunity, and that international law supports this. They take the example of the General comment No. 36 of the UN Human Rights Committee, in which it is stated that '*environmental degradation, climate change and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life'.*[86] It is therefore conceivable that the Court will use these observations and arguments to deliver a groundbreaking judgment that would recognise a violation of Article 2 because of the Respondents insufficient actions to take measures to combat climate change. However, it seems more likely that a potential 'success' for the applicants will occur in favour of Article 8.

3.2 - The heart of the climate litigation strategy: Article 8 ECHR

3.2.1 - Article 8 and the right to health

[85] Theil, Stefan, (note 82).

[86] United-Nations Human Rights Committee, General comment No. 36 (2018) on Article 6 of the International Covenant on Civil and Political Rights, UN Doc. CCPR/C/GC/36, 30 October 2018, §62.

As mentioned in the previous Chapter, the Court has developed a jurisprudence according to which severe environmental pollution can affect peoples's well being and the enjoyment of their home to such an extent that it breaches Article 8 of the Convention.[87] The scope of application of this provision can be qualified as broad in environmental cases. Indeed, the Court has not defined precisely the notion of 'private life', which made it possible to deal with a broad range of cases within the ambit of Article 8, going from excessive noise levels from airport,[88] smells and contamination emanating from a waste treatment plant,[89] to toxic emissions from factories,[90] and other similar types of interference. The Court has however recalled that this Article does not provide for a general right to an healthy environment, and remains confined to application concerning individual interference of one's right because of environmental degradation.[91] Hence, rather than providing a general right to the environment, some scholars have noticed that Article 8 has been transformed into a *de facto* right to health. Indeed, many environmental disputes have been dealt with from this perspective, because issues such as waste collection,[92] water supply contamination,[93] industrial pollution,[94] or dangerous industrial activities,[95] have obvious impacts on health.

The climate cases relied heavily on this aspect of Article 8 developed by the Court when framing their application. Indeed, the Applicants alleged that the Respondents are violating Article 8 by failing to comply with their positive obligation to put in place all the necessary measures to fight against climate change, which greatly interferes with their right to private and family life, and more specifically to their right to well-being and health. The negative effects of climate change on health materialise in different ways for the claimants. In the case of *Duarte Agosthino*, where the claimants are young people, it is argued that the increased heatwaves

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[87] ECHR, *Brânduşe v. Romania,* Application no. 39951/08*,* 7 April 2009, § 67.

[88] *Hatton and Others v. the United Kingdom*, (note 53).

[89] *López Ostra v. Spain*, (note 30).

[90] *Guerra and Others v. Italy, (*note 60*)*.

[91] *Kyrtatos v. Greece*, (note 49), § 52.

[92] *Branduse v. Romania*, (note 87).

[93] ECHR, *Dzemyuk v. Ukraine*, Application no. 42488/02, 4 September 2014.

[94] *Lopez Ostra v. Spain* (note 30).

[95] *Őneryildiz v. Turkey*, (note 33).

caused by climate change in Portugal interfere with their « *ability to sleep, exercise and spend time outdoors, and causes them anxiety about its potential impacts* ». One of the reasons for the anxiety that has begun to develop among these young people is that the number of heatwaves in Portugal is projected to increase by 7 to 9-fold by 2100 under the global warming scenario based on the current emissions levels. All this increases the risk of wildfires and fatal illness caused by airborne pollutants that are sensitive to changes in weather conditions and cause a broad range of respiratory health effects. Four of the young applicants already suffer respiratory conditions that can worsen significantly with the adverse effects of climate change.

In *Greenpeace Nordic Ass'n*, the emphasise is also on mental health and the climate anxiety developed by the young applicants, who experience emotional distress and worry greatly about the current and imminent risks of serious climate effects in Norway, and how this will impact their life. In *Klimaseniorinnen*, the petitioners argued that the average annual temperature in their country has increased around 2.1°C since 1864, and that this temperature increase is 3 times faster since 1961. Relying on scientific evidence, they asserted that heatwaves cause many health problems in the elderly, such as dehydration, hyperthermia, fatigue, loss of consciousness, heat cramps and heat strokes. All these medical arguments are based on reports from the Respondent itself. They finally describe how they have been personally affected by the increase in temperature, through means of personnel statements or medical certificates.

In *Mex M. Austria*, it is argued that the applicant is already suffering from the present increase in temperature due to the Uthoff's syndrome, and that he will have to suffer for many more years because his health and well-being are worsening as the Respondent is not taking adequate climate policies. The applicant also invokes the fact that his personal dignity is at stake, as every time the temperature goes beyond 25°C, it greatly impacts his physical ability to move around freely and to lead a self-determined and non-isolated private life in dignity. Thus, it is argued that the adverse effects of the climate crisis constitute a real and serious risk to the applicant's physical, psychological and moral integrity.

3.*2.2 - Admissibility requirements of Article 8*

For an issue to arise under Article 8 in environmental cases, the environmental nuisance must directly and seriously affect an individual's wellbeing.[96] Two things will therefore be verified by

[96] *Taşkın and Others v. Turkey,* judgment of 10 November 2004, § 113

the Court once it receives this type of claim. First, whether a causal link exists between the activity and the harm claimed by the applicant. Second, whether the adverse effects of the activity meet a certain threshold of harm. This assessment is not based on an exhaustive list of criteria, but depends on many factors such as the context, the duration and intensity of the nuisance, or the physical and mental health impacts of the applicants.[97] The next subsection will examine the way the applicants of the climate cases have taken these criteria into account when framing their application and the obstacles that may arise.

3.2.2.a - The causal link

The heart of the applicants' arguments in climate cases consists in demonstrating that a clear link exists between climate change and the adverse effects they feel on their well-being and their health. Yet, two obstacles may arise during the review of the merits of this argument by the Court: on one hand, the attribution of a particular source of emissions on specific climate-related harm, and on the other hand, the specific time scale of climate change. These hurdles can nevertheless can nevertheless be overcome based on the Court's jurisprudence.

With regard to the first hurdle, the doctrine has regularly stated that one of the biggest difficulties in litigating climate cases is the challenge of proving causal links between specific state actions or lack of action, climate change, and the resulting specific harm to individuals.[98] The difficulty arises because the effects of pollution caused by GHG emissions occur in a diffuse period of time, but also in a transboundary context with multiple actors. The issue touches upon the relationship between climate science and climate litigation.[99] Yet, if the most recent academic literature focuses on assessing the scientific and legal bases for establishing causation, this work has only recently emerged and fills a gap in the academic literature on the subject.[100]

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[97] ECHR, *Fadeyeva v. Russia*, Application no. 55723/00, 9 June 2005, § 69; ECHR, *Borysiewicz v. Poland*, Application no. 71146/01, 1 July 2008, § 51.

[98] C. Williams and G. Macnaughton, 'Health Rights and the Urgency of the Climate Crisis', Health and Human Rights Journal, December 2021, 75-79; Burns, W. C. G., & Osofsky, H. M., 'Adjudicating Climate Change State, National and International Approaches' Cambridge, MA: Cambridge University Press, 2009.

[99] Setzer, Joana, et Lisa C. Vanhala. 'Climate Change Litigation: A Review of Research on Courts and Litigants in Climate Governance', *WIREs Climate Change* 10, 2019. https://doi.org/10.1002/wcc.580.

[100] Marie-Bénédicte Dembour, 'Proving a Causal Link in Climate Change Litigation', Human Rights Centre. https://hrc.ugent.be/thesis/proving-a-causal-link-in-climate-change-litigation-2/.

Applicants of the climate cases before the ECtHR have used many climate scientific reports in the framing of their lawsuit, such as the IPCC's 2018 Special Report on Global Warming of 1.5°C, the UN Environment Programme's (UNEP) 'Emissions Gap 2019' report, or reports more specific to the domestic situation.[101] Although engaging with science is a complex process for judges,[102] the ECtHR has often relied on scientific reports on environmental matters and has recalled that the interpretation and application of the ECHR must take into account scientific research and generally accepted standards.[103] In *Cordella on Others v. Italy*, the Court recognised the existence of a causal link between emissions from a steel factory and health risks in surrounding community based on the scientific reports. An analogy can be made between this case and the climate applications. Indeed, it might be difficult for the Court to find a direct causal link between the State's GHG emissions and the alleged risks to the physical and mental health of the applicants. However, many scientific reports - way more than in *Cordella*, are available and crystal clear about the impacts of emissions on health, specifically for the most vulnerable groups.[104] Furthermore, some of these scientific studies can be considered as generally accepted standards.[105] Indeed, on one hand, States have ratified Treaties such as the UNFCCC or the Paris Agreement, and thus explicitly recognise the scientific consensus on the impacts and cause of climate change. On the other hand, the causality established by science has been recognised by some of the highest domestic courts of the Council of Europe, such the Supreme Court in the Netherlands and the German Constitutional Court.[106]

The second hurdle highlighted by the doctrine with regard to causality in climate litigation concerns the time scale. In the cases at hand, the applicants are arguing that they are suffering from adverse effects at the present time but also that those effects will worsen over

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[101] See, e.g., the Climate Analytics report in Duarte Agosthino 'Climate Impacts in Portugal'.

[102] Lima, L. C., 'The evidential weight of experts before the ICJ: Reflections on the whaling in the Antarctic case', Journal of International Dispute Settlement, 2015.

[103] See, e.g., ECtHR, *Rees v the United Kingdom,* Application no. 9532/81, 17 October 1986, § 47; ECtHR, *Öneryildiz v Turkey* Application no. 48939/99, 30 November 2004, §§ 59, 71, 90 and 93.

[104] 'Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment', A/74/161, 15 July 2019.

[105] Generally Accepted Standards are standards which the Court consider to be common to all Member States with regard to international conventions, national legal frameworks, legal principles specific to each State, etc. Mamic-Sacer, Ivana, 'The Regulatory Framework of Accounting and Accounting Standard-Setting Bodies in the European Union Member States', Financial Theory and Practice, 39(4), 2015, 393–410.

[106] Respectively the case *Urgenda (Urgenda Foundation v. The Netherlands C/09/456689 / HA ZA 13-1396);* and the case *Neubauer and Others* (Federal Constitutional Court of Germany, 1 BvR 2656/18, 1 BvR 288/20, 1 BvR 96/20, 1 BvR 78/20, 24 May 2021).

time if the Respondents do not take the necessary measures. Hence, they are talking about a harm that is both present and future. This is what Hilson has described as a tension between a future-looking scientific time frame and an environmental policy-based framing of time, which is present focused.[107] In the first time frame, the dangerous effects of climate change have yet to occur and are still in the '*modelled*' future. This can be difficult to translate into legal terms. Yet, one can observe that the ECtHR has shown flexibility regarding the demonstration of a direct causal link between the environmental harm and its adverse effects in the light of a particular time frame.[108] Indeed, in the case *Taskin v. Turkey*, the Court has admitted the idea that petitioners could bring cases based on a reasonable hypothesis of harm which may be satisfied through future harm, in particular where the potential consequences are serious and irreversible.[109]

Finally, this tension in time frame described by Hilson can be solved through the application of the precautionary principle. According to the precautionary approach, where their are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.[110] Consequently, States must act with due caution to prevent future possible damage. Applicants of the climate applications have called upon the Court to interpret the Respondent's obligations under Article 8 in the light of those principles, just like it did in the case of *Tatar v. Romania,* highlighting that the scientific community has established the real and serious risks of the climate crisis, and that the Respondents are perfectly aware of these risks. In *Tatar*, the Court recalled the importance of the precautionary principle, which is « *intended to apply with a view to ensuring a high level of protection of health, consumer safety and the environment in all activities of the Community* ».[111] However, the precautionary emphasis developed in this ruling has not been further developed by the ECtHR. This has led some academics to believe that the

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[107] Hilson, Chris, 'Framing Time in Climate Change Litigation' (May 16, 2018). Oñati Socio-Legal Series, Forthcoming, Available at SSRN: https://ssrn.com/abstract=3179384.

[108] *López Ostra* v. *Spain* App no 16798/90 (ECtHR, 9 December 1994) [51]; *Taskin and others* v. *Turkey* App no 46117/99 (ECtHR, 10 November 2004); *Fägerskiöld* v. *Sweden* App no 37664/04 (ECtHR, 26 February 2008) [1]; more recently see *Maempel and Others* v. *Malta* App no 24202/10 (ECtHR, 22 November 2011) [36]

[109] ECtHR, *Taskin and others v. Turkey*, Application no. 46117/99, 10 November 2004, §§ 113 and 126.

[110] Report of the United Nations Conference on Environmental and Development (Rio Declaration), A/CONF.151/26 (Vol. I), 12 August 1992, Principle 15.

[111] *Tatar v. Romania,* (note 67), §120.

Court achieved its end point about how far it was willing to carry the development of environmental protection under the Convention.[112]

Perhaps the emergence of the climate litigation before the Court could reinvigorate the use of the precautionary approach. Indeed, precedent case law from the ECtHR have shown that in order for the precautionary principle to apply, the Court requires at least that scientific studies support the fact that a certain activity can be harmful to health and the environment.[113] In the case of climate litigation, there is no shortage of reports on the subject. This application of the precautionary principle to climate litigation has been supported by numerous Third Party Interventions to the climate cases.[114]

3.2.2.b - Minimum level of severity of the alleged violation

The second application requirement of Article 8 concerns the minimum threshold of harm regarding the adverse effects of the environmental harm. In *Grimkovskaya v. Ukraine*, the ECtHR recalled that the environmental hazard at issue must attain a level of severity which result in a « *significant impairment of the applicant's ability to enjoy her home, private or family life* ».[115] Yet, if it is clear that the adverse effects must attain a minimum threshold, the criterion has not been clarified much further. Indeed the Court has stated that « *the assessment of that minimum is relative and depends on all circumstances of the case, such as the intensity and duration of the nuisance and its physical or mental effects, as well as on the general environmental context* ».[116]

In the case of *Klimaseniorinnen*, applicants argued that the real and serious risk to their rights should be assessed taking due account of the recurring heatwaves and their consequences on health, the medical evidence that the applicants have already suffered harm and, above all, the findings of the IPCC. The Norwegian climate case, on the other hand, evokes « *an ecological*

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[112] Pedersen, Ole W. 'The European Court of Human Rights and International Environmental Law'. In *The Human Right to a Healthy Environment*, Cambridge University Press, 2018. https://doi.org/10.1017/9781108367530.005.

[113] ECtHR, *Luginbühl v. Switzerland*, decision of 17 January 2006.

[114] See e.g. the UN Special Rapporteur's intervention to the case of Duarte Agosthino which emphasised that '*The precautionary principle is particularly important in relation to the climate crisis, given the IPCC warning that 'pathways that overshoot 1.5°C run a greater risk of passing through 'tipping points', thresholds beyond which certain impacts can no longer be avoided even if temperatures are brought back down later' '*.

[115] ECtHR, *Grimkovskaya v. Ukraine*, Application no. 38182/03, 21 July 2017, § 58.

[116] *Fadeyeva* v. *Russia,* (note 97), *§§* 68–69.

risks that reaches a level of seriousness which significantly diminishes the applicant's ability to enjoy their home and wellbeing ». It further notes that this already serious violation of the applicant's rights will increase if licences for new oil and gas drilling are issued, and that the notion of seriousness must be read in light of the Paris Agreement.

As the ECtHR assesses the minimum threshold on a case-by-case basis, without a predefined method, it is difficult to make a prognosis of how the court will interpret these arguments and whether or not it will accept them. However, one can observe that the Court has been rather flexible with engaging Article 8 when there is at least some evidence of a link between the harmfulness of an environmental harm and the health of the applicants, specially when authorities have failed to implement the national environmental regulations.[117] Two observations can be made from this finding.

First of all, as already mentioned, there is no shortage of reports establishing the dangerousness of climate change-related health effects, and the applicants have addressed them in their application. The applicant of the Austrian climate case has for example argued that when signing the Paris Agreement, the Parties recognised the IPCC as '*the scientific authority*' concerning global warming science. Yet, its scientific reports are clear about the seriousness of the adverse effects on health if the limits set by the international climate change regime are not respected.[118]

Second of all, if most national laws of the Respondents do not establish clear regulations about what States should do regarding the mitigation of climate change, the latter nevertheless have clear commitments in this respect under international law. Indeed, all the Respondents have ratified the Paris Agreement, which contains specific obligations to reduce emissions. Among other things, States must « *reach global peaking of greenhouse gas emissions as soon as possible, recognising that peaking will take longer for developing country Parties* ».[119] But as pointed out by the applicants of the case *Duarte Agosthino*, governments worldwide - but with a

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[117] See e.g. ECtHR, *Dubetska and Others v. Ukraine*, Application no. 30499/03, 10 February 2011, where the Court found a violation of Article 8 by the competent authorities because of chronic health problems of the applicants living in a rural area surrounded by a coal mine and a factory. Even though the Court recalled that industrial pollution is likely to negatively affect public health, it was very hard to assess its effects on each individual. Yet, the Court found a breach of Article 8 based on the legislative framework which provided for a minimum distance between factories and residences, and which had not been respected.

[118] See e.g. IPCC, Sixth Assessment Report, *Climate Change 2021: The Physical Science Basis,* 6 August 2021. <https://www.ipcc.ch/report/sixth-assessment-report-working-group-i/>

[119] Paris Agreement, Article 4(1).

great part coming from the Respondents of the case, are planning to produce about 50% more fossil fuels by 2030 than would be consistent with a 2°C target.

These commitments were made with the aim of stabilising greenhouse gas concentration in the atmosphere at a level that would prevent « *dangerous anthropogenic interference* » with the climate system.[120] Yet, many officials reports demonstrate that the objectives set by the successive Treaties to implement this framework Convention are far from being met, jeopardising the main goal set in Article 2, in which the word « dangerous » has been used on purpose, with full awareness and knowledge. While the use of this word is not exactly specific to health effects, it could nevertheless appear difficult for the defendants to contest the fact that the adverse effects of emissions that continue to be emitted by States are not serious enough for Article 8 to be applicable.

Nevertheless, one more thing must be looked at concerning the applicability and a potential infringement of Article 8. Indeed paragraph 2 of this provision states that the obligation of States not to take measures which interfere with the right to respect for private and family life is not absolute. Indeed, a certain margin of appreciation is left to States to implement the ECHR. The last subsection will look at the role of the margin of appreciation doctrine in climate litigation.

3.2.3. The margin of appreciation in climate litigation: a possible justification for the State's interference

The Convention provides that any infringement of Article 8 remains open to justification, provided that the interference is « *in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, of for the protection of the rights and freedoms of others* ».[121] It follows that an interference with Article 8 can be be justified if it is provided for by law and follow a legitimate aim in a proportionate way. In other words, a fair balance must be struck between the interest of the community and the person involved.

When reviewing this fair balance, the Court will take due account of the margin of appreciation left to the States to implement the Convention. The margin of appreciation stems

[120] United Nations Framework Convention on Climate Change (UNFCCC), Article 2.

[121] ECHR, Article 8(2).

from the principle of subsidiarity, according to which States are sometimes in a better position than international judges to rule on certain subjects.[122] The review of the Court takes place in two phases and has been detailed in the case *Giacomelli v. Italy*.[123] First of all, the Court assesses the substantive merits of the State's decision to authorise a particular activity to ensure that it is compatible with Article 8. Secondly, it focuses on the decision making process, in order to assess whether the individual's interest has been taken into due consideration.

3.2.3. a - Margin of appreciation and separation of power

The extent to which States enjoy a wide margin of appreciation in the climate cases is a central question. What is at stake is the determination of the amount by which emissions must be reduced. This matter has often been associated with the issue of the separation of powers, and is thus a sensitive issue. This has been highlighted in the Norwegian case, where the Norwegian Supreme Court had insisted on the margin given to the government's action: it argued that the judge's review must take into account the societal considerations underlying the environmental encroachment and the societal costs of the measures taken in response. In its view, this requirement stems from democratic considerations relating to the separation of powers, which were highlighted during the parliamentary debates and by the preparatory work on Article 112 of the Norwegian Constitution. Hence, the Court had made it clear that it envisaged a lesser degree of control over decisions of the executive or Parliament than in the case of subordinate administrative authorities.[124] This type of ruling is, according to Professor Pederson, one of the reason why so far, European domestic courts have not been able to provide adequate remedies with regard to inadequate climate mitigation policies. It is interesting to note that according to him, even the Dutch Supreme Court in the landmark Urgenda case responded to a '*separation of powers-type of considerations*', which has led the Court to endorse the lowest end of the equity range. In his view, if this judgment is taken as a model at the European level, it will be impossible to stay below the temperature limits set by the Paris Agreement.

3.2.3.b - Arguments for a narrow application of the margin of appreciation

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[122] ECtHR, *Handyside v UK*, Application no. 5493/72, 7 December 1976.

[123] ECtHR, *Giacomelli v. Italy*, Application no. 59909/00, 2 November 2006, § 79.

[124] A. Dylio, '21 Greenpeace Nordic Ass'n et Nature and Youth c. Ministry of Petroleum and Energy (2018-2020)'. <https://dice.univ-amu.fr/sites/dice.univ-amu.fr/files/public/1221-le_dylio.pdf>

The applicants of the climate cases before the ECtHR argued for a narrow application of the margin of appreciation.[125] According to them, nothing can justify the Respondents' omissions to protect from the adverse effects of climate change. It follows that the margin of appreciation doctrine should not be read as allowing a broad discretion to States in the context of climate change mitigation.

Applicants of the case *Duarte Agosthino* argued that as the States' obligations under Article 2 and 8 ECHR must be read in light of the temperature goals of the Paris Agreement, an interference with such an objective can not be considered '*necessary in a democratic society*'. Hence, as highlighted in the case *Klimaseniorinnen*, the Respondents' margin of appreciation should be limited to determining the choice of means that must be taken to fulfil their duty to protect. The two other climate cases have adopted a similar line of argument on this fundamental question, highlighting that the Paris Agreement provides for a clear European consensus, which does not allow a wide margin of appreciation.[126]

The applicant of the Austrian case goes even further by alleging that the Respondent has misapplied its margin of appreciation by committing a '*manifest error of appreciation*' in its choice of means to tackle the climate crisis. Concerning the fair balance, the applicant found that there is no conflict of interests between the general interest of the community and the petitioner's protection of rights, as the « *Respondent's protection is essential for society as a whole and of primary importance* », using the ECtHR's formula in the case Oneryildiz v. Turkey.[127]

This line of argument was reiterated in the Amicus Brief submitted by the UN Special Rapporteur on human rights and the environment in the case *Duarte Agosthino*. Indeed, after highlighting that climate change litigation will necessitate some adjustments to the Court's approach to environmental cases, David R. Boyd stated that « *In climate cases, the interests of the individual and the community are not competing. Both the individual and the community share a common interest in a safe climate system* ». He concludes that a new yardstick is necessary for the Court to assess whether States have properly implemented their positive obligation to protect the individuals from the adverse effects of the climate crisis. Indeed, the yardstick used so far by the ECtHR for the margin of appreciation follows from the case *Hatton v. UK*, in which the Court stated that the extent of the interference was to be appreciated in light

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[125] Paul Clark, Gerry Liston, Ioannis Kalpouzos, 'Climate change and the European Court of Human Rights: The Portuguese Youth Case', October 6, 2020. <https://www.ejiltalk.org/climate-change-and-the-european-court-of-human-rights-the-portuguese-youth-case/>

[126] N. Vogiatzis, 'The relationship between European consensus, the margin of appreciation and the legitimacy of the Strasbourg Court', European Public Law (2019) 445.

[127] *Oneryildiz v. Turkey*, (note 33), § 89.

of the competing economic interests at stake. Yet, in the context of climate change litigation, one can hardly see how such an argument could ever justify a non-alignment with the temperature target of the Paris Agreement. In effect, the serious and irreversible effects that this would generate can hardly be deemed as necessary in a democratic society. The question of the margin of appreciation finally shows once again that climate litigation will be a real challenge for the ECtHR.

3.3 - Partial conclusion

This chapter provided an insight into the substantive arguments raised by the applicants to frame their application in order to pursue climate objectives. It argued that Article 2 has been mobilised, but it seems unlikely that the climate applications reach the high standards necessary to find a violation of the right to life in an environmental context. This would require an innovative and proactive approach by the Court. The applicants relied more heavily on Article 8, and more specifically on the implicit right to health developed by the Court through its environmental case law, to try to demonstrate the serious damage caused to their fundamental rights by climate change. Chapter 3 showed that the originality and difficulty of this new litigation lie mainly in establishing a causal link between the harm suffered and greenhouse gas emissions. It will also be interesting to see how the court deals with the question of the margin of appreciation as to the fair share.

While these cases will certainly challenge the Court's well-established environmental case law in its substantive aspect, this is all the more true for the admissibility requirements provided for by the Convention, which the Court has to review before it can rule on the merits. The next chapter will focus on three of those procedural criteria, namely the exhaustion of domestic remedies, the victim status and the jurisdiction. Their study will help to address the question of whether the scope of the ECHR can provide the applicants the legal remedies to challenge climate inaction.

4 - Admissibility requirements under the ECHR: what scope for legal remedies in climate litigation?

Courts do not operate in an open space but have to apply the law, and in particular their own procedural rules. Yet, the admissibility requirements enshrined in the ECHR can constitue

hurdles in climate litigation. In its Third Party intervention to the case *Duarte Agosthino*, the European Commissioner considered that « *the extraordinary nature of climate change, and the resulting human rights challenges, create a need to adapt the protection offered by the Convention* ».

Procedural aspects of the climate lawsuits are important to study in detailed because the specific and unprecedented characteristics of the climate crisis (such as the fact that it is a global, large-scale and spread out issue) can, and already are, a barrier to accessing justice. Yet, many people feel truly affected in their fundamental rights by States' omissions to adopt effective measures. The role of the Court is to respond to the claim of any violation from the ECHR, in order to best protect the human rights enshrined in the Convention. Thus, there is a pressent need to foresee the legal avenues for the applicants of human-rights based climate litigation before the ECtHR, in order to assess whether the Convention is able to provide the legal remedies to climate litigation.

This Chapter will look consecutively at the exhaustion requirement (Article 35 ECHR), the victim status (Article 34), and finally how to deal with the Convention's territorial scope in the context of climate change, that is to say the issue of jurisdiction (Article 1 ECHR).

4.1 - The exhaustion of domestic remedies

The exhaustion of domestic remedies is a fundamental principle of international law which requires an applicant to attempt to resolve issues using national mechanism before turning to international tribunals.[128] For what concerns the ECHR, Article 35 § 1 provides that « *The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law* ». The rational for the exhaustion requirement is that the ECtHR is subsidiary to the national systems in the safeguarding of human rights. Accordingly, national courts should primarily have the opportunity to review questions regarding the compatibility of domestic law with the Convention.[129] It is based upon the presumption that an effective legal remedy will be provided by the national systems if a violation of the Convention occurs, which is reflected in Article 13 of the Convention. Although this

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[128] Professor Helen Keller, Lecture 'Climate Change in Human Rights Courts: Overcoming Procedural Hurdles in Transboundary Environmental Cases', 2021. <https://www.youtube.com/watch?v=PyIw3HDHFcE&t=2591s>

[129] ECtHR, *A,B and C v. Ireland*, Application no. 25579/05, 16 December 2010.

admissibility requirement appears strict at first glance, given that it is the most frequent ground of rejection of applications from the ECtHR,[130] the latter nevertheless enjoys a large discretion on how to apply this requirement and has shown flexibility through the development of exceptions in its case law.[131]

4.1.1 - Climate applications and the exhaustion requirement

The exhaustion requirement seems to be fulfilled for three of the four climates cases pending before the ECtHR. In Klimaseniorinnen, the applicants brought the proceeding before the Federal Council, the Federal Administrative Court, and finally went before the Swiss Federal Supreme Court. It took them three years to go through this proceeding. The applicant of the case Mex M. v. Austria received the final decision of the Austrian Supreme Court on October 12, 2020. As for the applicants of the case Greenpeace Nordic Assn', their lawsuit was heard by the Oslo District Court, the Bogarting Court of Appeal and finally by the Norwegian Supreme Court. However, in the case of Duarte Agosthino, applicants went directly before the ECtHR, without going before national jurisdictions. They argued that given the urgency of the situation, requiring that their case be brought before every court in the 33 Respondent States would not be reasonable nor in line with the ECtHR's case law. Indeed, the Court has repeatedly held that the exhaustion requirement should not impose an unreasonable burden on the applicant. In line with this view, the Court has developed exceptions with regard to this admissibility requirement. Although not yet established in the climate context, two of those exceptions could apply in the innovative case of Duarte Agosthino.

4.1.2 - Legal avenues to the exception of the exhaustion requirement

4.1.2.a - The issue of effective and available national remedies

The first exception stems from the case Aksoy v. Turkey, where the Court stated that the applicant can only be required to exhaust all national remedies if they are '*effective*' and

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[130] See statistics on the subject: <https://www.echr.coe.int/Pages/home.aspx?p=reports&c=>

[131] ECtHR, *Ringeisen v. Austria*, Application n°2614/65, 16 July 1971; ECtHR, Decision as to the admissibility of *Kenneth Lehtinen against Finland*, Application no. 39076/97, 14 October 1999.

'*available*'.[132] This means that remedies must be accessible and capable of providing redress to the applicants, which according to the Court's case law mean offering reasonable prospects of success.[133]

The capability of proving redress for the domestic remedies in Duarte Agosthino is easily questionable. Indeed, as mentioned in their application, « *the adequacy of the remedy at the domestic level for the Respondents' combined contributions to the risk of harm for climate change is contingent upon every one of their domestic courts providing an adequate remedy in relation their own State's contributions* ». Yet, as pointed out in the Third Party intervention by Climate Action Network, not all the Respondent provide the legal remedies to challenge a GHG emission reduction target. Indeed, if States such as Belgium, Germany or Ireland have such target enshrined in a legislative act and offer direct access to court review (but with very strict standing requirements), other States such as France, Italy or Poland hardly provide for such remedies. Indeed, the targets are either enshrined in general executive act, which are very difficult to challenge, or in a political declaration, which courts can hardly review. It follows that applicants have very little chance of having their application accepted at the first attempt in all state jurisdictions. Moreover, in the cases where legal remedies are the 'most available', it would take a long time, which runs counter to the urgency of the situation.

4.1.2.b - Consideration of the general context

The Court has recalled on various occasions that the rule of exhaustion is neither absolute, nor meant to be applied automatically.[134] Article 35 must be applied with « *some degree of flexibility regarding the general legal and political context in which the formal remedies operate, as well as the personnel circumstances of the applicant* ».[135] Applicants have raised the fact that they are young adults and children, and that therefore they do not have a lot of means. Requiring them to go to every court in each of the 32 states would impose them an 'unreasonable or

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[132] ECtHR, *Aksoy v. Turkey*, Application no. 21987/93, 18 December 1996, §52.

[133] ECtHR, *S.A.S v. France*, Application no. 43835/11, 1 July 2014, § 61.

[134] ECtHR, *Kozacioglu v. Turkey*, Application no. 2334/03, 19 February 2009, §40.

[135] ECtHR, *Akdivar and Others v. Turkey,* Application no. 99/1995/605/693, 1 April 1998, §§ 68-69; ECtHR, *Khashiyev and Akayeva v. Russia*, Applications nos. 57942/00 and 57945/00, 24 February 2005, §§ 116-17.

disproportionate burden'. Yet, the Court has recalled many times that the principle of exhaustion ought not to be applied in a manner that would impose such a burden.[136]

4.1.2.c - Special circumstances stemming from 'generally recognised principle rules of international law'

Lastly, the Court has recalled in the case *Demopoulos and Others v. Turkey* that there can be special circumstances where applicants are absolved from the exhaustion requirement, which stem from the '*generally recognised principles rules of international law*'.[137] Two of them could apply to the case *Duarte Agosthino*.

The first circumstance stems from the situation where national authorities have remained totally passive in the face of serious allegations of misconduct or infliction of harm by State agents. In the climate context, such a conduct could be argued to occur from the States, as their failure to address the climate crisis and to protect from the great harms that follow could be recognised as serious misconduct. The Court could recognise that a situation where states completely ignore the threats of climate change, and where its laws and policies even contribute to exacerbating the situation, does indeed constitue a special circumstance of such a nature as to exonerate the applicants from having to comply strictly with the exhaustion requirement.

The second exemption that arises out of special circumstances is where a government has adopted a practice that is incompatible with the Convention, and where proceedings to challenge the practice would be futile, ineffective, or constitue an unreasonable burden. The Court has described such a practice as one consisting '*of an accumulation of identical or analogous breaches which are sufficiently numerous and interconnected to amount not only to isolated incidents but to a pattern, or a system*'.[138] Here again, one could argue that such an exemption apply. Indeed, the continuing failure of the Respondents to reduce their carbon footprint could be deemed as enough to demonstrate a pattern of violation. Furthermore, one could argue that Respondents have a pervasive system in place that provides for tax breaks and other advantages

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[136] ECtHR, *MacFarlane v Ireland*, Application no 31333/06, 10 September 2010, §124; ECtHR, *Gaglione and Others v. Italy*, Application no. 45867/07, 21 December 2012, §22.

[137] ECtHR, *Takis Demopoulos and Others*, Application no. 46113/99 19, 1 March 2010.

[138] Lecture Professor Helen Keller, (note 128).

to fossil fuel companies whereas economists has shown that removing certain subsidies can have immediate effects on the reduction of greenhouse gases.[139]

4.1.3 - A pressing need for flexibility for the younger generation

Their are legal avenues for overcoming the procedural hurdle of the exhaustion requirement in the case Duarte Agosthino if the Court is willing to take a pro-active approach and build on its jurisprudence to adapt this criterion to the specificities of climate litigation. Adaptation and flexibility seems necessary to move forward with climate litigation. Indeed, a similar petition was brought before the UN Committee on the Rights of the Child by children arguing that five countries belonging to the G20 are violating their rights to life, health, and culture under the Convention on the Rights of the Child by failing to reduce their greenhouse gas emissions to levels that would limit global warming to 1.5°C.[140] Yet in a frustrating decision, the Committee accepted the merits of most of the substantive arguments, but nevertheless dismissed the case on the ground that the applicants must first exhaust all the national remedies. Despite ignoring the fact that in most of the Respondent countries foreign litigants are denied the right to bring environmental claims, this decision condemns these children to spend most of their youth fighting in court for a cause that is beyond them. This cannot be an enduring prospect, the international courts must restore balance in this fight that is already extremely asymmetric, and this involves adapting procedural criteria to the urgency of the situation.

4.2 - The victim status

Article 34 ECHR stipulates that the Court may receive applications from anyone alleging to be the victim of a violation of his or her rights protected by the Convention because of one or more of the High Contracting Parties. Case law has clarified that the victim must be '*directly concerned by the situation and have a legitimate personal interest in seeing it brought to an end*'. Applicants of climate litigation are often faced at the domestic level with the statement that they do not have standing. Indeed, many national jurisdictions have argued that climate change is

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[139] Shelagh Whitley, 'Time to change the game: fossil fuel subsidies and climate change', Overseas Development Institute, 2013.

[140] Communication to the Committee on the Rights of the Child, Chiara Sacchi and Others v. Argentina, Brazil, France, Germany and Turkey, 23 September 2019. <https://childrenvsclimatecrisis.org/wp-content/uploads/2019/09/2019.09.23-CRC-communication-Sacchi-et-al-v.-Argentina-et-al.pdf>

a global phenomenon which affects everyone, and thus no one directly or particularly. The notion of victimhood within the meaning of Article 34 has a substantive component that has already been addressed in Chapter 3.[141] Here, the focus is on the admissibility component of the standing requirement, which I will argue entails two specific legal issues in the context of climate litigation, namely the large-scale characteristic of climate change and the standing of NGOs.

4.2.1 - The large-scale characteristic of climate change

In its third party intervention to the case *Klimaseniorinnen*, the European Network of National Human Rights Institutions (ENNHRI) summarised the complexity of recognising the status of victim for climate litigation claimants. It observed that « *it requires a bit of conceptual imagination to argue that one is personally affected by a State's failure to take measures against large-scale threats in the absence of a specific harmful past event. But it is legally possible.* ».[142] Faced with this dilemma, domestic courts have had different reactions. In the Swiss case, the national jurisdictions argued that the applicants had no standing because they could not prove that they were 'directly' affected by climate change, as it is a global phenomenon that affects everyone. However, the German Constitutional Court adopted the opposite view in its landmark case *Neubauer*, in which it stated that "*the mere fact that very large numbers of people are affected does not exclude persons from being individually affected in their own fundamental rights* ».[143]

The real challenge is that in climate litigation, the line is hard to draw between securing the protection of fundamental rights and leave the door open for *actio popularis*, which refers to public interest litigation, that the ECtHR has always dismissed.[144] But this problem was already inherent to environmental cases (even if to a lesser extent), and it did not prevent the Court from being flexible in some cases. Hence, in *Cordella v. Italy*, the Court showed willingness to go beyond the limited interpretation of the notion of victim in environmental cases, and granted

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[141] See the part about causality in climate litigation (2.2.a) and more specifically note 33 (*Taskin v. Turkey*, in which the Court admitted the idea that petitioners could bring cases based on a reasonable hypothesis of harm which may be satisfied through future harm).

[142] Evelyn Schmid, 'Victim Status Before the ECtHR in Cases of Alleged Omissions: the Swiss Climate Case', 30 April 2022, EJIL: Talk!. <https://www.ejiltalk.org/victim-status-before-the-ecthr-in-cases-of-alleged-omissions-the-swiss-climate-case/>

[143] Federal Constitutional Court of Germany, *Neubauer and others v. Germany*, §§ 110 and 130.

[144] See e.g. ECtHR, *Di Sarno et Autres c Italie*, Application no. 30765/08, 10 January 2012, § 81.

victim status to a large number of people in a polluted area.[145] As explained in the precedent Chapter, the Court based its ruling on scientific evidence. This method can easily be replicated in the context of climate change, although in practical terms, this means potentially granting victim status to a very large number of people. It is however interesting to note that the Court has stated in a case that involved mass surveillance that the status of victim can not be undermined, for the purpose of Article 34, by the mere fact that numerous others will likely suffer similar effects, and therefore will benefit from the decision that the applicants pursue.[146]

In the climate context, opening such a Pandora's box can lead to consequences that are difficult to manage, because the Court may find itself overwhelmed by a large number of applications. However, it seems complicated for the Court to hide behind the large-scale argument and argue that no fundamental rights are being violated, merely because the scale of the challenge is too big.[147] This has led some academics to argue that the way out for the Court may lie in the evolution of the standing of NGOs, in order to bundle the applicants and claims, and at the same time facilitate some of the procedural hurdles for the applicants.[148]

4.2.2 - A way forward: the evolution of the standing requirements for NGOs

The standing of associations concerns mainly the Swiss case, which application « *concerns violations of the human rights of an association of older women and four individuals women* », and the Norwegian case, brought by six young Norwegians and two organisations « *whose members' lives, health and well-being are directly affected by the escalating climate crisis* ».

The victim status for NGOs has tended to be interpreted restrictively by the ECtHR - which could be the reason why the two cases just mentioned do not have their case carried solely by the associations, but also rely on individuals. Indeed, according to the Court's settled case-law, the principle is that an applicant association could not claim to be the victim of measures that infringed its members' rights under the Convention.[149] However, the Court has shown

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[145] ECtHR, *Cordella and Others v Italy,* Application no. 54414/13 and 54264/15, 24 January 2019, § 101.

[146] ECtHR, *Zakharov v. Russia*, Application no. 47143/06, 4 December 2015.

[147] Paul Clark, Gerry Liston and Ioannis Kalpouzos, (note 125).

[148] Helen Keller & Corina Heri, 'The Future is Now: Climate Cases Before the ECtHR, Nordic Journal of Human Right's (2022) DOI: 10.1080/18918131.2022.2064074.

[149] ECtHR, Association des Amis de Saint-Raphael et de Fréjus and Others v. France, Application no. 45053/98, 29 February 2000.

flexibility in precedent case law, as their are isolated cases where it has granted victim status to environmental association. For instance, in *Gorraiz Lizarraga v Spain*, a group a people gathered within an association to protest against the construction of a dam. The court granted victim status to the association on the ground that ' (…) *in modern-day societies, when citizens are confronted with particularly complex administrative decisions, recourse to collective bodies such as associations is one of the accessible means, sometimes the only means, available to them whereby they can defend their particular interests effectively* (…)'.[150] The climate Norwegian case relied on this case law and argued that the organisation, in their case, was the only means to defend the interests of its members, because licensing of fossil fuels extraction is a very complex administrative decision for individuals, and specifically young people, to challenge alone. The organisation maintains being in a better position and to have more resources to challenge the decisions on behalf of its members.

It is possible, under the ECtHR's case law, that an association represents its member's rights if requested to do so. However, the organisation can bring a complaint on its own name only if it is directly affected by the issue at stake.[151] The premise behind this Court's case law is that members of associations are adults and therefore have full legal capacity to act before the Court on their own. Howbeit, this assumption does not automatically fit climate litigation, as illustrated in the Norwegian case, where applicants are young people. Moreover GHG emissions have long-term repercussions, impacting persons that do not yet have the legal capacity to act, such as children and futur generations, or elderly men and women, whose age-specificity interest is not permanent.[152] Thus, for some specific groups, having their complaints represented and carried by associations might be the only practical mean to have their human rights protected against the long-term adverse effects of climate change. Not recognising the victim status of those associations would be in breach with the ECtHR's consistent case law that representative complaint should be allowed where a lack of representation would prevent serious rights violations from being examined, and States might escape accountability under the Convention.[153]

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[150] ECtHR, *Gorraiz Lizarraga v Spain,* Application no. 62543/00, 27 April 2004, *§ 38.*

[151] ECtHR, *Identoba et al. v. Georgia,* Application no. 73235/12, 12 May 2015, § 45.

[152] European Network of National Human Rights Institutions' Third Party Intervention, Verein Klimaseniorinnen Schweiz et autres c. la Suisse. <https://ennhri.org/wp-content/uploads/2021/09/Third-Party-Intervention-Klimaseniorinnen-_-website.pdf>

[153] ECtHR, *Centre for Legal Resources on Behalf of Valentin Câmpeanu*, Application no. 47848/08, 17 July 2014 § 112.

Both cases defended the fact that the applicant associations are the only viable way to defend the rights of the claimants effectively. The applicants of *Klimaseniorinnen* also argued that the association of older women is directly affected by the Respondent's omissions to limit GHG emissions to a safe level, because the association's purpose is to prevent health issues caused by the dangerous adverse effects of climate change. Thus, according to them, the organisation should be considered as a direct victim, because it defends the interests of its members who are part of a vulnerable group, and therefore is directly concerned with the proceedings.

It is difficult to predict the way the Court will receive and interpret this kind of argument. Usually, an association is considered 'directly affected' if for example it is prevented from acting at the national level in a manner contrary to Article 11 ECHR. According to the Court's case law, Article 2 and 8 are considered to guarantee rights inherent to the human person, and therefore cannot affect legal entities.[154] However the Court has shown some flexibility with regard to this latter jurisprudence, especially where individuals have no other means of asserting their rights, as illustrated in the case *Gorraiz Lizarraga v. Spain*.[155] This is especially true for so-called 'vulnerable' persons, such as elderly or young applicants, a category of people into which both groups of applicants fall.

Finally, the only thing we can assert is that the way the ECtHR will interpret victim status in the climate cases will inform us about how it wishes to engage with complex, urgent and large-scale threats to fundamental rights, in circumstances in which political and scientific factors are particularly prominent.[156]

4.3 - Climate litigation and jurisdiction under the meaning of Article 1 ECHR

Any individual wishing to challenge a State's act or omission under the framework of the ECHR must be within the jurisdiction of that State.[157] The term jurisdiction refers to the power of a

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[154] ECtHR, *Association des Résidents du Quartier Pont Royal, la commune de Lambersart and Others v. France*, Application no. 18523/91, 8 December 1992; *Aly Bernard and 47 others and Greenpeace - Luxembourg v. Luxembourg*, Application no. 29197/95, 29 June 1999; and *Greenpeace e. V. and Others v. Germany*, Application no. 18215/06, 12 May 2009.

[155] Helle Tegner Anker, Brigitte Egelund Olsen, 'Sustainable management of natural resources, Legal Instruments and Approaches', European Environmental Law Forum, Series 5.

[156] Evelyn Shmidt, (note 142).

[157] ECHR, Article 1.

State to prescribe rules, and the power to enforce such rules.[158] The exercise of jurisdiction is a necessary condition for a Contracting State to be held responsible for a violation of the rights enshrined in the Convention,[159] and the ECtHR has recalled that this concept is closely linked to that of the international responsibility of the State concerned.[160]

The cross-border nature of climate change challenges the notion of jurisdiction. Indeed, in the words of the UN Special Rapporteurs, '*climate change does not fit the traditional rules of international law, based on territorial sovereignty and national jurisdiction*'.[161] This is because GHG emissions do not respect territorial boundaries, and their effects can therefore be felt far from where they have been emitted. Climate change thus encompasses a transboundary dimension never addressed by the Court. Indeed, the Court has not ruled on environmental cases that raise extra-territorial and transboundary issues.[162] It has however clarified the extra-territoriality of the Convention through its case law in other contexts. Although the facts are different from the climate cases, the Court could nevertheless build on this jurisprudence to answer the applicant's claim. Three questions arise regarding the transnational dimension of climate change when assessing whether the ECHR can provide the legal remedies for climate litigation. First, whether States can be held individually accountable for a phenomenon that is global. Second, whether one or several States can be responsible for the extra-territorial effects of GHG emissions that are under its effective control. Third, whether State responsibility should take into account territorial effects of exported GHG emissions under a State's effective control.

4.3.1 - Individual responsibility for a global phenomenon

At the opposite of the case Duarte Agosthino, in which applicants asked the Court to recognise the shared responsibility of the 32 Respondents, the question that arises for the three other cases is whether States can be held individually accountable for the effects of climate change, which is

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[158] J Crawford, Brownlie, 'Principles of Public International Law', Oxford University Press, (2019) 440 et seq.

[159] ECtHR, *Catan and Others v. Moldova and Russia*, Applications nos 43370/04, 8252/05 and 18454/06, 19 October 2012.

[160] ECtHR, *Ilaşcu and Others v. Moldova and Russia*, Application no. 48787/99, 18 January 2018, § 312.

[161] UN Special Rapporteurs, Third Party Intervention to the case Duarte Agosthino. <http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2021/20210504_3937120_na.pdf>

[162] Manual on Human Rights and the Environment, (note 41).

the result of a multiple of global emissions. Some national courts have answered positively to the question, and ruled that States must reduce 'their part' of GHG emissions to comply with the obligation to protect the people under their jurisdiction.[163]

Holding individually a State responsible for climate harm can also be considered under the ECtHR's case law regarding Article 1. Indeed, in the case *Andrejeva v. Latvia*, the Court held that '*the fact that the factual or legal situation complained of by the applicant is partly attributable to another State is not in itself decisive for the determination of the respondent State's "jurisdiction"*'.[164] Furthermore, the applicant of the case *Max M. v. Austria* has recalled that according to the ECtHR's case law, the States' obligation to adopt appropriate measures to protect can arise even if it has no direct and/or exclusive responsibility.[165] Besides, according to customary international law, '*where several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act*'.[166] It remains to be seen whether the Court will agree to establish that States' non-compliance with the Paris agreements, the evidence of which may be shaky, constitutes an internationally wrongful act. Indeed, the identification of such an act will depend on the particular primary obligation, '*and cannot be prescribed in the abstract*'.[167] Yet, it is interesting to note that in the case *Corfu Chanel,* the International Court of Justice (ICJ) held several States individually responsible on the basis of their conduct with regard to their own international obligations.[168]

4.3.2. - Jurisdiction and the extra-territorial effects of GHG emissions

The applicants of Duarte Agosthino asked the Court to recognise the shared responsibility of the 32 Respondents for not securing some of their fundamental rights of the Convention. As such, they claim to be within the extra-territorial jurisdiction of the 31 Respondent States other than

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[163] *Neubauer and Others* (Germany), *Notre Affaire à Tous* (France), 14 January 2021, Urgenda, 20 December 2021 (The Netherlands), *Klimaatzaak,* 24 March 2021 (Belgium).

[164] ECtHR, *Anderjeva v. Latvia*, Application no. 55707/00, 18 February 2009, § 56.

[165] ECtHR, *Nicolae Virgiliu Tanase v. Romania*, Application no. 41720/13, 15 November 2017, § 135.

[166] Responsibility of States for Internationally Wrongful Acts, International Law Commission, Annex to General Assembly resolution 56/83 of 12 December 2001, Article 47. <https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf>

[167] Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, International Law Commission at its fifty-third session, General Assembly session (A/56/10), 2001.

[168] ICJ, Corfu Channel, Merits, Judgment, Reports 1949, pp 22-23.

Portugal - as residents in Portugal, there is no doubt about the jurisdiction of this country. As mentioned above, the Court has never ruled on extra-territorial jurisdiction in environmental case. However, it is not impossible that this case will become the first on the subject.

Article 1 was drafted with the intention of leaving the door opened to a jurisdiction that goes beyond the mere residents of a State.[169] Indeed, initially the drafters of the Convention had written that *'member States should undertake to secure everyone residing in their territories the Rights*' of the Convention. But the words *'residing in their territories*' were replaced by '*within their jurisdiction*' by the Committee of Intergovernmental Experts which reviewed the draft.[170] Since then, the ECtHR has consistently held that jurisdiction under the meaning of Article 1 is primarily territorial, but States may also be held responsible for acts that occur or produce effects outside their territory.[171] For this exception to take place, the principle is that the State must have an effective control over the area where the harm occurred.[172] But like any principle, it has exceptions.

The facts of the case Duarte Agosthino do not show that the 31 Respondents exercise an effective control over the territory of Portugal in the context of climate change. However, the Court has already recognised that States might exercise extra-territorial jurisdiction '*even in the absence of effective control*' over the region.[173] This situation can be considered when for example the extra-territorial effect is the result of a law adopted by the State Party.[174] The applicants in Duarte Agosthino have argued that this exception applies, and that the Respondents' positive obligation to secure their Convention rights arises from the fact that States' laws are not demanding enough and therefore allow the continued release of an amount of GHG emissions that contributes greatly to climate change. Extra-territorial jurisdiction can further come from a situation where the effect of the act or omission of the concerned State was completely

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[169] Guide on Article 1 of the European Convention on Human Rights, updated 31 December 2021. <https://www.echr.coe.int/Documents/Guide_Art_1_ENG.pdf>

[170] Ibid.

[171] ECtHR, Al-Skeini and Others, Application no. 55721/07, 7 July 2011, §131; ECtHR, *Loizidou v Turkey* Application No 15318/89, 23 March 1995, § 62.

[172] ECtHR, *Banković and Others v Belgium and Others*, Application no. 52207/99, 12 December 2001; ECtHR, *M.N. and others v. Belgium*, Application no. 3599/18, 5 March 2020, § 101.

[173] ECtHR, *Ilaşcu v Moldova and Russia,* Application no. 48787/99, 8 July 2004.

[174] *ECtHR, Kovaĉić and others v Slovenia,* Application no. Applications nos. 44574/98, 45133/98 and 48316/99, 3 October 2008; ECtHR, *Liberty and Others v. UK,* Application no. 58243/00, 1 July 2008.

foreseeable.[175] An analogy has here again be made by the applicants. They argued that no one can claim not to know that the adverse effects of climate change caused by the emissions at a given location can have adverse effects in other places. A final example of an exception to the territoriality of State's jurisdiction that could apply in the present case is when the effect of the State's act or omission is linked to resources under the State's control.[176] Applicants have argued that their lawsuit also fits this situation, as Respondents exercise control over '*(i) the land and resources which are used to release emissions on their territory; (ii) fossil fuels extracted from their territory and exported for combustion overseas; (iii) the importation into their territory of goods the production of which involves the release of emissions into the atmosphere; (iv) companies and other entities domiciled on their territory with operations overseas which contribute to climate change'*.

Thus, through their failure to address climate change, applicants argue that even if the Respondents do not exercise an effective control over the territory of the State of Portugal, they do exercise control over their Convention fundamental rights. Indeed, even though Respondents do not have full control over the rights of the applicants, they do have effective control over activities that exacerbate GHG emissions and therefore impact directly the claimants rights. Such an interpretation of the notion of jurisdiction is further supported by customary international law, which provides that where significant transboundary harm occur, the State Responsible for it must provide access to remedies, regardless of nationality, residence or the location of the harm.[177] This rule, set in stone by the International Law Commission, establishes that if significant harm occurs in State A as a result of an activity, State B may not bar an action on the grounds that the harm has occurred outside its jurisdiction.

The court is likely to take the issue of jurisdiction very seriously. Indeed, recognising such an extra-territorial jurisdiction is potentially limitless for the future. The adverse effects of climate change are felt in many parts of the world, and the States Parties to the Council of Europe have a great historical responsibility for the large amount of CO2 present in the atmosphere. Hence, could it be considered that residents of India, who are currently experiencing absolutely insane heat waves, claim to be under the jurisdiction of the State Parties to the ECHR

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[175] ECtHR, *Andreou v Turkey,* Application no. 58243/00, 1 July 2008.

[176] ECtHR, *Minasyan and Semerjyan v. Armenia*, Application no. 27651/06, 23 June 2009.

[177] Article 15 of the International Law Commission's *Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities, 2001*, Report of the International Law Commission on the work of its fifty-third session (A/56/10), p. 167

because of their failure to reduce their emissions? The same question arises with the issue of exported GHG emissions.

4.3.3 - Jurisdiction and territorial effects of exported GHG emissions

The applicants of Greenpeace Nordic Ass'n v. Ministry of Petroleum and Duarte Agosthino both claimed that each of their Respondents have not adopted a proper legislative or administrative framework that would take into account the emissions generated outside their territories, but that are nevertheless linked to those States. The underlying rational behind the idea that exported combustion emissions and their adverse effects are under the control of the exporting State can have far reaching consequences under Article 1, by once again extending the application of the Convention, potentially to third parties.[178] In the Norwegian case, applicants assert that the judgment of the Norwegian Supreme Court removes the duty to conduct an impact assessment of Norway's exported emissions, which constitute 95% of the total emissions from fossil fuels extraction. They argued that not taking into account the emissions from oil combustion biases the decision to grant the permit by not foreseeing the global contribution of this project to the climate crisis.[179] While at first glance this may not appear to be a matter for the Court, this could be the case if the Court recognises that exported combustion emissions cause extra-territorial damage that occur under the producing State's effective control, and as such must be taken into account in the decision making for licensing fossil fuel extraction. Such a ruling would be in line with the idea that the Court's role is to review that State measures are effective to safeguard the Convention rights, so these are not illusory.[180]

Applicants in Duarte Agosthino went even further and argued that 'overseas' emissions encompass the Respondents' export of fossil fuels, but also their import of goods carrying 'embodied' carbon and their contributions to emissions through entities located abroad but under their jurisdiction. The legal reasoning is much the same as for the extra-territorial effects of

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[178] Jenny Sandvig, Peter Dawson and Marit Tjelmeland, 'Can the ECHR Encompass the Transnational and Inter-temporal Dimensions of Climate Harm?', EJIL:Talk! blog, 23 June 2021. <https://www.ejiltalk.org/can-the-echr-encompass-the-transnational-and-intertemporal-dimensions-of-climate-harm/>

[179] It is interesting to note that the Norwegian Supreme Court ruled that only emissions produced on Norwegian territory should be taken into account, and deduced from this that the severity threshold of Article 112 was not met, but that it could be met if the Norwegian-based activities also contribute to environmental damage outside Norway; Antoine Le Dylio, (note 124).

[180] *Fadeyeva v. Rusia,* §§ 123, 133-34.

greenhouse gas emissions emitted within the territory of State Parties, and stems from international law: State action must incorporate the activities that have '*a direct and reasonably foreseeable impact*' on the risk of harm from climate change, no matter where the emissions occur.[181] Recognising that States should regulate their emissions emitted indirectly abroad through activities that they can regulate will necessitate a different interpretation work than in the case of extra-territorial effects of domestic emissions. Indeed, exported emissions is precisely the missing part of the international climate change regime, which does not provide for such inventory to be done by the State Parties.[182] Applicants are therefore asking the Court to compensate for the lack of such obligation on the part of the international regime by expanding its environmental case law. It seems unlikely that the Court will take this step. The ECtHR will probably develop a legal reasoning that distinguishes between lawsuits that concern States located within the legal space of the Convention, as opposed to cases involving third parties.[183] Indeed, the ECtHR has recently warned against interpretations which would render jurisdiction unlimited and universal.[184]

To conclude, cases like the Swiss or the Austrian lawsuits make it quite simple for the Court to confirm territorial jurisdiction, as long as the ECtHR recognises that a share in exacerbating the climate crisis by not reducing domestic emissions enough is equivalent to a share of responsibility. In the case of emissions produced on national territory but whose effects are felt abroad, or in the case of emissions emitted abroad, the assessment of jurisdiction is more complex. It will depend on the willingness of the Court to develop the existing standards and its jurisprudence on extra-territorial jurisdiction. However, the difficulty here is that unlike the other concepts discussed in this thesis, the Court cannot base its reasoning on precedent environmental case law, as there is no such case law on extra-territoriality. Furthermore, the extra-territorial application of the ECHR is a sensitive issue, as an expensive understanding of it can be seen as 'human rights imperialism'.[185] The Court has already been criticised for its jurisprudence on

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[181] Committee on the Rights of the Child and Committee on the Rights of Persons with Disabilities, Statement on Human Rights and Climate Change, UN Doc. HRI/2019/1, § 10, 16 September 2019; Inter-American Court of Human Rights, Advisory Opinion OC-23/18, §81, 101-02.

[182] Jenny Sandvig, Peter Dawson and Marit Tjelmeland, (note 178).

[183] Helen Keller & Corina Heri, 'The Future is Now: Climate Cases Before the ECtHR, Nordic Journal of Human Rights', (2022), DOI: 10.1080/18918131.2022.2064074.

[184] ECtHR, *M.N. and Others v. Belgium*, Application 3599/18, 5 March 2020.

[185] Samantha 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, 2021.

extraterritoriality, issued from the case *Bankovic v Belgium*, which was considered confusing and inconsistent.[186] Thus, even though some scholars argue in favour of the extraterritorial application of human rights treaties in the context of climate litigation,[187] it is uncertain whether the Cour has sufficient room for manoeuvre to establish that extra-territorial effects of GHG emissions fall under the jurisdiction of the Convention.

4.3.4 - Partial conclusion

This overview of the procedural hurdles highlights that the Convention might not be completely suited to provide the legal remedies to all the applicants wishing to challenge climate inaction. the adaptation of admissibility requirements to the specificities and nature of climate litigation will depend on the willingness of the Court to take a proactive role. One of the key challenge for the Court will be to deal with the globality, or even universality of climate harm, as well as its long-term effects. This makes for example difficult to draw the line between widening the possibility of granting victim status and opening the pandora's box of actio popularis; or between adopting an interpretation of jurisdiction that would render the concept very broad, even almost unlimited, and preventing protection vacuums in the legal space of the Convention.

Furthermore, if the primary role of the Court is to ensure that Convention rights are not illusory, and thus to guarantee the best available remedies to anyone who feels their rights have been violated, the Court is also bound in some way by the consent and original intent of the States Parties to the ECHR. Consequently, it is unclear how far the Court can go in its interpretation on admissibility issues, because it is uncertain whether the Court has the same room for interpretation with admissibility criteria than it does with the substantive law of the Convention.[188] Nevertheless, while the review of the admissibility criteria will be the most challenging for the court, it will not be equally challenging for every case. Indeed, the convention seems better suited to provide for legal remedies to the applicant of the case Max. M. v. Austria, who has exhausted the domestic remedies and only challenges Austria's national

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[186] Fiona de Londras and Kanstantsin Dzehtsiarou, 'Great Debates on the European Convention on Human Rights' (Palgrave 2018) 129; Lea Raible, 'The Extraterritoriality of the ECHR: Why Jaloud and Pisari Should be Read as Game Changers' (2016) 2 European Human Rights Law Review 161.

[187] Benoit Mayer, 'Climate Change Mitigation as an Obligation Under Human Rights Treaties?' , American Journal of International Law, 2021.

[188] Helen Keller & Corina Heri (note 148).

mitigation policy, than to the applicants of the case Duarte Agosthino, whose legal strategy is ambitious and innovative.

5 - Conclusion and opening

The thesis has shown that the protection of the environment under the ambit of the ECHR has emerged as a result of a proactive role of the Court in its interpretation of the Convention. The applicants of the climate cases relied on the principles developed by the court in environmental litigation. However, it has been demonstrated that the analogy is not always obvious because climate litigation has its own specificities that are challenging to overcome.

The thesis has argued for a dynamic interpretation on the part of the Court, following the idea that the development of human rights owes much of its evolution to the active role of the judiciary all over the world. Indeed, in addition of upholding human rights, Courts have also participated in very important policy shifts.[189] Among many examples are the abolishment of segregation in the United-States following the landmark decision of the Supreme Court,[190] or the end of the death penalty in Hungary subsequent to a ruling on a case referred by an NGO to the Constitutional Court.[191]

However, the appropriate role of the judiciary in the battle against climate change is not easy to assess. A ruling establishing the Respondents' responsibility for omission and insufficient action in relation to climate change would require ambitious mesures from domestic legislators. The ECtHR could be accused of 'judicial activism', which has been defined by van Geel as '*judges pushing the boundaries of existing law for political purposes*'.[192] This highlights the fear that the judiciary encroaches on the power of the legislature, destabilising the delicate balance based on the separation of powers. This is all the more true as the subject of climate change has become very political, especially through the international negotiations that take place every year at the time of the Conference of the Parties (COP). A binding judgment on the matter could be

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[189] Leonardo Pierdominici, 'Constitutional Adjudication and the Dimensions of Judicial Activism: Comparative Legal and Institutional Heuristics' (2012) 3 *Transnational Legal Theory* 207, 216.

[190] Brown v. Board of Education 347 US 483 (1954) 495.

[191] Hungarian Constitutional Court, Decision 23/1990 of 31 October 1990 (1990).

[192] Olivier van Geel, 'Urgenda and Beyond: The past, present and future of climate change public interest litigation' (2017) 57 *Maastricht University Journal of Sustainability Studies* 56, 58.

seen as judicial interference in climate policy.[193] This is echoed by the critics of climate litigation, who maintained that '*strategic litigation on climate change is misusing the legal system for political purposes*'.[194] In particular, they emphasise that those lawsuits ask judges to decide how much carbon dioxide can be lawfully emitted by companies or States, which constitues '*a question no judge is qualified to answer*'.[195]

However, the thesis has shown that this statement is not entirely true, as States have international commitments regarding the reduction of their emissions, and the role of the judiciary is also to ensure government's compliance with the law. Thus, the ECtHR has many resources to deliver a landmark case based on legal principles and substantive law within the framework of the ECHR. It has the tools to shape a jurisprudence that would fit the climate change narrative, at least for the 'easiest' cases where the admissibility requirements are more or less met, such as the lawsuit *Klimaseniorinnen*. In that respect, the Court's announcement on 29 April that this case will be dealt with by the Grand Chamber allows for some optimism.[196] Indeed, this kind of decision is made when the seven judges decide that the case '*raises a serious question affecting the interpretation of the Convention or the Protocols thereto*'.[197] The Court is thus giving a high-profile to that case, which will be the first climate case to be ruled by the ECtHR.[198] This relinquishment in favour of the Grand Chamber does not necessarily guard against a disappointing judgment, but nevertheless indicates that the legal issues raised by the case will be taken seriously. To be followed closely.

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[193] H. Colby, A.S Ebbersmeyer, L.M. Heim and M. Kielland Rossaak, 'Judging Climate Change: The Role of the Judiciary in the Fight Against Climate Change', Oslo Law Review, Volume 7, No. 3-2020, p. 168–185.

[194] Goldberg P, 'Climate Change Lawsuits Are Ineffective Political Stunts' (*The Hill*, 1 March 2018) <https://thehill.com/opinion/energy-environment/376307-climate-change-lawsuits-are-showy-ineffective-political-stunts> Accessed May 10th 2022.

[195] Ibid.

[196] Press release, Relinquishment in favour of the Grand Chamber of the Case Verein KlimaSeniorinnen Schweiz and others v. Switzerland (application no. 53600/20), 29.04.2022. <https://www.klimaseniorinnen.ch/wp-content/uploads/2022/05/Relinquishment-in-favor-of-the-Grand-Chamber-of-the-case-Verein-KlimaSeniorinnen-Schweiz-and-Others-v.-Switzerland.pdf> Accessed 22 May 2022.

[197] ECHR, Article 30.

[198] Even though the case Duarte Agosthino was the first one to be communicated to the Court, it goes much slower because of the the large number of defences to be delivered by the 32 Respondents to the Court. Evelyne Schmid, (note 148).

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