Protecting rights through climate change litigation before European courts

Hartmann, Jacques; Willers, Marc

Published in:
Journal of Human Rights and the Environment

DOI:
10.4337/jhre.2022.01.04

Publication date:
2022

Document Version
Peer reviewed version

Protecting Rights through Climate Change Litigation before European Courts

Jacques Hartmann and Marc Willers QC*

This article examines the scope for holding States to account for their failure to tackle dangerous climate change by bringing cases before regional European courts. We examine recent developments that demonstrate the difficulties faced by lawyers and activists when pursuing climate change related claims before the Court of Justice of the European Union. We then turn to consider rights-based climate complaints filed before the European Court of Human Rights, the hurdles they face and their comparatively better prospects of success.

Keywords: Climate Change Litigation, Paris Agreement, Human Rights, Standing, CJEU, ECHR, ECtHR

1 INTRODUCTION

Global trends in climate change litigation demonstrate the importance of human rights law as a tool for improving the response of public authorities and corporations to climate change.[1] Much of this burgeoning litigation was brought after the adoption of the 2015 Paris Agreement, which makes specific reference to human rights in the preamble.[2] While there has been some discussion as to the significance of this reference,[3] the debate now appears moot. Numerous human rights cases all over the world seek redress for the impacts of climate change and/or ask courts to order State and non-State actors to adopt more ambitious measures to tackle climate change.[4]

No region has seen more rights-based climate cases than Europe, both at the domestic and regional level.[5] At the domestic level there have been many setbacks but also notable success and following the ground-breaking decision in *Urgenda*[6] an increasing number of

*Jacques Hartmann is Reader in Law at Dundee University and Marc Willers QC is a practising barrister and member of Garden Court Chambers in London.

1 See Jacqueline Peel and Hari M Osofsky, 'A Rights Turn in Climate Change Litigation?' (2018) 7 Transnational Environmental Law 37; and Annalisa Savaresi and Juan Auz, 'Climate Change Litigation and Human Rights: Pushing the Boundaries' (2019) 9 Climate Law 244.

2 2015 Paris Agreement to the United Nations Framework Convention on Climate Change (Paris Agreement).

3 Boyle, for example, argues that the Paris Agreement does not 'bring about a true incorporation of human rights' whereas Knox argued that the reference clarifies 'that actions to address climate change should take human rights into account, the agreement helps to mainstream human rights norms into the ongoing implementation and evolution of the climate regime.' A Boyle, 'Climate Change, the Paris Agreement and Human Rights' 2018 67 (4) *International and Comparative Law Quarterly* 769-770 and JH Knox, 'The Paris Agreement as a Human Rights Treaty' in D Akande and others (eds), *Human Rights and 21st Century Challenges: Poverty, Conflict, and the Environment* (Oxford University Press 2020: 323), respectively.

4 For an overview of this litigation, see A Savaresi and J Setzer, 'Rights-based litigation in the climate emergency: mapping the landscape and new knowledge frontiers', in this Special Issue.

5 Ibid.

6 *The State of the Netherlands (Ministry of Economic Affairs and Climate Policy) v Stichting Urgenda*, Supreme Court of the Netherlands (20 December 2019). Available at < http://climatecasechart.com/climate-change-litigation/non-us-case/urgenda-foundation-v-kingdom-of-the-netherlands/> accessed 15 November 2021. Stein E and Geert Castermans A, 'Case Comment—Urgenda v. The State of the Netherlands: The "Reflex Effect"— Climate Change, Human Rights, and the Expanding Definitions of the Duty of Care' (2017) 13(2) *McGill Journal of Sustainable Development Law* 303; Barritt E, 'Consciously transnational: Urgenda and the shape of climate change

pioneering claims have drawn attention to the disproportionately detrimental effect climate change will have on the rights of future generations.[7]

This article focuses on the climate cases that have been decided or are pending before regional courts in Europe. In these cases, the applicants challenge States' insufficient action to combat dangerous climate change and its impacts on the enjoyment of human rights. The article considers past efforts to hold the European Union (EU) to account before its courts — the 'General Court' and the 'Court of Justice', commonly referred to collectively as the 'Court of Justice of the European Union' (CJEU) — and the scope for holding Member States of the Council of Europe (CoE) to account before the European Court of Human Rights (ECtHR).

We first consider two recently failed applications to the CJEU, which relied at least in part on human rights law. These unsuccessful applications are part of a long series of similarly unsuccessful environmental cases,[8] which demonstrate the near impossibility for individuals or environmental interest organisations to initiate climate cases before the CJEU.

We then consider three cases pending before the ECtHR. Although these cases differ in significant ways, the applicants all argue that the respondent States have failed to comply with their obligations imposed by the European Convention of Human Rights (ECHR), read in light of obligations enshrined in the 2015 Paris Agreement.[9]

As explained in more detail below, in all these cases the applicants invoke States' positive obligations associated with the right to life (Article 2) and right to respect for private and family life (Article 8). As the cases remain pending, little can be said about their outcomes. Drawing largely on the arguments made in *Duarte Agostinho*,[10] the concluding part of this article reflects on the role that human rights litigation may play in holding European States to account

---

litigation: The State of the Netherlands (Ministry of Economic Affairs and Climate Policy) v Urgenda Foundation' (2020) 22(4) *Environmental Law Review* 296; Mayer B, The State of the Netherlands v. Urgenda Foundation: Ruling of the Court of Appeal of The Hague (9 October 2018)" (2019) 8(1) *Transnational Environmental Law* 167. For more recent examples of climate cases, see The French Paris Administrative Court judgment of 3 February 2021, N°1904967, 1904968, 1904972, 1904976/4-1. The full text of the judgment is available in French (with an English) summary at <http://paris.tribunal-administratif.fr/Actualites-du-Tribunal/Communiques-de-presse/L-affaire-du-siecle> accessed 15 November 2021. For comments, see Dadomo C, The First Successful Claim Against the French State for Failure to honour its obligations to Combat Global Warming – Paris Administrative Court's Judgment of 3 February 2021 on Climate Change: the Case of the Century or is it?" in *Environmental Liability* 26(3) (2021) 119. See also judgment of the German Supreme Court of 24 Marts 2021, 1 BvR 2656/18, 1 BvR 96/20, 1 BvR 78/20, 1 BvR 288/20, 1 BvR 96/20, 1 BvR 78/20. A full translation of the judgment is at <https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2021/bvg21-031.html> accessed 15 November 2021. For comments, see eg Mührel K, All that Glitters Is Not Gold, Voelkerrechtsblog. Available at <https://voelkerrechtsblog.org/all-that-glitters-is-not-gold/> accessed 15 November 2021.

[7] For comments, see Jodoin and others, 'When the Kids Put Climate Change on Trial: The Disruptive Nature of Youth-Focused Climate Litigation', in this Special Issue.

[8] For an overview, see M Pagano, 'Overcoming Plaumann in EU Environmental Litigation an Analysis of ENGOS Legal Arguments in Actions for Annulment' (2019) Diritto e Processo 311.

[9] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) and Paris Agreement (n 2).

[10] *Duarte Agostinho and Others v Portugal and 32 other States* App no 39371/20 was lodged on 7 September 2020, given priority and communicated to the respondent States on 13 November 2020. The 33 respondent States include Portugal, the other 26 EU States, the UK, Switzerland, Norway, Russia, Turkey and Ukraine. For more information and submissions, see <https://youth4climatejustice.org/> and <http://climatecasechart.com/climate-change-litigation/non-us-case/youth-for-climate-justice-v-austria-et-al/> accessed 15 November 2021. The French Paris Administrative Court judgment of 3 February 2021, N°1904967, 1904968, 1904972, 1904976/4-1. The full text of the judgment is available in French (with an English) summary at <http://paris.tribunal-administratif.fr/Actualites-du-Tribunal/Communiques-de-presse/L-affaire-du-siecle> accessed 15 November 2021. For commentary Dadomo C, 'The first successful claim against the French State for failure to honour its obligations to combat global warming – Paris administrative court's judgment of 3 February 2021 on climate change: the case of the century or is it?', Environmental Liability 26(3) [2021] 119.

for their failure to avert the catastrophic impacts of climate change. In this regard, the ECtHR cases are particularly important, given the hurdles facing individuals and groups trying to satisfy the standing requirements before the CJEU.

2 CLIMATE CHANGE LITIGATION BEFORE THE COURT OF JUSTICE OF THE EUROPEAN UNION

The CJEU has explicit and far-reaching judicial review powers, which include the power to annul legislative acts.[11] As such, its powers are similar to those of a constitutional court. However, unlike domestic courts, it is extremely difficult for private parties to establish *locus standi* before the CJEU.[12]

The CJEU has already dismissed two climate change cases in which the applicants challenged EU legislative acts on the grounds that they breached both the EU's founding treaties and the applicants' human rights, as protected under the EU Charter of Fundamental Rights.[13] Both cases were brought directly against the EU, as an independent climate actor. And both cases were rejected as the applicants failed to satisfy the CJEU's stringent standing requirements.

The first case — *Armando Carvalho and Others v European Parliament and Council of the European Union* (also known as *The People's Climate Case*)[14] — was brought in 2018 by ten families, all working in the agricultural or tourism sectors, from Portugal, Germany, France, Italy, Romania, Kenya, Fiji, and the Swedish Sami Youth Association, Sáminuorra. The applicants challenged three pieces of EU legislation adopted to enable the EU to meet its greenhouse gas emissions reduction target of 40 per cent, compared with 1990 levels.[15] The applicants argued that this target was insufficient to protect their lives, livelihoods and human rights from the impacts of climate change.

The second case — *Peter Sabo and Others v European Parliament and Council of the European Union* (also known as the *EU Biomass case*)[16] — was brought in 2019 by a group of individuals and civil society organisations from Estonia, France, Ireland, Romania, Slovakia and the US. The applicants challenged the EU's Renewable Energy Directive, which considers the burning

---

[11] Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union (TFEU) [2016] OJ C202/1, Article 263(1).

[12] The term '*locus standi*' refers to the right to be heard in court and to be a party to legal proceedings. Legal standing comprises the provisions regulating the identification of the person, or groups of persons, who are allowed to bring a claim before a court. Hereinafter referred to as 'standing'.

[13] Charter of Fundamental Rights of the European Union (CFR) [2000] OJ 2000 C 364.

[14] Case T-330/18, *Armando Carvalho and Others v European Parliament and Council of the European Union* Order of the General Court (Second Chamber) (8 May 2019), on appeal Case C-565/19 P, *Armando Carvalho and Others against the Order of the General Court* Judgment of the Court (Sixth Chamber) (25 March 2021).

[15] The three pieces of EU legislation were: 1) Directive (EU) 2018/410 amending Directive 2003/87/EC to Enhance Cost-effective Emission Reductions and Low-carbon Investments, and Decision (EU) 2015/1814 [2018] OJ L76/3 (ETS Directive); 2) Regulation (EU) 2018/842 on Binding Annual Greenhouse Gas Emission Reductions by Member States from 2021 to 2030 Contributing to Climate Action to Meet Commitments under the Paris Agreement and amending Regulation (EU) No 525/2013 [2018] OJ L156/26 (Climate Action Regulation); 3) Regulation (EU) 2018/841 on the Inclusion of Greenhouse Gas Emissions and Removals from Land Use, Land Use Change and Forestry in the 2030 Climate and Energy Framework, and amending Regulation (EU) No 525/2013 and Decision No 529/2013/EU [2018] OJ L156/1 (LULUCF Regulation).

[16] Case T-141/19, *Peter Sabo and Others v European Parliament and Council of the European Union* Order of the General Court (Fourth Chamber) (6 May 2020), on appeal Case C-297/20 P, *Peter Sabo and Others v European Parliament and Council of the European Union* Order of the Court (Eighth Chamber) (14 January 2021).

of 'forest biomass' — eg trees, branches and bark — to be a source of renewable energy.[17] The applicants came from regions particularly affected by forest logging, such as the US Southeast, Estonia, and the Carpathian Mountains in Eastern Europe. They alleged that wood-burning power plants release more carbon dioxide into the atmosphere per energy unit than coal plants and therefore sought the annulment of EU law provisions relating to forest biomass.[18]

Thus, whereas *Carvalho* challenged legislation that sets the EU's overall climate change targets, *Sabo* challenged legislation that permits a specific climate change measure — namely, reliance on biomass — to meet those targets. In both cases the applicants sought judicial review of the EU's legislative acts.

2.1 The Problem of Standing

Carvalho and *Sabo* were brought under Article 263 of the Treaty on the Functioning of the European Union (TFEU) which gives the CJEU the power to review and annul acts of the EU that are defective in some way.[19]

According to Article 263(4) TFEU 'natural or legal persons' (that is, individuals, companies, associations, foundations and other incorporated bodies) may bring an action for the annulment of EU legislation, in whole or in part. However, applicants must satisfy the CJEU that they meet certain requirements for admissibility. These are set out in Article 263(4) TFEU, according to which:

> Any natural or legal person may… institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures.

Thus, there are three scenarios enabling a natural or legal person to bring an action before CJEU.[20] Only one of these is relevant to the climate cases discussed, namely that of 'an act… which is of direct and individual concern to them'.

The meaning of this cumulative requirement was famously established in the *Plaumann* case in 1963.[21] In *Plaumann* it was stated that 'direct concern' only exists if an EU Member State is not granted discretion under the disputed act. Therefore an act requiring further national or EU implementation that involves an element of discretion, as is often the case, is not of 'direct concern'. Furthermore, according to the *Plaumann* doctrine, the requirement of 'individual concern' is only met when a contested act affects the applicants:

> …by reason of certain attributes that are peculiar to them or by reason of circumstances in which they are differentiated from all other persons, and by virtue of these factors distinguishes them individually…[22]

---

[17] Directive (EU) 2018/2001 (recast) on the promotion of the use of energy from renewable sources. Article 2(2)(1) of the contested directive defines 'energy from renewable sources' as being, *inter alia*, 'energy from renewable non-fossil sources, namely… biomass'.

[18] Case T-141/19 (n 16). The submission is available at <http://eubiomasscase.org/wp-content/uploads/2019/08/EU-Biomass-Case-Main-Arguments.pdf> accessed 15 November 2021.

[19] The list of grounds for annulment is set out in Article 263 TFEU and includes infringement of the foundational treaties and the EU Charter. See eg P Craig and G de Búrca, *EU Law: Text, Cases, and Materials* (7th edn, Oxford University Press 2020).

[20] The three scenarios in which a natural or legal person can bring an action before CJEU for annulment are: (i) against an act that is addressed to them; (ii) against an act that is of direct and individual concern to them; and (iii) against a regulatory act that is of direct concern to them and does not entail implementing measures.

[21] Case 25/62, *Plaumann & Co v Commission* [1963] ECR 95.

[22] Ibid 107.

While the wording of Article 263 was changed with the Lisbon Treaty, the *Plaumann* test still stands and its restrictive approach has sparked vast academic debate and criticism.[23]

In essence, in order to gain standing before the CJEU, private applicants must possess some characteristics that distinguish them uniquely, vis-à-vis other members of society. There is general agreement that this is a particularly strict requirement, which 'extensively curtails' the ability of natural or legal persons to bring actions for annulment before the CJEU.[24] Standing is even more limited for groups, such as environmental interest organisations. Commentators have observed how the criteria laid down in Article 263 TFEU are 'interpreted so strictly that they bar all environmental organisations from challenging environmental measures'.[25]

This stringent interpretation of standing requirements means that environmental interest organisations have only been able to establish standing where the contested act has granted them a specific prerogative or a procedural right, such as the right to be heard in a specific decision-making process.[26]

2.2 First Attempt to Overcome the *Plaumann* Test: The General Court

In their first attempt to overcome the *Plaumann* test, the applicants in the two climate cases argued that any violation of human rights is by its very nature unique or alternatively that the test should be altered to take into account the realities of climate change.[27] Although the focus of the two cases differed, they were argued in similar ways. In both, the applicants relied *inter alia* on Article 191 TFEU, which states that EU policy on the environment should contribute to pursuit of the following objectives:

- preserving, protecting and improving the quality of the environment,
- protecting human health,
- prudent and rational utilisation of natural resources, and
- promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change.

The applicants further relied on the EU Charter, which combines rights enshrined in various international human rights agreements and which, like the TFEU, binds EU institutions.[28]

In *Carvalho*, the applicants asked the General Court to declare that specific pieces of EU climate legislation were unlawful under Article 263 TFEU. They further sought pecuniary damages under Article 340 TFEU for their alleged individual losses and compensation in the form of an injunction. Under both provisions, the remedy sought was almost identical. Thus, the applicants request that Parliament and the Council be ordered to adopt measures requiring a reduction in greenhouse gas emissions by 2030 by at least 50% to 60% compared to 1990 levels.[29]

---

[23] For an overview, see eg M Eliantonio and others (eds), Standing up for Your Right(s) in Europe: A Comparative Study on Legal Standing (Locus Standi) Before the EU and Member States' Courts (2013) Intersentia 17 and M van Wolferen and M Eliantonio, 'Access to Justice in Environmental Matters in the EU: The EU's Difficult Road towards Non-Compliance with the Aarhus Convention' in M Peeters and M Eliantonio (eds), *Research Handbook on EU Environmental Law* (Edward Elgar Publishing 2020) 148.

[24] K Lenaerts, I Maselis and K Gutman, *EU Procedural Law* (Oxford University Press 2014) 324.

[25] Eliantonio and others (n 23) 42–43.

[26] See eg Case C-321/95, Stichting Greenpeace Council (Greenpeace International) and Others v Commission of the European Communities and Case C-355/08 P, *WWF-UK v Council* [2009] OJ C205/16, 69. But see reference to further developments on standing for environmental organisations in part 2.4, below.

[27] Case T-330/18 (n 14) Case T-141/19 (n 16).

[28] TEU (n 11) Article 6(1). European Union, *Charter of Fundamental Rights of the European Union*, 26 October 2012, 2012/C 326/02.

[29] Case C-565/19 P (n 14) 100-106.

Specifically, the applicants argued that the EU's emissions target for 2030 affected their legal situation by requiring an insufficient reduction and thereby authorising an excessive volume of greenhouse gas emissions. As such, EU climate law infringed their human rights as enshrined in the EU Charter, namely: the right to life (Article 2); the right to the integrity of the person (Article 3); the freedom to choose an occupation and right to engage in work (Article 15); the freedom to conduct a business (Article 16); the right to property (Article 17); equality before the law (Article 21); and the rights of the child (Article 24). However, the merits of their claims were never considered as the applicants failed to persuade the CJEU that they had standing to present their case.

The General Court's approach was confirmed in *Sabo*, which, although initiated after *Carvalho*, was decided first. In *Sabo* the applicants sought annulment of the Renewable Energy Directive for being in breach of Article 191 TFEU and the EU Charter. They argued that the contested directive was of individual concern to them because they came from regions particularly affected by forest logging and because the accelerated forest loss and significant increase in forest logging and consequently, increased greenhouse gas emissions, violated their right to respect for private and family life (Article 7); freedom to manifest religion (Article 10); right to education (Article 14); right to property (Article 17); right to equality before the law (Article 21); right to respect for religious diversity (Article 22); rights of the child (Article 24); and right to health care (Article 35). Even though some applicants were foresters or lived in forest areas, their application was rejected at the admissibility stage as the Court was not satisfied that the applicants had standing to bring the case.

2.3 Second Attempt to Overcome the *Plaumann* Test: The Court of Justice

In both *Carvalho* and *Sabo* the applicants appealed the decisions to dismiss their respective applications. They argued *inter alia* that the 'individual concern' requirement should be interpreted in view of the reality of the global climate crisis and that, in cases alleging human rights violations, direct access to CJEU must be ensured, as long as there are no alternative *fora*. The Court of Justice rejected these and other arguments. It provided identical reasoning in both cases, holding that:

> …the claim that the acts at issue infringe fundamental rights is not sufficient in itself to establish that the action brought by an individual is admissible, without running the risk of rendering the requirements of the fourth paragraph of Article 263 TFEU meaningless.[30]

The Court relied on its established case law, according to which the strict interpretation of Article 263(4) is consistent with the EU Charter, and with the right of access to justice to an effective remedy under Articles 6 and 13 of the ECHR.[31] As stated in *Inuit*, the right to an effective remedy and to a fair trial under Article 47 of the Charter 'does not require that an individual should have an unconditional entitlement to bring an action for annulment' directly before the CJEU.[32] Thus, the Court upheld the *Plaumann* doctrine and continued to bar most natural or legal persons from contesting EU law. It further reiterated its position that the EU provides a 'complete system of legal protection', based on a combination of Articles 263 and 267 TFEU, by which the national courts of EU Member States can refer questions of EU law to the CJEU.[33]

The CJEU's view on standing has been criticised by Advocate General Francis Jacobs

---

[30] Case C-565/19 P (n 14) 22; Case C-297/20 P (n 16) 12.

[31] Case C-565/19 P (n 14) 67 and 77.

[32] C-583/11, *Inuit Tapiriit Kanatami and Others v Parliament and Council* [2013] EU:C:2013:625, 105.

[33] Case C-565/19 P (n 14) 68; Case C-297/20 P (n 16) 17.

in a series of exchanges.[34] Jacobs has famously questioned reliance on preliminary references under Article 267 TFEU from national courts as a means to address issues of European law. This route is fraught with difficulties:[35] not only is this often at the discretion of domestic courts, but it is likely to take years and to be very expensive.[36]

In *Sabo*, the Court of Justice reasserted its view that the strict interpretation of Article 263(4) is in compliance with the Aarhus Convention,[37] to which the EU is party.[38] It concluded that reliance on the Aarhus Convention as a ground for appeal was manifestly unfounded.[39]

Article 9(3) of the Aarhus Convention states that:

> …members of the public [must] have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.

Academic commentators have long argued that the strict interpretation of the standing requirement before the CJEU should be regarded as a breach of Article 9(3).[40] This view was confirmed by the Aarhus Convention Compliance Committee, which has found that the standing requirements before the CJEU are 'too strict to meet the criteria of the convention'.[41] According to the Committee, neither the Aarhus Regulation[42] — which was adopted by the EU explicitly to implement Article 9(3) of the Aarhus Convention — nor the jurisprudence of the CJEU implement or comply with the obligations arising from the Aarhus Convention on access

---

[34] Case C-50/00 P, *Unión de Pequeños Agricultores v Council* [2002] ECR I-667, Opinion of AG Jacobs, and Judgment of the Court [2002] ECR I-6677 and Case T-177/01 *Jégo-Quéré et Cie SA v Commission* [2002] ECR II-02365, on appeal, Case C-263/02 P *Commission v Jégo-Quéré et Cie SA* [2004] ECR I-2365.

[35] Article 267 TFEU (n 11) gives lower courts discretion to refer a case to the CJEU and requires national courts of final appeal to refer cases. The discretion of lower court judges in referring cases is, however, restricted in validity cases. The CJEU has ruled that national courts cannot themselves rule EU acts invalid but must refer cases involving the question of validity of an EU act to the EU courts via the Article 267 procedure. Case C-314/85 *Foto-Frost v Hauptzollamt Luebeck-Ost* [1987] ECR 4199.

[36] In a study almost one-third of responses from environmental organisations, EU citizens and other NGOs criticised the Article 267 mechanism for failing to provide effective access to justice. Among the complaints were: 'National courts are often hesitant or wrongfully refuse to refer preliminary questions to the CJEU' and 'Excessive costs and length of referral proceedings (averaging almost two years)'. See Study on EU implementation of the Aarhus Convention in the area of access to justice in environmental matters, Final report (September 2019) 07.0203/2018/786407/SER/ENV.E.4, 85.
<https://ec.europa.eu/environment/aarhus/pdf/Final_study_EU_implemention_environmental_matters_2019.pdf> accessed 15 November 2021

[37] Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, (Aarhus, 25 June 1998, in force 30 October 2001) UNTS Volume Number, 2161, 447.

[38] Case C-297/20 P (n 16) 31-38.

[39] Ibid 38.

[40] See eg M Eliantonio and others and M van Wolferen and M Eliantonio (n 23).

[41] The findings appeared in two parts. Part 1 issued on 24 August 2011 and Part 2 on 17 March 2017. ACCC Findings and Recommendations of the Compliance Committee with regard to Communication ACCC/C/2008/32.

[42] Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies OJ L 264/13.

to justice.[43] This finding has been confirmed in a series of complaints brought before the Committee by environmental organisations.[44]

2.4 Not all is lost: The EU's New and Increased Emission Reduction Targets for 2030

As *Carvalho* and *Sabo* illustrate, the CJEU has refused to revisit the *Plaumann* test to take account of the reality of climate change. Its strict approach to standing in effect prevents individuals from challenging EU law measures of general application, even when the applicants' human rights are affected. It also makes it impossible for environmental pressure groups to bring public interest litigation before the CJEU. Some had hoped the CJEU's approach to standing might be somewhat mitigated, following its accession to the Aarhus Convention in 1998 and the adoption of a string of directives,[45] which sought to enhance the standing of environmental associations.[46] The decisions in *Carvalho* and *Sabo* clearly demonstrate that this hope was misplaced.

Yet not all is lost. In 2020, the EU increased its 2030 emissions reduction target from 40 per cent to 55 per cent compared to 1990 levels and expressed the ambition to become the world's 'first climate neutral continent,' with no net greenhouse gas emissions in 2050 and economic growth decoupled from resource use.[47] As part of its enhanced 2030 target, the EU has embarked on a process to revise the 2030 Climate and Energy package, a set of laws passed to ensure the EU meets its 2030 climate and energy targets.[48] The EU is working on the revision of its climate, energy and transport-related legislation under the so-called 'Fit for 55 package' in order to align current laws with the 2030 and 2050 ambitions. In this connection, the EU Commission published its proposal for an amendment of the Renewable Energy Directive, which was challenged in *Sabo*. The amending directive envisages a phasing out of electricity production from biomass by 2026.[49] During the presentation of the Fit for 55 package, the EU Commissioner for Energy, Kadri Simson, said:

---

[43] ACCC, Findings and Recommendations (Part II) (41), 123. The findings have not yet been endorsed by a meeting of the parties to the Aarhus Convention (MOP). The 2017 MOP could not agree and decided to postpone consideration to its next session in October 2021. For a discussion on the impact of ACCC findings, see G Samvel, 'Non-Judicial, Advisory, Yet Impactful? The Aarhus Convention Compliance Committee as a Gateway to Environmental Justice' (2020) 9(2) Transnational Environmental Law 211.

[44] See findings by the Aarhus Compliance Committee in case ACCC/C/2008/32 issued on 17 March 2017 and case ACCC/C/2015/128 issued on 17 March 2021. The findings are available at <https://unece.org/environment-policy/public-participation/aarhus-convention/compliance-committee> accessed 15 November 2021

[45] See eg Directive 2003/4/EC of the European Parliament and of the Council (28 January 2003) on public access to environmental information and repealing Council Directive 90/313/EEC; Directive 2003/35/EC of the European Parliament and of the Council (26 May 2003) providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC. Provisions for public participation in environmental decision-making are furthermore to be found in a number of other environmental directives, such as Directive 2001/42/EC (27 June 2001) on the assessment of certain plans and programmes on the environment and Directive 2000/60/EC (23 October 2000) establishing a framework for Community action in the field of water policy.

[46] C Barnard and S Peers (eds), *European Union Law* (3rd edn Oxford University Press 2020) 310.

[47] Commission (EU) 'The European Green Deal' (11 December 2019) COM (2019) 640 final, (Green Deal Communication) 1.

[48] See the 'Key actions' contained in the Annex to the Communication on the European Green Deal Roadmap, ibid.

[49] See Proposal for a Directive of the European Parliament and of the Council amending Directive (EU) 2018/2001 of the European Parliament and of the Council, Regulation (EU) 2018/1999 of the European Parliament and of the Council and Directive 98/70/EC of the European Parliament and of the Council as regards the promotion of energy from renewable sources, and repealing Council Directive (EU) 2015/652. COM(2021) 557 final.

> It is obvious that bioenergy will be part of the Green Deal only if it is produced sustainably… We therefore propose to make the sustainability criteria for the woody biomass stricter… It is common sense that we must use wood where it adds more value, like in furniture, construction and high-quality wood should not be burned for energy…[50]

This adjustment of 2030 and 2050 emissions reduction targets and review of the role of biomass implies that the applicants in *Carvalho* and *Sabo* might at least have partly won their arguments, even though they lost their legal cases before the CJEU.[51]

In addition, the European Commission recently released its draft proposal for a reform of the Aarhus Regulation.[52] Under the current law, environmental interest organisations (though not individuals) that meet certain requirements can submit a request for 'internal review', which enables them to ask an EU institution or body to consider whether an administrative act it has adopted (or not adopted) is contrary to EU environmental law.[53] The proposal would broaden the scope of the internal review procedure to include acts of general scope. The proposal clarifies that this would include review of any 'non-legislative act adopted by a Union institution or body, which has legal and external effects and contains provisions that may contravene environmental law within the meaning of point (f) of Article 2(1)'.[54]

However, the Commission's original proposal excludes legislative provisions that required implementing measures; the rationale being the familiar argument that a remedy may be sought before the national courts, with further access to preliminary references under Article 267 TFEU.

Although broadly welcoming the fact that the Commission was reviewing the Aarhus Regulation, environmental interest organisations have questioned several issues. Among others, and in line with Advocate General Francis Jacob's critique, they have questioned the exclusion of legislative provisions that require implementing measures, given that it would exclude 'most' EU acts.[55] In a joint position paper, the European Environmental Bureau, Client Earth, and Justice and Environment, warned that the Commission's 'proposal contains significant loopholes which the institutions can use to avoid being held accountable',[56] stating further that the exclusion 'fails to ensure compliance with the EU's international law commitments in the Aarhus Convention...'[57]

The European Parliament's Committee on the Environment, Public Health and Food

---

[50] See Statement by Commissioner Simson on delivering the European Green Deal (14 July 2021). SPEECH/21/3709 <https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_21_3709> accessed 15 November 2021.

[51] Cf A Savaresi, L Perugini and MV Chiriacò, 'Making Sense of the LULUCF Regulation: Much Ado about Nothing?' (2020) Review of European, Comparative & International Environmental Law 212.

[52] See Proposal for a Regulation of The European Parliament and of the Council on amending Regulation (EC) No 1367/2006 of the European Parliament and of the Council (6 September 2006) on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies (14 October 2020) COM (2020) 642 final.

[53] Regulation (EC) No 1367/2006 (n 42), Articles 10-11.

[54] See European Parliament legislative resolution of 5 October 2021 on the proposal for a regulation of the European Parliament and of the Council Amending Regulation (EC) No 1367/2006 of the European Parliament and of the Council (6 September 2006) on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies (COM(2020)0642 – C9-0321/2020 – 2020/0289(COD), amendments to in Article 2(1), point (g).

[55] The submission (10 December 2020) is available at <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12165-EU-environmental-law-better-access-to-justice-updated-rules-/F1305795_en> Feedback reference F1305795, p 2 accessed 15 November 2021.

[56] Ibid 1.

[57] Ibid.

Safety (ENVI) has broadly agreed with this criticism and *inter alia* specified in its report on the draft proposal that reliance on preliminary references was insufficient to ensure compliance with the Aarhus Convention.[58] A provisional agreement was hereafter reached between Parliament and the Council, among others, removing any exception from internal review for provisions that require implementing measures. The provisional agreement has been endorsed by Member States' ambassadors and approved by ENVI.[59] The current draft text is expected to be formally adopted in a first vote by Parliament in October 2021.[60] Thus there is hope that the EU law will align with the right to access to justice under the Aarhus Convention.[61]

3 CLIMATE CHANGE LITIGATION BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS

Given the setbacks before the CJEU, climate cases brought before the ECtHR are of special importance. So far, there have been three cases filed before the ECtHR in which the applicants argue that Member States of the CoE have violated the ECHR, when considered in light of the Paris Agreement.

The first case — *Duarte Agostinho and Others v Portugal and Others* — was brought by a group of six Portuguese children and young people against Portugal and another 32 States.[62] The case was taken directly to the ECtHR, without exhausting domestic remedies. The applicants claim that the respondent States have breached their human rights protected by the ECHR, including the right to life (Article 2), and by failing to adopt urgent deep cuts to greenhouse gas emissions, which are necessary to comply with the Paris Agreement. They point to the increased temperatures and lethal forest fires in Portugal, and to the impact of climate change on their lives and their physical and mental health.[63] In addition, the applicants argue that the respondent States have failed to take responsibility for the ways in which they contribute to greenhouse gas emissions overseas through activities such as the export of fossil fuels, the import of goods containing 'embodied' carbon, and emissions abroad resulting from the activities of entities domiciled within their jurisdictions, such as fossil fuel extraction overseas.

The second case — *Verein Klimaseniorinnen Schweiz and Others v Switzerland* — was brought by an association of senior women and four individual applicants against Switzerland.[64] The association (Senior Women for Climate Protection Switzerland) has more than 1,800 members, all women over the age of 64. The applicants complained about breaches of the

---

[58] Report on the proposal for a regulation of the European Parliament and of the Council Amending Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies.
(COM(2020)0642 – C9-0321/2020 – 2020/0289(COD) (4 May 2021).

[59] See Legislative Train 09.2021 8 Environment, Public Health and Food Safety – ENVI <https://www.europarl.europa.eu/legislative-train/api/stages/report/current/theme/environment-public-health-and-food-safety-envi/file/access-to-justice-in-environmental-matters> accessed 15 November 2021.

[60] Ibid 8.

[61] See eg ClientEarth, EU pulls down barriers for public to challenge environmental wrongdoing in court (Press release: 13 July 2021) <https://www.clientearth.org/latest/press-office/press/eu-pulls-down-barriers-for-public-to-challenge-environmental-wrongdoing-in-court/> accessed 15 November 2021.

[62] *Duarte Agostinho and Others* (n 10).

[63] See statement of alleged violations, ibid.

[64] *Verein Klimaseniorinnen v Switzerland* was lodged on 26 November 2020, given priority and communicated to the respondent States on 6 April 2021. For more information and submissions, including submissions, see <https://klimaseniorinnen.ch> and <http://climatecasechart.com/climate-change-litigation/non-us-case/union-of-swiss-senior-women-for-climate-protection-v-swiss-federal-parliament/> accessed 15 November 2021.

Swiss constitution resulting from inadequate climate policies, which do not adequately addressed the risk of heat related deaths, which occur more frequently in older people, particularly older women.[65] Their application to the ECtHR follows a domestic judicial saga, in which the Swiss Administrative Federal Court rejected the applicants' complaint, on the basis that senior women are not uniquely affected by climate change.[66] The Swiss Supreme Court denied an appeal, stating that the remedy the applicants sought must be achieved through political, rather than legal means.[67]

A third case — *Mex V v Austria* — has been lodged by an individual applicant against Austria, after an unsuccessful appeal to the Austrian Supreme Court.[68] The applicant suffers from Uhthoff's syndrome, which affects most sufferers of multiple sclerosis when temperatures rise above 25 degrees Celsius. Increasing temperatures will therefore severely affect the applicant, who claims that Austria is failing to take reasonable and appropriate measures to protect his health and wellbeing.[69]

As with other environmental cases before the ECtHR,[70] in all three cases the applicants have invoked the respondent States' positive obligations concerning the right to life (Article 2) and the right to respect for private and family life (Article 8). They further make discrimination claims, alleging that the characteristics of their group or their personal circumstances are such that they will suffer particularly from the impacts of climate change. In *Duarte Agostinho* the applicants furthermore invoked the United Nations Convention on the Rights of the Child, arguing that the ECHR must be read in the light of Article 3(1) of this Convention, which requires that any decision affecting them be based on the overriding consideration of the best interests of the child.[71] The Swiss and Austrian applicants also rely on the right to a fair trial (Article 6) and the right to a remedy (Article 13), arguing that domestic courts failed to hear the substance of their cases.[72] Ultimately, all applicants seek a ruling that will encourage domestic courts to make orders to ensure that all respondent States' mitigation efforts are consistent with the Paris Agreement's temperature goal of limiting warming to between 1.5 to 2 degrees Celsius above pre-industrial levels.[73]

---

[65] See statement of alleged violations in the submission of *Verein Klimaseniorinnen* (n 64).

[66] Judgment of the Swiss Federal Court in *Verein KlimaSeniorinnen Schweiz gegen Eidgenössisches Departement für Umwelt, Verkehr, Energie und Kommunikation*, *Generalsekretariat*, Doc 1C_37/2019 (5 May 2020). The judgment and an unofficial English translation are available at <http://climatecasechart.com/climate-change-litigation/non-us-case/union-of-swiss-senior-women-for-climate-protection-v-swiss-federal-parliament/> accessed 15 November 2021.

[67] The Court stated: 'Such matters are to be advanced not by legal action, but by political means, for which purpose the Swiss system with its democratic instruments opens up sufficient opportunities, ibid. para. 5.5.

[68] *Mex V v Austria* was lodged on 12 April 2021. For more information and the submission see <https://klimaklage.fridaysforfuture.at/> and <http://climatecasechart.com/climate-change-litigation/non-us-case/mex-m-v-austria/> accessed 15 November 2021.

[69] The application mainly relies in Article 8. See statement of alleged violations in the submission, ibid.

[70] See Europarat (ed), *Manual on Human Rights and the Environment* (2nd ed Council of Europe Publishing 2012); N Kobylarz, 'The European Court of Human Rights: An Underrated Forum for Environmental Litigation' in H Tegner Anker and B Egelund Olsen (eds), *Sustainable Management of Natural Resources: Legal Instruments and Approaches* (Intersentia 2018).

[71] The 1989 United Nations Convention on the Rights of the Child. In this regard, see also Third-party intervention by the Council of Europe Commissioner for Human Rights under Article 36, paragraph 3, of the European Convention on Human Rights Application No. 39371/20 Cláudia Duarte Agostinho and others v. Portugal and 32 other States, (5 May 2021), paras 31-34. Available at <https://rm.coe.int/third-party-intervention-by-the-council-of-europe-commissioner-for-hum/1680a26105> accessed 15 November 2021.

[72] See statement of alleged violations in the submission in *Verein Klimaseniorinnen* (n 64) *Mex V v Austria* (n 68), respectively.

[73] Paris Agreement (n 2), Article 2(1).

Just as with applicants before the CJEU, applicants before the ECtHR must satisfy certain admissibility preconditions.[74] It is nevertheless important to note that, unlike the CJEU, the ECtHR cannot annul laws or decisions. Its powers are limited to finding a violation of the ECHR and to awarding just satisfaction, which is intended to compensate applicants for pecuniary or non-pecuniary damage, such as mental or physical suffering, as well as for legal costs and expenses.[75] That said, respondent States are bound by the judgments of the ECtHR and are required to ensure that ongoing violations of the ECHR are brought to an end, and that no such violations occur in future.[76]

In order to bring a case to the ECtHR, applicants must satisfy the admissibility criteria set out in Articles 34 and 35 of the ECHR. These criteria are largely procedural in nature, but some require the ECtHR to assess the merits of a case at the preliminary stage.[77]

Article 34 of the ECHR provides that 'any person, non-governmental organisation or group of individuals' may bring a case before the ECtHR. Despite comparatively better prospects of admissibility than before the CJEU, applicants still face several hurdles. The admissibility procedures can be divided into two stages. In the first stage, before a respondent State is given notice of an application and asked for its observations (known as the 'communication' of the application) the ECtHR can, of its own motion, declare an application inadmissible.[78] At this stage, the burden is on the applicant to show that the admissibility criteria have been fulfilled. At the second stage, after the communication of an application, the ECtHR will generally only examine admissibility questions if the respondent State raises objections.[79]

Both the *Duarte Agostinho* and *Klimaseniorinnen* cases have been communicated to the respondent States.[80] Thus the ECtHR has considered both applications to be admissible, at least at the preliminary stage. Both have, moreover, been given priority, pursuant to a policy that allows the ECtHR to deal more rapidly with the most serious cases, as well as cases that disclose the existence of problems capable of generating large numbers of additional cases.[81]

While both *Duarte Agostinho* and *Klimaseniorinnen* have passed the first procedural hurdles, the respondent States in the first case are likely to raise the issue of non-exhaustion of local remedies. In this connection, Article 35(1) of the ECHR 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…

As noted above, the burden is on the respondent States to show that this requirement has not been fulfilled.[82] Therefore, the respondent States must point to an effective remedy that the applicants have failed to pursue and demonstrate that the applicants had effective access to that remedy. If the States can show the availability of an unused domestic remedy, then the applicants will have to demonstrate that the remedy is ineffective or that special reasons exist as to why that remedy was not pursued.[83]

---

[74] See generally *Practical Guide on Admissibility Criteria - Updated on 30 April 2020* (Council of Europe 2020) available at <https://www.echr.coe.int/documents/admissibility_guide_eng.pdf> accessed 15 November 2021.
[75] ECHR (n 9), Article 41.
[76] ECHR (n 9), Article 46.
[77] D Harris and others, *Harris, O'Boyle, and Warbrick: Law of the European Convention on Human Rights* (Oxford University Press 2018) 45.
[78] Under Rule 54(2)(b) of the Rules of Court.
[79] But the ECtHR can at any time consider questions relating to incompatibility *ratione loci*, *materiae*, *personae*, and *temporis* on its own motion. See D Harris and others (n 77) 46.
[80] See communication from the ECtHR concerning application no 39371/20 (13 November 2020) and communication concerning application no 53600/20 (6 April 2021).
[81] See Rules of the Court, Article 41. For application see eg Milovanović v. Serbia App 56065/10 (8 October 2019). For comments on the policy, see eg D Harris and others (n 77) 125.
[82] D Harris and others (n 77) 54–55.
[83] See eg *Selmouni v France* App 25803/94 (28 July 1999) 76.

In *Duarte Agostinho* the applicants argue that the exceptionally urgent need for the provision of adequate remedies to climate change justifies the filing of the application directly with the ECtHR. Specifically, they maintain that they cannot obtain any meaningful relief against the respondent States in Portuguese courts and could not reasonably be expected to litigate their case in the other 32 respondent States. Even if they had the capacity to do so, they would not have been able to obtain an effective remedy within sufficient time to avert dangerous climate change.[84] *Klimaseniorinnen* is a case in point. It took the applicants over three years from when the case was first filed until the final judgment by the Swiss Supreme Court.[85]

When it communicated *Duarte Agostinho*, the ECtHR asked the respondent States to comment on the alleged violations of the rights invoked by the applicants — namely, the right to life (Article 2), to respect for private and family life (Article 8) and the prohibition of discrimination (Article 14) — as well as rights that were not raised by the applicants — namely, the prohibition of torture (Article 3) and the protection of property (Article 1 of Protocol 1).[86] Additionally, the ECtHR asked the respondents States to comment on other questions, including:

- Do the applicants fall within the jurisdiction of the respondent States within the meaning of Article 1 of the ECHR?
- Does the case engage the responsibility of the respondent States taken individually or collectively because of their national or, as the case may be, European policies and regulations, aimed at measures to reduce the carbon footprint of their economies including as a result of activities carried out abroad?
- Can the applicants be regarded as actual or potential victims, within the meaning of Article 34 of the ECHR?
- Having regard to their margin of appreciation in the field of the environment, have the respondent States fulfilled their obligations under the ECHR, read in the light of the relevant environmental provisions and principles?[87]

These questions are of relevance to other climate cases that may be lodged before regional human rights courts and as such, merit further consideration. The next section considers these questions in turn.

3.1 The Jurisdiction of the Respondent States

The exercise of 'jurisdiction' is a necessary condition for a State to be held responsible for acts or omissions that give rise to a violation of the ECHR.[88] In international law, the term 'jurisdiction' generally refers to the power of a State to prescribe rules and the power to enforce such rules.[89] A State's jurisdictional competence under Article 1 of the ECHR is primarily territorial yet, under certain exceptional circumstances, States may be held responsible for acts

[84] See 'Compliance with admissibility criteria laid down in Article 35(1)' in *Duarte Agostinho* (n 10).
[85] The case was first lodged on 25 October 2016 Supreme Court handed down its judgment on 20 May 2020. *Verein Klimaseniorinnen* (n 64).
[86] On Article 3, see C Heri, 'The ECtHR's Pending Climate Change Case: What's Ill-Treatment Got to Do with It?' (*EJIL: Talk!*, 22 December 2020) <https://www.ejiltalk.org/the-ecthrs-pending-climate-change-case-whats-ill-treatment-got-to-do-with-it/> accessed 15 November 2021.
[87] See communication from the ECtHR concerning application no 39371/20 (13 November 2020).
[88] See *Banković and Others v Belgium and Others* App no 52207/99 (19 December 2021) 61 and 67; *Ilaşcu and Others v Moldova and Russia* App 48787/99 (8 July 2004) 311; *Al-Skeini v United Kingdom* App 55721/07 (7 July 2011) 130.
[89] J Crawford, *Brownlie's Principles of Public International Law* (9th edn Oxford University Press 2019) 440 *et seq*.

that are performed or produce effects outside their own territory.[90] The first part of the applicants' complaint in *Duarte Agostinho* clearly falls within the scope of jurisdiction outlined by the ECHR, as it relates to the emissions produced on the territory of the respondent States which have an effect on global climate change. Here, a State's human rights responsibility would arise from failure to regulate a hazardous activity within its territory, and thus within its jurisdiction.[91]

Additionally, the applicants allege that the respondent States are contributing to the release of greenhouse gas emissions overseas. Therefore the applicants also need to satisfy the requirement that they are within the so-called 'extraterritorial' jurisdiction of the ECtHR for this part of their claim. Generally, the ECtHR dismisses applications based on events that occurred outside the territory of contracting States, unless the applicants can show a sufficient link between those events and the exercise (or omission hereof) of the authority within the territory of the respondent State. Over the years, however, the ECtHR has grown increasingly comfortable with applying the ECHR extraterritorially, at least in relation to armed conflicts.[92] The ECtHR has, moreover, consistently stated that the concept of jurisdiction in Article 1 must be considered to reflect the term's meaning in public international law, which includes prescriptive jurisdiction (the power to legislate or otherwise regulate conduct by legal decree).[93] While prescriptive jurisdiction is predominantly exercised on the basis of territoriality, there is nothing in international law that prevents States from regulating events abroad, as long as this does not usurp the rights of another State.

This leaves ample scope for the applicants to rely on traditional principles of jurisdiction.[94] In human rights terms, this would mean that, if a State is allowed to prescribe conduct with an extraterritorial effect, the same conduct would fall within the jurisdiction of Article 1 of the ECHR.[95] While this would go beyond the ECtHR's traditional reading of Article 1, the ECtHR has held that 'accountability… stems from the fact that Article 1 of the Convention cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory'.[96] This holding is in line with a more generous interpretation of the reach of human rights law, for which certain scholars have long advocated.[97] In line with this interpretation, a State's human rights responsibility arises from failure to regulate an activity within its jurisdiction that has adverse effects on the enjoyment of human rights.

---

[90] See eg *Al-Skein* (n 88) 132*; Hirsi Jamaa and Others v. Italy* App 27765/09 (23 February 2012) 130-132; and *M.N. and Others v. Belgium* App no. 3599/18 (5 March 2020) 97-102.

[91] As in *Öneryıldız v Turkey* App 48939/99 (30 November 2004).

[92] Cf M Milanovic, 'Jurisdiction and Responsibility: Trends in the Jurisprudence of the Strasbourg Court' in A van Aaken and I Motoc (eds), *European convention on human rights and general international law* (Oxford University Press 2018).

[93] *Banković* (n 88), 59.

[94] See eg A Savaresi and J Hartmann, 'Using Human Rights Law to Address the Impacts of Climate Change: Early Reflections on the Carbon Majors Inquiry' in J Lin and DA Kysar (eds), *Climate Change Litigation in the Asia Pacific* (Cambridge University Press 2020).

[95] One example of an extraterritorial environmental regulation is the US ban on the import of endangered sea turtles. This developed into a dispute, which was heard by the World Trade Organisation (WTO) Appellate Body in the Shrimp-Turtle cases. See Reports of the Appellate Body, United States – Import Prohibition of Certain Shrimp and Shrimp Products, WT.DS58/AB/R (12 October 1998) and WT/DS58/AB/RW (22 October 2001). For comments on this and other environmental measures, see J Hartmann, 'A Battle for the Skies: Applying the European Emissions Trading System to International Aviation' (2013) 82 *Nordic Journal of International Law* 187.

[96] See *Issa and Others* App 31821/96 (16 November 2004) 71; *Solomou and Others v Turkey* App 36832/97 (24 June 2008) 45; *Carter v Russia* Appl 20914/07 (21 September 2021) 128.

[97] See eg, L Brilmayer, 'From "Contract" to "Pledge": The Structure of International Human Rights Agreements' (2007) 77 British Yearbook of International Law 163; M Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (Oxford University Press 2011).

3.2 Responsibility of the Respondent States Individually or Collectively

Unlike the previous question on jurisdiction, the ECtHR's second question seems to refer to attribution, especially attribution related to the regulation (or lack thereof) either by the respondent States themselves or by the EU. In that regard it should be noted that EU Member States are not absolved from their human rights obligations simply because they are implementing EU law.[98] But the question raises another issue related to attribution, namely: whether the respondent States may be held individually responsible for their greenhouse gas emissions, even if their individual emissions alone are insufficient to cause climate change or the resulting human rights violations.

In this connection, it is worth recalling that the ECHR forms part of international law. This means that general principles of international law, such as those concerning State responsibility, apply, even if the ECtHR's application of those principles is somewhat 'unsystematic'.[99] According to the International Law Commission (ILC) Articles on the Responsibility of States for Internationally Wrongful Acts attribution is just one of two core elements necessary to establish State responsibility.[100] The other element is a breach of an international obligation. In *Duarte Agostinho* the applicants rely upon the breach by a plurality of States of several rights protected by the ECHR.

Article 47 of the ILC Articles deals with the situation where there is a plurality of responsible States in respect of the same wrongful act. It states that:

> Where several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act.

Thus, the general rule is that each State is responsible for its own actions and omissions. As noted in the ILC Commentary, 'responsibility is not diminished or reduced by the fact that one or more other States are also responsible for the same act'.[101] The ILC also considers the situation where several States contributed to causing the same act by separate acts of internationally wrongful conduct. The example given is that of several States contributing to polluting a river by the separate discharge of pollutants, but the same could apply to climate change and the emissions of greenhouse gases.[102] In such cases, the responsibility of each participating State is determined individually, on the basis of its own conduct and by reference to its own international obligations. In line with the principle of systemic integration, in *Duarte Agostinho* it is argued that this should include the Paris Agreement.[103]

Even so, international law on shared responsibility is underdeveloped.[104] This is not for the lack of practice, since 'States rarely operate in isolation'.[105] Yet there is a surprising lack of

---

[98] *Michaud v France* App 12323/11 (6 December 2012) 102-104.

[99] Cf J Crawford and Amelia Keene, 'The Structure of State Responsibility under the European Convention on Human Rights' in A van Aaken and I Motoc (eds), *The European Convention on Human Rights and General International Law*, vol 1 (Oxford University Press 2018) 198.

[100] See the International Law Commission's (ILC) *Articles on Responsibility of States for Internationally Wrongful Act* appended to General Assembly Resolution 56/83, 12 December 2001, and with commentary in Yearbook of the International Law Commission 2001/II(2), 26–143, Article 2. The Articles mostly reflect customary international law. See Responsibilities and Obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011, p 10, 169, Article 2.

[101] Yearbook of the International Law Commission 2001/II(2), 123.

[102] A Savaresi, 'Inter-State Climate Change Litigation: "Neither a Chimera nor a Panacea"' in I Alogna, C Bakker and JP Gaucci (eds), *Climate Change Litigation: Global Perspectives* (Springer 2021).

[103] On the principle of systemic integration, see M Koskenniemi, 'Fragmentation of international law: Difficulties arising from the diversification and expansion of international law. Report of the study group of the International Law Commission', in International Law Commission, Documents of its fifty-eighth session, UN Doc. A/CN.4/L.682 (2006) 204-243.

[104] J Crawford, State Responsibility (Cambridge University Press 2019) 325.

[105] Ibid.

both literature and case law on the subject.[106] One reason is that most international tribunals lack procedures that allow for the mandatory joinder of parties or compulsory jurisdiction over multiple defendant States.[107]

In *Duarte Agostinho* the applicants rely upon the 'Guiding Principles on Shared Responsibility in International Law', the outcome of a project that sought to substantiate the literature on law of State responsibility.[108] The project focused on the allocation of international responsibility among multiple States and other actors and built on the existing rules of the law of States responsibility.[109] According to Guiding Principle 4, States share responsibility for multiple internationally wrongful acts when each of them engages in separate conduct that: (a) is attributable to each State separately; (b) constitutes a breach of an international obligation for each of those international persons; and (c) contributes to the indivisible injury of another person. This in itself is not novel. In *Rantsev*, for example, the ECtHR found Cyprus and Russia jointly responsible with respect to the death, in Cyprus, of a Russian national and probable victim of trafficking.[110] While each State had violated different obligations, the ECtHR found that both had contributed to the indivisible injury to the victim.[111] In *Duarte Agostinho* the applicants argue that a similar approach could be taken in relation to climate change. Thus, in their submission, the applicants argue that the 33 Respondents must be presumed to share responsibility under the ECHR for the interferences to the applicants' rights caused by climate change.[112]

The argument on presumptive responsibility is further supported by the general principle of international law where one or more of a number of potential wrongdoers must have caused a particular harm. If there is uncertainty as to which of them in fact caused that harm, each potential wrongdoer is presumptively responsible in law for the harm in question, and the onus is on those potential wrongdoers to show that they did not cause it.[113] Logically, the applicants' argument then places the onus on the respondent States to demonstrate the adequacy of their climate change mitigation efforts, in the real-world context of global warming at its current trajectory.

Finally, the applicants argue that each of the respondent States is non-compliant with the Paris Agreement. In this regard, their submission states that: 'Given that global warming is on course to vastly exceed the 1.5° C target [of the Paris Agreement], the Respondent's mitigation measures must be presumed inadequate'.[114] Thus the applicants argue that the respondent States are breaching their ECHR rights through their respective contributions to climate change. Citing data reported by the Climate Action Tracker — a think tank providing

---

[106] On the literature, see eg John E Noyes and Brian D Smith, State Responsibility and the Principle of Joint and Several Liability, 13 Yale Journal of International Law (1988) 225 and S Besson, La pluralité d'Etats responsables Vers une solidarité internationale? Revue suisse de droit international et de droit européen (2017) 13.
[107] Ibid, 223-224.
[108] The principles were developed as part of the SHARES Project was based at the Amsterdam Center for International Law. For more information, see <http://www.sharesproject.nl/> accessed 15 November 2021.
[109] A Nollkaemper and others, 'Guiding Principles on Shared Responsibility in International Law' (2020) 31 European Journal of International Law 15.
[110] *Rantsev v Cyprus and Russia* App 25965/04 (6 January 2010). See also *Soering v The United Kingdom* App 14038/88 (7 July 1989).
[111] The case is cited on the commentaries to the Guiding Principles. Nollkaemper and others (n 109) 35.
[112] See 'Statement of alleged violations' in *Duarte Agostinho* (n 10).
[113] See Separate Opinion of Judge Bruno Simma in *Oil Platforms (Islamic Republic of Iran v United States of America)* (2003) ICJ Rep 161.
[114] *Monnat v. Switzerland* App No 73604/01 (21 September 2006) 33.

independent scientific analysis of climate action — the applicants allege that the mitigation efforts of each of the 33 respondent States may be rated as 'insufficient'.[115]

3.3 Actual or Potential Victims

A core requirement for the admissibility of an application before the ECtHR is that the applicant is a 'victim'.[116] This requirement means that the applicant must have been directly affected in some significant way, even if the effects are only temporary.[117] The requirement of either a direct or potential effect on the alleged victim excludes any *actio popularis* from the ECtHR's jurisdiction.[118] This means that the ECtHR will declare inadmissible any case aimed at defending the environment in general, without specifying that there is an individual right at stake guaranteed by the ECHR.[119]

The victim requirement, however, is not an unsurmountable hurdle before the ECtHR. While the ECHR does not explicitly protect the environment, the ECtHR has adopted a 'surrogate' approach to the protection of the environment in its caselaw.[120] Thus, in several cases the ECtHR has found that certain ECHR rights may be breached by harm to the environment and/or exposure to environmental risks.[121] Most typically, cases that involve a serious risk to life as a result of hazardous activities have been found to engage the right to life (Article 2),[122] whereas less severe cases of pollution have been found to infringe the right to private and family life and home (Article 8).[123] The CoE Commissioner for Human Rights explained the link between environmental harm and the enjoyment of human rights in her intervention in *Duarte Agostinho:*

> Environmental degradation may not only affect the substantive human rights intuitively linked to it, such as the right to life, to private and family life, to peaceful enjoyment of the home, or freedom from inhuman or degrading treatment. It may also, indirectly, have an impact on the enjoyment of other rights and freedoms such as freedom of association and expression, the right to an effective remedy, or the right to education. Further, the effects of environmental degradation impact certain social groups more than others, highlighting the extent to which human dignity and equality — including full respect for the principle of non-discrimination — also depend on a clean and healthy environment.[124]

As there is no explicit recognition of the right to a clean environment in the ECHR, the admissibility of environmental cases before the ECtHR depends on the applicants providing sufficient evidence of environmental degradation that affects the enjoyment of their human rights.[125] In recent years the ECtHR has heard several complaints put forward by applicants

---

[115] See <https://climateactiontracker.org/> accessed 15 November 2021. See also G Liston, 'Enhancing the Efficacy of Climate Change Litigation: How to Resolve the "Fair Share Question" in the Context of International Human Rights Law' (2020) 9 Cambridge International Law Journal 241.
[116] See generally Practical Guide on Admissibility Criteria (2021) <https://www.echr.coe.int/documents/admissibility_guide_eng.pdf> accessed 7 October 2021.
[117] See eg *Monnat* (n 114), 33.
[118] See eg *Kyrtatos v. Greece* App 41666/98 (1 November 1998) 52.
[119] N Kobylarz (n 70) 105.
[120] For a systematic overview of the case law, see ibid 99–120.
[121] See Factsheet on the Environment and the ECHR, <https://www.echr.coe.int/documents/fs_environment_eng.pdf> accessed 15 November 2021.
[122] See eg *Guerra and others v Italy* App 116/1996/735/932 (19 February 1998) and *Öneryıldız* (n 91).
[123] See eg *López Ostra v Spain* App 16798/90 (9 December 1994).
[124] See Third party intervention by the Council of Europe Commissioner for Human Rights (n 71), para. 6.
[125] The Social Affairs Committee of the Parliamentary Assembly of the Council of Europe recently proposed a draft of an additional protocol to the ECHR, which would include an explicit 'right to a safe, clean, healthy and sustainable environment'. See Report by Rapporteur S Moutqu, Anchoring the right to a healthy environment: need for enhanced action by the Council of Europe (1 September 2021). Available at

lamenting that environmental pollution affected the enjoyment of their human rights.[126] This expansion of the ECtHR's caselaw has happened in spite of the respondent States' protestations that the applicants had failed to provide any factual evidence of significant health impacts that were specific to them, as opposed to the general populace of the areas affected by the pollution.[127]

In *Duarte Agostinho* the applicants allege that wildfires and increased temperatures affect their right to life (Article 2) and right to private and family life and home (Article 8). In addition, they allege breaches of the prohibition of discrimination (Article 14), because climate change has a disproportionate impact on younger generations and because interference with their rights will increase over time, due to the deterioration of climatic conditions. In particular, the applicants argue that the effects of climate change are discriminatory, due to the material interferences with their rights (Article 2 and 8) being greater than for older generations, 'not only because [younger generations will] live longer, but also because the impacts of climate change will worsen over time'.[128] As a result, the applicants' case hinges on 'the direct effects which climate change… is having, and will have, on their lives.'[129] The adverse effects of climate change on human rights are well documented[130] and the applicants argue that they are already exposed to harm from climate change, in particular from increased heat and associated consequences.

3.4 Margin of Appreciation and Obligations under the Paris Agreement

The jurisprudence of the ECtHR makes clear that the Member States of the CoE enjoy a certain 'margin of appreciation' in how they apply and implement the ECHR, depending on the circumstances of the case and the rights and freedoms engaged. As explained in the seminal *Handyside* case:

> This margin is given both to the domestic legislator ('prescribed by law') and to the bodies, judicial amongst others, that are called upon to interpret and apply the laws in force… The domestic margin of appreciation… goes hand in hand with a European supervision. Such supervision concerns both the aim of the measure challenged and its 'necessity'; it covers not only the basic legislation but also the decision applying it, even one given by an independent court.[131]

This judicial self-restraint is the result of the fact that the ECHR system is subsidiary to the safeguarding of human rights at the national level and that domestic authorities are in principle better placed than an international court to 'evaluate local needs and conditions'.[132] Yet this margin of appreciation 'goes hand in hand' with scrutiny by the ECtHR.[133]

<https://assembly.coe.int/LifeRay/SOC/Pdf/TextesProvisoires/2021/20210909-HealthyEnvironment-EN.pdf> accessed 15 November 2021.

[126] See eg *Cordella and Others v Italy* Apps *54414/13 and 54264/15* (24 January 2019) ECHR and *Fadeyeva v Russia* App 55723/00) (9 June 2005).

[127] See eg *Cordella, ibid,* 133.

[128] Ibid 31.

[129] P Clark, G Liston and I Kalpouzos, 'Climate Change and the European Court of Human Rights: The Portuguese Youth Case' (*EJIL: Talk!*, 6 October 2020) <https://www.ejiltalk.org/climate-change-and-the-european-court-of-human-rights-the-portuguese-youth-case> accessed 15 November 2021.

[130] See eg the UN Special Rapporteur on Human Rights and the Environment's 2019 report on the devastating effects of the current global climate emergency on the enjoyment of human rights UN Doc. A/74/161 (15 July 2019).

[131] *Handyside v the United Kingdom* App 5493/72 (7 December 1976) 49.

[132] Council of Europe, 'Explanatory Report: Protocol No 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms' (24 June 2013), 9. Available at <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016800d383d> accessed 15 November 2021.

[133] *Handyside* (n 131) 49.

The ECtHR's practice of scrutiny is aimed at ensuring that the domestic authorities take all competing interests into consideration when determining their policies and in choosing between different ways and means of meeting their international obligations.[134] Traditionally, the margin of appreciation doctrine is applied differentially, with the degree of discretion allowed to Member States varying according to the context. Thus, in the case of national emergencies or threats to national security, the margin is normally wide.[135] The same applies for various other areas, such as the implementation of social and economic policies.[136] According to the ECtHR, a wide margin should usually also be applied where national authorities are required to strike a balance between the competing ECHR interests.[137]

The scope of the State's margin of appreciation is further influenced by the concept of 'European consensus'.[138] The ECtHR applies this concept both to justify a wide margin of appreciation where there is no consensus and to impose a stricter scrutiny where there is a clear consensus amongst CoE Member States, thus advancing the interpretation of the ECHR. Therefore, where 'there is no consensus within the member States of the Council of Europe, either as to the relative importance of the interest at stake or as to the best means of protecting it… the margin will be wider'.[139]

In the climate caselaw before the ECtHR, the adoption of the Paris Agreement arguably provides evidence of a clear consensus to combat climate change. With it, all the respondent States (with the sole exception of Turkey[140]) have recognised that 'climate change represents an urgent and potentially irreversible threat to human societies and the planet and thus requires the widest possible cooperation by all countries' and further committed to combat climate change with measures reflecting their *'highest possible ambition*'.[141]

The traditional margin of appreciation doctrine should therefore not give the respondent States a broad discretion in terms of climate change mitigation. As noted by Judges Costa, Ress, Türmen, Zupančič and Steiner, environmental pollution is '*par excellence* an international issue' and not one where there is a need to evaluate local needs and conditions.[142] The limits of the margin of appreciation doctrine were most recently emphasised in *Cordella.*[143] In that case, the ECtHR observed that while it was not its role to determine precisely the measures that should have been taken to prevent pollution, it was undoubtedly for them to determine whether the national authorities had approached the issue with due diligence and whether they have taken into account all competing interests.[144]

4 CONCLUSION

---

[134] N Kobylarz (n 70) 115.
[135] See eg *Brannigan and McBride* App 5/1992/350/423-424*,* (22 April 1993) ECHR and *Leander v Sweden* App App 9248/81 (26 March 1987).
[136] See *Hatton and Others v. The United Kingdom* App 36022/97 (8 July 2003) 97.
[137] See eg *Evans v. The United Kingdom* App 6339/05 (10 April 2007) 77.
[138] See N Vogiatzis,The relationship between European consensus, the margin of appreciation and the legitimacy of the Strasbourg Court, European Public Law (2019) 445.
[139] See *Evans v. The United Kingdom*, (n 137) 77.
[140] Turkey has signed but not ratified the Pris Agreement. As such, it is not bound by the agreement although it has submitted intended nationally determined contributions. Turkey is preparing to seek parliamentary approval for ratification in October 2021. See <https://www.bloomberg.com/news/articles/2021-09-22/turkey-to-become-last-g-20-country-to-ratify-paris-agreement> accessed 15 November 2021.
[141] Preamble and Article 4(3) of the Paris Agreement. On the meaning of Article 4(3) see, for example, C Voigt and F Ferreira, "'Dynamic Differentiation": The Principles of CBDR-RC, Progression and Highest Possible Ambition in the Paris Agreement' (2016) 5(2) Transnational Environmental Law 285.
[142] Ibid *Hatton* (n 136) Joint dissenting opinion of judges Costa, Ress, Türmen, Zupančič and Steiner, 1.
[143]*Cordella and Others* (n 126) 161.
[144] Ibid.

Human rights litigation may serve distinct purposes,[145] and as lawyers and activists of all generations have begun filing human rights-based climate change cases before Europe's regional courts[146] it is important to remember that whilst attempts to challenge climate legislation within the EU have been rejected on admissibility grounds, the recently announced EU law reforms show that these applicants may have obtained important victories outside of the courtroom, or at least persuaded the EU to think again.[147]

Time is however of the essence, as scientists have warned that is little leeway to avert catastrophic climate change.[148] That is why pending cases before the ECtHR are of great consequence.

A judgment from the ECtHR might seem to hold out hope for providing important impetus for climate action in Europe and support potentially unpopular and radical decisions on the transition away from fossil fuels. This kind of shift seems to have happened in Germany already — albeit not as a result of an ECtHR judgment. After the Constitutional Court held that the country's climate law is partly unconstitutional,[149] ministers reportedly fell over themselves to hail the judges' wisdom in repealing an act, which the German Parliament had passed less than 18 months earlier.[150] Courts can, therefore, have a powerful degree of impact on political processes and policy. Yet, while the ECtHR could potentially provide an important degree of impetus for change, a judgment from the ECtHR might not be as well received: ‚the Court is often accused of taking on too much power and of meddling in domestic affairs.[151] Judgments from the ECtHR are not always properly enforced by Member States and the CoE's enforcement machinery — the Committee of Ministers — is currently faced with an enormous backlog.[152] Thus, while an ECtHR judgment may put extra pressure on States to comply with their obligations under the Paris Agreement and to protect human rights, a judgment is by no means a panacea.

Additionally, the ECtHR has often been criticised for being too political.[153] Former UK Supreme Court judge, Jonathan Sumption, has said that human rights allow courts to take inherently political questions and reclassify 'them as questions of law, thus reforming them from the realm of democratic decision making and referring them instead to national and

---

145 Cf H Duffy, *Strategic Human Rights Litigation* (Hart Publishing 2018).

146 Jodoin and others (n 7).

147 The authors acknowledge that that there are many other factors the influence the EU's climate policy.

148 See the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, Climate Change 2021: The Physical Science Basis, <https://www.ipcc.ch/report/sixth-assessment-report-working-group-i/> accessed 15 November 2021.

149 Judgment of 24 Marts 2021 (n 6).

150 See "A court ruling triggers a big change in Germany's climate policy" The Economist (8 May 2021) <https://www.economist.com/europe/2021/05/08/a-court-ruling-triggers-a-big-change-in-germanys-climate-policy > accessed 15 November 2021.

151 An extensive literature investigates the causes and consequences of an alleged backlash against international institutions, including the ECHR. See eg Popelier P, S Lambrecht, L Koen, *Criticism of the European Court of Human Rights* (Intersentia 2016); Madsen MR, 'Rebalancing European Human Rights: Has the Brighton Declaration Engendered a New Deal on Human Rights in Europe?' *Journal of International Dispute Settlement* 9 (2018)2, 199; Stiansen Ø, E Voeten, 'Backlash and Judicial Restraint: Evidence from the European Court of Human Rights', *International Studies Quarterly*, 64 (2020) 4, 770. However as argued elsewhere, it important not to equate political hostility to human rights with a public backlash. See Hartmann, 'Misdiagnosing the Human Rights Malaise: Possible Lessons from the Danish Chairmanship of the Council of Europe', The Global Community Yearbook of International Law and Jurisprudence 2018 (Oxford University Press 2019).

152 See 14th Annual Report of the Committee of Ministers, Supervision of the Execution of Judgments and Decisions of the European court of Human Rights (2020).

153 For an overview, see P Popelier, S Lambrecht and K Lemmens (eds), *Criticism of the European Court of Human Rights: Shifting the Convention System: Counter-Dynamics at the National and EU Level* (Intersia 2016).

international courts'.[154] A judgment related to climate change would almost certainly attract a similar criticism. Yet, climate change plays uniquely into democracy's weaknesses.[155] Democratic governments are responsible to their own voters, and many of the decisions that have to be taken to avert catastrophic climate change are going to be unpopular. This has meant that most governments have so far shied away from taking decisive action. It is precisely in this kind of situation that international institutions should watch over the shoulders of State authorities and prompt them to ensure ECHR rights are effective and real.

As noted by the President of the ECtHR, Judge Spanó:

> …the already established case-law in environmental cases before the Court demonstrates a certain conceptual trajectory, the logical extension of which remains to be determined by the Court using its traditional methodological approaches… we are present in a transformative moment in human history, a moment of planetary impact and importance. No one can legitimately call into question that we are facing a dire emergency that requires concerted action by all of humanity. For its part, the European Court of Human Rights will play its role within the boundaries of its competences as a court of law forever mindful that Convention guarantees must be effective and real, not illusory.[156]

We can only hope that the ECtHR stays true to that role. The cases before the Court provide it with a unique opportunity to plug the enforcement gap in climate law and play an important role in holding European States to account for failing to take much needed and urgent action to tackle climate crisis.[157]

---

[154] J Sumption 'Human Rights and Wrongs' (2019 Reith Lectures, Edinburgh, 4 June 2019) available at <https://www.bbc.co.uk/programmes/m0005msd > accessed 15 November 2021.

[155] See eg D Jamieson Reason in a Dark Time: Why the Struggle to Stop Climate Change Failed and What It Means for Our Future" (Oxford University Press, 2014).

[156] Robert Spano (President of the ECtHR), 'Should the European Court of Human Rights become Europe's environmental and climate change court' (Conference on Human Rights for the Planet, Strasbourg, 5 October 2020).

[157] On the enforcement gap, see A Savaresi and Setzer, (n 1).