

Written observations in application no. 39371/20

Duarte Agostinho et autres c. Portugal et 32 autres

I. Introduction

1. These third-party observations will address the Court's questions on jurisdiction (B), victim status (D) and indirect discrimination under Article 14 (E). To avoid duplication, we refer to ENNHRI's observations in *Klimaseniorinnen*¹ [hereinafter EOK] and *Carême*² [hereinafter EOC] on the applicability and obligations of Articles 2 and 8, respectively. Without prejudice to how the Court may conclude on the exhaustion of domestic remedies, ENNHRI submits the following.

II. General Statistical Data

2. The Court may base its factual and legal findings on "the entirety of the materials submitted" and should attach particular weight to reports of the Intergovernmental Panel on Climate Change (IPCC).³ The IPCC notes that greenhouse gas (GHG) emissions have already caused a significant increase in the frequency, intensity and duration of several heatwaves in Europe, as well as hot and dry weather conditions that promote wildfires. This is projected to worsen in Southern Europe if warming exceeds 1.5°C.⁴
3. Between 1991 and 2018, 27.7% of heat-related deaths in Portugal were attributable to human-induced climate change.⁵ In 2022, Portugal faced its hottest July in 92 years, resulting in over 1000 premature deaths.⁶ Particulate matter released from the 2017 wildfires caused 112 premature deaths, 474 cardiovascular hospital admissions and an increase in asthma.⁷ Children, especially those living in urban areas, are particularly vulnerable to heatwaves and wildfires due to both social and physiological factors, and are at greater risk of several respiratory, cardiovascular, blood, immune and nervous-system

¹ Available at: ennhri.org/wp-content/uploads/2022/12/ENNHRI-3rd-party-intervention-_Klimaseniorinnen-v.-Switzerland.pdf

² Available at: ennhri.org/wp-content/uploads/2022/12/ENNHRI-3rd-party-intervention-Careme-v.-France.pdf

³ E.g. *Pavlov et al. v. Russia* (31613/09) 11.10.2022 §§ 91, 62, 76, 87, discussed further in EOK para. 2.

⁴ IPCC, Sixth Assessment Report (AR6) Working Group I (WGI) *The Physical Science Basis*, 2021, pp. 1548-1557, 1600, 1823, Summary for Policymakers (SPM) Fig.3, Table 11.16; IPCC, AR6 WGII (2022) p. 1835; Guerreiro et al., "Future heatwaves, droughts and floods in 571 European cities," *Environ. Res. Lett.* 13, no. 3 (2018); Junk et al., "Future Heat Waves in Different European Capitals Based on Climate Change Indicators," *Int. J. Environ. Res. Public Health* 16, no. 20 (2019).

⁵ Vicedo-Cabrera et al., "The burden of heat-related mortality attributable to recent human-induced climate change," *Nat. Clim. Change* 11, no. 6 (2021), Supplementary Table 4.

⁶ Demony et al., "Portugal reports more than 1,000 heat-related deaths," *Reuters*. 20.07.2022.

⁷ Oliveira et al., "Environmental particulate matter levels during 2017 large forest fires and megafires in the center region of Portugal," *Int. J. Environ. Res. Public Health* 17, no. 3 (2020).

diseases and disorders, which in some cases can be fatal.⁸ Fine particulate air pollutants, which are co-emitted with GHG emissions from the burning of fossil fuels, also cause adverse health impacts and are responsible for 5,759 premature deaths annually in Portugal.⁹ Exposure during childhood is particularly harmful.¹⁰ Additionally, children exposed to wildfires face negative mental health impacts, including post-traumatic stress disorder (PTSD), anxiety, depression and insomnia.¹¹ For example, 25% of children in the Portuguese municipalities affected by the 2017 wildfires had some kind of psychological disorder and 8% had symptoms of PTSD.¹² Studies also suggest there is a correlation between increasing temperatures, hospitalisations for mental disorders and suicidality.¹³ Anxiety about the potential risks of climate change can also affect mental health, even in the absence of direct impacts.¹⁴ According to a recent survey, 65% of Portuguese youth aged 16-25 are worried about the climate crisis and 81% think the future is frightening.¹⁵

4. Younger generations or *birth cohorts* will be more affected by heatwaves and wildfires across their lifetimes compared with older generations.¹⁶ Under current policy pledges, which will result in around 2.4°C warming relative to pre-industrial condition by the end of this century,¹⁷ a person born between 1999 and 2012 in Portugal will experience at least 24.9 times more heatwaves and at least 1.8 times as many wildfires than they would have experienced without human-induced climate change.¹⁸ Exposure could be reduced by at least 48% for heatwaves and 18% for wildfires if warming is limited to 1.5°C.¹⁹

⁸ IPCC, AR6 Working Group II (WGII) *Impacts, Adaptation and Vulnerability*, 2022 pp. 1053, 1092; Romanello et al., “The 2022 report of the Lancet Countdown on health and climate change,” *The Lancet* 400, no. 10363 (2022); Watts et al., “The 2019 report of The Lancet Countdown on health and climate change,” *The Lancet* 394, no. 10211 (2019); Xu et al., “Wildfires, Global Climate Change, and Human Health,” *N. Engl. J. Med.* 383 (2020); Holm et al., “Health effects of wildfire smoke in children and public health tools: a narrative review,” *J. Expo. Sci. Environ. Epidemiol.* 31 (2021); Chen et al., “Cardiovascular health impacts of wildfire smoke exposure,” *Part Fibre Toxicol* 18, no. 2 (2021).

⁹ Vohra et al., “Global mortality from outdoor fine particle pollution generated by fossil fuel combustion,” *Environ. Res.* 195, no. 110754 (2021); European Environment Agency, *Portugal - Air pollution country fact sheet* (2021).

¹⁰ Keswani et al., “Health and Clinical Impacts of Air Pollution and Linkages with Climate Change,” *N. Engl. J. Med.* 1, no. 7 (2022); Manisalidis et al., “Environmental and Health Impacts of Air Pollution: A Review,” *Frontiers in Public Health* 20 (2020).

¹¹ IPCC, AR6 WGII (2022) pp. 1046, 1053 and 1078; Xu et al. (2020), p. 2175.

¹² Rocha et al., “Livro de Resumos do 1o Congresso de Psicologia do Trauma e do Luto” (2018).

¹³ Bundo et al., “Ambient temperature and mental health hospitalizations in Bern, Switzerland,” *PLoS one* 16, no. 10 (2021); Cervellin et al., “The number of emergency department visits for psychiatric emergencies is strongly associated with mean temperature and humidity variations,” *Emerg. Care J.* 10, no. 1 (2014); Florido Ngu et al., “Correlating heatwaves and relative humidity with suicide,” *Scientific Reports* 11, no. 22175 (2021).

¹⁴ IPCC, AR6 WGII (2022) p. 1078; Burke et al., “The Psychological Effects of Climate Change on Children,” *Curr. Psychiatry Rep.* 20, no. 35 (2018).

¹⁵ Hickman et al., “Climate anxiety in children and young people and their beliefs about government responses to climate change: a global survey,” *Lancet Planet. Health* 5, no. 12 (2021).

¹⁶ Thiery et al., “Intergenerational inequities in exposure to climate extremes,” *Science* 374, no. 6564 (2021).

¹⁷ Available here: <https://climateactiontracker.org/global/cat-thermometer/>, accessed 02/12/2022.

¹⁸ Thiery et al., additional data on Portugal provided by study authors; See also, UNICEF, *The coldest year of the rest of their lives: Protecting children from the escalating impacts of heatwaves*, 2022, pp. 42 and 47.

¹⁹ Thiery et al. (2022).

III. Jurisdiction and state responsibility (question B and 6.4)

I. Territorial harm caused by emissions under effective control

5. Jurisdiction under Article 1 for the purposes of Articles 2 and 8 clearly encompasses climate harm on the territory of a Contracting State. It is of no consequence that climate harm is also caused by emissions from other States and entities, since violations of the Convention can be attributable to more than one State, as well as factors that are partly outside the State's jurisdiction.²⁰ Similarly, under international law, each State may be held separately responsible for the conduct attributable to it.²¹ Article 2, for instance, merely requires that the State “had a real prospect of [...] mitigating the harm”, even if the harm could have occurred regardless.²² The IPCC confirms that “every tonne of CO₂ emissions adds to global warming”, and with “every additional increment of global warming, changes in extremes continue to become larger” and the risk of tipping points increases.²³ Conversely, all incremental decreases in the rate of GHG emissions count. A decrease in the rate of CO₂ emissions would for example slow down global surface warming within a decade.²⁴ Mitigation is also expected to have a “strong effect” on the risks related to hot extremes in Europe.²⁵
6. Aligned with these scientific insights, there is an emerging jurisprudence from Europe, the Americas, Asia and Australia that individual States may be held accountable for the harm their emissions or policies contribute to.²⁶ For instance, the German Constitutional Court has held that even though Germany is “incapable of halting climate change on its own”, it cannot “evade its responsibility” by pointing to GHG emissions in other States.²⁷ The Full Federal Court of Australia has accepted that the facilitation of 100 Mt of CO₂ emissions constitutes a “reasonably foreseeable” risk of death or personal injury to Australian children alive today, since “even an infinitesimal increase in global average surface

²⁰ *Andrejeva v. Latvia* [GC] (55707/00), 8.2.2009 § 56 with further references; Schabas, *The European Convention on Human Rights – A Commentary* (Oxford University Press, 2015) p. 93.

²¹ Articles on State Responsibility for International Wrongful Acts (UN Doc. A/RES/56/83, 2002) art. 47 widely considered to reflect customary international law, articulates this rule. See also *Corfu Channel Case (UK and Northern Ireland v. Albania)*, 9.4.1949, ICJ Reports 1949, p. 23.

²² *Bljakaj et al. v. Croatia* (74448/12) 18.9.2014 § 124 with further references.

²³ IPCC, AR6 WGI *The Physical Science Basis: Summary for Policymakers (SPM)*, 2021, para. B.2.2, pp. 19–24, 35, 41. IPCC, AR6 WGI (2021) para. 11.3.5. “A tipping point is a critical threshold beyond which a system reorganises, often abruptly and/or irreversibly”, see IPCC, AR6 WGI (2021) SPM p. 21.

²⁴ IPCC, AR6 WGI *The Physical Science Basis: Frequently Asked Questions (FAQ)*, 2021, pp. 4-103, FAQ 4.2.

²⁵ IPCC, AR6 WGI (2021) Chapter 12, pp. 12-68.

²⁶ *Urgenda v. the Netherlands*, ECLI:NL:HR:2019:2007 (Supreme Court of the Netherlands), 20.12.2019, paras. 5.7.1, 5.7.7-5.7.8; *Neubauer et al. v. Germany*, BvR 2656/18 (German Constitutional Court), 24.03.2021, paras. 149, 202-204; *Notre Affaire à Tous et al. v. France*, no. 1904967, 1904968, 1904972, 1904976/4-1 (Administrative Court of Paris), 3.2.2021, para 34; *Commune de Grande-Synthe v. France* (“Grande-Synthe I”), no. 427301, (Le Council d'Etat) 19.11.2020 para 12; *VZW Klimazaak v. Belgium et al.*, no. 2015/4585/A (First Instance Court of Brussels), 17.6.2021, p. 61 (appealed); *Massachusetts v. EPA*, 549 U.S. 497 (Supreme Court of the United States), 2.4.2007, p. 23, *Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 (Supreme Court of Canada), 25.3.2021, paras. 188–190; *Mathur v. Ontario*, 2020 ONSC 6918 (Superior Court of Justice, Ontario, Canada), 12.11.2020; *Future Generations v. Ministry of the Environment et al.*, STC4360-2018 (Supreme Court of Colombia), 5.4.2018; *Shrestha v. Office of the Prime Minister et al.*, no. 10210, no. 074-WO-0283 (Supreme Court of Nepal), 25.12.2018; *Leghari v. Federation of Pakistan*, W.P. No. 25501/201 (Lahore High Court, Pakistan), 4.9.2015; *Waratah Coal Pty Ltd v. Youth Verdict et al.* (No 6) [2022] QLC 21, 25.11.2022 §§ 35, 36, 41, 44, 45.

²⁷ *Neubauer*, paras. 149, 202. See also *Urgenda*, paras. 5.7.7, 5.7.8.

temperature” above 2°C could set off a catastrophic “tipping cascade” triggering a 4°C warmer “hothouse Earth”.²⁸ Based on the above, a Contracting State may be held accountable for contributing to territorial climate harm, regardless of its relative emissions, because mitigation by one State will “slow the pace of global emission increases, no matter what happens elsewhere”.²⁹

7. A Contracting State’s jurisdiction naturally encompasses all emissions under its *effective control*. At the very least, it must include territorial harm caused by the combustion of emissions from *fossil fuels extracted from its territory*. There are several special features³⁰ of fossil fuel extraction which justify this interpretation. *Firstly*, extracted fossil fuels *cause territorial harm* regardless of where in the world the carbon is ultimately combusted.³¹ *Secondly*, a Contracting State has *formal and effective control* over the approval permits which allow fossil fuels to be extracted from reservoirs in the slow geological carbon cycle within its territory, thereby entering the surface climate system as combusted GHG.³² Indeed, States have a “sovereign right to exploit their own resources”, limited only by the customary no harm-principle, whereby States must “ensure that activities within their jurisdiction *or control* do not cause damage to the environment of other States”.³³ *Thirdly*, the extraction and ultimate combustion of fossil fuels is *the primary cause* of climate change, accounting for 81-91% of the anthropogenic CO₂ emissions, mostly since 1990.³⁴ There is “large consensus” that a *sine qua non* for limiting warming to 1.5°C, and even 2°C, is to leave new coal, oil, and gas fields in the ground.³⁵ According to the IPCC, “early decommissioning”, “reduced utilisation” and “cancellation” of new plans for fossil fuel infrastructure is *required* because the estimated future emissions from existing fossil fuel infrastructure (660 GtCO₂) already exhaust the remaining 1.5°C global carbon budget,³⁶ and the additional emissions from planned fossil fuel infrastructure (850 GtCO₂) exhaust even the 2°C budget.³⁷ Any decision allowing the extraction of fossil fuels is thus *a priori* capable of aggravating climate harm within the territory of a Contracting State.

²⁸ *Minister for the Environment v. Sharma et al.* [2022] FCAFC 35, paras. 293, 332, 403 and 423. While the majority of the Full Federal Court upheld the findings on foreseeability in *Sharma et al. v. Minister for the Environment* (Federal Court of Australia) FCA 774, 08.07.2021 paras. 84, 88, 247, 253, 257, it disagreed that tort law absent confirmation by the Supreme Court, establishes a novel duty of care for children. See also *Waratah* § 35.

²⁹ *Massachusetts* p. 23.

³⁰ *H.F. et al. v. France* [GC] (24384/19 and 44234/20) 14.09.2022 § 185.

³¹ *Greenpeace Nordic et al. v. Norway*, HR-2020-2472-P (Supreme Court of Norway), 22.12.2020 para 149; *Waratah* §§ 26.

³² *Greenpeace Nordic*. para. 149; CRC, *Sacchi et al. v. Germany* (dec.), 22.09.2021, CRC/C/88/D/107/2019 para 9.9.

³³ UNFCCC, preamble, rec. 8 (our emphasis). See also the Stockholm Declaration prin. 21, the Rio Declaration prin 2, the Maastricht Principles, ICJ, *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgement 20.4.2010 para. 101.

³⁴ IPCC, AR6 WGI (2021) pp. 676, 687, 688; Stainforth et al., “More than half of all CO₂ emissions since 1751 emitted in the last 30 years”, Institute for European Environmental Policy, 29.04.2020.

³⁵ Conclusion by a meta-study from the International Institute for Sustainable Development (IISD), *Navigating Energy Transitions: Mapping the road to 1.5°C*, 21.10.2022 p. 14 ff., referring *inter alia* to reports from the IPCC (see below) and IEA, *World Energy Outlook 2021*, 2021, p. 112; IEA, *Net Zero by 2050*, 2021, pp. 23, 99.

³⁶ IPCC, AR6 Working Group III (WGIII) *Mitigation of Climate Change* 4.4.2022, p. 11 defines carbon budget as the “maximum amount of cumulative net global anthropogenic CO₂ emissions that would result in limiting global warming to a given level with a given likelihood, taking into account the effect of other anthropogenic climate forcers”.

³⁷ IPCC, AR6 WGIII 2022, p. TS-26 and 2-72. While non-scalable CCS technologies to remove some of the CO₂ emissions are also mentioned by the IPCC, several courts have dismissed a speculative reliance on immature or non-existing technologies with reference to the precautionary principle, see *Neubauer* para 33; *Urgenda* para 7.2.5; *EOC* para. 16.

8. To include exported combustion emissions for the purposes of Article 1 would be consistent with the UN Climate Regime, which the Convention must be read in harmony with. The express reference in the UNFCCC preamble to the no harm-principle applies to any “related legal instrument” such as the Paris Agreement (PA). Therefore, the technical accounting rules for Nationally Determined Contributions (NDCs) in the PA, which are based on territorial emissions, do not limit or affect State Parties’ responsibility under international law for *transboundary harm* caused by carbon extracted from their territories and combusted abroad. If this were the case, States would be able to circumvent the “ultimate objective” of the UNFCCC and the PA through unchecked exportation of fossil fuels, contrary to the principle of good-faith interpretations under the VCLT Article 31.1.³⁸ The purpose of these treaties is to stabilise GHG emissions “at a level that would prevent dangerous anthropogenic interference with the climate system”.³⁹ Based on updated consensual science, this level is now defined in the PA art. 2.1.a, read in conjunction with the 2021 Glasgow Climate Pact, as limiting warming to 1.5°C.⁴⁰ To reach this aim, State Parties must “reach *global* peaking of [GHG] emissions as soon as possible” and undertake “rapid reductions thereafter in accordance with best available science” to achieve net zero emissions “in the second half of this century”.⁴¹
9. Subsequent State practice also shows the relevance of fossil fuels independent of NDCs in the UN Climate Regime. The 2021 Glasgow Climate Pact, recalled in Sharm el-Sheikh, calls for limits to fossil fuel extraction through the “phase-down of unabated coal” and “phase out of inefficient fossil fuel subsidies”.⁴² Several states have adopted moratoriums on oil, gas, and coal exploration and the phase out of fossil extraction and have reported these as relevant strategies under the PA art. 4.19.⁴³ Lastly, if the Court were to limit its own jurisdiction based on a particular reading of the PA, it would allow States to rewrite and limit the scope of the Convention through subsequent international agreements. Oppositely, the preamble of the PA presupposes that States have “*respective*” human rights obligations, that naturally will and must evolve independently of the UN Climate Regime. The bottom-up approach of the PA makes it appropriate to seek and enforce climate protection through various measures on a national or regional level, the IPCC even noting that systemic climate litigation “can lead to an increase in a country’s overall ambition to tackle climate change.”⁴⁴
10. Similar conclusions have been reached by the UN Committee on the Rights of the Child (CRC). It considers that it has jurisdiction with respect to State Parties’ effective control over “acts or omissions regarding the carbon emissions *originating* within its territory” by its “ability to regulate activities that are the source of these emissions”.⁴⁵ Domestic courts in Europe, the US and Australia have also held

³⁸ *Waratah* paras. 674–682.

³⁹ UNFCCC, Article 2.

⁴⁰ Decision -/CMA.3 *Glasgow Climate Pact*, 13.11.2021, paras. 20–22.

⁴¹ PA Article 4.1.

⁴² *Glasgow Climate Pact* para 36; Decision -/CMA.4, *Sharm el-Sheikh Implementation Plan*, 20.12.2022, para 28.

⁴³ SEI et al., *The Production Gap Report 2021*, s. 58 (box 5.1), p. 66; Jones et al. *Tapping the potential of NDCs and LT-LEDs to address fossil fuel production*, 2021, SEI working paper pp. 5–7.

⁴⁴ The IPCC, AR6 WGIII, 2022 TS-111 lines 9 to 11; see also Banda, “The Bottom-Up Alternative: The Mitigation Potential of Private Climate Governance After the Paris Agreement”, *Harvard Environmental Law Review* Vol. 42 no. 2 (2018) p. 329.

⁴⁵ *Sacchi* para 9.9 (our emphasis). The CRC also calls for the immediate phase-out of fossil fuels, see *Draft General Comment No. 26 (202x) Children’s rights and the environment with a special focus on climate change* para 73d.

that territorial harm caused by exported combustion emissions are part of the legal responsibility of a State or a company.⁴⁶ For instance, the Norwegian Supreme Court held that territorial climate harm caused by exported combustion emissions from oil and gas extracted in Norway are encompassed by the Norwegian Constitution because i) the “authorities may influence directly on or take measures against” these emissions, and ii) there is “no doubt” that the emissions “affect” and “cause harm” territorially.⁴⁷ It is also increasingly endorsed in international guidelines that companies are accountable for combustion emissions.⁴⁸ Based on the above, ENNHRI submits that exported combustion emissions are within the effective control of a Contracting State, capable of engaging the Convention.

II. Extra-territorial harm caused by emissions under effective control

11. While jurisdiction for the purposes of Article 1 is “primarily territorial”, “acts of the States Parties [...] producing effects [...] outside their territories can constitute an exercise of jurisdiction”.⁴⁹ ENNHRI submits that “special features”⁵⁰ could justify extending at least a “divided and tailored” jurisdiction for the purposes of Articles 2, 8 and 14 to persons in other Contracting States.
12. The Court has previously held that jurisdiction is not established by the “mere fact that decisions taken at a national level had an impact on the situation of persons resident abroad”.⁵¹ However, these cases were brought by applicants outside *l’espace juridique* of the Convention and can thus be distinguished from cases concerning the impacts of climate change *within* a Contracting State. Moreover, contrary to *M.N.*, extra-territoriality in climate cases would not be triggered unilaterally by non-nationals asking from abroad that a Contracting State facultatively improve a personal situation it has not contributed to, but by the State’s *active contribution* to reasonably foreseeable harm, affecting persons outside its borders.⁵² Extra-territoriality under these circumstances would not render the Convention limitless and universal, but limited to its *l’espace juridique*, potentially tailored to specific obligations.⁵³ Lastly, extra-territoriality would not impose Convention standards on third countries, but rather prevent Contracting States from escaping accountability for human rights violations within the territory already covered by the Convention.⁵⁴
13. In addition, any protection afforded by a territorial State under Articles 2 and 8 against climate harm, could be undermined if other Contracting States were *de facto* incentivised under the same Convention to only consider how its decisions or activities impacting the climate may harm persons within its

⁴⁶ *Waratah* paras. 25, 26, 695, 717; *Royal Dutch Shell*, ECLI:NL:RBDHA:2021:5339 (The Hague District Court), 26.05.2021, para. 4.4.19 (appealed), 4.4.25; *Ctr. for Biological Diversity v. Bernhardt (Liberty)*, 982 F.3d 723 (9th Cir. 2020), p. 19–23; *Sovereign Inupiat for a Living Artic et al v. Bureau of Land Management et al. (Willow)*, p. 28–31., District Court of Alaska; *Friends of the Earth et al. v. Debra A. Haaland et al. Civil Action*, No.: 21-2317 (RC), District Court of Columbia, 27.01.2022, p. 23–40, *Gloucester Resources Ltd v. Minister for Planning* (2019) 234 LGERA 257, paras 499–513.

⁴⁷ *Greenpeace Nordic Ass.*, para. 149 ref. para 155, see also paras 167 and 260.

⁴⁸ References in *Shell* (appealed), paras 4.4.11–4.4.25, especially 4.4.18.

⁴⁹ *M.N. et al. v. Belgium* [GC] (dec.) (3599/18) 05.05.2020 §§ 98, 101.

⁵⁰ *H.F.* § 185.

⁵¹ *M.N.* §§ 112, 121; *Banković et al. v. Belgium et al.* [GC] (dec.) (52207/99) 12.12.2001 §§ 75, 80.

⁵² Similarly, see *Sacchi* para. 9.7, 9.11, 9.12; *Neubauer* paras. 175;

⁵³ *H.F.* § 189; *Al-Skeini et al. v. the United Kingdom* [GC] (55721/07) 07.07.2011, §§ 133-137. A contrario, *Banković*.

⁵⁴ Thereby avoiding human rights vacuums, ref. *Cyprus v. Turkey* (25781/94) 10.05.2001 § 78; *Banković* § 80.

territory.⁵⁵ For instance, a Contracting State could allow fossil fuel extraction based on the (flawed) assumption that the combustion emissions will not harm persons *on its territory*, without considering how persons within the Convention’s broader legal space could be affected.⁵⁶ Conversely, extraterritoriality in the context of climate within *l’espace juridique* may contribute to fulfilling the Convention’s objectives to create “unity” and a “common understanding” of human rights between Contracting States.⁵⁷ The special character of the ECHR as a treaty for the “collective enforcement of human rights” already implies that Contracting States must “act jointly and to cooperate” *within* Europe with respect to transborder crime.⁵⁸ These established principles could be applied *mutatis mutandis* to transborder climate harm. Such an interpretation has been adopted by the German Constitutional Court with respect to international cooperation from climate harm, noting that the State “must avoid creating incentives for other states to undermine this cooperation.”⁵⁹

14. It is recalled that the no-harm rule already requires States to “ensure that activities within their jurisdiction *or control* do not cause damage to the environment of other States”.⁶⁰ Extraterritorial jurisdiction would thus at any rate be limited to the inherent transboundary features of GHG emissions and other pollutants. Relying on the no-harm rule, the IACtHR, the CCPR, and the CESCR have held that their respective Conventions apply extra-territorially where a State’s activities affect human rights outside its territory in a “direct and reasonably foreseeable manner”, or if there is a “causal link” between the act and the infringement of the right.⁶¹ The CRC has also held that it has jurisdiction to consider climate harm to children abroad caused by GHG emissions under the effective control of a State party.⁶² Without concluding, the German Constitutional Court has suggested that residents in other countries, indeed other continents, exposed to harm partly caused by emissions emanating from Germany, can invoke the rights to life, physical integrity and property under the German Constitution due to the possible “connecting factor” between German emissions and severe climate-induced human rights impacts abroad.⁶³
15. On this basis, ENNHRI submits a Contracting State may have jurisdiction insofar it allows significant transboundary GHG emissions that may affect the rights of persons within the territory of other Contracting States under Article 2, 8 and 14. At the very least, ENNHRI submits that a Contracting State

⁵⁵ IACtHR, *Advisory Opinion on the Environment and Human Rights*, OC-23/17, 2017, para. 94 (pacta sunt servanda requires that “States Parties to the American Convention should not act in a way that hinders other States Parties from complying with their obligations under this treaty” in relation to jurisdiction); CESCR UN Doc. E/C.12/GC/24 para. 31.

⁵⁶ See for instance the three approvals for oil and gas extraction from the Norwegian Ministry of Petroleum and Energy based on the mere assumption that the exported combustion emissions would not “cause harm to the environment in Norway” (our translation), 8.7.2022, <https://www.regjeringen.no/no/aktuelt/te/id2920648/> (in Norwegian).

⁵⁷ ECHR Preamble recital 3 and 4.

⁵⁸ *Guzelyurtlu et al. v. Cyprus and Turkey* [GC] (36925/07) 29.01.2019 § 232, *Romeo Castaño v. Belgium* (8351/17) 09.07.2019 § 81. See also *Neubauer* paras. 202 ff.

⁵⁹ *Neubauer* para. 202.

⁶⁰ N(33). In *Tatar* part II.B), the Court refers to the Stockholm Declaration prin. 21, and the Rio Declaration prin. 2.

⁶¹ OC-23/17, paras. 71-104; UN Human Rights Committee (CCPR), *General Comment No. 36 on the Right to Life*, UN Doc. CCPR/C/GC/36, para 22, 2018; CESCR, *General Comment No. 24*, UN Doc. E/C.12/GC/24, 2017, para. 31.

⁶² *Sacchi* paras. 9.2–9.12.

⁶³ *Neubauer* paras. 101, 174-178.

has jurisdiction in respect of alleged violations of the procedural obligation under Articles 2 and 8 to assess “the effects” of such pollution on persons in other Contracting States.⁶⁴

IV. Victim status (question D)

16. An individual who is *directly affected* by an alleged violation is a victim for the purposes of Article 34, even if countless others are similarly affected [EOK para. 7]. While children and young persons may be physically affected by heatwaves and wildfires, mental harm such as climate anxiety may also suffice, as is the case under the Optional Protocol to the Convention on the Rights of the Child.⁶⁵ The Court also exceptionally allows complaints over *potential violations* [EOK paras. 9–10]. Children and youth are vulnerable to climate change, not only by virtue of their dependency and age, but also because, in political and economic terms, they have “less possibility than adults to make a strong case for their interests”⁶⁶ within the rapidly closing window of opportunity to secure a livable future for themselves. Hence, to safeguard their rights before the finite 1.5°C carbon budget is exhausted, children and youth are particularly reliant on rights enforcement in courts. In addition, the certainty of latent future climate harm and its “effectively unchallengeable” nature at a time when dangerous and potentially irreversible warming above 1.5°C may still be prevented, favors a non-formalistic interpretation of Article 34 in order to ensure effective rights.⁶⁷ For its part, the CRC stresses the need for children to access “timely” and “effective” regional judicial mechanisms.⁶⁸

V. Applicability and obligations under art. 2 and 8 (questions E.5 a) and b), F.6)

17. ENNHRI submits that Articles 2 and 8 (i) apply to the real and immediate threats to life and health resulting from climate harm [EOK paras. 14–17], and (ii) require States to adopt and implement an ambitious, realistic and specified reduction pathway to limit global warming to 1.5°C, with interim targets in accordance with the IPCC’s reduction rates, reaching carbon neutrality as soon as possible, and no later than 2050 [EOC paras. 8–18].
18. Additionally, the onus would be on States⁶⁹ to justify how new fossil fuel licensing is compatible with an obligation to protect life and physical integrity from the harmful effects of warming above 1.5°C. It would not be appropriate to base this assessment on speculations of *market substitution*.⁷⁰ Just as a State cannot evade its responsibility for contributing to climate harm by pointing to emissions in other States

⁶⁴ *Taşkin et al. v. Turkey* (46117/99) 10.11.2004 § 118-19.

⁶⁵ *Sacchi* para 9.13 regarding the Optional Protocol to the Convention on the Rights of the Child on a communications procedure 19.11.2011 Article 5. For evidence on anxiety and other mental health impacts for children, see above (part II).

⁶⁶ CRC, *General comment No. 14*, UN Doc. CRC/C/GC/14, 2013, para. 37.

⁶⁷ See further in ENNHRI, *Written observations in application no. 53600/20*, p. 2-4.

⁶⁸ CRC, *Draft General comment No. 26 (202x)*, paras. 63, 70.

⁶⁹ See e.g. *Öneryıldız v. Turkey* [GC] (48939/99) 30.11.2004 § 89; *Budayeva et al. v. Russia* (15339/02 etc.) 20.03.2008 § 132; *Cordella* §§ 161, 173; *Dubetska et al. v. Ukraine* (30499/03) 10.02.2011 §§ 145, 155. Similarly, *Urgenda*, para. 5.3.3 and *Waratah* paras. 35, 36, (indirectly dismissing market substitution (discussed in paras. 781–1029) by stating that “1.58 Gt of CO₂ is a meaningful contribution to the remaining carbon budget to meet the long-term temperature goal of the [PA]. Making the coal available for combustion could limit the options for achieving that goal.”).

⁷⁰ The claim that “reducing production in one location will simply lead to an equal amount being produced elsewhere”, UNEP et al., *The Production Gap Report*, 2019, p. 50, box 6.1.

(see para. 6), it cannot evade its responsibility for exported combustion emissions by pointing to the hypothetical emissions of others. Indeed, the “environmental impact remains unacceptable regardless of where it is caused” and irrespective of any “hypothetical but uncertain alternative development” that *might* cause the same unacceptable environmental impact.”⁷¹ To the extent that market substitution is assessed, it must be based on publicly available data and methodology, considering that speculations of this kind have been invalidated in courts for being “arbitrary and capricious”, invalid or “flawed”.⁷²

VI. Applicability and obligations under art. 14 (questions E.5.2 and 8)

19. The ancillary protection of Article 14 extends to indirect discrimination of a general policy, measure or de facto situation that has “disproportionately prejudicial effects on a particular group [...] even where it is not specifically aimed at that group and there is no discriminatory intent”.⁷³ It may include the disproportionate effects of environmental harm.⁷⁴ In cases where statistics establish that a measure or situation disproportionately affects a particular group, it is for the respondent State to rebut a *prima facie* presumption of indirect discrimination.⁷⁵
20. Assuming that Articles 2 or 8 apply, statistics show that children and young people are already disproportionality affected by the impacts of climate change on account of their developmental vulnerabilities and will be increasingly impacted throughout their lives.⁷⁶ For example, children who were under ten in 2020 will “experience a four-fold increase in extreme events under 1.5°C, and a five-fold increase under 3°C warming”, which “would not be experienced by a person aged 55 in the year 2020 in their remaining lifetime under any warming scenario”.⁷⁷ Under a 2.4°C warming scenario, a person born between 1999-2012 in Europe and Central Asia will experience at least 7 times more heatwaves and at least 1.5 times as many wildfires over their lifetime than a person born in 1960.⁷⁸ *In addition*, older generations are presently allowed to “consume large portions of the CO2 budget while bearing a relatively minor share of the reduction effort”, leaving younger and subsequent generations with a “drastic reduction burden” and exposing them to “comprehensive losses of freedom” in the future.⁷⁹

⁷¹ *Gloucester*, para. 525.

⁷² *Liberty*, pp. 18–23, *Willow*, pp. 28–31, *Friends of the Earth*, p. 23–40, *Shell*, para. 4.4.50 (appealed), *Gloucester*, para. 538, *Waratah* paras. 781–1029. UNEP has noted that perfect substitution of oil and gas “defies basic economics of supply and demand”, *Production Gap Report 2019*, p. 50; see also Welsby et al., *UK oil and gas policy in a 1.5°C world*, 2021, p. 4.

⁷³ *S.A.S v. France* [GC] (43835/11) 1.7.2014 § 161 & *Zarb Adami v. Malta* (17209/02) 20.6.2006 § 76 with further references.

⁷⁴ *Mossville Environmental Action Now v. United States*, Inter-Am. Comm’n H.R., Report No. 43/10, 17.03.2010 (admissibility decision), para. 42; UN Special Rapporteur on Human Rights and the Environment, *Framework Principles on Human Rights and the Environment*, Principles 3 and 14; *Report on the Relationship Between Children’s Rights and Environmental Protection*, para 64, 24.01.2018, UN Docs. A/CCPR/37/58 and 59.

⁷⁵ *Di Trizio v. Switzerland* (7186/09) 02.02.2016, § 86 & *Talpis v. Italy* (41237/14) 02.03.2017, § 145 with further references.

⁷⁶ E.g. *Sacchi*, para 9.13; IPCC, *AR5 WGII Impacts, Adaptation, and Vulnerability*, 2014, pp. 717-718; Stanberry et al., “Prioritizing the needs of children in a changing climate” *PLOS Medicine* 15, nr. 7 (2018); Watts et al. (2021).

⁷⁷ IPCC, *AR6 WGII: Overarching Frequently Asked Questions and Answers*, 28.02.2022, p. 5 (question 3).

⁷⁸ Thiery et al., supplementary data 03_EMF_young2ref_Europe & Central Asia.

⁷⁹ *Neubauer*, para. 192.

21. This *de facto* difference in treatment of children and young people compared to older generations, both in terms of climate impacts and mitigation burdens, has no other basis than their date of birth. Date of birth is an identifiable characteristic encompassed by the term “birth” in Article 14.⁸⁰ The Court has confirmed temporal discrimination where siblings were affected differently by legislation based on their date of birth.⁸¹ Relatedly, the CJEU views different treatment of generations as discrimination, based on age.⁸² Confirming date of birth, or birth cohort on a group level, as a prohibited basis for discrimination would be consistent with the principle of intergenerational equity,⁸³ relied upon by domestic courts,⁸⁴ as well as the recommendations of UN Treaty Bodies.⁸⁵ Younger generations or birth cohorts are in a “relevantly similar” or “comparable situation” to older generations with respect to the harmful impacts of State decisions concerning climate change.⁸⁶ The fact that societal opportunities and burdens generally change over time does not preclude this. For instance, the CJEU has held that generations over the retirement age were in a “comparable situation” to that of younger generations, regardless of their different societal circumstances.⁸⁷
22. Once an applicant has demonstrated a difference in treatment, it is for the Contracting State to show that it was justified.⁸⁸ The margin of appreciation is arguably overstepped where the State cannot show that it has duly considered i) younger generations’ “interest in living in a safe environment”⁸⁹ throughout their lives (beyond 2100) when balancing competing interests to determine mitigation and fossil fuel extraction policies, or considered ii) the infringements on younger cohorts’ future rights that are predetermined by policies that unilaterally exhaust the remaining carbon budget today. Indeed, this Court has already recognised that “in all decisions concerning children, their best interests must be paramount”.⁹⁰ These obligations are owed to children and younger generations, considering that the inaction of present-day adults may be described as “the greatest intergenerational injustice ever inflicted by one generation of humans upon the next”.⁹¹

⁸⁰ *Zeggai v. France* (12456/19) 13.10.2022 § 55.

⁸¹ *Zeggai* § 55. See also *Advisory opinion requested by the French Conseil d’État (P16-2021-002)* 13.07.2022 [GC] § 60.

⁸² See e.g. *Petersen* (C-341/08) paras. 65-68, where the Court considered an objective to “share out employment opportunities among the generations” as justified; *Georgiev* (C-250/09) para. 32; *Commission v. Hungary* (C-286/12) para. 50. The EU Commission interpreted the prohibition on age discrimination as a prohibition on discrimination between birth cohorts.

⁸³ ICJ, *Whaling in the Antarctic (Australia v. Japan)*, 06/02/2014 Rep. 226, Separate Opinion by Judge Trindade, para. 47; PA preamble rec. 11; Stockholm Declaration, princ. 1; UNFCCC, art. 3. See also the UN Charter, Preamble rec. 1 (“save succeeding generations”).

⁸⁴ *Neubauer*, paras. 146, 183, 192 and 205; *Sharma*, para. 293; *Leghari*, para. 13; *Shrestha*, p. 11; *Future Generations*, p. 34.

⁸⁵ Joint Statement by CESCR, CEDAW, CMW, UNCRC and CRPD, *Human Rights and Climate Change*, UN Doc. HRI/2019/1, 16.09.2019, para. 9; CCPR, *General Comment No. 36*, para. 62.

⁸⁶ *Biao v. Denmark* [GC] (38590/10) 24.05.2016, § 89.

⁸⁷ C-341/08 paras. 65-68; C-250/09 para. 32, C-286/12 para. 50.

⁸⁸ *Biao*, § 92.

⁸⁹ *Pavlov* § 85.

⁹⁰ *Popov v. France* (39472/07 and 39474/07) 19.01.2012 § 140. See also CRC, *Draft General comment No. 26 (202x)*, paras. 52–55, 87–89 (“[e]nvironmental decisions generally concern children”) under CRC Article 3.

⁹¹ *Sharma* [2021] para. 293.