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Climate Change and Extraterritorial Human Rights Obligations

Under what circumstances can a state be held responsible for adversely affecting the enjoyment of human rights of individuals outside its territory?

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1 Introduction

1.1 Research question

The topic of this thesis is the extraterritorial human rights obligations of states in relation to climate change. As states continue to emit greenhouse gases, they contribute to global warming and climate change, thereby adversely impacting people around the world. This thesis will analyse the extraterritorial reach of a state's positive obligation under the European Convention of Human Rights ("ECHR" or "the Convention") to mitigate the adverse effects of climate change. More precisely, this thesis aims to answer the question of whether a state that contributes to climate change has an obligation to secure human rights to individuals outside of its territory who are adversely impacted by climate change. Furthermore, this thesis aims to clarify the content of such an obligation.

The ECHR Article 1 states that the member states shall secure to everyone within their *jurisdiction* the rights and freedoms defined in Section I of this Convention.[1] Any obligation the state may have to mitigate the effects of climate change will therefore depend on whether the impacted individuals in question are within the jurisdiction of the state. While it is clear that the state's jurisdiction encompasses individuals on its territory, the question is more uncertain in relation to individuals outside its territory.

This thesis will analyse the term "jurisdiction" in Article 1 of the ECHR in light of general public international law, and present the various grounds for extraterritorial jurisdiction. Based on this, it will discuss whether there are legal grounds for extending jurisdiction extraterritorially to individuals who are adversely affected by the state's contribution to climate change. Lastly, this thesis will also discuss whether the states have obligations under the Convention to secure the human rights of the affected individuals and provide suggestions as to the further content of these obligations.

Questions relating to other obstacles in climate change cases, such as whether or not individuals outside the state's territory fulfil the admissibility criteria of the Court, fall outside the scope of this thesis.

1.2 The relationship between climate change and human rights

The adverse effects of climate change impact the enjoyment of human rights around the world. The Human Rights Council has recognised that climate change has negative implications, both

[1] ECHR Article 1.

direct and indirect, to the effective enjoyment of all human rights, and that climate change constitutes one of the most pressing and serious threats to the ability of future and present generations to enjoy human rights, including the right to life.[2]

Human rights are adversely impacted by both slow onset and extreme events caused by climate change, such as flooding, drought, sea level rise, hurricanes, heat waves and destruction of ecosystems. While the most adverse impacts of climate change will occur in the future, many of the adverse effects have already begun to materialise. For example, climate change has led to a reduction in food and water security[3] and has adversely impacted human health, livelihoods and key infrastructure.[4] Extreme heat events have resulted in human mortality and morbidity in all regions, including Europe.[5] It is estimated that at least 15,000 people died in Europe in 2022 due to the record heat waves caused by climate change.[6]

Furthermore, the projected adverse impacts and related losses and damages escalate with every increment of global warming.[7] This necessitates intensive climate action. Since climate change is a global problem caused by emissions worldwide, it requires a global response.

1.3 A human rights-based approach to climate change litigation

One potential course of action to instigate such climate action, is through litigation. States are generally unwilling to create legally binding obligations to the extent necessary to limit global warming, and there are also few options of enforcing such obligations at an international level. States are, however, bound by the human rights treaties they are party to, and there are several human rights courts that can enforce these treaties, such as the European Court of Human Rights ("ECtHR" or "the Court").

The ECtHR enjoys a high status and its judgments are binding on the member states of the ECHR. Taking a climate change case to the ECtHR, claiming that climate change affects human rights, therefore has a greater potential to effect change. The ECtHR has yet to rule on issues relating to climate change, but there are currently several pending cases that relate to these issues.[8]

[2] Human Rights Council, Resolution 48/13.

[3] IPCC (2022) p. 9.

[4] Ibid. p. 11.

[5] Ibid. .

[6] WHO/Kluge (2022).

[7] IPCC (2022) p. 14.

[8] Carême v. France; Duarte Agostinho and others v. Portugal and others; Klimaseniorinnen Schweiz and others v. Switzerland.

There are, however, some disadvantages to this approach. One of them is that the right to a healthy environment is not a separate right in the Convention. Any obligation relating to climate change must therefore be derived from existing human rights obligations in the Convention.

Another difficulty is the specific characteristic of climate change, namely that its adverse effects cannot be traced back to any single act or omission, such as an identifiable emission of greenhouse gas (GHG). Nor is it caused by any one state. Rather, it is caused by the accumulation of GHG in the atmosphere, emitted all over the world and over a long time, and the effects of it are global. The Convention is not designed for situations of this transboundary nature. It is mainly designed for situations where a state, through its acts or omissions, has violated the human rights of individuals within its own territory.

For a state to have an obligation to secure human rights to an individual, that individual must come within the state's jurisdiction.[9] The state's jurisdiction is understood by the Court to be primarily territorial.[10] An important question in relation to climate change is therefore whether individuals outside of the state's territory come within the state's jurisdiction with respect to climate change.

Assuming that the state does have extraterritorial jurisdiction in such a situation, the next question is which positive obligations, if any, the state owes to individuals outside its territory in order to protect them from the adverse effects of climate change.

1.4 Relevance

In recent years, litigation has become an increasingly more applied means to achieve climate action, both nationally and internationally. Examples include cases before national courts, such as in the Netherlands, Germany, France and Norway.[11] At the international level, climate change has been addressed *inter alia* by the Human Rights Committee in Torres Strait v. Australia and by the Committee on the Rights of the Child ("CRC") in Sacchi et al. v. Argentina et al. ("Sacchi").

The European Court of human Rights currently has three pending cases related to climate change. These are Duarte Agostinho et al. v. Portugal and 32 other states ("Agostinho"), Klima-seniorinnen Schweitz v. Switzerland, and Carême and others v. France.

[9] ECHR Article. 1.

[10] Banković and others v. Belgium and others, para. 59; Andreou v. Turkey p. 9; Ilaşcu and others v. Moldova and Russia, para. 312.

[11] The Netherlands v. Urgenda; HR-2020-2472-P; Neubauer et al. v. Germany; Notre Affaire à Tous et autres c. France.

Of these, only the Agostinho case has an extraterritorial element. The applicants in this case are Portuguese and have lodged a complaint against Portugal and 32 other states who are members of the ECHR. They claim that the respondent states are violating their rights pursuant to Articles 2, 8 and 14 of the Convention by failing to sufficiently mitigate climate change. This impacts their human rights, for example, through climate change-induced heat waves in Portugal. The extraterritorial element here is the question of whether these states (including Norway) have any human rights obligations towards the complainants in Portugal, and if so, what these consist of.

The Court also has a number of adjourned cases relating to climate change.[12] One of them, Greenpeace Nordic Ass. Et al. v. Norway ("Greenpeace Nordic"), has an extraterritorial element. The applicants of this case have lodged a complaint against Norway for issuing more licences to explore and extract oil and gas in the Arctic, claiming that this is a violation of their rights pursuant to articles 2 and 8, as well as articles 13 and 14 of the ECHR. The extraterritorial element here is that the Norwegian state failed to consider emissions from exported fossil fuels prior to licensing. Exported emissions constitute 95 percent of total emissions from fossil fuels extracted from the Norwegian continental shelf, and Norway is the 7th largest exporter of oil and gas in the world. The applicants therefore claim that the state must take into account the impact that exported emissions have on their lives and health before issuing licences.

The research question of this thesis will be analysed in light of the Agostinho and Greenpeace Nordic cases.

1.5 Methodology, relevant sources and interpretation of the ECHR

Since this thesis concerns the interpretation of the ECHR, the methodology that will be applied is that of the ECtHR. Jurisprudence from the ECtHR is therefore particularly relevant. While the Court has not yet ruled in any case relating to climate change, its jurisprudence provides guidance and general principles that are relevant also in a climate change case. This jurisprudence is important in determining the extent of the states' jurisdiction and the content of its positive obligations. However, since climate change constitutes a very specific circumstance that has not yet been treated by the Court, its jurisprudence cannot provide a definite conclusion in this matter.

[12] ECtHR (2023).

The Convention must therefore also be interpreted in light the Court's relevant rules of interpretation. This includes the state's "margin of appreciation",[13] the "living instrument" doctrine,[14] and the principle of "common ground" or European consensus.[15]

Furthermore, the text must also be interpreted in accordance with the Vienna Convention on the Law of Treaties (VCLT).[16]

To the extent that other human rights treaties aim to secure the same human rights as the ECHR, jurisprudence from these human rights bodies can also be relevant to the interpretation of the European Convention. This jurisprudence has no binding effect on the ECtHR, but can still be afforded a certain relevance and weight as an argument in favour of a given solution. In this regard, practice from national European courts can also be relevant, especially when there is a growing consensus or "common ground" between the member states.

Lastly, other areas of international law are also relevant in the interpretation of the Convention rights. The principles underlying the Convention shall not be interpreted in a vacuum,[17] and the Court must take into consideration any relevant rules of international law while also remaining mindful of the Convention's special character as a human rights treaty.[18]

2 Background issues concerning extraterritorial jurisdiction

2.1 Extraterritorial acts

2.1.1 Introduction

An extraterritorial act is an act that either occurs or produces an effect outside the territory of the state. An example is military action where one state invades the territory of another state. Another example could be that state agents enter another state's territory to arrest a national who is in hiding there. Extraterritorial acts are not necessarily illegal. It could also be acts related to international trade or transportation across borders for instance.

[13] Now included in the ECHR preamble.

[14] Austin and others v. the United Kingdom, para. 53; the same follows from Tyrer v. the United Kingdom, para. 31.

[15] For example, Tyrer v. the United Kingdom, para. 31.

[16] For example, Banković and others v. Belgium and others, para. 55.

[17] Ibid. para. 57.

[18] Ibid. para. 57.

For the purposes of jurisdiction under the Convention, the Court defines an extraterritorial act as an impugned act which, wherever decided, was performed, or had effects, outside of the territory of the states.[19]

The thesis will focus mainly, but not exclusively, on acts that are committed in one state and produce effects in another state, as is the case with climate change. There are several scenarios that involve such extraterritorial acts.

2.1.2 Scenario A

The first scenario is where state A commits an act on its own territory, and the effects materialise in state B. A typical example is transboundary environmental damage. In the Trail Smelter Arbitration, a smelter located in Canada produced fumes which caused damage within US territory.[20] In relation to climate change, this scenario concerns situations where a state emits greenhouse gases on its own territory, and the adverse effects of climate change impact the enjoyment of human rights of individuals in another state.

This scenario is the basis of the claim against the 32 other states in the Agostinho case described above. It was also the basis of the claim in Sacchi. The children in that decision claimed that the respondent states were violating their human rights by emitting greenhouse gases and thereby contributing to climate change, which affected their health and future. While the case was not decided on the merits due to a failure to exhaust domestic remedies, the Committee on the Rights of the Child found that states do have a responsibility to protect children worldwide from the adverse effects of climate change.

2.1.3 Scenario B

A second scenario is where state A commits an act in state B, which produces effects in state B. This is for instance the case if state A or a company controlled by state A is involved in activities in state B which might affect the enjoyment of human rights there. An example could be that state A has a factory in state B that pollutes the drinking water of individuals in state B. In relation to climate change, the question is if state A has an obligation towards the individuals in state B to lower the emissions from its activities there when these activities contribute to climate change and adversely affects the enjoyment of human rights in state B. Of course, state B also has an obligation to regulate the business activities taking place in state B.

[19] Banković and others v. Belgium and others, para. 54.

[20] Trail Smelter Case (United States, Canada).

2.1.4 Scenario C

A third scenario is where state A commits an act in state B, and the effects materialise in state A. This is one of the questions in the Greenpeace Nordic case. Scenario C can be further nuanced by adding situations where state A commits an act in state B, which produces effects in state C.

The matter is further complicated by the fact that adverse climate change effects cannot be attributed to any one act of GHG emissions. Rather, the effects are caused by these emissions combined. However, the main issue remains the same: the state's actions, whether on its own territory or abroad, contribute to climate change and therefore affect the enjoyment of human rights both on its own territory and abroad. The question is therefore whether the state has an obligation to protect the human rights outside of its territory as well as within its territory, and which measures it must take, both territorially and extraterritorially, to secure those rights.

2.2 Jurisdiction as a threshold criterion in ECHR

As mentioned above, the jurisdiction of the member states of the ECHR is regulated in Article 1 of the Convention, which states that:

> The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.

This article limits the extent of the states' human rights obligations. The European Court has held in multiple cases that:

> The exercise of jurisdiction is a necessary condition for a Contracting State to be able to be held responsible for acts or omissions imputable to it which give rise to an allegation of the infringement of rights and freedoms set forth in the Convention.[21]

It is therefore a threshold criterion that needs to be fulfilled in order for the rights to apply, that the applicant is within the jurisdiction of the respondent state.[22] This means that if the respondent state in a climate change case is to be held responsible for its failure to mitigate

[21] Inter alia, Ilascu and others, para. 311; Issa and others v. Turkey, para. 66.

[22] Milanovic (2011) p. 19.

climate change, it must first be established that the applicant is within this state's jurisdiction pursuant to Article 1 of the Convention.

The question here is whether the state's jurisdiction can include an individual who is not within the national territory of the state. Since jurisdiction is primarily a territorial notion, public international law normally requires some form of legal basis for the extraterritorial exercise of jurisdiction.[23] For this reason it is necessary to examine the extent of a state's jurisdiction outside its borders.

2.3 Clarifications

Jurisdiction in this sense refers to the jurisdiction of the member states, as follows from the wording in article 1, and not the jurisdiction of the Court itself. The jurisdiction of the Court is regulated in article 32 of the Convention and extends to "all matters concerning the interpretation and application of the Convention and the protocols thereto".[24] That being said, if the matter does not fall within the state's jurisdiction pursuant to article 1, the Convention does not apply and the Court will therefore lack jurisdiction *ratione materiae* under article 32.[25] However, the question of jurisdiction in article 1 is a different one from the question of the Court's jurisdiction, which will not be discussed in this thesis.

While the jurisdiction of the Court is a criterion for admissibility, this is not the case for state jurisdiction.[26] State jurisdiction is a threshold criterion for the application of the Convention and therefore a preliminary question, but it is not one of the admissibility criteria like victim status and exhaustion of domestic remedies. The admissibility criteria are part of the Court's own procedural rules and are set out in Section II of the Convention relating to the Court. However, since it is a preliminary issue, it is often considered by the Court at the admissibility stage of the proceedings, sometimes even in a separate decision on admissibility prior to the judgment on the merits of the case.

[23] Crawford (2019) p. 440.
[24] ECHR Article 32 (1).
[25] Milanovic (2011) p. 20.
[26] Ibid.

Lastly, the question of jurisdiction must be distinguished from the question of responsibility. A state may have jurisdiction over an infringement of human rights, without necessarily being in violation of those rights.

2.4 Considerations - universal human rights *versus* state sovereignty

One of the main arguments in favour of extraterritorial application of human rights treaties is the idea that human rights are universal. They apply to all humans regardless of aspects such as ethnicity and nationality. In this respect, it might seem arbitrary and unjust that a state should only have human rights obligations towards people who find themselves located within the state's territory when its actions or omissions violate human rights outside its own borders. Accordingly, the principle of universality is an argument for extraterritorial jurisdiction.

The main consideration against extraterritorial jurisdiction is state sovereignty. State sovereignty is a core principle in international law, and the idea that every state has sovereignty over its own territory alone argues that the state should only have human rights obligations towards persons within its territory. In order to fulfil these obligations, it is often necessary for a state to have prescriptive, executive and judicial powers, which it usually only has within its own territory. Furthermore, the Convention does not govern the actions of a state that is not a party to it, nor does it purport to be a means of requiring the member states to impose the Convention's standards on other states.[27]

The rules of extraterritorial jurisdiction need to find a balance between these considerations, where on the one hand, states cannot be free to violate human rights outside its own territory, and on the other hand, it cannot be held responsible for human rights violations that are outside of its control and outside its powers to prevent.

3 The term "jurisdiction" in public international law

3.1 Introduction

Before interpreting the term "jurisdiction" in Article 1 of the ECHR, this chapter will first examine the meaning of "jurisdiction" in public international law and its various bases. There are two reasons for this approach. The first is that the ECtHR has stated in multiple judgments that the term "jurisdiction" must be interpreted in accordance with the meaning in public

[27] Banković and others v. Belgium and others, para. 66.

international law.[28] It is therefore worth analysing the meaning of the term in public international law before establishing the meaning within the ECHR.

The second reason is to provide a possible basis for extraterritorial jurisdiction that can be applied under Article 1 of the Convention. As will appear under chapter 4 below, the main bases for extraterritorial jurisdiction developed by the ECtHR are ill-suited to climate change. This chapter will therefore outline various grounds for jurisdiction in public international law and discuss whether any of them is suitable for the purpose of establishing extraterritorial jurisdiction in a climate change case.

3.2 Prescriptive jurisdiction and enforcement jurisdiction

In public international law, jurisdiction is considered an aspect of the state's sovereignty.[29] It refers to a state's competence under international law to regulate the conduct of natural and juridical persons.[30]

Public international law distinguishes between prescriptive jurisdiction and enforcement jurisdiction. It is possible also to operate with a third category, adjudicative jurisdiction, i.e., to make a decision in a legal proceeding, but it can be argued that this category should be subsumed under prescription and enforcement.[31] Prescriptive jurisdiction concerns the power to make laws, decisions, and rules, while enforcement jurisdiction concerns the power to take executive or judicial actions to enforce those rules.[32] These types of jurisdiction both have a territorial scope, and they require a specific basis in international law to be exercised extraterritorially.[33]

However, there is a significant difference in the scope of these types of jurisdictions. For instance, there are very few exceptions to the territorial limits of enforcement jurisdiction,

[28] Ilaşcu and others v. Moldova and Russia, para. 312; Banković and others v. Belgium and others, para. 59; Issa and others v. Turkey, para. 67.

[29] Crawford (2019) p. 440, Milanovic (2011) p. 23.

[30] Ibid. p. 440.

[31] Milanovic (2011) p. 23.

[32] Crawford (2019) p. 440.

[33] Ibid.; Milanovic (2011) p. 24.

which requires either a permissive rule in an international convention or consent from the other state in order to be exercised extraterritorially.[34]

Prescriptive jurisdiction, on the other hand, both can and is often exercised extraterritorially.[35] The requirement for this is that there is a "sufficient link" or "sufficient nexus" between the state's legal order and a given state of affairs.[36] Adjudicative jurisdiction, if it is to be distinguished from enforcement and prescriptive jurisdiction, is normally strictly limited to the territory of the state. Therefore, it is important to distinguish between the various types of jurisdictions in order to determine whether or not it can be exercised extraterritorially. Since it is mainly prescriptive jurisdiction that can be exercised extraterritorially, this will be the focus in the following.

3.3 Bases for prescriptive extraterritorial jurisdiction

3.3.1 Overview

There are several bases for the exercise of prescriptive jurisdiction. Perhaps the most fundamental one is the territoriality principle, which stipulates that a state exercises exclusive jurisdiction on its own territory. This type of jurisdiction is based on the nexus between the state and its territory. When it comes to jurisdiction beyond the state's territory, the grounds for jurisdiction are often considered to be the principle of personality/nationality, the protective principle, the principle of universality and extensions of the territoriality principle, including the effects doctrine.

3.3.2 The personality principle

The personality principle entails that a state can exercise jurisdiction over its own nationals abroad under certain circumstances. Here the connection between a state and its people provides the "sufficient nexus" between the state and the national. The personality principle can be divided into (i) the active personality principle, which allows the state to exercise jurisdiction over acts committed by its nationals abroad, and (ii) the passive personality principle, which allows the state to exercise jurisdiction over acts committed against its nationals abroad. Thus, this basis for jurisdiction is most relevant in criminal law, but can also be used, for example, to

[34] Milanovic (2011) p. 25.

[35] Ibid.

[36] Simma and Müller (2015) p. 137; Behrens (2021) section 2.

exercise taxing jurisdiction over nationals residing in other countries. However, it is not particularly relevant in a climate change case.

3.3.3 The protective principle

Under the protective principle, although somewhat controversial, the state can exercise jurisdiction over extraterritorial acts that threaten the state's security or the operation of the government. The nexus here is between the act and the state's government. Typical examples include espionage or counterfeiting the state's currency. While climate change is a threat to all states, this ground for jurisdiction is directed at acts that severally jeopardise a state's governmental functions,[37] and climate change might not be considered to be such a threat.

3.3.4 The universality principle

The universality principle allows the state to exercise jurisdiction over acts that do not necessarily have any particular nexus or link to the state.[38] Such acts include genocide and crimes against humanity, which are considered to be a concern of the international community as a whole, therefore providing a nexus of sorts to all states. The universality principle also includes jurisdiction over piracy. While piracy might not be considered as severe as acts such as genocide, it often occurs on the high seas beyond the states' territorial jurisdiction. In order to provide an effective response to this, states must be considered to have universal jurisdiction over these acts. However, even though climate change is a universal problem, contribution to climate change through greenhouse gas emissions might not currently fall under the categories of acts over which states exercise universal jurisdiction.

3.3.5 Extending the principle of territoriality

The principle of territoriality mentioned above can under certain circumstances be extended to include acts that partially occur abroad. In this regard, the principle has a subjective and an objective aspect. The subjective territoriality principle allows the state to exercise jurisdiction over acts performed abroad, but which originated within the territory of the state. An example could be a bomb that is loaded into a plane in state A, but which detonates when the plane is in state B. Although the explosion occurred in state B, state A can still exercise jurisdiction over the perpetrators under the subjective territoriality principle.

[37] Simma and Müller (2012) p. 144.

[38] Ibid. p. 144.

The objective aspect of the principle of territoriality on the other hand allows the state to exercise jurisdiction over acts performed abroad that have an effect within the territory of the state. In the example with the plane, state B would also have jurisdiction over the act, since the effect of it occurred in state B. There is nothing prohibiting the overlap of jurisdiction between state A and B in this scenario, as long as double jeopardy is avoided. In these instances, the territory of the state constitutes the sufficient nexus between the state and the act, even though the act or the effects occur abroad.

3.4 The effects doctrine in public international law

3.4.1 Introduction

Often considered to be an extension or a variation of the objective aspect of the territoriality principle is the "effects doctrine" or "effects principle". [39] This doctrine allows a state to exercise jurisdiction over acts conducted abroad, which have an effect within the territory of the state.

When it comes to extraterritorial jurisdiction in relation to climate change, the effects doctrine might be the most suitable ground for jurisdiction. The act of emitting greenhouse gases and failing to mitigate climate change might not be covered by the protective principle or the principle of universality. However, when the emission of greenhouse gases in one state leads to effects in another state, that state might have jurisdiction over the act according to the effects doctrine. This doctrine will therefore be further elaborated on in the following.

3.4.2 The Lotus case

Although the effects doctrine is somewhat controversial in international law,[40] it was accepted by the Permanent Court of International Justice ("PCIJ") in the Lotus case in 1927.[41] This case concerned the question of whether Turkey had jurisdiction to try a French lieutenant who was on watch duty when the French ship Lotus collided with a Turkish steamer, killing several Turkish nationals. The PCIJ stated as certain that the courts in many countries interpret criminal law in the sense that offences may be regarded as having been committed in

[39] Ryngaert (2013) p. 194; Lowe (2007) p. 172.
[40] Crawford (2019) p. 447; Lowe (2007) p. 173.
[41] Crawford (2019) p. 447.

the national territory, if one of the constituent elements of the offence, such as its effects, have taken place within the national territory of that state.[42]

The PCIJ considered a ship carrying a state's flag to be in the same position as national territory, and stated that offences occurring on board a vessel on the high seas must be regarded as if they occurred on the territory of the flag state. The PCIJ concluded that there is no rule of international law prohibiting the flag state to prosecute if the effects of the offence have taken place on the flag ship.[43]

Accordingly, the PCIJ considered the state jurisdiction in this case to stem from the territoriality principle, according to which the state may exercise jurisdiction over its own territory. This is so even where elements of the act were committed abroad (or on another ship.)

The essence of the Lotus case seems to be that where the act and effect are so closely connected, or inseparable, that they cannot be considered to be two separate offences, the nexus between the act and the state's territory is so strong that the act falls within the state's territorial jurisdiction.[44] As mentioned above, the effects doctrine might in this sense be considered an aspect of territorial jurisdiction rather than an aspect of extraterritorial jurisdiction.

3.4.3 Development and application of the effects doctrine

After the Lotus case, the effects doctrine has largely been developed by international criminal law and US antitrust law.[45] US antitrust law requires the effects to be "direct, substantial, and reasonably foreseeable".[46] As will appear below, these criteria have come to be applied outside of US law as well.

Today, it is also used in other areas of law, such as trade law. Within the legal boundaries of international trade conventions, states can impose trade regulations which have an effect outside its borders. An example is the World Trade Organization ("WTO") ruling in the "shrimp-turtle" case,[47] where the US had prohibited import of certain shrimp and shrimp products in order to

[42] Lotus p. 23.
[43] Ibid. p. 25.
[44] Ibid. p. 30-31.
[45] Crawford (2019) p. 447; United States v. Aluminum co. of America.
[46] The Foreign Trade Antitrust Improvements Act of 1982, 15. US Code, title 15, chapter 1, § 6a.
[47] United States: Import Prohibition of Certain Shrimp and Shrimp Products.

prevent the use of harvesting methods that posed a threat to sea turtles. The WTO noted that, since the sea turtles at stake were all known to traverse to waters over which the US exercised jurisdiction, there was a "sufficient nexus between the migratory and endangered marine populations involved and the United States".[48]

The effects doctrine has also been applied by the EU. While the EU rarely expressly refers to the effects doctrine as a ground for extraterritorial jurisdiction, they often make use of domestic measures that have an extraterritorial impact.[49] Examples include their strict regulation of GMOs (genetically modified organisms), their attempt to ban illegal logging through timber regulation, as well as the Emissions Trading Scheme.[50] The Emissions Trading Scheme includes the aviation industry, including all flights arriving at or departing from the European Union and accounts for emissions that occur partly outside of the EU, thereby giving it an extraterritorial impact.[51]

In the case of Intel v. the European Commission, the General Court established that the doctrine constitutes a separate ground for jurisdiction.[52] This was confirmed by the European Court of Justice ("ECJ") when the General Court's decision was appealed to it.[53] The ECJ sent the case back to the General Court to be re-examined, but the reason for this did not concern the question of jurisdiction. The ECJ applied a "qualified effects" test, which required "foreseeable, immediate and substantial effects in the EEA".[54]

3.5 Conclusion

Based on the above, it can be concluded that the effects doctrine can be a suitable basis for extraterritorial jurisdiction in relation to climate change. The effects doctrine requires that the effects must be "foreseeable", "direct" or "immediate", and "substantial".

[48] United States: Import Prohibition of Certain Shrimp and Shrimp Products, para. 133.
[49] Diz and Araújo (2021) section 3.3.
[50] Ibid. section 3.3 and 4.2.
[51] Voigt (2012) p. 476.
[52] Case T286/09 European Commission v. Intel (General Court), para. 236.
[53] Case C-413/14 P European Commission v. Intel (ECJ), para. 45-46.
[54] Ibid., para. 48.

4 The effects doctrine in human rights law

4.1 Introduction

Even though the effects doctrine has mainly been applied within other areas of law, it may also be a basis for jurisdiction in a case concerning climate change. Such an application would require that the effects are "substantial, immediate, and reasonably foreseeable" as established above. However, some modifications must be made in order to apply the effects doctrine to climate change within a human rights context. The following part will focus on the term "jurisdiction" in human rights law and how it has been interpreted by the ECtHR in light of public international law, before discussing how the effects doctrine can be applied in order to establish a state's jurisdiction in a climate change case.

4.2 Interpretation of the term "jurisdiction" in ECHR

4.2.1 Relevant sources

The term "jurisdiction" in Article 1 of the ECHR must be interpreted in accordance with the VCLT, the ECtHR's rules of interpretation as well as its jurisprudence.

Often considered a key decision that establishes the relevant principles of jurisdiction, is the Grand Chamber's decision in Banković and others v. Belgium and others. This decision is therefore particularly relevant in the interpretation of Article 1. The decision concerned a NATO attack on a TV station in the former Yugoslavia, where several civilians died. The Court found the case inadmissible on the grounds that the deceased and their relatives did not come within the jurisdiction of the states that were responsible for the attack. It thereby set the bar high for establishing jurisdiction extraterritorially.
However, this was a very political case, and the Court's jurisprudence relating to extraterritorial jurisdiction is far from consistent. It is therefore submitted that there are grounds for diverging somewhat from the Court's strict interpretation in this decision.

4.2.2 The "ordinary meaning" of the term

4.2.2.1 General remarks

The Court has previously interpreted "jurisdiction" in accordance with the principles put forth in the VCLT.[55] Article 31 (1) of the VCLT provides that the treaty "shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

As mentioned, the Court looks to the meaning given to the term in public international law when determining the "ordinary meaning" of the term jurisdiction.[56] Based on this, it concludes that jurisdiction is territorial in public international law, and can only be exercised extraterritorially in exceptional circumstances.[57]

However, as explained above, there is a significant difference in the extent to which the different types of jurisdictions can be exercised extraterritorially. The word "jurisdiction" in human rights treaties has a different meaning than prescriptive jurisdiction and enforcement jurisdiction in public international law.[58] Although the ECtHR interprets the term "within their jurisdiction" in accordance with public international law, some clarifications and adjustments are necessary due to the specific characteristics of human rights law.

4.2.2.2 The distinction between permissive and mandatory jurisdiction

An important distinction between jurisdiction in human rights law on the one hand, and prescriptive and enforcement jurisdiction on the other, is the distinction between permissive and mandatory jurisdiction. Prescriptive and enforcement jurisdiction in public international law concerns a permissive type of jurisdiction, which *allows* the state to exercise jurisdiction. Human rights law, on the other hand, concerns a mandatory type of jurisdiction: the states are *obligated* to ensure the rights of the convention to anyone within their jurisdiction. This type of jurisdiction is factual rather than legal such as prescriptive and enforcement jurisdiction.

[55] Banković and others v. Belgium and others, paras. 55 ff.
[56] Ibid., para. 59.
[57] Ibid. , para. 61.
[58] Milanovic (2011) p. 30 ff.; Costa (2013) p. 13.

4.2.2.3 The distinction between de facto and de jure jurisdiction

The exercise of jurisdiction in human rights law refers to a *de facto* situation and not a *de jure* situation.[59] This meaning of the term can be found in state practice, particularly treaty practice.[60] An example is Article 5(1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT"):

> 1. Each State Party shall take such measures as may be necessary to establish its *jurisdiction* over the offences referred to in article 4 in the following cases:
>
> (a) When the offences are committed in any territory under its *jurisdiction* or on board a ship or aircraft registered in that State[*emphasis* added]

In this article, the CAT uses the word "jurisdiction" twice, but with different meanings. Whereas the first meaning refers to a notion of legal jurisdiction, the second use refers to a *de facto* jurisdiction. Otherwise, the article would require the state to establish its jurisdiction in situations where they already have jurisdiction. The term used in Article 1 of ECHR has the same meaning as the second use of the term in Article 5(1) of the CAT.

4.2.3 The "context" and the "object and purpose" of the Convention

The treaty's "context" and "object and purpose" inform the interpretation of the "ordinary meaning" of the term.[61] While the Convention is a regional treaty and not meant to apply globally, the preamble of the Convention does refer to the Universal Declaration of Human Rights, and its aim is to secure "the universal and effective recognition and observance of the rights therein".[62] The context of the Convention is therefore an argument in favour of interpreting the term "jurisdiction" in a manner, which contributes to the universal enjoyment of human rights and not restricted to the state's territory.

4.2.4 Subsequent practice

Subsequent practice should also be taken into account when interpreting the meaning of the term jurisdiction.[63] The Court in Banković states that it "finds State practice in the application

[59] Milanovic (2011) p. 27; Costa (2013) p. 13.
[60] Milanovic (2011) p. 30 ff.
[61] VCLT Article 31 (1).
[62] ECHR preamble.
[63] VCLT art. 31 (3)(b).

of the Convention since its ratification to be indicative of a lack of any apprehension on the part of the Contracting States of their extra-territorial responsibility in contexts similar to the present case."[64] However, this has been contested,[65] and it is therefore difficult to establish that state practice influences the interpretation in either direction.

4.2.5 Preparatory works

Article 32 of the VCLT states that recourse may be had to supplementary means of interpretation, including preparatory works in order to confirm the meaning resulting from the application of Article 31. Supplementary means can also be used to determine the meaning when the application of Article 31 leaves the meaning ambiguous or obscure or leads to a result that is manifestly absurd or unreasonable. In Banković, the Court used the *travaux préparatoires* of the Convention to confirm its interpretation.[66]

The original text in Article 1 of ECHR stated that the rights must be ensured to everyone "residing in" the state.[67] This was considered too restrictive, and the states wished to "widen as far as possible the categories of persons who are to benefit by the guarantees contained in the convention". It was decided that replacing "residing in" with "living in" might give rise to a certain ambiguity, and therefore the words "within their jurisdiction" were suggested. The Committee of experts approved this suggestion, stating that there were "good grounds for extending the benefits of the Convention to all persons in the territories of the signatory states."[68]

In Banković, the Court considered this to be "clear confirmation of this essentially territorial notion of jurisdiction".[69] However, one could also argue that the drafters could have chosen the words "within their territory" if that was their intended meaning, and that "within their jurisdiction" is more flexible.[70] The Court also failed to mention the shared desire to "widen as far as possible the categories of persons who are to benefit by the guarantees contained in the

[64] Banković and others v. Belgium and others, para. 62.
[65] Costa (2013) p. 14.
[66] Banković and others v. Belgium and others, para. 63.
[67] *Travaux préparatoires* (1950) Vol. III p. 200.
[68] Ibid. p. 260.
[69] Banković and others v. Belgium and others, para. 63.
[70] Lawson (2004) p. 88.

Convention", which is an argument in favour of extraterritorial jurisdiction. There is also evidence of states opposing the inclusion of the word "territory" in the jurisdiction clause of International Covenant on Civil and Political Rights , which implies that at least some of those states, which were also involved in the drafting of ECHR, did not intend to limit jurisdiction to national territory.[71] However, it seems that the drafters did not really consider the question of extraterritorial jurisdiction when drafting the article, and therefore the travaux préparatoires might not give much weight to the interpretation.[72]

4.2.6 Interpretation principles developed by the ECtHR

As mentioned under chapter 1.5 the Court has developed its own principles of interpretation of the ECHR, such as the principle of dynamic interpretation. The Convention is a "living instrument which must be interpreted in the light of present-day conditions".[73] This entails that "the Court must have regard to the changing conditions within the respondent State and within Contracting States generally and respond, for example, to any evolving convergence as to the standards to be achieved".[74]

This principle supports the act of expanding a state's jurisdiction. While extraterritorial activities might not have been a concern when the Convention was drafted, globalisation has made it an increasingly more relevant issue over the last decades that the Court should respond to. Climate change is one of many examples of how a state's actions affect persons outside the state's territory.

However, in relation to the argument above, the Court stated in Banković that while it is true that the Convention is a living instrument which must be interpreted in light of present-day conditions, the scope of Article 1 "is determinative of the very scope of the Contracting Parties' positive obligations and, as such, of the scope and reach of the entire Convention's system of human rights' protection."[75] The Court was thus reluctant to apply a dynamic interpretation to Article 1 of the Convention.

[71] Lawson (2004) p. 88-89.

[72] Lawson (2004) p. 89; Costa (2013) p. 93-94.

[73] Austin and others v. the United Kingdom, para. 53; the same follows from Tyrer v. the United Kingdom, para. 31.

[74] Christine Goodwin v. the United Kingdom, para. 74.

[75] Banković and others v. Belgium and others, paras. 64-65.

Another important principle is that the Convention must be interpreted and applied in a manner which renders its rights "practical and effective, not theoretical and illusory".[76] Considering the transboundary nature of climate change, the effects on the individual is caused by all states that contribute to climate change. It is therefore difficult to imagine that the individual's human rights will be rendered "practical and effective" if the states cannot be held responsible for their contribution. This is a situation where the state on whose territory the individual resides, might not be able to singlehandedly secure the individual's rights while other states continue to emit GHG. Without the possibility of extraterritorial jurisdiction in such a situation, that individual's rights would not be rendered "practical and effective".

4.2.7 The ECtHR's practice: "effective control over an area" and "authority or control over an individual"

4.2.7.1 Introduction

The Court has only accepted extraterritorial jurisdiction when it found that there were "exceptional circumstances".[77] The requirement of "exceptional circumstances" sets the bar high for extending jurisdiction extraterritorially. What amounts to such exceptional circumstances has gradually been clarified in the court's practice, although it has also been criticised as inconsistent.[78] It often boils down to a question of whether the state exercised "effective control" over an area or an individual. The Court typically lists three situations in which extraterritorial jurisdiction has been established.

4.2.7.2 Extradition

One of these types of situations is the extradition of persons who risk being exposed to human rights violations in the state they are being extradited to.[79] In this case, the state might have an obligation not to extradite the person. Some would, however, argue that this is not actually an extraterritorial act, since the decision to extradite is made while the individual is on the state's territory, and clearly within its jurisdiction. The Court has later stated that such cases do not concern the actual exercise of a state's competence or jurisdiction abroad.[80]

[76] Christine Goodwin v. the United Kingdom, para. 74.
[77] Al-Skeini and others v. the United Kingdom, para. 132.
[78] For example, Costa (2013) p. 6.
[79] Soering v. the United Kingdom.
[80] Banković and others v. Belgium and others, para. 68; Drozd and Janousek v. France and Spain, para. 69.

4.2.7.3 Military actions in other states

Another typical situation in which jurisdiction might apply extraterritorially is that of military actions in another state. The responsibility of the state arises when the state exercises "effective control of an area" outside its national territory as a consequence of the military action.[81]

The reasoning here is that an occupied state can typically no longer protect and secure the rights of the people in its own territory. These people would therefore be without human rights protection if the occupying state were not obligated to secure their rights. However, this only applies when the occupying state exercises effective control of the area. Otherwise, it would not have the ability to ensure human rights there.

4.2.7.4 State agents operating abroad

A third typical situation where a state's jurisdiction applies extraterritorially, is the one where state agents are operating abroad. A member state may be held accountable for a violation of the Convention rights and freedoms of persons who are in the territory of another state but under the former state's authority and control, through its agents operating in the latter state.[82]

In this situation, the criterion is not effective control over an area, such as the case with military actions, but rather "authority and control over an individual". In such situations, accountability stems from the position that Article 1 of the Convention cannot be interpreted to allow a member state to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory.[83]

4.2.7.5 Other options?

What can be inferred from this jurisprudence is that there is a basic requirement that the state exercises a certain amount of control over the act or omissions in question. However, the tests of "effective control over an area" and "authority or control over individuals" relate to very different situations compared to the case of climate change. In the climate change case, it is not the state's control over territory or individuals that create a jurisdictional link, but rather its

[81] Loizidou v. Turkey, para. 62.

[82] Andreou v. Turkey p. 10; Öcalan v. Turkey para. 91; Carter v. Russia para. 126; Al-Skeini and others v. the United Kingdom, para. 136.

[83] Issa and others v. Turkey, para. 71.

control over harmful conduct that causes an effect in other states. Therefore, the bases for extraterritorial jurisdiction described here are not well suited to climate change. These bases are, however, not exhaustive. The Court has also considered a state to exercise jurisdiction extraterritorially in other situations, which will be shown below.

4.3 Application of the effects doctrine in human rights law

4.3.1 Introduction

It is submitted that a more suitable basis for jurisdiction in a climate change case would be to apply the effects doctrine. Since the effects doctrine described above is developed for the exercise of prescriptive jurisdiction, there are some difficulties with transposing it to human rights law, where jurisdiction is a factual concept rather than a legal one. While the effects-doctrine in public international law concerns the jurisdiction of the state where the effects occur, the question is somewhat reversed in human rights law.[84] Here the question relates to the jurisdiction of the state where the harmful *conduct* occurred, not the state where the *effects* of the conduct were felt. In this respect, it is more connected to the subjective territoriality principle described above rather than the objective principle. For this reason, one could also apply a "conduct doctrine" rather than an effects doctrine.[85]

In the Agostinho case, for example, it is not a question of whether Portugal has jurisdiction over acts committed in the other respondent states. Rather, the question is whether the other respondent states' human rights obligations have an extraterritorial scope that includes the individuals in Portugal who were affected by climate change. This depends on whether the states in question have jurisdiction over the individuals in Portugal. The situation could also be that the state contributes to greenhouse gas emissions abroad, which have effects abroad or in the territory of the state, such as in the Greenpeace Nordic case.

4.3.2 The effects doctrine applied by the ECtHR

It can be argued that the effects doctrine has in some instances been applied by the ECtHR. While the ECtHR has never explicitly referred to the effects doctrine in public international

[84] Ryngaert (2013) p. 194.
[85] Ibid. p. 195.

law, it has in multiple cases found that a state's conduct, which had effects abroad, constituted a human rights violation.

The Court has in multiple cases stated that "[t]he term "jurisdiction" is not limited to the national territory of the High Contracting Parties; their responsibility can be involved because of acts of their authorities producing effects outside their own territory".[86] This can be interpreted as a formulation of the effects doctrine.

Consistent with this, the Court stated in Andreou v. Turkey, that in exceptional cases, the acts of a member state, which produce effects outside their territory and over which they exercise no control or authority may amount to the exercise by them of jurisdiction within the meaning of Article 1 of the Convention.[87]

The applicant in that case had been shot by Turkish or Turkish Cypriot uniformed personnel, while she was standing outside the territory that was occupied by Turkey. A difference between this and other cases on extraterritorial jurisdiction before the ECtHR, was that although the act itself occurred on territory over which Turkey exercised effective control, the effect of the act (the applicant being hit by the bullet) occurred outside this territory. Even though the applicant in the case was injured in a territory over which Turkey did not exercise control, the opening of fire on the crowd from a close range was the direct and immediate cause of the injuries. The applicant was therefore within the jurisdiction of Turkey in the meaning of Article 1.[88] Without explicitly mentioning the effects doctrine, this seems to be the approach the Court takes in this case, since it concerns an act that occurred on territory over which the state had effective control, and the effects were felt outside of the territory.

Another case where the Court implicitly applies the effects doctrine, is the case of Kovačić and others v. Slovenia.[89] In the admissibility decision, the Court stated that the responsibility of the member states may be engaged by acts of their authorities that produce effects outside their

[86] Ilascu and others v. Moldova and Russia para. 314; M.N. and others v. Belgium; Medvedyev and others v. France, para. 64; Al-Skeini and others v. the United Kingdom, para. 131; and Güzelyurtlu and others v. Cyprus and Turkey, para. 178.

[87] Andreou v. Turkey, p. 9.

[88] Ibid. p. 11.

[89] Kovačić and others v. Slovenia.

own territory.[90] The case concerned three Croatian nationals who deposited hard foreign currencies in savings accounts with the office of a Slovenian bank. Due to the monetary crisis following the dissolution of Yugoslavia, Slovenia enacted legislation that made the applicants generally unable to gain access to their money. The Court held that the acts of the Slovenian authorities produced these effects, albeit outside Slovenian territory, such that Slovenia's responsibility under the Convention could be engaged.[91]

4.3.3 Criteria for the effects doctrine

4.3.3.1 Introduction

Although the Court has indirectly used the effects doctrine multiple times as illustrated above, it has not elaborated on the criteria of the doctrine. The question here is whether the criteria established in public international law outlined above should apply here as well: that the effects must be "substantial, immediate and foreseeable". There is also a question of whether other criteria must be added. While some criteria might be inferred from the Court's jurisprudence, it is also useful to have recourse to practice from other human rights institutions. While such practice is not binding on the ECtHR, it can serve as examples and show how grounds for extraterritorial jurisdiction is generally understood in human rights law. Practice related to the American Convention on Human Rights, the Convention on the Rights of the Child and the International Covenant on Civil and Political Rights can, for example, be relevant because those conventions use similar language in their jurisdictional clauses as the ECHR.

4.3.3.2 Causal link?

In relation to transboundary damage, both the CRC and the Inter-American Court of Human Rights ("IACtHR") have stated that "the persons whose rights have been violated are under the jurisdiction of the State of origin, if there is a *causal link* between the act that originated in its territory and the infringement of the human rights of persons outside its territory [*emphasis* added]."[92] One could view the requirement of a "causal link" as a separate criterion of jurisdiction. However, it is this author's opinion that it is simply a different formulation of the effects doctrine and not a separate criterion. The term "effect" itself already implies that there must be a causal link. In any case, the requirement of a "causal link" can be subsumed under

[90] Kovačić and others v. Slovenia p. 54.

[91] Ibid. p. 55.

[92] Sacchi et al. v. Argentina et al., para. 10.6; Advisory Opinion OC-23/17, para. 101.

the requirements outlined below: that the act must be the "immediate" and "foreseeable" cause of the effects. These requirements could not be fulfilled if there was not also a "causal link".

4.3.3.3 "Effective control"

It can be assumed that the harmful conduct in question must be within the state's "effective control", based on the Court's jurisprudence. Otherwise, it would be unreasonable to extend the state's jurisdiction; if the harmful conduct is out of the state's control, it would be impossible or disproportionately burdensome for the state to secure the Convention rights to the individuals concerned. An important criterion is therefore whether the harmful conduct in question is within the state's "effective control". This criterion was also applied by the CRC in the Sacchi case.[93]

The Human Rights Committee has also stated that the state's jurisdiction extends to all persons over whose enjoyment of the right it exercises power or effective control, and that this includes persons located outside any territory effectively controlled by the State, whose rights are nonetheless impacted by its military or other activities in a direct and reasonably foreseeable manner."[94]

Moreover, the effective control principle has also been confirmed in the Maastricht Principles, which aim to clarify existing law related to extraterritorial obligations of states in the area of economic, social and cultural rights.[95] Principle 9 states:

> A State has obligations to respect, protect and fulfil economic, social and cultural rights in any of the following:
>
> > a) situations over which it exercises authority or effective control, whether or not such control is exercised in accordance with international law;
> > b) situations over which State acts or omissions bring about foreseeable effects on the enjoyment of economic, social and cultural rights, whether within or outside its territory;
> > c) situations in which the State, acting separately or jointly, whether through its executive, legislative or judicial branches, is in a position to exercise decisive

[93] Sacchi et al. v. Argentina et al., para. 10.7.

[94] Human Rights Committee, General comment (2019), para. 63.

[95] Andreou v. Turkey p. 11.

influence or to take measures to realize economic, social and cultural rights extraterritorially, in accordance with international law.

4.3.3.4 Direct and immediate

As noted above, the Court emphasized that the act was the "direct and immediate cause" of the applicant's injuries in Andreou v. Turkey. The Human Rights Committee referred to situations where the individual's rights were impacted in a "direct" manner. Thus, it seems reasonable to establish that the act or omission must be the "direct and immediate" cause of the effects.
In relation to climate change, the state's contribution to climate change must be the "direct and immediate" cause of the adverse effects that impact the rights of the individual.

4.3.3.5 Foreseeable

The ECtHR does not mention a requirement that the effects must be "foreseeable". However, as appears from the above, the CRC, the Human Rights Committee, and the Maastricht Principles all refer to "foreseeable" or "reasonably foreseeable" effects.[96] It therefore seems reasonable to assume that any adverse effects of the states' contribution to climate change must have been reasonably foreseeable in order to establish jurisdiction.

4.3.3.6 "Substantial" or "significant"?

When it comes to the criterion of "substantial" effects established in public international law, this does not appear to be a criterion for jurisdiction in human rights law, although there might be grounds for claiming that there is a qualification requirement for the effects. The CRC referred to the Advisory Opinion of the IACtHR and observed "that not every negative impact in cases of transboundary damage gives rise to the responsibility of the State in whose territory the activities causing transboundary harm took place, that the possible grounds for jurisdiction must be justified based on the particular circumstances of the specific case, and that the harm needs to be "significant".[97]

It further referred to the International Law Commission and established that "significant" harm should be understood as something more than "detectable" but need not be at the level of

[96] Sacchi et al. v. Argentina et al., para. 10.7; Human Rights Committee, General comment (2019), para. 63; Maastricht Principles 9b).

[97] Sacchi et al. v. Argentina et al., para. 10.12.

"serious" or "substantial".[98] As the IACtHR had noted, "harm must lead to a real detrimental effect on matters such as, for example, human health, industry, property, environment or agriculture in other States and […] such detrimental effects must be susceptible of being measured by factual and objective standards".[99]

This is borrowed from principles of responsibility, which is a matter of merits and a different question from jurisdiction. When the Inter-American Court considered this criterion, it was in relation to the obligations of the states and not directly in relation to jurisdiction.[100] However, the Committee in Sacchi appears to consider it a criterion for jurisdiction as well, although it does not go on to establish whether the effects in the Sacchi case were "significant".

Requiring that the harm must be "significant", also seems to harmonise well with Banković, where the Court denied a "cause-and-effect" notion of jurisdiction, where anyone who was adversely affected by an act imputable to a state, is thereby brought within the jurisdiction of that state for the purpose of Article 1 of the Convention, regardless of where in the world that act may have been committed or its consequences were felt.[101] The Court considered that such a wide interpretation would render Article 1 meaningless. However, requiring that the effect must be "significant", "direct", "immediate", "reasonably foreseeable" and within the state's "effective control", seem to counteract that effect of this interpretation.

4.3.4 Conclusion

Despite the use of different formulations in international human rights law, it seems established that there is a requirement of "effective control", that the act must be the "direct and immediate" cause of the effects, and that the effects must be "significant" and "reasonably foreseeable". The application of these criteria will be further discussed below in relation to the specific acts and omissions of the state that have an extraterritorial effect.

[98] Ibid.

[99] Ibid.

[100] Advisory Opinion OC-23/17, para. 102.

[101] Banković and others v. Belgium and others, para. 75.

5 The scope and content of the states' positive obligation to mitigate the impacts of climate change

5.1 Introduction

Based on the above, it is possible to argue that the state has extraterritorial jurisdiction over individuals abroad whose rights are affected by the state's contribution to climate change. This is a question that must be determined on a case-by-case basis. Once jurisdiction is established, it follows from Article 1 that the state has an obligation to secure to that individual the rights in Section 1 of the Convention. This raises the question of what rights the individual has in relation to climate change. In other words, what obligations does the state have to protect individuals outside its territory from climate change? These obligations might differ somewhat from obligations towards individuals within the state's territory.

These questions have yet to be determined by the Court, but some assumptions can be made based on the Court's jurisprudence and relevant sources of international law. The following chapters will first briefly discuss the application of the Convention to climate change. Then, the positive obligations arising from the Convention and their spatial scope will be outlined. Finally, the specific measures the state might be required to take will be discussed in light of the criteria of the effects doctrine.

5.2 A right to a healthy environment?

The ECHR does not contain any explicit provisions on the right to a healthy environment. The inclusion of such a provision in a protocol under the Convention has been discussed, but no decision has yet been reached.[102] For this reason, the Court cannot rule on a claim based on a right to a healthy environment alone, since its jurisdiction only extends to the interpretation and application of the Convention.[103] Therefore, a claim relating to the environment or climate must be brought under another right, one that is protected by the Convention.

A healthy environment is a prerequisite for the enjoyment of many of the substantive rights set forth in the Convention. To the extent that environmental degradation, or in this case climate

[102] Council of Europe (2021).

[103] ECHR Article 32.

change, affects the enjoyment of a human right protected by the Convention, proceedings can be brought under the provision securing that right.

While climate change can have an effect on several human rights, the most relevant ones for the purposes of this thesis are the right to life under Article 2 and the right to respect for private and family life under Article 8. As explained under 1.2, climate change poses a significant risk to human life, health, and private and family life. These articles are also invoked in the Agostinho and Greenpeace Nordic cases.

The following section will focus on the applicability of Articles 2 and 8 to climate change and discuss to what extent they impose obligations on the state to mitigate climate change in order to secure these rights.

In this regard, it is important to distinguish between the state's positive and negative obligations. Whereas a negative obligation requires the state to *refrain* from violating a human right, a positive obligation requires the state to actively protect a human right. The Convention includes, in addition to negative obligations, also positive obligations relating to the protection of the environment.[104] A state's obligation to take action to mitigate climate change is a positive obligation.

Articles 2 and 8 also contain procedural obligations, but these will not be discussed further.

5.3 The right to life – application of article 2

The right to life in ECHR is set out in Article 2, the first paragraph of which states:

> 1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

The second paragraph concerns exceptions from the right to life and is not relevant in this case. The first paragraph contains both a positive and a negative obligation: the state's positive obligation to *protect* life and the state's negative obligation to *refrain* from taking life. The positive obligation entails that the Convention "guarantees the right to life in general terms and,

[104] Judge Serghides, concurring opinion to Kotov and others v. Russia, para. 8.

in certain well-defined circumstances, imposes an obligation on States to take appropriate steps to safeguard the lives of those within their jurisdiction."[105]

This chapter specifically concerns the state's positive obligation to "take appropriate steps to safeguard the lives of those within their jurisdiction" who are adversely affected by climate change resulting from the state's greenhouse gas emissions.

The Court has established a set of criteria for when a threat obliges the states to take measures. It must be established that the authorities *knew or ought to have known* at the time of the existence of a *real and immediate risk* to the life of an individual from the criminal acts of a third party and that they *failed to take measures* within the scope of their powers, which might have been expected to avoid that risk.[106]

The application of these criteria to climate change could be discussed at length, but that would be beyond the scope of this thesis. For the purposes of this thesis, it is therefore submitted that the authorities must know about the risks of climate change, that the risks are real and immediate, and that the state therefore has an obligation to take measures to avoid those risks. The Court has previously applied Article 2 to environmental degradation.[107] There also seems to be a growing consensus between member states that it applies to climate change.[108]

5.4 The right to private and family life – application of article 8

Article 8 of ECHR states that:

> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

[105] Öneryildiz v. Turkey, para. 62; Osman v. UK, para. 115; Budayeva and others v. Russia, para. 128.
[106] Osman v. UK, para. 116; Öneryildiz v. Turkey, para. 63.
[107] Öneryildiz v. Turkey; Budayeva and others v. Russia.
[108] For example, The Netherlands v. Urgenda; Neubauer et al. v. Germany.

While this article makes no mention of either the environment or climate, it has been interpreted so as to include environmental protection[109] and it has also been applied to climate change in national case law.[110]

However, it is not violated every time that environmental deterioration occurs.[111] In order for the article to be applicable, the deterioration must "directly affect the applicant's home, family or private life",[112] or put in other words, there must be "an actual interference with the applicant's private sphere".[113]

Furthermore, this interference must reach a certain level of severity; it must be "serious enough to affect adversely, to a sufficient extent, the family and private lives of the applicants and their enjoyment of their homes."[114] The assessment of this minimum level is relative.[115] It depends on all the circumstances of the case, such as the intensity and duration of the nuisance, and its physical or mental effects on the individual's health or quality of life.[116] The general context of the environment should also be taken into account. For example, there would be no claim under Article 8 of the Convention if the detriment complained of is negligible in comparison to the environmental hazards inherent to life in every modern city.[117] Industrial pollution may negatively affect public health in general and worsen the quality of an individual's life. However, it is often impossible to quantify its effects in each individual case. It would be hard to distinguish the effect of environmental hazards from the influence of other relevant factors, such as age, profession or personal lifestyle.[118]

In Kotov and others v. Russia, the Court found that the first applicant had not provided any medical evidence which could clearly establish that there was a "direct causal link between any of his specific health problems and the high levels of pollution."[119] However, the Court found that although it could not be established that the pollution had affected the applicant's health,

[109] Judge Serghides, concurring opinion to Kotov and others v. Russia, para. 8.
[110] For example, The Netherlands v. Urgenda; Neubauer et al. v. Germany.
[111] Fadeyeva v. Russia, para. 68; Kyrtatos v. Greece, para. 52.
[112] Fadeyeva v. Russia, para. 68.
[113] Kotov and others v. Russia, para. 101.
[114] Ibid.
[115] Fadeyeva v. Russia, para. 69; Kotov and others v. Russia, para. 101.
[116] Ibid.
[117] Fadeyeva v. Russia, para. 69.
[118] Kotov and others v. Russia, para. 101.
[119] Ibid., para. 107.

"living in the area marked by pollution in clear excess of the applicable safety standards made him more vulnerable to various illnesses".[120] It also pointed out that "severe environmental pollution may affect individuals' well-being in such a way as to affect their private and family life adversely, without, however, seriously endangering their health".[121]

From this it can be concluded that while climate change must constitute an interference of a certain severity to the right to private and family life in order to fall within the scope of article 8, it is not necessary to establish that it has in fact affected the health of the applicants. It is sufficient that it has adversely affected their private and family life, although in a way that is not negligible in comparison to the environmental hazards inherent in life in every modern city.

5.5 Positive obligations arising from climate change

5.5.1 Introduction

As it has been established that Articles 2 and 8 are applicable, the next question is which obligations arise from these articles in relation to climate change and its extraterritorial effects. The jurisprudence of the Court provides some guidance in this regard, but recourse must also be had to relevant sources of international law to establish the extraterritorial obligations further.

Despite the fact that Articles 2 and 8 concern different rights and entail somewhat different criteria in order for these rights to be fulfilled, the positive obligations arising from them in relation to climate change are somewhat similar. Because of this overlap, case law relating to one of them can also be used to establish obligations relating to the other.[122] These obligations will therefore mainly be treated together in the following.

5.5.2 The standard of due diligence

In order to fulfil the positive obligations arising from articles 2 and 8, the state must take "all appropriate steps" to safeguard life[123] and "reasonable and appropriate measures" to secure the right to respect for private and family life.[124] This standard of care is that of due diligence.[125]

[120] Kotov and others v. Russia para. 107.

[121] Ibid., para. 108.

[122] Budayeva and others v. Russia, para. 113; Öneryildiz v. Turkey, paras. 90 and 160.

[123] Öneryildiz v. Turkey, para. 89.

[124] Fadeyeva v. Russia, para. 89; Kotov and others v. Russia, para. 123; Pavlov v. Russia, para. 75.

[125] Fadeyeva v. Russia, para. 128; Kotov and others v. Russia, para. 134; Pavlov v. Russia, para. 90.

Due diligence is the level of care that a state is expected to exercise in the fulfilment of its duties.[126]

It entails "above all a primary duty on the state to put in place a legislative and administrative framework designed to provide effective deterrence against threats to the right to life".[127] In relation to the rights under article 8, the Court would first assess whether the state "could reasonably be expected to act so as to prevent or put an end to the alleged infringement of the applicant's rights",[128] and then, "whether the State, in securing the applicant's rights, has struck a fair balance between the competing interests of the applicant and the community as a whole."[129]

5.5.3 Margin of appreciation

When assessing the positive obligations Arising from articles 2 and 8, it is important to note that the Court usually refrains from stating which measures a state should take to fulfil its obligations. This is considered to fall under the state's margin of appreciation. Therefore, the Court normally limits itself to controlling whether the state has taken "reasonable and appropriate steps".[130] This entails assessing whether the state has approached the problem with due diligence, and in the case of Article 8, given consideration to all the competing interests and struck a fair balance between them.[131]

However, while the state enjoys a wide margin of appreciation in for example the sphere of emergency relief in relation to a meteorological event, the margin of appreciation is narrower in the sphere of "dangerous activities of a man-made nature".[132] While the effects of climate change include meteorological events beyond human control, such as extreme weather, the harmful actions that cause climate change are "dangerous activities of a man-made nature". Furthermore, the scope of the positive obligations depends on the extent to which the risk is susceptible to mitigation".[133] This is also the case with climate change, as every reduction in GHG emissions contributes to the mitigation of climate change. It follows that the margin of

[126] Voigt (2022) p. 161.
[127] Öneryildiz v. Turkey, para. 89.
[128] Fadeyeva v. Russia, para. 89.
[129] Ibid., para. 93.
[130] Budayeva and others v. Russia, para. 134.
[131] Kotov and others v. Russia, para. 134; Pavlov and others v. Russia, para. 90; Fadeyeva v. Russia, para. 128.
[132] Budayeva and others v. Russia, para. 135.
[133] Ibid., para. 137.

appreciation in relation to climate change should be narrow. This entails that while the state should have a margin of appreciation in relation to the choice of means to reduce its emissions, the margin of appreciation does not include the minimum rate of emission reduction.[134] In other words, the measures chosen by the state to reduce emissions are within their margin of appreciation, but the Court can review whether their reduction targets are ambitious enough, whether their plan to achieve those targets is sufficiently realistic, and whether their chosen measures are suitable and appropriate.

5.5.4 The relevance of international law

In order to determine which specific measures a state must take to fulfil its obligations under articles 2 and 8, recourse should be had to international law. The ECHR should not be interpreted in a vacuum,[135] and "any relevant rules of international law applicable in the relations between the parties" [136] should be taken into account. Especially in a situation such as climate change, which concerns the entire international community, relevant rules of international environmental law should be referenced.[137]

5.5.5 The no-harm principle

While human rights law is mostly concerned with states' obligations towards its own inhabitants, international environmental law takes into account the transnational character of environmental damage and concerns to a larger extent obligations between states. Of particular relevance here is the general prohibition of transboundary harm, or the no-harm principle. The principle is codified in the Stockholm Declaration of 1972 and the Rio Declaration of 1992:

> States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.[138]

[134] The Netherlands v. Urgenda, para. 6.3; Neubauer et al. v. Germany, para. 137.
[135] Banković and others v. Belgium and others, para. 57.
[136] VCLT Article 31 (3) c).
[137] Judge Krenc, concurring opinion to Pavlov v. Russia, para. 4.
[138] Stockholm Declaration Principle 21 and Rio Declaration Principle 2.

The ICJ has also referred to this principle on multiple occasions, stating that it is every State's obligation not to allow its territory to be used for acts contrary to the rights of other states.[139]

This entails an obligation on the State to "use all the means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another State".[140] The Court has also established that this principle is now part of the corpus of international law relating to the environment.[141] It has also been referred to in ECtHR practice.[142]

5.5.6 The principle of prevention

Closely related to this principle are the principles of prevention and of precaution. The principle of prevention has its origins in the due diligence that is required of a state in its territory[143] and forms part of international customary law.[144] As with the no-harm rule, this principle also contains the obligation to "avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the territory of another state".[145]

The application of the principle of prevention to climate change implies that states should not simply take measures that address the adverse effects of climate change when they occur, but also measures to prevent these effects from materialising in the first place, especially since many of the damages will be irreversible once we reach a certain tipping point. That would include both measures to reduce greenhouse gas emissions in order to prevent the most adverse effects of climate change, as well as measures to adapt to these effects in order to prevent as much damage as possible.

More precisely, in relation to dangerous activities, this includes an obligation to put in place regulations that "must govern the licensing, setting up, operation, security and supervision of the activity and must make it compulsory for all those concerned to take practical measures to

[139] Corfu Channel p. 22, Pulp Mills, para. 101, Legality of the Threat or Use of Nuclear Weapons, para. 29.

[140] Pulp Mills, para. 101.

[141] Pulp Mills, para. 101; Legality of the Threat or Use of Nuclear Weapons, para. 29; Gabčíkovo-Nagymaros Project, para. 53.

[142] Tătar v. Romania Section II) B.

[143] Pulp Mills para. 101.

[144] Legality of the Threat or Use of Nuclear Weapons, para. 29; Gabčíkovo-Nagymaros Project, para. 140; PulpMills, para. 101.

[145] Pulp Mills, para. 101.

ensure the effective protection of citizens whose lives might be endangered by the inherent risks."[146]

5.5.7 The principle of precaution

The principle of precaution stipulates that "where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation."[147] In relation to climate change, there is near scientific certainty of both serious and irreversible damage, but uncertainty in relation to the exact nature and extent of the damages as well as when they will materialise. Taking this uncertainty into account, the precautionary principle entails that states should not postpone measures to mitigate climate change.

5.5.8 The Paris Agreement

The fact that almost all states have ratified the Paris Agreement, implies that the climate change therein could be considered a "common ground" between the member states of the ECHR. It is therefore particularly relevant in order to determine the climate change obligations under Articles 2 and 8 of the Convention.

The Paris Agreement aims to strengthen the global response to climate change by holding to the increase of the global average temperature to well below 2 °C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5 °C above pre-industrial levels.[148] It also aims to increase the ability to adapt to the adverse impacts of climate change.[149]

The parties to the Paris Agreement are required to "prepare, communicate and maintain successive nationally determined contributions that it intends to achieve."[150] These nationally determined contributions (NDCs) will reflect "its highest possible ambition, reflecting its common but differentiated responsibilities and respective capabilities",[151] in contradiction to the Urgenda case, where the Court stated a minimum target of 25 percent reduction. The principle of common, but differentiated responsibilities, entails that developed states must

[146] Öneryildiz v. Turkey, para. 90; Budayeva and others v. Russia, para. 132.
[147] Rio Declaration Principle 15.
[148] Paris Agreement Article 2 (1) (a).
[149] Ibid. Article 2 (1) (b).
[150] Ibid. Article 4 (2).
[151] Ibid. Article 4 (3).

reduce more than other states, and consequently, a target of the absolute minimum in the developed states will not be sufficient to achieve the global reduction target in the Paris Agreement.

This means that if the parties to ECHR are to fulfil their obligations pursuant to Articles 2 and 8 read in light of the Paris Agreement, their plans to reduce emissions must reflect their highest possible ambition.

5.5.9 Distinction between mitigation measures and adaptation measures

Measures to mitigate climate change must be supplemented by measures of adaptation.[152] While mitigation measures aim to mitigate the adverse effects of climate change by reducing the amount of GHG in the atmosphere and thereby limit global warming, adaptation measures aim to adapt to the adverse effects of climate change and alleviate the ensuing risks. Mitigation measures include reducing GHG emissions, for example by increasing energy efficiency, transitioning to renewable energy etc. It also includes carbon sinks, which absorbs CO2 from the atmosphere, such as carbon capture or preservation and enhancement of natural carbon sinks such as forests or the ocean.

Adaptation measures refer to all measures that aim to protect humans and places from the adverse effects of climate change, such as flooding, drought, and sea level rise for instance. Such measures can include building sea walls in areas that are vulnerable to sea level rise, restoring forests, wetlands and other vegetation that absorb water in the event of flooding, and increasing green spaces in cities to reduce the impact of heat waves and improve air quality.

However, it is clear that adaptation measures alone will not be sufficient to safeguard the right to life and health.[153] There are limits to adaptation possibilities, and "[w]ith increasing global warming, losses and damages increase and become increasingly difficult to avoid."[154] In order to protect the right to life and the right to health, the state must take both mitigation measures and adaptation measures.[155]

[152] Paris Agreement Article 7.

[153] Neubauer et al. v. Germany, para. 157.

[154] IPCC (2022) p. 26.

[155] For example, Neubauer et al. v. Germany, para. 144; The Netherlands v. Urgenda, para. 5.3.2.

5.5.10 Conclusion

There can be argued that there is a growing consensus among the member states that Articles 2 and 8 impose a positive obligation to take measures against climate change. What this positive obligation entails, must be determined in light of international law. Based on this, it can be concluded that states must take measures to limit global warming to 1.5 °C and well below 2 °C. The principle of prohibition of transboundary damage entails that this is also an extraterritorial obligation. However, the question of which specific mitigation and adaptation measures the state owes extraterritorially, depends on whether or not the state has jurisdiction in relation to those measures. This will be discussed below.

5.6 Specific measures of mitigation and adaptation

5.6.1 Introduction

It has been determined above that the state does have an obligation under Articles 2 and 8 to take measures to protect individuals abroad from the impacts of climate change that it has contributed to. However, there is still a question of which measures the state must take. These measures relate to acts or omissions that in some way contribute to extraterritorial effects. The effects caused by these specific acts or omissions must be within the state's jurisdiction pursuant to Article 1 in order to establish that the state must take measures related to these acts or omissions.

Using the effects doctrine to answer this question entails that the aforementioned criteria "significant", "real and immediate", "reasonably foreseeable" and "within the state's effective control" must all be fulfilled in relation to these rights.

Here it is necessary to distinguish between the state's various acts and omissions that contribute to climate change in order to determine whether they are within the state's jurisdiction. In this regard, the distinction between mitigation measures and adaptation measures becomes more important, especially since adaptation measures cannot be implemented extraterritorially to the same extent as they can within the state's territory.

5.6.2 Mitigation measures

The following sub-chapters will examine some possible measures a state can take to mitigate climate change and discuss whether these measures are obligations that apply extraterritorially pursuant to Article 1 interpreted in light of the effects doctrine.

For some of these measures, it is relevant to distinguish between mitigation measures a state must take to protect individuals on its own territory from climate harm and measures it must take to protect individuals abroad. The only importance of this distinction is the question of jurisdiction. The individuals on the state's territory are already within the state's jurisdiction pursuant to Article 1. In relation to individuals abroad, however, the criteria for extraterritorial jurisdiction must be fulfilled in order to establish that the same obligation applies extraterritorially.

Other than this, there is no legitimate reason to differentiate between effects on individuals in the state's territory and effects on individuals abroad. The Convention cannot be interpreted "so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory".[156] In any case, climate change is of such a nature that it will produce effects everywhere, even though some areas will be hit harder than others.

5.6.3 Reduction of GHG emission on state territory

One of the most relevant measures a state can take to safeguard the rights of individuals both on its own territory and abroad is to reduce GHG emissions on the state's own territory. This is a measure that is clearly within the state's effective control, because the state has the power to regulate all activity within its territory. This includes both GHG emitting activities effectuated by the state itself, and GHG emitting activities by private parties, who are subject to the state's laws and regulations and who are therefore also within the state's effective control. The Committee on the Rights of the Child also arrived at this conclusion, stating that "given its ability to regulate activities that are the source of these emissions and to enforce such regulations, the State party has effective control over the emissions."[157]

Regarding the requirement of "significant" effects, it is clear from what has been described in chapter 1.2 that many of the adverse effects are "significant" or even more severe.

Furthermore, the territorial GHG emissions must also be the "direct and immediate" cause of the adverse effects that impact the individual. On the one hand, the effects of climate change are impossible to trace back to any specific emissions of GHG, and it is therefore difficult to establish that the emissions within one state were the "direct and immediate" cause of a specific

[156] For example, Carter v. Russia, para. 128 with further references.

[157] Sacchi et al. v. Argentina et al., para. 10.9.

effect on the individual. For example, it is impossible to establish which GHG emissions were the direct cause.

On the other hand, such an interpretation would render it impossible to establish responsibility for any state that emits GHG. Anthropogenic GHG emissions is clearly the "direct and immediate" cause of climate change in general. Since all emissions contribute to climate change, one could therefore argue that all emissions that are not in line with the targets of the Paris Agreement, are the "direct and immediate" cause of all adverse effects of climate change.

Requiring that the emissions must be a "direct and immediate" cause of the effect, does not mean that it must be the *only* cause. In Sacchi, France argued that since climate change is a global phenomenon, their emissions could not be considered to be the "direct" source of the alleged violations. In the hearing of Klimaseniorinnen v. Schweiz, the Government also argued that the contribution of Switzerland was too small to constitute a "sufficiently direct causal link"[158] (although this was in relation to victim status, not extraterritorial jurisdiction). However, that is a question of attribution of responsibility and is not related to the question of "direct" effects.[159] The CRC established in Sacchi that "the collective nature of the causation of climate change does not absolve any state of the individual responsibility that may be derived from the harm that the emissions originating within its territory may cause to children, regardless of their location."[160]

The issue of foreseeability is a question of whether the state has known about the harmful effects of its GHG emissions. It must be clear that all states are now aware of the correlation between GHG emissions and climate change, especially after signing the United Nations Framework Convention on Climate Change of 1992 and the Paris Agreement of 2015.[161] As the CRC stated in Sacchi: "Scientific evidence shows the impact of the cumulative effect of carbon emissions on the enjoyment of human rights, including rights under the Convention, and the potential harm of a state's acts or omissions must be considered sufficiently foreseeable."[162] Furthermore, it is not only reasonably foreseeable, but also inevitable, that emitting greenhouse gases will have a direct impact on the human rights of people around the world.

[158] ECtHR Webcast (2023).
[159] Boyd and Knox, third-party intervention, para. 24.
[160] Sacchi et al. v. Argentina et al., para. 10.10.
[161] Ibid., para. 10.11.
[162] Ibid.

Based on the above, the state has an extraterritorial obligation to reduce GHG emissions on its own territory in order to protect the rights of individuals abroad.

This view was indirectly supported by the German Federal Constitutional Court ("FCC").[163] While it did not conclude on the matter, it opened for the assumption that the obligation to reduce emissions to secure the rights of the German Basic law applied not only to individuals on state territory but also the applicants in Bangladesh and in Nepal.

5.6.4 Extraction and export of fossil fuels

5.6.4.1 The issue

Another question is whether the obligation to reduce GHG emissions also involves extraction and export of fossil fuels. The reason why it is relevant to view extraction as an act separate from combustion, is that the combustion of fossil fuels might not occur on the territory of the state where they were extracted. This is the case in Greenpeace Nordic. Norway exports most of the oil and gas extracted from its territory. This means that 95 percent of the total GHG emissions from Norwegian petroleum are emitted outside of Norway. The emissions resulting from the combustion of exported fossil fuels are not included in the national inventory report of anthropogenic emissions that the state must provide according to the Paris Agreement.[164] This allows a state such as Norway to avoid responsibility for the emissions caused by oil and gas extracted from Norwegian territory and combusted in other states.

This is a problem because Norway is the 7th largest exporter of oil and gas in the world.[165] The petroleum extracted on the Norwegian continental shelf therefore constitutes a major contribution to climate change. Furthermore, Norway's emissions trajectory, with proposed and prospective oil and gas fields is not in line with the rate of global emissions reduction needed to achieve the goals in the Paris Agreement.[166]

The question is therefore whether the state must take into account the emissions from combustion of petroleum extracted on its territory. It is possible to distinguish between territorial and extraterritorial effects in this regard.

[163] Neubauer et al. v. Germany, paras. 173-181.
[164] Paris Agreement Article 13 (7).
[165] McKinnon et al. (2017) p. 3.
[166] Ibid.

5.6.4.2 Territorial harm caused by combustion of exported petroleum

The first question relates to extraction and export of fossil fuels when this leads to harm on the state's own territory. In its third-party intervention to the ECtHR in the Agostinho case, the European Network of National Human Rights Institutions (ENNHRI) argues that the state's jurisdiction must at the very least include territorial harm caused by the combustion of fossil fuels extracted from its territory.[167]

In my view, however, this is not a question of jurisdiction. All individuals on the territory of the state are automatically within its jurisdiction pursuant to Article 1. It is therefore not necessary to apply the effects doctrine here. Rather, this is a question of responsibility, i.e. whether the state must also take responsibility for the emissions resulting from the combustion of fossil fuels extracted on its territory in order to protect the individuals on its territory.

It seems reasonable to answer this question positively, since Norway would otherwise be able to avoid taking responsibility for its greatest contribution to climate change. It also seems unreasonable that a developed country, such as Norway, should profit from its export while also allocating the responsibility for emissions resulting from its extraction to other states, for instance developing states that might not have the same possibilities to reduce its emissions.

To a certain extent, this view is also supported by the Norwegian Supreme Court (NSC) in the Norwegian climate lawsuit (leading to the Greenpeace Nordic application).[168] In spite of arriving at the opposite conclusion on this question,[169] the NSC stated that "if Norway is affected by activities taking place abroad that Norwegian authorities may influence on or take measures against, this must also be relevant to the application of Article 112",[170] which contains the constitutional right to a healthy and sustainable environment. As an example, it mentioned "the combustion of Norwegian-produced oil and gas abroad, when this causes harm also in Norway."[171]

[167] ENHRI Written observations in application no. 39371/20, para. 7.
[168] HR-2020-2472-P.
[169] Ibid., para. 159.
[170] Ibid., para. 149.
[171] Ibid.

5.6.4.3 Extraterritorial harm caused by combustion of exported petroleum

When considering the effects on individuals abroad, the criteria for extraterritorial jurisdiction must be fulfilled.

The extracting state does not exercise effective control over combustion of fossil fuels in other states. It does, however, exercise effective control over extraction and export of fossil fuels from its territory. Exploration and extraction on state territory, as well as export, are all subject to the state's laws and regulations. It therefore also has influence over the subsequent combustion. The state could for example prevent or limit the combustion of its petroleum simply by reducing its own extraction and export. By extension of its control over extraction and export, the emissions from petroleum extracted on its territory are therefore also within the state's effective control.

There is more uncertainty regarding whether extraction and export can be considered the "direct and immediate" cause of the effects of climate change. One could argue that GHG emissions are caused by the *combustion* of fossil fuels and not directly by the exploration and extraction of it (even though some emissions are caused by this process as well). However, the very purpose of the extraction is the subsequent combustion. Further, combustion would not be possible without prior extraction. There is therefore a direct causal link between extraction of fossil fuels and subsequent GHG emissions that come from combustion. This entails that extraction of fossil fuels, and not only combustion of it, could be considered a "direct and immediate" cause of climate change.

It is clear that the effects of extraction and export are also "reasonably foreseeable", since the very purpose of it is combustion and this inevitably leads to climate change. As explained above, the effects are also "significant".

It can be concluded that the state should have jurisdiction in this scenario, and that the state should therefore to a certain extent have responsibility for emissions from fossil fuels extracted and exported from its territory and combusted abroad. This view is supported by human rights institutions such as the CRC in the Sacchi case. The CRC also stated in its review of Norway's report that "[i]n the light of the State party's exploitation of fossil fuels, the Committee recommends that it increase its focus on alternative energy and establish safeguards to protect

children, both in the State party as well as abroad, from the negative impacts of fossil fuels."[172] It thereby implies that when exporting fossil fuels abroad, the state should not only take into account the rights of individuals on its own territory, but also the rights of individuals abroad. This would entail an obligation to reduce extraction of oil and gas on the territory to an extent that is in line with the targets in the Paris Agreement and the remaining carbon budget. Additionally, it should include mitigation measures related to the export. Such measures could include setting conditions on production and export licences as well as conditions for the combustion in importing state.[173]

5.6.5 Activities that take place outside of the state's territory

The situations discussed above differ from situations where a state is directly responsible for carrying out GHG emitting activities outside of its territory. An example could be that a state-controlled oil and gas company is engaged in the extraction of oil and gas on the territory of other states or owns factories or production facilities that emit GHG. The question is whether there should be any distinction between this and the situations described above.

The state must be considered to exercise effective control over its own activities abroad, even though these activities are also subject to the *de jure* jurisdiction of the other state. The determination of the fulfilment of the other criteria – "direct and immediate", "significant" and "reasonably foreseeable" – is the same as under the question of territorial GHG emissions above. This entails that state activities abroad also come within the state's jurisdiction. The state therefore has an obligation to reduce emissions from its extraterritorial activities as well as emissions on its own territory.

Another question in this regard relates to the situation where a company that is registered in the state, carries out activities in another state. Thus, the activities are carried out by private parties and not the state itself. In this case, the state does not exercise the same amount of control as it does over emissions by private parties on its own territory. It cannot regulate or monitor activities in other states to the same extent.

However, to the extent that it is possible, the obligation to regulate in order to prevent damage might also to a certain extent apply to activities that occur outside of state territory. The Inter-

[272] CRC (2018) para. 27.

[173] Voigt (2021) Section 4.3.

American Court of Human Rights has recognised that in the case of companies that are registered in the state, but develop activities outside of its territory, there is a tendency towards the regulation of such activities by the state in which the company is registered.[174] The UN Guiding Principles on Businesses and Human Right contains principles on the state's duties in this regard. However, as the name implies, these principles are only guiding.

The conclusion is therefore that it might not be possible to establish jurisdiction over extraterritorial activities by companies registered in the state, but that the state's own activities abroad are within its jurisdiction. Thus, it has an obligation to reduce emissions from these activities.

5.6.6 Adaptation measures

Adaptation measures are mainly local and must be implemented where they are needed. Due to the fact that the state does not have prescriptive or enforcement jurisdiction outside of its territory, it does not have the same ability to implement adaptation measures in other states as it does on its own territory. Therefore, the state does not have the same options at its disposal for protecting individuals abroad as it has for protecting individuals on its territory. In Neubauer, the FCC stated that "for this reason alone, a duty of protection could not have the same content as it has vis-à-vis people living in Germany".[175] It further stated that "emission reductions and adaptation measures complement one another and are inextricably linked. In this respect, it would not be possible to ascertain whether a possible duty of protection had been violated."[176]

In any case, the FCC found that no violation could be found vis-à-vis the complainants in Bangladesh and in Nepal, since it had already concluded that there was no violation vis-à-vis the complainants in Germany.[177] Even though Germany's reduction plan was based on a 2 °C target rather than the 1.5 °C target of the Paris Agreement, the FCC found that this was not a violation, because the increased risks associated with this reduction target might be alleviated through adaptation measures.[178] It failed to consider how these risks would be alleviated for the

[174] Advisory Opinion (OC-23/17), para. 151.
[175] Neubauer et al. v. Germany, para. 178.
[176] Ibid., para. 181.
[177] Ibid., para. 173.
[178] Neubauer et al. v. Germany, para. 167.

individuals in Bangladesh and in Nepal, where such adaptation measures could not be implemented.

The fact that the state has less options at its disposal for protecting individuals abroad, cannot relieve the state of its responsibility towards these individuals. The obligation to take "all appropriate measures" still applies, entailing that when adaptation measures are less available, the obligation must be fulfilled through correspondingly comprehensive mitigation measures. This means that states must take mitigation measures that are sufficient for achieving the 1.5 °C target, thereby significantly limiting the need for adaptation measures.

There is also an unjust and unequal burden sharing in relying too heavily on adaptation measures rather than mitigation measures. It is mostly the developing states, who have contributed the least to climate change and are most vulnerable to its consequences, who are least able to take sufficient adaptation measures. For this reason, it is important that developed states take mitigation measures that are sufficient for reaching the 1.5 °C target, while also providing developing countries with financial support in accordance with Article 9 of the Paris Agreement to help them implement adaptation measures.

5.7 Conclusion

In order to protect the rights of individuals both within and without the state's territory, Articles 2 and 8 of the Convention impose on the member states a positive obligation to take measures to mitigate and adapt to climate change. The most important measure in this regard is the reduction of GHG emissions on the state's territory, but it must also reduce its extraction of fossil fuels and reduce the GHG emissions from its own activities abroad.

6 Concluding remarks

In conclusion, there are many political as well as legal arguments in favour of holding a state responsible for its contribution to the adverse extraterritorial effects of climate change on the enjoyment of human rights. Scientific evidence clearly shows that the impact of the cumulative effect of GHG emissions constitutes a serious threat to human beings globally. In order to protect individuals around the world from this serious threat, states must be held accountable for their share of the responsibility.

The right to life pursuant to article 2 and the right to private and family life pursuant to article 8 imposes a positive obligation on the state to take measures to protect individuals from the risks posed by climate change. While the issue of extraterritorial obligations has yet to be

addressed by the ECtHR, there are possible grounds for extending the jurisdiction of member states pursuant to Article 1 of the Convention to individuals outside the state's territory. This thesis concludes that the effects doctrine developed in public international law is the most suitable basis for jurisdiction in this regard.

By using the effects doctrine, some of the obligations on the states to mitigate climate change apply extraterritorially. The state has an obligation to reduce its GHG emissions in order to safeguard the rights of individuals outside the state's territory. This obligation mainly entails reducing emissions on its own territory in line with the targets of the Paris Agreements. It also includes measures relating to extraction and export of fossil fuels, and activities carried out extraterritorially.

Based on the jurisprudence of the ECtHR, the effects doctrine *inter alia* requires that the state exercises effective control over the act or omission that infringes the enjoyment of the rights of the Convention. In many of these situations, such effective control can be proven to exist, and should lead to responsibility, even if the effects occur outside the territory of that state, i.e., even if the responsibility depends on extraterritorial jurisdiction.

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