The European Journal of International Law Vol. 33 no. 3

Climate Change before the European Court of Human Rights: Capturing Risk, Ill-Treatment and Vulnerability

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Abstract

Human rights law is increasingly being mobilized to litigate against the effects of anthropogenic climate change. This now includes proceedings before the European Court of Human Rights, which is currently considering its first five climate cases. The present article contends that an examination of climate change as a human rights issue by the Strasbourg Court, although requiring transformations of existing case law, is not only possible but also normatively desirable. It does so while examining two interlinked topics that could prove crucial to this type of case. The first is the assessment of risk – that is, the ability of the European Convention on Human Rights (ECHR) to capture impending harms through the doctrine of positive obligations. Second, the article frames climate claims as a matter for Article 3 of the ECHR (the prohibition of torture and inhuman and degrading treatment). This right has gone largely ignored in the relevant scholarship and the Court's environmental cases to date. The resulting discussion of positive climatic obligations is interlinked with a discussion of climate-related vulnerabilities, which could potentially shape state obligations and lower the procedural and substantive hurdles that imperil the success of climate cases before the Court.

1 Introduction and Context

The European Court of Human Rights (ECtHR) has never considered the human rights impacts of anthropogenic climate change. This sets it apart from the Inter-American Court of Human Rights,[1] the United Nations (UN) Committee on the Rights

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[1] IACtHR, *Advisory Opinion OC-23/17 on the Environment and Human Rights*, Advisory Opinion requested by the Republic of Colombia, 15 November 2017, 21. All IACtHR decisions are available at https://www.corteidh.or.cr/jurisprudencia-search.cfm?lang=en.

of the Child[2] and a growing number of domestic courts, which have begun engaging with climate change caused by greenhouse gas emissions as a human rights issue.[3] Despite its silence on the matter to date, the Strasbourg system holds promise for prospective climate litigants in light of the Court's extensive case law on environmental issues, particularly under the rights to life and private and family life (Articles 2 and 8 of the European Convention on Human Rights [ECHR]).[4] As part of the larger 'rights turn' in climate activism,[5] this potential has now clearly been recognized,[6] and five climate cases (*Duarte Agostinho and Others v. Portugal and Others*,[7] *KlimaSeniorinnen v. Switzerland*,[8] *Greenpeace Nordic and Others v. Norway*,[9] *Carême v. France*[10] and a yet-uncommunicated case against Austria concerning the exacerbation of chronic illness by high temperatures[11]) are currently pending before the Court, with three cases having been referred to the Grand Chamber.[12]

Any one of these cases could potentially become a landmark judgment, setting the course for the Court's future case law on climate change. Even if the five pending applications do not lead to 'success' for the applicants – that is, a finding of a violation – similar cases are sure to follow given the scale of the impending climate catastrophe and its current and projected impacts on the enjoyment of human rights. These types of applications promise not only to clarify how climate change affects rights under the ECHR but also to reshape the Court's case law in various structural regards. They provide an impetus to rethink, among other things, requirements for standing and victim status, including the ability of environmental non-governmental organizations (NGOs) to bring public interest cases; questions of causation, attribution and responsibility for prospective or risked harm; issues of extraterritorial jurisdiction and shared

2 UN Committee on the Rights of the Child, *Sacchi and Others v. Argentina*, Communication no. 104/2019, UN Doc. CRC/C/88/D/104/20192021, 22 September 2021 (along with four other decisions against Brazil, France, Germany and Turkey in this same case).

3 For two examples among many others, see German Federal Constitutional Court, 1 BvR 2656/18, Judgment of the First Senate, 24 March 2021; Supreme Court of the Netherlands, *State of the Netherlands v. Urgenda*, ECLI:NL:HR:2019:2006, 20 December 2019.

4 Convention for the Protection of Human Rights and Fundamental Freedoms 1950, 213 UNTS 222.

5 Savaresi and Setzer, 'Rights-based Litigation in the Climate Emergency: Mapping the Landscape and New Knowledge Frontiers', 13(1) *Journal of Human Rights and the Environment* (2022) 7.

6 Setzer and Vanhala, 'Climate Change Litigation: A Review of Research on Courts and Litigants in Climate Governance', 10 *WIREs Climate Change* (2019) 580; Peel and Osofsky, 'Climate Change Litigation', 16 *Annual Review of Law and Social Science* (2020) 21.

7 ECtHR, *Duarte Agostinho and Others v. Portugal and Others*, Appl. no. 39371/20, Communicated Case of 13 November 2020, relinquished to the Grand Chamber on 29 June 2022. All ECtHR judgments and decisions are available at http://hudoc.echr.coe.int/.

8 ECtHR, *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, Appl. no. 53600/20, Communicated Case of 17 March 2021, relinquished to the Grand Chamber on 26 April 2022.

9 ECtHR, *Greenpeace Nordic and Others v. Norway*, Appl. no. 34068/21, Communicated Case of 16 December 2021.

10 ECtHR, *Carême v. France*, Appl. no. 7189/21, not yet communicated, relinquished to the Grand Chamber on 31 May 2022.

11 ECtHR, *Mex M. v. Austria*, application filed on 25 March 2021, not yet communicated, available at www.michaelakroemer.com/wp-content/uploads/2021/04/rechtsanwaeltin-michaela-kroemer-klimaklage-petition.pdf.

12 These are the *KlimaSeniorinnen*, *supra* note 8, *Duarte Agostinho*, *supra* note 7, and *Carême*, *supra* note 10, applications.

responsibility; the balancing of environmental and economic interests; and the limits of the subsidiarity principle and the state margin of appreciation. These cases are, in other words, relevant for the ECHR system as a whole.

At the same time, there are numerous hurdles to this type of litigation, including the absence of a right to a healthy environment from the ECHR,[13] the fact that the Court precludes *actiones populares* in the general interest and concerns about the appropriateness and effectiveness of litigating climate change through human rights.[14] In fact, the hurdles facing climate cases in Strasbourg are so numerous and complex that the present contribution cannot cover them all in detail. As Benoit Mayer has found, these cases question territorially focused accounts of jurisdiction, anti-redistributive positions, the political question and separation of powers doctrines, the idea of rights as individual 'trumps' over the public interest and arguments about the rights impacts of climate action.[15] Ultimately, Mayer finds that climate cases risk 'betraying the text, and the object and purpose, of human rights treaties, and using them as a Trojan horse at the service of extraneous objectives'.[16]

These concerns, it is argued here, stem from a static understanding of human rights law. With respect to the ECHR, a static perspective lacks due regard for the convention's nature as a living instrument. In fact, this convention is capable of tackling unforeseen situations, considering interests that are both individual and general and striking a fair balance between the various interests at stake in a given case. Admittedly, there is no guarantee that even 'successful' human rights litigation will bring about a transition to net zero emissions.[17] But, and to counter Mayer, that is not the issue here: there is no guarantee, in any context, that human rights law will conclusively abolish human rights violations in practice, and this is accordingly not a precondition of its application.[18] Although remedial considerations, in particular, require exploration in this context,[19] what is essentially at stake here is whether the current progression of climate change violates human rights law. Emphasizing the difficulties of litigating climate claims has a place, but many of the hurdles facing these cases can be overcome.[20] And, importantly, they should not be overestimated to pre-empt consideration

[13] Although a renewed attempt to recognize such a right is currently ongoing (see PACE Res. 2396 (2021), 29 September 2021). On past efforts in this regard, see Pedersen, 'The European Court of Human Rights and International Environmental Law', in J.H. Knox and R. Pejan (eds), *The Human Right to a Healthy Environment* (2018) 86.

[14] Mayer, 'Climate Change Mitigation as an Obligation under Human Rights Treaties?', 115(3) *American Journal of International Law* (2021) 409.

[15] *Ibid.* On rights as trumps, see *ibid.*, at 423, who cites R. Dworkin, *Taking Rights Seriously* (1997), at 6.

[16] Mayer, *supra* note 12.

[17] See the discussion in Rajamani, 'Human Rights in the Climate Change Regime', in Knox and Pejan, *supra* note 11, 236.

[18] As discussed in N. Mavronicola, *Torture, Inhumanity and Degradation under Article 3 of the ECHR: Absolute Rights and Absolute Wrongs* (2021).

[19] Keller, Heri and Piskóty, 'Something Ventured, Nothing Gained? – Remedies before the ECtHR and Their Potential for Climate Change Cases', 22(1) *Human Rights Law Review* (*HRLR*) (2022).

[20] For example, Helen Keller and Abigail Pershing have recently shown that the supposed hurdles to the admissibility of climate cases, although challenging, can be overcome. Keller and Pershing, 'Climate Change in Court: Overcoming Procedural Hurdles in Transboundary Environmental Cases', 3(1) *European Convention on Human Rights Law Review* (2022) 23.

of these kinds of cases. In particular, extraneous considerations should not be allowed to overwhelm rights: the meaning and role of human rights is undermined if their application ends where they begin to trouble the *status quo*.[21]

Overall, and to reconcile these perspectives, it is possible to argue that climate change-related impacts are atypical when compared to other types of human rights harms and that not every aspect of climate justice can be addressed through human rights litigation. Much of the harm caused by climate change lies in the future, will be of a continuing and ever-worsening nature and will be nigh on impossible to remedy *ex post*. Even though these harms are perhaps unique in terms of their scale and structural nature, they are of urgent relevance to the work of human rights bodies like the ECtHR. This is so because they threaten the enjoyment of many of the rights protected by that institution and others like it. As a result, this analysis accepts that 'the question is no longer whether, but how, human rights courts should address the impacts of environmental harms' and, specifically, climate change harms.[22]

Ultimately, climate cases hold the potential for reassessing and transforming various aspects of ECHR rights. Especially in the environmental context, the ECtHR's case law is ripe for such reassessment: it has been critiqued because it is too procedural or supervisory,[23] because it prioritizes economic considerations over environmental ones,[24] because it takes an overly liberal approach that focuses on providing information about risks instead of on risk avoidance[25] and because it is overly individualistic.[26] At the same time, authors have expressed hope about the potential of the ECHR to play a role, and perhaps even a leading one, in contesting current approaches to climate regulation and in formulating a human rights-based case for climate action.[27]

Despite its critics, the ECtHR's environmental case law has proven capable of transformation. For example, in the *Cordella v. Italy* case, which concerned pollution from a steelworks, the Court showed a willingness to modify its interpretation of similar facts over time, evolving its case law to eventually find a violation of the ECHR due to environmental harms.[28] Arguing that such transformation is normatively desirable also in

[21] In this vein, see Theilen, 'The Inflation of Human Rights: A Deconstruction', 34(4) *Leiden Journal of International Law* (*LJIL*) (2021) 1, at 4.

[22] UN Special Rapporteurs David R. Boyd and Marcos A. Orellana, third party intervention in the *Duarte Agostinho* case (4 May 2021), para. 17, available at https://ln.sync.com/dl/383819540/pwjktn7x-uy5x8334-sib42xf2-pk8wkc9b/view/doc/5917189570010.

[23] Pedersen, *supra* note 11.

[24] Kobylarz, 'The European Court of Human Rights: An Underrated Forum for Environmental Litigation', in H. T. Anker and B.E. Olsen (eds), *Sustainable Management of Natural Resources: Legal Instruments and Approaches* (2018) 99.

[25] Hilson, 'Risk and the European Convention on Human Rights: Towards a New Approach', 11 *Cambridge Yearbook of European Legal Studies* (2009) 353.

[26] Francioni, 'International Human Rights in an Environmental Horizon', 21 *European Journal of International Law* (*EJIL*) (2010) 41.

[27] Braig and Panov, 'The Doctrine of Positive Obligations as a Starting Point for Climate Litigation in Strasbourg: The European Court of Human Rights as a Hilfssheriff in Combating Climate Change?', 35 *Journal of Environmental Law and Litigation* (2020) 261; Hänni, 'Menschenrechtsverletzungen infolge Klimawandels – Voraussetzungen und Herausforderungen: Dargestellt am Beispiel der EMRK', 46 *Europäische Grundrechte Zeitschrift* (2019) 1; Kobylarz, *supra* note 22; Pedersen, *supra* note 11.

[28] ECtHR, *Cordella and Others v. Italy*, Appl. nos 54414/13 and 54264/15, Judgment of 24 January 2019.

the climate change context, this article probes the limits of states' existing obligations to protect against impending harms and applies this case law to the climate context. It does so by scouting two interlinked topics that could be key in bringing climate cases before the Court. The first is the environmental case law revolving around the assessment of risks to life and limb under Articles 2 and 8 of the ECHR and the positive obligations of the state in this regard. The second is an issue that is rarely discussed in the environmental context – namely, the protection offered by Article 3 of the ECHR (the prohibition of torture and inhuman and degrading treatment and punishment). Understanding the potential of Article 3 in this context means discussing the Court's response to risks of ill-treatment, its appreciation of relevant harms, such as the psychological harms caused by so-called 'climate anxiety', and its treatment of human dignity and of vulnerability.

2 Risks of Harm and Positive Climate Obligations under the ECHR

The progression of anthropogenic climate change brings with it, along with damage to plant and animal species, changing weather patterns, rising sea levels and impacts on a host of other crucial natural and environmental phenomena, a number of acute and well-described risks of harm to human life and limb.[29] While some types of climate change-related harms have already begun to manifest, the brunt of these harms lies ahead and will take place when emissions reduction targets and temperature goals (that is, the Paris Agreement's target to limit warming to 'well below 2 degrees Celsius above pre-industrial levels and to pursue efforts to limit the temperature increase even further to 1.5 degrees Celsius'[30]) are not reached in time.[31] The risk of these harms is acute: current projections indicate that both the 1.5-degree and the two-degree temperature goals will be missed,[32] with the former target likely to be surpassed in a decade's time.[33] In their third-party intervention in the *KlimaSeniorinnen* case, two leading climate experts warned the Court that current levels of warming, around 1.1 degrees Celsius, already represent a danger for vulnerable humans, animals, plants and natural systems, with that danger sure to grow as warming progresses.[34] Emissions that take place today, as well as historical emissions,

[29] Intergovernmental Panel on Climate Change (IPCC), Climate Change 2014: Synthesis Report (2014); IPCC, Global Warming of 1.5°C (2019); IPCC, Climate Change 2021: The Physical Science Basis (2021).

[30] Paris Agreement on Climate Change, UN Doc. FCCC/CP/2015/L.9/Rev.1, 12 December 2015.

[31] IPCC, Global Warming of 1.5°C, *supra* note 27; United Nations Environment Programme (UNEP), Emissions Gap Report 2020 (2020).

[32] UNEP, *supra* note 29, at xxi.

[33] IPCC, Climate Change 2021: The Physical Science Basis (2021).

[34] S.I. Seneviratne and A. Fischlin, third party intervention in *KlimaSeniorinnen v. Switzerland*, 22 September 2021, at 2, available https://www.klimaseniorinnen.ch/wp-content/uploads/2021/11/2021.10.11-Intervention-Seneviratne_and_Fischlin-Corrected_registered_letter_from_22.Sep_.2021-signed.pdf.

will contribute to these harms, which will grow progressively and unstoppably more severe if certain 'tipping points' are passed.[35]

With these considerations as its backdrop, the present analysis dives into the still largely uncharted waters of the ECtHR's ability to tackle climate change-related human rights harms. Providing redress for these harms, especially as concerns the risk of future impacts, is particularly a task for the positive obligations under various convention rights. These positive obligations provide protection against state negligence, and they mandate appropriate measures to secure the protection of rights, including against third-party harms.[36] The following will explore the potential of the positive obligations under the ECHR for capturing existing risks of harm, including especially in the environmental case law, by sketching the Court's understanding of causation, attribution and knowledge of risk. It will take this further by interrogating the ECHR's potential to capture future risks, including by looking at the degree of precaution required from states. Lastly, it will ask whether adequate regard for the merits of climate cases – that is, emphasizing the severity of the (risks of) harm at stake – can help to overcome the procedural hurdles facing these cases.

A *Positive Obligations in the ECtHR's (Environmental) Case Law*

1 *Applying Positive Obligations: Attribution, Causation and Knowledge*

Under Articles 2, 3 and 8 of the ECHR, states have well-established positive obligations to protect against harms to life and limb.[37] This requires protection against convention violations of which the state 'knew or ought to have known', i.e. risks of which it had actual or putative knowledge.[38] These obligations raise complex and intertwined questions regarding attribution, causation and imputing state knowledge, which are made particularly acute by the Court's refusal to 'develop a general theory of the positive obligations which may flow from the Convention'.[39]

Both attribution and causation concern the link between a given act and the state. Attribution (or 'imputation') of conduct to the state – which is not always properly

[35] P.D.L. Ritchie *et al.*, 'Overshooting Tipping Point Thresholds in a Changing Climate', 592 *Nature* (2021) 517.

[36] ECtHR, *López Ostra v. Spain*, Appl. no. 16798/90, Judgment of 9 December 1994, para. 51. For more information, see Morrow, 'The ECHR, Environment-Based Human Rights Claims and the Search for Standards', in S.J. Turner *et al.* (eds), *Environmental Rights: The Development of Standards* (2019) 41, at 45ff.

[37] Overall, see Braig and Panov, *supra* note 25. On Article 2, see ECtHR, *Öneryıldız v. Turkey*, Appl. no. 48939/99, Judgment of 30 November 2004. On Article 3, see ECtHR, *O'Keeffe v. Ireland*, Appl. no. 35810/09, Judgment of 28 January 2014. On Article 8, see ECtHR, *Roche v. United Kingdom*, Appl. no. 32555/96, Judgment of 19 October 2005, para. 157.

[38] For an in-depth analysis, see Stoyanova, 'Fault, Knowledge and Risk within the Framework of Positive Obligations under the European Convention on Human Rights', 33 *LJIL* (2020) 601, 604.

[39] Stoyanova, 'Causation between State Omission and Harm within the Framework of Positive Obligations under the European Convention on Human Rights', 18(2) *HRLR* (2018) 309, at 310, citing ECtHR, *Plattform Ärzte für das Leben v. Austria*, Appl. no. 10126/82, Judgment of 21 June 1988, para. 31.

distinguished from matters of jurisdiction[40] – concerns the question of whether the state is responsible for a given act or omission – that is, whether that conduct is 'regarded in law as that of the State'.[41] Under general international law, the nature of this exercise – and the extent of its interlinkage with matters of causation – has been subject to intense debate.[42] While the ECtHR regularly draws on its international law context, including the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts, it remains 'mindful of the Convention's special character as a human rights treaty'.[43] The resulting understanding of attribution is not necessarily well developed, and the Court, for example, has been reluctant to consider the possibility of shared responsibility between multiple states.[44]

The question of causation, in turn, concerns the link between a wrongful act attributable to the state and an injury suffered.[45] Although the relationship between attribution and causation is debated,[46] as Ilias Plakokefalos has noted, 'attribution refers to conduct while causation refers to the result of this conduct'.[47] Under general international law, causation accordingly plays a particularly important role in determining the obligations of reparation.[48] For present purposes, however, it is especially relevant

[40] For an overview of the different positions, see Rooney, 'The Relationship between Jurisdiction and Attribution after *Jaloud v. Netherlands*', 62 *Netherlands International Law Review* (*NILR*) (2015) 407.

[41] Milanovic, 'Special Rules of Attribution of Conduct in International Law', 96 *International Law Studies* (2020) 295, at 296. For an example from the Court, see ECtHR, *Carter v. Russia*, Appl. no. 20914/07, Judgment of 21 September 2021, paras 162–169.

[42] D'Aspremont, 'The Articles on the Responsibility of International Organizations: Magnifying the Fissures in the Law of International Responsibility', 9(1) *International Organizations Law Review* (2012) 15, at 21; J. Crawford, *The International Law Commission's Articles on State Responsibility, Introduction, Text and Commentaries* (2002), at 91; Fry, 'Attribution of Responsibility', in A. Nollkaemper and I. Plakokefalos (eds), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art: Shared Responsibility in International Law* (2014) 98.

[43] International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts, UN Doc A/56/83, 3 August 2001; ECtHR, *Banković and Others v. Belgium and Others*, Appl. no. 52207/99, Judgment of 12 December 2001, para. 57; see also Feria-Tinta, 'Climate Change Litigation in the European Court of Human Rights: Causation, Imminence and other Key Underlying Notions', 1(3) *Europe of Rights and Liberties* (2021) 52, at 62, citing ECtHR, *Kotov v. Russia*, Appl. no. 54522/00, Judgment of 3 April 2012, paras 30–32; ECtHR, *Al Nashiri v. Poland*, Appl. no. 28761/11, Judgment of 24 July 2014, para. 207.

[44] Besson, 'Concurrent Responsibilities under the European Convention on Human Rights', in A. van Aaken and I. Motoc, *The European Convention on Human Rights and General International Law* (2018) 155; see also den Heijer, 'Shared Responsibility before the European Court of Human Rights', 60(3) *NILR* (2013) 411 (discussing cases such as ECtHR, *Ilaşcu and Others v. Moldova and Russia*, Appl. no. 48787/99, Judgment of 8 July 2004, paras 352, 385, 393; ECtHR, *Hussein v. Albania and Twenty Other States*, Appl. no. 23276/04, Decision of 14 March 2006).

[45] Lanovoy, 'Causation in the Law of State Responsibility', 90 *British Yearbook of International Law* (2022) 1, at 3.

[46] Stoyanova, *supra* note 37, at 317 (referring to ECtHR, *Vilnes and Others v. Norway*, Appl. nos. 52806/09 and 22703/10, Judgment of 5 December 2013, paras 225 and 229); see also ECtHR, *Andreou v. Turkey*, Appl. no. 45653/99, Decision of 3 June 2008 (where 'cause' was relevant for the determination of territorial jurisdiction).

[47] Plakokefalos, 'Causation in the Law of State Responsibility and the Problem of Overdetermination: In Search of Clarity', 26(2) *EJIL* (2015) 471, n. 77.

[48] Lanovoy, *supra* note 43.

in the context of omissions, where it concerns the link between the response to an unreasonable risk and a human rights impact.[49] Because the ECtHR has not formulated a clear standard for assessing causation, and its approach here is flexible,[50] it is difficult to define its understanding of this concept. What is clear from the case law is that the Court does not require applicants to show that an impact on their rights would not have happened 'but for' an omission by the state; it suffices, here, that the state failed to adopt 'reasonably available measures which could have had a real prospect of altering the outcome or mitigating the harm'.[51] In doing so, the Court regularly intermingles causation with the foreseeability of a given harm.[52] As a result, foreseeability – and, more specifically, the imputation of knowledge of a risk of harm to the state – plays a key role in the context of states' positive obligations.

2 Positive Obligations in the Environmental Context

Because foreseeability, along with the ability to influence harms, is used to delimit causation in the ECtHR's case law,[53] states can have positive obligations concerning environmental disasters that are in no way caused by state action.[54] In imputing knowledge of a risk of environmental harm, the Court relies on the information available to the authorities, including government studies and scientific evidence.[55] Obtaining the relevant information – for example, by commissioning scientific studies and surveys – is part of the state's obligations in relationship to dangerous activities.[56]

Within this context, positive obligations under the right to life in Article 2 of the ECHR have gained particular relevance. States must take appropriate steps to effectively safeguard this right in the context of any activity in which the authorities know or should know about a 'real and immediate risk' to life.[57] As the Grand Chamber noted in *Öneryıldız v. Turkey*, this applies for example to the unintentional loss of life

[49] See, among others, Turton, 'Causation and Risk in Negligence and Human Rights Law', 79(1) *Cambridge Law Journal* (2020) 148.

[50] Stoyanova, 'Common Law Tort of Negligence as a Tool for Deconstructing Positive Obligations under the European Convention on Human Rights', 24(4) *International Journal of Human Rights* (2020) 648.

[51] *O'Keeffe*, *supra* note 35, para. 149.

[52] Former ECtHR judge Benedetto Conforti, cited in Conforti, 'Exploring the Strasbourg Case-Law: Reflections on State Responsibility for the Breach of Positive Obligations', in M. Fitzmaurice and D. Sarooshi (eds), *Issues of State Responsibility before International Judicial Institutions* (2004) 129, at 132, as discussed in Stoyanova, *supra* note 37, at 314. Under Article 2, this takes the form of the '*Osman* test' requiring 'that the authorities knew or ought to have known at the relevant time of the existence of a real and immediate risk to the life of an identified individual 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'. ECtHR, *Osman v. United Kingdom*, Appl. no. 23452/94, Judgment of 28 October 1998, para. 116.

[53] Stoyanova, *supra* note 48, at 648, referring, among others, to *O'Keeffe*, *supra* note 35, para. 149.

[54] Feria-Tinta, *supra* note 41 (however arguing that attribution, and not causation, is the definitive test in climate cases before the Court).

[55] ECtHR, *Budayeva and Others v. Russia*, Appl. nos 15339/02, 11673/02, 15343/02, Judgment of 20 March 2008, para. 148.

[56] ECtHR, *Tătar v. Romania*, Appl. no. 67021/01, Judgment of 27 January 2009, para. 88.

[57] Building on the '*Osman* test', see note 50 above.

caused by dangerous industrial activities, and requires 'preventative operational measures' to protect and inform at-risk individuals.[58] Where there is a foreseeable risk to life, the authorities also have a positive obligation to protect against its manifestation by establishing a legislative and administrative framework designed to provide effective deterrence. This means that states can be held responsible for negligence in their response to risks. For example, in *Budayeva and Others v. Russia*, the Court held that the respondent state had violated the right to life when it failed to implement land-planning and emergency relief policies in a hazardous area despite the 'foreseeable exposure of residents … to mortal risk' from mudslides.[59]

In addition, failures to adequately protect people from, and inform them about, harms caused by environmental pollution and natural disasters can violate the right to respect for private and family life under Article 8 of the ECHR.[60] Past violations of this right have stemmed from protection failures regarding industrial pollution and toxic industrial waste,[61] excessive noise pollution,[62] badly managed garbage[63] and water contamination.[64] This case law covers the issue of mental well-being in addition to physical harms and has condensed to a point that the ECtHR has implied the existence of a right to a clean and quiet environment under the convention.[65] Where individual applicants are 'directly and seriously affected by noise or other pollution', especially severe environmental pollution, the resulting impacts on their well-being and homes can violate Article 8, even absent serious health impacts.[66] However, the threshold for finding that the mental or psychological impacts of environmental degradation have violated Article 8 in this context is high. Thus, the Court requires a direct effect on the applicant, which must reach a minimum level of severity derived from the case law under Article 3 of the ECHR. This minimum threshold is relative: it requires taking '[t]he general context of the environment' into account, but it does not cover harms that are 'negligible in comparison to the environmental hazards inherent in life'.[67]

[58] *Öneryıldız, supra* note 35.

[59] *Budayeva, supra* note 53, para. 158.

[60] ECtHR, *Brincat and Others v. Malta*, Appl. nos 60908/11, 62110/11, 62129/11, Judgment of 24 July 2014.

[61] *López Ostra, supra* note 34; ECtHR, *Taşkın and Others v. Turkey*, Appl. no. 46117/99, Judgment of 10 November 2004; ECtHR, *Giacomelli v. Italy*, Appl. no. 59909/00, Judgment of 2 November 2006; ECtHR, *Fadeyeva v. Russia*, Appl. no. 55723/00, Judgment of 9 June 2005; *Tătar, supra* note 54; *Cordella supra* note 26.

[62] ECtHR, *Mileva and Others v. Bulgaria*, Appl. nos. 43449/02 and 21475/04, Judgment of 25 November 2010; ECtHR, *Yevgeniy Dmitriyev v. Russia*, Appl. no. 17840/06, Judgment of 1 December 2020.

[63] ECtHR, *Brânduse v. Romania*, Appl. no. 6586/03, Judgment of 7 April 2009; ECtHR, *Di Sarno and Others v. Italy*, Appl. no. 30765/08, Judgment of 10 January 2012.

[64] ECtHR, *Dzemyuk v. Ukraine*, Appl. no. 42488/02, Judgment of 4 September 2014.

[65] ECtHR, *Fägerskiöld v. Sweden*, Appl. no. 37664/04, Decision of 26 February 2008, para. 1, referring to ECtHR, *Hatton and Others v. United Kingdom*, Appl. no. 36022/97, Judgment of 8 July 2003, para. 96; *Taşkın, supra* note 59, para. 113.

[66] *Hatton, supra* note 65, para. 96.

[67] *Fägerskiöld, supra* note 65, para. 1.

3 Positive Obligations and Climate Change?

The ECtHR's existing positive obligations case law, especially its environmental case law under Articles 2 and 8 of the ECHR,[68] means that the convention has the potential to capture risks of harms, including in the context of climate change. Still, the existing case law has its limitations for capturing climate change-related impacts, not least because it largely concerns retrospection about harm or loss of life that has to some extent already been realized by the time a case is considered in Strasbourg. Climate change does not exactly fit this model. Of course, it would be a gross oversight to ignore the deaths and harms due to climate change that are already taking place today, including in the Council of Europe's member states. In Portugal, for example, it has been shown that more than 1 per cent of all deaths in the country are due to extreme heat waves, which are being caused, or at least exacerbated, by climate change.[69] Others lose their lives in climate change-related wildfires, such as those at issue in *Duarte Agostinho*. If an additional half degree of global warming – that is, warming of two degrees Celsius instead of 1.5 degrees Celsius – would expose almost half a billion more people globally to heat waves, then it is clear that there are well-defined risks to human life at play here and also clear targets to be met if those risks are to be avoided.[70]

Once harms have occurred, if it can be demonstrated that states were not only aware of the risk but also had even set themselves preventative targets, then it is not a particularly large stretch under existing environmental case law to find that the failure to adhere to these targets is also a failure to respect positive protective obligations under the ECHR. In other words, it can be argued that, for example, the failure to adhere to Paris Agreement targets, and to set and fulfil nationally determined contributions that reduce emissions sufficiently to reach those targets,[71] means knowingly ignoring the scientifically proven risk of harm posed by climate change. The requirements of putative knowledge of harm and of clear scientific evidence that emissions reductions are necessary to avoid climate catastrophe should be foregrounded here to avoid creating the impression that states are free of climate obligations if they refuse to set reduction targets. In addition, it might be possible to argue that states have failed to take sufficient adaptation measures – that is, measures aimed at adjusting to the effects of climate change.[72] Still, the models available under existing case law have been applied largely retrospectively. These types of arguments are likely to be part of any

[68] These are the key provisions of relevance in this context, but certainly not the only ones, as illustrated in the discussion on Article 3 later in this article.

[69] Merte, 'Estimating Heat Wave-related Mortality in Europe Using Singular Spectrum Analysis', 142 *Climatic Change* (2017) 321.

[70] IPCC, Global Warming of 1.5°C, *supra* note 27, at 190.

[71] United Nations Framework Convention on Climate Change, Nationally Determined Contributions under the Paris Agreement: Synthesis Report by the Secretariat, Doc. FCCC/PA/CMA/2021/2, 26 February 2021.

[72] See, e.g., European Commission, Forging a Climate-resilient Europe: The New EU Strategy on Adaptation to Climate Change, Doc. COM/2021/82 final, 24 February 2021.

cogent and holistic effort to stave off the grave human rights impacts linked to climate change. But what of all the harms related to climate change that have not yet materialized? This situation, which still concerns the majority of climate change-related human rights impacts, is discussed in the following section.

B *Prospective Climate Harms: Positive Obligations, Risk and Precaution*

1 Capturing Present and Future Risks

Addressing present harms caused by climate change is certainly important. But waiting to take climate action until harms materialize means losing precious time and permitting carbon emissions to overshoot 'tipping points' in the climate system, to the eventual and irreversible detriment of the enjoyment of human rights.[73] Focusing only on present harms may also mean minimizing the scale of the climate problem or legitimizing further delays in taking concerted mitigation and adaptation measures. In *KlimaSeniorinnen*, for example, the domestic courts found that there was sufficient time for the political process to address climate change and wrote the application off as an *actio popularis*.[74] More than a question of the separation of powers, wholesale deference to the political process regardless of its outcome represents a failure to address the full scale of climate change as a systemic and exponentially worsening environmental and human rights catastrophe.

In this regard, and in the interests of capturing ongoing or impending harms, it should be emphasized that environmental harms other than, and leading up to, losses of life are relevant under the ECHR, along with losses of life themselves. In the ECtHR's environmental case law, failures to adequately protect people from, and inform them about, risks to life and health that have not (yet) caused a loss of life can potentially be categorized as violations of the right to respect for private and family life under Article 8 of the ECHR.[75] On substance, applicants in climate cases could argue that they have suffered harms because the state failed to take adequate climate mitigation or adaptation measures. But what of cases where applicants have not yet suffered harms that are demonstrably linked to climate change? Here, applicants may struggle to make an individualized claim and prove their victim status. In addition, the Court's subsidiary role and the qualified nature of Article 8 mean that the concepts of fair balance and the margin of appreciation weigh heavily, that the Court's assessment is often procedural in nature and that it is hesitant to assess the effectiveness of domestic measures, while generally requiring a serious and direct impact on applicants.[76]

[73] Ritchie *et al.*, *supra* note 33.

[74] Swiss Federal Supreme Court, *Verein KlimaSeniorinnen Schweiz v. Federal Department of the Environment, Transport, Energy and Communications*, Judgment 1C_37/2019 of 5 May 2020, paras 5.3, 5.5.

[75] *Brincat*, *supra* note 58.

[76] Pedersen, *supra* note 11, at 90; Morrow, *supra* note 34, at 46; *Fägerskiöld*, *supra* note 63; ECtHR, *Brânduşe v. Romania*, Appl. no. 6586/03, Judgment of 7 April 2009.

The case of *Hardy and Maile v. United Kingdom* is illustrative here. The applicants in this case invoked their Article 2 and 8 rights under the ECHR, arguing, in particular, that the Court should apply Article 8 'in a precautionary way' to counter the domestic authorities' allegedly faulty risk assessment concerning two liquefied natural gas terminals at a local harbour.[77] The Court's response was deferential to the domestic legislative and regulatory framework, finding that it was coherent and comprehensive and that extensive studies had been conducted concerning the terminals. As a result, instead of considering the precautionary measures that the state might have been required to take to avoid the risks involved in the terminals, which would have meant applying some iteration of a due diligence test,[78] it only applied a test of manifest error, finding that the domestic authorities had struck a fair balance between the competing interests at stake.[79] While the Court's willingness to apply this type of approach may depend on the perceived quality of domestic frameworks,[80] this reasoning requires transformation if the Court is to meaningfully assess environmental cases and climate cases among them.

Still, the ECtHR's case law is not necessarily incapable of capturing risks that are not (yet) imminent and individualized. As Vladislava Stoyanova has noted, while positive obligations to provide individualized protection are triggered only where states have actual or imputed knowledge of 'real and immediate risk to the life of an identified individual or individuals', the state's obligation to provide 'general protection to society' applies constantly.[81] Under the latter, applicants are not required to show that they have faced an individualized risk in order to establish a failure to comply with positive obligations. Instead, this type of applicant becomes a 'representative victim' in relationship to a general problem requiring state action, in the form of an obligation of conduct and not of result.[82] This approach, which reconciles individual harms with their systemic origins, stems from key cases in the Court's environmental case law, such as *Öneryıldız* and *Budayeva*,[83] and its relevance to the climate change context was underscored by the Dutch domestic courts in the *Urgenda* case.[84] This line of case law places the state under a positive obligation to take appropriate regulatory

[77] ECtHR, *Hardy and Maile v. United Kingdom*, Appl. no. 31965/07, Judgment of 14 February 2012, para. 186.

[78] Malaihollo, 'Due Diligence in International Environmental Law and International Human Rights Law', 68 *NILR* (2021) 121, at 123.

[79] *Hardy and Maile*, *supra* note 75, para. 231.

[80] Çalı 'Coping with Crisis: Whither the Variable Geometry in the Jurisprudence of the European Court of Human Rights', 35 *Wisconsin International Law Journal* (2018) 237.

[81] Stoyanova, *supra* note 36, at 605–606, referring to ECtHR, *Mastromatteo v. Italy*, Appl. no. 37703/97, Judgment of 24 October 2002, paras 69–73; ECtHR, *Cevrioğlu v. Turkey*, Appl. no. 69546/12, Judgment of 4 October 2016, para. 50; see also ECtHR, *Tagayeva and Others v. Russia*, Appl. nos 26562/07, 14755/08, 49339/08, Judgment of 13 April 2017, para. 482 (on Article 2); ECtHR, *Georgel and Georgeta Stoicescu v. Romania*, Appl. no. 9718/03, Judgment of 26 July 2011, para. 59 (on Article 8 and the obligation of means that applies to issues in the general interest in the form of public health issues).

[82] *Georgel and Georgeta Stoicescu*, *supra* note 79, para. 59 (using the term 'obligation of means'); Stoyanova, *supra* note 36, at 606; with references to case law including *Mastromatteo*, *supra* note 79.

[83] *Öneryıldız*, *supra* note 35; *Budayeva*, *supra* note 53.

[84] *Urgenda*, *supra* note 3, n. 14, 20, 24 and accompanying text.

measures 'geared to the special features of the activity in question, with particular regard to the level of the potential risk to human lives involved'.[85] As with any positive obligation, the Court emphasizes a standard of reasonableness, meaning that the convention may not 'impose an excessive burden on the authorities'.[86] However, this need not preclude the Court from applying positive obligations to climate protection. Here it can be argued that the state knew or ought to have known of the dangers of climate change and failed to adequately regulate the matter or provide effective protection for those endangered by it.[87]

2 Applying the Principle of Precaution and the Example of Cordella

Tying into the reality and immediacy of the risk at stake in climate cases, the Council of Europe's commissioner on human rights has recently argued that 'the increasingly manifest negative impact of climate change on human rights and the gravity of this impact place a special onus on states to take concrete preventive measures … rather than follow a piecemeal approach that merely reacts to individual complaints'.[88] The resulting holistic approach could take different forms. To the commissioner, the solution to the ECHR's environmental lacunae lies in recognizing the right to a healthy environment. To date, the Court has not taken this approach; instead, it has developed its environmental jurisprudence under existing ECHR rights, thereby 'greening' the convention without explicitly[89] acknowledging the existence of a separate right to a healthy environment. This 'greening' falls short of full recognition of a distinct right to a healthy environment, particularly because it fails to transcend the ECHR's individualistic, anthropocentric positioning and recognize the rights of nature as such.[90] The argument that the Court has recognized the right to a healthy environment 'all but in name' is therefore somewhat precipitated.[91]

Still, the Court's case law has laid the groundwork for achieving environmental protection through the ECHR; for example, by recognizing a due diligence obligation, including an obligation to consider the environmental law principles of precaution and prevention.[92] The Court recognized the requirement of due diligence in *Cordella v. Italy*,[93] having previously noted the principle of precaution in *Tătar v. Romania*.[94] In *Cordella*, which was brought by 180 residents of the Taranto area in southern Italy,

[85] *Cevrioğlu*, *supra* note 79, para. 51.
[86] *Ibid.*, para. 52. On the standard of reasonableness, see Stoyanova, *supra* note 37, at 338–339.
[87] *Brincat*, *supra* note 58, para. 111.
[88] Council of Europe Commissioner for Human Rights, Third Party Intervention in *Duarte Agostinho*, 5 May 2021, para. 22, available at https://bit.ly/3zXesjc.
[89] Although it has implied its existence: see note 63 above.
[90] For more on the content of the human right to a healthy environment, see, e.g., *Advisory Opinion OC-23/17*, *supra* note 1.
[91] Pedersen, *supra* note 11, at 86.
[92] Boyd and Orellana, *supra* note 20, para. 29 (with references).
[93] *Cordella*, *supra* note 26, para. 161.
[94] *Tătar*, *supra* note 54.

the Court used the precautionary principle to find a violation of Article 8 due to the health hazard posed by a steelworks. The Court held that, while it was not its role to determine exactly what the Italian state should have done to reduce pollution levels, it had to assess whether the domestic authorities displayed due diligence and took into account the competing interests at stake.[95] It also held that states must provide precise and detailed evidence to justify situations in which certain individuals must bear heavy burdens in the name of the societal or overall interest.[96]

Cordella is interesting especially when compared to an earlier case, *Smaltini v. Italy*.[97] That case concerned pollution by the same steelworks in Taranto, the Ilva plant, and was decided in 2015, four years before *Cordella*. The applicant in *Smaltini*, who died of leukaemia during the Strasbourg proceedings, argued that the national authorities had not acknowledged the existence of a causal link between the emissions from the Ilva plant and her illness. In *Smaltini*, the Court found that, in the light of the scientific knowledge available at the time of the facts, the domestic decisions had been duly reasoned, and it found no violation of Article 2 of the ECHR. *Cordella*, however, was framed differently. Instead of an Article 2 case, it was brought under Article 8. Instead of aiming to hold the state responsible for harm by demonstrating a causal link to ill health effects, the applicants denounced the absence of state measures to protect their health and the environment. And, unlike the applicant in *Smaltini*, the *Cordella* applicants succeeded in obtaining recognition of a violation of the ECHR. To some extent, this finding contradicted the Court's claim that it does not matter whether a complaint is framed as a failure by the state to prevent harms or as an interference by the state with the enjoyment of the rights concerned.[98] While *Cordella* admittedly came later, and after a number of additional scientific studies attesting to the harmful effects of the Ilva plant, the negative health impacts of the pollution in question had been widely documented at the time of *Smaltini*.[99] Comparing these two cases highlights the potential for transformation and reinterpretation that characterizes the Court's living instrument approach.

With an eye to climate litigation, two additional aspects of *Cordella* are worth noting. First, the Court pointed out that the Italian authorities intervened to keep the Ilva plant open and productive despite environmental studies indicating its links to pollution and increased risks of cancers and other pathologies in the region.[100] There was, in other words, an element of state action involved. However, this need not be a critical hurdle in the climate change context. Given that states facilitate and encourage greenhouse gas emissions in various ways, whether through investments in high emissions projects or by dispensing fossil fuel subsidies, it may even nudge the Court towards holding them responsible. Second, it is worth noting that, in *Cordella*, the Court went beyond what was at stake in the case: it found that the pollution in Taranto endangered

[95] *Cordella*, *supra* note 26, para. 161.
[96] *Ibid.*, para. 161.
[97] ECtHR, *Smaltini v. Italy*, Appl. no. 43961/09, Decision of 24 March 2015.
[98] *Cordella*, *supra* note 59, para. 158.
[99] *Ibid.*, paras 15–31.
[100] *Ibid.*, para. 168.

the health not only of the 180 applicants but also of the entire population living in the affected areas.[101] By making this kind of broadly worded finding, the Court adopts a practical perspective to environmental cases, which concern both the individual and the public interest.

If applying this case law hinges on whether the greenhouse gas emissions responsible for climate change can be described as a 'dangerous activity' or a form of 'significant industrial pollution', the diffuse and global but variable (in terms of causation and effects) nature of climate change might present some hurdles. Still, if the ECtHR examines climate change under a *Cordella* approach, it could require states to adopt and implement risk-sensitive regulations to mitigate emissions.[102] This would mean an obligation to adopt and implement a legislative framework capable of evaluating and mitigating the effects of climate change.[103] Such an obligation should be read together with the principles of precaution and prevention, and demands to provide 'practical and effective' protection of rights.[104] States' resulting obligations to safeguard the human rights of those in their jurisdiction – and perhaps those outside it as well – would likely need to include assessment of the environmental impacts of greenhouse gas emissions and the rights to information, participation and justice.[105]

The ECtHR has already provided a first tentative indication that it is willing to go this route, for example through the choice of wording used in the *KlimaSeniorinnen* communication, where it asked the parties whether the respondent state had fulfilled its ECHR obligations when read in light of the precautionary principle and the principle of intergenerational equity.[106] Although the phrasing of the communication does not give much indication about how the Court will evaluate a case, its purpose is to ensure that the Court obtains relevant information, and it accordingly allows for speculation that, within the Court, these principles have been flagged as relevant to the case. Given the vast and compelling scientific evidence documenting the reality and harms of the climate emergency,[107] as well as the existence of international instruments on the matter,[108] states must be considered aware of these harms. Accordingly, it can be argued that the failure to 'implement effective and equitable mitigation plans that will rapidly achieve ambitious emission reduction targets' violates states' positive obligations to protect against the resulting risks to human rights.[109] In short, because unmitigated climate change will have deleterious impacts on human rights, and states are aware of these risks, it is possible to build an argument for positive obligations around climate change.

[101] *Ibid.*, para. 172.
[102] *Ibid.*, para. 160.
[103] Braig and Panov, *supra* note 25, at 278.
[104] *Öneryıldız, supra* note 35, para. 69.
[105] Boyd and Orellana, *supra* note 20, para. 19. The latter obligations are codified e.g. in the Aarhus Convention (1998, 2161 UNTS 447).
[106] *KlimaSeniorinnen*, *supra* note 8, question 2.3.
[107] For example, in the work of the IPCC, cited in note 27 above.
[108] Such as the Paris Agreement.
[109] Boyd and Orellana, *supra* note 20, para. 13.

C *Emphasizing the Severity of Harm to Overcome Procedural Hurdles*

While capturing climate harms under the doctrine of positive obligations certainly seems possible, it is not certain that the ECtHR will in fact do so. The main arguments against climate-related ECHR violations are not substantive ones. Instead, they relate to institutional, remedial, procedural or subsidiarity matters. This means arguing, for example, that the Court is not the appropriate body for making this type of finding, that these cases represent public interest litigation and that the applicants do not fulfil the requisite victim status or standing requirements or that there has been insufficient proof of harm to the individuals concerned. In other words, the main hurdle here is not the substantive question of whether climate change impacts human rights in a way that states are obligated to prevent but, rather, the fact that these cases are difficult to bring, to win and to implement.

There is merit to arguments that individual human rights cases cannot independently resolve the systemic issue of climate change, that human rights bodies are not as well placed as domestic authorities to make the relevant decisions and that these proceedings may divert attention from other efforts. These criticisms are not unique to climate cases: similar arguments could be made for any other issue of societal relevance.[110] However, if these arguments are accepted uncritically, they can potentially exempt any large-scale or divisive issue from the application of human rights standards, suspending the application of human rights law where it is most needed.[111] In addition, because it is the failure of other means of action that has given rise to the human rights catastrophe impending in the climate context, tacit deference to these same means is unlikely to be helpful. Recognition of the human rights issues at stake here may not bring about a transition to net zero on its own, but it may nevertheless contribute to this transition in meaningful ways. Still, there is no guarantee that the five pending climate cases, or any climate case before the ECtHR, will be examined on the merits: like any judicial instance, the Court refuses to examine the substance of cases that do not first meet its procedural requirements.

A notable argument in this regard has recently been made by the Council of Europe's commissioner for human rights, who effectively turned the sequential order of this procedure on its head in her submission to the ECtHR in *Duarte Agostinho*.[112] She argued that, because the human rights harms at stake in climate cases are clear, it is necessary to remove barriers in access to individual justice.[113] This reversal is essentially an argument against formalism, and it underscores the importance of focusing on the merits issues at stake in these cases even in the face of uncertainties concerning admissibility. The commissioner focused on the severity of the harms concerned to argue for procedural flexibility and a relaxing of admissibility criteria (or, at least, a

[110] In this vein, see ECtHR, *Andrejeva v. Latvia*, Appl. no. 55707/00, Judgment of 18 February 2009, para. 83.

[111] As argued in Winter, '*Armando Carvalho and Others v. EU*: Invoking Human Rights and the Paris Agreement for Better Climate Protection Legislation', 9(1) *Transnational Environmental Law* (2020) 137, at 158.

[112] *Duarte Agostinho*, *supra* note 7.

[113] Council of Europe Commissioner for Human Rights, *supra* note 86, para. 37.

'practical and effective' approach to them). And this argument certainly holds potential: the Court has regularly displayed such flexibility in the past, often by referring to the particular vulnerability of applicants.[114]

This focus on the substantive merit of climate cases not only serves to counter admissibility hurdles. How the ECtHR engages with the merits of these cases matters as well. For example, if the Court – like the domestic instances in *KlimaSeniorinnen* – were to consider that there is still sufficient time for states to act, and refer applicants to the exercise of their political rights, this could further delay climate action. This outcome would be a particularly bitter pill for minor applicants to swallow, as they do not enjoy political rights. And even if the Court does engage with the claims made in climate cases, a violation judgment might be averted or softened by emphasizing subsidiarity and the state margin of appreciation in choosing the appropriate measures to comply with ECHR obligations.

This situation ties into the tendency to proceduralize cases before the ECtHR – that is, to focus on the quality – or, less charitably put, the mere presence – of domestic decision-making and assessment instead of tackling the harms at stake head on.[115] The *Hardy and Maile* case is one example of such proceduralization, which involves deference to domestic decision-making processes and a focus on balancing and the margin of appreciation.[116] In this regard, the Court has a tendency to frame environmental cases, especially those brought under Article 8, as being about the balancing of competing interests.[117] While climate action can be framed as being both in the individual and the public interest,[118] a number of other interests can be seen as competing with climate mitigation measures. These range from development efforts and the eradication of poverty, to the rights of those affected by clean energy projects, to the continuing profits made by corporations extracting and trading fossil fuels, among others.

It should be noted here that, according to the ECtHR itself, financial interests – and perhaps even ownership rights – should not have priority over the public interest in environmental protection.[119] In addition, the Court has recently refused to accept arguments about gentrification and attracting investment as legitimate interests in human rights terms, thereby indicating a decreasing willingness to balance the interests of capital against the enjoyment of human rights.[120] At the same time, unraveling the interests at stake here means pushing back against global extractive capitalism and enduring colonial legacies. Proceduralism may seem like a useful method for dealing with these cases while respecting the Court's subsidiarity and protecting it from backlash. Convincing the Court to scrutinize these cases more strictly is one of the challenges of bringing climate litigation before it. In this regard, appreciating the

[114] As discussed below in the section on vulnerability.
[115] Çalı, *supra* note 78.
[116] *Hardy and Maile*, *supra* note 75.
[117] See, e.g., *Hatton*, *supra* note 63.
[118] Boyd and Orellana, *supra* note 20, para. 8.
[119] Braig and Panov, *supra* note 25, at 283, citing, among others, *Fadeyeva*, *supra* note 59, paras 66–70.
[120] ECtHR, *Lăcătuş v. Switzerland*, Appl. no. 14065/15, Judgment of 19 January 2021, para. 113.

severity of the impact of climate change on individual and collective interests – that is, the common good[121] – could help centre the gravity of what is at stake and transcend a low-bar balancing approach.

3 Article 3 of the ECHR and Regard for Climate Vulnerability

Under the *Urgenda* model, climate claims lend themselves to argumentation under Articles 2 and 8 of the ECHR.[122] However, these are not the only provisions of relevance for climate cases under the convention. Other rights have largely been ignored in the context of these discussions, including the prohibition of torture and inhuman and degrading treatment in Article 3 of the ECHR.[123] Article 3 is rarely mentioned by the ECtHR in the environmental context, especially since a complaint in this regard was summarily written off in the *López Ostra* case[124] and disregarded again in *Hatton*.[125] As a result, only a sliver of the Article 3 case law has been directly relevant to the environment so far. This relates to the state's obligation to protect certain categories of people – that is, those under its sole authority – from the effects of toxic emissions, specifically second-hand smoke.[126]

This section sets out an argument for capturing climate change as a form of ill-treatment and considers that Article 3 holds vast untapped promise for climate cases. This assertion is reinforced by the ECtHR's decision to raise this provision *proprio motu* in *Duarte Agostinho*.[127] To explore the potential of Article 3, the following discussion will examine the ways in which the provision responds to risks of harm and how climate harms can be subsumed under its definition of ill-treatment. Parallels can also be drawn here to the rich body of case law under Article 3 on the protection of especially vulnerable groups and individuals against ill-treatment or the risk thereof.

A *Article 3's Ability to Capture Risks of Harm*

The first aspect of relevance here is the possibility of finding an Article 3 violation where applicants are exposed to a risk of harm. These types of findings are possible

[121] Pavoni, 'Public Interest Environmental Litigation and the European Court of Human Rights: No Love at First Sight', in F. Lenzerini and A.F. Vrdoljak (eds), *International Law for Common Goods: Normative Perspectives on Human Rights, Culture and Nature* (2014) 331, at 333.

[122] Referring to the Dutch domestic proceedings in *Urgenda*, *supra* note 3.

[123] Another concerns the disproportionate impacts of climate change on certain groups, which could raise an issue under the prohibition of discrimination in Article 14 of the ECHR. See the argument about the rights of the Sami made in *Greenpeace Nordic*, *supra* note 9.

[124] ECtHR, *López Ostra v. Spain*, Appl. no. 16798/90, Judgment of 9 December 1994, paras 59–60. Since then, see ECtHR, *Ward v. United Kingdom*, Appl. no. 31888/03, Decision of 9 November 2004, para. 1.

[125] Where the minority questioned the majority's decision to make light of sleep deprivation, considering that this could (albeit under different circumstances) raise an issue under Article 3. *Hatton*, *supra* note 63, para. 13, Joint Dissenting Opinion of Judges Costa, Ress, Türmen, Zupančič and Steiner, as discussed in Hart and Wheeler, 'Night Flights and Strasbourg's Retreat from Environmental Human Rights', 16 *Journal of Environmental Law* (2004) 100, at 135.

[126] ECtHR, *Florea v. Romania*, Appl. no. 37186/03, Judgment of 14 September 2010, paras 60–63.

[127] *Duarte Agostinho*, *supra* note 7.

even when the risk in question remains a future eventuality and has not yet (fully) manifested. In the context of climate change, discussing these future harms should not be understood as a negation of already-occurring harms. Instead, the aim here is to carve out a path for a Strasbourg climate case law that takes a holistic look at the climate catastrophe, including the likely majority of the harms at stake, which lie in the future despite being caused by today's emissions.

One prominent example of how the ECtHR deals with risks of harm are the conditional violations of Article 3 of the ECHR that occur in the *non-refoulement* context – that is, concerning applicants who would face an individual risk of ill-treatment if expelled from the respondent state.[128] This means that, where there is a 'real and probable' – and, accordingly, individualized – risk of ill-treatment post-expulsion, carrying out that expulsion means that the removing state has exposed the persons concerned to ill-treatment and thereby violated Article 3.[129] This standard also applies where removal exposes an applicant to a lack of adequate medical care,[130] a risk of violence[131] or a marked risk of deterioration in their mental and physical health due to the nature of detention conditions in the receiving state.[132]

When these cases are assessed pre-expulsion, and no harm has yet taken place, the ECtHR can nevertheless find that a violation of Article 3 is conditional on expulsion as a way of preventing the irreparable harm in question from taking place.[133] It can be difficult for applicants to prove an individual risk in this context.[134] However, in contexts where human rights are systematically being violated, states bear the burden of establishing the particulars of the risk.[135] Likewise, the Court has noted that 'a certain degree of speculation is inherent in the preventive purpose of Article 3 and that it is not a matter of requiring the persons concerned to provide clear proof of their claim that they would be exposed to proscribed treatment'.[136] While the Court's approach

[128] ECtHR, *M.S.S. v. Belgium and Greece*, Appl. no. 30696/09, Judgment of 21 January 2011, para. 365; ECtHR, *Tarakhel v. Switzerland*, Appl. no. 29217/12, Judgment of 4 November 2014, para. 93.

[129] ECtHR, *Hirsi Jamaa and Others v. Italy*, Appl. no. 27765/09, Judgment of 23 February 2012, paras 131–138.

[130] ECtHR, *Paposhvili v. Belgium*, Appl. no. 41738/10, Judgment of 13 December 2016, paras 205–206.

[131] ECtHR, *B. and C. v. Switzerland*, Appl. nos. 889/19 and 43987/16, Judgment of 17 November 2020.

[132] ECtHR, *Aswat v. United Kingdom*, Appl. no. 17299/12, Judgment of 16 April 2013, para. 49.

[133] F. De Weck, *Non-Refoulement under the European Convention on Human Rights and the UN Convention against Torture* (2016); ECtHR, *M.A. v. Belgium*, Appl. no. 19656/18, Judgment of 27 October 2020; *B. and C.*, *supra* note 127.

[134] On this topic, see, among others, de Weck, *supra* note 129; Greenman, 'A Castle Built on Sand? Article 3 ECHR and the Source of Risk in Non-refoulement Obligations in International Law', 27(2) *International Journal of Refugee Law* (2015) 264; Den Heijer, 'Whose Rights and Which Rights? The Continuing Story of Non-refoulement under the European Convention on Human Rights', 10(3) *European Journal of Migration and Law* (2008) 277.

[135] *Hirsi Jamaa*, *supra* note 125, para. 116; see also ECtHR, *Saadi v. Italy*, Appl. no. 37201/06, Judgment of 28 February 2008, para. 129; ECtHR, *F.G. v. Sweden*, Appl. no. 43611/11, Judgment of 23 March 2016, para. 120.

[136] *Paposhvili*, *supra* note 126, para. 187, citing ECtHR, *Trabelsi v. Belgium*, Appl. no. 120/10, Judgment of 4 September 2014, para. 130.

in this regard is attenuated by inconsistencies,[137] this case law indicates the role that Article 3 can play to protect against future or impending harms.

Article 3 is also capable of responding to risks in other types of settings. For example, in the detention context, states must prevent the materialization of 'real and immediate risks to prisoners' physical integrity, of which the authorities had or ought to have had knowledge'.[138] This preventive obligation also exists in the context of real or imputed knowledge about sexual and non-sexual violence, especially where it is inflicted on children; this includes a requirement to deploy the criminal law or what has elsewhere been called a 'coercive obligation'.[139] Many of these types of findings relate to the vulnerability – or, more concretely, the special dependence on the state – of those concerned, which generates particularly intense Article 3 obligations.[140]

Risks of harm relate to both the negative and the positive obligations under Article 3: states must refrain from exposing applicants to ill-treatment, but they must also provide protection from potential ill-treatment of which they knew or ought to have known. Because Article 3 operates on a severity threshold, and its protection is absolute, treatment that reaches the threshold of severity under the provision – which is contextual and relative –automatically constitutes a violation thereof, with no possibility for justification or balancing of interests.[141] Indeed, under reference to this absolute nature, the ECtHR has stated in very general terms that states must 'take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment', including by private individuals.[142] While this should not place the authorities under an excessive burden, and does not mean that every risk of ill-treatment requires preventive measures, it at least means providing effective protection of vulnerable people and, again, taking 'reasonable steps to prevent ill-treatment of which the authorities had or ought to have had knowledge'.[143] Applicants are not required to establish a directly or exclusively causal link between the state's behavior and the harm in question – that is, to show that the ill-treatment would not have happened 'but for' the state omission. Instead, failure to

[137] Which can be seen when comparing the response to different cases. See, e.g ECtHR, *A.I. v. Switzerland*, Appl. no. 23378/15, Judgment of 30 May 2017; ECtHR, *N.A. v. Switzerland*, Appl. no. 50364/14, Judgment of 30 May 2017. Further examples in which the Court limited the protection under the ECHR in expulsion cases include ECtHR, *Sow v. Belgium*, Appl. no. 27081/13, Judgment of 19 January 2016; ECtHR, *A.M.E. v. Netherlands*, Appl. no. 51428/10, Decision of 13 January 2015, para. 32; ECtHR, *N.D. and N.T. v. Spain*, Appl. nos. 8675/15 and 8697/15, Judgment of 13 February 2020 (concerning pushbacks); see also Ciliberto, 'A Brand-New Exclusionary Clause to the Prohibition of Collective Expulsion of Aliens: The Applicant's Own Conduct in *N.D. and N.T. v Spain*', 21(1) *HRLR* (2021) 203.

[138] ECtHR, *D.F. v. Latvia*, Appl. no. 11160/07, Judgment of 29 October 2013, para. 84.

[139] L. Lavrysen and N. Mavronicola (eds), *Coercive Human Rights: Positive Duties to Mobilise the Criminal Law under the ECHR* (2020).

[140] For some key examples of vulnerability under Article 3, see *M.S.S.*, *supra* note 124; *O'Keeffe*, *supra* note 35.

[141] ECtHR, *Bouyid v. Belgium*, Appl. no. 23380/09, Judgment of 28 September 2015, para. 86.

[142] *O'Keeffe*, *supra* note 35, para. 144.

[143] *Ibid.*

take reasonably available measures with a real prospect of altering outcomes or mitigating harms suffices to engage state responsibility.[144]

In short, Article 3 is equipped to protect against certain risks, and this same case law could potentially be applied in the climate context. A similar argument has already been made in other fora regarding the *non-refoulement* of climate migrants.[145] In the present context, Article 3 could accordingly apply to the prevention of climate harms amounting to a risk of ill-treatment. The key question, then, is whether there is in fact such a risk.

B *Subsuming Climate Harms under Article 3*

The crux of the matter here is whether climate change-related harms indeed fall under Article 3 – that is, whether they constitute inhuman or degrading treatment or even torture. In other words, having established that Article 3 requires a response to risks of ill-treatment, it is necessary to establish whether ill-treatment is indeed at stake. The following will argue that this is the case, perhaps in more than one regard. It will do so by drawing on Natasa Mavronicola's innovative conceptual framework for understanding the scope of Article 3.[146] Mavronicola argues for a recasting of the threshold of severity test as related to the nature of the treatment inflicted upon, and not the suffering experienced by, the victim of an alleged Article 3 violation. This, she argues, encourages a shift in perspective – from the problematic question of whether the victim has 'suffered enough' to the absolute relational, qualitative and contextual wrong committed by the person inflicting the ill-treatment.[147] By focusing on the 'wrong' of ill-treatment, her framework not only shows that inaction is omission but also reflects power asymmetries and responds to discriminatory motives. It exposes certain contexts in which displacement of Article 3 has become unjustifiably normalized, such as the penal and migration contexts. The ECtHR, Mavronicola argues, immunizes these contexts from scrutiny under the usual Article 3 standards by treating them as 'special', hollowing out the prohibition of ill-treatment in the process.[148] Various elements of this framework can help to guide the analysis of Article 3 in the climate context as well.

If torture is the 'radical denial of human dignity', then inhuman and degrading treatment (and punishment) can be understood as less severe versions of that same denial of dignity.[149] Particularly relevant here is the concept of degrading treatment – that is, that which humiliates or debases its victims, shows a lack of respect for those affected by diminishing their human dignity or causes them to experience feelings

[144] *Ibid.*, para. 149, citing ECtHR, *E. and Others v. United Kingdom*, Appl. no. 33218/96, Judgment of 26 November 2002, para. 99.

[145] UN Human Rights Committee, *Ioane Teitiota v. New Zealand*, Appl. no. 2728/2016, UN Doc. CCPR/C/127/D/2728/2016, 7 January 2020 (although no refoulement was found in the concrete case).

[146] Mavronicola, *supra* note 16 (setting out a conceptual framework consisting of parameters for the applicability and specification of the absolute protection of Article 3).

[147] *Ibid.*, at 66–67.

[148] *Ibid.*, at 138.

[149] *Ibid.*, at 46.

of fear, anguish or inferiority that can break their moral and physical resistance.[150] Ill-treatment that reaches Article 3's minimum level of severity will usually involve bodily injury or intense physical or mental suffering, but this is not an essential condition of applying Article 3. The Court has recognized that its assessment must be contextual, having due regard for the circumstances and vulnerability of the persons concerned, and that 'the absence of an intention to humiliate or debase the victim cannot conclusively rule out a finding of a violation of Article 3'.[151]

Three interrelated aspects of this definition merit particular emphasis. These are the idea of human dignity, the concept of vulnerability and the 'feelings of fear, anguish or inferiority' that can violate Article 3. In the ECtHR's case law, 'feelings of fear, anguish or inferiority' meeting the Article 3 threshold can stem from a variety of situations. For example, in *Svinarenko and Slyadnev*, which concerned the caging of defendants in criminal trials, the Court held that the applicants' treatment 'must have undermined their image and must have aroused in them feelings of humiliation, helplessness, fear, anguish and inferiority'.[152] In *M.S.S. v. Belgium and Greece*, it held that the applicant's homelessness and abject poverty, while dependent on the state, had 'aroused in him feelings of fear, anguish or inferiority capable of inducing desperation'.[153] And, in *Bouyid v. Belgium*, concerning the slapping of two young men by police officers during questioning, the Court held that they had suffered 'a feeling of arbitrary treatment, injustice and powerlessness'.[154] In this same case, the Court underscored the close link between the scope of Article 3 and dignitary harms, finding that 'the general purpose of that provision was to prevent particularly serious interferences with human dignity'.[155]

These cases indicate that emotional extremes – of humiliation, desperation, helplessness, fear, anguish, powerlessness, inferiority or feelings of having been exposed to arbitrary treatment or injustice – and experiences of indignity can violate Article 3. It is thus possible to wonder whether the anxiety, powerlessness and helplessness induced by climate harms could meet the Article 3 severity threshold.[156] In this regard, research on climate anxiety – also variously called eco-anxiety, climate depression, climate grief or environmental melancholia[157] – complements discussions about the current and impending physical harms caused by climate change with an understanding of the psychological toll that the climate crisis can take, especially in young people.[158]

[150] *Bouyid*, *supra* note 137, para. 87.

[151] *Ibid.*, para. 86, citing, among others, ECtHR, *Svinarenko and Slyadnev v. Russia*, Appl. nos. 32541/08 and 43441/08, Judgment of 17 July 2014, para. 114.

[152] *Svinarenko and Slyadnev*, *supra* note 147, para. 129.

[153] *M.S.S.*, *supra* note 124, para. 263.

[154] *Bouyid*, *supra* note 137, para. 106. On this case, see Mavronicola, '*Bouyid v Belgium*: The "Minimum Level of Severity" and Human Dignity's Role in Article 3 ECHR', 1(1) *ECHR Law Review* (2020) 105.

[155] *Bouyid*, *supra* note 137, para. 90.

[156] See Mavronicola, 'The Future Is a Foreign Country: Understanding State (In)Action on Climate Change as Ill-treatment', *Strasbourg Observers Blog* (19 October 2021), available at https://strasbourgobservers.com/2021/10/19/the-future-is-a-foreign-country-understanding-state-inaction-on-climate-change-as-ill-treatment/.

[157] As used in R. Lertzman, *Environmental Melancholia: Psychoanalytic Dimensions of Engagement* (2015).

[158] Wu, Snell and Samji, 'Climate Anxiety in Young People: A Call to Action', 4(10) *The Lancet* (2020) 435.

This anxiety relates not only to environmental harm as such but also to the future impacts of climate change on the lives – and exercise of human rights and freedoms – of young and future generations. In other words, this is a question of intergenerational equity, given that what remains of the global carbon budget is rapidly being annihilated, and 'the lifetime carbon dioxide emissions (or carbon budget) of the average young person today will need to be eight times less than that of their grandparents to restrict global warming to 1.5°C'.[159] This intergenerational harm was recently addressed by the German Bundesverfassungsgericht,[160] and psychologists have documented that the resulting stress is capable of causing lasting psychological harm, especially during vulnerable developmental years.[161] In this vein, it can be argued that insufficient mitigation measures today are causing feelings of helplessness, distress, anxiety and fear, especially in young people, that could rise to the threshold of Article 3. Dignity-based argumentation comes into play here too, with hopes for a dignified life for future generations dwindling as emissions continue and the shrinking or destruction of spaces that are safe and habitable for human beings – to say nothing of flora and fauna – becomes an ever-growing certainty.

The ECtHR has previously indicated, albeit under Article 8 of the ECHR, that fear and anxiety about the effects of pollution can raise a convention issue.[162] In communicating *Duarte Agostinho*, the Court may have indicated its willingness to examine these issues under Article 3 by raising this issue of its own motion (that is, without a corresponding claim by the applicants). It flagged that the applicants 'are anxious about natural disasters such as forest fires that have caused the death of more than a hundred people, which have already occurred in their neighborhood and which they have sometimes witnessed. Their anxiety is, moreover, linked to the prospect of living in an increasingly hot climate for the rest of their lives, which would affect them and the families they might found in the future'.[163] Finding a violation of Article 3 due to stress, anxiety or trauma is possible under the ECtHR's case law, but it usually only makes these types of violation findings under specific circumstances. This generally involves a particular dependence on, or exposure to, the state – for example, in the context of detention or migration, which are paradigmatic examples of the Court's vulnerability case law. It also requires the treatment in question to meet Article 3's threshold of severity.[164] At the same time, and relying here on Mavronicola's shift in perspective, it is possible to consider whether there is a sufficiently intense wrong being committed here instead of whether there is enough suffering at stake. This

[159] *Ibid.*; Lee *et al.*, 'Youth Perceptions of Climate Change: A Narrative Synthesis', 11(3) *Wiley Interdisciplinary Review of Climate Change* (2020) 641; Clayton and Karazsia, 'Development and Validation of a Measure of Climate Change Anxiety', 69 *Journal of Environmental Psychology* (2020) 1.

[160] Finding that fewer reductions in greenhouse gas emissions until 2030 mean that fundamental freedoms will have to be more strongly curtailed in the future to prevent catastrophic warming, thereby disproportionately rolling climate harms in the form of interference with fundamental freedoms over onto future generations. German Federal Constitutional Court, *supra* note 1, especially paras 185–187.

[161] Wu, Snell and Samji, *supra* note 154.

[162] ECtHR, *Tătar v. Romania*, Appl. no. 67021/01, Judgment of 27 January 2009, para. 122.

[163] *Duarte Agostinho*, *supra* note 7 (translation from the original French by the author).

[164] *Bouyid*, *supra* note 137, para. 86.

means looking at the power imbalances at play and the ways in which environmental wrongs are treated as 'special' or 'too complex' from a human rights perspective and, thus, are immunized from appropriate scrutiny. The resulting assessment might take the form of asking whether it is 'wrong enough' to sacrifice future human dignity and autonomy for the modern-day interests of extractivism and capital. Any analysis of this question should heed the fundamental importance of Article 3 and its absolute nature, which should encourage decision-makers to favour an overly inclusive interpretation of Article 3 over an under-inclusive one.[165] In this regard, it is urgently necessary to transform the Court's case law so that arguments against a vigorous assessment of potential ill-treatment in the environmental and other contexts are subjected to adequate scrutiny.

A first tentative engagement with the nexus between human rights and climate anxiety was recently made in the Committee on the Rights of the Child's inadmissibility decision in the *Sacchi* case, where it noted the particular impact of climate change on children.[166] This type of argument involves seeing the threat of climate-related harms not – or not only – as an abstract fear for others or for the environment as such but, rather, as a very concrete fear for one's own future. While this comes with the dangers of flattening and distortion that are inherent to anthropocentric environmental protection, it frames the relevant harms in terms that are comprehensible to the Court and its positive obligations doctrine.

C *Vulnerability in the Context of Climate Change*

The ECtHR's concept of vulnerability, which has been mentioned at various points throughout this article, relates to the particular attention and protection due to groups and individuals in specific circumstances or with specific traits. This concept has not benefited from a clear definition under the Court's case law, but it is nevertheless powerful: vulnerability reasoning takes place under various convention rights and with a wide range of effects. For example, it can soften admissibility requirements, expand the scope of Article 3, shape and direct positive obligations and affect everything from the burden of proof to just satisfaction awards.[167] Concerning risk, such as in non-refoulement cases, it may ease the burden on applicants to prove a sufficiently individualized risk of ill-treatment.[168] And, under the deterrence limb of Article 3 – that is, states' preventive obligations – known vulnerability can contribute to imputing knowledge of a risk of ill-treatment to the state, thereby triggering the applicability of these obligations.[169]

In broad strokes, the ECtHR's approach to vulnerability entails identifying specific groups or individuals that are considered particularly vulnerable – that is, more vulnerable than the standard applicant. The idea of a standard applicant is problematic,

[165] Mavronicola, *supra* note 16, at 202.
[166] *Sacchi*, *supra* note 2, para. 10.13.
[167] For more on this, see C. Heri, *Responsive Human Rights: Vulnerability, Ill-treatment and the ECtHR* (2021).
[168] ECtHR, *Samina v. Sweden*, Appl. no. 55463/09, Judgment of 20 October 2011, para. 64.
[169] *O'Keeffe*, *supra* note 35, paras 144–146, 168.

as is the implication that some applicants may not be vulnerable, but this approach does allow for context-responsive findings to be made and flexibility to be deployed where applicants have suffered particularly because of factors such as their age, dependency, marginalization, disability, lack of access to justice, experience of victimization or other reasons.[170] Several of these factors could be applied to climate cases. The first and perhaps most obvious one, given the facts of *Duarte Agostinho*, *Greenpeace Nordic* and *KlimaSeniorinnen*, is the factor of age. The applicants in *Duarte Agostinho* are a group of children and young people, while *Greenpeace Nordic* was brought by six young applicants and two NGOs who drew on the Court's vulnerability case law to 'represent future generations'.[171] Meanwhile, *KlimaSeniorinnen* concerns a group of self-described vulnerable senior women with an average age of 73 at the time the application was brought.[172] While elderly age has received limited consideration as a source of vulnerability under the ECHR,[173] children are the paradigmatic example of vulnerability in the Court's case law, and it relies quite heavily on this concept to create various types of special protections for minors, including by creating a minimum content for the state's positive protective obligations, which must 'at least' provide adequate protection for children and other vulnerable individuals.[174] In this way, children's vulnerability creates more stringent obligations to protect them against the materialization of risks of harm – for example, in the context of real or imputed knowledge about (sexual and non-sexual) violence inflicted on them.[175]

Vulnerability here entails a special dependence on the state, and deploying the concept both focuses and restricts the scope of protective obligations, reining in what states are required to do and regarding whom. In climate change cases brought by minors, this doctrine might work to the applicants' advantage. While children are particularly vulnerable to begin with, their vulnerability is particularly acute in the context of climate change. For one, they suffer particularly from climate-related health problems.[176] In addition, they will live to experience more of the climate catastrophe.

[170] On vulnerability and the Court, see, among others, Timmer, 'A Quiet Revolution: Vulnerability in the European Court of Human Rights', in M.A. Fineman and A. Grear (eds), *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics* (2013) 147; Peroni and Timmer, 'Vulnerable Groups: The Promise of an Emerging Concept in European Human Rights Convention Law', 11 *International Journal of Constitutional Law* (2013) 1056; Truscan 'Considerations of Vulnerability: From Principles to Action in the Case Law of the European Court of Human Rights', 36(142) *Retfærd* (2013) 64; Zimmermann, 'Legislating for the Vulnerable? Special Duties under the European Convention on Human Rights', 25(4) *Swiss Review of International and European Law* (2015) 539; Kagiaros, 'Vulnerability as a Path to a "Social Minimum"?: An Analysis of ECtHR Jurisprudence', in I. Leijten, T. Kootkas and F. Pennings (eds), *Specifying and Securing a Social Minimum in the Battle Against Poverty* (2019) 245; Heri, *supra* note 162.

[171] *Greenpeace Nordic*, *supra* note 9.

[172] *KlimaSeniorinnen*, *supra* note 8.

[173] For some examples, see ECtHR, *Mudric v. Republic of Moldova*, Appl. no. 74839/10, Judgment of 16 July 2013, para. 51; ECtHR, *Cestaro v. Italy*, Appl. no. 6884/11, Judgment of 7 April 2015, para. 180.

[174] For three often-cited examples (among many others), see *O'Keeffe*, *supra* note 35; *Tarakhel*, *supra* note 124; ECtHR, *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, Appl. no. 13178/03, Judgment of 12 October 2006.

[175] Lavrysen and Mavronicola, *supra* note 135.

[176] Boyd and Orellana, *supra* note 20, para. 13.

Furthermore, when it comes to climate policy, individuals on their own and collectively are, without state action, largely powerless to ensure sufficient emissions reductions take place in time to reach the Paris Agreement goals, and this is particularly true in the case of (politically disenfranchised) minors. In light of this vulnerability – that is, this exposure to, and dependence on, state (in)action as a form of omission of protection[177] – the state can be seen as having an obligation to protect against the harms at stake, including the anxiety, powerlessness and helplessness they induce. An argument could even be made here by drawing on the special obligations of the state regarding people under its 'sole authority',[178] given that individuals have no alternative for adequate, effective and timely climate measures.

In addition, the ECtHR's case law on the 'experience', 'sense' or 'feeling' of vulnerability is particularly relevant here. This applies to applicants who have experienced particular fear or suffering because of a traumatic experience.[179] The idea of vulnerability as an emotion evoked in response to victimization has frequently been invoked by the Court, including in order to characterize a given treatment as torture (as opposed to inhuman or degrading treatment).[180] Where applicants experience a 'sense or feeling of vulnerability', this can lead to heightened attention to their experience and context and can serve as an indicator that they have suffered ill-treatment that meets the threshold of Article 3.[181] Applicants are usually not required to prove their own feelings of vulnerability, which is imperative given the near impossibility of proving an emotional state, and the Court usually infers a sense of vulnerability from context.[182]

This strand of vulnerability case law, while lacking clear contours, allows the Court to capture particular extremes of fear and anguish and counteract the effects of victimization, infer ill-treatment from context and display sensitivity for the effects of psychologically painful experiences.[183] Understanding the Court's response to vulnerability as a form of judicial empathy means recognizing the emotive process that takes place in assessing vulnerability and harms related to human dignity.[184] This may even help to better understand the concept of vulnerability as such, given that human vulnerability has inextricable links to human emotion and that only invulnerable beings have no reason to fear or to suffer.[185] At the same time, emotion needs to reach extreme levels to fall under this case law.

A concerted response to the current and pending harms posed by climate change, and the ways in which it both exacerbates and creates vulnerabilities, provides the

[177] Mavronicola, *supra* note 16.

[178] ECtHR, *Florea v. Romania*, Appl. no. 37186/03, Judgment of 14 September 2010, paras 60–63.

[179] *Ibid.*

[180] ECtHR, *Dikme v. Turkey*, Appl. no. 20869/92, Judgment of 11 July 2000, para. 91; ECtHR, *Doğanay v. Turkey*, Appl. no. 50125/99, Judgment of 21 February 2006, para. 32; ECtHR, *Hajrulahu v. Former Yugoslav Republic of Macedonia*, Appl. no. 37537/07, Judgment of 29 October 2015, para. 100.

[181] See, e.g., ECtHR, *Bilen v. Turkey*, Appl. no. 34482/97, Judgment of 21 February 2006, para. 35.

[182] ECtHR, *Tanko Todorov v. Bulgaria*, Appl. no. 51562/99, Decision of 29 September 2005; ECtHR, *Levinta v. Moldova*, Appl. no. 17332/03, Judgment of 16 December 2008, para. 73.

[183] Heri, *supra* note 162.

[184] White, 'Till Human Voices Wake Us: The Role of Emotions in the Adjudication of Dignity Claims', 3 *Journal of Law, Religion and State* (2014) 201, at 207–209.

[185] M.C. Nussbaum, *Hiding from Humanity: Disgust, Shame, and the Law* (2004), at 6.

ECtHR with an opportunity to guide states and ensure that ECHR rights will be effectively protected now and in the future. Taking the effective protection of human rights as the Court's guiding standard makes it clear that the Court should recognize the risks and harms of climate change for various human rights as well as the need for urgent and sufficient state action to prevent and mitigate these harms. Because states are patently failing to take sufficient action, especially to mitigate emissions, climate change has long crossed the line from political talking point to human rights emergency. Human rights bodies should deal with this issue because failing to do so immunizes perhaps the greatest-ever threat to human rights from review by human rights' supervisory bodies.[186] This means that, to guarantee 'practical and effective' rights, the boundaries of the law can shift here, they should shift and, in fact, they are already shifting.[187] In this regard, it is useful to reflect on Dimitrios Kagiaros' argument about the normative power of vulnerability, specifically, to sharpen the Court's level of scrutiny and justify certain types of obligations.[188] Reasons of vulnerability, human dignity and justice can all be used to justify the Court's engagement with climate cases and to argue normatively that the Court should address this issue.

4 Conclusion

With five climate cases pending before it, the time seems to have come for the ECtHR to address the human rights violations inherent in the unmitigated progression of the climate catastrophe. From a substantive perspective, protection against the human rights impacts of climate change under the ECHR is both possible – as part of the state's positive obligation to avert known risks and its duty to protect the vulnerable – and normatively desirable, given that the potential impacts on human rights are grievous and that measures to avoid them must be taken with the utmost urgency if access to justice and the practical and effective enjoyment of convention rights in the future is to remain possible. This contribution has mapped how the Court's current case law on positive obligations can factor into this equation. It has covered the case law on positive obligations in the environmental context, under the right to life and the right to respect for private and family life, and the possibilities outside that context under the prohibition of torture and inhuman and degrading treatment. This case law shows that the ECHR can be applied to the current and future harms posed by climate change and that the protection of Article 3 of the ECHR, which has largely been ignored in climate litigation so far, could play a meaningful role, including in capturing experiences of climate anxiety. This is particularly the case if due regard is had for the vulnerability of specific groups and individuals, which can facilitate access to justice and underscore the *raison d'être* not only of states' positive obligations but also of the convention itself.

[186] Robinson, 'Social and Legal Aspects of Climate Change', 5 *Human Rights and Environment* (2014) 15.

[187] On existing shifts, see Savaresi and Auz, 'Climate Change Litigation and Human Rights: Pushing the Boundaries', 9 *Climate Law* (2019) 244. Compare also the findings made on extraterritoriality and standing in *Sacchi*, *supra* note 2.

[188] Kagiaros, *supra* note 165.