ILGSPD Publication Series
No 2/24: Working Paper

The European Court of Human Rights in a New Era: The Rising Trend of Rights-Based Climate Change Litigation

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March 2024

ERASMUS MUNDUS JOINT MASTER
International Law
of Global Security,
Peace and Development

Erasmus Mundus Joint Master in International Law of Global Security, Peace and Development

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Co-funded by the European Union

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The European Court of Human Rights in a New Era: The Rising Trend of Rights-Based Climate Change Litigation

Rusudan Shashikadze[*]

Introduction

Climate change is widely recognised as a threat to human security. Severe weather conditions, rising sea levels, and melting polar regions have an adverse effect on human security by inducing competition over land and water, increasing poverty and inequality, causing famine, and triggering migration. Inadequate measures against such effects of climate change have eroded the protection of human rights. The increasing recognition that climate change poses a significant threat to human security and human rights has led to the judicialisation of this issue before domestic and international courts and tribunals. State responses to climate change are currently subject of proceedings *inter alia* before the International Court of Justice, International Tribunal for the Law of the Sea, and the European Court of Human Rights.[1] This paper examines a particular trend within this wave of judicialisation, namely right-based climate change litigation, with a focus on the European Court of Human Rights (ECtHR or the Court or Strasbourg Court).

Many domestic courts have declared that failing to effectively protect individuals from the harmful consequences of climate change violates human rights. The most famous decision in this regard is the landmark case of *Urgenda Foundation v. the Netherlands*.[2] The Supreme Court of the Netherlands held that the state must take reasonable steps to stop hazardous climate change according to Articles 2 and 8 of the European Convention on Human Rights (ECHR or the Convention). Apart from domestic courts, this view has been shared by the Inter-American Court of Human Rights (IACtHR or the Inter-American Court) in its advisory opinion on 'Environment and Human

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[1] See 'The General Assembly of the United Nations request for an advisory opinion from the Court on the obligations of States in respect of climate change (Pending)' ICJ Press Release 19 April 2023 <https://www.icj-cij.org/sites/default/files/case-related/187/187-20230419-PRE-01-00-EN.pdf > accessed 26 April 2023; 'Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law to the International Tribunal for the Law of the Sea (pending)' 12 December 2022 <https://www.itlos.org/fileadmin/itlos/documents/cases/31/Request_for_Advisory_Opinion_COSIS_12.12.22.pdf> accessed 26 April 2023; 'Climate change fact sheet', European Court of Human Rights, January 2024 <https://www.echr.coe.int/documents/d/echr/fs_climate_change_eng > accessed 26 April 2023.

[2] Dutch Supreme Court (Hoge Raad), Urgenda Foundation v. the Netherlands, Judgment of 20 December 2019, No. 19/00135, ECLI:NL:HR:2019:2006 (Urgenda Case).

Rights'.[3] Additionally, in September 2022, the United Nations Human Rights Committee (HRC or the Committee) adopted a revolutionary decision regarding Torres Strait Islanders.[4] In this case, the Committee found that Australia violated the indigenous Torres Islanders' rights to culture and private and family life by not providing sufficient protection from the adverse impact of climate change.

The ECtHR is no exception to the growing trend of climate change litigation before human rights courts, as an increasing number of climate change-related cases are pending before the Court. The aims of this paper are two-fold. First, the paper offers an analysis of the legal challenges that the ECtHR is likely to face in its development of climate change jurisprudence. Secondly, the paper explores potential legal approaches that the Court can adopt in response to the challenges, drawing also on the jurisprudence of other international courts that have to date dealt with climate change-related cases. To these ends, two main questions are addressed in this paper: (a) what challenges do applicants have to overcome before the Court can proceed to the merits stage, and (b) even if the Court declares the cases admissible, does the European Convention on Human Rights (ECHR) protect the rights of individuals from the adverse effects of anthropocentric climate change? These two questions are addressed respectively in Parts I and II of the paper. Part I examines challenges stemming from the admissibility criteria, such as victim status, non-exhaustion of domestic remedies, and compatibility *ratione personae*. Part II explores substantive issues such as the margin of appreciation that the states can be granted in regard to climate change cases, and if and how climate change-related cases fall within the scope of Articles 2, 8, and 14 of the ECHR.

1. Admissibility of Climate Change-Related Cases before the ECtHR

As with every other case brought before the ECtHR, climate change-related cases must satisfy the admissibility criteria set by the ECHR in Articles 34 and 35. Out of the twelve pending cases related to climate change, the Court has already declared two cases inadmissible, and three cases had their first hearing in March 2023 before the Grand Chamber.[5] There is no doubt that human rights-based climate change litigation poses difficulties to applicants in meeting the admissibility criteria. The first challenge applicants must overcome is establishing their standing before the Court by establishing their victim status, which indeed is a strenuous task but by no means impossible to achieve. The main hurdles in relation to admissibility include demonstrating that claims fall within the jurisdiction of the Court, as set in Article 1 of the Convention, and meeting the criteria of exhaustion of domestic remedies.

[3] The Environment and Human Rights, Advisory Opinion OC-23/17, Inter-American Court of Human Rights (15 November 2017) (IACtHR Advisory Opinion).
[4] Views adopted by the Committee under Article 5 (4) of the Optional Protocol concerning communication No. 3624/2019, UN Human Rights Committee, CCPR/C/135/D/3624/2019.
[5] 'European Court of Human Rights Press Release, Grand Chamber procedural meeting in climate cases', 3 March 2023 < https://www.echr.coe.int/w/grand-chamber-procedural-meeting >

1.1 Establishing the victim status of climate change litigants

Article 34 of the Convention provides that a person or persons directly or indirectly affected by the alleged violations can claim victim status under the Convention.[6] Thus, according to the ECHR, victimhood can be direct or indirect. Within the meaning of Article 34 of the Convention, a direct victim is a person who was directly impacted by the alleged violation.[7] By contrast, an indirect victim is an individual who has a legal interest or personal connection with a person who has been directly affected by the impugned measure.[8] For instance, a next-of-kin of the person who has died or disappeared would be considered an indirect victim.[9] Beyond direct and indirect victims, the Court has explicitly stated that the Convention does not allow the institution of *actio popularis*, which denotes cases brought before the Court in public interest and lacking any individual harm suffered by the applicant. [10]

Establishing victim status before the Strasbourg Court is exceedingly difficult for climate change litigators. Direct victims must prove a clear causal link between the failure of States to address the climate crisis and the harm they have suffered, while indirect victims must demonstrate legal interest or personal connection with the individual directly affected by the impugned measure. The difficulty in proving both direct and indirect victimhood arises from the nature of climate change mitigation, which involves future harm that the applicants may suffer. Future-oriented harm does not readily align with the conventional definition of victimhood. Hence, it poses a serious challenge for litigators seeking to establish victim status in climate change cases before the Strasbourg Court. The fact that the Court has already declared two climate change-related cases inadmissible due to lack of victim status demonstrates the significance of this challenge.[11]

Nonetheless, the Convention acknowledges that an individual can be a potential victim even if direct or indirect victim status is not yet established. This may include instances where a person has reasonable doubt that he or she will become a victim of certain acts or laws of the state.[12] In this situation, the individual 'must produce reasonable and convincing evidence of the likelihood that a violation affecting him or her

[6] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) Article 34.
[7] Burden v. the United Kingdom [GC], App no 13378/05 (ECHR, 29 April 2008) § 33; Lambert and others v. France [GC], App no 46043/14 (ECHR, 5 June 2015) §89.
[8] Varnava and others v. Turkey [GC], App nos 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90 (ECHR 18 September 2009) §112.
[9] Ibid.
[10] Burden v. the United Kingdom [GC] (n. 7); Aksu v. Turkey [GC], App nos 4149/04 and 41029/04 (ECHR, 15 March 2012) § 50; Cordella and Others v. Italy, App nos 54414/13 and 54264/15 (ECHR, 24 January 2019) §100; Dimitras and Others v. Greece (dec.), App nos 59573/09 and 65211/09 (ECHR, 4 July 2017) §§ 28-32; Kalfagiannis and Pospert v. Greece (dec.), App no 74435/14 (ECHR, 9 June 2020) § 46.
[11] Plan B. Earth and Others v. the United Kingdom (dec.), Appl. no. 35057/22 (ECHR, 13 December 2022); Humane Being v. the United Kingdom (dec.), App no. 36959/22 (ECHR, 1 December 2022).
[12] Soering v. the United Kingdom, App no 14038/88 (ECHR, 7 July 1989); Dudgeon v. the United Kingdom, App no 7525/76 (ECHR, 22 October 1981); Klass and Others v. Germany, App no 5029/71 (ECHR, 6 September 1978).

personally will occur, mere suspicion or conjecture is insufficient'.[13] That is why most climate change litigators opt to arguing their 'potential' victimhood before the Court. However, even in this regard, a well-substantiated and evidence-based claim is essential.

Here, not all applicants are confronted by the same level of difficulty. For example, the applicants in the case of *KlimaSeniorinnen v. Switzerland (Swiss Senior Women Case)*,[14] pending before the Grand Chamber, has the greatest potential to substantiate their victim status. The five applicants, in this case, consist of Swiss senior women who have been diagnosed with severe diseases and are at significant risk of premature death due to climate change-related heatwaves, thus constituting a vulnerable group of individuals.[15] On top of extensive description of their illness and particularly vulnerable situation caused by climate change, applicants also provided the medical certificates describing their health condition in detail to the Court. The medical proof can be particularly beneficial for their case as the ECtHR has in the past given weight to support of an allegation with medical certificates in the context of environmental matters.[16] Therefore, by providing material proof for the direct effect of climate change on their health conditions, the applicants, in this case, may have a higher chance of proving their potential victimhood.

On the other hand, there are nine more pending cases, not all similar to the Senior women case. The case of *Duarte Agostinho and others v. Portugal and 32 other states (Portuguese Youth Case)*, which is pending before the Grand Chamber, [17] and two other similar cases,[18] are the most ambitious in this regard. The applicants in *Portuguese Youth Case* are four Portuguese children and two young adults claiming that 33 Council of Europe member states, by not effectively contributing to fighting climate change, violate their right to private and family life (Article 8, ECHR), as well as the right not to be discriminated against (Article 14, ECHR). In their application, the applicants argue that climate change has already caused severe damage to their everyday lives, and this harm will likely aggravate in the future.[19] They emphasised that urgent measures are needed to minimise the risk that the applicants will experience in the future.[20] Therefore, they claim to be potential victims under the definition of Article 34 of the Convention, invoking

[13] Senator Lines GmbH v. fifteen member States of the European Union (dec.) [GC], App no 56672/00 (ECHR, 10 March 2004); Shortall and Others v. Ireland (dec.), App no 50272/18 (ECHR, 19 October 2021).
[14] Verein KlimaSeniorinnen Schweiz and Others v. Switzerland, App no. 53600/20, (ECHR, Communicated Case, 17 March 2021, relinquishment to the Grand Chamber 26 April 2022) (Swiss Senior Women Case).
[15] Swiss Senior Women Case, text of the Application < https://en.klimaseniorinnen.ch > 4 April 2023.
[16] Fägerskiöld v. Sweden (dec.), App no 37664/04 (ECHR, 26 February 2008); Vecbaštika and others v. Latvia (dec.), App no 52499/11 (ECHR, 19 November 2019) §§ 82,83.
[17] Duarte Agostinho and Others v. Portugal and 32 Other Member States, App no. 39371/20, (ECHR, Communicated Case, 30 November 2020, relinquished to the Grand Chamber 29 June 2022) (Portuguese Youth Case).
[18] De Conto v. Italy and 32 other States, App no. 14620/21 (submitted on 3 March 2021); Uricchio v. Italy and 32 other States, App no. 14615/21 (submitted on 3 March 2021).
[19] Portuguese Youth Case, text of the Application <https://youth4climatejustice.org/wp-content/uploads/2020/12/Application-form-annex.pdf > 4 April 2023.
[20] Ibid.

the precautionary principle, intergenerational equity, and the fact that the best interest of the child must always be given primary consideration.[21]

While children, and in general youth, are at higher risk of suffering more due to climate change, one possible scenario for these applicants is that the Court will only establish the victim status of some applicants and not all of them. It is for this reason that the ECtHR previously, in one of the environmental cases, namely *Cordella and others v Italy*, accepted the victimhood of only those applicants who lived in a region with higher environmental risk.[22] In the *Portuguese Youth Case*, four applicants live in a region at higher fire risk, and in 2017 wildfire took place very close to their home and covered their surroundings and gardens in ashes.[23] Therefore, per the decision made in *Cordella and others v Italy*, it is possible that the Court here as well accepts that the four applicants residing in a region with an elevated risk of danger are to be regarded as victims under Article 34 of the Convention.

Of course, it is not precluded that the Court recognises the victim status for all the applicants, especially considering the new developments regarding the victim status in international law. For example, in September 2022, the UN Human Rights Committee (HRC) dealt with a climate change-related matter in the case of *Daniel Billy et al. v. Australia*, also known as the Torres Strait Islanders case.[24] The Committee delivered a landmark decision, establishing that Australia, by not taking adequate mitigation and adaptation measures to combat climate change, violated the rights of indigenous people living on the Torres Strait Islands.[25] In this communication, the HRC also had to deliberate on the victim status of the applicants, where it noted that 'the risk of impairment of rights, owing to alleged serious adverse impacts that have already occurred and are ongoing, is more than a theoretical possibility'.[26] Thus, the HRC acknowledged that they satisfied the requirement of victimhood. The same view has been shared by the UN Committee on the Rights of the Child (CRC) in the case of *Sacchi et al. v. Argentina, Brazil, France, Germany, and Turkey.*[27] Even though this decision was declared inadmissible on the basis of a separate ground, the CRC noted that the infringement of the applicants' convention rights as a consequence of the Contracting State's action or inaction in relation to its greenhouse gas emissions in its territory was reasonably foreseeable.[28] It further concluded that the applicants had '*prima facie* established that they have personally experienced a real and significant harm in order to justify their victim status'.[29]

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[21] Ibid.
[22] Cordella and Others v. Italy (n. 10).
[23] Portuguese Youth Case, text of the Application (n. 17) 7.
[24] Daniel Billy et al. v. Australia, Communication No. 3624/2019 (UN Human Rights Committee, 22 September 2022, UN Doc. CCPR/C/135/D/3624/2019) (Torres Strait Islanders Case).
[25] Ibid.
[26] Ibid § 7.10.
[27] Sacchi et al. v. Argentina (dec.), (Committee on the Rights of the Child, 22 September 2021, UN Doc. CRC/C/88/D/104/2019) (Sacchi et al. v. Argentina).
[28] Ibid § 10.14.
[29] Ibid.

The only court, so far, that has refused the victim status of climate change litigators is the Court of Justice of the European Union. The CJEU had to adjudicate on two climate change-related cases, namely *Armando Carvalho and Others v European Parliament and Council of the European Union* (known as the People's Climate Case)[30] and *Peter Sabo and Others v European Parliament and Council of the European Union* (known as the EU Biomass case).[31] In both cases, the applicants requested the annulment of several EU acts. In the *People's Climate* case, applicants challenged the EU's 2018 legislative package regulating GHG emissions from 2021 to 2030.[32] In the *EU Biomass* case, the applicants disputed the EU's Renewable Energy Directive.[33] The CJEU declared both cases inadmissible due to the lack of individual concern of the applicants. However, it must be noted that the CJEU is not a human rights court, and its decisions in the cases mentioned above concern the EU legislative framework. Additionally, standards applied in the CJEU proceedings are strict and different compared to the human rights courts.[34]

An additional issue that should be addressed in relation to victim status is the question of attribution, namely whether the actions leading to the alleged violation of the applicant's human rights can be attributed to the respondent state. Given that climate change is a global phenomenon, multiple, if not all, states are arguably responsible for the substantial increase in global warming.[35] Therefore, respondent states may claim that impugned acts are not solely caused by their own actions. For instance, the Swiss Government, in response to the *Swiss Senior Women* application, has emphasized this fact, noting that regardless of whether the applicant is a direct, indirect or potential victim, there must be an element of attribution, which remained vague and distant in the case.[36] While it holds true that numerous states collectively share accountability for contributing to climate change, this reality does not absolve each state of its individual role in exacerbating climate change. Under general 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'.[37] Although the ECtHR has not examined yet whether a state can be individually responsible for climate change, recent precedents of domestic case law show the feasibility of establishing state responsibility.[38] Therefore,

[30] Armando Ferrão Carvalho and Others v. The European Parliament and the Council (dec.), App no T-330/18 (Court of Justice of the European Union, 8 May 2019) (People's Climate Case).
[31] Peter Sabo and Others v European Parliament and Council of the European Union (dec.), App no T-141/19 (Court of Justice of the European Union, 14 January 2021) (The EU Biomass case).
[32] People's Climate Case (n. 30).
[33] The EU Biomass case (n. 31).
[34] Jacques Hartmann, Marc Willers QC, 'Protecting rights through climate change litigation before European courts' (2022) 13:1 Journal of Human Rights and the Environment 90, 98.
[35] Jenny Sandvig, Peter Dawson, Marit Tjelmeland, 'Can the ECHR encompass the transnational and intertemporal dimensions of climate harm?' (EJIL: Talk 23 June 2021) < https://www.ejiltalk.org/can-the-echr-encompass-the-transnational-and-intertemporal-dimensions-of-climate-harm/ > 4 April 2023.
[36] Swiss Senior Women Case, Governments observations < http://climatecasechart.com/non-us-case/union-of-swiss-senior-women-for-climate-protection-v-swiss-federal-council-and-others/ > 4 April 2023
[37] Responsibility of States for Internationally Wrongful Acts (2001) Article 47.
[38] Urgenda Case (n. 2); Supreme Court of Ireland, Friends of the Irish Environment v. The Government of Ireland and Others, Judgment of 31 July 2020, [2020] IESC 49.

arguments that the global nature of climate change forecloses attribution of relevant internationally wrongful acts to a single state should be contested.

1.2 Extraterritorial jurisdiction in climate change cases

Another challenge for climate change litigators is to demonstrate that their cases fall within the ambit of Article 1 of the Convention, which suggests that a state's jurisdiction is 'primarily territorial'.[39] The exception to this is when a state exercises jurisdiction outside its territory, i.e. extraterritorial jurisdiction.[40] Per the ECtHR case law, extraterritorial jurisdiction is evident 'where a Contracting State is in effective control over an area or has at the very least a decisive influence over it'.[41] The state may also be responsible for violating the rights of individuals outside of its territory if an individual falls under the State agent's authority and control.[42]

As climate change is a global crisis, climate-related cases are unlikely to fall within the scope of territorial jurisdiction as traditionally understood. For example, one state's Greenhouse Gas (GHG) emissions can threaten the lives of people living far away from its territory. The individual applications pending against several states invoke extraterritorial jurisdiction as a basis for admissibility *ratione personae*. Namely, these cases are *Soubeste and others v. Australia and 11 other states*,[43] *De Conto v. Italy and 32 other states*,[44] *Uricchio v. Italy and 32 other states*,[45] and *the Portuguese Youth Case*.[46] In all these cases, applicants claim that even though the respondent states do not exercise territorial jurisdiction as such, they still exercise effective extraterritorial control in connection with the acts which caused the alleged violation. Nonetheless when discussing extraterritoriality and climate change before the Strasbourg Court, there are challenges that need to be addressed.

Firstly, in its recent judgement in the *Georgia v. Russia (II)* case, the Court refused to acknowledge the extraterritorial jurisdiction during the active hostilities phase in the

[39] Catan and Others v. the Republic of Moldova and Russia [GC], App nos 43370/04, 18454/06, and 8252/05 (ECHR, 19 October 2012) § 104; Banković and Others v. Belgium and Others (dec.) [GC], App no 52207/99 (ECHR, 12 December 2011) §§ 61, 67.
[40] Banković and Others v. Belgium and Others (n. 39), § 71; Ilaşcu and Others v. Moldova and Russia, App no 48787/99 (ECHR, 8 July 2004) § 314.
[41] Georgia v. Russia (II) [GC], App no 38263/08 (ECHR, 21 January 2021) §§ 161-175; Ilaşcu and Others v. Moldova and Russia (n. 40) §§ 314-316, 392; Catan and Others v. the Republic of Moldova and Russia (n. 39), §§106-107; Al-Skeini v. the United Kingdom, App no 55721/07 (ECHR, 7 July 2011) §§ 138-140; Medvedyev and Others v. France [GC], App no 3394/03 (ECHR, 29 March 2010) §§ 63-64.
[42] Veronica Ciobanu v. the Republic of Moldova, App no 69829/11 (ECHR, 9 February 2021) §§ 25-26; Issa and Others v. Turkey, App no 31821/96 (ECHR, 16 November 2004) § 71; Öcalan v. Turkey [GC], App no 46221/99 (ECHR, 12 May 2005) § 91; Al-Skeini v. the United Kingdom (n. 41), § 149; Hassan v. the United Kingdom [GC], App no 29750/09 (ECHR, 16 September 2014) §§ 76-80; Jaloud v. the Netherlands [GC], App no 47708/08 (ECHR, 20 November 2014) §§ 140-152.
[43] Soubeste and 4 other applications v. Austria and 11 other States, App nos. 31925/22, 31932/22, 31938/22, 31943/22, and 31947/22 (ECHR, application filed 21 June 2022, not yet communicated).
[44] De Conto v. Italy and 32 other States (n. 18).
[45] Uricchio v. Italy and 32 other States (n. 18).
[46] Portuguese Youth Case (n. 17).

2008 Russo-Georgian war.[47] In its decision, the Court declared that the 'context of chaos' made it impossible to determine the jurisdiction of one or the other state.[48] It also referred to the extensive evidence required and complicated factual grounds, which, according to Raible, can pose a challenge in climate change cases.[49] Taking one of the pending cases as an example, namely *Duarte Agostinho and others v. Portugal and 32 other states*, there are six different applicants arguing that their rights have been violated by thirty-three member states of the CoE. Certainly, examining if and how the thirty-three states are connected to the alleged violation and offering a detailed evaluation of all the evidence and facts would be 'chaotic'. Therefore, the Court may abstain from deciding on this matter, as in *Georgia v. Russia (II)*. However, recently, the Court, in the case of *Ukraine and the Netherlands v. Russia*, concerning the conflict in eastern Ukraine, acknowledged that the approach to extraterritoriality adopted in *Georgia v. Russia (II)* does not in all circumstances exclude the exercise of jurisdiction during international armed conflict and jurisdiction should rather be established on a case-by-case basis.[50] In any event, the Court should take into consideration that climate change is significantly different from the active phase of international conflicts. With the help of extensive scientific or medical evidence produced by applicants, it may be relatively easier to ascertain the jurisdiction of states compared to armed conflict-related inter-state disputes.

Secondly, the most pressing issue is that the above-mentioned climate change cases can only fall within the purview of extraterritoriality, if the Court broadens its understanding of this concept. It can be legally feasible if we take into consideration the fact that the Court has never before adjudicated on climate change-related matters and that there are recent developments in international law in relation to extraterritoriality and climate change. For instance, in its landmark advisory opinion on "Human Rights and the Environment'' the Inter-American Court of Human Rights developed a novel approach to jurisdiction.[51] According to the IACtHR, under the American Convention, jurisdiction is not limited to the territory of a state and, in some situations, may go beyond the territorial borders.[52] Adopting an expansive interpretation of the extraterritorial human rights obligations of the states, it noted that extraterritorial jurisdiction exists when the State has effective control over the actions that inflict harm and cause ensuing human rights abuses.[53] To date, the European Court of Human Rights has resisted more liberal interpretations of extraterritoriality. In the case of *Bankovic v. Belgium and Others*, which concerned airstrikes on the territory of the Former Republic of Yugoslavia, the Court held that 'effective control' could not be founded merely because the state had control over

[47] Georgia v. Russia (II) [GC] (n. 41).
[48] Ibid.
[49] Lea Raible, 'Expanding Human Rights Obligations to Facilitate Climate Justice? A Note on Shortcomings and Risks' (EJIL: Talk 15 November 2021) < https://www.ejiltalk.org/expanding-human-rights-obligations-to-facilitate-climate-justice-a-note-on-shortcomings-and-risks/ > accessed 26 April 2023.
[50] Ukraine and the Netherlands v. Russia, App nos. 8019/16 43800/14 28525/20 (ECHR, 30 November 2022).
[51] IACtHR Advisory Opinion (n. 3).
[52] Ibid.
[53] Ibid.

the action which caused the violation.[54] It is evident that this approach is opposite to what IACtHR has stated in the advisory opinion.[55]

However, it should not be overlooked that climate change is a novel phenomenon that needs to be seen from a new perspective by human rights courts, as has been done by the IACtHR. It is a firmly established principle in the jurisprudence of the ECtHR that the Court gives particular value to the doctrine of the 'living instrument' and the Convention should be interpreted in conformity with the 'present-day conditions'[56] and the developments in international law.[57] As it would have been impossible for the drafters when designing the Convention to envisage a climate crisis and the adverse impact it would have on humankind, making fresh considerations is essential in this matter. The Court can do so by taking into account the advisory opinion of the IACtHR, as it has done previously in its other decisions.[58] Notably, the UN CRC in the case of *Sacchi and Others v Argentina and Others* already directly incorporated the approach of the IACtHR, acknowledging the extraterritoriality of human rights obligations in regard to climate change, and adding that climate change 'raises novel jurisdictional issues of transboundary harm related to climate change'.[59]

In re-conceptualising extraterritoriality, the ECtHR can also draw on the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights (Maastricht Principles).[60] These principles were drafted by the International Commission of Jurists, who were prompted to address new global challenges to human rights. According to the Maastricht Principles, without a clear-cut definition of extraterritorial jurisdiction, it would be impossible for human rights to fulfil their role as the legal foundation for governing globalization and guaranteeing universal protection for every human being.[61] Thus, the Commission provided a broad definition of extraterritorial obligations, which are 'obligations relating to the acts and omissions of a State, within or beyond its territory, that have effects on the enjoyment of human rights outside of that State's territory; and obligations of a global character that are set out in the Charter of the United Nations and human rights instruments to take action, separately, and jointly through international cooperation, to realize human rights

[54] Banković and Others v. Belgium and Others (dec.) (n. 3539).
[55] IACtHR Advisory Opinion (n. 3).
[56] George Letsas, "The ECHR as a Living Instrument: Its Meaning and Legitimacy" in Andreas Føllesdal, Birgit Peters and Geir Ulfstein (eds), *Constituting Europe: The European Court of Human Rights in a National, European and Global Context* (Cambridge University Press 2013) 107.
[57] CDDH, 'The place of the European convention on human rights in the European and international legal order' (2019) <https://www.coe.int/en/web/human-rights-intergovernmental-cooperation/-/the-place-of-the-european-convention-on-human-rights-in-the-european-and-international-legal-order > 4 April 2023.
[58] Monica Feria-Tinta, 'The Future of environmental cases in the European Court of Human Rights: extraterritoriality, victim status, treaty interpretation, attribution, imminence, and due diligence in climate change cases' (2022) 13 Journal of Human Rights and the Environment 172, 178.
[59] Sacchi et al. v. Argentina (dec.) (n. 27).
[60] Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights (2011) (Maastricht Principles).
[61] Ibid preamble.

universally'.[62] This innovative interpretation may also serve as a model for expanding the existing notion of extraterritoriality in the case law of the ECtHR.[63]

1.3 Exhaustion of domestic remedies

The criterion of exhaustion of domestic remedies is enshrined in Article 35 (1) of the Convention, requiring that the applicants, before turning to the ECtHR, must exhaust all available and effective remedies on a domestic level.[64] According to Article 35 (1) and the case law of the Court, this admissibility criterion is in compliance with international law, and it can also be found in other regional human rights systems.[65] The basis for the requirement to exhaust domestic remedies derives from the principle of subsidiarity, which is embodied in the preamble of the Convention.[66] Accordingly, domestic courts should be given a chance to examine first the compliance of their domestic laws to the Convention.

Several climate change cases submitted before the Court without exhausting domestic remedies. For example, the applicants in the Portuguese Youth case directly initiated proceedings before the ECtHR.[67] Underscoring the urgent nature of climate change, applicants noted how time-consuming it would be to start domestic proceedings in Portugal and the other thirty-two states.[68] Additionally, they emphasized that they are children, and according to the UN Committee on the Rights of the Child, children are amongst those who face 'real difficulties' in commencing legal proceedings to remedy rights violations.[69]

A similar case to the Portuguese Youth in this respect is the Sacchi case before the CRC.[70] The CRC, specifically on the ground of exhaustion of domestic remedies, found the case inadmissible. The Committee held that applicants, who were children, should have exhausted all the domestic remedies available and that mere suspicion of a potentially unfavourable outcome of a case does not exonerate the authors from exhausting domestic remedies.[71] The ECtHR may give a similar ruling on this matter. However, Article 35 (1) contains several exceptions to the requirement of exhaustion of domestic remedies. One such exception is when exhausting a remedy is 'unreasonable in practice and would constitute a disproportionate obstacle to the effective exercise of the right of the

[62] Ibid § 8.
[63] Katharina Franziska Braig, Stoyan Panov, 'The Doctrine of Positive Obligations as a Starting Point for Climate Litigation in Strasbourg: The European Court of Human Rights as a Hilfssheriff in Combating Climate Change?' (2020) 35 Journal of Environmental Law and Litigation 261, 291-292.
[64] ECHR (n. 6), Article 35 (1).
[65] European Court of Human Rights, 'Practical Guide on Admissibility Criteria' (2022) < https://ks.echr.coe.int > 6 April 2023 (Admissibility Guide).
[66] ECHR (n. 6), preamble.
[67] Portuguese Youth Case (n. 17).
[68] Ibid.
[69] Ibid.
[70] Sacchi et al. v. Argentina (dec.) (n. 27).
[71] Ibid § 10.17.

individual'.[72] Indeed, it might be considered to be unreasonable and unachievable to exhaust domestic remedies in the Portuguese Youth case, as four of the applicants are children, and two represent young adults studying at the undergraduate level who lodged the application against thirty-three countries, by initiating domestic proceedings in each and every respondent state.[73] Additionally, under the case law of the ECtHR, the burden of proof that an applicant has not exhausted domestic remedies rests upon the respondent state(s).[74] As a result, it is upon the respondent states to illustrate that effective remedies which the applicants have access to but failed to use exist.[75]

2. Substantive Aspects of Climate Change Litigation before the European Court of Human Rights

In addition to admissibility criteria, substantive applicability of ECHR rights emerges as an important issue in the context of rights-based climate change litigation. As the Convention does not include any rights that are expressly related to climate change, this part examines the relevance of Articles 2, 8 and 14 to climate change cases, as the provisions that have been most frequently invoked in the climate change cases brought before the ECtHR, and the margin of appreciation afforded to states in this context. Relying on existing Convention rights in the absence of an expressly applicable right is not unprecedented: while the Court has explicitly stated that the Convention does not contain a right to a healthy environment, it has decided environmental cases on the basis of relevant Convention rights.[76]

2.1 The margin of appreciation in the context of climate change

The doctrine of margin of appreciation acknowledges that states are vested with a degree of discretion on domestic matters as they have a more comprehensive understanding of their national needs and circumstances. The term itself derives from the preamble of the Convention, where it is stated that the High Contracting Parties, in line with the principle of subsidiarity, have the chief responsibility to safeguard the Convention rights for which they are granted a room for manoeuvre.[77] In *Handyside v. the United Kingdom*, the Court famously held that the national authorities are better placed than the judge of the international court to provide a legal position on particular requirements of the rights

[72] Gaglione and Others v. Italy, App nos. 45867/07 and 69 more (ECHR, 21 December 2010) § 22; Veriter v. France, App no 31508/07 (ECHR, 14 October 2010) § 27; M.S. v. Croatia (no. 2), App no 75450/12 (ECHR, 19 February 2015) §§ 123-125.
[73] Portuguese Youth Case (n. 17).
[74] Mocanu and Others v. Romania [GC], App nos. 10865/09 45886/07 32431/08 (ECHR, 17 September 2014) § 225; Molla Sali v. Greece [GC], App no 20452/14 (ECHR, 18 June 2020) § 89; Dalia v. France, App no 26102/95 (ECHR, 19 February 1998) § 38; McFarlane v. Ireland [GC], App no 31333/06 (ECHR, 10 September 2010) § 107.
[75] Hartmann, Willers (n. 34) 103.
[76] Press unit of the European Court of Human rights, 'Environment and the European Convention on Human Rights', (2023) < https://www.echr.coe.int/documents/fs_environment_eng.pdf > accessed 10 April 2023.
[77] ECHR (n. 6), Preamble.

restriction at issue. [78] However, the ECtHR has also emphasized that the margin of appreciation is not unlimited and goes 'hand in hand with the European supervision'.[79] Accordingly, the Court decides whether the states are conferred a wide or narrow margin of appreciation depending on the context of the case. While there has been some consistency in the Court's methodology of applying this doctrine, it often has led to unpredictable decisions regarding the margin granted to states.[80]

When it comes to climate change-related cases, the margin that would be awarded to a state is uncharted territory, as the Court has not dealt with the merits of a climate change case yet. If one looks at the environmental case law of the ECtHR, it is seen that the Court tends to give a wider margin of appreciation to states, leaving the Court with very small room for manoeuvre.[81] For example, in the case of *Powell and Rayner v. the United Kingdom,* which concerned air traffic and aircraft noise, the applicants who lived near the airport argued that the measures taken by the government were insufficient to reduce the noise.[82] However, the Court held that 'it was certainly not for the Commission or the Court to substitute for the assessment of the national authorities any other assessment of what might be the best policy in this difficult social and technical sphere'.[83] Another example is the case of *Hatton and Others v. the United Kingdom*, in which the Court reiterated that when the matter concerns the issue of general policy where public opinion may vary, the role of the national decision-maker should be awarded particular weight.[84] These examples reaffirm that the margin of appreciation awarded to states in relation to environmental policies is typically broad.

However, as the ECtHR decides differently on the issue of margin of appreciation in different contexts, the new context of climate change can, and should, see the development of a tailored approach, whereby the margin of appreciation awarded to states regarding climate change cases is narrow. Two sets of developments are important in this respect. Firstly, there is a global consensus on the emergency to combat climate change on the international level.[85] Even though states have to assess their national needs and conditions regarding climate change, this should not broaden the scope of the margin of appreciation, as a state's climate change policy has global consequences that extend beyond its territory. Thus, it is an international concern which needs to be tackled with the combined force of the states.[86] Notably, all the Council of Europe members, except Turkey, are the signatories of the Paris Agreement, where states have

[78] Handyside v the United Kingdom, App no 5493/72 (ECHR, 7 December 1976).
[79] Ibid.
[80] George Letsas, 'Two Concepts of the Margin of Appreciation', (2006) 26:4 Oxford Journal of Legal Studies 705, 706.
[81] Chris Hilson, 'The margin of appreciation, domestic irregularity, and domestic court rulings in ECHR environmental jurisprudence: global legal pluralism in action' (2013) 2:2 Global Constitutionalism 262, 266.
[82] Powell and Rayner v. the United Kingdom, App no 9310/81 (ECHR, 21 February 1990) § 44.
[83] Ibid.
[84] Hatton and Others v. the United Kingdom, App no 36022/97 (ECHR, 8 July 2003) § 97.
[85] Ibid.
[86] Ibid.

unanimously committed to take all the effective mitigation and adaptation measures to reduce the increase in temperature.[87]

Secondly, there is a growing number of national court decisions in the CoE member states finding states responsible because of their ineffective measures to fight climate change, demonstrating a clear recognition of the link between climate change and human rights. So far, these cases have been lodged before countries such as the Netherlands, Germany, Ireland, Norway, Switzerland, Belgium, France, Poland, the Czech Republic, and Italy.[88] This development is essential as it shows the emerging consensus or trend within the CoE regarding climate litigation. Identifying an emerging consensus has a crucial role for the Court's grant of appreciation to a state. [89] As Letsas has observed, the 'new' European Court of Human Rights has set a different standard for the states for protecting human rights.[90] '[T]he new Court treats the ECHR as a living instrument by looking for common values and emerging consensus in international law'.[91] For this reason, the Court frequently sets a higher threshold for the protection of human rights compared to the existing standards provided by states.[92] If there is an emerging trend among the CoE countries, then the Court would typically decide on a narrow margin of appreciation.[93]

To identify an emerging consensus, it is necessary to look at climate change-related cases on the national level. *Urgenda Foundation v the Netherlands*[94] is the first successful case where a national court recognised that the climate policy of the Dutch Government violated Articles 2 and 8 of the European Convention on Human Rights.[95] In this case, the National Court also demanded that the Government reduce the country's greenhouse gas emissions by 2020.[96] The Urgenda Case is remarkable because it effectively demonstrates how a state's ineffective climate policy can breach the human rights granted by ECHR. It is also significant as it gave impetus to strategic climate change litigation at the domestic level across the European continent.

Another important recent case is *Friends of the Irish Environment v. Government of Ireland.*[97] The Irish Supreme Court, in 2020, delivered a judgement that overruled the 2017 National Mitigation Plan of Ireland.[98] In this case, the applicants alleged inter alia a violation of the right to life. The Supreme Court rejected this argument because the

[87] Ibid.
[88] The Climate Litigation Database < https://climaterightsdatabase.com > accessed 16 April 2023.
[89] Kanstantsin Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Right* (Cambridge University Press 2015) 124.
[90] Letsas (n. 57) 117.
[91] Ibid.
[92] Ibid.
[93] Ibid.
[94] Urgenda Case (n. 2).
[95] Maiko Meguro, "State of the Netherlands v. Urgenda Foundation" (2020) 114 American Journal of International Law 729, 729.
[96] Urgenda Case (n. 2).
[97] Supreme Court of Ireland, Friends of the Irish Environment v. The Government of Ireland and Others (n. 38).
[98] Ibid.

applicants, Friends of the Irish Environment, were a corporate entity that did not enjoy the right to life and bodily autonomy.[99] Nevertheless, the Supreme Court did not entirely exclude the possibility of accepting human rights-based arguments in future climate change cases.[100] The Supreme Court noted that 'it would not rule out the possibility that the interplay of existing constitutional rights with the constitutional values to be found in the constitutional text and other provisions, such as those to be found in Art. 10 [...] might give rise to specific obligations on the part of the State.[101] This statement of the Irish Supreme Court indicates the possibility of litigating climate change through the lens of human rights. The judgement is crucial as another decision where the domestic Court quashed the state's climate policy.

The case of *Klimaatzaak ASBL v. Belgium* is also noteworthy.[102] Here the first instance court of Belgium found that the Belgian climate policy violated the human rights of the applicants enshrined in Articles 2 and 8 of the ECHR.[103] Additionally, the Municipal Court of the Czech Republic, in the case of *Klimatická žaloba ČR and Others v. Czechia,* ruled that different Ministries of the country, with their ineffective mitigation plan, had interfered with the rights of the applicant and required from the Government immediate termination of such interference and adoption of a new adequate mitigation plan.[104] Finally, there have been a number of constitutional complaints against the 2019 Federal Climate Change Act of Germany.[105] The Constitutional Court of Germany on 24 June 2021 delivered a historical judgement on four constitutional complaints, stating that the German Federal Climate Change Act violated a number of fundamental rights of the German Constitution.[106] This decision is unquestionably ground-breaking as it provides that the government has a constitutional obligation to protect the environment and emphasizes the need for international cooperation to effectively combat climate change.[107]

All these cases clearly show that the domestic courts of the CoE member states started to identify a clear link between human rights and climate change. Even though

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[99] Ibid.
[100] Orla Kelleher, The Supreme Court of Ireland's decision in Friends of the Irish Environment v Government of Ireland ("Climate Case Ireland"), (EJIL TALK 9 September 2020) < https://www.ejiltalk.org/the-supreme-court-of-irelands-decision-in-friends-of-the-irish-environment-v-government-of-ireland-climate-case-ireland/ > accessed 16 April 2023.
[101] Ibid.
[102] Francophone first instance court of Brussels, 4th chamber, Klimaatzaak ASBL v. Belgium, no. 2015/4585/A, Judgment of 17 June 2021, < https://prismic-io.s3.amazonaws.com/affaireclimat/18f9910f-cd55-4c3b-bc9b-9e0e393681a8_167-4-2021.pdf > accessed 16 April 2023.
[103] Ibid.
[104] Municipal Court of Prague, Klimatická žaloba ČR and others v. the Czech Republic and others, Judgment No. 14A 101/2021 of 15 June 2022.
[105] Anna-Julia Saiger, 'The Constitution Speaks in the Future Tense: On the Constitutional Complaints Against the Federal Climate Change Act' (VerfBlog, 29 April 2021) < https://verfassungsblog.de/the-constitution-speaks-in-the-future-tense/ > accessed 16 April 2023.
[106] German Bundesverfassungsgericht, Order of the First Senate of 24 March 2021, no. 1 BvR 2656/18 §§ 1-270 <https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2021/03/rs20210324_1bvr265618en.html > accessed 16 April 2023.
[107] Saiger (n. 113).

the number of cases is limited to firmly establish the existence of a European consensus, these cases certainly reveal an emerging trend among the European countries to litigate climate change through the human rights paradigm, taking into account also that there are a significant number of cases pending before different national courts. For now, the existence of the emerging trend will have an influence on the margin of appreciation granted to states in ECtHR rulings on climate change cases.

2.2 Articles 2 and 8 of the ECHR

Articles 2 and 8 of the ECHR are the most frequently invoked articles by climate change applicants. Article 2 guarantees the right to life, and Article 8 embodies the right to private and family life. Unquestionably, these two rights are most affected by climate change, as many people have suffered from the loss of their homes and, in most severe cases, premature death. Multiple international human rights organisations have confirmed the magnitude of the existing and prospective adverse effects of global warming on the effective exercise of human rights.[108]

The European Convention on Human Rights acknowledges that states have a negative obligation not to interfere in the enjoyment of certain rights but also a positive obligation to take necessary and appropriate measures to guarantee the nationals of their country the effective enjoyment of rights. Taking effective adaptation and mitigation measures to fight climate change should be considered within the scope of positive obligations under Articles 2 and 8 of the Convention. To start with the right to private and family life, under Article 8, states have certain positive obligations.[109] According to the Court, Article 8 "does not merely compel the State to abstain from interference." [110] There might also exist positive obligations 'inherent in an effective respect for family life'.[111] Moreover, under Article 8, states must give 'due weight' to the interests of the person in question, for example, by conducting a comprehensive examination to assess and pre-empt the effects of potential detrimental activities.[112]

In several environmental cases, the Court found that the state violated its positive obligations under Article 8. For example, in *Tătar v. Romania,* concerning gold mining activities, the Court held that the Romanian government neglected its duty to conduct a proper examination of the threats posed by the actions of the company and adopt

[108] Third-party intervention to the case of Verein KlimaSeniorinnen Schweiz and Others v. Switzerland, International Commission of Jurists and the Swiss Section of the International Commission of Jurists, 21 September 2021, 6 <http://climatecasechart.com/non-us-case/union-of-swiss-senior-women-for-climate-protection-v-swiss-federal-council-and-others/ > accessed 20 April 2023.
[109] European Court of Human Rights, Guide on Article 8 of the European Convention on Human Rights, 31 August 2022 < https://ks.echr.coe.int > accessed 20 April 2023 (Guide to Article 8).
[110] Marckx v. Belgium, App no 6833/74 (ECHR, 13 June 1979) § 31.
[111] Ibid.
[112] Taşkin and others v. Turkey, App no 46117/99 (ECHR, 10 November 2004) §§ 118-119; McMichael v. the United Kingdom, App no 16424/90 (ECHR, 24 February 1995) § 87; Hatton and Others v. United Kingdom (n. 90) § 104.

relevant measures for safeguarding the rights of the affected individuals.[113] The Court also emphasised that the state has an obligation to monitor industrial activities which may have a negative and harmful effect on the person's health and general environment.[114] In *Guerra and Others v. Italy,* regarding a factory producing fertilisers, the Court once more reiterated that serious environmental degradation could have a detrimental impact on the health of individuals, undermining their right to private and family life.[115] These cases clearly emphasise that the ECtHR acknowledges that environmental degradation can interfere with people's private and family life.

Considering that climate change poses an even greater risk to the homes and families of numerous individuals, states must follow their positive obligations under Article 8 and enact any necessary and foreseeable measures to combat climate change and guarantee the protection of this right. The applicants in several cases pending before the Court have invoked the violation of Article 8. For instance, in the Swiss Senior Women case, the applicants stated that their conditions are so severe during the summer that they cannot even leave their houses, which leads to anxiety, loneliness and depression.[116] Additionally, in the Portuguese Youth case, the applicants complained that wildfires have even reached the area where they live, and as a result, the risk of losing their homes is increasing daily.[117] All these examples show the manifest interference in the right of the private and family life of the applicants, demonstrating the plausibility of a finding that the Governments did not fulfil their positive obligations.

To continue with the right to life, under Article 2, the CoE member states must take all necessary and appropriate measures to protect the lives of persons within their jurisdiction.[118] Thus the state has an obligation to enact a legal framework and undertake proactive procedural steps.[119] The positive obligations stemming from Article 2 apply when the right to life may be at stake due to inherently dangerous activities.[120] Additionally, according to the Court, the risk to life should be real and foreseeable.[121] It is beyond dispute that climate change causes severe threats to the lives of people all around the world. As the United Nations Human Rights Office of High Commissioner mentioned in its third-party intervention in the Senior Swiss Women case, 'the deadly impact on the foundational right to life is no longer simply an argument of reasonable foreseeability,

[113] Tătar v. Romania, App no 67021/01 (ECHR 27 January 2009).
[114] Ibid.
[115] Guerra and Others v. Italy, App no 14967/89 (ECHR, 19 February 1998).
[116] Swiss Senior Women case (n. 14).
[117] Portuguese Youth case (n. 17).
[118] Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania [GC], App no 47848/08 (ECHR, 17 July 2014), § 130.
[119] European Court of Human Rights, Guide on Article 2 of the European Convention on Human Rights, 31 August 2022 < https://ks.echr.coe.int > accessed 20 April 2023 (Guide to Article 2).
[120]Ibid.
[121] Ibid.

but of current, lived experience'.[122] The fact that climate change has 'real and immediate risk' on the enjoyment of the right to life was also recognised by the UN Human Rights Committee in its general comment No 36.[123] The HRC highlighted that climate change poses one of the most grave and pressing challenges to the right to life.[124] Acknowledging that the right to life 'concerns the entitlement of individuals to be free from acts and omissions that are intended or may be expected to cause their unnatural or premature death, as well as to enjoy a life with dignity',[125] the Committee has also emphasized that state parties' have a positive obligation to reduce reasonably foreseeable risk to life.[126] This positive obligation should also be considered in light of climate change, as the states have to take all the possible adaptation and mitigation measures to reduce the risks posed to human life by global warming.

Even though the ECtHR has yet to deliver a judgement on the climate change applications, it has previously found a violation of Article 2 in cases concerning dangerous industrial activities. In the case of *Öneryıldız v. Turkey,* the Court, with reference to both the substantive and procedural limbs of Article 2, declared that Turkey violated the applicant's right to life due to the absence of appropriate steps taken to prevent the death of nine of the applicant's close relatives, and insufficient laws that lacked the adequate protection of the right to life.[127] In *Özel and others v. Turkey,* regarding the collapse of a building built in a 'major risk zone', the Court once again noted that Turkey violated Article 2 of the Convention, ruling that the respondent government had not taken swift measures to ascertain the liability and circumstances of the collapse of the buildings which resulted in deaths.[128]

The UN Human Rights Committee has also found a violation of the right to life in the environmental case of *Portillo Caceres et al. v. Paraguay* (Portillo Caceres case).[129] The Portillo Caceres case involved the issue of environmental pollution in which it was alleged that the government was unable to safeguard persons from environmental harm.[130] The Committee underlined that '[t]he obligation of States parties to respect and ensure the right to life extends to reasonably foreseeable threats and life-threatening situations that can result in loss of life'.[131] Additionally, in the case of Torres Strait Islanders, even though the HRC did not find a violation of the right to life in the end,[132] it once again emphasised

[122] Third-party intervention in the case of Verein KlimaSeniorinnen and Others v. Switzerland, United Nations High Commissioner for Human Rights, 20 July 2021, § 12 < http://climatecasechart.com/non-us-case/union-of-swiss-senior-women-for-climate-protection-v-swiss-federal-council-and-others/ > accessed 20 April 2023.
[123] UNHRC 'Article 6: right to life' (3 September 2019) UN Doc. CCPR/C/GC/36, § 3.
[124] Ibid.
[125] Ibid.
[126] Ibid, § 21.
[127] Öneryıldız v. Turkey [GC], App no 48939/99 (ECHR, 30 November 2004).
[128] Özel and others v. Turkey, App nos. 14350/05 15245/05 16051/05 (ECHR, 17 November 2015).
[129] Norma Portillo Càceres et al. v. Paraguay, Communication No. 2751/2016 (UN Human Rights Committee, 20 September 2019, UN Doc. CCPR/C/126/D/2751/2016) §7.3.
[130] Ibid.
[131] UNHRC 'Article 6: right to life' (n. 131).
[132] Torres Strait Islanders Case (n. 24).

that climate change poses a real and serious threat to people's right to life.[133] The Committee also stated that the 'right to life cannot be properly understood if it is interpreted in a restrictive manner'.[134]

There is no doubt that the threat stemming from climate change amounts to a serious and foreseeable risk to the lives of many individuals. If a state does not undertake practical legislative and policy efforts to combat climate emergencies, this may amount to the violation of positive obligations under Article 2 of the ECHR. Moreover, recent climate change applicants in their applications have provided extensive evidence of how their right to life has been threatened, which arguably demonstrates a foreseeable risk to their lives.

2.3 Article 14 of the ECHR

The prohibition of discrimination enshrined in Article 14 is another alleged violation in the Portuguese Youth application. Article 14, which has an ancillary nature, prohibits discrimination in the enjoyment of the rights guaranteed under the Convention on any ground, such as 'sex, race, colour, language, religion, political or other opinion' as well as 'birth or other status'.[135] Article 14 entails not only the prohibition of direct discrimination but also indirect discrimination.[136] Indirect discrimination is evident when national laws or measures, even when framed in a neutral manner, indirectly affect certain individuals or groups of people.[137] It means that even though the policy or measure is not directed to one particular person or a group, it still indirectly discriminates against this group.[138] Notably, the intent is not necessary for an occurrence of indirect discrimination.[139]

The child applicants in the Portuguese Youth case have argued that they have been victims of discrimination as the national governments are not effectively fighting climate change, which causes them to experience more severe consequences of climate change due to their age. The state's policy or measure, which fails to efficiently work for achieving a globally recognised temperature goal, is the kind of policy which indirectly discriminates against children. For this reason, younger and future generations who are yet to be born are more likely to face disastrous impacts of climate crisis if no adequate steps are taken.

While the ECtHR has accepted age as one of the grounds for discrimination, in this case, it is not the age that is relevant but the 'cohort of birth' of which these children are

[133] Ibid.
[134] Ibid.
[135] ECHR (n. 6) Article 14.
[136] European Court of Human Rights, Guide on Article 14 of the European Convention on Human Rights, 31 August 2022 < https://ks.echr.coe.int > accessed 25 April 2023.
[137] Biao v. Denmark [GC], App no 38590/10 (ECHR, 24 May 2016) § 103; D.H. and Others v. the Czech Republic [GC], App no 57325/00 (ECHR, 13 November 2007) § 184.
[138] Hugh Jordan v. the United Kingdom, App no 24746/94 (ECHR, 4 May 2001) § 154.
[139] Biao v. Denmark and D.H. and Others v. the Czech Republic (n. 145).

part.[140] In other words, the issue that arises here concerns the principle of intergenerational equity. The term 'intergenerational equity' or 'intergenerational justice' proposes that each generation must pass on to the next generation the same equitable share of resources that it has received from previous generations.[141] Thus, it refers to the disparities between generations, which oblige living generations to consider the interest of the future ones.[142] Every age group wants to enjoy at least the same benefits as the past generation from the environment.[143] Therefore, there must be a balance between intergenerational needs to offer a certain degree of manoeuvre to future generations to accomplish their desired objectives.[144]

The importance of the principle of intergenerational equity has also been affirmed in the case law of different countries.[145] For instance, the Supreme Court of Colombia, in the case of *Pena v. Presidencia de la República de Colombia,* concerning the life of the Columbian Amazon, defined intergenerational equity as not only the equality between present and future generations but also 'between those who make decisions today and the generation of younger people who face the effects of those decisions made in the present'. [146] Even though this case did not concern climate change, it is still important as it provided the definition of intergenerational equity. Additionally, acknowledgement of intergenerational equity can be seen in more recent documents. For example, in requesting an advisory opinion from the International Court of Justice (ICJ), the General Assembly of the United Nations (UNGA) emphasised the present and future generations, which can be seen as a reference to intergenerational justice and equity.[147]

The European Court of Human Rights has not yet used the principle of intergenerational equity. Undoubtedly, the novelty of climate change litigation through human rights brought some modern and somewhat unfamiliar concepts. However, the Court always takes into account the present-day conditions and developments in international law. Grounds of discrimination under Article 14 are not exhaustive and have been broadened from time to time. It is undeniable that today's children and future generations will endure more drastic consequences, as global warming will worsen if no effective measures are taken. Therefore, every inadequate policy, adaptation or mitigation can be considered as indirect discrimination against children, young people, and future birth cohorts.

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[140] Sandvig, Dawson, and Tjelmeland (n. 35).
[141] Edward Page, 'Intergenerational Justice and Climate Change' (1999) 47 (1) Political Studies 53, 55.
[142] James C. Wood, 'Intergenerational Equity and Climate Change' (1996) 8 Georgetown International Environmental Law Review 293, 298.
[143] Lydia Slobodian, 'Defending the Future: Intergenerational Equity in Climate Litigation' (2020) 32 Georgetown Environmental Law Review 569, 571.
[144] Ibid.
[145] Sandvig, Dawson and Tjelmand (n. 35).
[146] Pena v. Presidencia de la República de Colombia, § 3 cited in Slobodian (n. 151) 578.
[147] The general Assembly of the United Nation request for an advisory opinion from the Court on the obligations of States in respect of climate change (Pending) ICJ Press Release (n. 1).

Conclusion

Human rights-based climate change litigation is gaining more prominence in today's world of climate crisis. With the proliferation of rights-based climate change cases, the importance of discussing this matter is unquestionable. Therefore, this paper provided a comprehensive analysis of the climate change cases before the ECtHR, focusing on the obstacles regarding both the admissibility and merits stages of the proceedings.

For the Court to accept the admissibility of climate change cases, it is necessary to apply the concept of victimhood in a more flexible way. The main problem surrounding this admissibility criterion is that the climate crisis is a global phenomenon affecting the entire world population. However, this does not preclude that it also has adverse effects on particular individuals, especially those most vulnerable. Thus, affected persons should have a remedy against the violations of their rights, which goes in line with the recent developments in different human rights bodies. Moreover, when it comes to jurisdictional issues, while the case law of the ECtHR is against the extensive interpretation of extraterritoriality, it nonetheless has never dealt with climate change cases before. Therefore, incorporating new approaches specifically tailored to the cases concerning global warming is necessary. The Convention should be interpreted in light of the doctrine of living instrument and take into consideration new developments such as the advisory opinion of the Inter-American Court and Maastricht Principles on Extraterritoriality. In addition, in the context of evaluating the exhaustion of domestic remedies, a pertinent issue arises for the applicants in the Portuguese Youth case. Given that the case at hand concerns children against thirty-three states, for whom it would be unfeasible to conduct domestic proceedings in every respondent state the latter should fall within the exceptions for the exhaustion of domestic remedies acknowledged under Article 35 (1) of the Convention.

Although the jurisprudence of the Court in environmental matters usually grants states a wide margin of appreciation, climate change cases are different from all the previous cases rendered by the Court. Hence, climate change disputes should be addressed with novel approaches. Upon reviewing the developments in the national courts of the CoE member states, an emerging trend of climate change litigation was identified. This observed emerging trend should warrant the consideration of the margin of appreciation accorded to states, advocating for a narrower scope. In addition, taking effective adaptation and mitigation measures to fight climate change falls within the scope of the positive obligation of states under Articles 2 and 8 of the Convention. When it comes to Article 14, children and future generations are likely to suffer from discrimination due to the fact that climate change will have more adverse impacts in the future if no effective measures are taken.

Consequently, even though human rights-based climate change litigation is a crucial step taken to resolve global warming, the aim of this paper was not to depict it as the sole and the most effective tool for fighting the climate crisis. Nor did it claim that the

Strasbourg Court should find the violation in every pending case before it. To finally meet the temperature goals, it takes international cooperation and joined forces, and human rights-based litigation is one part of it. Even in the case of the ECtHR, there are other possibilities for addressing climate change. For instance, per Protocol No. 16, the Court can issue an advisory opinion relating to the interpretation of the Convention requested by the highest courts of the CoE member states.[148] Although only some of the member states have ratified this protocol, it is still of utmost importance as the advisory opinions have substantial sway on how the domestic courts interpret the Convention in their national proceedings. Moreover, there has been a recent proposal to the European Convention on Human Rights to enact a new additional protocol, which would guarantee the right of individuals to a clean, healthy, and sustainable environment.[149] All this demonstrates that there are other possibilities within the human rights paradigm to combat the increase of global temperatures, which, along with the litigation, should serve as another brick in the rising movement for climate justice.

[148] Protocol No. 16 to the Convention on the Protection of Human Rights and Fundamental Freedoms, Council of Europe Treaty Series - No. 214 (1 August 2018).

[149] Parliamentary Assembly of Council of Europe, ' Committee proposes a draft of a new protocol to the European Convention on Human Rights on the right to a healthy environment' < https://pace.coe.int/en/news/8419/committee-proposes-draft-of-a-new-protocol-to-the-european-convention-on-human-rights-on-the-right-to-a-healthy-environment > accessed 28 May 2023.

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Co-funded by
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