CLIMATE LITIGATION CASE STUDY COLLECTION (CJEU & ECtHR)

Case Study Collection

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CONTENT

1. LEGAL STANDING BEFORE THE CJEU AND THE PLAUMANN FORMULA

Climate lawsuits have been filed before the CJEU in the form of actions for annulment. The action for annulment under Art 263 TFEU is, in addition to the preliminary ruling procedure under Art 267 TFEU, the second pillar of Union judicial review of the legality or validity of all legally binding acts of the EU, including legislative acts (cf. Borchardt in Lenz/Borchardt6 Art 263 TFEU, para. 1). While the action for annulment opens a direct legal path to the Union courts, namely the ECJ at first instance, the preliminary ruling procedure additionally offers the possibility to review the validity of an act of the Union (Art 267 (1) lit b TFEU) or the national measures based on it by way of cooperation of Member State courts with the ECJ. In their interplay, these two legal channels guarantee the functioning and the legitimacy of the Union's judicial protection system and its multi-level structure by ensuring the effectiveness and completeness of legal protection against all legal acts as required by Art 19 TEU and Art 47 TFEU, which are adopted in the exercise of administrative or legislative Union power - whether by supranational or Member State authorities - and violate natural or legal persons in their rights guaranteed by the Union legal order With the Treaty of Lisbon, Art 263 TFEU replaced the provision that had remained largely unchanged until 1 December 2009. 2009 and contains three essential changes compared to the previous legal situation: firstly, acts of the ER as well as those of the institutions and other bodies of the Union with legal effects vis-à-vis third parties can now be challenged with an action for annulment; secondly, the group of partially privileged plaintiffs was supplemented by the CoR; thirdly, Art 263 (4) TFEU now provides in a third case that natural and legal persons can also challenge if these directly affect them and do not result in implementing measures. Therefore, the restrictive criterion of individual concern was abolished for actions by natural or legal persons against this Regulation with the aim of improving the protection of individual rights - at the special instigation of the Austrian delegation (see in more detail para. 36 et seq.).

The action for annulment under Art 263 TFEU is by far the most important type of direct action, both practically and legally, by MS, the institutions of the Union and, in particular, individuals against legally binding acts and legislative acts of the Union. Furthermore, in annulment proceedings, the Union courts monitor the "legality of acts of Union institutions or bodies having legal effects vis-à-vis third parties" (Art 263 (1), second sentence, TFEU).The criterion of individual concern has always been by far the greatest hurdle for the admissibility of actions for annulment by natural and legal persons. According to the intention of the authors of the Treaties, it should prevent an actio popularis in the sense that anyone can attack any legal act of the Union by means of an action for annulment, especially those with general application or of an abstract-general nature. The starting point is the "Plaumann" formula used in case law, according to which a plaintiff is only individually affected if "the [challenged] decision affects him by reason of certain personal characteristics or special circumstances which distinguish him from all other persons and therefore individualises him in a manner similar to an addressee" (ECJ 16 June 1963, 25/62, Plaumann v Commission, ECLI:EU:C:1963:17 238).This formula has led to a frequently criticised shortening of the "central" legal protection against abstract-general measures of the Union institutions and to its shift to the "decentralised" level before the Member State courts, before which corresponding implementing acts of Member State authorities can be challenged. In contrast to German and Austrian administrative procedural and constitutional law, direct (fundamental) legal involvement, irrespective of its intensity, is not sufficient to establish legal standing; rather, a high degree of individualisation is required, which is assessed less on the basis of substantive or evaluative aspects than on formal aspects.

2. PETER SABO ET AL. V. EUROPEAN PARLIAMENT AND COUNCIL OF THE EUROPEAN UNION (T-141/19)

The dispute involves applicants comprising individuals from various EU Member States (Estonia, Ireland, France, and Slovakia) and the United States, as well as environmental interest groups with seats in different Member States. They brought an action against Directive (EU) 2018/2001 (contested directive), which aims to promote the use of energy from renewable sources, including biomass. The European Council had approved the 2030 EU climate and energy policy framework in October 2014, which set a binding target of at least 40% reduction in EU greenhouse gas emissions by 2030. The contested directive is a recast of Directive 2009/28/EC and establishes a common framework for promoting energy from renewable sources, with a binding Union target for the period up to 2030.

The applicants specifically target Article 29(1) of the contested directive, which includes energy from forest biomass as a renewable energy source. They argue that this inclusion contradicts Article 191 of the Treaty on the Functioning of the European Union (TFEU) and violates certain fundamental rights enshrined in the Charter of Fundamental Rights of the European Union (Articles 7, 10, 14, 17, 22, 24, 35 and 37). The applicants assert that energy from forest biomass leads to increased carbon emissions and promotes industrial logging, undermining the environmental goals of the contested directive. They claim that this adversely affects their legal situation and leaves no discretion to its addressees (the EU institutions).

The Parliament and the Council challenged the admissibility of the action based on the fourth paragraph of Article 263 TFEU. According to this provision, an individual or entity must demonstrate that the act being challenged is of direct and individual concern to them to have standing to bring an action for annulment before the Courts of the European Union.

The court analysed whether the contested directive met the criteria of direct and individual concern. It concluded that the directive is an act of general application that applies to all persons, both natural and legal, without distinguishing the applicants individually. The court highlighted that while the contested directive might have negative impacts on forests and power plants, it affects the public and not a specific, identifiable category of individuals. The court rejected the argument that the applicants' fundamental rights were violated, as it did not establish individual concern. It also noted that the contested directive was a legislative act, not a regulatory act, which further limited the possibility of individual concern.

The applicants further claimed that environmental interest groups should be allowed to bring a direct action for annulment in environmental matters if they have a demonstrable interest in the issue at hand. However, the court stated that changes to the current system would be a matter for the Member States, not the Courts of the European Union. As a result, the court upheld the plea of inadmissibility raised by the Parliament and the Council and dismissed the action as inadmissible.

3. ARMANDO FERRÃO CARVALHO AND OTHERS V. THE EUROPEAN PARLIAMENT AND THE COUNCIL (C-565/19 P)

Mr. Armando Carvalho and 36 other appellants sought the setting aside of the order of the General Court of the European Union, which was dated 8 May 2019. The General Court had dismissed their action to partially annul specific EU directives and regulations concerning greenhouse gas emissions and climate action. The appellants had demanded that the Court declare the legislative package on greenhouse gas emissions unlawful as it allows greenhouse gas emissions corresponding to 80% of 1990 levels in 2021, decreasing to 60% in 2030 and annul specific parts of the legislative package related to a 40% reduction in greenhouse gas emissions by 2030 compared to 1990 levels. The General Court had declared both the claim for annulment and the claim for damages submitted by the appellants inadmissible. Concerning the claim for annulment, the court found that the appellants did not meet any of the locus standi criteria specified in the fourth paragraph of Article 263 TFEU. On the other hand, regarding the claim for damages, the General Court concluded that it essentially sought a result like the annulment of the acts at issue and, therefore, had to be considered inadmissible, just like the claim for annulment. The appellants, who operated in the agricultural and tourism sectors, came from various EU Member States, including Germany, France, Italy, Portugal, and Romania, as well as non-EU countries like Kenya and Fiji. They also included an association governed by Swedish law, representing young indigenous Samis. The appellants sought compensation and an injunction for the damage they claimed to have suffered.

In their first ground of appeal, the appellants argue that the General Court made a legal error by not considering that each appellant was affected differently, both factually and legally. They claim that the acts in question have distinct impacts on each appellant due to their unique attributes and circumstances. For example, some families are affected by droughts, while others suffer from flooding or heatwaves caused by climate change. The appellants assert that the General Court did not acknowledge this individualized impact in their previous order.

The appellants further argue that recent case-law developments regarding locus standi (the right to bring an action) support their claim that the interference of the acts in question with fundamental rights gives them individual concern. They emphasize that the Charter of Fundamental Rights of the European Union and the Court of Justice's case-law confirm that each appellant possesses individual rights. These rights include the right to equality and non-discrimination, the right to pursue an occupation, the right to property, and children’s rights.

The appellants' second ground of appeal argues for an adaptation of the test for establishing 'individual concern' derived from the judgment in Plaumann. They argue that the wording of the fourth paragraph of Article 263 TFEU allows for altering the test established by case-law, and the Court has already relaxed the test in certain circumstances to ensure effective judicial protection. They maintain that the condition of individual concern should be interpreted in line with the constitutional traditions of Member States, as specified in Article 6(3) TEU. None of the Member States requires proving individual distinction in the narrow sense of the Plaumann test. The further appellants assert that the right to bring an action should be interpreted teleologically to consider the seriousness of an applicant's concern. They find it paradoxical that serious consequences of the European Union's failure to fulfil its legal obligations would not allow an individual to demonstrate individual concern. They go on to claim that the of Article 263(4) TFEU should allow for direct actions against legislative acts, as these acts

inherently affect many people, making it difficult to meet the strict Plaumann test. The appellants argue that the test must be amended to meet the legal requirement of effective judicial protection, especially in cases where other remedies like interlocutory procedures or national court proceedings are not practically applicable. They propose that the criterion of individual concern could be satisfied if the contested legislative act significantly encroaches on a personal fundamental right or undermines the essence of that right. This criterion, they believe, would effectively filter potential actions while considering different fundamental rights and factual circumstances.

In the third ground of appeal, the association Sáminuorra claimed that the General Court had made legal errors. They argued that the General Court did not consider the evidence showing their individual concern in a single sentence in the order under appeal. Sáminuorra also contended that the General Court failed to recognize the concept of the 'action of a collective defending a collective good', which they believed should apply to their case. According to Sáminuorra, they represented the common good of the Sami people's right to use land for their reindeer herds, as defined in the Swedish Law on Reindeer Husbandry. They suggested that individual concern should have been interpreted as the concern of an identifiable collective, in line with international obligations such as the United Nations Declaration on the Rights of Indigenous Peoples and the Convention on Biological Diversity.

With regards to the first ground of appeal, the Court of Justice finds that the General Court did consider their specific characteristics but concluded that individual concern was not established solely based on differing effects of climate change on each person. The appellants also argue that the interference of the acts at issue with their fundamental rights should establish individual concern. However, the Court of Justice clarifies that individual concern requires the contested act to affect them by reason of certain attributes that distinguish them from all other persons, and mere invocation of an infringement of fundamental rights is not sufficient to establish individual concern. In conclusion, the Court of Justice rejects the appellants' first ground of appeal in its entirety, as the General Court appropriately considered their arguments and found that individual concern was not established based on the presented facts and claims.

Concerning the second ground of appeal, the Court emphasized that the European Union is founded on the rule of law and is subject to judicial review to ensure compliance with Treaties, general principles of law, and fundamental rights. The appellants had sought to modify the "individual concern" criterion to enable them to bring an action against the acts at issue. However, the Court clarified that the EU had established a comprehensive system of legal remedies and procedures, and the review of acts' legality was entrusted to the Courts of the European Union. The Court of Justice could not interpret the conditions for bringing actions in a way that set them aside, especially considering the provisions expressly laid down in the FEU Treaty regarding the admissibility of actions for annulment, such as the Article 263(4) TFEU. The General Court correctly held that the acts at issue did not identify the appellants as addressees and, therefore, the first scenario for standing to bring proceedings under Article 263 TFEU had to be excluded. Regarding the second scenario, the General Court rightly considered that the appellants had not established that the contested provisions of the acts at issue distinguished them individually, just as in the case of the addressee. The conditions of direct concern and individual concern were cumulative, and as the appellants failed to show individual concern, the General Court's decision was justified. Finally, the General Court correctly determined that the acts at issue were not regulatory acts covered by the third scenario for standing under Article 263 TFEU. The

Court of Justice reiterated that while the conditions of admissibility had to be interpreted in light of the fundamental right to effective judicial protection, this interpretation could not disregard the conditions expressly laid down in the treaties. The appellants' arguments seeking to extend the criterion of individual concern could not, therefore, be accepted. In conclusion, the Court of Justice rejected the appellants' arguments seeking to modify the criterion of individual concern and upheld the General Court's decision that the appellants did not meet the conditions for standing under Article 263 TFEU.

Regarding the association Sáminuorra, the General Court had found, in the order under appeal, that it could not be considered individually concerned. The General Court also stated that the association did not meet the conditions for admissibility of an action for annulment. Specifically, the Court referred to settled case-law that allows actions for annulment brought by associations in three types of situations, none of which applied to Sáminuorra. In response to the association's appeal, the Court of Justice examined the General Court's findings. Firstly, it confirmed that the association was not individually concerned, consistent with the conclusions reached in connection with the first and second grounds of appeal. Secondly, the Court upheld the General Court's decision that Sáminuorra failed to demonstrate that it met the conditions under which associations could bring an action for annulment. The association had argued that another situation, 'the action of a collective defending a collective good,' should apply to their case. However, the Court of Justice deemed this argument inadmissible since it was not raised before the General Court, as per the Rules of Procedure of the Court of Justice. Consequently, the Court rejected this ground of appeal as unfounded and inadmissible.

The fourth ground for appeal regarding damages was ultimately also considered inadmissible. In conclusion, the Court of Justice upheld the General Court's decision that the appellants did not meet the necessary conditions for standing under Article 263 TFEU, and their arguments seeking to modify the criterion of individual concern were rejected.

4. VILLE DE PARIS AND OTHERS V. EUROPEAN COMMISSION (C-179/19 P)

With the adoption of Directive 2007/46/EC of the European Parliament and of the Council of 5 September 2007 establishing a framework for the approval of motor vehicles and their trailers, and of systems, components and separate technical units intended for such vehicles [Framework Directive] (OJ L 2007/263, 1), the EU legislator created a harmonised framework for the approval of motor vehicles in order to facilitate their registration, sale and entry into service in the Union.

In the context of the "Dieselgate" scandal, the EC introduced a test procedure for the measurement of in-service emissions (RDE) (EC Regulation [EU] 2016/427 of 10 March 2016 amending Regulation [EC] 692/2008 as regards emissions from light passenger and commercial vehicles [Euro 6], OJ L 2016/82, 1) which provides a more realistic picture of the emissions measured on the road from vehicles registered under the current legislation (Regulation [EC] 715/2007 of the European Parliament and of the Council of 20 June 2007 on type-approval of motor vehicles) type-approval of motor vehicles with respect to emissions from light passenger and commercial vehicles [Euro 5 and Euro 6] and on access to vehicle repair and maintenance information, OJ L 2007/171, 1).

The provisions on the RDE tests were later supplemented by EC Regulation 2016/646 (EC Regulation [EU] 2016/646 of 20 April 2016 amending Regulation [EC] 692/2008 as regards emissions from light passenger and commercial vehicles [Euro 6], OJ L 2016/109, 1), which sets values for nitrogen oxide emissions that must not be exceeded in these tests ("the contested Regulation").

The City of Paris, the City of Brussels and the Ayuntamiento de Madrid each brought an action for annulment of the contested regulation on the ground that it prevented them from imposing traffic restrictions on passenger cars on account of their pollutant emissions. The EC raised objections of inadmissibility against the aforementioned actions, claiming that these cities were not directly affected by the contested regulation within the meaning of Article 263(4) TFEU. However, the Court of First Instance upheld these claims in part and held that the plaintiff cities were directly affected by the contested regulation (see Court of First Instance, 13 December 2018, T-339/16, T-352/16 and T-391/16, Ville de Paris, Ville de Bruxelles and Ayuntamiento de Madrid v Commission).

In its interpretation of Directive 2007/46 (Article 4(3) of Directive 2007/46) in the context in which the contested regulation is inserted, the court found in particular that this regulation was to be classified as a legal act in the nature of a regulation which did not entail any implementing measures and which directly affected the exercise of the legislative powers of those cities in the field of the regulation of road transport.

The Court of Justice, upon appeals brought by the Federal Republic of Germany (Case C-177/19 P), Hungary (Case C-178/19 P) and the EC (Case C-179/19 P), sets aside the judgment of the General Court and, in that context, clarifies the concept of 'person directly concerned' as a condition for the admissibility of an action for annulment brought by a regional entity of a MS against an act of the European Union.

First, the Court points out that a regional or local entity with legal personality, like any natural or legal person, may bring an action against an act of Union law only if it falls within one of the situations referred to in Article 263(4) TFEU, according to which the person or entity concerned must be directly concerned by the act in question. (Note: According to Art 263(4) TFEU, "[a]ny natural or legal person may, under the conditions laid down in paragraphs 1 and 2, institute proceedings against an act addressed to that

person or which is of direct and individual concern to him or her, and against a regulatory act which is of direct concern to him or her and does not entail implementing measures").

In order to establish that a sub-state entity is directly affected by the contested act, two criteria must be met cumulatively. First, the contested measure must have a direct impact on the legal status of these entities and, second, it must not leave any discretion to the addressees entrusted with its implementation.

Next, the ECJ examines whether Article 4(3)(2) of Directive 2007/46, according to which "[t]he MS [...] may not prohibit [...] the registration, sale, entry into service or use on the road of vehicles [...] if they comply with the requirements of that Directive".] prohibit, restrict or impede the registration, sale, entry into service or use on the road of vehicles [...] which comply with the requirements of this Directive", actually prevents the applicant cities from exercising the powers vested in them to regulate the circulation of passenger cars in order to reduce pollution, and whether those cities must therefore be regarded as directly concerned by that regulation, having regard to the link between that provision and the regulation at issue. For that purpose, the Court adopts an interpretation of the provision in question on the basis of its wording, the context in which it is inserted, the objectives pursued by the regulation of which it forms part and the relevant indications resulting from its legislative history.

With regard to the wording of Art 4(3)(2) of Directive 2007/46 and, in particular, the prohibition of restrictions on the participation of certain vehicles in "road traffic" provided for therein, the Court clarifies that this provision concerns not only the participation of vehicles in traffic on the territory of a MS, but also other activities such as the registration, sale and entry into service of vehicles. Such restrictions constitute a general obstacle to access to the vehicle market.

As regards the context in which that provision is placed, the Court points out that the obligations imposed on MSs under Directive 2007/46 concern the placing on the market of motor vehicles and not their subsequent participation in traffic.

Moreover, it notes that, whereas Article 4(3)(2) of that Directive imposes a negative obligation preventing MS from prohibiting, restricting or impeding the registration, sale, entry into service or road use of vehicles which comply with the requirements of that Directive, Article 4(1) of that provision imposes a positive obligation allowing MS to register those vehicles and to permit their sale and entry into service, without mentioning road use.

Thus, contrary to the court's interpretation, the scope of the negative obligation cannot be wider than the scope of the positive obligation, as the wording of these two subparagraphs is complementary.

Finally, the ECJ points out that the applicant cities have no powers in relation to the type-approval of vehicles. The objective pursued by Directive 2007/46 is the introduction of a uniform approval procedure for new vehicles and, in a broader sense, the establishment and functioning of the internal market, while at the same time guaranteeing a high level of road safety, which is ensured by the complete harmonisation of technical requirements, inter alia, for the construction of vehicles. Moreover, the legislative history of Art 4(3)(2) of Directive 2007/46 shows that the prohibition to restrict the participation of certain vehicles in "road traffic" was not intended to extend the scope of the legislation on the approval of motor vehicles, but only to prevent MS from circumventing the prohibition to oppose market access for vehicles that comply with the applicable regulations. The interpretation of the Court of First Instance therefore amounts, in the Court's view, to granting a broad scope to Article 4(3)(2) of Directive 2007/46

in order to support the conclusion that that provision precludes certain local traffic restrictions which serve, inter alia, to protect the environment. Such an interpretation is neither consistent with the context in which that provision is inserted, nor with the objectives of the system of which it forms part, nor with the legislative history of the provision.

The ECJ therefore concludes that the Court of First Instance erred in law in deciding that the applicant cities were directly affected by the contested regulation within the meaning of Article 263(4) TFEU.

The Court counters the appellant cities' fears with regard to the possibility that an action for failure to fulfil obligations could be brought against one of the Member States to which they belong for infringement of the contested regulation by pointing out that the adoption of a regulation restricting the local circulation of certain vehicles in order to protect the environment cannot infringe the prohibition imposed by the contested regulation, so that it cannot have a direct effect on a possible action for failure to fulfil obligations. In the light of the foregoing, the Court sets aside the judgment under appeal, considers that the dispute is ripe for judgment and dismisses as inadmissible the actions for annulment brought by the applicant cities.

5. LEGAL STANDING BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS ("ECTHR") AND THE PRINCIPLE OF EXHAUSTION OF DOMESTIC REMEDIES

Perhaps the biggest obstacle in bringing environmental cases in general and climate change cases in particular before the ECtHR is its partially outdated and restrictive approach on the issue of legal standing. Thus, it has consistently stressed that the European Convention on Human Rights ("the Convention") does not extend to *actio popularis* claims,[1] nor can it review domestic law and practice in the abstract. Put simply, there has to be an identified victim who incurred – or could reasonably claim that they could incur – harm on one of their right protected by the Convention. Part of the reason behind this approach is the fact that the Convention, as a first-generation human rights instrument, does not contain any entitlement to a health environment as such; as a result, in environmental cases the applicant has to show that their Convention rights (primarily Article 2 – right to life- and Article 8 – right to respect for private and family life and home-) have been breached.

It is not, however, enough for someone to be merely a victim; any prospective applicant should prove that they raised their grievance before domestic courts, thus giving an opportunity to the respondent State to put things rights. The ECtHR has considerably wider leeway in absolving applicants from this obligation than their victim status and has done so when there is no evidence that the remedies suggested by the States could have been effective, i.e., could have addressed the gravamen of the applicant's complaint.

The ECtHR recognizes three categories of victims: first, direct victims, namely legal or physical persons who were "directly affected" by an action or omission by or attributable to the state. In environmental cases, the ECtHR has been broadening the scope of direct victim; thus for example in a case regarding the health hazards arising from the failure of the authorities to collect and dispose of rubbish in a region of Italy, the ECtHR held that all the inhabitants of the region could in fact be victims (and therefore could seize the ECtHR), while in light of the dimensions and extent of the problem, there was no need for them to launch proceedings before the domestic courts, as there were no remedies that would have allowed them (the applicants) to force the authorities to collect the rubbish (Di Sarno v. Italy, 2012). Similarly, in cases regarding air pollution, the ECtHR has been willing to be less severe when it comes to the application of the standing criterion; thus, the applicants were considered as direct victims even though they lived at a considerable distance from the pollution-producing industrial facilities. Of particular note is that in that case, the applicants had not produced any evidence that their health had been negatively affected; rather, the ECtHR considered that as long as there was evidence that the pollution in the area where they lived was "in clear excess" of the relevant health thresholds, such adverse impact could be presumed (Pavlov and Others v Russia, 2022).

Second, indirect victims; should the direct victim die before filing an application with the ECtHR then, provided the right is transferable (usually a right that has a pecuniary dimension will be considered as such), then their next of kin or other person close them can bring forward an application regarding their demise.

[1] That said, the ECtHR is now more willing to accommodate applicants who seize it without having had recourse to domestic courts but the issue they complain about was raised in related *actio popularis* claims before national authorities; Kósa v Hungary (2017).

Third, potential victims. In order for an applicant to claim such a victim status, they must produce reasonable and convincing evidence of the likelihood that a violation of a Convention right, affected them personally, will occur. Mere conjecture of speculation will not suffice. Thus, for example, should a piece of legislation concern a particular population group, then the group's member can claim victim status precisely due to their membership of that group, even though they have yet to suffer any violation of their rights by the application of that law. Similarly, if a person's deportation had been ordered but not yet enforced, they can challenge it as it would make little sense to demand of them to wait until it is actually enforced so that they could challenge it.

In environmental cases, applicants who did not manage to adduce evidence that the building and operation of windfarms would *probably* have an impact on their lives, were not considered potential victims (Vecbaštika and Others against Latvia, 2019).

6. TERRITORIAL JURISDICTION AND STATE LIABILITY

State's jurisdictional competence (and, therefore, liability) is primarily territorial. In principle however, States can also be held liable for acts or omissions attributed to their agents that take place, or produce effects, outside their own territory. Such extra-territorial jurisdiction however will be recognized only exceptionally, with the main criterion employed by the ECtHR being that of effective control or decisive influence over an area outside the borders of the State. Thus the ECtHR held that reviewing whether the death of sixteen persons as a result of a NATO airstrike against the building of Serbian Radio Television, was outside jurisdiction as the seventeen respondent states (all of which were NATO members and had participated, in one way or another, in the attack) did not exercise effective control over the area where the deaths took place (Banković and Others v Belgium, the Czech Republic, Denmark, France, Germany, Greece, Hungary, Iceland, Italy, Luxembourg, the Netherlands, Norway, Poland, Portugal, Spain, Turkey and the United Kingdom, 2001). While the ECtHR has partially changed its tack on such case, it again requires a certain element of control by the State over, if not necessarily the area, then at least of its agents present there: in a case where a Dutch soldier serving in Iraq killed an Iraqi civilian passing through a Dutch checkpoint, the ECtHR held that the incident fell within the extraterritorial jurisdiction of the Netherlands, even though the presence of the Dutch military contingent was the result of United National Security Council Resolution and although the two nations designated by the Resolution as exercising control over Iraq were the US and the UK. The fact that the checkpoint was manned by Dutch soldiers under the command of a Dutch military officer were enough to make the Netherlands liable (Jaloud v. the Netherlands, 2014).

7. CLIMATE CHANGE CASES BEFORE THE ECTHR

While it would be a rather hackneyed joke to say that the climate for climate changes cases is not particularly positive in the ECtHR, one could at least argue that this is changing.

In at least two cases, the ECtHR has declared climate change inadmissible, without however providing any reasoning for its decision to do (in cases the ECtHR considers manifestly ill-founded or not meeting the admissibility criteria – including victim status and exhaustion of domestic remedies, as presented above. Such inadmissibility decision is not published). The first concerned the impact of factory farming[2] and its impact on the environment (Humane Being and Others v. the United Kingdom, 2022). The second concerned the alleged failure by the UK to take practical and effective measures to address man-made climate change by failing to reduce GHG emissions (Plan B. Earth and Others v. the United Kingdom, 2022).[3]

At the same time however, the ECtHR has adjourned the examination of six other application, some of which were rather interestingly filed before the aforementioned two cases that were declared inadmissible.[4]

It was likely that the ECtHR adjourned these cases in anticipation of the three landmark cases pending before its Grand Chamber, following relinquishment of the jurisdiction by the Chambers to which they were allocated : it is again of particular importance to note that while in the vast majority of cases, applications are dealt with either by a Committee or a Chamber, the latter has the possibility of relinquishing jurisdiction in favour of the Grand Chamber. This happens when a case raises a serious question regarding the interpretation of the Convention or if there appears to be an inconsistency in the case law of the ECtHR (with different sections of the Court having reached diverging and conflicting judgments regarding the same issues). As no climate change cases have been addressed on their merits by the ECtHR to date, there is clearly no risk of conflicting jurisprudence. As a result, the reason behind the relinquishment cannot but concern the interpretation and application of the Convention and its principles on a topic the tackling of which poses particular challenges to the Court's in relation to the applicant's victim status, the extraterritorial jurisdiction of states and that of exhaustion of domestic remedies.

The first where the Court's Chamber relinquished jurisdiction in favour of the Grand Chamber was that of Verein Klimaseniorinnen Schweiz et autres contre la Suisse (in French). The case was brought by a Swiss association and its members and a group of elderly people concerned with the consequences of global warming on their living conditions and health and the concomitant failures of the Swiss authorities to take the necessary preventive measures, in particular to implement the necessary measures in order to meet the 2030 goal set by the 2015 Paris Agreement, as well as the lack of access to court in relation to their complaints. Before the relinquishment took place, the ECtHR communicated the case to the respondent Government; this meant that the ECtHR prepared a short summary of the facts of the case and the applicants' complaints and also prepared and addressed a series of questions to the parties. It is interesting therefore to note that the very first question addressed to the parties by the ECtHR

[2] For more information see: https://thehumaneleague.org/article/what-is-factory-farming
[3] For more information see https://climatecasechart.com/non-us-case/plan-bearth-and-others-v-united-kingdom/
[4] A list of these cases, together with a short summary is available at: https://www.echr.coe.int/documents/d/echr/fs_climate_change_eng

concerns the associations and the physical persons status as either direct or potential victims. Another question by the ECtHR asks whether the respondent State has taken all the necessary measures, on the basis of the precautionary principle and that of intergenerational equity. A legal summary of the application and the ECtHR's questions is available here while a more extensive summary of the case together with the parties' submissions and third party briefs is available here. The hearing before the ECtHR's Grand Chamber took place on 29 March 2023 and a video of the hearing is available here.

The second case is that of Carême v. France; the applicant, the mayor of a municipality, addressed (both in his official and personal capacities) a series of letter to the competent French authorities, asking them to implement all necessary measures to reduce greenhouse emissions. A particularly interesting aspect of the case concerns the fact that in the domestic proceedings, while the Council of State found that the applicant did not have legal standing, also found, in the context of proceedings launched by the municipality, that the French state had failed to take appropriate and effective measures and directed it to implement additional one by 31 March 2022. A more extensive summary of the case is available here.

The third and probably more high-profile case is that of Duarte Agostinho and Others v. Portugal and 32 Other States (in French). Partly because of the age of the applicants (between 10 and 23) and partly because of the number of the respondent governments, it has attracted significant public interest. The applicant claim that these 33 States have failed to take measures to reduce greenhouse gas emissions as they have undertaken too under the Paris Agreement, and that this failure, together with the concomitant impact it has on global warming, poses a threat to the applicants' living conditions and health. This case was also communicated to the 33 respondent States. It should come as no surprise that the ECtHR's very first question concerns respondent States' jurisdictional competence, with the ECtHR referring to the aforementioned *Banković* judgment. Rather interestingly, the way the question is phrased suggests that the ECtHR is willing to recognised either individual State(s) responsible, or collective responsibility, or both. The second question concerns the applicants' victim status, with the ECtHR asking whether they can be considered as direct or potential victims. The third question asks whether the respondent States have taken all the necessary measures, on the basis of the precautionary principle and that of intergenerational equity. A legal summary of the application and the ECtHR's questions is available here while a more extensive summary of the case together with the parties' submissions and third party briefs is available here. The hearing before the ECtHR's Grand Chamber took place on 27 September 2023 and a video of the hearing is available here while a running commentary of the hearing by Corina Heri, outlining the main tenor of the presentations by the parties to the case and the third party interveners, is available here.[5] The following selective overview of the main interventions that were made during the hearing is based on her coverage of the hearing.

Numerous of the respondent States took the floor. Unsurprisingly, their arguments revolved around admissibility issues such as jurisdiction, exhaustion of domestic remedies and victim status – the three main stumbling blocks that the applicants are facing which are, in many ways, interrelated. Thus, the UK was critical of any attempt to expand the notion of extraterritorial jurisdiction (invoking *Banković*) and highlighted the social and financial impact of the applicants' claims. Belgium focused on the issue of exhaustion of domestic remedies, arguing that the applicants had failed to bring their complaints before

[5] Please note that apparently this particular link (referring to a Twitter thread) does not function if you merely click on it; you must copy the link and paste it to your browser.

the domestic (Portuguese) courts; it also argued that the complaint should have been filed earlier and that the alleged failure did not constitute a continuing situation, i.e. one that would absolve the applicants from the obligation of filing a complaint with the ECtHR within 6 months (as applicable at the time; it has since been reduced to 4 months) from the end of the situation they are complaining of. Portugal contested the applicants' victim status and argued that their claim was essentially an *actio popularis* one and that the applicants' claims do not fall in the jurisdiction of either Portugal or any of the other States.

The Netherlands were ready to concede the applicants' potential victim status (agreeing that children are particularly vulnerable to the effects of climate change but watering this down by noting that not only they would be impacted by them) but still considered that the complaint should be declared inadmissible, on grounds of lack of jurisdiction (there was no link between the damage they alleged to have incurred and the Netherlands) and non-exhaustion of domestic remedies, noting that at least in the Netherlands and as was seen by the Urgenda judgment, such remedies exist and are effective.

Counsels for the applicants agreed that the case poses some unique issues, most notably regarding the ECtHR's interpretation and application of the concept of extraterritorial jurisdiction and called upon it to expand it. She claimed that there is definitely a link between a State's failure to tackle the issue of greenhouse emissions impacts individuals located outside that State. She stressed that it had not been established that the obligations incumbent on State Parties that had signed up to the Paris Agreement were not excessive or impossible to meet.

The Council of Europe's Commission for Human Rights ("CHR") intervention focused on the impact of climate change on children and youth, called for the recognition of a right to a healthy environment, noting that all Council of Europe Member States (and thus all the respondent Sates in this case) supported United Nations General Assembly (Resolution A/76/L.75) and that the Council of Europe Committee of Ministers (Council of Europe's decision-making body made up of government representatives) had called upon Member States to consider recognising this right at the national level (a development that would remove many of the admissibility hurdles before the ECtHR). CHR's third party brief is available here while their oral submission during the Grand Chamber hearing are available here. The European Union's representative also took floor, essentially arguing that the EU stood at the forefront of the attempt to address climate change and that despite numerous difficulties (such as the war in Ukraine), it was doing more than enough in that respect.

Grand Chamber judges also addressed a series of questions to the Parties; these questions are often giving an idea of the judges' concerns about different aspects of the applicant's case. Thus, one judge asked the applicants why they had not approached any domestic court with their grievances before turning to ECtHR, while four others raised questions regarding the issue of extra-territorial jurisdiction. Two judges asked the Portuguese Government if they could provide information on domestic climate change legislation and jurisprudence (should such jurisprudence exist and be favourable to the applicants' claims, then it would strengthen an argument of inadmissibility on grounds of non-exhaustion of domestic remedies; of note that the Portuguese legal order provides for *actio popularis* claims). Another judge queried the applicants about their choice of respondent States and how they believed responsibility and in what shares should be attributed to them. An interesting question was posed by the ECtHR's President who asked the applicants why they opted for taking their case to the Strasbourg and did not have recourse to the tools available to them under EU law.

8. SOME TENTATIVE CONCLUSIONS

It is difficult to be optimistic about the prospects of these cases; the odds are heavily stacked against the applicants who have to overcome numerous admissibility hurdles before the ECtHR even hears them.

At the same time however, it appears that the ECtHR is clearly thinking that a change in its jurisprudence, at least in the context of climate change cases, is long overdue. And given the numerous positive judgments handed down by domestic courts and the increasing importance of the issue, as well as the more positive stance taken by other international quasi-judicial for a such as the United Nations' Convention on the Rights of the Child (UN CRC) regarding two key admissibility issues,[6] it is very likely that the ECtHR will be reluctant to fully reject the applicants' complaints. Where it will draw the line remains to be seen.

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[6] UN CRC declared inadmissible a complaint by 16 children (among them Greta Thunberg) against Argentina, Brazil, France, Germany and Turkey regarding the respondent States' failure to curb greenhouse emissions. Interestingly, UN CRC acknowledged that the complainants had victim status and that it had jurisdiction to entertain the complaint, it found it inadmissible on grounds of non-exhaustion of domestic remedies; see Sacchi et al v Argentina ,Brazil, France, Germany and Turkey, 2021