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‘Consideration of the need for and feasibility of a further instrument or instruments in the field of human rights and the environment – limitations linked to extraterritoriality, with a particular focus on climate change’

1. Introduction on Limitations: Climate Change and Extraterritoriality

For any instrument in the field of human rights and the environment two areas of concern will have to be considered front and centre: the unfolding climate crisis and the question of extraterritoriality. Many environmental issues, and anthropogenic climate change in particular, involve actions and omissions by more than one state or transboundary harm, or both. International human rights law as it stands struggles with both of these factors: it builds on the assumption that it is usually not a problem to identify a particular state which is violating a particular right of a particular individual in a specific way. But this is not the case when it comes to many environmental harms, and most importantly it is not true regarding climate change. *Duarte Agostinho and Others v Portugal and Others* is a good example in this regard: the case is brought by Portuguese youth but aimed at 33 states.¹ Once the hurdle of extraterritoriality is overcome, we then need to ask how to integrate human rights protection and environmental law. I will speak on both aspects.

This paper proceeds in three steps.

- 1) First, it explain how and why extraterritoriality poses problems for the application of human rights standards to climate change mitigation efforts.
- 2) Second, it addresses two ways forward for a Protocol to the ECHR. On the one hand, a protocol could build on a stringent right to a healthy environment as it is currently envisaged by, eg, the PACE Recommendation² or by the UN General Assembly³ and the UN Human Rights Council.⁴ The consequence of this approach is that its extraterritorial reach may remain limited. On the other hand, such an instrument could change the focus of the standards of protection. This would allow it to extend the extraterritorial reach and potentially also states’ buy-in, but would come at a cost in terms of benefits for individuals.
- 3) Third, the paper sketches what an additional convention on environmental threats could contribute to the protection of a human right to a healthy environment.

¹ ECtHR, *Duarte Agostinho and Others v. Portugal and Others*, Appl. no. 39371/20.

² PACE Recommendation 2211 (2021), *Anchoring the right to a healthy environment: need for enhanced action by the Council of Europe*, 29 September 2021.

³ UN General Assembly, ‘The Human Right to a Clean, Healthy, and Sustainable Environment’, 26 July 2022, UN Doc. A/76/L.75.

⁴ UN Human Rights Council, Resolution of the Human Rights Council Adopted on 8 October 2021, UN Doc. A/HRC/Res/48/13.

Extraterritoriality

2. The Role and Importance of Extraterritorial Human Rights Obligations

Human rights are still primarily a national affair.⁵ Even human rights that are recognised and protected in international instruments must usually be claimed against a state. Paradigmatically this remains the territorial state where a human right is being violated. But environmental harm in general, and climate change in particular, are global problems. The worst emitters who are causing the violation of human rights of residents of, say, coastal regions around the globe are precisely not the states where these individuals live. On the contrary, large, rich, and powerful countries, including Council of Europe members such as the UK and Germany are the worst offenders when it comes to cumulative emissions over time. Claiming human rights violations resulting from global effects of climate change or localised effects abroad against these nations requires that these states owe obligations to individuals outside their territory. This is known as extraterritoriality or extraterritorial jurisdiction in international human rights law,⁶ and it will be an issue even once a right to a healthy environment is recognised either in a protocol to the European Convention on Human Rights or in a separate instrument, or both.⁷

In the **ECHR** jurisdiction – including extraterritorial jurisdiction – is regulated in **Article 1**:

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

That is, it stipulates that the human rights holder – the individual – needs to be subject to jurisdiction. Accordingly, the European Court of Human Rights has held that an individual needs to be within a territory under the effective control of a state or under state agent authority and control to come within said jurisdiction.⁸ The problem with these criteria is that a failure to protect the environment may be perpetrated in one place but have effects somewhere else and on individuals who are nowhere near the source of the problem. That is, while the action that may violate a human right is within the control of a state in the required sense, the individual who suffers the resulting harm and thus the potential human rights violation is not. Two recent developments in this area are relevant to considering how to address extraterritoriality when it comes to human rights and climate change.

- 1) The first development is that some negative human rights obligations are recognised to arise even if only the means of harming an individual are within the control of a state while the individual is not. This is what the ECtHR found in *Carter v Russia*.⁹ It chose to emphasise that Russia may not have been in control of the relevant territory, nor the victim of a poisoning. But it was in control of the victim’s life.¹⁰ In other words, controlling whether a victim lives or dies was sufficient to bring the victim within Russia’s jurisdiction, even though neither of the

⁵ The introduction of this section draws on Lea Raible, ‘Expanding Human Rights Obligations to Facilitate Climate Justice? A Note on Shortcomings and Risks’ *EJIL:Talk!* 15 November 2021 <<https://www.ejiltalk.org/expanding-human-rights-obligations-to-facilitate-climate-justice-a-note-on-shortcomings-and-risks/>> accessed 5 October 2022.

⁶ See generally Marko Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (OUP 2011); Samantha Besson, ‘The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to’ (2012) 25 *Leiden Journal of International Law* 857; Conall Mallory, *Human Rights Imperialists: The Extraterritorial Application of the European Convention on Human Rights* (Hart 2020); Lea Raible, *Human Rights Unbound: A Theory of Extraterritoriality* (OUP 2020). For a short overview on the ECtHR’s case law until 2016 see Lea Raible, ‘The Extraterritoriality of the ECHR: Why Jaloud and Pisari should be Read as Game Changers’ [2016] *European Human Rights Law Review* 161.

⁷ For a similar assessment of the pervasiveness of the issue see Helen Keller and Corina Heri, ‘The Future is Now: Climate Cases Before the ECtHR’ *Nordic Journal of Human Rights* (2022) <https://doi.org/10.1080/18918131.2022.2064074>.

⁸ ECtHR, *Al-Skeini v United Kingdom*, Appl. no. 55721/07, Judgment of 7 July 2011, paras 130-139.

⁹ ECtHR, *Carter v Russia*, Appl. no. 20914/07, Judgment of 21 September 2021.

¹⁰ *Carter v Russia*, para 150.

established criteria was fulfilled. However, the Court also found that this type of jurisdiction was related to ‘specific acts involving an element of proximity.’¹¹ While this line of case law thus looks like it is expanding the Convention’s extraterritorial scope, it is questionable if a failure to protect the environment or insufficient climate mitigation measures could be described as ‘specific acts involving an element of proximity.’

- 2) The second development to the Court’s case law occurred in *Georgia v Russia (II)*.¹² The case involved the armed conflict and active hostilities between the two states. The Court declined to apply extraterritorial human rights obligations in some respects partly because they involved complex fact patterns and an overwhelming amount of evidence, as well as a large number of potential victims and the fact that law other than the Convention was applicable.¹³ While the somewhat dubious notion of a ‘context of chaos’¹⁴ played a major role in the Court’s reasoning in this case and may not be as relevant for climate cases, it is also true that complex fact patterns, and potentially large numbers of victims are precisely some of their key characteristics. It is thus possible that the Court could and would rely on similar arguments as those advanced in *Georgia v Russia (II)* to decline adjudicating such disputes. This means that extraterritorial human rights duties of states are not currently likely to close the accountability gap between major emitters and geographically distant victims.

3. Envisaged Protection Standards and Limited Extraterritoriality v. Different Protection Standards and More Extraterritoriality?

- 1) The provision recognising a human right to a healthy environment as currently envisaged for a Protocol to the ECHR reads: ‘Everyone has the right to a safe, clean, healthy and sustainable environment.’¹⁵ And it defines this right further as ‘... the right of present and future generations to live in a non-degraded, viable and decent environment that is conducive to their health, development and well-being.’¹⁶ The draft text does not include any consideration of Article 1 of the ECHR and the jurisdictional limits it sets. This means that everything set out previously – tests of effective control, the limitations in cases with many applicants and unclear causality as well as large amounts of presumably complex evidence – will apply to any cases brought under the Protocol as well.

This allows for high standards of protection. But it also means that individual applications to hold states accountable for breaches of these standards face significant hurdles as soon as they are aimed at multiple states – not all of which will be where the alleged human rights violations have taken place – or if they are brought by individuals from outside Europe. Because the cause of climate change is cumulative, this means that this version of a Protocol is likely to remain of limited use to adapting the ECHR to tackling climate change and its human

¹¹ *Carter v Russia*, para 130.

¹² *Georgia v Russia (II)*, Appl. no. 38263/08, Judgment of 21 January 2021, paras 109-144. The analysis draws on Lea Raible, ‘Expanding Human Rights Obligations to Facilitate Climate Justice? A Note on Shortcomings and Risks’ *EJIL:Talk!* 15 November 2021 <<https://www.ejiltalk.org/expanding-human-rights-obligations-to-facilitate-climate-justice-a-note-on-shortcomings-and-risks/>> accessed 5 October 2022. For a more detailed analysis and further references see Lea Raible, ‘Extraterritoriality between a Rock and Hard Place’ (2021) *Zoom-in 82 – Questions of International Law 7*, available at <<http://www.qil-qdi.org/extraterritoriality-between-a-rock-and-hard-place/>> accessed 5 October 2022.

¹³ *Georgia v Russia (II)*, para 141.

¹⁴ *Georgia v Russia (II)*, para 126.

¹⁵ Appendix, *The proposed text for an additional protocol to the European Convention on Human Rights, concerning the right to a safe, clean, healthy and sustainable environment* to PACE Recommendation 2211 (2021), *Anchoring the right to a healthy environment: need for enhanced action by the Council of Europe*, 29 September 2021, Article 5.

¹⁶ Appendix, *The proposed text for an additional protocol to the European Convention on Human Rights, concerning the right to a safe, clean, healthy and sustainable environment* to PACE Recommendation 2211 (2021), *Anchoring the right to a healthy environment: need for enhanced action by the Council of Europe*, 29 September 2021, Article 1.

rights impacts. This is true regardless of the convincing substantive arguments that can be made in favour of finding violations.¹⁷

- 2) One possibility to lower the hurdles of extraterritoriality is to include a provision in a Protocol that would amend Article 1 of the ECHR and thus adapt the meaning of jurisdiction for the substantive provisions in the protocol. As set out above, the current meaning requires that the **victim** of the harm and/or human rights violation is within the jurisdiction of the state being held accountable. However, in situations where the harm is dispersed or globalised and the victims potentially scattered far and wide, a provision that requires control over the **source of the harm** instead is an option to tie such globalised harms to responsible states.¹⁸ This could read, for example, as follows:

‘For the purposes of substantive and procedural rights recognised in this Protocol, jurisdiction may be established either according to Article 1 of the Convention, or if the High Contracting Party exercises significant control over the source of harm.’

It needs to be stressed, however, that this would be a significant departure from current law and practice and that it will be more onerous on states ratifying such an instrument. It would mean, for example, that a realistic opportunity to regulate extraterritorial harms committed by private actors would be sufficient to establish jurisdiction. In a second step, the failure to regulate (or to regulate appropriately) could then be a breach of a human rights obligation.¹⁹ It would be important to keep these steps separate, because not every opportunity to address a source of harm would also translate into an obligation to do so. Neither does establishing such an opportunity address criteria for what kind of regulation would be compliant with obligations under the right to a healthy environment. This is where other international instruments, such as the Paris Agreement²⁰ or a potential CoE Convention on environmental threats,²¹ could be considered.²²

- 3) As just set out, this approach is potentially significantly more onerous on states than the current state of affairs. It might be difficult to secure ratifications of a Protocol that includes the suggested expansion of extraterritorial jurisdiction. If extraterritoriality of the kind that would be useful to address climate change (and other transboundary environmental harms) through human rights law is a priority, but buy-in from states is judged to be an obstacle, it would be possible to change the levels and kinds of protection available to individuals through the substantive right to a healthy environment. This limitation could take various forms but would most likely mean that the draft text for the Protocol envisaged by PACE would have to be changed significantly.

¹⁷ For suggestions see Corina Heri, ‘Climate Change before the European Court of Human Rights: Capturing Risk, Ill-Treatment and Vulnerability’ *European Journal of International Law* (2022); available at <<https://academic.oup.com/ejil/advance-article-abstract/doi/10.1093/ejil/chac047/6717882?redirectedFrom=fulltext&login=false>> accessed 5 October 2022.

¹⁸ On this distinction and the consequences in particular for obligations of due diligence see Samantha Besson, ‘Due Diligence and Extraterritorial Human Rights Obligations – Mind the Gap!’, *ESIL Reflections* 9:1 (2020).

¹⁹ This framing addresses concerns on mixing up jurisdiction with an assessment of whether obligations so established have been violated. See, eg, the dissenting and concurring opinions to UN Human Rights Committee, *AS et al v Italy* (27 January 2021) UN Doc. CCPR/C/130/D/3042/2017.

²⁰ Paris Agreement on Climate Change, UN Doc. FCCC/CP/2015/L.9/Rev.1, 12 December 2015.

²¹ PACE Recommendation 2211 (2021), *Anchoring the right to a healthy environment: need for enhanced action by the Council of Europe*, 29 September 2021, para 3.3.

²² See for an argument to this effect: Corina Heri, ‘Climate Change before the European Court of Human Rights: Capturing Risk, Ill-Treatment and Vulnerability’ *European Journal of International Law* (2022); available at <<https://academic.oup.com/ejil/advance-article-abstract/doi/10.1093/ejil/chac047/6717882?redirectedFrom=fulltext&login=false>> accessed 5 October 2022.

Examples of such modifications include a limit on sums of compensation. Or the Protocol could put limits to the number of claims that can be brought for what can be judged as a single impact (eg, a particular flood, or changes to weather patterns in a particular region). This might involve requiring that groups of applicants be joined or even potentially thinking about systems of class action. The consequence of such approaches would be that the focus moves away from providing individual redress. This means that extending extraterritoriality in climate change cases would come at the cost of at least some of the main characteristics of the Convention and human rights protection generally.

Alternatively, the limits on extraterritoriality could be kept as they are, accepting that this would diminish a Protocol's use in combating the causes and effects of climate change, with particular limitations on benefits for individuals abroad or outside Europe. Either way, both high levels of protection and a wide extraterritorial scope are unlikely to be realised concurrently. This paper thus submits that any instrument that is drafted should build on the insight that there is a choice to be made and further urges the drafting group to make this choice actively.

4. Added Value of a Separate Convention on Environmental Threats to Human Life

The advantage of adding a separate CoE convention on environmental threats to human life to a Protocol to the Convention is that it would help clarify states' human rights obligations in the area of climate change – particularly climate change mitigation. Most obligations regarding climate change mitigation relate to risk regulation. That is, positive obligations based on Articles 2, 3, and 8 ECHR and the associated doctrines are the most relevant for many claims relating to environmental and climate harms.²³ The ECtHR has long recognised their existence, including in cases concerning environmental harms.²⁴ Such obligations protect against negligence of authorities to regulate risk appropriately even if that risk emanates from (private) third parties.²⁵

The ECHR, however, does not specify the content of such regulations or the principles that should guide their drafting or implementation. This is where a Convention on Environmental Threats to Human Life could be a useful addition to human rights protection, even if it is not intended to be a human rights instrument *stricto sensu*. The ECtHR has in the past referred to principles originating in international environmental law.²⁶ Examples are the principles of due diligence²⁷ and precaution.²⁸ However, these references are few and far between and clarification is necessary.²⁹ **A CoE Convention on environmental threats could provide for these principles in a way that makes them amenable to be referred to in the ECtHR's jurisprudence.** For example, if a state's regulation falls foul of its commitments under such a Convention there could be a presumption that it is not complying with human rights standards either. As such, an additional instrument could supplement

²³ Corina Heri, 'Climate Change before the European Court of Human Rights: Capturing Risk, Ill-Treatment and Vulnerability' *European Journal of International Law* (2022); available at <<https://academic.oup.com/ejil/advance-article-abstract/doi/10.1093/ejil/chac047/6717882?redirectedFrom=fulltext&login=false>> accessed 5 October 2022.

²⁴ ECtHR, *Öneriyıldız v Turkey*, Appl. no. 48939/99, Judgment of 30 November 2004; ECtHR, *Fadeyeva v. Russia*, Appl. no. 55723/00, Judgment of 9 June 2005.

²⁵ See, eg, ECtHR, *López Ostra v Spain*, Appl. no. 16798/90, Judgment of 9 December 1994, para 51.

²⁶ Helen Keller and Corina Heri, 'The Future is Now: Climate Cases Before the ECtHR' *Nordic Journal of Human Rights* (2022) <https://doi.org/10.1080/18918131.2022.2064074>.

²⁷ ECtHR, *Cordella and Others v. Italy*, Appl. nos 54414/13 and 54264/15, Judgment of 24 January 2019. See further Medes Malaihollo, 'Due Diligence in International Environmental Law and International Human Rights Law: A Comparative Legal Study of the Nationally Determined Contributions under the Paris Agreement and Positive Obligations under the European Convention on Human Rights' (2021) 68 *Netherlands International Law Review* 121.

²⁸ ECtHR, *Tătar v. Romania*, Appl. no. 67021/01, Judgment of 27 January 2009.

²⁹ Helen Keller and Corina Heri, 'The Future is Now: Climate Cases Before the ECtHR' *Nordic Journal of Human Rights* (2022) <https://doi.org/10.1080/18918131.2022.2064074>.

Articles 4 and 7 of the Draft Protocol³⁰ on environmental law principles and the interpretation of the rights in the Protocol respectively. In this regard, my recommendation would be to note examples of instruments that could be considered in this respect explicitly. The main advantage of this approach would be to relieve some of the potential pressures on the legitimacy of the Court because it would not have to establish such links independently, being able to rely on the text instead.

5. Summary of Findings and Recommendations

- 1) **Extraterritorial human rights obligations** and how to establish a state's jurisdiction are **pervasive issues regarding climate cases because emissions causing climate change often originate in one state but impact individuals in another**. While extraterritoriality may normally be regarded as an exception, it is the rule for climate cases.
- 2) This means that a **Protocol's extraterritoriality would have to be expanded** if it is to play a significant role in tackling climate change and its human rights impacts. This could be achieved by explicitly recognising a **jurisdictional link based on control over the source of harm** as opposed to potential victims (as is the case at the moment). Should this approach make it difficult to secure buy-in from states, the Protocol could limit sums of compensation or introduce measures to focus on collective redress for a particular pattern of harm. Both measures would **limit available individual redress**.

An additional **CoE Convention on Environmental Threats is to be welcomed**. To make it useful to human rights protection the **Protocol to the ECHR could make explicit reference** which commitments under the additional instrument would count as human rights obligations and could be enforced as such. This would contribute to **preserving the legitimacy of the Court** because it would not have to establish such links independently.

³⁰ Appendix, *The proposed text for an additional protocol to the European Convention on Human Rights, concerning the right to a safe, clean, healthy and sustainable environment* to PACE Recommendation 2211 (2021), *Anchoring the right to a healthy environment: need for enhanced action by the Council of Europe*, 29 September 2021.