Application no. 39371/20

EUROPEAN COURT OF HUMAN RIGHTS

GRAND CHAMBER

DUARTE AGOSTINHO AND OTHERS

Applicants

v

PORTUGAL AND OTHERS

Respondents

REPLY TO THE OBSERVATIONS OF THE RESPONDENT STATES DATED 31 JANUARY 2023

---

29 March 2023

I. INTRODUCTION[1]

1. The Applicants and RSs agree that climate change is a severe threat to the global community, presents an unprecedented challenge in magnitude and scale, and that there is an "imperative for urgent action to address that threat".[2] The dispute concerns whether the Convention and the Court have a role in protecting the rights of persons (the Applicants) within the Convention Legal Space (CLS) from the existential threat of climate change.

2. On the RSs' case, the Convention has little role to play in addressing the most catastrophic threat to human rights of this century. "[T]he intended role of the Court", in the RSs' view, is non-existent or minimal when it comes to protecting the Applicants' rights from the ever-worsening climate impacts in Portugal (PRT). On the RSs' case, climate change is a matter to be left to political mechanisms and "internationally agreed framework[s]", no matter how ineffective they are and no matter the gravity and urgency of the threat posed to the Applicants' rights.[3]

3. The Applicants' answer is that the Convention can and must be relevant to the profound threat climate change poses to human rights. That answer is rooted in both the scientific realities of climate change and the purpose of the Convention. Far from "bypassing" its admissibility conditions, engaging in a "radical and far-reaching expansion of [the Court's] case law" or seeking to "go beyond the interpretation and application of the Convention", the Applicants apply well-established principles under the Convention to the exceptional circumstances of climate change.[4] This is necessary to provide effective protection of the Applicants' Convention rights in the face of the threats posed by climate change.

II. FACTS

4. It is telling how few factual disputes there are between the Applicants and the RSs. The following are undisputed: (i) the global causes and impacts of climate change; (ii) the climate impacts in PRT and the limits of PRT's adaptive capacity; (iii) the imperative to keep global warming to 1.5℃ (the LTTG);[5] (iv) the trajectory of 2.6-2.8℃ on current policies and commitments; (v) the need for rapid global emissions reductions outlined as necessary by the IPCC; (vi) the need for steep declines in fossil

[1] References are made below to the RSs Joint Observations (RSJO), as well as the Supplementary Observations of individual RSs as appropriate. The Applicants' have filed Observations dated 9 February 2022 (AO) and Final Submissions dated 5 December 2022 (AFS).
[2] RSJO/§4.
[3] RSJO/§§3, 237.
[4] Cf RSJO/§§2-3.
[5] While certain RSs have disputed that they are legally obliged to pursue the LTTG of 1.5℃, their consensus surrounding the appropriateness and necessity of pursuing that LTTG is expressed in a series of international agreements and declarations (AFS/§12; AO/§516).

fuel production; and (vii) the contribution to climate change of embedded and overseas emissions of entities domiciled within the RSs.[6] The RSs do not and cannot question the science of the IPCC, UNEP and the IEA.

5. The factual disputes are understood to be limited to the impacts of climate change upon the Applicants. The Applicants have presented a comprehensive body of evidence in support of the Application, which includes witness statements, the authoritative reports of international bodies (i.e. the IPCC, UNEP and the IEA), expert reports, official reports from PRT and studies of other RSs, and reputable scientific papers. The minor issues identified by the RSs (addressed at §7 below) do not materially detract from the cumulative force of the evidence that the Applicants have provided regarding the current and future impacts of climate change upon the enjoyment of their rights.[7] Taken together, it is plain that the Applicants have provided evidence of current and future impact from which at the very least "sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact" can be drawn.[8]

6. In response to discrete matters raised by the RSs:
   a. The risk levels of heatwaves in the Applicants' districts are relative to the overall high and increasing risk of heatwaves in PRT as a whole.[9] All the Applicants live in areas which have experienced record temperatures of over 40°C in recent years.[10] Applicants 1-4 live in areas classified as being at "moderate" risk, not mild risk.[11] All Applicants live in or near coastal areas with higher humidity where heat stress can occur at lower temperatures.[12]
   b. Applicants 1-4's district of Leiria was one of the three districts in PRT most affected by wildfires in 2022.[13]
   c. The findings of the expert opinion of Caroline Hickman regarding the Applicants are consistent with and bolstered by the Expert Composite Report of *Lawrence et*

[6] AFS/§§4-12 (general causes/impacts), §§13-17 (impacts in Portugal), §§19-22 (trajectory/reductions), §§34-38 (fossil fuels) and §§39-40 (embedded/overseas emissions). RSJO/§237.
[7] AO/§§331-332
[8] AO/§588, fn 1118. E.g. *Fadeyeva v Russia* no 55723/00 (9 June 2005) ('*Fadeyeva*') §79.
[9] PRT's National Risk Assessment 2019 (**Key Annex 17**) does not give any temperature figures corresponding to various risk levels and is based on the IPCC AR5 report, not the more recent SR 1.5/AR6 reports. In addition, the assertion that the Applicants have made "new factual allegations" with respect to the effects of climate change in the region in which they reside is misplaced. The Application expressly addressed the effects of climate change in Portugal, with reference to the effects in the particular regions in which the Applicants lived (§§21-22), consistent with AFS/§§ 13-18 and 83(a).
[10] CA Impacts Report (**Key Annex 11**) 540-541; IPMA Bulletins (**Key Annexes 14a** and **15a**); AFS/§14.
[11] PRT's National Risk Assessment 2019 (**Key Annex 17**, p 39) refers to the risk as "moderada" in Portuguese, not a "mild" susceptibility to heatwaves as the RSs assert at RSJO/§24.
[12] AFS/§14, fn 32. National Risk Assessment 2019 (**Key Annex 17**, p 25).
[13] AFS/§16, fn 48. 5th Rural Fire Interim Report 2022, 4 (Figure 1).

al and Lancet's recent study regarding the impact of climate change and extreme weather events on young people's mental health.[14]

d. The relevance of Martim, Catarina, Sofia and André's conditions (e.g. rhinitis, asthma, bronchitis) is to highlight that they have particular vulnerabilities to the climate impacts of extreme heat, air pollution and allergens.[15]

e. To dismiss the fact that the Applicants are forced to stay indoors during extreme heat as a mere "common issue" in PRT is wholly inappropriate, given that the extent to which the Applicants have had and will have to stay indoors will substantially increase as a result of climate change.[16] More generally, that a current or potential risk of harm is widespread does not preclude it from being genuine and significant for the individuals concerned.[17]

7. The RSs' fixation on the 2017 wildfires betrays a misunderstanding of the Application.[18] The 2017 wildfires are an example of the increasingly frequent and severe climate impacts that affected and will continue to affect PRT. They are one of the many effects which led the Applicants to recognise the urgent threat to their rights posed by climate change.[19] The 2017 wildfires are *not*, and have never been claimed to be, exhaustive of the impacts of climate change upon the Applicants.[20] To this end, the RSs' arguments regarding the six-month time limit take an artificially narrow view of the Applicants' case and are without merit.[21]

III. JURISDICTION

8. That the Application "does not come within any of the established exceptions" does not preclude a finding of jurisdiction.[22] The bases of extra-territorial jurisdiction set out in in *Bankovic*, *Al-Skeini* and *M.N.* are not exhaustive. Rather, jurisdiction is to be assessed on the particular facts of a given case.[23]

9. Whether exceptional circumstances exist which give rise to extraterritorial jurisdiction turns on whether there is a sufficient factual and/or legal connection between the RSs

[14] Expert Composite Report (**Key Annex 32**); Clark et al, A future for the world's children? A WHO–UNICEF–Lancet Commission (2020) 395 The Lancet 605, 609 (**AA Doc 9**).
[15] AFS/§§15, 17 (and **Key Annexes 11, 20, 21, 22, 29, 30**). Cf RSJO/§20(a)-(b). In addition, the Applicants note that Martim missed several days of school in June 2017, not half a day as claimed: Duarte Agostinho statement (**Key Annex 20**), §5. Cf RSJO/§12.
[16] AFS/§15, fn 34. Cf RSJO/§19.
[17] Cf RSJO/§19.
[18] Cf RSJO/§§10-13, 17.
[19] Duarte Agostinho statement (**Key Annex 20**), §9; dos Santos Mota statement (**Key Annex 21**), §3; dos Santos Oliveira statement (**Key Annex 22**), §7.
[20] The RSs in fact acknowledge that the Applicants' claim extends to "the effects of climate change more generally" (emphasis added) RSJO/§114.
[21] Cf RSJO/§§110-120.
[22] Cf RSJO/§42.
[23] AO/§§235-236, 244; AFS/§44.

and the Applicants.[24] In assessing the aforesaid, the Court must have regard to the "special features[25]" of climate change, relevant factors derived from the Court's case law and relevant principles of international law. It is inevitable that the special features in other cases, far removed from climate change, will be different from those of the Application.[26]

10. The Applicants' case has consistently been that it is the *cumulative* force of the factors relied upon that gives rise to a sufficient connection between the RSs and the Applicants establishing jurisdiction.[27] In particular:
    a. By relying on causation and control of interests/activities as relevant but not decisive factors, the Applicants are plainly not invoking a "cause and effect" notion of jurisdiction.[28] The special features of climate change and factors of foreseeability, knowledge, duration, and capacity are distinct from and cannot be depicted as other ways of describing "cause and effect" jurisdiction.[29]
    b. While capacity alone would be insufficient, the submission that it is "not a relevant factor" is contrary to authority.[30] The RSs' reference to only being responsible for 15% of global GHGs omits their contributions to climate change through extra-territorial emissions, neglects the multilateral dimension of climate change, and ignores the relative incapacity of PRT alone to secure the Applicants' rights.[31]

11. The RSs have been unable to explain why rules of international law are relevant to jurisdiction in relation to diplomatic/consular staff, ships/aircraft, and the procedural limb of Art 2, but not to the Application.[32] Following this:
    a. The RSs' submissions that the no-harm principle and right to access a remedy are irrelevant fall away;[33]
    b. The IACtHR Advisory Opinion expressly refers to climate change, and its applicability to climate change has been confirmed by the IACommHR;[34]
    c. Authorities of international human rights bodies as to the interpretation of jurisdiction are relevant and can persuasively inform the Court's approach.[35]

---

[24] AFS/§§42-43, 45.
[25] As to the relevance of "special features" in the assessment of jurisdiction, see AFS/fn 144.
[26] AFS/§§47-49. Cf RSJO/§48.
[27] AO/§247; AFS/§§50-57.
[28] AFS/§52; AO/§239. Cf RSJO/§§53-54, 59.
[29] Cf RSJO/§§43, 50.
[30] AFS/§56, fn 170. Cf RSJO/§60.
[31] AFS/§§56, 74. Cf RSJO/§§61, 74.
[32] AFS/§57, fn171; AO/§§253-254. Cf RSJO/§63.
[33] Cf RSJO/§§64-65.
[34] AFS/§57(b), fn 173. Cf RSJO/§66.
[35] AFS/§57(b); AO/§§257, 290. Cf RSJO/§§66-67. It is accepted that the general comments of the CESCR are of limited relevance because the ICESCR does not contain a jurisdiction clause.

12. The RSs have failed to engage with the special features of climate change relied upon by the Applicants.[36] The RSs accept that climate change is an unprecedented issue affecting the global community,[37] but seek to deny its "novelty" in the context of jurisdiction (on the unconvincing basis that the RSs' acts and omissions have been contributing to climate change for decades, and the effects of such contributions will persist for decades into the future).[38]

13. This is not a case where the "ordinary meaning" of "jurisdiction" in Art 1 provides an answer to the issue.[39] It is where there is ambiguity regarding the interpretation of the Convention that its purpose and the related living instrument and effectiveness principles find their significance.[40]

14. The RSs' position that their observations can be taken as an expression of State practice to preclude a finding of jurisdiction would provide a self-serving avenue for States to redefine the scope of their obligations in any multistate application before the Court.[41] The assertion that the interpretation of Art 1 cannot develop "without State consent" is unsupported by authority, is inconsistent with the special nature of the Convention as an instrument designed to provide effective protection of human rights, and is belied by the incremental development of the concept of jurisdiction throughout the Court's case law.[42]

15. The Applicants have presented an approach by which the Court can apply its well-established principles to the exceptional circumstances of climate change, and use the special features and factors relied upon to delimit the scope of the RSs' jurisdiction in that context. The call for the Court not to "develop the concept of jurisdiction in Article 1 in an inconsistent, unpredictable and unprincipled manner" is effectively an invitation for the Court to abandon its fact-sensitive approach to jurisdiction, which would disable the Court from developing the concept of jurisdiction in response to new and exceptional circumstances.[43]

---

[36] AFS/§§47-49 (e.g. multilateral nature, gravity, alternative remedies, urgency).
[37] RSJO/§§4, 210, 212. IRL 2 §282; GBR 2 §138(2).
[38] RSJO/§68 (citing AO/§282). It is also recalled that the Court has not dealt with any cases concerning transboundary environmental harm (AFS/§42).
[39] Cf RSJO/§70.
[40] AFS/§48; AO/§§249-252. Cf RSJO/§§71, 74.
[41] Cf ILC Commentary to Draft Conclusions on Identification of Customary International Law, Conclusion 2 fn 670 "the shared view of parties to a case is not sufficient; it must be ascertained that a general practise that is accepted law actually exists". See also Commentary to Draft Conclusion 3 emphasising the importance of the context in assessing the significance of certain forms of practice/evidence of *opinio juris* (para. 3).
[42] AFS/§48; AO/§§249-252, 265, 272. Cf RSJO/§§43, 49, 69.
[43] Cf RSJO/§70.

16. It is no answer that jurisdiction would be established with respect to PRT in any event.[44] If the RSs' obligations were limited to persons in their territories, it would not be possible to secure the effective protection of persons' rights in the most vulnerable parts of the CLS. That reality has not been contested by the RSs.

17. The RSs' "floodgates argument" neglects the opportunity that the Court has to provide guidance for domestic courts on this supra-national issue, which would obviate the need for similarly placed applicants to have recourse to the Court.[45]

IV. EXHAUSTION OF DOMESTIC REMEDIES

18. The Court must have regard to the specific nature of the Applicants' complaints in assessing the effectiveness of a proposed domestic remedy. The RSs' assertion that the Applicants are incorrect that the effectiveness of any remedy must be assessed against the parameters of their own case is misconceived.[46] Any disputes as to the parameters of the Applicants' case must be left to the merits stage.

19. The Applicants were not required to test their position by bringing cases in RSs where domestic courts have dismissed similar or less ambitious cases. In such circumstances, any remedies available plainly would not be capable and/or offer reasonable prospects of providing effective redress.[47]

20. Neither DEU, BGR, FRA nor IRL have provided an answer to the Applicants' case that formally successful judgments in each RS would not be capable of providing effective redress to their complaint.[48] It is accepted that the Dutch Supreme Court could come to a different conclusion on the facts in a new *Urgenda*-type claim owing to developments in climate science and the emergence of the LTTG of 1.5℃ since *Urgenda* was issued. However, that is no answer to the Applicants' submissions on the deficiencies of the judgment in *Urgenda*.[49] Further, no RS has identified any new cases beyond those addressed at AFS/§61-64.[50]

---

[44] AFS/§49; AO/§§266-272. Cf RSJO/§73; NLD FS/§§43-44.
[45] AFS/§70; AO/§221. Cf RSJO/§75.
[46] RSJO/§96. Cf AFS/§60.
[47] AFS/§§61-63. Cf RSJO/§96.
[48] AFS/§64.
[49] AFS/§64(a). Cf NLD/§§51-59.
[50] The Czech case of *Klimatická žaloba ČR v Czech Republic* has been overturned on appeal (AFS/§64(d)). The Supreme Administrative Court's decision (9 As 116/2022 – 166, Supreme Administrative Court, 20 February 2023) can be found here.

21. As to RSs with no relevant jurisprudence:

    a. In their restatement of the law, the RSs omit the principle that remedies are not "sufficiently certain" where there are no remedies which have been "clearly set out and confirmed or complemented by practice of case law".[51]

    b. While applicants in certain cases have been required to test uncertain protections in domestic law, that is not an absolute requirement.[52]

    c. No compelling answer has been given as to why the Applicants must exhaust domestic remedies in the circumstances of the Application and the distinctions drawn with *Gherghina*, *Bregu and Nokshiqi* and *Vuckovic*.[53]

22. As to the reasonableness of the burden upon the Applicants to exhaust domestic remedies in 33 States, it is axiomatic that this would require significant resources and time, particularly if litigation had to be pursued to the highest court in each RS.[54] The RSs' submission on it being the Applicants' "subjective choice" to bring a claim against 33 States neglects the urgency and gravity of the threat climate change poses to the Applicants' rights and the necessity for them to act.[55]

23. The magnitude, urgent and unprecedented nature of the threat climate change poses to the Applicants' rights, and the signals from domestic courts that they are waiting for Strasbourg's intervention,[56] distinguishes the Application from other novel claims where there could be a benefit to first bringing domestic litigation.[57] The effect of providing guidance blunts the force of any "floodgates" argument.[58]

V. VICTIM STATUS & APPLICABILITY

24. The Applicants agree with NLD's observation that the issue of victim status is "interlinked with the merits of the case" and "climate change may indeed pose threats to rights of individuals".[59] To the extent that issues regarding victim status overlap with the merits, they should be addressed at the merits stage.

---

[51] AFS/§67. Cf RSJO/§§81-84, 97.

[52] *McFarlane v Ireland* [GC] no 31333/06 (10 September 2010*)* §§114-120; *Sejdovic v Italy* [GC] no 56581/00 (1 March 2006) §§50-52. The reference to AFS/§67 fn 197-198 should be to *McFarlane*.

[53] AFS/§68.

[54] AFS/§69. Cf RSJO/§87.

[55] AFS/§69. Cf RSJO/§90.

[56] See AFS/ fn 207: *Plan B et al v Prime Minister et al* (2022) CA-2021-003448, §5, per Singh LJ ("[t]he fundamental difficulty which the Claimants face is that there is no authority from the European Court of Human Rights on which they can rely"); *Friends of the Irish Environment CLG v The Government of Ireland and The Attorney General* [2019] IEHC 747, §§139-140, per MacGrath J ("it is not for the domestic court to declare rights under the Convention, but that this is a matter for the European Court").

[57] AFS/§70. Cf RSJO/§103.

[58] See paragraph 17 above. Also AFS/§70. Cf RSJO/§105.

[59] NLD SS/§§69, 112.

25. It is agreed that there is a "directness" requirement in relation to victim status and the applicability of Art 8 which imports questions of causation.[60] The Applicants do not, however, need to establish an immediate causal link where future risks of harm are concerned.[61]

26. A preliminary question is what causal link must be established. The answer is that causation must be established between the relevant interference and the individual's rights. The relevant interference is climate change and its impacts on the Applicants' rights.[62] While this appears to be tacitly accepted by the RSs,[63] their submissions rely upon the premise that causation must be established between the RSs' *measures* and the impacts on the Applicants.[64] That approach loses sight of the interference in issue, fails to appreciate the nature of the obligations relied upon, and elides the distinction between the applicability and the merits stages:

a. If a case involves negative obligations (i.e. it is alleged that the State's acts have interfered with an individual's rights), the causal link must necessarily be established between the relevant measures of the State (i.e. the interference) and the impact upon the individual.[65]
b. Where omissions are concerned, the initial question is whether there is an interference with the Applicant's rights that is capable of engaging the State's positive obligations. The source of the interference need not be attributable or causally linked to the actions of the State, but can relate to any external source, such as private parties, other States or natural phenomena.[66]
c. In positive obligations cases it must also be established that the State's "failure to take reasonably available measures…could have had a real prospect of altering the

[60] AFS/§§73, 82. It is also accepted causation is implicit regarding the applicability of Arts 2 and 3.
[61] As regards victim status, this follows from the fact that potential victimhood can be established where there is reasonable and convincing evidence of the likelihood violations will occur. As regards applicability, this follows from the fact that Arts 2, 3 and 8 can be engaged by "potential risks" of interferences. AFS/§§74-75, 83(c), 86; RSJO/§§122, 178.
[62] AFS/§81.
[63] See references to the "impugned interference", "alleged interference" and the "alleged harm" at RSJO/§§121-122, 124.
[64] See references to "measures" and "contributions": RSJO/§§123, 129, 166.
[65] E.g. *Roman Zakharov v Russia* [GC] no 47143/06 (4 December 2015) §164.
[66] E.g. *Guerra and Others v Italy* no 14967/89 (19 February 1998) §§57-58; *Nicolae Virgiliu Tănase v Romania* no 41720/13 (25 June 2019) §134; *Budayeva and Others v Russia* nos 15339/02 and others (20 March 2008) ('*Budayeva*') §137. The reference to "mesure litigieuse" in *Caron and Others v France* no 48629/08 (29 June 2010) is irrelevant. *Caron*, a brief admissibility decision from the Fifth Section of the Court, can be distinguished from the Application. Firstly, *Caron* concerned the impact of GMOs on health, which the Court was unable to determine due to the state of scientific knowledge at that time, whereas the impacts of climate change which underpin the Application are undisputed. Secondly, the applicants did not present evidence that GMOs had or would impact their rights, whereas the Applicants have provided comprehensive evidence. Thirdly, the source of the alleged harm concerned a local source of pollution (e.g. a single corn field) which the applicants did not live near, whereas proximity to the source of pollution is immaterial in the context of climate change as a global issue (cf RSJO/§83(b)).

outcome or mitigating the harm" but that inquiry is conceptually distinct and subsequent to the initial question of what causation must be established between.[67]

27. Insofar as it is established that climate change interferes with the Applicants' rights and the RSs have a real prospect of mitigating that harm, it is irrelevant *at the admissibility stage* whether the RSs have taken sufficient mitigation measures, or to what extent climate impacts can be attributed to the RSs.

28. An additional issue concerns the relevant standard of causation to be applied. The RSs seek to set the bar impermissibly high:

a. Without authority, the RSs add a gloss to the potential victim test set out in, *inter alia*, *Senator Lines GmbH v Austria* (§11) by asserting that the Applicants must establish a "strong connection" between the alleged interference and the victim's private sphere, providing "detailed evidence" of harm suffered.[68]

b. The RSs' position is premised on the misunderstanding that the Applicants must establish "but for" causation (i.e. "[t]hey must then provide detailed evidence that – by virtue of the lack of adequate measures or precautions taken by the authorities of the respondent States – they suffered actual and serious harm").[69] This goes beyond the real prospect of mitigating harm test in *O'Keeffe*, where it was held "it is not necessary to show that "but for" the State omission the [interference] would not have happened" (§149). That measures *could* have a *real prospect* of *mitigating* harm is plainly a lower threshold.[70]

c. Arguing that the Applicants "must prove…the degree of probability of damage" goes beyond *Senator Lines* and is contrary to the principle that the Applicants need not establish "quantifiable harm".[71] It is sufficient that there is evidence from which inferences can be drawn that the Applicants will "inevitably be made…more vulnerable" to the interference with their rights.[72]

29. It is clear that the Applicants have established a sufficient causal link between climate change and the actual and future impacts upon their rights for the purposes of victim

[67] AO/§421; RSJO/§131. See further: *O'Keeffe v Ireland* no 35810/09 (28 January 2014) §149; *Opuz v Turkey* no 33401/02 (9 June 2009) §136.
[68] RSJO/§124.
[69] RSJO/§124. See further RSJO/§§131, 163-165.
[70] The "but for" test is particularly inappropriate in circumstances where multiple States have contributed to an indivisible injury. References to *Fairchild v Glenhaven Financial* Services [2002] UKHL 22, [2002] 3 WLR 89 and the Guiding Principles on Shared Responsibility in International Law provide persuasive authority for that submission: AFS/§83(d). Cf RSJO/§168.
[71] AFS/§83(b). Cf RSJO/§147. See further: *Fadeyeva* §88; *Cordella and Others v Italy* nos 54414/13 and 54264/15 (24 January 2019) ('*Cordella*') §105.
[72] AFS/§§74-75, 83(a), read with the case law identified at AO/§588 fn 1118. As to future harm, it is recalled that as global warming increases, the harm to the Applicants will inevitably worsen.

status and applicability.[73] In view of (*i*) the evidence that climate change has made and will make PRT more vulnerable to, *inter alia*, extreme heat and wildfires, and the undisputed evidence that (*ii*) anthropogenic GHG are the key determinant of temperature increases and that (*iii*) States must rapidly reduce their emissions to *mitigate* climate change and its impacts, it is axiomatic that the rapid reductions of the RSs' emissions would have a *real prospect* of *mitigating* climate change and its associated impacts upon the Applicants.[74]

30. As to the severity of impact, it is agreed that environmental degradation must have adverse effects upon the Applicants.[75] The RSs' submissions at §§132-153 are primarily factual and have been addressed at paragraphs 6-8 above. It is plain that the Applicants have presented sufficient evidence regarding the adverse effects of climate change upon the enjoyment of their rights under Arts 2, 3 and 8. In that regard, the Application can be distinguished from *Fägerskiöld v Sweden* and *Bernard and Others and Greenpeace-Luxembourg v Luxembourg*.[76] Hard limits to PRT's adaptive capacity means that it cannot meet the current and future harms/risks of harm to the Applicants alone.[77] The fact that climate change has a widespread impact upon people across the world is irrelevant: for present purposes the key point is that the thresholds of causation and adverse impact have been satisfied *by the Applicants*.[78]

31. In addition to the above, the Court is directed to the Applicants' submissions on the applicability of Arts 2, 3, 8 and 14 at AFS/§§82-93. Further:
    a. The RSs' reliance upon the "real and immediate risk" threshold is misconceived for the reasons set out at AFS/§§86-89.[79]
    b. The Applicants' case under Art 3 is concerned with inhumane or degrading treatment, not torture or punishment.[80] The assertion that Art 3 has never been applied to environmental cases ignores the cases on passive smoking.[81]
    c. The RSs' submissions on Art 14 ignore the vulnerability of young people and the progressively intensifying nature of the climate impacts that young people will disproportionately suffer from as global warming increases.[82]

[73] AFS/§§74-77, 83.
[74] AFS/§§4, 13-19, 22, 83(a), 96.
[75] AFS/§§82, 88, 91; RSJO/§125.
[76] Cf RSJO/§§138, 147.
[77] AFS/§§8, 49. Cf NLD/§§69, 112. PRT has made no assertions to the contrary.
[78] AFS/§§77-78; AO/§333-343. Cf RSJO/§159.
[79] Cf RSJO/§§171-173, 201.
[80] AFS/§§91-92. Cf RSJO/§§183, 186
[81] AFS/§92(b), fn 269; NLD SS/§97. Cf RSJO/§190.
[82] AO/§§343(b), 441; see also NLD SS/§§70, 139. Cf RSJO/§197(a).

VI. MERITS: DUTIES UNDER THE CONVENTION

32. The RSs' duties contended for by the Applicants are driven by the gravity and urgency of the threat climate change poses to the enjoyment of their rights, and are anchored in the best available climate science and studies of independent experts.[83] The RSs fail to grapple with the factual realities giving rise to the overriding obligation (OO) to regulate and limit their emissions in a manner that is consistent with achieving the LTTG of 1.5°C under Arts 2, 3 and 8. Notably: (i) the RSs provide no answer to the starting point that there is a duty to regulate and limit their emissions in view of indisputable facts regarding the causes and gravity of climate change, and the imperative for States to reduce GHG;[84] (ii) the RSs have acknowledged the appropriateness of pursuing the LTTG of 1.5°C in view of the severe consequences of surpassing that threshold.[85]

33. That the RSs have "detailed legislative and administrative framework[s]" to tackle climate change does not demonstrate compliance with Arts 2, 3 and 8 where those frameworks do not provide "effective deterrence" against the threats posed by climate change to the Applicants' rights.[86] Nor does the existence of such a framework *without more* mean that the RSs have complied with their duty to take reasonable steps to protect the Applicants' rights from climate impacts.[87]

34. The RSs' defence relies upon having an excessively wide margin of appreciation (MOA), without which they would have no prospect of establishing that they have taken reasonable and effective measures to protect against the threats posed by climate change.[88] However, the width of the MOA contended for is unsustainable:

a. The RSs make no attempt to properly engage with the contended effect that the following factors have in narrowing the MOA:[89] (*i*) the nature of the rights at issue, (*ii*) the gravity and foreseeability of the climate impacts, (*iii*) the comparative weakness of the RSs' competing interests, (*iv*) the feasibility of compliance with the OO, and (*v*) the quality of the RSs' decision-making processes.[90]

---

[83] Cf RSJO/§207.
[84] AFS/§§12, 96; AO/§516. The RSs recognise that there is a consensus that "measures to limit global warming are urgently needed" (RSJO/§237).
[85] AFS/§§12, 97; AO/§516. The RSs also fail to address the fact that the principle of practical and effective protection supports and requires the existence of such a duty (AFS/§99).
[86] AFS/§94; AO/§449(b). Cf RSJO/§207. See further: *Öneryildiz v Turkey* [GC] no 48939/99 (30 November 2004) ('*Öneryildiz*') §89.
[87] AFS/§94; AO/§449(a).
[88] RSJO/§§208-216; NLD SS/§§114-115.
[89] Cf to the bland assertion that the factors "are not relevant to the [MOA]".
[90] AFS/§100. Cf RSJO/§216. A more reasonable position is taken by NLD, which appears to tacitly accept that the fair balance/MOA assessment is multifactorial in nature (NLD SS/§103).

b. The relevance of those factors is evident from the Court's case law, whilst the weight to be placed on each factor is unique to the case. In the circumstances of the Application, their relevance is intrinsic to the "ultimate question" of whether "a fair balance has [been] struck between the competing interests of the individual and the community as a whole".[91] No proper balancing exercise can be undertaken without having regard to the impact on the individual.

c. While the complexity of an issue, its socio-economic implications and the absence of uniformity in State practice are relevant factors, any effect they may have in broadening the RSs' MOA is outweighed by the countervailing factors set out by the Applicants in their earlier submissions.[92]

d. Subsidiarity is relevant to the width of the MOA but, in the present case, is of little weight and/or supports a narrow MOA due to the supra-national nature of the issues, the record of States acting in their short-term self-interest *vis-à-vis* climate change, and the need for guidance on the Convention.[93]

35. The RSs' position that "the only question for the Court is whether there has been a manifest error of appreciation" is misconceived.[94] The threshold test of manifest error of appreciation has only been referred to in three environmental judgments (the latest of which was in 2012)[95] and a series of Grand Chamber judgments regarding travellers' rights handed down in January 2001.[96] The threshold has not been endorsed in any of the Court's recent case law or Grand Chamber authorities concerning the environment,[97] nor has it been applied to Arts 2 or 3.[98] Given that dearth of authority, the manifest error of appreciation threshold has plainly not been adopted as a test of general application in environmental matters.[99] In any case, the manifest error threshold is in essence a proxy for States having a wide MOA which is inappropriate

---

[91] *Hatton and Others v United Kingdom* no 36022/97 (8 July 2003) ('*Hatton*') §§98, 122-123; *Broniowski v Poland* no 31443/96 (22 June 2004) §150; *Dubetska and Others v Ukraine* no 30499/03 (10 February 2011) ('*Dubetska*') §141; *Hardy and Maile v United Kingdom* no 31965/07 (14 February 2012) ('*Hardy and Maile*') §222; *Jugheli and Others v Georgia* no 38342/05 (13 July 2017) ('*Jugheli*') §64.

[92] AFS/§100. Cf RSJO/§§209-212.

[93] AFS/§§70, 100(h).

[94] Cf RSJO/§§205, 209.

[95] *Fadeyeva* §105 (cited in *Greenpeace e.V. and Others v Germany* no 18215/06 (12 May 2009) §1); *Hardy and Maile* §231; *Dubetska* §142.

[96] *Chapman v United Kingdom* no 27238/95 (18 January 2001) §92; *Coster v United Kingdom* no 24876/94 (18 January 2001) §106; *Beard v United Kingdom* [GC] no 24882/94 (18 January 2001) §103; *Jane Smith v United Kingdom* no 25154/94 (18 January 2001) §99; *Lee v United Kingdom* no 25289/94 (18 January 2001) §94. See also *Porter v United Kingdom* no 47953/99 (30 January 2001) §1; *Eatson v United Kingdom* no 39664/98 (30 January 2001) §1; *Clark and Others v United Kingdom* no 28575/95 (22 May 2001) §1; *Harrison v United Kingdom* no 32263/96 (3 May 2001) §1. See also a 2001 partial decision as to admissibility case concerning construction of a new railroad: *Smits, Kleyn and Others v Netherlands* nos 39032/97/98 and others (3 May 2001) §2.

[97] E.g. *Pavlov and Others v Russia* no 31612/09 (11 October 2022)*; Cordella; Jugheli; Hudorovic and Others v Slovenia* nos 24816/14 and 25140/14 (7 September 2020). The test was not referred to in the Grand Chamber judgment of *Hatton*

[98] E.g. *Öneryildiz ; Budayeva; Kolyadenko and Others v Russia* nos 17423/05 and others (28 February 2012).

[99] It is noted that NLD has not sought to rely upon such a test being applicable (NLD SS/§§114-115).

in the circumstances of the Application for the reasons set out above and at AFS/§100. Likewise, that the breach was found in *Jugheli* (§75) where there was a "virtual absence of a regulatory and administrative framework" cannot be read to suggest the Court intended this to be a general and necessary condition to establish breach.[100]

36. As to the relevant rules of international law:

a. The assertions that the Applicants are (*i*) asking the Court to monitor their compliance with the UNFCCC/ Paris Agreement (PA) and (*ii*) going "far beyond"/will "undermine" these treaties, are untenable.[101] The Applicants' case is that while there are aspects of the UNFCCC/PA which support the existence of the OO, the RSs' duties under the Convention must be more stringent if the Applicants' rights are to be effectively protected.[102] There is no logical or principled difficulty with the RSs having independent obligations under the UNFCCC/PA and the Convention.

b. The IACtHR's Advisory Opinion is not principally concerned with the right to a healthy environment or economic, social and cultural rights, but addresses the interpretation and application of the rights to life and personal integrity under Arts 4(1) and 5(1) of the ACHR in the context of the environment.[103]

c. The Applicants' position regarding the status of the no-harm/prevention principle, reflected in the 2001 ILC Draft Articles, is set out at AAO/§491.[104] The RSs' assertion that "a finding of 'transboundary damage' requires a finding of accountability with regard to individual harm" is without authority and was rejected in the commentary to the 2001 ILC Draft Articles.[105]

d. The European Commission's submissions outlining climate law and policy make clear that they are aimed at bringing the EU in line with its obligations under the PA.[106] This is insufficient to satisfy the RSs' obligations under the Convention (see AO §§546-554).

e. The Applicants' position on the precautionary and sustainable development principles is set out at AAO/§§472-481.[107]

37. The living instrument principle is inextricably linked with the practical and effectiveness principle: the former is designed to give effect to the latter and further

[100] Cf RSJO/§206.
[101] RSJO/§§3, 213, 221, 227-228.
[102] AFS/§§101-102.
[103] AFS/§106. Cf RSJO/§226.
[104] Cf RSJO/§229.
[105] International Law Commission, Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, with commentaries, Report of the ILC on the Work of its Fifty-third, UN Doc A/56/10 (2001) 144, p.153 (para. 9) and p.159 (para 8).
[106] TPI European Commission (2 December 2022) §§3, 15, 44, 84.
[107] Cf RSJO/§231.

the object of the Convention where sociological, technological, legal *and/or* scientific developments lead to a change in "present day conditions".[108] There is no authority for the proposition that an evolutive interpretation under the living instrument principle can only be adopted "[w]here the Court identifies a consensus with respect to legal obligations".[109]

38. The RSJO and the RSs' supplemental submissions (SS) provide no answer to the Applicants' position on the content of the OO with respect to territorial emissions[110] and extra-territorial emissions.[111] The Applicants limit themselves to replying to points that have not been addressed in previous submissions:

    a. All the studies which comprise the CAT analysis have been peer reviewed, the CAT analysis is relied upon by *inter alia* the UNEP and its fair share assessment methodology forms the basis of the the *Rajamani et al* paper, a peer-reviewed paper whose authors contributed to the CAT methodology.[112]

    b. As regards overseas emissions of domiciled entities, it is nothing to the point that compliance with the OO could lead to "double-regulation" (i.e. entities being subjected to regulation in multiple States for the same activity).[113] It is within States' jurisdiction under public international law (i.e. the territoriality principle) to regulate within their territory acts of domiciled entities which take place outside their territory. Such jurisdiction is already the case in myriad areas, such as money laundering, taxation, and human rights due diligence.

VII. MERITS: BREACHES OF THE CONVENTION

39. AFS/§§136-175 provides a summary of how each RS has breached Arts 2, 3, 8 and 14. Detailed submissions for each RS can be found at AO Section VIII which, save for minor clarifications in the AFS, reflect the Applicants' case. The replies below address points made in the RSs' SS that are new or require clarification:

    a. DNK: The Climate Change Council's Status Outlook Report 2022 indicates that DNK is still not on course to achieve its own 2030 target;[114] as to fossil fuel

---

[108] AFS/§99 fn 287; AO/§456.

[109] Cf RSJO/§§233-236. The authorities relied upon – *Caamaño Valle v Spain* no 43564/17 (11 May 2021), *Shindler v United Kingdom* no 19840/09 (7 May 2013) and *Sitaropoulos and Giakoumopoulos v Greece* no 42202/07 (15 March 2012) – do not refer to the living instrument principle and cannot bear the weight placed on them by the RSs.

[110] AFS/§§111-123. Noting NLD SS/§152, the Applicants have addressed why the CAT does not and should not take account of land-use at AFS/§152.

[111] AFS/§§124-134.

[112] See, for example, EGR 2022 (**Key Annex 3**) 13 (AFS/§25, fn 80); Rajamani et al. (**Key Annex 34**) 998; CA Mitigation Report (**Key Annex 7**) 35, 40.

[113] Cf DNK FS/§§76 and 116.

[114] Climate Change Council, Status Outlook 2022 – English summary (**Key Annex 46**) 5. Cf DNK SS/§58 (which refers only to compliance with DNK's target under the (old) EU ESR) and DNK SS/§89.

production, DNK's SS provides no answer to the Applicants' position;[115] as to climate finance and other support, DNK has not demonstrated the level of emissions reductions that have or will result therefrom.[116]

b. GBR: GBR's claims that the target in its new NDC, which involves no revision of its 2030 target, is "aligned with a least-cost global pathway". That is an admission that its target is not equitable given cost-effectiveness is unrelated to any principles of equity;[117] GBR's "Energy and Emissions Projections" of October 2022 further demonstrate that it is not on course to meet its own 2030 target;[118] its updated submissions on climate finance and other support do not demonstrate the emissions reductions that will result therefrom.[119]

c. LVA: If LVA's 2030 target is to achieve emissions reductions of 55% below 1990 levels, it is less ambitious than the target relied on by the Applicants.[120]

d. LTU: LTU's reference to its 2030 target to reduce emissions by 30% below 2005 levels is a reference to the same target referred to in its previous Observations, albeit expressed relative to a different base year.[121]

e. NLD: The Applicants have not rescinded their claim against the Netherlands with respect to overseas emissions of entities domiciled within its territory.[122]

f. TUR: TUR's new 2030 target equates to emissions of 247% above 1990 levels (excl. LULUCF), 178% short of its CAT Fair Share Assessment.[123]

40. The failure of the RSs to contest key allegations is telling.[124] Breaches of the Convention have plainly been established. With "a rapidly closing window of opportunity to secure a liveable and sustainable future",[125] the Court is accordingly urged to act.

---

[115] DNK SS/§91. Cf AO DNK/§§265-272, 281-281 and AFS/§§168-171.
[116] AFS/§115(c). Cf DNK SS/§§100-101, 104.
[117] GBR SS/§8. See AO /§ 133-135, 591; AFS/§ 23 including fn 75.
[118] Cf GBR SS/§10; AO GBR/§§1266-1271, 1296(c). The Climate Change Committee's 2022 Progress Report, submitted as **Key Annex 54** to the AFS and referred to at GBR FS/§14, also confirms this.
[119] GBR SS/§17. See AO GBR/§§1252-1255; AFS §141.
[120] See AO LVA/§624. The reference to the target being "in line with the objective advanced by the EU" suggests that it is a reduction of 55% below 1990 levels that is targeted, given that the EU's 2030 target is expressed relative to 1990 levels.
[121] This is clear from the fact that both figures are referred to as being prescribed by LTU's "National Climate Change Management Agenda". See LTU SS/§285; LTU1/§24. Cf AO LTU/§654.
[122] AFS/§174; AO NLD/§§768-771, 779. Cf NLD SS/§80.
[123] TUR SS/§34. See Climate Action Tracker (20 March 2023), *Turkey: Targets*.
[124] Notably as to the following allegations: *(i)* their mitigation efforts are consistent with a level of global warming of <3℃ or worse by 2100 if all States pursued equivalent levels of ambition relative to their respective CAT fair share ranges, that *(ii)* their domestic mitigation measures are inconsistent with achieving the LTTG of 1.5℃ if judged on a cost-effectiveness basis, that *(iii)* they are failing to meet their own mitigation targets, that *(iv)* their rates of or plans for fossil fuel extraction are incompatible with the thresholds in the UNEP's 2021 PGR or the IEA NZE Pathway, that *(v)* they lack effective frameworks for regulating embedded and overseas emissions, and that *(vi)* they have not met the procedural requirements of the OO.
[125] IPCC, AR6 Synthesis Report: Climate Change 2023 – Summary for Policymakers 10 § C.1.