

ber states of the Council of Europe with, among other things, taking of insufficient means to reduction of greenhouse gas emissions that are destabilising the climate and have adverse effect on life of the complainants.

Although the European Convention fails to expressly guarantee the environmental right or a climate right, the complainants focused on the charge of breaching the rights under Article 2 (right to life), Article 8 (right to respect for private and family life), and Article 14 (non-discrimination) of the European Convention.

The subject matter of the following discussion deserves interest for several reasons. First, the European Court of Human Rights will consider a case concerning the climate for the first time. It is true the Strasbourg judicature about the environmental right is well established, yet it has not referred to climate issues till now. The complaint in question, meanwhile, reaffirms the fact the climate changes, complicated processes affecting not only the environment but also the economy and society, require a new perspective on human rights. The Court guards the human rights and freedoms contained in the European Convention, therefore, a complaint regarding these issues has been a matter of time. The climate changes, loss of biodiversity, exhaustion of natural resources or chemical pollution undoubtedly pose new challenges not only to societies and governments of particular states, but also to the Court. Second, the way the ECHR considers these problems and interprets the European Convention in the first case concerning the climate changes is of paramount importance. Will it, like with reference to the right to environment protection, find the right to climate protection in the text of the European Convention and, if so, will the right be incorporated among those guaranteed by the European Convention?

As the complaint is filed, a great number of issues has emerged that must be analysed for the case to considered and resolved correctly. Reasons for the complaint, establishing whether the complainants can be regarded as real or potential victims of the breach under Article 34 of the European Convention, have they, directly or not, suffered consequences of the alleged insufficient action or inaction of the states sued to limit the temperature growth to 1.5°C and, if so, have the guarantees been breached of Articles 2 and 8 of the European Convention separately and in conjunction with violations of its Article 14, as well as of Article 1 of the Protocol No. 1 to the European Con-

vention, are some of the intriguing questions. It is also essential to find whether, given the margin of evaluation of the states' environments,⁴ they have fulfilled their undertakings arising from the provisions the European Convention cited above in the light of relevant regulations and principles, like the principle of caution and intergenerational equality under the international environment protection legislation, including the international treaties these states are parties to. It needs to be considered in particular whether the states have adopted adequate internal regulations that are enforced by suitable and sufficient means to attaining the target of limiting the temperature growth to 1.5°C.⁵

1. Comments on the climate changes

Climate is understood as the statistical condition of the atmosphere, an image of weather averaged over a longer period (e.g. 30 years) characterised by mean values and changes of variables (temperature, precipitation, sunlight hours, wind speed, air humidity, etc.) [Kundzewicz 2012, 9]. Climate is largely determined by the natural presence in the atmosphere of the so-called greenhouse gases, especially water steam, carbon dioxide, methane, freons, nitrogen oxide, and ozone. Their over-concentration may lead to excessive warming and consequently to adverse climate changes, as argued by scientists relying on available evidence since the early 1960s. Reports of various academic groupings published over the years contain alarming data about greenhouse gas accumulation that causes excessive capture of solar energy in the atmosphere, which in turn leads to a gradual increase of temperature

⁴ In line with the ECHR's established decisions, a state has at its disposal a margin of discretion on matters like regional planning and environment protection policies, where general (public) interest prevails. However, the margin is far broader than in cases of solely civil law; cf. e.g. the ECHR's judgement of 27 April 2004 in the case *Gorraiz Lizarraga and others against Spain*, complaint No. 62543/00; the ECHR's judgement of 28 July 2005 in the case *Alatulkkila and others against Finland*, complaint No. 33538/96; the ECHR's decision of 21 March 2006 in the case *Valico S.r.l. against Italy*, complaint No.70074/01, and the ECHR's decision of 26 February 2008 in the case *Lars and Astrid Fägerskiöld against Sweden*, complaint No. 37664/04.

⁵ Cf. the ECHR's judgement of 27 January 2009 in the case *Tătar against Romania*, complaint No. 67021/01; the ECHR's decision of 19 May 2009 in the case *Greenpeace EV and others against Germany*, complaint No. 18215/06.

on the Earth. This triggers other processes like rising sea-levels and the resultant greater threat to lower-lying and often more populated areas of the globe (e.g. Bangladesh, Indonesia, Pacific islands) [Kenig-Witkowska 2011, 64].

Greenhouse gases, aromatic hydrocarbons, suspended dusts, and other harmful substances penetrate the atmosphere and raise global temperature, influencing not only climate changes that jeopardise states and nations but also have adverse effects on each and every human, bringing dramatic consequences for human health. They not only contribute to development of many diseases (like cancer, autism, dementia, Alzheimer's, etc.) but, as the World Health Organisation claims, may even lead to a global lowering of *Homo sapiens*'s intelligence [Lato 2017, 6].

Causes and effects of the climate warming are discussed by scientists [Jackson 2021], as there is no clear consensus. Most academics believe they are consequences of human activities in connection with the so-called technological progress. One cannot ignore some sceptics, however, who treat global warming as a natural phenomenon independent from man [Singer and Avery 2007, 11]. Representatives of diverse disciplines agree about one thing – the climate changes are very rapid, faster than the response of the international community. In A. Giddens' opinion, many problems will not be solved until the threats become directly observable in everyday life. Research demonstrates, on the one hand, most people agree the climate changes are a grave threat, yet a scant number are ready to change their life substantially, on the other hand [Giddens 2010, 10].

The United Nations Framework Convention on Climate Change⁶ is the most important international legal document intended to counteract adverse effects of the climate changes. As interpreted by Article 2 of the Convention, its objective is to stabilise greenhouse gas concentrations in the atmosphere at a level that would prevent a dangerous anthropogenic interference in the climate system. The Convention and the Kyoto Protocol⁷ set an international framework for restricting emissions of harmful substances to the air. Its Article 1 part 2 defines the concept of climate changes as “changes in the climate

⁶ The Framework UN Convention on Climate Changes, signed in New York on 9 May 1992, Journal of Laws of 1996, item 238.

⁷ The Kyoto Protocol to the Framework UN Convention on Climate Changes, signed in Kyoto on 11 December 1997, Journal of Laws of 2005, No. 203, item 1684.

caused, directly or indirectly, by human activity which changes the composition of the Earth's atmosphere as distinct from the natural climate variability observed in comparable periods." These treaties form an international legal framework for counteracting adverse climate changes. Authors stress they reflect the growing awareness of the international community environment protection on the global scale is a necessity and the environment must be treated as an asset requiring "joint care" [Ciechanowicz-McLean 2012, 69].

2. An avalanche of climate suits

Questions of the climate and environment protection are increasingly becoming important subjects of public debate. They have long been most popular topics in global media. Absence of an appropriate response of the international community seems to affect standards of obedience to human rights in this case. Human rights and the environmental right are systems that have evolved independently from each other. For a long time, connections between them were ignored, yet development of each has caused areas of their regulation to overlap. The recognition that the environmental right is one of the human rights at the Stockholm Conference was indubitably of paramount importance to this process [Ciechanowicz-McLean and Nyka 2012, 82].

As awareness of the matter grew and impact of the deteriorating condition of the natural environment on human life, health, and being escalated, these problems have become objects of complaints filed with national and international judicial bodies. An attorney representing complainants worldwide claims more than 1300 suits regarding the climate changes (most in the United States) since 1990, although the case discussed here is very likely to set a precedent. A range of voices are raised this may be the most important of cases ever heard by the ECHR. It is notable the Supreme Court of the Netherlands was the first domestic court of the highest instance to specify the state's duty of rapid and substantial reduction of the emissions as part of its human rights obligations. In *Urgenda versus the Government of the Netherlands*⁸ judgment (19/00135), announced on 20 December 2019, the

⁸ The judgement in the case *Stichting Urgenda against the government of the Netherlands (Ministry of Infrastructure and Environment)* of 24 June 2015, ECLI:NL:RBDHA:2015:7145, Rechtbank Den Haag, C/09/456689/HA ZA 13-1396, <http://uitspraken.rechtspraak.nl/inzie>

Dutch government was found to be charged with the duty of meeting the reduction target laid down for developed countries by the 4th Assessment Report (AR4) of the Intergovernmental Panel on Climate Change (IPCC), issued in 2007 [Metz, Davidson, Bosch, et al. 2007].

In July 2020, the Supreme Court of Ireland accepted the suit submitted by Friends of the Irish Environment,⁹ according to which the government's National Mitigation Plan 2017-2022 was not sufficiently detailed and breached the constitutional law.

The Canadian Supreme Court in its groundbreaking judgment in the case *La Rosse and others against Canada*, concerning the climate changes, found the rights protected by the Charter of Rights and Freedoms can be at risk from the climate changes and citizens are capable of questioning actions of the Canadian government in relation to the climate crisis by virtue of domestic legislation. The Court pointed out the rights under the Charter should provide a minimum of the same protection as equivalent rights under binding human right treaties.

3. Description of the Portuguese suit

Established in 1959, the ECHR hears individual (Article 34 the European Convention) and interstate (Article 33 the European Convention) complaints. Article 34, sentence one of the European Convention is interpreted to the effect that the European Court of Human Rights can receive complaints from any person, non-government organisation or group of individuals who believe themselves to be victims of a violation of any rights contained in the European Convention or its protocols by a state party to the Convention. B. Gronowska is correct the right to file individual complaints in the system of the European Convention is allowed to a relatively wide range of entities [Gronowska 2011, 95], however, the doctrine assumes the said

ndocument?id=ECLI:NL:RBDHA:2015:7196 [accessed: 17.03.2021]. Read more about the judgement *Urgenda against the government of the Netherlands*: Grobicki and Rogulska 2020, 128-36.

⁹ The Supreme Court of Ireland judgement in the case *Friends of the Irish Environment against The Government of Ireland & Ors*, complaint No. 205/19, https://www.courts.ie/view/judgments/681b8633-3f57-41b5-9362-8cbc8e7d9215/981c098a-462b-4a9a-9941-5d601903c9af/2020_IESC_49.pdf/pdf [accessed: 17.03.2021].

provision stipulates the right to individual complaint is based on joint fulfilment of two conditions. First, it accrues to entities listed in the provision; second, these entities are bound to substantiate they are victims to breaches of rights or freedoms included in the European Convention and its protocols [Kondak 2011, 126-27]. As a consequence, there should be a direct connection between a complainant and a violation of the European Convention. This is corroborated by established Strasbourg decisions, according to which the status of a victim is due to a person who demonstrates a relation between their impaired situation and a state's actions. The notion of a victim is interpreted independently, without reference to a national legislation concerning interest in or capability of taking actions.¹⁰

Based on this authorisation, on 3 September 2020 British lawyers (experts in environment protection and climate changes law) who represent Portuguese children and youth, supported by a non-government organisation Global Legal Action Network, filed a complaint with the ECHR, charging 33 Council of Europe countries (all the EU member states, Russia, Norway, Switzerland, Turkey, Ukraine, and the UK) that are party to the European Convention with defaults on protection of the natural environment. The case focuses on the countries the complainants believe have not prepared appropriate policies to limit the growth of average global temperature to 1.5°C compared to pre-industrial levels, as envisaged in the Paris Agreement.¹¹

It should be pointed out at this junction the European Convention does not require a complainant to be a citizen of the state against which their complaint is raised, it is enough they are under the jurisdiction of a country party to the European Convention [Nowicki 2011, 41]. A complaint can also be

¹⁰ The ECHR's judgement of 27 April 2004 in the case *Gorraiz Lizarraga and others against Spain*, complaint No. 62543/00.

¹¹ The Paris Agreement to the UN Framework Convention on Climate Changes, drafted in New York on 9 May 1992, Journal of Laws of 2017, item 36. In the light of Article 2 part 1a of the treaty, "1. By fostering implementation of the European Convention for this purpose, this Agreement shall attempt to intensify the global response to threats associated with the climate changes in the context of sustainable development and efforts for liquidation of poverty by inter alia: (a) Restricting the growth of average global temperature to far less than 2°C above pre-industrial levels and efforts to limit the temperature growth to 1.5°C above the pre-industrial levels, accepting this will significantly lower the risks associated with the climate changes and their effects."

submitted by a group of individuals even without any formal relations [Gronowska 2011, 96].

The complaint applies to states other than those inhabited by the complainants as well. The Portuguese activists sue state(s) other than those to whose jurisdiction they are subject. In this way, the concept emerges of a jurisdiction covering transborder harm to the environment [Zbarszewska 2008, 109-23]. The complainants are six young¹² Portuguese citizens (aged 8 to 21, including two of age; they live in Lisbon and Leiria¹³) represented by British lawyers. They are members of three Portuguese families who have suffered effects of the climate changes themselves. They were driven to submit their individual complaint by their situation – the forest fires of 2017 became formative experiences for most and made them file their suit with the ECHR. Leiria was one of the towns most affected by the fires. The constant threat of forest fire, climbing air temperature (the warmest July in Portugal for 90 years) are changes the complainants believe make their everyday life harder. Some complainants are minor children.¹⁴ Although provisions of the European Convention do not make direct references to children's rights, the guarantees contained in the treaty apply to children and, as a matter of fact, individual complaints have over the years been presented to the ECHR concerning violations of these rights in relation to children. *Tyrer against Great Britain* was the first case of this type, heard by the Court in 1978:¹⁵ the complainant pointed to breaches of Articles 3, 8, 13 and 14 of the European Convention.

4. Object of the complaint and the complainants' demands

The complaint in question brings the charges of breaching Article 2 (the right to life), Article 8 (right to respect for private and family life), and Arti-

¹² Cláudia Agostinho (21), Catarina Mota (20), Martim Agostinho (17), Sofia Oliveira (15), André Oliveira (12), Mariana Agostinho (8).

¹³ One of the Portuguese regions most affected by the climate changes.

¹⁴ Cf. Fenton-Glynn 2021. The monograph offers an extensive analysis of the ECHR's decisions concerning children, stressing a number of the European Court's achievements in this field.

¹⁵ The ECHR's judgement of 25 April 1978 in the case *Tyrer against Great Britain*, complaint No. 5856/72.

cle 14 (non-discrimination) of the European Convention, The complainants accuse 33 states of failure to discharge positive obligations arising from the above provisions of the European Convention in light of the undertakings under the Paris Climate Agreement¹⁶ signed on 12 December 2015. They refer in more detail to the undertaking incorporated in Article 2 of the Agreement, namely, restraining the rise of average global temperature to much less than 2°C compared to pre-industrial levels and continuing such actions.

Article 2 of the European Convention, in whose light every human's right to life is protected by law (Section 1) and no-one can be killed with premeditation with the exception of execution of court sentences ordering capital punishment by force of law (Section 2), first of all expressed a general negative obligation, or prohibition to take life. In I.C. Kamiński's belief, the ECHR in environment-related cases refers to the state's positive duties of assuring guarantees under the Convention by taking actions to secure human life [Kamiński 2010, 28].

In accordance with Article 8 of the European Convention, everyone has the right to respect for their private and family life, their home and correspondence (Section 1). Interference of public authorities with enjoyment of this right are unacceptable except as provided for by law as necessary in a democratic society due to state security, public security or economic welfare of a state, protection of order and crime prevention, health care and protection of morality or rights and freedoms of others (Section 2). In line with the established ECHR's judicature, Article 8 the European Convention may only apply where harm to the environment has direct adverse effects on family and private life of a complainant. A violation of the environment will substantiate application of Article 8 of the European Convention when it attains a certain extent whose determination is relative and dependent on a variety of circumstances. In the opinion of the Court, overall standards and standing of the environment protection in a given country are material as well. Article 8 of the European Convention is not breached if harm – comparable to ecological risks of living in a modern city – is minor [Nowicki 2006, 142]. When considering the case under study, will the ECHR interpret Article 8 of the European Convention in parallel with regard to the climate changes?

¹⁶ EU OJ L 282/4.

The charges of infringements on the right to life and to respect for private and family life do not give rise to doubt, however, a violation of non-discrimination may come as a surprise. The complainants argue, though, the non-discrimination relates to their age. They claim the interference with their rights is greater than in the case of older people, because they will live longer and effects of the climate changes will be aggravated in time. Given that four petitioners are children, the complainants argue the said provisions of the European Convention should be read in the light of Article 3(1) the UN Convention on the Rights of the Child,¹⁷ which requires that any decision affecting children be based on their overarching interest. They also cite the principle of intergenerational equality contained in several international instruments, including the 1992 Rio Declaration on the environment and development, the preamble to the Paris Agreement, and the 1992 Framework UN Convention on Climate Change, which states the right to development must be realised fairly and appropriately to developmental and environmental needs of the present and future generations. They believe it is objectively unreasonable to burden young generations with the climate changes by failing to take appropriate means to restricting warming.

Three first petitioners also complain against the hardships of extended dry periods that prevent continued vegetable growing in their garden and drawing water from a well in their family's land. The recurrent forest fires in recent years caused damage to their family's estate, especially due to ash emissions. The complainants believe the member states have failed to perform on their undertakings under the said provisions of the European Convention, particularly if read in the light of international climate treaties. They bind the signatory states to adopt measures to appropriate regulation of their contributions to the climate changes by: reducing emissions in their territories and other territories subject to their jurisdiction, banning exports of fossil fuels, compensating for the emissions resulting from commodity imports, and limiting emissions abroad.

These specific undertakings persist even where contributions of the member states to global warming materialise out of their territories. By force of these undertakings, the states must introduce palpable and effective means

¹⁷ The European Convention on the Rights of the Child dated 20 November 1989, Journal of Laws of 1991, No. 120, item 526 as amended.

to be evaluated on the degree to which the emissions are reduced on their implementation. Given the exceeded target of warming rise in the present case, set at 1.5°C, the petitioners believe the states' shares in this excess is substantial, thus the steps taken to reduce it are insufficient, unless proven otherwise.

As far as the legal status of the complainants is concerned, they must be regarded as direct victims, since the ECHR's decisions imply a victim is direct where actions or negligence in a case have direct impact on a complainant.¹⁸ The alleged failures comprise allowing domestic emissions, permitting exports of fossil fuels extracted from their territories, allowing imports of goods containing embedded coal, and permitting entities based in these countries to contribute to emissions abroad (by extracting or financing extraction of fossil fuels elsewhere). Absence of appropriate means to reducing the global emissions is in itself, the complainants claim, a violation of the undertakings that bind the states.

The complainants assert the member states share the responsibility for the climate changes and uncertainty as to a "fair division" of the contribution among the member states can only act to the petitioners' benefit. They emphasise an absolutely urgent need to work for the climate and believe it important for the Court to quickly recognise the shared responsibility of the states and release the complainants from the duty of exhausting domestic legal remedies in their respective states. If governments are inactive, the Court should defend the complainants and protect them against threats arising from the climate changes. Such an approach would satisfy the urgent need for actions to achieve the set warming reduction to 1.5°C and would improve the likelihood of effective responses of national jurisdictions. The complainants point out in this respect certain third parties in several member states have already taken legal steps in relation to failed undertakings to reduce the global emissions. Some of these actions have been successful, some not, while others are still in progress in domestic courts.

In a particularly complex case like this, however, binding the complainants from humble Portuguese families to exhaust remedies in domestic courts of each respondent state would mean an excessive and non-proportional

¹⁸ The ECHR's judgement of 25 June 1996 in the case *Amuur against France*, complaint No.19776/92.

burden, given that effective responses of courts in all the member states appear unnecessary, since domestic courts can only issue orders applicable to their own states. It should be noted the ECHR has expanded the scope of the complaint as it has requested the states to respond to the charges against them and enquired whether their negligence at countering the global warming of the climate also constitutes a breach of Article 3 of the European Convention. That provision says no-one can be subject to torture or inhuman or humiliating treatment or punishment. It can be inferred, therefore, effects of the climate changes suffered by the complainants are so grave their rights under the said provision are probably violated.

The complainants demand from authorities of the respondent states that the emissions drop by 65% till 2030. The complainants have decided to file a Strasbourg suit since they believe the ECHR's decision in the matter is urgently needed, as its object is of utmost importance and a decision of the Court would foster necessary changes at national levels in each of the respondent states. The Court's judicature concerning the environmental right is already well established.¹⁹ It takes the position that if someone is directly and seriously affected by noise or other pollutions, the issue may come under the European Convention. Grave changes in the environment may influence well-being of individuals. In the opinion of the ECHR, states are not only obliged to refrain from arbitrary interference but also charged with a positive duty of adopting reasonable and appropriate means to protection of individual rights.

According to the Court, although the European Convention does not have a clear provision to protect the right to a clean and peaceful environment, wherever an individual is directly and seriously exposed to noise or other pollution, a breach of Article 8 of the European Convention may arise. In its judgement in the case *López Ostra versus Spain*, the Court found Article 8 may incorporate the right to protection from a range of environment pollutions as they interfere with individual well-being and prosperity and discourage from

¹⁹ The ECHR has resolved in approximately 300 cases relating to the environment so far. See more in https://www.echr.coe.int/Documents/FS_Environment_ENG.pdf [accessed: 10.02.2021].

using home in such a way that it may adversely affect private or family life.²⁰ The charge of breaching Article 8 of the European Convention is reasonable where levels of pollution (noise) a complainant is exposed to have for years been in excess of acceptable standards. In its judgement in the case *Oluic versus Croatia* of 20.05.2010, the Court found the charge reasonable, yet refused to consider the charge of violating Article 1 of Protocol 1.²¹

The so-called environmental issues, objects of complaints submitted to the European Court of Human Rights, have been heard with reference to breaches of diverse human rights. They can be grouped into the following problems: prevention of environment pollution and disasters, environmental threats, access to information and compensation, protection against noise and air pollution, access to courts, freedom of expression and property right. The foregoing discussion can be summarised by indicating the complainants accused the respondent states of negligence at their climate policies and excessive permissible emission levels they believe lead to irreversible environmental changes. The object of their complaint is not the environment or climate right, since the European Convention fails to guarantee such rights explicitly. This can be explained by the fact the treaty was signed in 1950, when the environment protection was not so urgent as to include these rights in the catalogue of rights warranted by the European Convention. The Strasbourg decisions imply, though, the European Convention is the so-called living instrument to be interpreted in the light of current conditions²² and developments in international law, so that it expresses increasing standards of human right protection that result from increasingly resolute evaluations of breaches of fundamental values of democratic societies.²³

²⁰ The ECHR's judgement of 9 December 1994 in the case *Lopez Ostra against Spain*, complaint No. 16798/90.

²¹ The ECHR's judgement of 20 May 2010 in the case *Oluic against Croatia*, complaint No. 61260/08.

²² Cf. the ECHR's judgement of 25 April 1978 in the case *Tyrer against Great Britain*, complaint No. 5856/72; the ECHR's judgement of 22 January 2008 in the case *E.B. against France*, complaint No. 43546/02.

²³ The ECHR's judgement of 28 July 1999 in the case *Selmouni against France*, complaint No. 25803/94.

It is the complainants' belief the deteriorating climate conditions affect their own health and that of their entire generation, aggravating the risk of depression and panic attacks and preventing free enjoyment of open spaces. The climate changes constitute an increasing jeopardy to life and physical and mental state. Aside from the alleged discrimination, the complainants charge the respondent states with violating their right to life and right to respect for family life. They require these states to accept responsibility for the climate crisis. On the other hands, as the Court has repeatedly confirmed European Convention is not specifically designed to provide general protection of the environment as such; to that effect, other international instruments and domestic legislation are more pertinent.²⁴

5. Obstacles to the suit and initial verification of the complaint

A comparison of conditions of acceptability of individual complaints adumbrated in Articles 34 and 35 of the European Convention to those fulfilled by the authors of the complaint under consideration indicates distinct divergences from established requirements. They relate to jurisdiction in relation to countries other than Portugal, status of victims, and the duty of exhausting domestic legal remedies. The question of jurisdiction is an evident impediment to hearing the complaint by the European Court of Human Rights. In the light of Article 1 of the European Convention, the states party to this treaty shall provide every person subject to their jurisdiction with rights and freedoms guaranteed by the European Convention. The formulation of this provision seems to imply the Court's jurisdiction extends to persons in territories of the states party to the European Convention regardless of their nationality, in particular, regardless of whether they are citizens of a state party to the European Convention. This wording does not mean, however, the Court's jurisdiction must be limited to territory of a state party. In line with Article 1 of the European Convention, it is enough for an individual to show they are "subject to jurisdiction" of a given state at a given time to prove that state is responsible for breaches against that individual. Acceptance of this assum-

²⁴ The ECHR's judgement of 22 May 2003 in the case *Kyrtatos Againts Greece*, complaint No. 41666/98; see also the ECHR's judgement of 23 January 2019 in the case *Cordella and Others Againts Italy*, complaint No. 54414/13 and 54264/15.

ption implies, among other things, the responsibility based on territorial jurisdiction will be extended and founded on nationality of a party responsible for a breach as well [Wierczyńska 2008, 30].

In respect of this question, the complainants argue they are subject to ex-territorial jurisdiction of the remaining 32 states. L. Garlicki pints out the scope of ex-territorial applicability of the European Convention has not been explicated beyond any doubt by decisions of the Court so far. It also gives rise to heated disputes in the doctrine. The Strasbourg decisions are not always fully consistent, which is not unrelated to political potential of its cases. Nonetheless, three conclusions seem possible.

The European Court of Human Rights has emphasised the ex-territorial jurisdiction of a state can only be admitted by way of exception, since the ordinary understanding of Article 1 of the European Convention in the framework of international law suggests a state has a mainly territorial competence.²⁵ Ex-territorial application of the European Convention should be justified by individual circumstances of a case [Garlicki 2011, 39]. More doubts concern the victim status. It is important to answer the question whether the Court will accord this status to the complainants, thus making an evolutionary interpretation of the concept of “victim” included in Article 34 of the European Convention.

Another question arises in the context of Article 35(1) of the European Convention, whose interpretation says an individual complaint may be filed with the ECHR only after legal remedies under internal laws of a given state have been exhausted. This provision expresses the principle of subsidiarity, according to which an individual complaint can be presented to the ECHR only after legal remedies available domestically have been resorted to, thus requiring that a case be filed with highest instance courts in all respondent states. The Court’s interpretation of the principle tends to be case-based. It always examines whether the remedies to be necessarily exhausted have been available to a complainant, relevant to an alleged violation, and offered

²⁵ The ECHR’s decision of 12 December 2001 in the case *Banković and others against Belgium and 16 other states*, complaint No. 52207/99; the ECHR’s judgement of 8 July 2004 in the case *Ilaşcu and others against Moldova and Russia*, complaint No. 48787/99.

reasonable changes of success.²⁶ The principle of exhausting legal remedies available in domestic law is intended to allow the state parties the possibility of preventing or remedying breaches they are accused of before charges are submitted to the Court.²⁷ Protection of individual freedoms and rights guaranteed by the European Convention should first of all be ensured in domestic courts and authorities. The ECHR, meanwhile, is to provide the protection only where domestic entities fail to perform their undertakings.

As distinct from other public order requirements the Court reviews *ex officio*, the charge of failing to exhaust domestic remedies is only reviewed once raised by a government [Romańska 2013, 302]. The European Court of Human Rights has given a green light to the complaint without rejecting it at the stage of examining its admissibility. Thus, it has potentially shown its willingness to consider the complaint on its merits. What is more, the Chair of the ECHR Section IV accepted the complainants' request to hear the case on a priority basis under Article 41 of the ECHR Regulations on 13 October 2020.²⁸ That provision states that, when determining the order of considering its cases, the Court takes into account significance and urgency of their subject matter according to criteria set at its own discretion. The Chamber or its Chair, however, may abandon these criteria to accord priority to a specific complaint. In line with the ECHR procedures, the Court communicated the complaint to the respondent states and ordered them to respond to the charges contained therein on 30 November 2020. The states are bound to respond by 23 February 2021. The respondent states should cooperate with the Court in this respect.²⁹ Time will show if a hearing will be arranged, which, as M. Balcerzak notes, happens only in cases of paramount importance to the Strasbourg system [Balcerzak 2016, 14].

²⁶ The ECHR's judgement of 28 July 1999 in the case *Selmouni against France*, complaint No. 25803/94.

²⁷ Cf. *inter alia* the ECHR's decision of 1 March 2005 in the case *Charzyński against Poland*, complaint No. 15212/03.

²⁸ As modified by the Court on 17 June and 8 July 2002 and 29 June 2009.

²⁹ See resolutions ResDH(2001) 66 of 26 June 2001 and ResDH(2006)45 of 4 July 2006 binding states to cooperate with the European Court of Human Rights and report on the Member States' duty of cooperation with the European Court of Human Rights, Parliamentary Assembly, Doc. 9.02.2007, 11183.

6. Possible consequences of the judgment

A judgement is still a distant prospect, although the Court has so far given the case a priority treatment. It seems unusual, nonetheless, since the European Convention doesn't guarantee the environmental right. As far as actual effects of the Court considering this complaint are concerned, a judgement of this type may require significant modifications to policies and practices of the respondent states. Given the changes introduced on foot of the Court's decisions regarding the natural environment, it can be concluded a potential decision in the case *Agostinho* that would recognise a violation of the European Convention will force the respondent states to implement some changes in order to enforce the judgement. The states may be bound to take more intensive actions as a result. The member states may decide to adopt another additional protocol to the European Convention that would guarantee the environmental right.

Will the Court, like the Court of Appeals in the *Urgenda* case, recognise existence of "the duty of care" in the laws of the respondent states based on the European Convention, and if so, do not specific contents of this duty derive not from human rights, but from scientifically proven and internationally approved target reductions of greenhouse gas emissions which are necessary to reach the Paris Agreement temperature target? [Minnerop 2019, 1]. The Court's judgement in this case is likely to set a new standard by indicating states cannot evade responsibility for climate violations of human rights only because greenhouse gas emissions are caused by other states as well.

However, if a case brought before the ECHR has an unfavourable outcome in relation to forcing greater governmental action in combating climate change, this may also have greater consequences than such an outcome of a domestic challenge, since it will set a minimum standard of care, or completely exclude climate change in relation to human rights [Niska 2020, 331].

Conclusion

Answering most of the questions asked above is very difficult. It depends on the Strasbourg judges whether a resolution of the case under discussion proves historic, like in the question of the environmental rights, and the ECHR will opt for a dynamic and functional interpretation of the European

Convention in this case as well, finding reasonable and admitting the complainants' suits and, as a consequence, whether the environmental right will become part of the European Convention system and if governments of the respondent states will incur responsibility for excessively slow actions taken to reduce greenhouse gas emissions, as claimed by the complainants. The Court's resolution in the present case may turn into a precedent. The European Court of Human Rights frequently decides to issue an unprecedented judgment that provides interpretations for domestic courts of the states party to the European Convention. Thus, a resolution will have far-reaching effects as it may force the respondent states to limit their emissions. In addition, in view of the impact of international judicial decisions on other regional systems of human right protection, such a resolutions may have even broader effects beyond the European continent. Even a failure of the complainants will draw attention to the weight of the issue in both domestic court proceedings and at the EU level. Such a judgement may also encourage potential complainants to file comparable suits.

REFERENCES

- Balcerzak, Michał. 2016. "Standardy dowodowe w postępowaniu przed Europejskim Trybunałem Praw Człowieka." In *Odpowiedzialność międzynarodowa w związku z naruszeniami praw human rights i międzynarodowego prawa humanitarnego*, edited by Michał Balcerzak, and Julia Kapelańska-Pręgowska, 13-31. Toruń: Katedra Praw Człowieka Wydział Prawa i Administracji Uniwersytet Mikołaja Kopernika.
- Ciechanowicz-McLean, Janina. 2012. "Historia prawa ochrony środowiska: od ochrony przyrody do ochrony klimatu." In *W kręgu historii doktryn politycznych i prawnych oraz konstytucjonalizmu. Księga jubileuszowa profesor Andrzeja Sylwestrzaka*, edited by Dariusz Szpoper, 63-71. Gdańsk: Wydział Prawa i Administracji Uniwersytetu Gdańskiego.
- Ciechanowicz-McLean, Janina, and Maciej Nyka. 2012. "Human rights and the environment. Prawa człowieka i środowisko." *Przegląd Prawa Ochrony Środowiska* 3:81-109.
- Fenton-Glynn, Claire. 2021. *Children and the European Court of Human Rights*. Oxford: Oxford University Press.
- Garlicki, Leszek. 2011. *Europejska konwencja o ochronie praw człowieka i podstawowych wolności*. Vol. 1. Edited by Leszek Garlicki, Piotr Hofmański, and Andrzej Wróbel. Warsaw: C.H. Beck.

- Giddens, Anthony. 2010. *Klimatyczna katastrofa*. Warsaw: Prószyński i S-ka.
- Grobicki, Grzegorz, and Zofia Roguska. 2020. "W obronie eksperckiego charakteru polityki klimatycznej. Glosa krytyczna do wyroku Sądu Najwyższego Niderlandów z dnia 20 grudnia 2019 r., 19/00135, Urgenda przeciwko Rządowi Niderlandów." *Glosa* 3:128-36.
- Gronowska, Bożena. 2011. *Europejski Trybunał Praw Człowieka. W poszukiwaniu efektywnej ochrony praw jednostki*. Toruń: TNOiK.
- Jackson, Stephen. 2021. "Climate change." <https://www.britannica.com/science/climate-change> [accessed: 20.05.2021].
- Kamiński, Ireneusz C. 2010. "Prawo do życia i zakaz tortur oraz poniżającego i nie-ludzkiego traktowania w orzecznictwie ETPCz w 2009 r." *Europejski Przegląd Sądowy* 10:27-37.
- Kenig-Witkowska, Maria M. 2011. *Międzynarodowe prawo środowiska. Wybrane zagadnienia systemowe*. Warsaw: Wolters Kluwer.
- Kondak, Ireneusz. 2011. *Europejska konwencja o ochronie praw człowieka i podstawowych wolności*. Vol. 2. Edited by Leszek Garlicki. Warsaw: C.H. Beck.
- Kundzewicz, Zbigniew W. 2012. "Zmiany klimatu, ich przyczyny i skutki – możliwości przeciwdziałania i adaptacja." *Studia BAS* 1 no. 29:9-30.
- Lato, Agata. 2017. "Mózg w oparach smogu." *Świat Mózgu* 4:7-18.
- Metz, Bert, Ogunlade Davidson, Peter Bosch, et al. 2007. "Climate Change 2007: Mitigation. Contribution of Working Group III to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change." https://www.ipcc.ch/site/assets/uploads/2018/03/ar4_wg3_full_report-1.pdf [accessed: 10.02.2021].
- Minnerop, Petra. 2019. "Integrating the «duty of care» under the European Convention on Human Rights and the science and law of climate change: the decision of The Hague Court of Appeal in the Urgenda case." *Journal of Energy & Natural Resources Law* vol. 37, 149-79.
- Niska, Therese K. 2020. "Climate Change Litigation and the European Court of Human Rights – A Strategic Next Step?" *Journal of World Energy Law & Business* 13, no. 4:331-42.
- Nowicki, Marek A. 2006. *Europejski Trybunał Praw Człowieka Praw. Wybór orzeczeń 2005 r.* Cracow: Zakamycze.
- Nowicki, Marek A. 2010. "Wprowadzenie do interpretacji EKPCz." *Europejski Przegląd Sądowy* 1:4-11.
- Nowicki, Marek A. 2011. *Wokół Konwencji Europejskiej. Komentarz do Europejskiej Konwencji praw człowieka*. Warsaw: Wolters Kluwer.
- Romańska, Marta, ed. 2013. *Pozainstancyjne środki ochrony prawnej*. Warsaw: C.H. Beck.
- Singer, Fred S., and Dennis Avery T. 2007. *Unstoppable Global Warming*. New York: Rowman & Littlefield Publishers.

- Wierczyńska, Karolina. 2008. "Odpowiedzialność państwa za ekstraterytorialne naruszenia prawa międzynarodowego w świetle decyzji i orzeczeń ETPCz." *Europejski Przegląd Sądowy* 6:30-34.
- Zbaraszewska, Anna. 2008. "Prawnomiędzynarodowa odpowiedzialność za szkody transgraniczne w środowisku – problem prewencji." *Ruch Prawniczy, Ekonomiczny i Socjologiczny* LXX, no. 2:109-23.

The Environmental Right in the System of the Convention for the Protection of Human Rights and Fundamental Freedoms. Some Comments Based on an Individual Complaint Filed with the European Court of Human Rights on 7 September 2020 in the Case *Cláudia Agostinho against Portugal and 32 other states*

Abstract

Climate changes are a major threat to human life. In this connection, submission of a complaint in the case *Cláudia Agostinho against Portugal and 32 other states* to the European Court of Human Rights in Strasbourg is no surprise, especially as a number of such complaints have been raised against governments worldwide recently. This paper discusses the complaint in detail and attempts to answer some of the questions raised, such as, will the Strasbourg Court find the complaint reasonable and, if so, will it address treaties on climate changes when interpreting the Convention for the protection of human rights and fundamental freedoms?

Keywords: European Convention, European Court of Human Rights, human rights, environmental right, individual complaint

Prawo do klimatu na gruncie Europejskiej Konwencji o Ochronie Praw Człowieka i Podstawowych Wolności. Uwagi wybrane na kanwie skargi indywidualnej do Europejskiego Trybunału Praw Człowieka z dnia 7 września 2020 r. w sprawie *Cláudia Agostinho przeciwko Portugalii i 32 innym państwom*

Streszczenie

Zmiany klimatyczne są jednym z istotnych zagrożeń dla życia ludzkiego. Z uwagi na ten fakt wniesienie skargi w sprawie *Cláudia Agostinho przeciwko Portugalii i 32 innym państwom* do Europejskiego Trybunału Praw Człowieka w Strasburgu nie jest zaskakujące, tym bardziej że w ostatnim czasie złożono wiele skarg tego rodzaju przeciwko rządóm na całym świecie. Prezentowany artykuł zawiera szczegółowe omówienie tytułowej skargi, a także próbę odpowiedzi na pojawiające się pytania, m.in. czy Trybunał strasburski uzna skargę za zasadną, a jeśli tak, czy dokonując interpretacji Europejskiej Konwencji o Ochronie Praw Człowieka i Podstawowych Wolności, weźmie pod uwagę traktaty dotyczące zmian klimatycznych.

Słowa kluczowe: Konwencja Europejska, Europejski Trybunał Praw Człowieka, prawa człowieka, prawo do klimatu, skarga indywidualna

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