The European Convention on Human Rights and Climate Change

The right to life in a changing climate

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1 Introduction

1.1 Topic, research questions and relevance

The topic of this thesis is whether the European Convention on Human Rights (“ECHR” or the “Convention”) offers protection against the risk climate change poses for the right to life set out in Article 2. One of the greatest challenges of our time is the risk climate change poses to our civilization.1 It is now beyond debate that climate change has started, and will continue, to take human lives. While the Convention did not aim at protecting the right to life from environmental issues like climate change when signed in 1950, it is a “living instrument” which “must be interpreted in light of present-day conditions”.2 In light of the risk climate change poses to human lives, the question arises: Does Article 2 offer protection against the human rights challenges posed by climate change?

This topic raises three research questions. The first is whether the applicants in climate change cases are likely to meet the admissibility criterion to access the Court set out in Article 34. The second is whether Article 2 is applicable to the risk climate change poses to the enjoyment of the right to life. An affirmative answer would mean that States have a positive obligation to take measures to mitigate climate change. The third question is accordingly what a State must do to comply with such a positive obligation.

These questions are on the European agenda. Four domestic supreme courts have already discussed the applicability of Article 2 and 8 to the risk of climate change.3 While these supreme courts adopted different conclusions, the authoritative answer is just around the corner. Two climate cases are currently pending before the European Court of Human Rights (“ECtHR” or “the Court”). In November 2020, the Court decided to communicate a climate change case called Duarte Agostinho et autres c. le Portugal et 32 autres États to the 33 respondent States. Even though this case had not been processed in domestic courts, the States have to respond to the complaint by the end of May 2021.4 In March 2021, the Court accepted its second climate change complaint in a case called Verein KlimaSeniorinnen Schweiz et autres c. la Suisse.5 A third case is to be brought before the ECtHR by one of the environmental organizations who

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1 See Chapter 2.3.
2 See ECHR preamble recital 3 and e.g. Tyrer v. the United Kingdom para 31 and Austin and others v. The United Kingdom [GC] para 53.
4 See Youth4ClimateJustice (2020) and European Court on Human Rights (2020), case number 39371/02.
5 See Application Klimaseniorinnen v. Switzerland (2020) and European Court on Human Rights (2021), case number 53600/20.
lost in the Norwegian Supreme Court case *Greenpeace and others v. Norway.* The topic of this thesis is therefore of significant practical relevance.

### 1.2 Limitations on scope

This thesis discusses whether the Convention – in its current form – *can* respond to the human rights challenges posed by climate change. Normative reflections on whether the Convention *should* offer environmental protection, for example if States should adopt an additional protocol recognizing an individual right to a healthy environment, will consequently not be discussed.

Moreover, the positive obligation to mitigate climate change could also have been discussed in relation to the right to private life, family life and home according to Article 8. In the environmental field, the protection offered by Article 2 and 8 is similar. The applicants in environmental cases often invoke both Articles, leaving the Court to decide which one it will use. While a clear majority of environmental cases have been discussed under Article 8, these cases mainly concern situations where an environmental issue already has interfered with the interests protected by Article 8. Only in a few cases has the Court discussed an obligation to take preventive measures against future environmental risks. Conversely, under Article 2, the Court has created and developed the Osman-test to decide if a State should have taken positive measures to prevent violations of the right to life. The obligation to take preventive measures under Article 8 is accordingly less developed. As this thesis discusses the preventive application of the Convention to the risk of climate change, Article 2 will provide the best foundation for a nuanced analysis. On this basis, and due to space constraints, only Article 2 will be discussed.

Lastly, the interpretation of the term “jurisdiction” under Article 1 will not be discussed. The notion of jurisdiction reflects the term in public international law, referring to the territory of the State. However, a State may also exercise jurisdiction over persons and events outside its territory where “acts and omissions of their authorities produce effects outside their own

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7. See e.g. Özel and Others v. Turkey para 145, Cordella et autres v. Italie para 94 and Hardy and Maile v. the United Kingdom para 184 with further references.
10. See Ebert et al. (2015) and Chapter 4.2 and 4.4.
11. See e.g. Al-Skeini and Others v. the United Kingdom [GC], paragraphs 131 ff. with further references.
The effects doctrine has led to a discussion of how to understand extraterritorial jurisdiction in climate change cases. Nevertheless, these discussions address specific extraterritorial situations, which are not decisive for the general application the ECHR to the risk of climate change. On this basis, and due to space constraints, I will not discuss extraterritorial jurisdiction.

1.3 Methodology
The ECtHR has not yet ruled in any climate change cases. This section will therefore give an overview of the available legal sources, which will guide the interpretations set forth in this thesis.

The Convention must be interpreted in accordance with the rules on treaty interpretation provided by Article 31 to 33 of the Vienna Convention on the Law of Treaties (“VCLT”). However, the ECHR is comprised of “more than mere reciprocal engagements between Contracting States”, meaning that they “do not have any interest of their own and do not pursue their individual advantages; instead, they are supposed to tend towards an objective common interest which is the protection of the rights of individuals”. The ECtHR has consequently developed some particular interpretative tools, such as the living instrument doctrine, European consensus and the margin of appreciation.

In accordance with Article 31 of the VCLT, the ECtHR interprets the Convention “in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”. For the purposes of this thesis, the terms of Article 2 offer little guidance.

However, the object and purpose of the Convention is an important source in the following discussions. The purpose of the ECHR is to ensure the protection of individual human beings. Accordingly, the Convention is a “living instrument” which “must be interpreted in light of present-day conditions” by having regard to the changing conditions in the member States to the Convention. The Court has held that “it is of crucial importance that the Convention is..."
interpreted and applied in a manner which renders its rights \textit{practical and effective, not theoretical and illusory.}\textsuperscript{19} (emphasis added) Indeed, the Court considers that a failure to maintain a dynamic and evolutive approach would risk rendering the Convention “a bar to reform or improvement.”\textsuperscript{20}

The living instrument doctrine is the foundation for the topic of this thesis. Article 2 can only offer protection against climate change if interpreted dynamically in light of the present-day understanding of how climate change challenges the right to life. The president of the ECtHR, Judge Spano, considers this element as crucial for the future environmental case law of the Court.\textsuperscript{21} An important limitation, however, is that the Court cannot respond to present-day needs by creating new rights apart from those recognized by the Convention.\textsuperscript{22} The Court would for example go too far if it, through its interpretation, created an individual right to a healthy environment.

In lack of guidance from the text of the Convention, it is also essential to analyze the \textit{jurisprudence} of the Court. The Court has the authoritative power to decide on matters concerning the interpretation and application of the Convention, and follows its previous judgments in the interests of legal certainty, foreseeability and equality before the law.\textsuperscript{23} The Court’s previous environmental jurisprudence is therefore an imperative source for this thesis. Baumann, offering a detailed and comprehensive analysis of this jurisprudence, will serve as a guide to the case law.\textsuperscript{24}

However, this case law discusses environmental issues that differ from climate change in theme, severity and scope. Accordingly, these cases cannot be applied without reflecting on whether the special features of climate change necessitate another approach. This implies that many of the questions posed in this thesis have no authoritative answer at present. Some guidance can be found in the reasoning of the domestic supreme courts who have discussed the application of the Convention to the risk of climate change. Even though the ECtHR has the authoritative interpretative power, the judgments from domestic supreme courts are a subsidiary means of

\textsuperscript{19} Christine Goodwin v. the United Kingdom [GC] para 74. See also e.g. Soering v. the United Kingdom para 87, Demir and Baykara v. Turkey [GC] para 66.
\textsuperscript{20} Ibid.
\textsuperscript{21} Spano (2020) page 2.
\textsuperscript{22} See e.g. Austin and others v. The United Kingdom [GC] para 53.
\textsuperscript{23} See ECHR Article 32 and e.g. Christine Goodwin v. the United Kingdom [GC] para 74 with further references.
\textsuperscript{24} Baumann (2018).
Regardless of formal weight, the level of quality of the legal reasoning can shed light over the correct interpretation of the Convention in climate change cases. The domestic climate change judgements based on the ECHR are The State of the Netherlands v. Urgenda Foundation (“Urgenda”), HR-2020-2472-P (“Greenpeace and others v. Norway”), Verein KlimaSeniorinnen Schweiz v. Bundesrat (“Klimaseniorinnen v. Switzerland”) and Friends of the Irish Environment v. Ireland (“FIE v. Ireland”). Another relevant case was recently issued by Federal Constitutional Court of Germany, BVerfG, Beschluss des Ersten Senats, 1 BvR 2656 /18 (“Neubauer et al v. Germany”). While this case was based on the right to life after the German Constitution, the Federal Constitutional Court held that ECHR Article 2 did not offer a more extensive protection than the German Constitution, affirming an overlap between the two Articles.

Moreover, the Convention cannot be interpreted in a vacuum, but must be read in light of international law. Under Article 31.3 c) of the VCLT, “any relevant rules of international law applicable in the relations between the parties” shall be taken into account when interpreting a treaty. This thesis concern the interrelationship between climate change and human rights. Accordingly, it is crucial to discuss how international climate change law might inform the interpretation of the Convention.

Under international law, the interpretation of the words “relevant”, “rules” and “applicable in the relations between the parties” is debated. However, the ECtHR has adopted a rather liberal approach to these questions. The Court has stated that it is for the Court to decide “which international instruments and reports it considers relevant and how much weight to attribute to them”. Moreover, the Court does not understand “rules” as only referring to legally binding sources, as the ECtHR frequently applies non-binding documents to interpret its provisions, for example documents from the UN Human Rights Committee or environmental declarations from the United Nations. Lastly, the ECtHR does not understand “applicable in the relations

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26 BVerfG, Beschluss des Ersten Senats, 1 BvR 2656/18 para 147.
27 See e.g. Magyar Helsinki Bizottság v. Hungary [GC] para 123 and Demir and Baykara v. Turkey [GC] para 76.
28 See VCLT Article 31 (3).
30 See e.g. Dörr et al. (2018) pages 603–613.
31 See e.g. A.M.V v. Finland para 74 with further references.
32 See e.g. Demir and Baykara v. Turkey [GC] paras 74 ff. with further references.
33 Tătar c. Roumanie para 111 and 118.
between the parties” as requiring all Convention States to be Parties to the relevant treaty. For example, the Court frequently refers to judgments by the Inter-American Court of Human Rights. In the environmental field, the Court has interpreted the ECHR in light of the Aarhus Convention, even though six Convention States are not part to it.

Baumann describes the Court’s method in environmental cases as a synergy between various sources of domestic and international law, both “hard and soft”. For example, in Tătar c. Roumanie, the Court interpreted Article 8 in light of the Aarhus Convention, the precautionary principle as enshrined in the Rio Declaration and reports from the United Nations. While this argumentation might be necessary to find a legal solution to the environmental problems the ECtHR is faced with, Baumann notes that the method of the ECtHR is not always respectful of legal orthodoxy. The basis for harmonizing different sources of international law is the obligation of a State to perform its treaty obligations in good faith. According to Dörr, “every party to a treaty in principle be presumed to intent to keep its treaty obligation in conformity with its other obligations under international law”. This reasoning only extends to the rules a State has accepted. In light of these considerations, the relevance of the Paris Agreement will later be assessed.

Furthermore, the ECtHR interprets the Convention in light of what has been called “European consensus” or “common ground”. The ECtHR has never defined the terms and it is hardly possible to propose a comprehensive definition of them. Moreover, the Convention system does not have any standardized rules as to how to identify a consensus. Dzehtsiarou, who has studied the concept, argues that “European consensus is a rebuttable presumption in favor of the solution adopted by a significant majority of the Contracting Parties which is identified on the basis of comparative analysis of laws and practices of these Parties.” The existence of a

34 See Demir and Baykara v. Turkey [GC] para 83.
35 See e.g. Slovenia v. Croatia [GC] para 66.
36 Tătar v. Romania para 111 and 118. See also Demir and Baykara v. Turkey [GC] para 83.
37 Baumann (2018) page 204.
38 See Tătar c. Roumanie para 100, 104, 118 and 120.
40 See VCLT Article 26 (pacta sunt servanda).
41 Dörr et al. (2018) pages 207 and 603.
42 See Chapter 2.4.
43 See e.g. Tyrer v. the United Kingdom para 31.
European consensus can justify a dynamic interpretation, and, conversely, the lack of one establishes a presumption in favor of a broader margin of appreciation. Previous case law shows that the Court has found a “broad consensus” where thirty-one States surveyed had adopted a legal solution, and a “large majority” or a “strong consensus” where 41 member States had adopted one solution. This can serve as a general starting point, but European consensus cannot be used as a decisive interpretative argument without reflecting on what consensus is and how to properly identify in the field of climate change.

Lastly, the ECtHR uses the margin of appreciation to interpret the provisions of the Convention. The margin of appreciation doctrine describes two different concepts – a substantive and a structural one.

The substantive concept addresses the relationship between human rights (individual freedoms) and public interests (collective goals). The preamble to the Convention reads that fundamental freedoms, the foundation of justice and peace, “are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the human rights upon which they depend”. According to the ECtHR, some compromise between the “the requirement for defending democratic society and individual rights is inherent in the system of the Convention”. This means that a fair balance has to be struck between the competing interests of the individual and of the community as a whole, and in this balancing, the State enjoys a certain margin of appreciation. While the extent of the margin must be determined on a case-to-case basis, the ECtHR has previously held that, due to difficulty in balancing social, economic and environmental interests, the State must be afforded a wide

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47 See e.g. Christine Goodwin v. the United Kingdom [GC] paras 85–90 and Dudgeon v. the United Kingdom para 60.
48 See e.g. VO v. France [GC] paras 84 and 85.
50 Dzehtsiarou (2015) page 43.
51 A new Protocol no. 15 will amend the Convention by adding a recital to the preamble with a reference to the principle of subsidiarity and margin of appreciation, see Council of Europe (2013) para 7 and Harris et al. (2018) page 176. This protocol will enter into force on 1 August 2021, see Press release issued by the Registrar of the Court (2021).
54 ECHR Preamble recital 4.
56 See e.g. López Ostra v. Spain para 51 and Cordella et Autres c. Italie para 158.
margin in environmental cases. However, in a 2019 environmental case, the Court only afforded the State a “certain” margin of appreciation to the State. Extra-judicially, the ECtHR Judge Eicke stated that it remains to be seen “whether this signifies a greater willingness on the part of the Court to engage with national policy”.

The structural concept concerns the intensity of the review carried out by the ECtHR. This element addresses how the ECtHR, an international court, has limited power to carry out a judicial review of a State. The Court often underlines the fundamentally subsidiary role of the Convention system by acknowledging that national authorities, who have direct democratic legitimation, are in principle better placed than an international court to evaluate local needs and conditions. This margin is an aspect of the principle of subsidiarity, a consequence of the separation of powers between the ECtHR and the national authorities, where State Parties have the primary responsibility to enforce the Convention. The Court has generally afforded a wide margin in environmental cases as these concern matters of general policy, where opinions may reasonably differ widely, leading the Court to conclude that the role of the domestic policy-maker should be given special weight. The same is true for the field of climate change, where members of the society disagree over the scope of the problem and which measures that should be taken.

To summarize, the interpretation of the ECHR in climate cases is challenging. No guidance can be found in the text of the Convention. The previous environmental jurisprudence of the Court can to some extent inform the interpretation, but the novelty and particularities of climate change mean that not all answers can be found there. Accordingly, the object and purpose of the Convention, relevant international law, European consensus and the margin of appreciation are important sources in this thesis.

57 See e.g. Hatton and others v. the United Kingdom [GC] paras 97 and 101 with further references and Öner and others v. Turkey [GC] para 107.
58 Cordella et autres c. Italie para 158.
59 Eicke (2021) para 22.
61 Ibid page 721.
62 See e.g. Hatton and Others v. the United Kingdom [GC] para 97 and 101.
63 Protocol no. 15 Article 1.
64 See e.g. Hatton and Others v. the United Kingdom [GC] para 97 and 101.
1.4 Outline

Chapter 2 will give a context to the setting in which this thesis operates. First, some argue that climate change – a matter involving allocation of resources - should be left to the political authorities rather than the courts, an argument that will be addressed in Chapter 2.1. Second, even though the ECHR does not contain an individual right to a healthy environment, the ECtHR has delivered over 300 cases concerning environmental issues. This jurisprudence is possible due to the interrelationship between the environment and human rights, which will be explained in Chapter 2.2. Third, while the ECtHR has not issued any climate change cases, there seems to be an equally close interrelationship between a safe climate and the right to life, which will be discussed in Chapter 2.3. Fourth and last, the relevance of the Paris Agreement when interpreting the Convention will be discussed in Chapter 2.4.

The following Chapters will answer the three research questions set forth in this thesis. Chapter 3 will analyze whether applicants in climate change cases are likely to meet the admissibility criterion set out in Article 34. Chapter 4 will discuss whether Article 2 is applicable to the risks arising from climate change. Chapter 5 will examine the scope of a positive obligation to protect the right to life against the risk of climate change.
2 The context of the thesis

2.1 Climate change as a political and legal question

Climate change litigation based on human rights often generate discussions on the role of the judiciary in a field many deem as political. The general view seems to be that climate change cannot be both a political and legal question at the same time.

In this sense, climate change litigation based on human rights offers a good example of the use of persuasive definitions in legal argumentation. Charles Stevenson, who first introduced this term, defined is as follows:

“A "persuasive" definition is one which gives a new conceptual meaning to a familiar word without substantially changing its emotive meaning, and which is used with the conscious or unconscious purpose of changing, by this means, the direction of people's interests.”

Words that have a vague conceptual meaning and a rich emotive meaning are often used in persuasive definitions. The conceptual meaning of the words is subject to constant redefinition, where the speaker bestows the word with the qualities of his own choice in order to change interests. However, the speaker is not necessarily attempting to deceive or fool the addressee, but might be unaware of the persuasive element in the way he uses the word.

The terms “separation of power” and “politics” are ideal for persuasive definitions. These terms are familiar to all, and most have some connotations to them. Judges, in particular, are wary to overstep their role in a system of separation of powers. Their role is to adjudicate law, whereas politics is outside their jurisdiction. An accusation of being political is therefore something a court wishes to avoid. Yet, the vagueness of the terms means that different speakers might use the words in climate change cases according to their own interests.

On the one hand, Attorney Generals may argue that an interpretation where climate change is a human right question, affording judges the power to adjudicate on climate change policies,
would be political.\textsuperscript{70} In this scenario, the Attorney General defines “politics” as the allocation of resources in a complex and controversial field, requiring consideration of competing social, political and economic interests. In a system of separation of powers, elected representatives must take these decisions. On the other hand, environmental lawyers will argue that the domain of politics is, in a constitutional democracy, framed by the limits of human rights law.\textsuperscript{71} In this scenario, the environmental lawyers define “politics” as the room for maneuver left for the legislative and executive branch after they have fulfilled their obligations to respect fundamental human rights. As climate change is a human rights question, it is unpolitical by definition.

This dispute is over term “politics”. Despite centuries of discussion, there is no consensus on a clear definition of the term.\textsuperscript{72} Moreover, the distinction between law and politics is part of a greater debate on the concept of separation of power and the role of judiciary in a democratic society. The competence of courts to carry out judicial reviews with the decisions taken by elected parliaments and governments varies greatly between member States to the Convention.\textsuperscript{73} Even within a country, the roles of the executive, legislative and judicial branches are seldom fixed, but flexible and apt to change.\textsuperscript{74} In our time, the emergence of supranational courts further complicate the traditional understandings of distribution of power.\textsuperscript{75} The lack of a clear definition of “politics” creates a great deal of confusion. Blindness to the persuasive nature of such arguments leads to disputes concerned with terminology rather than material questions.\textsuperscript{76} This is presumably the reason behind the reluctance by the Grand Chamber to define the concept of separation of power:

“Although the notion of the separation of powers between the political organs of government and the judiciary has assumed growing importance in the Court’s case-law ... neither Article 6 nor any other provision of the Convention requires States to comply with any theoretical constitutional concepts regarding the permissible limits of the powers’ interaction. The question is always whether, in a given case, the requirements of the Convention are met.”\textsuperscript{77} (emphasis added)

\textsuperscript{70} See e.g. Fauchald (2018).
\textsuperscript{71} See e.g. The State of the Netherlands v. Urgenda Foundation paras 8.3.2 and 8.3.3.
\textsuperscript{72} Sunde (2020). See also Juliana v. the United States (District Court of Oregon) page 6.
\textsuperscript{73} See e.g. Sunde (2020) and Cappelletti (1970).
\textsuperscript{74} See e.g. Sunde (2020), Kierulf (2018) and Lustig et al. (2018).
\textsuperscript{75} See e.g. Ulfstein (2017).
\textsuperscript{76} Stevenson (1938) page 344.
\textsuperscript{77} See e.g. Kleyn and others v. the Netherlands [GC] para 193 and Oleksandr Volkov v. Ukraine para 103.
In its climate change judgment, the Irish Supreme Court stated that

“Constitutional rights and obligations and matters of policy do not fall into hermetically sealed boxes. There are undoubtedly matters which can clearly be assigned to one or other. However, there are also matters which may involve policy, but where that policy has been incorporated into law or may arguably impinge rights guaranteed under the Constitution, where the courts do have a role.”

Against this background, it seems unfeasible to analyze a theoretical separation between human rights and politics. Discussing whether climate change cases are political takes the focus away from the interpretation of the Convention, which is far more interesting. Indeed, human rights “are open to varied interpretations and to reasonable disagreement over which interpretation is best”. Even though it is a philosophical question whether human rights are universal at the level of abstraction, it is difficult to argue that there is only one fundamental truth about the exact application of a human right in a specific case. Rather, the application of human rights often offer a wide range of opportunities. The President of the ECtHR, Robert Spano, has argued that extra-judicially the application of human rights often requires compromises and that this is a question of degree “to be analysed along a spectrum of possibilities”, where an international court can either conduct a total reassessment of the domestic decision-making, or grant full and unlimited discretion to the State.

The Court has not yet considered the application of the Convention to climate change. This makes it possible to discuss which interpretation is correct according to the legal sources available, a discussion that has a specter of possible solutions. The interpretation of the right to life is not a binary question where the interpretative choice can be characterized as either politics or not politics. Rather than focusing on the (un)political nature of the dispute, the interpreter should focus on the underlying interests behind the different arguments to identify a fair compromise. Accordingly, the conflicting interests discussed here should both inform the interpretative choices taken by the courts. Under the Convention system, there are interpretative tools created for taking the need for the authorities to have flexibility (margin of appreciation), and the need to interpret human rights in light of present-day conditions in order to ensure their

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79 Sathanapally (2017) page 43.
80 Spano (2014) page 494.
82 Spano (2014) page 494.
effectiveness (living instrument doctrine).\textsuperscript{83} Indeed, the need to strike a compromise between an effective democratic society and the protection of individual rights is “inherent in the system of the Convention”.\textsuperscript{84}

To summarize, it is not helpful for this thesis to discuss whether a situation where the judiciary can review climate change claims based on Convention would be political. This thesis can hardly aim to settle this theoretical debate, which has been going for centuries, and is further complicated by the emergence of supranational courts. General arguments concerning the (un)political nature of climate change and human rights cases should accordingly be met with the question of which definition of the term “political” the speaker is using. The interests behind the arguments, however, can and should influence the interpretation of the right to life in climate change cases.

\textbf{2.2 The interrelationship between the environment and human rights}

The 1950 European Convention on Human Rights does not mention the environment. At that time, the link between environmental issues and human rights was not yet apparent. The first international legal document that drew the connection appeared in 1972, when the Stockholm Declaration was adopted. According to the Declaration, the environment is essential to “the enjoyment of basic human rights”, including “the right to life itself”.\textsuperscript{85}

This marked the starting point for the growing consensus that environmental protection and human rights are interrelated.\textsuperscript{86} The International Court of Justice (“ICJ”) held in 1996 that the “environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn”.\textsuperscript{87} The former Vice-President of the ICJ expressed this link even more strongly in a Separate Opinion in 1997:

“The protection of the environment is likewise a vital part of contemporary human rights doctrine, for it is a sine qua non for numerous human rights such as the right to health and the right to life itself. It is scarcely necessary to elaborate on this, as damage to the

\textsuperscript{83} See Chapter 1.4.
\textsuperscript{84} See Klass and others v. Germany para 59 and Letsas (2006) page 711.
\textsuperscript{86} For a detailed description on the emergence and the existence of this consensus, see Boyd (2012) and Sands (2018) pages 814–827.
\textsuperscript{87} Legality of the Threat or Use of Nuclear Weapons para 29.
environment can impair and undermine all the human rights spoken of in the Universal Declaration and other human rights instruments.\footnote{Hungary v. Slovakia Separate Opinion of Vice-President Weeramantry page 91.}

Despite the growing international consensus, no international convention affords a general right to a healthy environment. However, domestic and regional human rights law have recognized this right. At the domestic level, a right to a healthy environment now enjoys constitutional recognition in 110 out of the 193 member States of the United Nations.\footnote{The UN Special Rapporteur on human rights and the environment (2019) para 10.} At the regional level, the right to a healthy environment is explicitly included in three different human right treaties: the African Charter of Human Rights and the Arab Charter on Human Rights both recognize a right to a healthy environment, while a right to a healthy environment has been included in the Additional Protocol to the American Convention on Human Rights.\footnote{The Banjul Charter Article 24, ACHR Article 38 and the Protocol of San Salvador Article 11.}

Human rights institutions are also acknowledging the growing consensus. The Inter-American Court on Human Rights has ruled that “damage to the environment may affect all human rights, in the sense that the full enjoyment of all human rights depends on a suitable environment,”\footnote{Advisory Opinion (OC-23/17) para 64.} and describes the right to a healthy environment as a “universal value” and “a fundamental right for the existence of humankind”.\footnote{The Indigenous Communities Members Of The Lhaka Honhat (Our Land) Association v. Argentina para 203.} The UN Human Rights Committee held in 2019 that international tribunals are recognizing “the existence of an undeniable link between the protection of the environment and the realization of human rights” and have established “that environmental degradation can adversely affect the effective enjoyment of the right to life”.\footnote{Portillo Cáceres and others v. Paraguay para 7.4. See also Ogoni v. Nigeria para 51.}

The ECtHR, influenced by this international development, recognized in 1991 that “protection of the environment is an increasingly important consideration”.\footnote{Fredin v. Sweden para 48.} The explicit acknowledgement of the interrelationship between the environment and human rights came in the 1994, with the case \textit{López Ostra v. Spain}. The Court examined whether severe environmental pollution could violate the right to private life and home under Article 8. The Court held that
“Naturally, severe environmental pollution may affect individuals’ well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely, without, however, seriously endangering their health.”95 (emphasis added)

Thus, the Court acknowledged a “natural” link between the environment and the rights under Article 8. The Court did not explain why this link was natural. Presumably, the Court found it self-evident that there is an inherent and undeniable link between the protection of the environment and the right to private and family life: A healthy environment is a precondition for realizing the rights under Article 8. This marked the starting point for a jurisprudence concerning environmental issues and human rights.96

In 1999, the Parliamentary Assembly of the Council of Europe (“PACE”) attempted to enhance the environmental protection under the Convention system. It recommended that the Committee of Ministers – made up of the Ministers for Foreign Affairs of member States – examined the feasibility of drafting an amendment or an additional protocol to the ECHR, affording individuals a right to a healthy and viable environment. PACE held that due to the “changing living conditions and growing recognition of the importance of environmental issues”, the Convention should include this as a “basic human right”.97 The Committee of Ministers rejected this proposition as the “recognition of the individual and legally enforceable nature of the human right to a healthy and viable environment meets at present certain difficulties, legal and conceptual”.98 This reply was the end of the process.

The ECtHR, however, continued to issue judgments concerning environmental issues up until 2003, when another attempt to draft an additional protocol was set forth.99 One of the Committees under PACE was afraid that the Court “would be given tasks beyond their competence and means” as a broadly defined right to a healthy environment would not define which activities that were prohibited and what kind of remedies should be available in case of a violation.100 Against this background, PACE only recommended that the Committee of Ministers drew up an additional protocol recognizing individual procedural rights in the

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95 López Ostra v. Spain para 51.
96 Press Unit at the Council of Europe (2020) and Council of Europe Publishing (2012).
98 The Committee of Ministers (2000).
99 See e.g. Hatton and Others v. the United Kingdom [GC].
100 The Committee on Legal Affairs and Human Rights (2003) part I para 2. See also the Committee on the Environment, Agriculture and Local and Regional Affairs (2003).
environmental field. The Committee of Ministers responded that the “Convention system already indirectly contributes to the protection of the environment through existing Convention rights and their interpretation in the case-law of the European Court of Human Rights.” Given that the case law would continue to evolve, the Committee of Ministers did not find it necessary to adopt a new protocol.

As presumed, the ECtHR continued to evolve its environmental case law up until 2009, when the last attempt to enhance the environmental protection under the Convention was set forth. PACE recommended that the Committee of Ministers drafted an additional protocol to the ECHR, recognizing a general right to a healthy and viable environment. The Committee of Ministers responded by recalling its reply from 2003, where it did not consider it advisable to draw up an additional protocol in the environmental domain. However, it also recalled that it was not necessary to draft an additional protocol – the Convention system already indirectly contributed to the protection of the environment through existing rights and their interpretation in the evolving case law of the ECtHR.

The Court continued to issue environmental judgments after 2009. In total, the Court has issued approximately 300 environment-related rulings under Article 2, 3, 5, 6, 8, 10, 11, 13, 14 and Article 1 of Protocol No. 1. Yet, the Court has been mindful of the discussions in PACE and the Committee of Ministers. For example, the Court held in 2010 that

“In today's society the protection of the environment is an increasingly important consideration … However, Article 8 is not engaged every time environmental deterioration occurs: no right to nature preservation is included as such among the rights and freedoms guaranteed by the Convention or its Protocols … Indeed, that has been noted twice by the Council of Europe's Parliamentary Assembly, which urged the

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103 Ibid Annex I para 5.
104 See e.g. Taşkin and others v. Turkey and Budayeva v. Russia.
105 The Parliamentary Assembly of the Council of Europe (2009) para 1 and 2. For the preparatory work, see reports from The Committee on the Environment, Agriculture and Local and Regional Affairs (2009) and The Committee on Legal Affairs and Human Rights (2009).
107 Ibid.
Committee of Ministers to consider the possibility of supplementing the Convention in that respect.\textsuperscript{109}

What can be inferred from this history? It is clear that the Convention system neither provides general protection to the environment\textsuperscript{110} nor affords a human right to a healthy environment. This clearly limits the scope of the environmental protection offered by the Convention system.

Yet, the Court has gradually created a system where the Convention offers protection against environmental hazards affecting existing human rights. The Court acknowledges that there is a natural link between the protection of the environment and human rights.\textsuperscript{111} As stated extra-judicially by the president of the ECtHR, “it is now accepted that human rights and the environment are interrelated”.\textsuperscript{112} States, through their representatives in the Committee of Ministers, have endorsed the indirect environmental protection under the Convention. What is more, they have used it as an argument against the need to adopt an additional protocol when underlining that the jurisprudence is likely to evolve in accordance with the dynamic interpretation of the Court. While some have argued that the dismissal of an additional protocol shows that the Member States are opposed to environmental protection under Convention rights, this argument does not consider the justification of the Committee of Ministers for doing so. The fact that States presumed that the environmental protection under the Convention would continue to evolve is – at the very least – an argument against a rejection of a dynamic interpretation of the right to life in climate change cases.

2.3 The interrelationship between climate change and human rights

Our climate is changing due to human activities, and these changes will have severe consequences for human lives. This is now international consensus, reflected in the reports of the Intergovernmental Panel on Climate Change (“IPCC”), a United Nations body established to assess the science on climate change. The reports from the IPCC offer the best available science on climate change, providing the basis for international climate change law.\textsuperscript{113}

\textsuperscript{109} Ivan Atanasov v. Bulgaria para 66.
\textsuperscript{110} The Court considers “other international instruments and domestic legislation” to be “more pertinent in dealing with this particular aspect”, see Kyrtratos v. Greece para 52.
\textsuperscript{111} López Ostra v. Spain para 59 and Budayeva v. Russia para 117.
\textsuperscript{112} Spano (2020) page 2.
\textsuperscript{113} See the Paris Agreement Article 4.1, 7.5 and 14, Sands et al. (2018) page 81, Bodansky et al. (2017) page 57, 99, 119 and HR-2020-2472-P para 50.
According to the IPCC, *climate* is the average, statistical weather over a time period, normally 30 years.\(^{114}\) *Climate change* is a “change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods”.\(^{115}\) While the climate also can change due to natural internal processes or external forcing, the focus in this thesis is on the climate change attributable to human activity.\(^{116}\)

The IPCC estimated in 2018 that human activities have caused a global temperature increase of approximately 1.0°C above pre-industrial levels.\(^{117}\) Warming has already “resulted in an increased frequency, intensity and duration of heat-related stress, including heatwaves, in most land regions”,\(^{118}\) but “with increased warming, the frequency intensity and duration of heat related events including heatwaves are projected to continue to increase throughout the 21\textsuperscript{st} century”.\(^{119}\) Furthermore, since the mid-20\textsuperscript{th} century, the shrinking cryosphere in the Arctic and high mountain areas has led to “predominantly negative impacts” on “livelihoods, health and well-being”.\(^{120}\) Sea level continues to rise at an “increasing rate” and “extremes sea level events that are historically rare (once per century in the recent past) are projected to occur frequently (at least once per year)”.\(^{121}\) Rising mean sea level “will contribute to higher extreme sea levels associated with tropical cyclones”.\(^{122}\) If greenhouse gas emissions continue at the present rate, the projected global mean surface temperature change is projected to be between 3 and 4 degrees in 2100.\(^{123}\) This will lead to a rise in global mean sea level at between 3-4 meters,\(^{124}\) something that will render “a large part of Europe’s coastal zones exposed to intermittent flood hazard” and exposing approximately five million Europeans at risk for a flood on an annual basis.\(^{125}\)

\(^{114}\) The Inter-Governmental Panel on Climate Change (2018) page 544.
\(^{115}\) The UNFCCC Article 1.2 and the Paris Agreement Article 1.
\(^{116}\) The Inter-Governmental Panel on Climate Change (2018) page 544.
\(^{117}\) Ibid page 4.
\(^{118}\) The Inter-Governmental Panel on Climate Change (2019a) page 9.
\(^{119}\) Ibid page 17.
\(^{120}\) The Inter-Governmental Panel on Climate Change (2019b) page 15.
\(^{121}\) Ibid page 21.
\(^{122}\) Ibid page 21.
\(^{123}\) See United Nations Environment Programme (2020a) page IX.
\(^{124}\) The Inter-Governmental Panel on Climate Change (2019b) pages 7, 8 and 21. This scenario is referred to as “RPC8.5” in the report.
\(^{125}\) Vousdoukas et al. (2017) page 319.
Once the contraction of greenhouse gas emissions in the atmosphere reaches a certain point, a number of tipping points will be activated. According to the IPCC, tipping points “refer to critical thresholds in a system that, when exceeded, can lead to a significant change in the State of the system, often with an understanding that the change is irreversible”. Loss of the Arctic sea ice, widespread thawing of the permafrost, a collapse of the monsoon system and the deforestation of the Amazon are some examples of tipping points. The activation of these tipping points will greatly accelerate global warming and cause irreversible changes to our climate. There is not yet any consensus as to the precise level of climate change likely to trigger tipping points, but there are strong suggestions that even a global temperature increase of 2°C may activate some tipping points.

Greenhouse gas emissions accumulate and stay in the atmosphere for thousands of years. However, it takes time before the greenhouse gases lead to a temperature increase. This phenomenon is known as climate change commitment, referring “the unavoidable future climate change resulting from inertia in the geophysical and socio-economic systems”. In other words, climate change commitment is “the future warming to which we have committed ourselves by virtue of past human activities. Because of the slow response time of the climate system, the equilibrium climate consistent with current levels of greenhouse gases will not be reached for many centuries.” Accordingly, even if all worldwide emissions stopped now, scientists have calculated that the global average temperature would still increase about 0.5°C over the next two to three decades due to already emitted carbon. Thus, a temperature increase of 1.5°C might already be unavoidable. When calculating the risk of activating tipping points, an understanding climate change commitment is accordingly essential.

Even though it is not possible to avoid climate change, the climate-related risks for human systems depend on the magnitude and rate of warming. The term climate change mitigation refers to a human intervention to reduce emissions or enhance the sinks of greenhouse gases, with the purpose of limiting the increase in the global average temperature. The risks decrease or increase contingent on whether States successfully adapt to and mitigate climate

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126 The Inter-Governmental Panel on Climate Change (2018) page 262.
127 Ibid page 264.
128 Rood (2014).
129 The Inter-Governmental Panel on Climate Change (2018) pages 544–545.
131 The Inter-Governmental Panel on Climate Change (2018) pages 5 and 78.
132 Ibid page 64, Readfearn et al. (2021) and Sharma and others v. Minister for the Environment paras 63 and 74.
133 The Inter-Governmental Panel on Climate Change (2018) page 7.
134 Ibid page 554. See also Regulation (EU) 2020/852 Article 2 (5).
Accordingly, it is possible for States to reduce the human rights risks posed by climate change.

The harmful effects of climate change have a clear link with human rights, for example the right to life. According to the UN Special Rapporteur on Human Rights and the Environment, “climate-related deaths are caused by extreme weather events, heat waves, floods, droughts, wildfires, water-borne and vector-borne diseases, malnutrition and air pollution”. The World Health Organization estimates that by 2030, some 250,000 climate-related deaths each year will be caused by heat stress, malaria, diarrhea and malnutrition alone.

International, regional and national courts worldwide are increasingly accepting a link between the right to life and climate change. The Norwegian Supreme Court and the Federal Constitutional Court of Germany both held that climate change threatens the right to life by increased frequency and intensity of heat waves, landslides, floods or hurricanes. Similarly, the Dutch Supreme Court found that the lives and welfare of Dutch residents could be seriously jeopardised by climate change. The Irish Supreme Court ruled that climate change is undoubtedly one of the greatest challenges facing all States, and that the consequences of failing to address climate change will be “very severe with potential significant risk to both to life and health throughout the world but also including Ireland”. The United Nations Human Rights Committee has so far been the most explicit:

“Environmental degradation, climate change and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life. … Implementation of the obligation to respect and ensure the right to life, and in particular life with dignity, depends, inter alia, on measures taken by States parties to preserve the environment and protect it against harm, pollution and climate change caused by public and private actors.” (emphasis added)

135 Ibid and the Inter-Governmental Panel on Climate Change (2019b) page 18.
138 For an overview of world-wide climate change litigation, see United Nations Environment Programme (2020b).
139 HR-2020-2472-P paras 49–55 and 167 and BVerfG, Beschluss des Ersten Senats, 1 BvR 2656/18 para 148.
140 The State of the Netherlands v. Urgenda Foundation paras 2.1 and 5.6.2.
141 Friends of the Irish Environment v. Ireland para 1 and 3.6.
Bodansky considers it “beyond debate” that “the adverse effects of climate change will, in their severity, threaten a range of human rights, including the rights to life, health, food, and housing”.  

Against this background, it seems clear that there is a strong consensus on the interrelationship between climate change and human rights. This consensus forms an important backdrop to the topic of this thesis.

2.4 The Paris Agreement

This international need to mitigate climate change led to the adoption of the Paris Agreement, where the State Parties agreed on what level of global climate change constitutes a dangerous interference with the climate system. The purpose of the Paris Agreement is to strengthen the global response to the threat of climate change by holding “the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels”. Accordingly, dangerous climate change is a term that will be applied in this thesis, referring to a climate change where the global average temperature increases to more than well below 2°C above pre-industrial levels.

In a new article, Preston illustrates how the Paris Agreement has influenced domestic climate litigation all over the world. The Paris Agreement might also inform the interpretation of the Convention. However, this is contingent on whether the provisions of the treaty are, in accordance with Article 31.3c) of the VCLT, “relevant rules of international law applicable in the relations between the parties” to the ECHR.

The Paris Agreement is a treaty adopted under the United Nations Framework Convention on Climate Change (“UNFCCC”). All Parties to the ECHR are also parties to the UNFCCC and the Paris Agreement. Consequently, the treaty is a “rule” of international law “applicable in the relation between the Parties”. The decisive question is accordingly whether the Paris Agreement is “relevant” to the Convention.

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143 Bodansky et al. (2017) page 296 with further references.
144 Klein et al. (2017) pages 124–125.
145 The Paris Agreement Article 2.1a.
146 Preston (2021).
147 See Chapter 1.3.
148 See UNFCCC Article 17, the Paris Agreement preamble recital 1 and Bodansky et al. (2017) page 212 and the Paris Agreement Article 2.1.
149 See United Nations Treaty Collection (2021a) and (2021b). Turkey has signed, but not ratified, the Paris Agreement.
Seen in isolation, the Paris Agreement has little to do with human rights – it is a treaty that regulates the obligations between States in the field of climate change. However, as seen, a safe climate is a precondition for the realization of human rights. The States Parties to the UNFCCC first addressed this link in a decision adopted in 2010.\textsuperscript{150} This lead the way for a debate of whether the Paris Agreement should incorporate human rights. The negotiation text of the Paris Agreement suggested multiple references to human rights, both in the preamble and in the operational provisions.\textsuperscript{151} In the end, human rights were mentioned only in the preamble:

\begin{quote}
\textit{“Acknowledging that climate change is a common concern of humankind, Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity.”}\textsuperscript{152} (Emphasis added)
\end{quote}

This vague preamble does not create any new and separate human rights obligations, but draws attention to existing ones.\textsuperscript{153} According to the wording, Parties should only consider “their respective obligations on human rights” when “taking action to address climate change”. The right to life is not explicitly mentioned, but is a part of the general clause of “respect and consider their respective obligations” on human rights – the mentioning of specific human rights is not exhaustive.\textsuperscript{154}

Despite the ambiguous language, the preamble was deemed “revolutionary” as it connected the climate change and human rights regime – Klein notes that the preamble is a good example of an incorporative clause built in to “integrate norms or principles of other areas of international law and also contribute to avoid conflict between different regimes”.\textsuperscript{155} Indeed, Savaresi points out that the reference in the preamble can serve as a reminder to practice systematic interpretation.\textsuperscript{156} Accordingly, the human rights reference makes the Paris Agreement a relevant source when interpreting the right to life.

\textsuperscript{150} Conference of the Parties to the UNFCCC (2010) part I para 2.8.
\textsuperscript{152} The Paris Agreement preamble recital 11. See Bodansky et al. (2017) page 311 for the reasons behind this choice.
\textsuperscript{153} See Klein et al. (2017) page 115 and Bodansky et al. (2017) pages 228 and 312.
\textsuperscript{154} Klein et al. (2017) page 115.
\textsuperscript{155} Ibid.
\textsuperscript{156} Savaresi (2019) page 39.
The admissibility criterion of Article 34

3.1 Introduction

Every year, thousands of applications are lodged before the Court. Only a few of them are eventually accepted. In 2020, out of 41,700 applications, 37,279 were declared inadmissible.\textsuperscript{157} The admissibility criteria, set out in Article 34 and 35, consist of detailed rules for when a case can be admitted to the Court.\textsuperscript{158} While it is outside the scope of this thesis to discuss these rules generally, the “victim” criterion of Article 34 is likely to determine whether any climate cases will be accepted to the Court. Whether applicants in climate cases can claim to be a “victim” of a violation, will be discussed in the following.

Article 34 decides that the Court may receive applications from any “person, non-governmental organization or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto” (emphasis added). The Court consistently recalls that in order to rely on Article 34 of the Convention, an applicant must meet two conditions:

“[H]e or she must fall into one of the categories of petitioners mentioned in Article 34 and must be able to make out a case that he or she is the victim of a violation of the Convention. According to the Court’s established case-law, the concept of “victim” must be interpreted autonomously and irrespective of domestic concepts such as those concerning an interest or capacity to act … The word “victim”, in the context of Article 34 of the Convention, denotes the person or persons directly or indirectly affected by the alleged violation”.\textsuperscript{159} (emphasis added)

The criterion “directly or indirectly affected” presupposes that the alleged violation has happened. Applicants in climate change cases, however, often claim that the State has violated an obligation to protect against climate change damage that will materialize in the future. The “victim” criterion is accordingly a possible ground for inadmissibility for Duarte Agostinho et autres c. le Portugal et 32 autres États and Verein KlimaSenorinnen Schweiz et autres c. la Suisse.\textsuperscript{160} Indeed, the Swiss Supreme Court found that the elder women claiming to be victims

\textsuperscript{157} Council of Europe (2021) page 4.

\textsuperscript{158} See Council of Europe (2020e) for an overview of the admissibility criteria.

\textsuperscript{159} See e.g. Vallianatos and Others v. Greece para 47 with further references.

\textsuperscript{160} European Court on Human Rights (2020) question 2 and European Court on Human Rights (2021) question 1.
of a violation of Article 2 and 8 were not “victims” according to Article 34.Chapter 3.2 will therefore discuss whether complaints from future victims can be accepted.

The categories of petitioners are physical persons, legal persons and group of individuals. Environmental organizations often set forth claims concerning the obligation of a State to protect the right to life against dangerous climate change, even though they are not themselves affected by a potential violation. Chapter 3.3 will accordingly discuss whether environmental organizations can represent their members’ right to life before the ECtHR.

The Court has explicitly held that Article 34 “cannot be interpreted solely in accordance with the intentions of their authors as expressed” over 70 years ago. Accordingly, the Court interprets the procedural provisions in the same manner as the substantive provisions, following the interpretative rules as set forth in Chapter 1.4.

### 3.2 Can complaints regarding future violations of the Convention be accepted?

#### 3.2.1 General principles

The word “victim” denotes that the applicants must be “directly or indirectly affected” by the alleged violation. According to the Grand Chamber, Article 34 of the Convention does not allow complaints in abstracto alleging a violation of the Convention:

“The Convention does not provide for the institution of an actio popularis … meaning that applicants may not complain against a provision of domestic law, a domestic practice or public acts simply because they appear to contravene the Convention.”

While the Convention system could have permitted an abstract review of domestic law and practice, the authors of the Convention chose otherwise. The Court has stated that

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163 Loizidou v. Turkey (preliminary objections) [GC] para 70. Article 25 is the present Article 34.
164 See e.g. Gorraiz Lizarraga and others v. Spain para 38, with reference to the living instrument doctrine and European consensus. See also Council of Europe (2020e) paras 17–19.
165 See e.g. Centre for Legal Resources on Behalf of Valentin Câmpeanu v. Romania [GC] para 101 and Council of Europe (2020a) paras 34-38 with further references.
166 The Federal Constitutional Court of Germany is one of several courts that accepts in abstracto complaints under domestic rules of standing, see e.g. BVerfG, Beschluss des Ersten Senats, 1 BvR 2656/18, para 110.
“It can be observed from the terms "victim" and "violation" and from the philosophy underlying the obligation to exhaust domestic remedies provided for in [Article 35] that in the system for the protection of human rights conceived by the authors of the Convention, the exercise of the right of individual petition cannot be used to prevent a potential violation of the Convention: in theory [the European Court of Human Rights] cannot examine - or, if applicable, find - a violation other than a posteriori, once that violation has occurred.”167

While the “victim” criterion is indispensable for putting the protection mechanism of the Convention into motion, the Court has underlined that “this criterion is not to be applied in a rigid, mechanical and inflexible way throughout the proceedings”.168 Accordingly, in “highly exceptional circumstances”, the Court has recognized that an applicant may “claim to be a victim of a violation of the Convention owing to the risk of a future violation”.169

In the landmark case Soering v. the United Kingdom, the Commission was presented with a complaint from an applicant who argued that his envisaged extradition to the United States risked a treatment contrary to Article 3 of the Convention. The Commission recalled that “it is not normally for the Convention institutions to pronounce on the existence or otherwise of potential violations of the Convention”.170 However, due to “the serious and irreparable nature of the alleged suffering” and the need to ensure the effectiveness of Article 3, the Commission considered a departure from this principle necessary.171 The complaint was thus accepted. The Court now accepts complaints from potential and future victims in non-refoulement cases, where the applicant is at risk for inhuman or degrading treatment contrary to Article 3 if returned to a third country.172

The most famous exception is perhaps the case of secret surveillance. In the landmark case Klaas and others v. Germany, the Court was presented with the question of “whether an individual is to be deprived of the opportunity of lodging an application” because, “owing to

167 See e.g. Tauira and 18 Others v. France page 130 and Berger-Krall and Others v. Slovenia para 258 with further references.
168 See e.g. Beizaras and Levickas v. Lithuania para 75 and Roman Zakharov v. Russia [GC] para 164 with further references.
169 See e.g. Tauira and 18 Others v. France page 130, Berger-Krall and Others v. Slovenia para 258 with further references and Senator Lines Gmbh v. 15 member states [GC] page 11.
170 Soering v. the United Kingdom paras 90–91.
171 Ibid.
172 See e.g. M.S.S. v. Belgium and Greece [GC], Hirsi Jamaa and Others v. Italy [GC] and Lemmens (2018) page 57.
the secrecy of the measures objected to, he cannot point to any concrete measure specifically affecting him.”\textsuperscript{173} The Court found that “the efficiency of the Convention’s enforcement machinery would be materially weakened” if this was the case.\textsuperscript{174} The Court therefore accepted “that an individual may, under certain conditions, claim to be the victim of a violation occasioned by the mere existence of secret measures or of legislation permitting secret measures, without having to allege that such measures were in fact applied to him.”\textsuperscript{175} After this case, the Court has accepted claims of secret surveillance \textit{in abstracto} on several occasions.\textsuperscript{176}

The majority of environmental cases heard under the Convention concerned environmental issues that had already occurred, where the applicants thus were “directly or indirectly affected” by the alleged violation. One of few cases concerning a future environmental damage is the inadmissibility decision \textit{Tauira and 18 Others v. France}. A group of individuals complained that their rights under the Convention were at risk due to radioactive contamination from nuclear plants. The Commission held that the applicants could not merely invoke risks inherent in the use of nuclear power as grounds to be a victim – many human activities generate risk.\textsuperscript{177} The Commission held that in order to be a potential victim, the applicants

“must have an arguable and detailed claim that, owing to the authorities' failure to take adequate precautions, the degree of probability that damage will occur is such that it may be deemed to be a violation, on condition that the consequences of the act complained of are not too remote”.\textsuperscript{178}

The applicants failed to substantiate such claims, and the complaint was thus inadmissible. The same paragraph was recalled in the inadmissibility decision \textit{Asselbourg and others v. Luxembourg}. The case concerned an alleged violation of the Convention due to pollution risks inherent in the production of steel from a crap iron. The Court recalled that the exercise of the right of individual petition cannot have the aim of preventing a violation of the Convention, and only in wholly exceptional circumstances can the risk of a future violation confer the status of “victim”.\textsuperscript{179} The Court found that the applicants could not assert that lack of adequate

\begin{itemize}
\item \textsuperscript{173} Klaas and others v. Germany para 34.
\item \textsuperscript{174} Ibid.
\item \textsuperscript{175} Ibid.
\item \textsuperscript{176} Roman Zakharov v. Russia [GC] para 165 with further references.
\item \textsuperscript{177} Tauira and 18 Others v. France page 131.
\item \textsuperscript{178} Ibid page 132.
\item \textsuperscript{179} Asselbourg and others v. Luxembourg pages 6–7.
\end{itemize}
Precautions taken by the authorities lead to a sufficient degree of probability that damage would occur. It was not “evident from the file that the conditions of operation imposed by the Luxembourg authorities and in particular the norms dealing with the discharge of air-polluting wastes were so inadequate as to constitute a serious infringement of the principle of precaution”, leading the case to be declared inadmissible.\(^{180}\)

These cases illustrate that the Court is aware of the need for a precautionary approach in environmental cases. This case law leaves the door open for finding that applicants in environmental cases can be potential victims, if they assert that the probability of damage is sufficiently probable due to the lack of adequate precautions by the authorities.

The European Network of National Human Rights Institutions has argued that subsequent environmental case-law suggest that the threshold of a future victim status is lower today, under reference to \(\text{Taşkin and others v. Turkey and Hardy and Maile v. the United Kingdom}\).\(^{181}\) However, neither of these cases discuss Article 34. In the \(\text{Taşkin}\) case, the violation of Article 8 consisted of a refusal by the authorities to comply with a decision in their favor issued by a domestic court, which the applicants in question were directly affected by.\(^{182}\) In \(\text{Hardy and Maile}\), the Court accepted a complaint under Article 8 where “the dangerous effects of an activity to which the individuals concerned are likely to be exposed have been determined as part of an environmental impact assessment procedure in such a way as to establish a sufficiently close link with private and family life for the purposes of Article 8 of the Convention”.\(^{183}\) These elements are similar to the test in \(\text{Tauira and Asselbourg} – both formulations refer to a sufficient likelihood for a damage and a sufficient link with a human right. These judgments do not, in my opinion, suggest that there is a lower threshold.

### 3.2.2 The context of climate change

The question here is whether the risk of climate change is a “highly exceptional” situation that justifies complaints from future or potential victims.

There is a high threshold for deviating from the rule that the applicants must be “directly or indirectly affected”. An exception is always discussed with reference to particular features of the concrete situation. In non-refoulement cases, the justification was the serious and irreparable

\(^{180}\) Ibid.

\(^{181}\) ENNHRI (2021) page 23.

\(^{182}\) \(\text{Taşkin and others v. Turkey}\) paras 123. The same element was also a violation of Article 6, see para 137. See also Lemke c. Turquie para 36 and Dzemynuk v. Ukraine paras 92 and 95.

\(^{183}\) \(\text{Hardy and Maile v. the United Kingdom}\) paras 189–192.
nature of the alleged suffering, whereas the secrecy of the measures objected to in secret surveillance cases justifies *in abstracto* complaints. In the environmental case law referred to above, the Court opened the door for complaints from future victims where the applicants “have an arguable and detailed claim that, owing to the authorities' failure to take adequate precautions, the degree of probability that damage will occur is such that it may be deemed to be a violation, on condition that the consequences of the act complained of are not too remote.”\(^\text{184}\)

Even if all the pledges and targets of the Parties communicated under the Paris Agreement are implemented, the world is heading for a warming of 2.4°C by the end of the century.\(^\text{185}\) Even in a best-case scenario, the world is accordingly heading for a dangerous climate change, meaning that there is a high probability that a vast number of lives will be lost unless States take further steps to reduce their emissions.\(^\text{186}\) Whether or not these consequences would be “too remote” for the right to life of a particular applicant, is difficult to decide. However, opposed to *Asselbourg and others v. Luxembourg*, the gap between what reduction is needed to avoid dangerous climate change and what reduction most countries aim to implement arguably illustrate that “the norms dealing with” climate change mitigation at present are “so inadequate as to constitute a serious infringement of the principle of precaution.”\(^\text{187}\)

What is more, the principle of precaution is arguably even more important when there is a lack of time to prevent irreversible climate change. The phenomenon of climate change commitment, as discussed in Chapter 2.3, means that we probably already are committed to a warming of 1.5°C. The greenhouse gases emitted today are therefore likely to determine whether we will also commit ourselves to a warming of 2°C. The Norwegian National Human Rights Institution (“NHRI”) argues that due to the climate change commitment, a formal understanding of the “victim” requirement could lead to a paradox: At present, applicants would be precluded from accessing the ECtHR as they are not yet directly affected by climate change. However, when climate change has manifested in a way where individuals are directly affected, it would be impossible to avoid dangerous climate change, as the greenhouse gases emitted would already have committed us to an irreversible temperature increase above 2°C.\(^\text{188}\) Where the secrecy of the measures justified a potential victimhood in surveillance cases, the lack of

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\(^{184}\) Tauira and 18 Others v. France page 132 and Asselbourg and others v. Luxembourg pages 6–7.

\(^{185}\) Climate Action Tracker (2021b).

\(^{186}\) See Chapter 2.3.


\(^{188}\) Norwegian National Human Rights Institution (2020) section 5.9.3.
time to prevent irreversible climate change might justify complaints from potential victims.\textsuperscript{189} Accordingly, the NHRI concludes that there are several arguments in favor of a more relaxed test of standing in climate change cases.\textsuperscript{190}

Similar to the reasoning in the \textit{non-refoulement} cases, one could accordingly argue that the issue of climate change is a “serious and irreparable” risk to the right to life.\textsuperscript{191} By the time climate change materializes in a way that harms individuals directly, the climate system would already be committed to a dangerous climate change of more than 2°C. Contrary to its object and purpose, a solution where applicants in climate cases are denied “victim” status could render the Convention system ineffective and without protection against what has been called the “most serious and pressing threat” against the right to life.\textsuperscript{192} This solution would also be “a serious infringement of the principle of precaution.”\textsuperscript{193}

At the same time, if applicants are allowed to complain to the ECtHR with reference to the fact that climate change will affect them personally at some point in the future, everyone would be able to set forth a claim before the ECHR – climate change is likely to affect everyone. This interpretation would accordingly risk rendering Article 34 meaningless. In secret surveillance cases, the Grand Chamber has held that test in “Klass and Others could not be interpreted so broadly as to encompass every person in the respondent State who feared that the security services might have compiled information about him”.\textsuperscript{194}

The ECtHR might therefore follow the reasoning by the European Court of Justice (“ECJ”) in a related issue of standing in a climate change case called \textit{Carvalho and Others v. Parliament and Council}. The case concerned a large group of individuals and one organization who sought to annul several regulations in the climate field as they allegedly infringed higher-ranking rules of law.\textsuperscript{195} According to the Treaty on the Functioning of the European Union (“TFEU”), any natural or legal person may institute proceedings against an act “which is of direct and individual concern to them”.\textsuperscript{196} The ECJ has interpreted this as requiring that “the contested act affects them by reason of certain attributes that are \textit{peculiar to them} or by reason of

\textsuperscript{189} Ibid.
\textsuperscript{190} Ibid.
\textsuperscript{191} Soering v. the United Kingdom paras 90–91.
\textsuperscript{193} Asselbourg and others v. Luxembourg pages 6–7.
\textsuperscript{194} Roman Zakharov v. Russia [GC] paras 167 ff.
\textsuperscript{195} Case C-565/19 P Carvalho and Others v. Parliament and Council paras 1 and 14.
\textsuperscript{196} TFEU Article 263 fourth paragraph.
circumstances in which they are differentiated from all other persons, and by virtue of these factors distinguishes them individually just as in the case of the addressee”.\(^{197}\) (emphasis added) The applicants claimed that they met these criteria:

“Each of the appellant families, and even each member of those families, has different characteristics that are peculiar to them. Some families are affected by droughts, others by flooding, still others by melting snow or heatwaves caused or intensified by climate change. Some of those families are farmers or forest owners, others own businesses in the tourism sector, still others are dedicated to animal husbandry. Ultimately, they are all individuals suffering in distinct ways as a result of climate change.”\(^{198}\)

The ECJ did not agree with this claim. On the contrary, the ECJ held that the applicants had “misinterpreted the criterion”.\(^{199}\) According to the ECJ, the suggested interpretation would risk rendering “the requirements of the fourth paragraph of Article 263 TFEU meaningless” as everyone would have standing to set forth climate claims.\(^{200}\)

The applicants also argued that the condition of “individual concerned” must be regarded as satisfied “if the contested legislative act significantly encroaches on a personal fundamental right or encroaches on that right to an extent likely to undermine the essence of the right.”\(^{201}\) However, the ECJ held that “the appellants cannot ask the Court of Justice to set aside” the conditions of standing explicitly laid down in TFEU, which are conditions regulating the system of judicial review by the ECJ.\(^{202}\) While conditions of admissibility must be “interpreted in the light of the fundamental right to effective judicial protection, such an interpretation cannot have the effect of setting aside the conditions expressly laid down in that Treaty”.\(^{203}\) The case was therefore dismissed.

Following this reasoning, the ECtHR might risk setting aside ECHR Article 34 in climate change cases if they allowed actio popularis. While Article 34 cannot be interpreted solely in accordance with the intentions of its authors expressed over 70 years ago, such an interpretation would arguably render Article 34 without content in climate cases. This would arguably be

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\(^{197}\) Case C-565/19 P Carvalho and Others v. Parliament and Council para 46.

\(^{198}\) Ibid para 29.

\(^{199}\) Ibid para 45.

\(^{200}\) Ibid para 48.

\(^{201}\) Ibid para 64.

\(^{202}\) Ibid paras 67–69 and 76.

\(^{203}\) Ibid para 78.
contrary to the object and purpose behind Article 34, which was to limit the situations where the ECtHR could review complaints.

Accordingly, there are two conflicting interests at stake when interpreting Article 34 in climate cases. On the one hand, the climate change commitment makes it scientifically impossible to avoid dangerous climate change by the time any individuals would be “directly affected” by climate change. Unless applicants are allowed to set forth claims of a violation of the State’s obligation to protect their right to life from dangerous climate change, this right may be undermined or even vindicated. On the other hand, such an interpretation would risk rendering the “victim” requirement without content, setting aside an important provision in the Convention.

In my opinion, the Court should strike a fair balance between these two conflicting interests. In secret surveillance cases, the Court has struck a balance between the need to review secret surveillance legislation and the need to limit the individuals who can complain under Article 34. In these cases, the Court determines “victim” status on a case-to-case basis, taking into account (i) whether the applicant can possibly be affected by the secret surveillance measures, either because he belongs to a group targeted by the contested legislation or because the legislation directly affects all users of communication and (ii) the availability of effective remedies for the applicant at the national level. Mutatis mutandis, the Court could determine potential victim status in climate cases on a case-to-case basis. In this assessment, relevant elements could be (i) the existence of remedies at the national level where the applicants can challenge the climate change policies of the State and (ii) whether the applicant belongs to a group particularly exposed to climate change. This compromise would allow particularly exposed individuals without access to effective domestic remedies to set forth claims of violations, while still keeping Article 34 operational.

Examples of groups that are particularly exposed to climate change are indigenous people and children. The Inter-American Court of Human Rights has ruled that States must address the particular vulnerabilities indigenous people have in the wake of climate change. Moreover, the UN High Commissioner for Human Rights and the UN Committee on the Rights of the Child acknowledges that children are disproportionately affected by changes in their

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205 See e.g. The UN Special Rapporteur on human rights and the environment (2016) para 81.
206 Advisory Opinion (OC-23/17) paras 47–49 and The Indigenous Communities Members Of The Lhaka Honhat (Our Land) Association V. Argentina para 209.
Applicants that belong to either of these groups can therefore argue they should be able to set forth a claim as a future victim under Article 34.

3.3 Environmental NGOs as victims under the right to life

Non-governmental organizations (NGOs) can, according to Article 34, claim to be a victim of the Convention. However, some rights are of such a nature that they cannot be invoked by NGOs. An environmental NGO is, for example, not in a position to rely on the right to private life under Article 8. Similarly, a NGO in itself cannot have a right to life.

NGOs can represent their members’ right to life according to the Rules of Court, where representation is allowed if the representatives can “demonstrate that they have received specific and explicit instructions” to act on the alleged victim’s behalf.

However, an association cannot itself be a victim under the Convention, simply because their members are direct victims. The Court consistently recalls that associations cannot be allowed to claim “to be a victim of the acts or omissions which affected the rights and freedoms of its individual members who themselves are adult persons with full legal capacity to act and can thus lodge complaints with the Court in their own name”. For example, even though “trade unions consider themselves as guardians of the collective interests of their members”, they cannot be considers as victims under Article 34 when they pursue to defend their members’ interests before the ECtHR. Similarly, environmental organizations cannot defend the right to life of their members under the ECHR.

While there are some exceptions from this rule, these exceptions seem to be limited. In the case Gorraiz Lizarraga and others v. Spain, five applicants argued that their right to a fair hearing under Article 6 was violated. The Spanish government claimed that the complaint had to be

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207 See e.g. United Nations High Commissioner for Human Rights (2017) para 50 and part II. See also Sharma and others v. Minister for the Environment paras 289 ff.
209 Greenpeace E.V. and others v. Germany page 4. See also Identoba and Others v. Georgia para 45.
210 Rule 36 § 1 and 45 § 3 in Rules of Court. See also Centre for Legal Resources on Behalf of Valentin Cămpeanu v. Romania [GC] para 102.
212 See e.g Identoba and Others v. Georgia para 45.
213 Purcell and others v. Ireland page 262.
dismissed for two reasons. The first claim was that the applicants were not victims of a violation of a right to a fair hearing as the five applicants were not parties to the domestic proceeding. For the same reason, the government secondly claimed the applicants had not exhausted domestic remedies after ECHR Article 35. The applicants pointed out that they had taken part in the domestic proceedings through an association as their intermediary, which they entrusted to defend their civil rights under Article 34. The ECtHR agreed with the applicants, pointing out that the “association was a party to the proceedings brought by it before the domestic courts to defend its members' interests.” The Court held that the question of victim status was closely linked the requirement of exhaustion of domestic remedies contained in Article 35 § 1. The Court then went on to find that even though the applicants were not parties to the impugned proceedings in their own name, they participated through the intermediary of an association. Interpreting Article 34 in light of the living-instrument doctrine, and “having regard to the particular circumstances of the case”, the Court considered that the applicants could claim to be victims of a violation of Article 6.

While this case has been used as an argument in favor of accepting environmental cases from NGOs, the reasoning shows that the circumstances of the case were special. According to the ECtHR judge Eicke, litigation by public interest organizations and NGOs are only admitted when they can show, for example,

“[That] they were set up for the specific purpose of defending their members’ interests before the courts, and that those members were directly concerned by the decision at issue [Gorraiz Lizarraga and Others v Spain] or that a domestic judgment in their favour had been not been executed [Bursa Barosu Başkanlıgı and Others v Turkey].”

The Court is aware of the fact that recourse to collective bodies can sometimes be the only means available for individuals to defend their interests effectively. In present-day society, as stated by the Court, associations play an important role in defending the right of individuals

215 Gorraiz Lizarraga and others v. Spain para 38.
216 Ibid para 34.
217 Ibid para 36.
218 Ibid para 37.
219 Ibid paras 38 and 39.
221 Eicke (2021) para 39.
222 Gorraiz Lizarraga and others v. Spain para 38.
in the field of environmental protection. Researchers point out that groups of individuals are in a better position to lodge applications for protection of the environment, which is a public good. These insights have lead many European countries to accept the standing of environmental organizations to bring legal proceedings in their members’ interests. The Court has previously justified a particular interpretation by pointing out fact that “the standing of associations to bring legal proceedings in defence of their members' interests is recognised by the legislation of most European countries.” The Court might therefore search for an European consensus in this field.

The domestic supreme courts, however, did not find such an exception to be justified. The Dutch Supreme Court held that the NGO Urgenda did not have a right to complain as it was “not itself a potential victim” of the alleged violation of the ECHR. Similarly, the Federal Constitutional Court of Germany rejected claims from environmental organizations under, inter alia, the right to life after the German Constitution. Before the Irish Supreme Court, the NGO “Friends of the Irish Environment” (“FIE”) accepted that it did not have standing to bring to the ECtHR pursuant to Article 34. However, FIE argued that it should be allowed to pursue claims based on the ECHR according to domestic rules of standing. According to Irish standing rules, associations could not rely on personal rights like the right to life and private life. However, the Irish Supreme Court held that

“[T]here are circumstances in which an overly strict approach to standing could lead to important rights not being vindicated. However, that does not take away from the importance of standing rules in our constitutional order. … [A] plaintiff [must] be able to demonstrate that they have been affected in reality or as a matter of fact by virtue of the measure which they seek to challenge on the basis that it breaches rights. ... The circumstances in which it is permissible to accord standing outside the bounds of that basic principle must necessarily be limited and involve situations where there would be a real risk that important rights would not be vindicated unless a more relaxed attitude to standing were adopted.” (emphasis added)

223 Collectif National d'information et d'opposition a l'usine Melox - Collectif Stop Melox et Mox c. France para 15.
225 Gorraiz Lizarraga and others v. Spain para 38.
226 The State of the Netherlands v. Urgenda Foundation para 5.9.3
227 BVerfG, Beschluss des Ersten Senats, 1 BvR 2656/18 paras 57, 136–137.
228 Friends of the Irish Environment paras 7.6.
229 Ibid para 7.21.
According to the Irish Supreme Court, the only explanation for why FIE, and not its members, brought the proceedings was the “desire to protect individuals from a possible exposure to the costs of unsuccessful proceedings”. However, the Irish Court held that there was not “any practical reason why FIE could not have provided support for such individuals in whatever manner it considered appropriate”. If the Irish Court granted FIE standing, it would move to “a situation where standing was greatly expanded and the absence of standing would largely be confined to cases involving persons who simply maintain proceedings on a meddlesome basis.” Against this background, FIE was not afforded standing to pursue the climate claims based on the right to life and private life.

A similar line of reasoning is applicable when discussing the right of environmental NGOs to rely on the right to life after Article 34. Environmental NGOs often pursue claims for its members with the justification that they have the resources to do so. However, the Court has rules of financial aid in the connection of the presentation of a case. Moreover, environmental NGOs might intervene in a case before the ECtHR and offer support to the applicants instead of pursuing claims in their own name.

In sum, the situation of climate cases seems a far cry from the previous situations where the Court has allowed NGOs to complain to the Court on their members’ behalf. In light of the previous case law of the Court, an expansion where NGOs can rely on the right to life in environmental cases seems unjustified. It should be up to the member States to change the Convention if they wish to make it easier for environmental NGOs to lodge complaints before the Court.

### 3.4 Summary

The applicants in the climate cases pending before the ECtHR must meet the “victim” requirement under ECHR Article 34 in order to access the Court. The ECtHR will first ask whether the applicants in question were “directly or indirectly affected” by the alleged violation. However, most climate damages – at present – remains to materialize. While the Convention system was not intended to prevent future violations, the Court accepts complaints from

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230 Ibid para 7.22.
231 Ibid.
232 Ibid.
233 Ibid paras 7.23 and 7.24.
234 Rule 105 in Rules of Court.
235 Rule 44 in Rules of Court.
potential or future victims in highly exceptional circumstances. While the lack of time to prevent irreversible and dangerous climate change might justify complaints from potential or future victims, it would be problematic if everyone could claim to be a potential or future victim of climate change. In line with previous reasoning of the Court, a compromise where “victim” status is determined on a case-to-case basis, considering the availability of effective domestic remedies and the particular vulnerability of the applicant in question to climate change, might be possible. From my perspective, this interpretation represents a fair balancing of the competing interests at stake.

The discussion above was made under the presumption that climate change – at present – is a primarily future risk. Accordingly, if climate change damages start materializing in a way that directly affects individuals, the “victim” criterion will be met in climate cases. The outcome of this assessment will therefore change with time, contingent on the (in)sufficient mitigation of climate change.

It is unlikely that the ECtHR will allow environmental NGOs to represent the right to life of their members. According to previous case law, associations cannot be allowed to claim “to be a victim of the acts or omissions which affected the rights and freedoms of its individual members who themselves are adult persons with full legal capacity to act and can thus lodge complaints with the Court in their own name”.

Notwithstanding the discussions above, it is worth noting that domestic courts are not subject to Article 34. They might therefore accept climate change cases based on the Convention under domestic rules of standing. For example, the Norwegian and Dutch Supreme Court both found that NGOs in question could invoke the Convention in accordance with domestic rules of standing. In a domestic case, the ECtHR might be requested to issue an advisory opinion under Protocol 16, which is not subject to the requirements in Article 34. Either way, the Convention might continue to play a role in domestic legal systems.

236 See e.g Identoba and Others v. Georgia para 45.
237 See HR-2020-2472-P para 165 and the State of the Netherlands v. Urgenda Foundation para 5.9.3.
238 Protocol no. 16 Article 1. See also Eicke (2021) para 41 and The State of the Netherlands v. Urgenda Foundation para 5.6.4.
4  Applicability of Article 2

4.1  Introduction

The question of this Chapter is whether Article 2 is applicable to the risk of dangerous climate change. The angle of the discussion is that climate change is a general, future risk that has yet to materialize.\(^{239}\)

Article 2 obliges States, under certain conditions, to take positive measures to mitigate environmental risks. These conditions will be identified in Chapter 4.2. This discussion will show that Article 2 contains two different substantive positive obligations to prevent the loss of life. In accordance with these findings, Chapter 4.3 will evaluate whether the State must regulate the risk of climate change, while Chapter 4.4 discusses whether the State must take preventive operational measures against the risk of climate change.

However, climate change has some features that separate it from other environmental risks. Climate change is a global problem created by the cumulative greenhouse gas emissions from all States in the world. Accordingly, one State has not created the risk on its own, nor does it have the means to avoid it. This raises the question of whether one State still can be legally obligated to address the risk of climate change under an obligation to protect the right to life, a question that will be discussed in Chapter 4.5.

4.2  General principles

Article 2 § 1 first sentence states “[e]veryone's right to life shall be protected by law.” The ECtHR describes the right to life as “an inalienable attribute of human beings” which “forms the supreme value in the hierarchy of human rights”.\(^{240}\) Therefore, the right to life “ranks as one of the most fundamental provisions in the Convention” and “enshrines one of the basic values of the democratic societies making up the Council of Europe”.\(^{241}\)

The primary purpose of Article 2 is to prevent a State from deliberately taking lives.\(^{242}\) Still, the wording of § 1 first sentence obliges the State to protect the right to life by law. As

\(^{239}\) Some have argued that climate change is already interfering with the right to life and private life, for example through mental issues or an increased frequency of heatwaves, see Youth4ClimateJustice (2020) and Application Klimaseniorinnen v. Switzerland (2020). Moreover, in some cases, the concrete risk of one decision, act or omission leading to greenhouse gas emissions has been discussed, isolated from climate change as a whole, see e.g. HR-2020-2472-P paras 164–178.

\(^{240}\) See e.g. Streletz, Kessler and Krenz v. Germany [GC] para 94.

\(^{241}\) McCann and others v. the UK [GC] para 147.

\(^{242}\) Article 2 §1 second sentence and § 2. See Council of Europe Publishing (2012) page 35.
previously seen, the provisions of the Convention must “be interpreted and applied in such a way as to make its safeguards practical and effective”. Moreover, ECHR Article 1 decides that States have a general duty to “secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention”. These considerations have lead the Court to develop the “doctrine of positive obligations”. The Court has stated on numerous occasions that “the first sentence of Article 2 § 1 obligates the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction”. The Court has emphasized that Article 2 may come into play even where there has been no loss of life.

Article 2 contains positive procedural and substantive obligations. The procedural obligation is to have in place an independent judicial system capable of holding accountable those at fault in the event of death. In this thesis, a future risk of loss of life is discussed. The procedural obligation is accordingly not relevant.

Article 2 contains two different substantive positive obligations to prevent the loss of life, applicable in two different situations. The explicit and coherent separation between the two situations commenced in 2019 with the Grand Chamber judgments Nicolae Virgiliu Tănase v. Romania and Fernandes de Oliveira v. Portugal, where the Court held that “two distinct albeit related positive obligations under Article 2, already developed in the jurisprudence of the Court, may be engaged”. The succeeding case law consistently separate between these two positive obligations. The preceding case-law must accordingly be read in light of the new clarification of the Court.

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243 See e.g. Vardosanidze v. Georgia para 52.
244 See Ergi v. Turkey para 82.
245 See e.g. Dijk et al. (2018) page 11.
246 See e.g. L.B.C v. The United Kingdom para 36, Önyerildiz v. Turkey [GC] para 69 and Vardosanidze v. Georgia para 52 with further references.
247 See e.g. Budayeva and others v. Russia para 146, Kolyadenko and others v. Russia para 151, Nicolae Virgiliu Tănase v Romania [GC] para 135 and Council of Europe (2020b) paras 4–8.
248 See e.g. Nicolae Virgiliu Tănase v. Romania [GC] para 137.
The first substantive positive obligation is that a State must regulate a risk that poses a *general threat* to the right to life in a legislative and administrative framework.\footnote{See e.g. Nicolae Virgiliu Tănase v. Romania [GC] para 135. See also Kotilainen v. Finland para 66 and 69.} This obligation is a core component of Article 2, namely the obligation of the State to protect the right to life by law. The obligation applies “in the context of any activity, whether public or not, in which the right to life may be at stake”.\footnote{See e.g. Öneröldiz v. Turkey [GC] para 89 and Nicolae Virgiliu Tănase v. Romania [GC] para 134.} The situations that may engage this obligation are accordingly not exhaustive.

Under the second substantive positive obligation, the State is required to take operational measures to prevent a *specific threat* from materializing, provided that the risk meets a well-defined set of criteria. This obligation goes beyond protecting the right to life by law. However, bearing in mind the complexity of modern society, the unpredictability of human conduct and the operational choices that must be made in terms of priorities and resources, not every claimed risk to life obligates the authorities to take preventive, operational measures.\footnote{Osman v. the United Kingdom [GC] para 116 and Nicolae Virgiliu Tănase v. Romania [GC] para 136.} The Court has therefore formulated the Osman-test: In order for a risk to activate the duty to take preventive operational measures,

> “it must be established to [the Court’s] satisfaction that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk”\footnote{Osman v. the United Kingdom [GC] para 116.} \footnote{See also Ebert et al. (2015) pages 344 and 345.} (emphasis added)

The Osman-test was originally intended for the risk from criminal acts of a third party to specific individuals. However, the Osman-test has been developed and applied broadly over the years, and now offer a general test for the preventive operational obligation of Article 2.\footnote{Fernandes de Oliveira v. Portugal [GC] para 103 ff, Nicolae Virgiliu Tănase v. Romania [GC] paras 135 ff. and all the cases in footnote 252. See also Ebert et al. (2015) pages 344 and 345.}

The separation between the two positive obligations under Article 2 has yet to materialize much of the available judicial theory. Likewise, none of the domestic supreme courts separated between the two obligations their above-mentioned climate cases. However, there is little doubt that the Court will continue the separation under Article 2. In the context of climate change, this is reflected in a speech made by the ECtHR Judge Eicke.\footnote{Eicke (2020) paras 25 and 26.} Consequently, the available
literature and the domestic judgements must be assessed in light of the separation between the two substantive obligations.

The following questions are whether the risk of dangerous climate change activates (i) a positive obligation for the State to regulate climate change, and (ii) a positive obligation for the State to take operational measures to prevent dangerous climate change from materializing.

4.3 A positive obligation to regulate the risk of climate change?

The obligation to adopt a legislative and administrative framework “applies in the context of any activity, whether public or not, in which the right to life may be at stake”.\textsuperscript{257} This positive obligation has been found applicable, \textit{inter alia}, in the healthcare sector and in the context safety on building sites.\textsuperscript{258} Similarly, the State must regulate dangerous activities or industrial sites, like a waste-collection site in Öneriylidiz v. Turkey or a reservoir in Kolyadenko v. Russia.\textsuperscript{259} In a case concerning road safety, the Court found “that the participation in road traffic is an activity potentially liable to result in serious threats to a person’s life”, obliging the State to regulate it by an overall framework.\textsuperscript{260} Similarly, in a case concerning the sale and use of firearms, the Court held that

“[T]here can be no doubt that the use of firearms entails a \textit{high level of inherent risks to the right to life} since any kind of misconduct, not only intentional but also negligent behaviour, involving the use of firearms may have fatal consequences to victims, and the risk of such weapons being used to commit deliberate criminal acts is even more serious. Accordingly, the use of firearms is a form of dangerous activity which must engage the States’ positive obligation to adopt and implement measures designed to ensure \textit{public safety}”.\textsuperscript{261} (emphasis added)

The case law of the Court illustrate that the situations in which the obligation to regulate applies are not exhaustive. The Court assesses the application of the obligation concretely, in light of the level of risk the activity in question poses to the right to life. Against this background, the question is whether the state has a positive obligation to regulate the risk of climate change.

\textsuperscript{257} See e.g. Nicolae Virgiliu Tănase v. Romania [GC] para 135 with further references and Kotilainen and others v. Finland para 67.


\textsuperscript{259} Öneriylidiz v. Turkey [GC] para 71 and Kolyadenko and Others v. Russia paras 162–166.

\textsuperscript{260} Smiljanić v. Croatia para 68.

\textsuperscript{261} Kotilainen and others v. Finland para 75.
The best available science from the IPCC concludes that dangerous climate change is a serious risk to all human lives. As discussed in Chapter 2.3, the effects of dangerous climate change can lead to loss of lives, probably on a level that far exceeds loss of life in road traffic or in the use of firearms. Several domestic and international courts have found that climate change entails a high level of inherent risks to the right to life. Indeed, the United Nations Human Rights Committee considers climate change as one of the “most pressing and serious threats to the ability of present and future generations to enjoy the right to life”. Consequently, it seems reasonable that the State must regulate the risk of climate change.

However, some have argued that individual human rights cannot apply to societal risks threatening the general population as a whole. Yet, as seen, the obligation to regulate has previously applied in order to ensure public safety in contexts where the entire population is at risk. Although the primary purpose of the Convention system is to provide individual relief, the Court considers that it is also to “determine issues on public-policy grounds in the common interest, thereby raising the general standards of protection of human rights and extending human rights jurisprudence throughout the community of the Convention States”. The rationale behind the framework obligation is arguably to protect the population against structural, systemic risks by obliging States to address these risks by law. This is the “primary duty” upon the State, a natural extension of the text of Article 2, which requires that “everyone’s right to life shall be protected by law.”

Moreover, a human rights protection against structural, systemic issues is in line with the interpretations of other international and regional human rights institutions. Under the system of the Council of Europe, the European Social Committee has held that the right to the highest possible standard of health attainable after Article 11, which has a clear complementary to Article 2 of the ECHR, obliges the State to have “sufficiently comprehensive environmental legislation and regulations” in the field of climate change. Similarly, Article 24 of the Banjul Charter sets out that “all peoples shall have the right to a general satisfactory environment

264 See e.g. Regjeringsadvokaten (2020) page 11.
265 See e.g. Kotilainen and others v. Finland para 75 and Smiljanić v. Croatia para 66.
266 Konstantin Markin v. Russia [GC] para 89 with further references. Moreover, the preamble reads that the Convention was intended “to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration”, see ECHR Preamble recital 5. See also Harris et al. (2018) page 39.
favourable to their development.”269 The term “peoples” is not defined in the Charter, but the African Commission on Human and Peoples Rights understands it as referring to, \textit{inter alia}, the entire people of a country as a collective.270

Against this background, it is possible to conclude that the high level of risk climate change poses to the right to life activates the positive obligation for the State to regulate climate change by law.

\section*{4.4 A positive obligation to take preventive measures mitigating climate change?}

\subsection*{4.4.1 Introduction}

The question here is if climate change activates the positive obligation to take preventive operational measures. According to the previously mentioned Osman-test, this obligation arises when the authorities “knew or ought to have known” of a “real” and “immediate” risk to the life of “an identified individual or individuals”.271

First, there must exist a “real” risk. While the Court has never defined this term, Ebert argues that there must be “a significant likelihood that the risk will materialize unless preventative measures are taken”.272 This argument was based on the judgment \textit{Keenan v United Kingdom}, where the Court discussed whether the threat for a mentally ill person committing suicide was “real” based on doctor reports and other evidence.273 Similarly, a risk is not “real” if there is no conclusive scientific evidence as to its harmful effects. For example, the Court held that a claim that radiation from mobile antennas posed a risk to human health was not sufficiently substantiated.274 However, there is an international scientific consensus that climate change is caused by human activities and poses a grave risk to human lives.275 The risk of climate change is accordingly “real”.

Second, the authorities must “know or ought to have known” of this risk. The criterion “know” necessitates an objective assessment of the national authorities’ factual knowledge about the

\begin{footnotes}
\footnotetext[269]{See Ugochukwu et al. (2012) page 107.}
\footnotetext[270]{Ogoni v. Nigeria paras 52 and 53 and Ugochukwu et al. (2012) pages 108 and 116.}
\footnotetext[271]{Osman v. the United Kingdom [GC] para 116.}
\footnotetext[272]{Ebert et al. (2015) page 358.}
\footnotetext[273]{Keenan v United Kingdom para 96.}
\footnotetext[274]{See \textit{mutatis mutandis} Gaida v. Germany page 11 with further references.}
\footnotetext[275]{See Chapter 2.3.}
\end{footnotes}
risk. The threat of climate change is well known. The UNFCCC and the Paris Agreement are global treaties that have been adopted to combat climate change as it constitutes a common threat to humankind. All Parties to the ECHR are also parties to the UNFCCC and the Paris Agreement. The Parties to the ECHR therefore “know” the risks arising from climate change.

However, the full consequences of climate change might still be a long way off, and it must therefore be discussed whether the risk is “immediate”. Moreover, the risk of climate change does not concern the life of one “identified individual”, but the lives of the population as a whole. While the Court has sometimes accepted an obligation to afford “general protection to society”, it must be discussed whether this obligation can be extended to the risk of climate change. These criteria will therefore be discussed in the following.

4.4.2 The condition of an immediate risk
The question here is whether the threat from climate change at present constitutes an “immediate” risk to the right to life.

An analysis of the term “immediate” is complicated by the fact that the ECtHR has, so far, not defined it. According to the dictionary Merriem Webster, “immediate” means “occurring, acting, or accomplished without loss or interval of time”. A dictionary understanding of the term is therefore that the risk must materialize within a short period of time. As dangerous climate change probably will not materialize until a few years from now, it is – according to a dictionary understanding – not “immediate”.

However, the ICJ has held that the term “immediate” is a synonym to imminence, and both goes beyond the concept of possibility. Discussing a provision in a treaty, the ICJ held the following.

“[T]he "extremely, grave and imminent" peril must "have been a threat to the interest at the actual time" … That does not exclude, in the view of the Court, that a "peril" appearing in the long term might be held to be "imminent" as soon as it is established, at the relevant

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276 See United Nations Treaty Collection (2021a) and (2021b).
279 See Merriem Webster (2021). The ECtHR uses dictionaries to establish the meaning of a term, see Golder v. the United Kingdom para 32 and the separate opinion of Judge Sir Gerald Fitzmaurice para 5.
280 Hungary v. Slovakia para 54.
point in time, that the realization of that peril, however far off it might be, is not thereby any less certain and inevitable.”

The ICJ accordingly accepts that a risk can be “immediate” at the point in time when the materialization of the risk becomes certain, even though the realization might be several years off. The ICJ did therefore not understand “immediate” as to referring to a risk occurring “without loss or interval of time”.

Analyzing the jurisprudence of the ECtHR, Ebert concludes that the “immediate” criterion is applied in a flexible manner, depending on the specific context of the case. According to Ebert, this approach, combined with a lack of definition, makes it unclear what threshold that needs to be satisfied in order for a risk to be “immediate”.

The environmental jurisprudence under Article 2 gives the same impression. In Budayeva v. Russia, the risk of a mudslide became immediate a year before the incident, when the authorities were warned of its likelihood. In Kolyadenko v. Russia, the risk of a flooding was found to be immediate when the authorities were warned of it in June 1999, two years before it materialized in August 2001. Some cases indicate that the Court can accept more than two years, especially if the risk constantly increases. In Öneriylidiz v. Turkey, the Grand Chamber considered that a risk of an explosion at a waste-collection site risk was real and immediate as it had been highlighted “long before the report of 7 May 1991 and that, as the site continued to operate under the same conditions, that the risk could only have increased during the period until it materialised on 28 April 1993.” What the Court meant by “long before” is not clear, but the risk had existed since the 1970s. The Court seemingly accepted that a risk can be immediate at least two years before it materialises, and plausibly even up to twenty years. Kobylarz, discussing the environmental case law of the Court, argues that the applicability test has become more relaxed, opening the door for preventive protection according to the circumstances of the case.

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281 Ibid.
283 Budayeva v. Russia paras 148 and 149.
284 Kolyadenko v. Russia paras 165 and 166.
285 In Özel and Others v. Turkey, buildings that were erected in 1994, in breach of special earthquake safety standards collapsed under an earthquake in 1999, see paras 7–15. The applicants claimed that the authorities had violated Article 2, but this part of the case was declared inadmissible. It is thus unclear whether the Court considered the risk as “imminent” when the buildings were erected.
286 Öneriylidiz v. Turkey para 100.
Whether the risk of climate change is “immediate”, must accordingly be determined in light of the particular features of climate change. One of these features is the climate change commitment. Once greenhouse gases are emitted, the climate is committed to an unavoidable temperature increase that will materialize in the future. Even if all the countries in the world stopped emitting greenhouse gases, the temperature would increase about 0.5°C over the next two to three decades due to already emitted carbon. Accordingly, a temperature increase of 1.5°C is already, or may soon be, inevitable. The Swiss Supreme Court, referring to earlier findings of the IPCC, held that “global warming will reach 1.5˚C around the year 2040”, and went on to argue that “it is assumed that there is still some time available to prevent global warming exceeding this limit”. This assumption, however, did not consider the climate change commitment. By 2040, it would be – for the reasons explained above – impossible to prevent dangerous climate change. Arguably, a duty to prevent a risk from materializing would be illusory if the interpretation of “immediate” did not take into account the climate change commitment. In order to ensure the effective protection of the right to life, the ECtHR should accept that a risk becomes “immediate” at the point in time where the realization of a risk, however far off it might be, becomes certain and inevitable. As the greenhouse gases emitted today will determine whether dangerous climate change can be avoided, the risk of dangerous climate change is accordingly “immediate”.

Admittedly, the timeframes are uncertain. It is impossible to predict exactly what year we will reach a temperature increase of 1.5°C or 2°C. However, this uncertainty is not an argument against the risk of dangerous climate change being “immediate”. The ECtHR has previously interpreted the Convention in light of the precautionary principle in the Rio Declaration, which sets out that “[w]here there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.” Dangerous climate change is a serious threat, and becomes irreversible when certain tipping points are reached. The lack of full scientific certainty of

288 See Chapter 2.3.
289 The Inter-Governmental Panel on Climate Change (2018) pages 5 and 78.
290 See e.g. the Inter-Governmental Panel on Climate Change (2018) page 64, Readfearn et al. (2021) and Sharma and others v. Minister for the Environment paras 63 and 74.
291 Verein KlimaSeniorinnen Schweiz v. Bundesrat para 5.3.
292 Mutatis mutandis, Hungary v. Slovakia para 54.
294 See Chapter 2.3 and the Inter-Governmental Panel on Climate Change (2018) page 262-265.
when climate change will exceed 1.5°C or 2°C should not be used as an argument against the activation of a preventive, operational duty.

The Norwegian Supreme Court held that the risk from climate change was not “immediate” as the potential impact of the oil extraction licenses was “a long way off”. The Norwegian Court understood the term “immediate” as solely referring to the time between when a risk is established and when it materializes. Although this interpretation seems like a natural first reading of the term, the Norwegian Court did not explain what a “long way off” was, nor did it refer to any jurisprudence. Conversely, the Dutch Supreme Court found that even though the risk of dangerous climate change – particularly sea level rise – would only be able to materialize in a few decades from now, this did not preclude the application of Article 2. The Dutch Court interpreted the criteria “immediate” in light of the case law discussed above and the precautionary principle, finding that it did not refer to “imminence in the sense that the risk must materialize within a short period of time”. Rather, the relevant question was whether dangerous climate change was “directly threatening the persons involved”. The UN Human Rights Committee seems to agree with this interpretation. The Committee has held that climate change is a reasonably foreseeable threat to the right to life, which activates an obligation for State parties to take steps to address this risk under the right to life.

To summarize, there is no clear definition or threshold as to what constitutes an “immediate” risk under the ECHR system. Under its previous environmental jurisprudence, the Court has accepted that a risk can be “immediate” at least two years before it materialises, and plausibly even up to twenty years. Due to the nature of greenhouse gas emissions, it is impossible to decide exactly when the effects of dangerous climate will materialize. This makes an understanding of “immediate” as simply referring to time unsuitable. Taking into account the features of climate change, the ECtHR should therefore look to the ICJ, and accept that a risk becomes “immediate” at the point in time where the realization of a risk, however far off it might be, becomes certain and inevitable. A temperature increase of 1.5°C might already be

295 HR-2020-2472-P para 168 (my own translation).
296 The Court later uses the word “tidsnær”, which directly translated means “close in time”, see HR-2020-2472-P para 170.
298 The State of the Netherlands v. Urgenda Foundation para 5.6.2.
299 Ibid para 5.2.2.
301 The ECtHR refers to the judgements of the ICJ in its reasoning, see e.g. Cyprus v. Turkey [GC] paras 24, 41, 45 and 46 and Nait-Liman v. Switzerland [GC] para 99.
unavoidable. At present, the risk of a dangerous climate change above 1.5°C is consequently “immediate”.

4.4.3 The condition of an identified individual or general protection to society

The last condition is that the relevant risk must concern the life of “an identified individual or individuals”.

The risk of dangerous climate change, however, presents a risk to the lives of the entire population of a State. This raises the question of whether this precludes the application of the preventive operational duty.

The Court has previously accepted risks directed at larger parts of the society. This commenced with the case *Mastromatteo v. Italy*, concerning a decision by Italian authorities to grant leave to prisoners. While on probation, these prisoners killed a man. The mother of the deceased complained that Italian authorities had violated their obligation to protect her son’s life. However, there was no specific threat to the applicant’s son in advance of his death. The Grand Chamber did not consider this as decisive, but stated that “what is at issue is the obligation to afford general protection to society against the potential acts of one or of several persons serving a prison sentence for a violent crime and the determination of the scope of that protection”.

In this situation, the authorities had to

“[D]o all that could reasonably be expected of them to avoid a real and immediate risk to life of which they had or ought to have had knowledge” (Osman, cited above, para. 116), the relevant risk in the present case being a *risk to life for members of the public at large* rather than for one or more identified individuals.”

In the following case law, the Court has found an obligation to afford general protection to society to arise in certain situations. In a recent case, the Court summarized the case law as follows:

“There are also obligations to take preventive operational measures to protect life from lethal threats coming from other individuals. The first is to take steps to protect an *identified individual*, if the authorities know or ought to know of the existence of a real and immediate risk to his or her life from acts by others (see Osman, cited above, § 115). The second obligation, which has *so far* been held to arise in relation to (a) the release of

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303 See Mastromatteo v. Italy [GC] para 69.
304 Ibid para 74.
305 See Kotilainen v. Finland paras 70–72 with further references.
violent prisoners on leave or on licence, (b) the supervision of a mentally disturbed person known to be predisposed to violence, and (c) a terrorist group suspected of preparing to attack unknown civilian targets in a given area, is to take steps to protect members of the public who cannot be identified in advance from a real and imminent risk of lethal acts emanating from such people.\textsuperscript{306} (emphasis added)

This statement illustrate that the general protection of society has so far been held to arise in certain situations, which all have in common that the real and immediate risk originated from non-State actors liable to use lethal force against a limited group of persons in a specific area, who could not be identified in advance.\textsuperscript{307}

In its climate case, the Dutch Supreme Court found that Article 2 and 8 were applicable to the risk climate change posed for large parts of the population under the following justification:

“The protection afforded by Articles 2 and 8 ECHR is not limited to specific persons, but to society or the population as a whole.\textsuperscript{14} The latter is for instance the case with environmental hazards.\textsuperscript{15} In the case of environmental hazards that endanger an entire region, Articles 2 and 8 ECHR offer protection to the residents of that region.”\textsuperscript{308}

The cases the Court explicitly referred to in footnote 14 were Gorovenky and Bugara v. Ukraine, concerning a mentally ill person known to be predisposed to violence, and Tagayeva and Others v. Russia, concerning a risk of a terrorist attack against unidentified civilians. In footnote 15, the Dutch Supreme Court referred to two cases under Article 8.\textsuperscript{309} Both these cases concerned an environmental risk threatening a limited group of people in a particular area under Article 8, which means that they do not necessarily shed light over the interpretation of the “identified individual”-criterion.

From my point of view, the conclusions drawn by the Dutch Supreme Court are questionable and without clear support in the previous case law of the Court because the situations in the two cases and climate change are not comparable. Gorovenky and Bugara v. Ukraine and Tagayeva and Others v. Russia both concerned risks originating from non-State actors liable to use lethal force risks against a limited group of persons in a specific area. Climate change, on the other

\textsuperscript{306} Ribcheva and others v. Bulgaria para 158.
\textsuperscript{307} See Council of Europe (2020b) paras 21 and 22.
\textsuperscript{308} The State of the Netherlands v. Urgenda para 5.3.1 and 5.6.2 and footnotes 14 and 15.
\textsuperscript{309} Cordella et autres c. Italie and Di Sarno and others v. Italy.
hand, is a risk to the entire population on the entire territory of the State, which arises from natural processes in our climate system. The origin and prevalence of the risks are thus different.

Moreover, where a duty to offer general protection to society was accepted, the alternative course of action was clear or limited to a few relevant measures. In *Mastromatteo v. Italy*, the question was whether the State should have denied leave to the prisoners who had killed a man while on leave.\(^\text{310}\) In *Tagayeva and others v. Russia*, the question was whether the State should have allocated resources to create a defence for the potential target population and ensured effective containment of the threat.\(^\text{311}\) In *Gorovenky and Bugara v. Ukraine*, the Court discussed whether the authorities should have allowed a mentally ill police officer to carry a weapon in breach of domestic regulations.\(^\text{312}\) The State could reasonably be expected to take these measures, as they could easily be identified and would not be economically burdensome.

In the context of climate change, however, it is not easy to identify an economically reasonable alternative course of action the State can take to protect its population against climate change. On the contrary, the State has a number of different tools available to mitigate dangerous climate change. The IPCC has underlined that “1.5°C-consistent pathways could be identified under a considerable range of assumptions in model studies despite the tightness of the 1.5°C emissions budget”.\(^\text{313}\) The choice of which measures to take is often controversial – the mitigation of climate change is a matter of general policy where opinions differ, and where enormous economic interests are at stake. Movements like “the yellow vests” in France illustrate how difficult it can be for States to balance environmental policies against economic and social issues.\(^\text{314}\) Should the Court then decide that a State must, for example, implement a carbon tax, invest in nuclear power, open large wind farms or stop burning coal? National authorities, who have direct democratic legitimation and can rely on expert knowledge, are better placed than the ECtHR to choose between and design concrete measures.\(^\text{315}\) Indeed, the judges of Court might lack the necessary expert knowledge to make informed decisions in complex economic, social and environmental issues.\(^\text{316}\) What is more, the State would arguably be under an impossible or disproportionate burden if the ECtHR could decide which particular measures the State must take to mitigate climate change. Arguably, the Court cannot review

\(^{310}\) *Mastromatteo v. Italy* paras 75–78.

\(^{311}\) *Tagayeva and Others v. Russia* para 491.

\(^{312}\) *Gorovenky and Bugara v. Ukraine* para 39.

\(^{313}\) The Inter-Governmental Panel on Climate Change (2018) page 109. See also BVerfG, Beschluss des Ersten Senats, 1 BvR 2656/18, para 162.

\(^{314}\) See e.g. Chamorel (2019) page 51.

\(^{315}\) *Hatton and Others v. the United Kingdom* [GC] para 97.

\(^{316}\) See e.g. Gerards (2017) page 127.
particular measures taken by the authorities to mitigate climate change – to that end, the review of the obligation to regulate climate change is more fitting.

Nevertheless, if a State could avoid a preventive, operational duty as long as the risk of climate change is not individualized, the Convention system could only remedy a violation after the risk had materialized in a way that harmed “identified individuals”. The effect would be that it was lawful under the Convention for a State to remain passive when faced with a real and immediate risk threatening the population as a whole. This could lead to a contra intuitive solution where the Convention did not offer protection against the greatest risks to life, which arguably could render the right to life unpractical and illusionary. This was an important point in the Urgenda case, where the Dutch Supreme Court found that Article 2 and 8 offered protection to the population against climate change. However, the Dutch Supreme Court did not take into account the two different positive obligations under Article 2. Even if the preventive operational obligation would prove to be inapplicable, Article 2 would still offer protection against dangerous climate change through the obligation to regulate the risk. There is accordingly not the same need to interpret the Osman-test dynamically.

In sum, there are arguments both for and against finding that a State has an obligation to offer “general protection to society” against the risk of climate change. There is thus no clear solution to this interpretation. In my opinion, however, a preventive operational duty to protect society in general should be limited to the situations where non-State actors are liable to use lethal force against a group of people who cannot be identified in advance, and were the alternative course of action is relatively clear. This means that it cannot apply to climate change, a societal risk is threatening the general population as a whole, where the State can take different preventive measures to mitigate it.

4.4.4 The internal consistency between application and compliance

The previous sections discussed whether the risk of climate change meets the criteria of the Osman-test. Regardless of these discussions, it is necessary to take a step back and reflect on whether the content of the preventive, operational obligation fits the risk of climate change. The preventive operational obligation dictates that the authorities must “take measures within the scope of their powers which, judged reasonably, might have been expected to avoid [the risk]”

317 See e.g. Norwegian National Human Rights Institution (2020) section 5.2.2.
318 The State of the Netherlands v. Urgenda paras 5.3.1 and 5.6.2.
in question. Accordingly, when the criteria of the Osman-test are met, the Court will review the practical measures taken by a State to avoid the risk in question.

However, the ECtHR has consistently held that it will not review the particular choices made by national authorities in the environmental field. As mentioned above, the explicit and coherent separation between the obligation to regulate and the obligation to take preventive operational measures did not commence until 2019. Before 2019, the applicability of Article 2 was discussed on a case-to-case basis, in a flexible and ad hoc manner. In the environmental cases under Article 2 – Öner Yildiz v. Turkey (2004), Budayeva and others v. Russia (2008), Kolyadenko and others v. Russia (2012) and Brincat and others v. Malta (2014) – the Court did not separate between a duty to regulate and a duty to take preventive operational measures. However, under the discussion of compliance, the Court held that

“As to the choice of particular practical measures, the Court has consistently held that where the State is required to take positive measures, the choice of means is in principle a matter that falls within the Contracting State’s margin of appreciation. There are different avenues to ensure Convention rights, and even if the State has failed to apply one particular measure provided by domestic law, it may still fulfil its positive duty by other means.

In this respect an impossible or disproportionate burden must not be imposed on the authorities without consideration being given, in particular, to the operational choices which they must make in terms of priorities and resources … this results from the wide margin of appreciation States enjoy, as the Court has previously held, in difficult social and technical spheres.”

This approach is consistent with the environmental case law under Article 8. For example, in the case Fadeyeva v. Russia, concerning industrial air pollution from a steel plant, the Court stated the following:

“[T]he Court has also preferred to refrain from revising domestic environmental policies. In a recent Grand Chamber judgment, the Court held that “it would not be appropriate for the Court to adopt a special approach in this respect by reference to a special status of


environmental human rights” (see Hatton and Others, cited above, § 122). In an earlier case the Court held that “it is certainly not for ... the Court to substitute for the national authorities any other assessment of what might be best policy in this difficult technical and social sphere. This is an area where the Contracting Parties are to be recognised as enjoying a wide margin of appreciation” (see Powell and Rayner, cited above, p. 19, § 44).

It remains open to the Court to conclude that there has been a manifest error of appreciation by the national authorities in striking a fair balance between the competing interests of different private actors in this sphere. However, the complexity of the issues involved with regard to environmental protection renders the Court's role primarily a subsidiary one. The Court must first examine whether the decision-making process was fair and such as to afford due respect to the interests safeguarded to the individual by Article 8 (see Buckley v. the United Kingdom, judgment of 25 September 1996, Reports 1996-IV, pp. 1292-93, §§ 76-77), and only in exceptional circumstances may it go beyond this line and revise the material conclusions of the domestic authorities (see Taşkın and Others v. Turkey, no. 46117/99, § 117, ECHR 2004-X).

Overall, I have not found any judgments where the Court has decided which particular measures the State must take to mitigate an environmental issue. The positive obligation at the level of compliance in environmental causes has exhaustively concerned the obligation to regulate and the procedural obligation to have a fair decision-making process.

Illustrative of the Court’s approach is the inadmissibility decision Greenpeace E.V. and others v. Germany under Article 8. The applicants argued that the German authorities’ refusal to take specific measures to curb repairable dust emissions of diesel vehicles amounted to a violation of Article 8. The Court found that Germany had taken measures to curb diesel-vehicle emissions. Even though other measures could have been more effective, for example tax incentives for low-emission cars, the “latitude available to the State’s authorities was not narrowed down to taking the specific measures requested by the applicants”. On the contrary,

321 Fadeyeva v. Russia paras 104 and 105. See also e.g. Dubetska and others v. Ukraine para 142 and Eicke (2021) para 22.
322 See the discussions in Chapter 5 and Baumann (2018) pages 422 ff.
323 Greenpeace E.V. and others v. Germany page 1.
324 Ibid page 4.
the “choice of means as to how to deal with environmental issues is a matter falling within the Contracting State’s margin of appreciation in environmental matters”.

Accordingly, the Court has up until now refrained from reviewing the choice of means the State takes to deal with environmental issues. This illustrates the proximity between application of and compliance with the preventive operational obligation in climate change cases. If the Court’s previous line of reasoning is to be continued, the preventive operational duty cannot apply to environmental issues like climate change. The obligation to take practical “reasonable measures” would be without content if the Court could not review the particular practical measures taken by the State at the level of compliance.

It can be discussed whether the risk of climate change necessitates a narrower margin of appreciation, where the duty to take preventive, operational measures is applicable. While it is true that climate change is a risk that far exceeds the previous environmental issues discussed by the Court, the discussions above illustrate that climate change is also a complex and sensitive field where the State has a range of different mitigation measures to choose between. There are different avenues to ensure the right to life, and even if the State has failed to apply one particular measure that could have been effective, it may still fulfil its positive duty by other means. Moreover, the effective and practical protection of the right to life against climate change does depend on the applicability of the preventive, operational obligation – the State is still under an obligation to regulate climate change by adopting an effective legislative and administrative framework.

Similarly, domestic supreme courts seem to only review the regulations of the State in the climate field. Conversely, the State is afforded a margin of appreciation to decide the choice of mitigation measures. In the Urgenda case, the Dutch authorities were obligated to achieve a certain reduction target, but the Court underlined that the State was free to choose which measures to take in order to achieve it. Similarly, in Neubauer et al. v. Germany, the Federal Constitutional Court of Germany held that the provisions of the Climate Change Act governing national climate targets and the annual emission amounts allowed until 2030 were incompatible with fundamental rights insofar as they lack sufficient specifications for further emission

\[325\] Ibid.
\[326\] Baumann (2018) page 422.
\[327\] The State of the Netherlands v. Urgenda para 8.2.7.
reductions from 2031 onwards. However, the legislature was left a considerable room of maneuver to decide which measures it wished to take to mitigate climate change.

Against this background, it would make little sense to interpret the Osman-test dynamically in order to find the preventive, operational duty applicable to the risk of climate change. In line with previous cases, the choice of means as to how to deal with climate change falls within the margin of appreciation of the State.

4.4.5 Summary
To conclude on the overall application of the preventive operational obligation, climate change is a “real” risk the authorities “know” of. While there are several arguments in favor of the risk also being “immediate”, climate change does – at present – threaten an “identified individual or individuals”. While the Court has previously found that the State has a duty to offer “general protection to society”, this line of reasoning is not applicable to the risk of climate change. The preventive operational obligation under Article 2 is thus not applicable.

In any case, it would make little sense for the Court to interpret the Osman-test dynamically to cover the risk of climate change when the Court has previously refrained from reviewing the particular practical measures taken by the State in the environmental field. Arguably, this precludes the application of the preventive operational obligation in the context of climate change mitigation.

4.5 Distinctive applicability questions in climate change cases
4.5.1 Introduction
Climate change is a global problem created by the cumulative greenhouse gas emissions from all States in the world. Two arguments might therefore preclude the application of Article 2. The first is that a State cannot be held responsible for mitigating a risk it did not create alone (4.5.2). The second is that a State cannot be obligated to mitigate a risk it cannot avoid alone (4.5.3).

328 BVerfG, Beschluss des Ersten Senats, 1 BvR 2656/18 para 195.
329 Ibid paras 207, 229 and 249.
330 The Inter-Governmental Panel on Climate Change (2018) page 4 and The Inter-Governmental Panel on Climate Change (2014) page 1007.
4.5.2 Responsibility of a State to address a risk it did not create alone

The question here is whether a State can be responsible for addressing the global risk of climate change, even though it did not create this risk alone.

In international law, there is a discussion of whether one State can be held responsible for climate change according to international rules of shared State responsibility.331 Some have argued that the obligation to protect human rights against climate change under ECHR Article 2 must be harmonized with these rules.332 However, rules of State responsibility regulates the obligations States owe to another under international law. This legal system is therefore not comparable to human rights law, which regulates the obligations States owe to the individuals on their territory.333 What is more, it is not necessary to go by international rules to decide whether a Convention State can be held accountable for addressing the risk of climate change:

Under the positive obligation of Article 2, a State is obligated to take measures to protect the right to life, regardless of who created the risk in question. According to the Grand Chamber, “the absence of any direct State responsibility for the death of an individual or for placing his life in danger does not exclude the applicability of Article 2.”334 The State must regulate and address risks to the right to life, regardless of whether the risk in question can be attributed to the actions or inactions of the State. For example, the State must regulate road traffic and the use of firearms.335 Another example is the case law concerning natural hazards. Even though the State did not cause the mudslide in Budayeva and others v. Russia or the flood in Kolyadenko and others v. Russia, the State still had a positive obligation under Article 2 to take measures to protect its population against these risks. Accordingly, the obligation to take positive measures to protect human rights is not contingent on whether the State has created the risk. This is unlike international rules on State responsibility, where the responsibility of a State to cease a wrongful act or repair the damage only arises when it has created or contributed to the wrongful act.336

332 The State of the Netherlands v. Urgenda paras 5.7.1–5.7.7 and Norwegian National Human Rights Institution (2020) section 5.7.
333 See e.g. Slovenia v. Croatia [GC] paras 60 and 66 with further references.
334 See e.g. Nicolae Virgiliu Tănase v. Romania [GC] para 135. See also Dzemyuk v. Ukraine para 83, where the Court underlined that “regardless of its origin”, the E. coli in the applicant’s drinking water represented an environmental risk to them.
335 See Chapter 4.3.
Accordingly, a State is obligated under the ECHR to address the risk of climate change, even though it did not create this risk alone. Contrary to the situations of natural hazards, the State is actually responsible for contributing to the risk of dangerous climate change by emitting greenhouse gases. When a State has created the risk, there are stronger requirements to the measures the State has to take to ensure that it does not materialize.337

4.5.3 Responsibility of a State to mitigate a risk it cannot avoid alone

The question here is whether a State can be responsible for addressing the risk of climate change, even though it cannot avoid this risk alone.

Even though a State can be held responsible to address a risk it did not create, a violation can only be established where the State failed to act in a way that would have protected the right to life from the risk in question. In this sense, there must be a sufficiently close link between the negligence of the State and the infringement of the relevant human right (a causality of omission).338 This requirement goes back to the principle of impossibilium nulla obligatio est, meaning that no one can be obligated to the impossible.339

In international and domestic tort law, causation is normally established through a “but for” test: would the plaintiff be injured “but for” the defendant’s action.340 The application of this test would preclude State responsibility to address climate change – the risk to the right to life exists “but for” the actions of one individual State. However, there are great differences between human rights law and tort law. In tort law, the responsibility for compensating a damage is activated when there is causation between the injurer’s actions and the damage in question, where the injures can be human beings, legal persons and States. The rationale is to allocate a duty to compensate a loss in line with considerations of fairness and prevention. Human rights law, however, is concerned with the responsibility of a State to respect, protect and ensure human rights when exercising power in a constitutional democracy. One should accordingly be wary of analogies from tort law when discussing the role of causality under the Convention.341

337 See e.g. Öneryildiz v. Turkey [GC] para 101, where the Court held that the obligation to take measures to prevent a risk from materializing was stronger as the authorities “themselves had set up the site and authorised its operation, which gave rise to the risk in question”.
339 See references to this principle in e.g. Gani v. Spain para 39 and partly dissenting opinion of Judge Serghides para 47 in Güzelyurtlu and Others v. Cyprus and Turkey.
340 See e.g. Burger et al. (2020) page 150.
341 See e.g. the discussion of Turton (2020) page 149 and Advisory Opinion of the Procurator General of the Supreme Court of the Netherlands para 4.194.
Indeed, the Court has consistently held that “the relevant test under Article 2 cannot require it to be shown that “but for” the failing or omission of the authorities” the risk in question would have materialized. The Court considers it sufficient to engage the responsibility by showing that “the deficiencies in the operation of the relevant regulatory framework worked to an individual’s detriment” or that the positive measures of the State had a “real prospect of altering the outcome or mitigating the harm”.

Against this background, the question is whether one State has a “real prospect of altering the outcome or mitigating the harm” of climate change. While it seems unrealistic that one State can alter the outcome of climate change alone, each individual country can “mitigate the harm” by reducing their greenhouse gas emissions. According to the IPCC, the world had a remaining carbon budget of 580 GtCO2 to stay within a global warming of 1.5°C in 2018. Consequently, each ton of CO2 that is not emitted leaves room in the carbon budget, reducing the risk for the materialization of dangerous climate change.

The U.S Supreme Court adopted a similar line of reasoning in Massachusetts v. EPA. Eleven States and several cities sued the federal Environmental Protection Agency (“EPA”) to force it to regulate carbon dioxide and other greenhouse gases as pollutants. In order to have standing in the U.S, the plaintiffs must establish, inter alia, that the injury complained over can be redressed by a favorable court decision. The EPA alleged there was “no realistic possibility that the relief sought would ... remedy petitioners’ injuries, especially since predicted increases in emissions from China, India, and other developing nations will likely offset any marginal domestic decrease EPA regulation could bring about”. The majority of the U.S Supreme Court, however, did not agree. Even though regulating motor-vehicle emissions would not reverse global warming, the EPA could have a “duty to take steps to slow or reduce it.” According to the Court, it was not dispositive “that developing countries such as China and India are poised to increase greenhouse gas emissions substantially over the next century: A

343 Smiljanić v. Croatia para 84.
344 See footnote 336.
345 The Inter-Governmental Panel on Climate Change (2018) page 96.
346 Burger et al. (2020) page 150.
348 Massachusetts v. EPA page 22.
reduction in domestic emissions would slow the pace of global emissions increases, no matter what happens elsewhere”. 349

While this case discussed American rules of standing, the Dutch Supreme Court, referring to Massachusetts v. EPA, interpreted ECHR Article 2 and 8 as obliging each State to reduce its emissions. 350 This interpretation was justified by the need for an effective and practical protection of the right to life and private life against the serious risk of climate change. The Dutch Supreme Court held that “each reduction of greenhouse gas emissions has a positive effect on combating dangerous climate change, as every reduction means that more room remains in the carbon budget.” 351 Similarly, the Federal Constitutional Court of Germany recently interpreted the right to life after the German Constitution as obliging the State to address climate change. The fact that Germany could not prevent climate change on its own, did not prevent the duty to protect the right to life from arising. 352 The Federal Constitutional Court of Germany held, under reference to other domestic judgments like Urgenda, that Germany could not evade its responsibility to mitigate climate change by referring to greenhouse gas emissions of other States. 353

In brief, the responsibility under ECHR Article 2 arises when a State has a real prospect of “mitigating the harm” in question. 354 The reasoning of the domestic supreme courts illustrate that every reduction of CO2 slows the pace of global warming. A State can therefore be held responsible to “mitigate the harm” of climate change by reducing their domestic greenhouse under ECHR Article 2.

4.6 Summary

The separation between the two positive obligations under Article 2 is the result of a very thorough and mature reflection. 355 It is a sound compromise between the need to protect human rights effectively and the need for the State to have a margin to balance social, economic and environmental interests. While an obligation to regulate a risk can arise in every context where the right to life is at stake, the obligation to take preventive operational measures – which is far more burdensome for the State – arises only in certain situations.

349 Ibid page 23.
350 The State of the Netherlands v. Urgenda para 5.7.7 and 5.7.8.
351 Ibid.
352 BVerfG, Beschluss des Ersten Senats, 1 BvR 2656/18 para 149.
354 See e.g. Smiljanić v. Croatia para 84, Bljakaj and others v. Croatia para 124, Opuz v. Turkey para 136, and Kotilainen and others v. Finland para 87.
In the field of climate change, the previous case law of the Court, read in light of the object and purpose of the Convention, the margin of appreciation and international human rights law, supports the conclusion that the risk of dangerous climate change activates the positive obligation to adopt a legislative and administrative framework aimed at mitigating climate change. However, the positive obligation to take operational measures to prevent the risk from materializing is, in my opinion, not applicable to the risk of climate change – the Court should not review the particular choice of means States take to mitigate climate change. In light if the conflicting interests in the area of climate change, discussed in Chapter 2.1, this seems like the correct interpretation of the Convention. However, like in Chapter 3, the discussions above have been under the presumption that climate change at present is a primarily future risk. If climate change starts materializing in a way that directly affects individuals, the “identified individual” criterion will be met. The duty to take preventive operational measures might therefore arise in the future, according to whether sufficient mitigation and adaptation measures are adopted by the State in question.

Objections from a State, claiming that it cannot be held responsible for mitigating a risk it has neither created nor can avoid alone, are likely to be dismissed. According to the case law of the Court, the relevant question is whether the State has a real prospect of “mitigating the harm” in question. As every reduction greenhouse gas emissions slows the pace of global warming, this criterion is met in the context of climate change.
5 Compliance with Article 2

5.1 Introduction

The general formulation of the positive obligation under Article 2 is that a State must take “all appropriate steps” to safeguard the lives of those within its jurisdiction against the risk in question.\(^{356}\) This Chapter will discuss what this obligation entails in the context of climate change.

The obligation to take “all appropriate steps” is one of due diligence.\(^{357}\) A due diligence obligation is used to establish a standard of care that takes into account the behaviour of the State and the possibility to avoid harm.\(^{358}\) The standard, adaptable to the particular circumstances of the State, preserves a significant measure of autonomy and flexibility for States in discharging their international obligations.\(^{359}\) The standard of care must be determined in light of which measures are considered proportionate to the level of risk – the higher the risk, the higher the requirements to State actions.\(^{360}\) The State’s responsibilities in environmental cases may also rise from a failure to regulate private industry.\(^{361}\) Importantly, the obligation is one of conduct, not one of result.\(^{362}\)

The ambition of this Chapter is to identify some concrete elements of the State’s positive obligation to take “all appropriate steps” to the protect lives of those within its jurisdiction against climate change. This discussion does not presume to be exhaustive: It is not possible to issue a detailed list of all the measures the State can take to comply with this obligation.\(^{363}\)

\(^{356}\) See e.g. Önerüyıldız v. Turkey [GC] paras 71 and 89, Kolyaydenko and others v. Russia para 157, Budayeva and others v. Russia para 128 and Nicolae Virgilii Tănase v. Romania [GC] para 134.

\(^{357}\) See Baumann (2018) page 213–214, Fadeyeva v. Russia para 128, Cordella et Autres c. Italie para 161 and Jugheili and Others v. Georgia para 76. A standard of due diligence is often expressed through a duty to take “all appropriate measures”; see e.g. International Law Commission (2001) Article 3 and para 7 ff. For due diligence in general, see ILA Study Group on Due Diligence in International Law (2016) page 2 and Argentina v. Uruguay paras 101 and 197.

\(^{358}\) Ribcheva and others v. Bulgaria para 160.

\(^{359}\) ILA Study Group on Due Diligence in International Law (2016) pages 2 and 3.


\(^{361}\) See e.g. Hatton and others v. the UK [GC] para 119 and Fadeyeva v. Russia para 89.

\(^{362}\) See Georgel and Georgeta Stoicescu v. Romania para 59. See also Advisory Opinion (OC-23/17) para 118. *Mutatis mutandis,* see the IACHR’s interpretation of the right to life: “this obligation must be fulfilled in keeping with the standard of due diligence, which must be appropriate and proportionate to the level of risk of environmental harm. Even though it is not possible to include a detailed list of all the measures that States could take to comply with this obligation, the following are some measures that must be taken in relation to
While the obligation to take “all appropriate steps” is the general formulation, the ECtHR has further concretized the content of the positive obligation. Under Article 2, there are procedural and substantive obligations. Of these two, I have chosen to focus only on the substantive obligation to mitigate climate change. Under the substantive obligation, the Court further separates between the obligation to regulate and the obligation to take preventive operational measures. As stated in Chapter 4, only the positive obligation to regulate is applicable to the risk of climate change. Accordingly, this discussion seeks to contribute to how the ECtHR might analyze and formulate the positive, substantive obligation of the State to regulate the risk of dangerous climate change. An obligation to adapt to the dangers of climate change will not be discussed.  

In context of dangerous activities, the positive obligations under ECHR Articles 2 and 8 largely overlap. Indeed, the Court considers the positive obligation under Article 8 as requiring the national authorities to take the same practical measures as those expected of them in the context of their positive obligation under Article 2. This means that the environmental case law under Article 8 is relevant to consider in the following interpretations.

This Chapter will first discuss the general requirements under the obligation to adopt and implement an effective framework regulating a risk to the right to life (5.2). This section is important, as it is impossible to determine at an abstract level what this obligation consists of in the context of climate change. This section will consequently illustrate which general elements the Court will consider when discussing whether a State has complied with its positive obligation to regulate climate change. Notwithstanding this disclaimer, I will move on to discuss whether there are some minimum requirements the State must comply with in order to have an effective climate change framework (5.3). Lastly, the findings of this Chapter will be summarized (5.4).

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activities that could potentially cause harm …” (emphasis added), see The Indigenous Communities Members Of The Lhaka Honhat (Our Land) Association V. Argentina para 208.


365 See e.g. Kolyadenko and Others v. Russia para 216 and Budayeva and others v. Russia para 133.

366 See e.g. Brincat and Others v. Malta para 102 and ENNHRI (2021) page 25.
5.2 The obligation to regulate climate change – general requirements

5.2.1 Introduction

Article 2 obligates the State to adopt an effective legislative and administrative framework regulating risks to the right to life.\(^{367}\) In a recent judgement, the requirements were formulated in the following manner:

“[There is a] primary duty on the part of the State to adopt and implement a legislative and administrative framework designed to provide effective deterrence against threats to the right to life. In this regard, the States’ obligation to regulate must be understood in a broader sense which includes the duty to ensure the effective functioning of that regulatory framework. The regulatory duties thus encompass necessary measures to ensure implementation, including supervision and enforcement. In sum, the States’ positive obligation under the substantive limb of Article 2 extends to a duty to ensure the effective functioning of the regulatory framework adopted for the protection of life.”\(^{368}\) (emphasis added)

Therefore, the existence of a regulatory framework is not sufficient on its own. There are qualitative requirements to this framework, both in terms of how it is designed and implemented. These requirements entails, *inter alia*, that the adopted framework must take into account the special features of the activity in question, notably the level of risk.\(^{369}\) This section will look into the general elements the ECtHR will take into account when discussing whether a State has complied with its positive obligation to regulate climate change.

5.2.2 The condition of an effective framework

The State must adopt a legislative and administrative framework “designed to provide effective deterrence” against threats to the right to life.\(^{370}\) While the legislature enjoys a margin of appreciation, its choices are not beyond the scrutiny of the Court.\(^{371}\)

In the recent case *Smiljanić v. Croatia*, the Court discussed whether the Croatian framework regulating road safety was effective. The Court found that the framework, among other, had

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\(^{367}\) See e.g. Öneryildiz v. Turkey [GC] para 89 and Kolyadenko and Others v. Russia para 157.

\(^{368}\) Smiljanić v. Croatia para 66.

\(^{369}\) See e.g. Tătar c. Roumanie para 88 and Öneryildiz v. Turkey [GC] para 90. This is in line the interpretations of the right to life set forth by the Human Rights Committee and the Inter-American Court on Human Rights, see UN Human Rights Committee (2018) para 18 and Advisory Opinion (OC-23/17) para 149.

\(^{370}\) Smiljanić v. Croatia para 66.

rules for the use of drugs and alcohol while driving, as well as preventive measures of seizure and confiscation of a driving license. Accordingly, the Court found that “the relevant domestic legal framework provided for appropriate preventive measures geared to ensuring public safety and minimizing the number of road accidents.”

In the environmental case *Brincat and others v. Malta*, the Court found that the State had enacted regulations to safeguard the applicants against the risk of asbestos at the workplace. However, the regulations made “no provision for any other practical measures which could or should have been taken in order to protect the applicants, nor were there any provisions concerning the right to access information”. Accordingly, the Court found that the legislation was deficient as it neither regulated the operation of asbestos-related activities nor provided any practical measures to ensure the effective protection of the employees. This amounted to a violation of Article 2.

In *Budayeva and others v. Russia*, the State violated its positive obligation to establish a framework providing effective deterrence against the risk of a mudslide. The authorities did not repair a broken mud-protection dam, nor did it inform the residents of the increasing risk of a mudslide. Overall, the Court found that “in exercising their discretion as to the choice of measures required to comply with their positive obligations, the authorities ended up by taking no measures at all up to the day of the disaster.” The lack of a framework amounted to a violation of Article 2.

The threshold for finding a violation seems to be high, reserved for the situations where the State had no framework to protect against the risk in question or where the framework made “no provision for any other practical measures which could or should have been taken in order to protect the applicants”. Indeed, it is not the role of the Court to prescribe an ideal framework in the field of climate change. The threshold might therefore be similar to the threshold under the German Constitution, where the right to life is violated only (i) where protective measures are not taken at all, (ii) where the regulations and measures taken are

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372 Smiljanić v. Croatia paras 73–76.
373 Ibid para 77.
374 Brincat and others v. Malta para 110.
375 Ibid para 111.
377 Ibid para 156.
378 Brincat and others v. Malta para 110.
obviously unsuitable or completely inadequate to achieve the required protective objective, or (iii) where they fall considerably short of the protective objective.\(^{380}\) Indeed, the Federal Constitutional Court does not consider the right to life after ECHR Article 2 as offering a more extensive protection than the right to life in the German Constitution.\(^{381}\)

Nevertheless, the requirements to the climate change framework might be more stringent than in previous environmental cases. The Court has previously held that “the onus is on the State to justify, using detailed and rigorous data, a situation in which certain individuals bear a heavy burden on behalf of the rest of the community”.\(^{382}\) The previous application of the rule seems to be based on the geographical location of a polluting activity, affecting the population in a certain area, city or village.\(^{383}\) In the context of climate change, inhabitations of regions particular exposed to climate change will have to bear a heavier burden of climate change than the rest of the community. Moreover, groups like indigenous people and children are particular exposed to the effects of climate change.\(^{384}\) In addition, the youth of today and future generations will have to endure greater restrictions in their human rights and fundamental freedoms by bearing a heavier burden to reduce greenhouse gases in order for the community today to live as freely as we like.\(^{385}\) The disproportionate impact of climate change might therefore lead to a more intense review of the legislative and administrative framework.

While there is not only one effective regulation in the context of climate change, one example is a framework climate change act, frequently referred to as the climate law of laws.\(^{386}\) Legal researches define a climate change act as a framework legislation “that lays down general principles and obligations for climate change policymaking in a nation-state with the explicit aim of reducing greenhouse gas emissions in relevant sectors through specific measures to be implemented at a later stage.”\(^{387}\) A climate change act often enshrines an emission reduction target, lays out the measures that will be used to achieve the target and creates mechanisms for

\(^{380}\) BVerfG, Beschuss des Ersten Senats, 1 BvR 2656/18 para 152.
\(^{381}\) Ibid para 147.
\(^{384}\) See Chapter 3.2.2.
\(^{385}\) Mutatis mutandis, BVerfG, Beschuss des Ersten Senats, 1 BvR 2656/18 paras 182 and 186 and Sharma and others v. Minister for the Environment para 293.
\(^{386}\) Council of the EU (2021).
\(^{387}\) Nash et al. (2019) page 2. See also Averchenkova et al. (2017).
supervision and control. Several European countries have adopted such acts. Depending on its content, a climate change act can be an effective regulation in the context of climate change.

An example of how the ECtHR could discuss whether a regulation was effective, can be found in the Urgenda case. The question before the Dutch Supreme Court was whether the Netherlands had to adhere to a target of minimum 25% reduction in greenhouse gas emissions by 2020 under ECHR Article 2 and 8. The State had reduced its reduction target to 20%, as it preferred to have a lower reduction target before 2020 in order to accelerate its reduction policies after 2020. The Dutch Supreme Court, however, found that the State had not justified how this policy was “practically feasible and sufficient” to prevent dangerous climate change in line with Netherlands’ share. The State was therefore obliged to adhere to a target of 25% emission reduction by 2020.

Another example is the case Neubauer et al v. Germany. Even though it concerned human rights under German Constitution, the reasoning of the Federal Constitutional Court of Germany might provide insight as to how the ECtHR can analyze whether a framework is effective. The Federal Constitutional Court of Germany held that the government jeopardized practically every type of fundamental freedom by pushing a disproportionate burden of emissions reductions into the future. According to the Federal Constitutional Court, it would not be proportional if one generation were allowed to consume large parts of the CO2 budget under a comparatively mild reduction burden if this would leave future generations with a radical reduction burden, exposing them to considerable losses of freedom. While it could not be established that this was the case, the government was nevertheless obliged to take precautionary measures to prevent such a situation. The Federal Constitutional Court accordingly ruled that German Climate Change Act must be designed in such a way that it provides sufficient guidance and incentive for the development and implementation of climate-

388 See e.g. Nash et al. (2019).
389 See e.g. Final proposal for the European Climate Law (2021), Federal Climate Change Act (2019) [Germany], Climate Change Act (2008) [The United Kingdom], Climate Change Act (2017) [Norway], Climate Change Act (2020) [Denmark], Climate Change Act (2015) [Finland], Climate Action and Low Carbon Development (Amendment) Bill 2021 [Ireland].
390 The State of the Netherlands v. Urgenda para 7.5.1.
391 Ibid para 7.4.2.
392 Ibid para 7.4.6.
393 BVerfG, Beschluss des Ersten Senats, 1 BvR 2656/18 para 192.
394 Ibid para 194.
neutral technologies and practices.\textsuperscript{395} As the German Climate Change Act lacked sufficient specifications for emission reductions from 2031 onwards, it was incompatible with fundamental rights under the German Constitution.\textsuperscript{396}

In both these cases, the courts reviewed whether a plan to achieve a reduction target was sufficiently feasible, detailed and concrete. In light of a precautionary approach and under reference to a fair burden sharing between different groups of the society, the ECtHR could also require that the climate change framework included a sufficiently feasible, detailed and concrete plan on how to achieve a reduction target.\textsuperscript{397} In line with Urgenda and Neubauer, examples of objections to the plans can be that the State disproportionately pushes a too large reduction burden into the future or that the State relies too heavily on technology that remains unproven on a larger scale.\textsuperscript{398}

\textbf{5.2.3 The condition of effective implementation}

According to the Court, “regulations to protect guaranteed rights serve little purpose if they are not duly enforced", which is not in line with the object of the Convention “to protect effective rights, not illusory ones”.\textsuperscript{399} Consequently, the State “must ensure the effective functioning of the regulatory framework adopted for the protection of life”.\textsuperscript{400}

In the above-mentioned case Smiljanić \textit{v. Croatia}, the framework regulating road traffic had not been sufficiently implemented. The case concerned a man (“D.M”) who had, under the influence of alcohol, killed the applicants’ relative in a car accident. Even though he had been registered thirty-five times in police records for various traffic offences, like drunk driving, speeding and not obeying road signs, D.M had a valid drivers licence at the time of the accident.\textsuperscript{401} Although the domestic authorities had taken certain measures against D.M., the Court found that “they failed to take a comprehensive and integrated approach of applying effective

\begin{footnotes}
\textsuperscript{395} Ibid para 195.
\textsuperscript{396} Ibid.
\textsuperscript{397} The ECtHR has previously interpreted the Convention in light of the precautionary principle in the Rio Declaration, see Tătar c. Roumanie para 100, 104, 118 and 120.
\textsuperscript{398} The IPCC considers that Carbon Dioxide Removal technologies “remain largely unproven to date and raise substantial concerns about adverse side effects on environmental and social sustainability”, and that “reliance on such technology is a major risk in the ability to limit warming to 1.5°C.”, see the Inter-Governmental Panel on Climate Change (2018) pages 96 and 121. This point is reflected in e.g. BVerfG, Beschluss des Ersten Senats, 1 BvR 2656/18 para 33 and LB-2018-60499 section 3.1.
\textsuperscript{399} Moreno Gómez \textit{v. Spain} para 61 and Dubetska and others \textit{v. Ukraine} para 144.
\textsuperscript{400} Smiljanić \textit{v. Croatia} para 66.
\textsuperscript{401} Ibid paras 8, 9 and 79.
\end{footnotes}
deterrent and preventive measures to put an end to his continuous serious breaches of road traffic regulations.

The authorities could have nulled or confiscated his drivers license for a longer period of time, measures that “would have been in line with the mechanisms put in place in the relevant domestic regulatory framework.” Against this background, the Court found that the State had failed “to ensure the effective functioning in practice of the preventive measures geared to ensuring public safety”, leading to a violation of Article 2.

The element of implementation has proved to be one of the most important elements in the environmental jurisprudence of the ECtHR. For example, in Fadeyeva and others v. Russia, the Court noted that

“In all previous cases in which environmental questions gave rise to violations of the Convention, the violation was predicated on a failure by the national authorities to comply with some aspect of the domestic legal regime. Thus, in López Ostra the waste-treatment plant in issue was illegal in that it operated without the necessary licence, and it was eventually closed down ... In Guerra and Others too, the violation was founded on an irregular position at the domestic level, as the applicants had been unable to obtain information that the State was under a statutory obligation to provide.”

On the other hand, compliance is an argument against a violation. In the Grand Chamber case Hatton and Others v. the United Kingdom, the question was whether noise pollution from Heathrow airport amounted to a violation of Article 8. The Grand Chamber distinguished the case from the above-mentioned environmental cases, underlining that the “element of domestic irregularity is wholly absent in the present case”. This was one of several arguments leading the Court to conclude that there was no violation of Article 8.

Furthermore, an unreasonable delay in implementation is in itself an argument for a violation of Article 2 and 8. In the 2005 judgment Fadeyeva v. Russia, the environmental pollution from a steel plant had been significantly reduced since the 1970s, but the pollution still exceeded

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402 Ibid para 83.  
403 Ibid.  
404 Ibid para 85.  
405 Fadeyeva and others v. Russia para 97. See also Hatton and others v. the United Kingdom [GC] para 120.  
406 Hatton and Others v. the United Kingdom [GC] para 120.  
407 See e.g. Ledyayeva, Dobrokhotova, Zolotareva and Romashina v. Russia para 110 and Dubetska and others v. Ukraine paras 151 and 155.
safe levels. The Court found that the “overall improvement of the environmental situation would appear to be very slow” Even though the pollution around the steel plant could “not be resolved in a short period of time”, the authorities could not remain passive when faced with the unsafe pollution. On the contrary, the authorities had to take “reasonable and appropriate measures to secure the applicants' rights under paragraph 1 of Article 8 … in a shortest delay possible” (emphasis added) The polluting site operated in breach of domestic environmental standards, and the unreasonable delay in implementation of safety measures amounted to a violation of Article 8.

Similarly, in Cordella et autres c. Italie, the applicants alleged that the government had failed to take all appropriate measures to protect their life and health against industrial pollution from a steel factory in their region. The authorities had planned a cleanup of the region in 2012, but it was never implemented. The Italian authorities had postponed another planned clean-up from 2014 to 2023, leading the Court to find that “the procedure for achieving the clean-up objectives pursued is proving to be extremely slow”. The Court found that the national authorities' management of the environmental issues was “at an impasse”, leading to a violation of Article 8.

Baumann argues that in environmental cases, a violation of the Convention is almost systematically contingent on a violation of the domestic law of the State concerned and, vice versa, compliance with the domestic framework is often the same as compliance with the Convention. He questions the verity of the Court when stating that the domestic legality of the alleged violation is just one of several elements, and not the decisive criterion. However, the ECtHR Judge Eicke has extra-judicially underlined that mere compliance with domestic law does not per se resolve the issue in favor of the State – domestic legality is only “one of many aspects which should be taken into account when striking a fair balance.”

408 Fadeyeva v. Russia para 126.
409 Ibid para 127.
410 Ledyayeva, Dobrokhотовa, Zolotareva and Romashina v. Russia para 104.
411 Fadeyeva v. Russia para 133.
412 Cordella et autres c. Italie para 161.
413 Ibid paras 167 and 168 (my own translation).
414 Ibid para 171.
415 Baumann (2018) page 393. See also pages 34 and 380 ff.
416 Ibid.
417 Eicke (2021) para 23. See also e.g. Kolyadenko and Others v. Russia para 161.
In the context of climate change, the Court will thus assess whether, *inter alia*, the measures in a climate change act are implemented without an unreasonable delay. This will likely be an important element of the Court’s review.

5.2.4 The condition of an individual’s detriment
Whether there has been a failure by the State to comply with its above-mentioned regulatory duties, calls for a concrete assessment:

“The Court’s task is not normally to review the relevant law and practice *in abstracto*, but to determine whether the manner in which they were applied to, or affected, the applicant or the deceased gave rise to a violation of the Convention. Therefore, the mere fact that the regulatory framework may be deficient in some respects is not sufficient in itself to raise an issue under Article 2. It must be shown to have operated to an individual’s detriment.”

This requirement normally plays a role where the Court discusses a complaint from a victim who has been “directly or indirectly affected” by the alleged violation. Even though these victims are allowed to complain where they have an “arguable claim” of a violation, a violation of Article 2 can only be established when it can be shown that there was a sufficiently close link between the deficient framework and its impact on the individual. For example, in *Smiljanić v. Croatia*, the Court found that “D.M.’s persistent unlawful conduct and breaches of road safety regulations finally resulted in the causing of the fatal road traffic collision in which the applicants’ relative died.” While the Court could not “speculate whether the matters would have turned out differently if the authorities had” annulled or confiscated his driver’s license, the “multiple failures of the domestic authorities at different levels to take the appropriate measures against D.M.’s continuous unlawful conduct” was sufficient to find that there had been a violation of Article 2.

In climate change cases, however, complaints are likely to be heard only if the Court accepts complaints from future or potential victims under Article 34. If such complaints are accepted, it would be contra intuitive to require that the framework operated to an individual’s detriment

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419 See Chapter 3.
420 Smiljanić v. Croatia para 84.
421 Ibid para 85.
in order to find a violation under Article 2. In secret surveillance cases, where the Court has accepted complaints from future or potential victims, the Court does not require that it must be shown that the regulatory framework operated to an individual’s detriment.\footnote{See e.g. Klaas and Others v. Germany para 33 and Centrum för Rättvisa v. Sweden [GC] para 177 ff.} Due to the secrecy of the measures, this would be impossible. Similarly, in climate cases concerning the risk of a future damage, it would be impossible to show that the framework already has operated to an individual’s detriment. Accordingly, this condition cannot be applicable in the situation where potential or future victims are allowed to set forth claims before the Court.

5.2.5 Minimum requirements for dangerous activities

The high level of risk in the context of dangerous activities has lead the Court to impose some specific, minimum requirements for the framework regulating these activities:

“[The positive obligation to put in place a legislative and administrative framework designed to provide effective deterrence against threats to the right to life] indisputably applies in the particular context of dangerous activities, where, in addition, special emphasis must be placed on regulations geared to the special features of the activity in question, particularly with regard to the level of the potential risk to human lives. They must govern the licensing, setting up, operation, security and supervision of the activity and must make it compulsory for all those concerned to take practical measures to ensure the effective protection of citizens whose lives might be endangered by the inherent risks.”\footnote{Öneryildiz v. Turkey [GC] para 90. See also e.g. Budayeva and others v. Russia para 132, Kolyadenko and others v. Russia para 158, Cordella et autres v. Italie para 159, Di Sarno and others v. Italy para 106 and Jugheli and others v. Georgia para 75.} (emphasis added)

These requirements make up a minimum standard for an efficient framework in the context of dangerous activities. The Court has not defined the notion of “dangerous activities”.\footnote{Council of Europe Publishing (2012) page 133.} However, the operation of a waste collection site,\footnote{Kolyadenko and others v. Russia para 164.} a water reservoir,\footnote{Vardosanidze v. Georgia para 57} gas-operated household devices,\footnote{Guerra and others v. Italy para 60} toxic emissions from a fertilizer factory\footnote{L.B.C v. the United Kingdom paras 36–38.} and nuclear testing sites\footnote{L.B.C v. the United Kingdom paras 36–38.} have all been characterized as dangerous activities.
The case Öneryildiz v. Turkey concerned the operation of a waste collection site, which was considered a dangerous activity. The main question was “whether the legal measures applicable to the situation in issue in the instant case call for criticism and whether the national authorities actually complied with the relevant regulations.” The safety regulations in place required the installation of a “vertical and horizontal drainage system” at the waste-collection site. However, the Court found that the implementation of the regulatory framework had “proved defective”. Even though the site did not comply with relevant safety standards, the national authorities opened and operated it. Moreover, there was no coherent supervisory system, which meant that the authorities had no means to ensure adequate protection of the public. What is more, the national authorities had not complied with a provision in its safety framework that obliged them to install a drainage system at the waste collection site. The Court considered that compliance with the obligation to install a gas-extraction system before the situation became fatal “could have been an effective measure without diverting the State’s resources to an excessive degree”. The lack of sufficient security rules constituted a violation of the minimum requirements to dangerous activities. Accordingly, there was a violation of Article 2.

In Kolyadenko and others v. Russia, the operation of a reservoir was considered a dangerous activity. Several elements of the reservoir were broken, which meant that it would not offer protection in case of a flood. Even though the State received several warnings of the risk of flooding, it did not adapt to this risk. While the State had a wide margin of appreciation in this difficult social and technical sphere, the Court was convinced that it was not an impossible or disproportionate burden for the authorities to clean up the river leading from the reservoir and to restore a broken emergency warning system. On the contrary, the authorities had breached relevant regulations by failing “to establish flood zones, catastrophic flood hazard zones and water protections”. Overall, the authorities “failed to establish a clear and legislative and administrative framework to enable them effectively to assess the risks inherent in the operation” of the reservoir and lacked a “coherent supervisory system to encourage those responsible to take steps to ensure adequate protection of the population living in the area”.

430 Öneryildiz v. Turkey [GC] para 97.
431 Ibid paras 102 and 104.
433 Ibid paras 102–104.
434 Ibid para 102.
436 Kolyadenko and others v. Russia paras 173 and 180.
437 Ibid para 183.
438 Ibid para 173.
439 Ibid paras 172 and 185.
The lack of a supervisory system and the lack of effective measures to protect the population from the dangerous activity amounted to a violation of Article 2.

The question in Budayeva and others v. Russia was whether Russian authorities had complied with their obligation to protect the right to life against the risk of a mudslide. The Court characterized Budayeva as a case concerning a “natural hazard”, where the State had a wide margin of appreciation. Indeed, the Court considered that the need for flexibility “must be afforded even greater weight in the sphere of emergency relief in relation to a meteorological event, which is as such beyond human control, than in the sphere of dangerous activities of a man-made nature.”

Rytter points out how “the identification of sources of disaster in terms of a rigidly binary separation between the natural and the industrial” is complicated by insights emerging from modern disaster research. Disasters in Europe are often the product of natural forces and human activity or neglect. According to Rytter,

“The river flood in the case of Kolyadenko serves as a good example of such modern hybridity between nature and technology in disasters. The case concerned the Russian authorities’ mismanagement of a river flood in 2001. While the flood in question was immediately caused by a decision to discharge water from a local reservoir, the decision to do so was necessitated by rainfall of an ‘exceptional intensity’. The Court categorized the disaster as being caused by an industrial hazard, but it might just as well have chosen to treat it as being proximately caused by a natural hazard, that is, the extraordinary rainfall that made the discharge necessary in the first place. Had the Court approached the disaster as stemming from a natural hazard, Russia would have been allowed a wider margin of appreciation, in accordance with the Court’s statement in Budayeva. Any modern urban disaster underlines the hybridity between man-made and natural hazard.”

Accordingly, the lack of definition and incoherent application makes it difficult to assess what a “dangerous activity” is. In turn, this makes it difficult to decide whether climate change can be characterized as a “dangerous activity”. Nevertheless, the activities previously considered as dangerous seems to be limited to factories or industrial constructions with an inherent level of

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440 Budayeva and others v. Russia para 135.
441 Rytter et al. (2016) page 121.
442 Ibid.
risk. These activities must be governed by rules on “the licensing, setting up, operation, security and supervision of the activity”.\(^443\) Climate change, however, is a change in the average, statistical weather over a period of time. Accordingly, it is not an activity that can be licensed, set up or operated. This means that the minimum requirements in the field of dangerous activities does not apply directly in the context of climate change.

5.2.6 Summary
This section has illustrated that whether a State has complied with its obligation to adopt and implement an effective framework is determined on a case-by-case basis, taking into account particular circumstances of the case. This section has therefore pointed to elements the Court can take into account when discussing this obligation in the context of climate change. It seems likely that the Court will assess whether the State in question has adopted and implemented an effective and feasible climate change act.

5.3 The obligation to regulate climate change – minimum requirements?
5.3.1 Introduction
The general principles reviewed above illustrate that compliance must be discussed on a case-to-case basis. With this disclaimer, the question here is whether there are some minimum requirements the State must comply with in order to discharge its obligation to regulate climate change.

A minimum level of protection in the context of climate change would be comparable to the minimum obligations to the framework in the context of dangerous activities. The rationale behind the minimum requirements is to compel the authorities to regulate activities that entail a high level of risk.\(^444\) This rationale also applies to the situation of climate change. While climate change is not a dangerous activity as such, dangerous climate change is one of the most pressing and serious threats against one of the most fundamental human rights – the right to life.\(^445\) The possibility of dangerous climate change materializing is a realistic and possibly irreversible prospect, which would substantially harm human lives and health indefinitely.\(^446\) There is accordingly a high probability for an irreversible, harmful change. These factors added

\(^{443}\) See e.g. Öneryildiz v. Turkey [GC] para 90.


\(^{446}\) See Chapter 2.3 and the Inter-Governmental Panel on Climate Change (2018) page 262.
up mean that the standard of care in the context of climate change should be high. Arguably, the Court will therefore compel authorities to comply with certain minimum requirements to the framework regulating the risk of climate change. In any case, the high level of risk will likely lead to more stringent requirements to the framework.

It would be impossible to discuss exhaustively what these requirements could consist of. The following discussions are therefore limited to three potential minimum requirements, which are the most prevalent in judicial theory and legal proceedings, inspired by the regulations in the Paris Agreement.\textsuperscript{447}

Against this background, the first question is whether the State must adopt an economy-wide reduction target and a plan for its implementation (5.3.2). The second question concerns whether the State must have a reduction target with a minimum level of ambition (5.3.3). Third and last, the question is whether a State can regress the ambition of its reduction target and its implementation (5.3.4).

5.3.2 An economy-wide reduction target and a plan to reach it?
The question here is whether the State is obliged to adopt an economy-wide reduction target and a plan to reach it.

An economy-wide emission reduction target is a target of emission cuts within a certain year that covers greenhouse gas emissions from all sectors on the entire territory of the State. The rationale is to have a comprehensive regulation of all greenhouse gas emissions without any loopholes or exceptions. Moreover, a reduction target makes it possible for a State to adopt a plan on how it aims to achieve its target. An economy-wide emission reduction target in an overall framework, requiring the State to acquire sufficient knowledge and plan the mitigation of climate change, could accordingly be effective in dealing with the risk of dangerous climate change. This is the rationale behind Article 4.2 and 4.4 of the Paris Agreement, which sets out the following:

\textit{“Each Party \textit{shall} prepare, communicate and maintain successive nationally determined contributions that it intends to achieve. Parties \textit{shall pursue} domestic mitigation measures, with the aim of achieving the objectives of such contributions …”}

\textsuperscript{447} See e.g. Liston (2020), Voigt (2021) pages 8–13 and The State of the Netherlands v. Urgenda paras 7.2.1 ff, particularly 7.2.5.
Developed country Parties should continue taking the lead by undertaking economy-wide absolute emission reduction targets. Developing country Parties should continue enhancing their mitigation efforts, and towards economy-wide emission reduction or limitation targets in the light of different national circumstances.” (emphasis added)

The Paris Agreement does not allocate legally binding emission targets. Rather, it creates a bottom-up approach where the Party itself communicates what emission reductions it aims to achieve.\textsuperscript{448} A Party is not obliged to achieve its nationally determined contribution (“NDC”). However, the “Parties” – not an individual Party – “shall pursue domestic mitigation measures” with the aim of achieving its NDC. The term “shall pursue” reflects an obligation of conduct: Even though a party is not obligated to achieve its NDC, it is obligated to strive to achieve the contribution. Bodansky states that “[while] these are binding obligations, they are obligations of conduct rather than result” and that the term intends to achieve “establishes a good faith expectation that each party intends to achieve its NDC, but stops short of requiring them to do so”.\textsuperscript{449}

Furthermore, the Paris Agreement dictates that developed country Parties should undertake economy-wide absolute emission reduction targets. This is not a legal obligation, but rather an expectation or recommendation. So far, 43 of the States to the Convention have followed the recommendation.\textsuperscript{450} These member States to the Convention represent, in line with previous jurisprudence of the Court, a significant majority.\textsuperscript{451} There is accordingly a European consensus on adopting an economy-wide reduction target.

However, a reduction target in itself is not efficient. Whether the framework provides effective deterrence against the risk climate change presents to the right to life, is contingent on whether the measures to achieve the target are implemented. The ECtHR has frequently underlined that the State has a “duty to ensure the effective functioning of that regulatory framework”, which “encompass necessary measures to ensure implementation, including supervision and

\textsuperscript{448} Bodansky et al. (2017) page 232 and Rajamani et al. (2019) page 1028.
\textsuperscript{449} Bodansky et al. (2017) page 231 and Bodansky (2016) page 146.
\textsuperscript{450} The European Union, the United Kingdom, Norway, Switzerland and Iceland have communicated economy-wide reduction targets, see United Nations Environment Programme (2019b). The NDCs communicated under the Paris Agreement shows that Albania, Andorra, Bosnia and Herzegovina, Liechtenstein, Monaco, Serbia, Moldova, Ukraine, Montenegro, Georgia, Russia and San Marino have adopted economy-wide reduction targets, see their respective NDCs available at NDC Registry (2021). Azerbaijan, Armenia and North Macedonia, however, have not. While Turkey have signed the Paris Agreement and adopted an INDC, they have yet to ratify it, which makes their position unclear.
\textsuperscript{451} See Chapter 1.3.
enforcement.”452 In the area of climate change, the State must accordingly have a plan for the implementation of the target, which includes supervision and enforcement.453

The need for an implementation plan is recognized under the system of the Paris Agreement. Parties are legally obligated to strive to achieve its NDC. In order to ensure compliance with this obligation, Parties are required to provide information in accordance with any relevant decisions of the Conference of the Parties serving as the meeting of the Parties to this Agreement (“CMA”).454 The CMA has decided that “in communicating their second and subsequent nationally determined contributions, Parties shall provide the information necessary for clarity, transparency and understanding contained in annex I as applicable to their nationally determined contributions”.455 Annex I decides that parties must provide information on among other reference points, time frames and periods for implementation, scope and coverage of the target, assumptions and methodological approaches, including those for estimating and accounting for anthropogenic greenhouse gas emissions and how the nationally determined contribution contributes towards achieving the objective of the Paris Agreement.456 Moreover, each Party shall regularly provide information on their national emissions and the information necessary to track progress made in implementing and achieving its NDC.457 These obligations must be read in light of the fact that Parties are only required to provide the information “as applicable” to their NDC.458 Nevertheless, the system under the Paris Agreement requires information on how the NDC shall be implemented and requires information on the progress of implementation.

The Paris Agreement and the European consensus are legal sources in favor of a duty to adopt an economy-wide reduction target and a plan for its implementation. These sources add to the need to interpret the right to life in a manner that renders its provisions practical and effective. Without sufficient knowledge of the climate situation and without a target to reduce emissions, the obligation of the State to protect the right to life against climate change could easily become theoretical and illusory. Conversely, by having a reduction target and a plan to achieve it, the State regulates the risk arising from climate change in a comprehensive manner. Moreover, this obligation would not be impossible or disproportionate for a State to discharge. The obligation would only compel the State to regulate – the content of the target and the plan would be up for

452 See e.g. Smiljanić v. Croatia para 66 with further references.
453 Mutatis mutandis, Beschluss des Ersten Senats, 1 BvR 2656/18, para 253.
455 Conference of the Parties serving as the meeting of the Parties to the Paris Agreement (2018) para 7.
457 The Paris Agreement Article 13.7.
458 Rajamani et al. (2019) page 1030.
the State to decide. Interpreting the Convention in light of the international obligations of the members to the Convention, and taking into account that dangerous climate change constitutes the most pressing and serious threat to the right to life, such an obligation seems reasonable. Against this background, a State is arguably obligated to adopt an economy-wide reduction target and a plan for its implementation.

5.3.3 A reduction target with a minimum level of ambition?

5.3.3.1 Introduction

The reduction targets adopted by the Parties to the ECHR are, as of yet, not sufficiently ambitious or sufficiently implemented to avoid dangerous climate change. \(^{459}\) Judicial authors and domestic courts have accordingly interpreted Article 2 as obliging States to achieve a reduction target with a minimum level of ambition in order to comply with the positive obligation to protect the right to life. Three different approaches have been presented, which will all be discussed in the following.

5.3.3.2 Fair share

First, some argue that a State must reduce domestic emissions by its “fair share” of global greenhouse gas emissions. \(^{460}\) The term “fair share” does not exist under international climate change law. Moreover, the determination of by how much individual countries must reduce their emissions is highly controversial – States have not been able to resolve this question during the last 30 years of international climate change negotiations. \(^{461}\) Accordingly, the Paris Agreement does not allocate binding reduction targets. A legal obligation for a State to reduce their emissions by its “fair share” would mean that the ECtHR single-handily would have to decide how much of the global share of greenhouse gas emissions an individual State is responsible for and by how much these must be reduced. The ECtHR can hardly be legitimized or competent to settle this question on its own. This interpretation is therefore without merit.

5.3.3.3 Highest possible ambition

The second interpretation is that the obligation to protect the right to life obligates a State to mitigate climate change at its “highest possible ambition”. \(^{462}\) Article 4.3 of the Paris Agreement

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\(^{459}\) Climate Action Tracker (2021b) and United Nations Environment Programme (2020a) pages 18 and 21.

\(^{460}\) The term “fair share” was used by the Dutch Supreme Court in The State of the Netherlands v. Urgenda paras 6.3 and 6.5. See also Liston (2020) page 260.


\(^{462}\) See Voigt (2021) pages 8–13, Youth4ClimateJustice (2020) para 30, Application Klimaseniorinnen v. Switzerland (2020) para 56 and the Committee on the Elimination of Discrimination against Women, the
has inspired this interpretation. Although the Paris Agreement does not allocate reduction targets, this provision states that

“Each Party's successive nationally determined contribution \textit{will} represent a progression beyond the Party's then current nationally determined contribution and \textit{reflect its highest possible ambition}, reflecting its common but differentiated responsibilities and respective capabilities, in the light of different national circumstances.” (emphasis added)

Progression means that a new NDC is more ambitious than the last one.\(^{463}\) Highest possible ambition is a phrase that combines the “highest” ambition of the state (idealism) with the “possible” ambition of the state (realism).\(^{464}\) When determining progression and the highest possible ambition, account must be taken to the principle of “common but differentiated responsibilities and respective capabilities, in the light of different national circumstances” (“CBRD-RC”). Progression and highest possible ambition only comes into play when the Party is communicating a new NDC (“successive”), meaning onwards from the first NDC.

The auxiliary verb “will” applies to both “progression” and “highest possible ambition”.\(^{465}\) The verb “will”, as opposed to “shall”, is predictive and not prescriptive. It does not oblige a State to progress or reflect its highest possible ambition as an obligation of result.\(^{466}\) Whether it is an obligation of conduct, is not easy to decide from simply analyzing the term. The verb “will” is of a stronger normative force than “should”, but still falls short of how other obligations of conduct are normally formulated.\(^{467}\) Voigt and Ferreira argue that the provision can be read as imposing the following obligation upon the State:

“Article 4.3 is reflective of a standard of care that States now need to exercise: to strive for their highest possible ambition in a manner that their efforts reflect their common responsibilities, respective capabilities and national circumstances. It is reminiscent of a due diligence standard in international law which requires governments to act in proportion to the risk at stake and to the extent of the capacity they employ. With that,

\(^{463}\) A progression can be measured in different ways, see Bodansky (2016) page 234.


\(^{465}\) Klein et al. (2017) page 146.

\(^{466}\) Bodansky et al. (2017) page 234.

\(^{467}\) One example is the term “shall pursue” in Article 4.2 of the Paris Agreement, see Chapter 5.3.2.
each and every party … has committed to take all appropriate and adequate climate measures according to its responsibility and its best capabilities in order to progressively achieve the objective of the Agreement.”

Klein, however, points out that the use of “will” is more common in non-binding instruments than in treaties, but consider the language to create a “clear and strong expectation”. Bodansky and Rajamani agree, stating that “will” signals a strong expectation, where NDCs will be open to comment and critique if it does not comply with the expectations inherent in Article 4.3. The negotiation text reinforces this interpretation: A proposal stating that each NDC “shall constitute” the highest possible efforts and a proposal obliging a Party to “strive for the highest mitigation ambition in light of science” both ended up being rejected. In order to facilitate clarity, transparency and understanding of NDCs, the CMA to the Paris Agreement has decided that the Parties must provide information of how the Party considers that its NDC is fair and how the Party has addressed Article 4.3. This information makes critique and comment possible, but does not support the existence of a legal obligation.

Moreover, the term “highest possible ambition” is arguably formulated to ambiguously to introduce any legal obligations – how is one to determine what constitutes the “highest” ambition that is “possible”, taking the CBRD-RC principle into account? To legally decide what ambition is “possible”, a judge must have an overview of the capabilities of a State and assess whether this State can increase its ambition. Voigt and Ferreira argue “that several tools developed by civil society”, such as the Climate Action Tracker, can assess, assist and inform the fairness and ambition of NDCs”.

Yet, as Bodansky points out, the reference to the CBRD-RC principle makes it, at least initially, up to the Party to determine its highest possible ambition. Bodansky and Rajamani note that as the agreement does not define these terms, the application of them is, by default, left to national determination.

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468 Voigt et al. (2016a) page 296. See also Klein et al. (2017) page 145.
469 Klein et al. (2017) page 146
472 Conference of the Parties serving as the meeting of the Parties to the Paris Agreement (2018) para 7 and annex I para 6.
473 The Climate Action Tracker is an independent scientific analysis that tracks government climate action and assesses whether this action complies with the Paris Agreement, see Climate Action Tracker (2021a).
474 Voigt et al. (2016a) page 296.
475 Bodansky et al. (2017) page 223.
476 Rajamani et al. (2019) page 1028.
It is worth comparing Article 4.3 of the Paris Agreement with Article 2.1 of the International Covenant on Economic, Social and Cultural Rights (“ICESCR”), where the relevant part of the provision reads:

“Each State Party to the present Covenant undertakes to take steps … to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.”[^477] (emphasis added)

The terms “maximum of its available resources” and “achieving progressively” are similar to the terms “progression” and “highest possible ambition” under the Paris Agreement. Commenters have noted that the term “maximum of its available resources” is subjective, and “the questions of whom or what is to determine which resources are available, and what is their maximum, must inevitably rest heavily, or at least initially, on the shoulders of the State under consideration”[^478]. The Committee on Economic, Social and Cultural Rights (“CESCR”) stated in a General Comment from 1990 that Covenant does not oblige the State Parties to immediately use the maximum of their available resources in order to respect and ensure all the rights of the Covenant.[^479] Nevertheless, the CESCR found that there were some “minimum core obligations” inherent in the Convention rights that could be legally enforced by the Committee.[^480] The notion of “minimum core obligations” has become a central feature of the Covenant – in fact, the discussions seems to be limited to this notion.[^481] In a later evaluation of an optional protocol to the covenant, the CESCR suggested some guidelines to assess compliance with the obligation to take “maximum of available resources”.[^482] Despite these efforts, the matter of resources continues to be a “vexed and highly complicated question of political opinion, policy choice and practical implementation”.[^483] Indeed, it can be discussed whether the term has more definition today than when it was written.[^484] The experience of the CESCR arguably sheds light over the fact that the term “highest possible ambition” under the Paris Agreement might be too ambiguous and wide-ranging to impose an enforceable legal obligation upon the State.

[^477]: ICESCR Article 2.
[^478]: Saul et al. (2014) page 143.
[^480]: Ibid para 10.
[^481]: Saul et al. (2014) pages 147 and 151.
[^483]: Saul et al. (2014) page 149.
Against this background, Article 4.3 must be interpreted as an expectation. The term “will”, combined with the vagueness of the term “highest possible ambition”, cannot impose a legal obligation upon the Parties to the Paris Agreement.

When a Party is not obligated to reflect its “highest possible ambition” under Article 4.3 of the Paris Agreement, it seems unlikely that a Party to the ECHR can be obligated to mitigate climate change with its “highest possible ambition” to protect the right to life. In my opinion, this obligation would be too ambiguous and wide-ranging. Against this background, the obligation to implement a framework to protect the right to life against dangerous climate change cannot be interpreted as requiring the State to mitigate climate change at its “highest possible ambition”.

5.3.3.4 Common ground

The last interpretation is that the European consensus or common ground method can be used to establish a minimum reduction target under the positive obligation to protect the right to life. As seen in Chapter 1.3, the existence of a legal solution adopted by a significant majority of the Contracting States can justify a dynamic interpretation of a Convention right. Some have argued that, due to the existence of a common reduction target adopted by a significant majority of Contracting States, the positive obligation to protect the right to life from climate change can be interpreted as obliging a State to achieve a minimum reduction target.

This interpretation was an innovation made by the Dutch Supreme Court in the Urgenda case. Due to a common ground in European States, the Dutch Supreme Court found that the Netherlands had to adhere to a target of minimum 25% reduction in greenhouse gas emissions by 2020 under ECHR Article 2 and 8. The common ground was based on reports from the IPPC and decisions from the Conference of the Parties under the UNFCCC (“COP”) up until COP-21, where the Paris Agreement was adopted. The Dutch Supreme Court referred to the Grand Chamber judgement Demir and Baykara v. Turkey as the basis for its use of common ground. In that judgement, the Grand Chamber stated that when searching for common ground, it has “never distinguished between sources of law according to whether or not they

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485 See e.g. ENNHRI (2021) pages 29–30.
486 The State of the Netherlands v. Urgenda para 7.5.1.
487 See UNFCCC Article 7.
488 The State of the Netherlands v. Urgenda paras 7.2.1–7.2.11, referring the IPCC report AR4, an resolutions from COP-13, COP-16, COP-17, COP-18, COP-19, COP-20 and COP-21. The conclusion is in 7.4.1.
489 Ibid para 5.4.2.
have been signed or ratified by the respondent State”.490 Moreover, the Court held that it has had regard to legal instruments, even though these were “not binding”.491 The Grand Chamber concluded that a common ground could exist where “relevant international instruments denote a continuous evolution in the norms and principles applied in international law or in the domestic law of the majority of member States”.492

From my perspective, the Dutch Supreme Court went too far when establishing a common ground solely on reports from the IPCC and decisions from the COP. Reports from the IPCC do not concern norms and principles of international law. As pointed out by the Federal Constitutional Court of Germany, reports from the IPCC say nothing about what should or must be done – on the contrary, which warming we will accept is a normative question.493 Moreover, the legal status of decisions from the COP in international law is uncertain, but from a formal perspective, they are not legally binding on Parties.494 Even though non-binding sources are relevant when interpreting the Convention, it is another question whether these sources alone can establish a common ground. This question is even more pertinent when the COP decisions now are inconsistent with Article 4.2 of the Paris Agreement. The Dutch Supreme Court did not discuss whether the new bottom-up approach in the Paris Agreement, where each party decide its own reduction target, might have influenced the evolution in the norms of principles previously argued for in COP decisions.495 In sum, the Dutch Supreme Court relies heavily on what a State should do, but does not discuss – in line with judicial orthodoxy – what a State is legally bound to do.

Moreover, according to Article 4 of the Paris Agreement, there must be a differentiation in the mitigation efforts expected of different States, contingent on their differentiated capabilities and responsibilities.496 The Paris Agreement differs from the formal differentiation in the Kyoto Protocol, where only developed country Parties had legal obligations to mitigate climate change.497 Under the Kyoto Protocol, 33 of the 47 member States to the Convention were

490 Demir and Baykara v. Turkey [GC] para 78 ff.
491 Ibid para 80.
492 Ibid paras 76, 85 and 86.
493 BVerfG, Beschluss des Ersten Senats, 1 BvR 2656/18 para 160.
495 See The State of the Netherlands v. Urgenda para 7.2.3, where the Court states that “climate change conferences after 2015 no longer explicitly addressed or referred to the reduction target of 25-40% by 2020”.
496 The Paris Agreement was adopted in 2015, but the Court does not discuss what significance this might have.
497 See e.g. Voigt et al. (2016a) pages 293 ff.
498 Ibid page 290.
considered developed.\textsuperscript{498} Although this formal differentiation was not continued under the Paris Agreement, the underlying rationale is still that developing countries – with fewer resources and less historic responsibility for climate change – should be afforded more flexibility to reduce their emissions. The rationale behind the CBRD-RC principle is also relevant under the Convention, where the member States to the Convention have very different resources and capabilities. In light of this principle, it seems difficult to establish a common ground on a minimum reduction target for all the member States to the Council of Europe. Yet, perhaps there can be common ground between all States that developed countries must reduce their emissions at a certain rate? The Dutch Supreme Court underlined that the consensus regarding the emission reduction target of 25 to 40\% by 2020 only referred to the developed country Parties in the Kyoto Protocol.\textsuperscript{499} A common ground on differentiated targets might be possible to establish.

In light of the \textit{Urgenda} case, the applicants in the Norwegian case \textit{Greenpeace and others v. Norway} argued that Norway also had to adhere to a minimum reduction target. The Norwegian Supreme Court, however, stated the “common ground” method could not be used in the environmental field because the ECHR does not include an Article providing a right to a healthy environment.\textsuperscript{500} The Court did not explain this postulate, but its background was probably an argument from the Attorney General, claiming that a common ground under ECHR Article 2 and 8 cannot be built on a consensus concerning specialized instruments of international climate change law.\textsuperscript{501} In my view, this objection has little merit: A common ground method can be used to establish the content of the right to life when faced with the challenge of climate change, given that the consensus is relevant for this right. For example, when instruments such as the Paris Agreement acknowledges the link to human rights like the right to life, the instrument should not be without relevance to these rights, simply because there is no right to a healthy environment.\textsuperscript{502} Similarly, domestic climate change acts recognizing the human rights implications of climate change are relevant when interpreting the human rights in question. However, a general environmental consensus on issues that are not related to human rights cannot inform the interpretation of the ECHR.

\textsuperscript{498} See the Kyoto Protocol Article 3.1 and Annex B. The 33 member States listed were the EU countries (minus Cyprus), Iceland, Liechtenstein, Monaco, Norway, Russia, Ukraine and the United Kingdom. The 14 that were not listed are Albania, Andorra, Armenia, Azerbaijan, Bosnia and Herzegovina, Cyprus, Georgia, Malta, Montenegro, North Macedonia, Moldova, San Marino, Serbia and Turkey.

\textsuperscript{499} The State of the Netherlands v. Urgenda paras 7.2.7 and 7.2.11.

\textsuperscript{500} HR-2020-2472-P para 174.

\textsuperscript{501} Regeringsadvokaten (2020) page 9.

\textsuperscript{502} See Chapter 2.4 and VCLT art. 31.3 c).
Even though a common ground would need a stronger legal foundation than decisions from COP and reports from the IPCC, the method used by the Dutch Supreme Court seems correct – a common ground method can be used to establish a minimum level of ambition a State has to comply with in order to protect life under ECHR Article 2. However, this is contingent on whether a particular solution has been “adopted by a significant majority of the Contracting Parties” and is “identified on the basis of comparative analysis of laws and practices of these Parties.” While it is outside the scope of this thesis to carry out a comparative analysis of the laws and practices of Contracting Parties in the climate field, there seems to be a growing number of domestic laws that enshrines a legally binding target of net-zero emissions by 2050 in order to protect fundamental rights like the right to life. The Federal Constitutional Court of Germany even held that the protection of the right to life would be obviously unsuitable if the protection policy did not pursue the goal of climate neutrality by 2050. Perhaps this is – or in the future, could be – sufficient to meet the threshold of a European consensus.

5.3.3.5 Summary
To summarize, it seems like a State is not obligated to adopt a reduction target that reflects either its “fair share” or its “highest possible ambition”. However, the common ground method can be used to establish a minimum level of ambition a State has to comply with to protect the right to life. To decide whether such a common ground exists, the Court would have to initiate a detailed study of the domestic law and practices of the Contracting Parties.

5.3.4 A rule of non-regression in the level of protection?
A rule of “non-regression” is increasingly included in international treaties and domestic legislation on human rights and environmental law. The core of the rule is that a State cannot reduce the level of legislative human rights or environmental protection. The question here is whether the right to life can be interpreted as obliging a State to not decrease the level of legislative protection against climate change.

503 Chapter 1.3 and Dzehtsiarou (2015) page 27 and 37.
505 BVerfG, Beschluss des Ersten Senats, 1 BvR 2656/18 para 155.
506 See Chapter 1.3.
507 Vordermayer-Riemer (2020) page 1 ff.
508 Ibid page 28.
A rule of non-regression has some basis in the Council of Europe system. The preamble of the ECHR reads that its aim is to achieve the “further realization of human rights”, a reference to progression or, as a minimum, non-regression.\textsuperscript{509} The European Social Committee has recognized a “principle of progressiveness” under the European Social Charter.\textsuperscript{510} Discussing the entirety of the environmental case law of the ECtHR, Baumann argues that an obligation to not regress in the protection of the environment is inherent in the positive obligation to protect human rights against environmental hazards.\textsuperscript{511}

The Committee on Economic, Social and Cultural Rights has explicitly established a rule of non-regression under the ICESCR. The CESCR continued its above-mentioned interpretation of ICESCR Article 2.1 by stating that even though there was no legal obligation to use the “maximum of its available resources” to achieve the rights in the Covenant, the Article could “not be misinterpreted as depriving the obligation of all meaningful content”.\textsuperscript{512} Rather, it had to be read in light of the object and purpose of the Covenant, which was to establish clear obligations for States parties in respect of the full realization of the rights in question. Against this background, the CESCR held that Article 2.1 obliged the State to not, \textit{inter alia}, regress in the protection of the rights in the Covenant:

“[Any] deliberately retrogressive measures … would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources.”\textsuperscript{513}

A rule of non-regression is also included in the Paris Agreement. Article 4.3 of sets out an expectation that each successive NDC shall progress and reflect the highest possible ambition of the State.\textsuperscript{514} This expectation adds to Article 4.11, according to which:

“A Party may at any time adjust its existing nationally determined contribution with a \textit{view to enhancing} its level of ambition in accordance with guidance adopted by the

\begin{footnotes}
\footnotetext{509}{ECHR preamble recital 3.}
\footnotetext{510}{Centre on Housing Rights and Evictions (COHRE) v. Italy para 27. See also Vordermayer-Riemer (2020) page 147 ff. for a discussion on the emergence of a non-regression obligation under the Charter.}
\footnotetext{511}{Baumann (2018) page 493.}
\footnotetext{512}{The Committee on Economic, Social and Cultural Rights (1990) paras 9 and 10.}
\footnotetext{513}{Ibid.}
\footnotetext{514}{See Chapter 5.3.3.3.}
\end{footnotes}
Conference of the Parties serving as the meeting of the Parties to this Agreement.” (emphasis added)

According to the text, only adjustments “enhancing” the level of ambition are allowed. The negotiating text to the Paris Agreement had different suggestions to the legality of downgrading NDCs, but, in the end, none were adopted.\(^{515}\) This provision must also be read in the light of the overall object and purpose of the Paris Agreement, which is to strengthen the global response to the threat of climate change.\(^{516}\) Rajamani argues that “the silence on this point is … plausibly read as confirming that downgrading would not be in keeping with the letter or spirit of the Paris Agreement”.\(^{517}\) Accordingly, a Party to the Paris Agreement seems to be legally obligated to not regress the ambition of its NDCs. The first legal interpretation of this question is underway – environmental organizations recently filed a lawsuit against the Brazilian government for an allegedly unlawful reduction of the Brazilian NDC communicated under the Paris Agreement.\(^{518}\) In order for the member States to both the Convention and Paris Agreement to perform all its treaty obligations in good faith, the rule of non-regression should arguably inform the Court of what framework provides effective deterrence against the risk of dangerous climate change.\(^{519}\)

In addition, a rule of non-regression in human rights protection exists under the domestic law of some of the member States to the Convention.\(^{520}\) For example, the Belgian Constitutional Court recognized a principle of non-regression under a constitutional right to a healthy environment, according to which the legislator cannot \textit{substantially reduce the level of legislative protection}, unless the reduction is \textit{necessary} to pursue general interests.\(^{521}\) Similarly, the Federal Constitutional Court of Germany recently held that a weakening of climate

\(^{515}\) The suggestions were that a party could downgrade a NDC (i) when subsequent rules differed substantially from the Party’s assumptions, (ii) in situations of force majeure, (iii) when severely affected by an extreme natural event, (iv) when adequate finance, technology transfer and capacity-building support was not available. It was also suggested to not allow downgrading at all, see Ad Hoc Working Group on The Durban Platform for Enhanced Action (2015) para 181.

\(^{516}\) The Paris Agreement Article 2.

\(^{517}\) Rajamani et al. (2017) pages 547–549. See also Vordermayer-Riemer (2020) page 312.

\(^{518}\) See Observatório do Clima (2021) and Complaint Six Youths v. Minister of Environment and Others (2021).

\(^{519}\) See Chapter 1.3.

\(^{520}\) See e.g. the French Code de l’environnement Article L.110-1 para II.9 and Vordermayer-Riemer (2020) pages 439 and 444, referring to Article 23 of the Belgian Constitution, Article 66 of the Portuguese Constitution and Article 20a of the Basic Law of the Federal Republic of Germany. See also the EU-UK Trade Agreement Part Two Title XI Article 7.2 (non-regression from levels of environmental protection).

\(^{521}\) My own translation of the French version of the judgment referred to by Vordermayer-Riemer (2020) page 440.
reduction targets would have to be justifiable in light of a constitutional obligation to protect the natural bases of life. While these rules concern other rights than the right to life and do not constitute a European consensus, they are a part of an emerging principle of non-regression in environmental law. Vordermayer-Riemer, studying non-regression in international environmental law, found that while “the concept of an environmental non-regression principle does not yet meet the thresholds of customary law or the general principles of international law”, its express inclusion in treaties and domestic laws means that a “non-regression principle may arguably now be considered part of international environmental ‘soft law’.”

In my opinion, the Urgenda case can be analyzed from a non-regression point of view. The essence of the case was whether Dutch authorities were obliged to reduce the emission of greenhouse gases originating from Dutch soil by at least 25% compared to 1990 levels by 2020. The Dutch government had a reduction target of 30% up until 2011, when it was reduced to 20%. The Dutch Supreme Court could have argued, from a non-regression perspective, that the positive obligation to protect life against dangerous climate change, as a minimum, meant that the State could not reduce its reduction target. The previously discussed common ground method would then have been unnecessary.

In addition, the need to interpret the right to life in an effective and practical manner is an argument in favor of a rule of non-regression. A rule of non-regression would be effective as it prohibits backsliding in the level of the protection of the right to life. At the same time, the rule would respect the need for the authorities, with better knowledge and direct democratic legitimation, to balance different interests when deciding their climate change policies. The outcome of these deliberations, however, would bind the state. In light of the high standard of care in the context of climate change is high, this rule seems reasonable.

If a rule of non-regression were to be recognized, several questions arise: What is to be considered regression? What should the point of reference be? And shall some retrogressive steps be allowed, and, if yes, which ones? These questions would have to be discussed in detail, which is beyond the scope of this thesis. One possible solution is that the Court, informed by the case law of the CESCR and domestic courts, could find that the legislator cannot

522 Beschluss des Ersten Senats, 1 BvR 2656/18 para 212.
523 Vordermayer-Riemer (2020) page 460.
524 The State of the Netherlands v. Urgenda paras 7.4.1–7.4.6
525 The obligation to implement the framework is already an obligation under ECHR Article 2, see Chapter 5.2.3.
526 See Chapter 5.3.1.
527 See e.g. Vordermayer-Riemer (2020) page 440.
substantially reduce the level of legislative protection against climate change after the adoption of the Paris Agreement in 2015. Thus, a regression of a reduction target adopted after 2015 would come into the review of the Court. Nevertheless, an absolute prohibition of regression might impose an impossible or disproportionate burden upon the State. Accordingly, regression should be lawful when fully justified by the State with reference to, *inter alia*, new scientific research, the country’s level of development and current economic situation.\(^{528}\)

Notwithstanding the discussions above, a general rule of non-regression is an emerging concept and has not yet been discussed under the ECHR. Consequently, it remains unclear whether such a rule could form part of a minimum positive obligation to take appropriate steps to protect the right to life against the risk of dangerous climate change. In my opinion, however, a rule of non-regression could be a fair compromise between the margin of appreciation of the State and the need to offer an effective and practical protection of human rights, interests as discussed in Chapter 2.1.

5.4 Summary

The question of what a State must do to comply with its positive obligation to protect the right to life against dangerous climate change cannot be solved at a general and abstract level. However, the difficulties in determining the extent of the State’s positive obligation should not undermine the existence of such a positive obligation.\(^{529}\) With this disclaimer, I have found that the following can be said generally:

First, there are some general requirements the Court will take into account when discussing whether a State has complied with its positive obligation to regulate climate change. The State must have a feasible framework providing effective protection against the risk of dangerous climate change. This framework must also be implemented within a reasonable time. Whether these requirements are met, must be assessed on a case-to-case basis.

Second, by the same reasoning the Court has adopted in the context of dangerous activities, the Court might discuss whether there are some minimum requirements to the framework regulating climate change. Arguably, the State has a duty to adopt an economy-wide reduction target and a plan for its implementation. After a target and a plan have been adopted, it is

\(^{528}\) *Mutatis mutandis*, Beschluss des Ersten Senats, 1 BvR 2656/18 para 212 and the Committee on Economic, Social and Cultural Rights (2007) para 10. For further guidance on CESCR and regression, see Vordermayer-Riemer (2020) page 80 ff.

possible that a State cannot regress the level of legislative protection, unless this regression is fully justified by the State. While it seems unlikely that ECHR Article 2 oblige the State to have a reduction target reflecting its “fair share” or “highest possible ambition”, the Court might find that there is a common ground in relation to a specific reduction target. For example, the increasing climate change acts that enshrine a legally binding reduction target of net zero by 2050 may be sufficient to establish a European consensus.

A violation of the obligation to regulate the risk in question often leads to a violation of Article 2.\textsuperscript{530} In certain cases, however, the Court sees the elements in light of each other, leading the assessment of compliance to be more flexible.\textsuperscript{531} Even though I did not discuss adaptation due to space constraints, national authorities might be able to justify that, despite lack in mitigation, they are taking appropriate measures to protect the right to life against climate change by relevant adaptation measures.\textsuperscript{532} Notwithstanding this flexibility, there is a strong presumption for a violation of Article 2 in case of a breach of the obligation to regulate climate change.

\begin{flushright}
\textsuperscript{530} See e.g. Fernandes de Oliveira v. Portugal [GC] para 133.
\textsuperscript{531} See e.g. Brincat and others v. Malta para 112, Budayeva and others v. Russia para 158 and Fadeyeva v. Russia para 105.
\textsuperscript{532} \textit{Mutatis mutandis}, BVerfG, Beschluss des Ersten Senats, 1 BvR 2656/18 paras 157, 164 and 181.
\end{flushright}
6 Concluding remarks

The European Court of Human Rights is at present processing climate change claims. How the Court ultimately interprets the Convention, will soon be a settled question. Discussing climate change and the Convention, the president of the ECtHR stated the following at a conference in October 2020:

“In this regard it bears reiterating that the Council of Europe is at this very moment reflecting on what role it should play to give a new impulse to protecting the environment. The path taken will be very important for the way in which the law will eventually develop … [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.”

The ECtHR seems wary to overstep its role in a system of separation of powers, and wishes to avoid a situation where a State refuses to implement its judgements. However, the Court should not accept arguments that climate change is only a matter for the political arena. Politics and law are not binary – between the two extremes, there is a spectrum of possible interpretations of the Convention. Indeed, the requirement of a fair balance between public interests and individual rights is inherent in the system of the Convention.

Accordingly, the Court should, at the stages of admissibility, applicability and compliance, seek compromises between a margin of appreciation for the State and the need to ensure an effective protection of the right to life. There is no clear or easy answer as to how these compromises should be: Treaty interpretation is to some extent an art, not an exact science. This thesis does not presume to have the definitive answers to the difficult questions of interpretation that arises when discussing the applicability of the Convention to dangerous climate change. With this disclaimer, I have found that the Convention system can – to some extent – respond to the risk climate change poses to the right to life.

534 Eicke (2021) paras 44 and 45.
536 See e.g. Dörr et al. page 560, referring to a statement by the International Law Commission.
With regard to the first research question, I concluded that the Court should assess victim status on a case-to-case basis, in light of the availability of effective domestic remedies and the particular vulnerability of the applicant in question to climate change. Whether the Court follows this approach, remains to be seen. However, regardless of the Court’s interpretation of Article 34, the rights under the ECHR can still play a role in some European jurisdictions according to domestic rules of standing. For example, petitioners in Norway and the Netherlands can set forth claims based on the ECHR. What is more, a domestic court may in a domestic case request that the ECtHR gives an advisory opinion on the interpretation of the right to life. Either way, the substantive provisions of the Convention may therefore play a role in the domestic courts of Europe.

With respect to the second research question, I concluded that the State has a positive obligation to regulate the risk of climate change under Article 2. However, the positive obligation to take operational measures to prevent the risk from materializing is not applicable to the risk of climate change. This obligation would necessitate that there were some identified individuals who were at particular risk from climate change, which – at present – seems hard to find. In any case, it would be difficult for the ECtHR to review of the particular measures taken by the State to mitigate climate change. Arguably, the choice of mitigation measures should remain within the margin of the appreciation of the State.

Concerning the third research question, I concluded that the State has an obligation to adopt and implement an effective and feasible framework regulating climate change. As a minimum, the State might be obligated to adopt an economy-wide reduction target and a plan for its implementation, in addition to an obligation to justify any regression in the level of protection in this framework. There might also be a European consensus on net zero emissions by 2050. The ECtHR can therefore come to play an important role in holding the executive and legislative branch accountable for implementing their climate change frameworks with a view to achieving net zero by 2050, mitigating the tendency of States to postpone or break their own reduction targets.

Finally, I wish to highlight two issues that have proved to be recurring themes in the analysis of admissibility, applicability and compliance. First, the Convention is designed to find violations a posteriori, which makes it difficult for the Convention system to offer protection against future climate change damages. Second, the Convention primarily aims to protect

537 HR-2020-2472-P para 165 and the State of the Netherlands v. Urgenda Foundation para 5.9.3.
538 The previous environmental rulings of the ECtHR has lead national authorities to improve their environmental regulations aimed at protecting human lives, see Council of Europe (2020d).
individual human rights, while climate change is a collective human rights problem. These two issues make it necessary for the Court and its interpreters to reflect on what kind of protection the Convention system really has to offer against climate change. Even if the Convention system can overcome these challenges, the protection offered by the Convention is at present likely to be limited to a review of a legislative and administrative framework. However, these two issues are only relevant as long as climate change remains a primarily future risk. If climate change starts materializing in a way that directly affects individuals, the “victim” criterion will be met and the effects of climate change will affect “identified individuals”, rendering the obligation to take preventive operational measures applicable. At present, the Member States to the Convention should therefore be aware of the fact that a failure to avoid dangerous climate change might result in a more intense judicial review in the future.
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