The future is a foreign country

Mavronicola, Natasa

The Future is a Foreign Country: State (In)Action on Climate Change and the Right against Torture and Ill-Treatment

Natasa Mavronicola*

1. INTRODUCTION

> *'We are today perilously close to tipping points that, once passed, will send global temperatures spiralling catastrophically higher. If we continue on our current path, we will face the collapse of everything that gives us our security: food production, access to fresh water, habitable ambient temperature and ocean food chains. And if the natural world can no longer support the most basic of our needs, then much of the rest of civilisation will quickly break down.'*[1]

> *'"Betrayal."*
> *That's how young people around the world are describing our governments' failure to cut carbon emissions. And it's no surprise.*
> *We are catastrophically far from the crucial goal of 1.5°C, and yet governments everywhere are still accelerating the crisis, spending billions on fossil fuels.'*[2]

While climate change is already ravaging many parts of the world, with its most devastating impacts on the poor and vulnerable,[3] the spectre of climate catastrophe haunts children and young people everywhere. States' climate commitments and concrete actions have been repeatedly found to be at best inadequate to avert the reaching of irreversible tipping points,[4] making the prospect of unprecedented environmental degradation and human devastation more and more real.

* Professor of Human Rights Law, Birmingham Law School, University of Birmingham. The author would like to thank Lee Davies, Kate Webster and Dominic Wells for their excellent research assistance. She also thanks Aristoteles Constantinides, Ruth Delbaere, Ioanna Hadjiyianni, Corina Heri, Caroline Hickman, Gerry Liston, Liz Marks, Juncal Montero Regules, Stephanos Stavros, Charikleia Vlachou, and participants at the 2021 SLS Conference's Human Rights section and the University of Cyprus' 2021 Guest Seminar series for their comments on earlier versions of this paper and/or the ideas contained within it. The author underlines that any errors are entirely her own.

[1] Video message by Sir David Attenborough, English broadcaster and natural historian, on the Maintenance of international peace and security: Climate and Security, during the Security Council Open VTC, 23 February 2021, available at: http://webtv.un.org/watch/sir-david-attenborough-on-climate-and-security-security-council-open-vtc-23-february-2021/6234476373001/.

[2] Greta Thunberg, Vanessa Nakate, Dominika Lasota, and Mitzi Tan, 'Emergency Appeal for Climate Action', *Avaaz.org*, November 2021; available at: https://secure.avaaz.org/campaign/en/climate_action_now_loc/.

[3] Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, David R. Boyd, UN Doc A/74/161, 15 July 2019.

[4] 'Nationally determined contributions under the Paris Agreement', UN Doc FCCC/PA/CMA/2021/2, 26 February 2021; H. Damon Matthews and Seth Wynes, 'Current global efforts are insufficient to limit warming to 1.5°C' (2022) 376(1600) *Science* 1404. On the 'overshooting' of relevant tipping points, see Paul D. L. Ritchie, Joseph J. Clarke,

The circumstances in which children and young people facing the catastrophic consequences of climate change within their lifetimes find themselves have led many to highlight the profound intergenerational injustice inflicted on younger generations by those that currently hold the key to averting the worst of climate change.[5] The inequities at issue are stark: children, young people and their children are condemned to bear the brunt of climate change despite being blameless and often lacking, or, rather, being denied the political agency to effect change. The very real threat – if not inevitable prospect – of enormous harm within their lifetimes, whether through gradually escalating climate change impacts or 'extreme' (but increasingly frequent) weather events, has led many children and young people to experience debilitating anxiety in anticipation of these catastrophic developments, a phenomenon referred to as 'climate anxiety'.[6]

What is considered in this paper is whether what is currently being inflicted on children and young people through State (in)action on climate change can be understood as amounting to ill-treatment, in contravention of one of the most fundamental norms of human rights law: the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment. The question of whether such an interpretation of State behaviour on climate change is tenable as a matter of human rights law has become a live issue in the case of *Duarte Agostinho and others v Portugal and others* before the European Court of Human Rights (ECtHR),[7] one of five climate cases currently pending before the ECtHR, three of which – including *Agostinho* – have been referred to the Grand Chamber of the Court.[8] Brought by 6 children and young people from Portugal against 33 Member States of the Council of Europe (all EU Member States as well as Norway, Russia, Switzerland, Turkey, the UK, and Ukraine), the *Agostinho* case raises the question of whether State

Peter M. Cox, and Chris Huntingford, 'Overshooting Tipping Point Thresholds in a Changing Climate' (2021) 592 *Nature* 517.

[5] Ann V. Sanson and Susie E. L. Burke, 'Climate Change and Children: An Issue of Intergenerational Justice' in Nikola Balvin and Daniel J. Christie (eds), *Children and Peace: From Research to Action* (Springer Open 2020).

[6] See, among a growing corpus of writings on the subject, Caroline Hickman, Elizabeth Marks, Panu Pihkala, Susan Clayton, Eric R. Lewandowski, Elouise E. Mayall, Britt Wray, Catriona Mellor and Lise van Susteren, 'Young People's Voices on Climate Anxiety, Government Betrayal and Moral Injury: A Global Phenomenon' (2021) 5(12) *Lancet Planetary Health* E863-E873; Judy Wu, Gaelen Snell and Hasina Samji, 'Climate anxiety in young people: a call to action' (2020) 4(10) *The Lancet* e435; Susan Clayton and Bryan T. Karazsia, 'Development and validation of a measure of climate change anxiety' (2020) 69 *Journal of Environmental Psychology* 101434, https://doi.org/10.1016/j.jenvp.2020.101434; Anna Harvey, Julian Manley and Caroline Hickman, 'Ecology, psychoanalysis and global warming: present and future traumas' (2020) 34(4) *Journal of Social Work Practice* 337; Susan Clayton, Christie Manning Kirra Krygsman and Meighen Speiser, 'Mental health and our changing climate: impacts, implications, and guidance' (American Psychological Association and EcoAmerica, 2017).

[7] *Agostinho and others v Portugal and others*, App No 39371/20 (Communicated Case of 13 November 2020, relinquished to Grand Chamber on 29 June 2022).

[8] The additional cases pending before the ECtHR are: *Verein KlimaSeniorinnen Schweiz and Others v Switzerland*, App No 53600/20 (Communicated Case of 17 March 2021, relinquished to Grand Chamber on 26 April 2022); *Greenpeace Nordic and Others v Norway*, App No 34068/21 (Communicated Case of 16 December 2021); *Carême v France*, App No 7189/21 (not yet communicated, relinquished to Grand Chamber on 31 May 2022); *Mex M v Austria* (not yet communicated), application available at: https://www.michaelakroemer.com/wp-content/uploads/2021/04/rechtsanwaeltin-michaela-kroemer-klimaklage-petition.pdf.

(in)action in respect of climate change violates the European Convention on Human Rights (ECHR). While the applicants had invoked the right to life and the right to respect for private and family life (Articles 2 and 8 ECHR respectively), as well as the prohibition on discrimination (Article 14 ECHR), the ECtHR added an important dimension to the case in its communication to the parties, inviting them of its own motion to address whether the right not to be subjected to torture or to inhuman or degrading treatment or punishment, protected by Article 3 ECHR, has been violated.[9] To my knowledge, at the time of writing, *Agostinho* is the only climate case currently pending before the ECtHR in which Article 3 has been explicitly invoked.

The relationship between climate (in)action, environmental law and human rights standards has been the subject of a substantial and growing body of academic writing[10] as well as pronouncements by key international organisations such as the United Nations,[11] and has seen an upsurge in rights-based litigation and other forms of human rights claims before national, regional, and international bodies.[12] Much has been written about the very clear threat that climate change poses to human rights such as the right to life, the right to private and family life, and the rights to health, food, and housing. The idea that States' active contribution to, and failure to take adequate action to avert, the onset of climate catastrophe, might violate the absolute right not to be tortured or ill-treated has not,

[9] See the ECtHR's Statement of the Case, 13 November 2020 (in French), available at: https://hudoc.echr.coe.int/eng?i=001-206535.

[10] See, among many works, Margaretha Wewerinke-Singh, *State Responsibility, Climate Change and Human Rights under International Law* (Hart Publishing 2019); Daniel Bodansky, Jutta Brunnée, and Lavanya Rajamani, *International Climate Change Law* (OUP 2017), ch. 9; Ottavio Quirico and Mouloud Boumghar (eds), *Climate Change and Human Rights: An International and Comparative Law Perspective* (Routledge 2015); Anna Grear and Conor Gearty (eds), *Choosing a Future: The Social and Legal Aspects of Climate Change* (Edward Elgar 2014); Stephen Humphreys (ed), *Human Rights and Climate Change* (CUP 2009). This research is located within a wider body of academic commentary on human rights and the environment. See, for example, Stefan Theil, *Towards the Environmental Minimum: Environmental Protection through Human Rights* (CUP 2021); Sumudu Atapattu and Andrea Schapper, *Human Rights and the Environment: Key Issues* (Routledge 2019); John H. Knox and Ramin Pejan (eds), *The Human Right to a Healthy Environment* (CUP 2018); Donald K. Anton and Dinah L. Shelton (eds), *Environmental Protection and Human Rights* (CUP 2011); Alan E. Boyle and Michael R. Anderson (eds), *Human Rights Approaches to Environmental Protection* (OUP 1996).

[11] See, among many examples, Human Rights Council (HRC) Resolution 7/23, UN Doc A/HRC/RES/7/23, 28 March 2008; HRC Resolution 32/33, UN Doc A/HRC/RES/32/33, 18 July 2016; HRC Resolution 47/24, UN Doc A/HRC/RES/47/24, 26 July 2021; UNGA Resolution 76/300, UN Doc A/RES/76/300, 28 July 2022; Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, David R. Boyd, 'A Safe Climate: Human Rights and Climate Change', UN Doc A/74/161, 15 July 2019; Office of the High Commissioner for Human Rights (OHCHR), 'Understanding Human Rights and Climate Change: Submission of the Office of the High Commissioner for Human Rights to the 21st Conference of the Parties to the United Nations Framework Convention on Climate Change' (26 November 2015).

[12] For an overview of relevant litigation, see Annalisa Savaresi and Joana Setzer, 'Rights-based litigation in the climate emergency: mapping the landscape and new knowledge frontiers' (2022) 13(1) *Journal of Human Rights and the Environment* 7. On the ECtHR specifically, see Helen Keller and Corina Heri, 'The Future is Now: Climate Cases Before the ECtHR' (2022) 40(1) *Nordic Journal of Human Rights* 153. For a recent pronouncement on State (in)action on climate change and human rights, see Human Rights Committee, *Billy et al v Australia*, 21 July 2022, UN Doc CCPR/C/135/D/3624/2019.

however, received significant attention.[13] The latter right is typically associated with police brutality and interrogational torture. Yet it extends far beyond a prohibition on brutal and purposeful physical violence, and the ECtHR has repeatedly recognised that someone may be ill-treated through a legal regime or through the imposition of systemically inhuman or degrading conditions for which responsibility may be diffuse.[14]

Prompted by the ECtHR's invocation of Article 3 ECHR in its communication to the parties in *Agostinho*, and with particular focus on children and young people, I consider the principled basis for finding that State (in)action in relation to climate change violates the right not to be subjected to torture or inhuman or degrading treatment or punishment under Article 3 ECHR. While the arguments set out in this paper may be seen as venturing into 'uncharted waters',[15] to the extent that they contemplate Article 3's applicability to a unique and uniquely challenging phenomenon, they are anchored in the reasoning and pronouncements of the ECtHR. The paper remains focused throughout on Article 3 ECHR, though some of the analysis offered is relevant to the delimitation of other ECHR provisions in this context. It does *not* engage in speculation as to whether or not the ECtHR *will* recognise human rights violations – and, if so, which ones – in *Agostinho* or any other of the climate change cases before it in the present circumstances.[16]

In view of space limitations, the paper focuses solely on the nature of the human rights violation at issue, and not on preliminary matters such as standing or jurisdiction, although these could play a crucial role in determining the success of litigation in this area.[17] The paper also stops short of tackling the important question of remedies, which has been the subject of sophisticated and thorough treatment in a recent piece by Helen Keller, Corina Heri and Réka Piskóty.[18]

---

[13] A notable exception is the recent discussion in Corina Heri, 'Climate Change before the European Court of Human Rights: Capturing Risk, Ill-Treatment and Vulnerability' (2022) *European Journal of International Law* (advance online access).

[14] See the overview of Article 3 case law in the following monographs: Natasa Mavronicola, *Torture, Inhumanity and Degradation under Article 3 of the ECHR: Absolute Rights and Absolute Wrongs* (Hart Publishing 2021); Corina Heri, *Responsive Human Rights*: *Vulnerability, Ill-Treatment and the ECtHR* (Hart Publishing 2021); Elaine Webster, *Dignity, Degrading Treatment and Torture in Human Rights Law: The Ends of Article 3 of the European Convention on Human Rights* (Routledge 2018).

[15] Vassilis P. Tzevelekos and Kanstantsin Dzehtsiarou, 'Climate Change: The World and the ECtHR in Unchartered Waters' [sic] (2022) 3(1) *European Convention on Human Rights Law Review* 1.

[16] But for an interesting account of the strategic dimensions of litigating climate change at the ECtHR, see Therese Karlsson Niska, 'Climate Change Litigation and the European Court of Human Rights – A Strategic Next Step?' (2020) 13 *Journal of World Energy Law and Business* 331.

[17] But see, in this respect, the analysis in Helen Keller and Abigail D Pershing, 'Climate Change in Court: Overcoming Procedural Hurdles in Transboundary Environmental Cases' (2022) 3(1) *European Convention on Human Rights Law Review* 23; Tim Eicke, 'Human Rights and Climate Change: What Role for the European Convention on Human Rights?' (2021) *European Human Rights Law Review* 262.

[18] Helen Keller, Corina Heri and Réka Piskóty, 'Something Ventured, Nothing Gained?—Remedies before the ECtHR and Their Potential for Climate Change Cases' (2022) 22(1) *Human Rights Law Review* 1. See, more broadly, Margaretha Wewerinke-Singh, 'Remedies for Human Rights Violations Caused by Climate Change' (2019) 9 *Climate Law* 224.

1. KEY IMPACTS OF (FACING) THE CLIMATE CRISIS

Many people around the world face serious harm and grave threats to their life and bodily integrity through the 'slow-onset' impacts of climate change, including increased heat, drought, sea-level rise, water scarcity, food insecurity and air pollution,[19] as well as through 'sudden-onset' impacts such as extreme weather events, natural disasters, and vector-, water- or food-borne infectious diseases.[20] Among the harms with which people are confronted is not just immediate harm to their health but also the (prospect of) loss of their homes,[21] livelihoods,[22] and access to other basic resources, forced displacement,[23] violence and conflict,[24] as well as the grave psychological trauma that is bound to accompany such events.[25] Although all of us face some vulnerability to these harms, climate change is impacting and will impact disproportionately on those already facing pronounced and often intersecting vulnerabilities,[26] including indigenous people, children, older people, women, poor people, people with disability or chronic illness, members of minority groups, workers exposed to extreme weather, and people in low-income countries.[27]

The dire climate reality and the prospect of climate catastrophe has led many people, notably children and young people, to experience climate anxiety. Those experiencing climate anxiety endure frequent or constant feelings of fear, anguish and powerlessness regarding their own and their loved ones' well-being, as well as more generalised, prolonged anxiety and uncertainty about the current state and future of the planet.[28] Lise Van Susteren has gone as far as to describe what children especially are experiencing in this context as '*pre*-traumatic stress' (emphasis in the original): 'a condition with the same

---

[19] Ibid; see also Paolo Cianconi, Sophia Betrò and Luigi Janiri, 'The Impact of Climate Change on Mental Health: A Systematic Descriptive Review' (2020) 11 *Frontiers in Psychiatry* 74.

[20] Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, on the relationship between children's rights and environmental protection, UN Doc A/HRC/37/58, 24 January 2018, paras 22-26.

[21] OXFAM, *Forced from Home: Climate-fuelled displacement* (2019), available at: https://oxfamilibrary.openrepository.com/bitstream/handle/10546/620914/mb-climate-displacement-cop25-021219-en.pdf.

[22] The Intergovernmental Panel on Climate Change, *Climate Change 2014: Impacts, Adaptation, and Vulnerability, Part A: Global and Sectoral Aspects* (Cambridge University Press 2014) 796-819.

[23] OXFAM, *Forced from Home: Climate-fuelled displacement* (2019), available at: https://oxfamilibrary.openrepository.com/bitstream/handle/10546/620914/mb-climate-displacement-cop25-021219-en.pdf.

[24] Katharine J. Mach, Caroline M. Kraan, W. Neil Adger, Halvard Buhaug, Marshall Burke, James D. Fearon, Christopher B. Field, Cullen S. Hendrix, Jean-Francois Maystadt, John O'Loughlin, Philip Roessler, Jürgen Scheffran, Kenneth A. Schultz and Nina von Uexkull, 'Climate as a risk factor for armed conflict' (2019) 571 *Nature* 193.

[25] Susan Clayton, 'Climate anxiety: Psychological responses to climate change' (2020) 74 *Journal of Anxiety* 102263.

[26] See the wide-ranging analysis in Intergovernmental Panel on Climate Change (IPCC), *Climate Change 2022: Impacts, Adaptation, and Vulnerability*. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change (Cambridge University Press 2022).

[27] See Barry S. Levy and Jonathan A.Patz, 'Climate Change, Human Rights, and Social Justice' (2015) 81(3) *Annals of Global Health* 310; M. Alexander Pearl, 'Human Rights, Indigenous Peoples, and the Global Climate Crisis' (2018) 53 *Wake Forest Law Review* 713.

[28] Panu Pihkala, 'Anxiety and the Ecological Crisis: An Analysis of Eco-Anxiety and Climate Anxiety' (2020) 12(19) *Sustainability* 7836.

characteristics as PTSD [post-traumatic stress disorder] …but that are [sic] triggered by the visions of future trauma'.[29] The phenomena of climate anxiety and pre-traumatic stress mean that even those who have not yet been subject to the most devastating immediate harms of climate change may nonetheless be experiencing significant distress because of the climate crisis in the here and now. Moreover, their suffering is likely to be prolonged and exacerbated over time. As highlighted in a relevant scientific study, the chronic stress associated with climate change 'may alter biological stress response systems and make growing children more at risk for developing mental health conditions later in life, such as anxiety, depression, and other clinically diagnosable disorders'.[30]

Children and young people face particular vulnerability to the impacts of climate change,[31] and are likely to be exposed to more of (and more significant) such impacts over the remainder of their lifetime than older generations simply because they will live through more of the climate crisis.[32] This is part of a wider phenomenon whereby, in large part, those least to blame for the climate crisis (stand to) face the most severe impacts of climate change.[33] In the remainder of my analysis, and in the context of the youth-led litigation in *Agostinho*, I consider how climate harms and climate wrongs might engage the right of children and young people not to be subjected to inhuman or degrading treatment under Article 3 ECHR.

2. WHAT IS INHUMAN OR DEGRADING ABOUT CLIMATE CHANGE?

There are three key factors to consider in determining whether climate change, and the way it has been addressed by State authorities, can be seen as falling within the purview of the right not to be subjected to inhuman or degrading treatment. With respect to children and young adults such as the applicants in *Agostinho*, these factors are: the way in which climate change is affecting and will affect children and young people like the applicants in *Agostinho*; the relative powerlessness of children and young persons such as the applicants vis-à-vis the situation causing them such distress and (risks of) harm, as against the power of State authorities to address it; and, finally, the attitude(s) of State authorities to this situation. I will discuss each of these dimensions of the issue in turn.

---

[29] Lise Van Susteren, 'Editorial Perspective: A parable for climate collapse?' (2021) 26(3) *Child and Adolescent Mental Health* 269, 269, citing Lise Van Susteren, 'Our children face "pretraumatic stress" from worries about climate change', *BJM Opinion*, 19 November 2020, https://blogs.bmj.com/bmj/2020/11/19/our-children-face-pretraumatic-stress-from-worries-about-climate-change/.

[30] US Global Change Research Program, *The Impacts of Climate Change on Human Health in the United States: A Scientific Assessment* (2016) 224; see also Susie E. L. Burke & Ann V. Sanson & Judith Van Hoorn, 'The Psychological Effects of Climate Change on Children' (2018) 20 *Current Psychiatry Reports* 35; Van Susteren, 'Editorial Perspective' (n 29).

[31] Elizabeth D. Gibbons, 'Climate Change, Children's Rights, and the Pursuit of Intergenerational Climate Justice' (2014) 16(1) *Health and Human Rights* 19; Katharina Ruppel-Schlichting, Sonia Human and Oliver C. Ruppel, 'Climate Change and Children's Rights: An International Law Perspective' in Oliver C. Ruppel, Christian Roschmann and Katharina Ruppel-Schlichting (eds), *Climate Change: International Law and Global Governance, Volume I: Legal Responses and Global Responsibility* (Nomos 2013).

[32] Wim Thiery et al, 'Intergenerational inequities in exposure to climate extremes' (2021) 374(6564) *Science* 158.

[33] Ruppel-Schlichting et al (n 31) 349.

A. The Effects of Climate Change on Children and Young People

The question of whether someone has been subjected to ill-treatment contrary to Article 3 ECHR is answered through an assessment of whether the relevant act, omission or situation (created by relevant (combination of) acts and/or omissions) reaches a 'minimum level of severity'.[34] As the ECtHR has established in its case law, determining whether the Article 3 'threshold' of severity has been reached requires a qualitative, context-sensitive assessment of the character of the treatment at issue,[35] which involves the consideration of a range of relevant elements, notably the nature and context of the treatment,[36] its duration, and its physical and mental effects.[37] The sex, age, and state of health of the victim are also considered where relevant.[38] Both relatedly and in addition to these considerations, the ECtHR pays close attention to any vulnerability experienced by the (alleged) victim,[39] and has repeatedly recognised the vulnerability experienced by children.[40] Vulnerability can both deepen the severity of the treatment at issue and operate as 'a magnifying glass'[41] through which the severity of a particular treatment becomes more palpable in the Court's assessment.[42] A distressing situation is more likely to cross the Article 3 'threshold' of severity when experienced by a person whose vulnerability is pronounced. As a relational concept,[43] vulnerability is shaped by relationships between persons, and between persons and the circumstances in which they find themselves. In *Bouyid v Belgium*, for example, which concerned single slaps inflicted by police on an adult and a minor in their custody, there was both situational vulnerability – arising in respect of both applicants in light of the power imbalance inherent in circumstances of custody[44] – and the particular vulnerability faced by a 17-year-old applicant in light of his age.[45]

[34] *Ireland v UK* (1979–80) 2 EHRR 25, para 162.
[35] Mavronicola, *Torture, Inhumanity and Degradation* (n 14) chapter 5.
[36] *Garabayev v Russia* (2009) 49 EHRR 12, para 75.
[37] *Ireland v UK* (1979–80) 2 EHRR 25, para 162; *Svinarenko and Slyadnev v Russia* App nos 32541/08 and 43441/08 (ECtHR, 17 July 2014), para 114.
[38] *Svinarenko and Slyadnev v Russia* App nos 32541/08 and 43441/08 (ECtHR, 17 July 2014), para 114.
[39] See, for example, *Bouyid v Belgium* (2016) 62 EHRR 32, para 107. See, further, Corina Heri, *The Rights of the Vulnerable under Article 3 ECHR: Promoting Dignity, Equality and Autonomy by Reconceptualizing the Human Rights Subject* (PhD thesis, University of Zurich 2017); Heri, *Responsive Human Rights* (n 14).
[40] *Bouyid* (n 39) paras 109-110; *DMD v Romania* App no 23022/13 (ECtHR, 3 October 2017), paras 41, 50, 63.
[41] Lourdes Peroni and Alexandra Timmer, 'Vulnerable Groups: The Promise of an Emerging Concept in European Human Rights Convention Law' (2013) 11 *International Journal of Constitutional Law* 1056, 1079.
[42] See Heri, *Responsive Human Rights* (n 14) 236.
[43] Florencia Luna, 'Elucidating the Concept of Vulnerability: Layers Not Labels' (2009) 2 *International Journal of Feminist Approaches to Bioethics* 121, 129.
[44] *Bouyid* (n 39) para 83.
[45] ibid para 109. For further discussion of the vulnerable position of children, young persons, and detainees, and on the 'types' and intersections of vulnerability recognised by the ECtHR, see Heri, *Responsive Human Rights* (n 14) ch. 3.

Treatment has been held by the ECtHR to be inhuman where it has caused 'intense physical and mental suffering'.[46] The Court has described degrading treatment as treatment that 'humiliates or debases an individual showing a lack of respect for, or diminishing, his or her human dignity or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance'.[47] The Court's jurisprudence makes it clear that such treatment can be contrary to Article 3 even in the absence of serious physical or mental suffering,[48] or an intent to humiliate or debase.[49] The ECtHR has predominantly tended to associate inhuman treatment with the infliction of serious pain or suffering, while recognising a wider range of dignity-related harms in its findings of degrading treatment;[50] nonetheless, it has not always drawn clear or rigid distinctions between inhumanity and degradation.

While the ECtHR has not yet pronounced on the experiences of children and young people in relation to (State (in)action on) climate change, the ECtHR has in other contexts associated the following experiences and harms with inhuman and/or degrading treatment: 'intense physical *or* mental suffering' (emphasis added);[51] 'feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance'[52] or 'inducing desperation';[53] 'feelings of fear, anxiety and powerlessness';[54] 'extreme despair, anxiety and debasement';[55] 'feeling afraid, depressed and hopeless';[56] 'intense fear and apprehension';[57] 'constant mental anxiety';[58] 'prolonged uncertainty';[59] 'serious distress';[60] 'a feeling of arbitrary treatment, injustice and powerlessness';[61] 'feeling of subordination, total dependence, powerlessness and, consequently, humiliation';[62] 'trauma, whether physical or psychological, pain and suffering, distress, anxiety, frustration, feelings of injustice or humiliation, prolonged uncertainty, disruption to life'.[63]

[46] See, for example, *Stanev v Bulgaria* (2012) 55 EHRR 22, para 203; *Jalloh v Germany* (2007) 44 EHRR 32, para 68.
[47] *Pretty v UK* (2002) 35 EHRR 1, para 52.
[48] *Bouyid* (n 39) para 87.
[49] Ibid para 86.
[50] On the nexus between dignity and degrading treatment, see Webster (n 14).
[51] *Bouyid* (n 39) para 87.
[52] ibid.
[53] *MSS v Belgium and Greece* (2011) 53 EHRR 2, para 263.
[54] *Volodina v Russia* App No 41261/17 (ECtHR, 9 July 2019), para 75.
[55] *Shioshvili and others v Russia* App No 19356/07 (ECtHR, 20 December 2016), para 84.
[56] *Premininy v Russia* (2016) 62 EHRR 18, para 81.
[57] *Akkoç v Turkey* (2002) 34 EHRR 51, para 116.
[58] *Rodić and Others v Bosnia and Herzegovina* App No 22893/05 (ECtHR, 27 May 2008), para 73.
[59] *MSS* (n 53) para 263.
[60] *Yunzel v Russia* App No 60627/09 (ECtHR, 13 December 2016), para 48.
[61] *Bouyid* (n 39) para 106.
[62] *Csüllög v Hungary* App No 30042/08 (ECtHR, 7 June 2011), para 37.
[63] *Varnava and others v Turkey* App Nos 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90 (ECtHR, 18 September 2009), para 224 (in relation to just satisfaction – Art. 41 ECHR).

The ECtHR's assessment of severity is responsive to the cumulative gravity of what a person has experienced or will experience.[64] Forcibly subjecting individuals to conditions that combine serious distress, anxiety, and prolonged uncertainty, for example, can reach the 'threshold' of severity and fall within the scope of Article 3 ECHR. In conjunction with this cumulative approach, the ECtHR has also recognised that where distressing circumstances disclose 'no prospect of an improvement in the situation', the despair this is bound to cause compounds the gravity of the suffering endured.[65]

There is, accordingly, recognition by the Court of the gravity of forms of suffering comparable to the distress many children and young people are *currently* experiencing in relation to climate change with the right not to be subjected to torture or inhuman or degrading treatment. Across the world, many people, notably children and young people such as the applicants in *Agostinho*, are currently experiencing climate anxiety or pre-traumatic stress.[66] Recall that persons who are experiencing climate anxiety tend to endure constant feelings of fear, anguish and – often – a sense of powerlessness or hopelessness vis-à-vis their own and their loved ones' well-being, as well as more generalised, prolonged anxiety about the current state and future of the planet,[67] and this can lead to or exacerbate prolonged mental ill-health.[68]

The distress experienced by many of those currently being confronted with the gradual and sudden onset impacts of climate change stems in large part from being made to face both the current consequences of climate change and the prospect of grave and potentially irreparable suffering and harm that they, on their own, are powerless to avert. This powerlessness does not denote a lack of agency or initiative: children and young people have in many respects shown the way in terms of individual and collective efforts to mitigate climate change and to push for the co-ordinated climate action necessary to avert climate catastrophe.[69] What 'powerlessness' represents here is the fact that even robust individual and collective action by the people committed to addressing climate change will not in itself be enough to avert climate catastrophe: the institutional, corporate and regulatory dimensions of climate change necessitate a mass law and policy overhaul by State authorities on a global scale if the worst climate outcomes are to be prevented. A recent landmark study on climate anxiety demonstrates clearly that feelings of hopelessness, despair and even a sense of betrayal[70] are attached to an understanding of the

[64] See, for example, *Piechowicz v Poland* (2015) 60 EHRR 24, paras 163, 178.
[65] *Clasens v Belgium* App No 26564/16 (ECtHR, 28 May 2019), para 36.
[66] See n 6 and n 29 above.
[67] Panu Pihkala, 'Anxiety and the Ecological Crisis: An Analysis of Eco-Anxiety and Climate Anxiety' (2020) 12 *Sustainability* 7836.
[68] U.S. Global Change Research Program, *The Impacts of Climate Change on Human Health in the United States: A Scientific Assessment* (2016) 224 – available at: https://health2016.globalchange.gov/low/ClimateHealth2016_FullReport_small.pdf.
[69] See, for example, the Fridays for Future climate movement: https://fridaysforfuture.org/.
[70] See text to n 2 above.

ways in which States are failing to stem, and indeed actively exacerbating, climate change.[71]

The ECtHR has recognised the grave implications of subjecting someone to the real threat or prospect of significant harm. In *Gäfgen v Germany*,[72] the applicant was threatened with torture by police officers while in police custody – a classic context of power and powerlessness. During the – limited – time that the threat was hanging over him, he must have experienced 'considerable fear, anguish and mental suffering', as the Court put it.[73] The ECtHR found that he had been subjected to inhuman treatment. Moreover, in its assessment of the death row phenomenon the ECtHR has indicated that the 'ever present and mounting anguish of awaiting execution'[74] or of awaiting 'the violence [one] is to have inflicted on [them]'[75] reaches the minimum level of severity. While the scenarios involved in these cases are clearly distinct from the climate change context, the Court's recognition of the suffering involved in being made to powerlessly await catastrophic harm is significant in view of the grave and escalating distress endured by children and young people such as the applicants in *Agostinho*, in respect of the fate that awaits them and their loved ones in the context of the advance of climate change. In a context of vulnerability and profound power asymmetry, children and young people such as the applicants in *Agostinho* are being placed in such a situation through State (in)action on climate change.

Finally, an important dimension of climate anxiety is not only the prospect of harm but also the loss of hope. The ECtHR in *Vinter v UK* clarified that denying anyone 'the experience of hope'[76] offends human dignity and violates Article 3 ECHR. As Judge Power-Forde put it in *Vinter*, '[t]o deny [someone] the experience of hope would be to deny a fundamental aspect of their humanity and, to do that, would be degrading'.[77] While the case of *Vinter* and a number of cases following it which invoke the right to the experience of hope[78] concern the quite distinct issue of life imprisonment without parole and the hope for release back into society, the ECtHR's recognition of the harm involved in losing hope, and the wrong involved in denying someone the experience of hope, offers a basis for similarly acknowledging the gravity of the loss of hope experienced by the applicants in *Agostinho* and others placed in a similar situation. A parallel can, in principle, be drawn between the loss of hope inflicted on those enduring whole life sentences in the total institution of the prison and the loss of hope inflicted – through State (in)action – on

[71] Hickman et al, 'Young People's Voices on Climate Anxiety' (n 66).
[72] *Gäfgen v Germany* (2011) 52 EHRR 1.
[73] Ibid para 103.
[74] *Soering v UK* (1989) 11 EHRR 439, para 111; see also *Al Saadoon and Mufdhi v UK* (2010) 51 EHRR 9, para 137.
[75] *Soering*, ibid para 100.
[76] *Vinter v UK* (2016) 63 EHRR 1, Concurring Opinion of Judge Power-Forde, para 2.
[77] Ibid. For an interesting critical analysis of the 'right to hope' in the ECtHR's case law, see Sarah Trotter, 'Hope's Relations: A Theory of the "Right to Hope" in European Human Rights Law' (2022) 22(2) *Human Rights Law Review* 1.
[78] See, for example, *Harakchiev and Tolumov v Bulgaria* App nos 15018/11 and 61199/12 (ECtHR, 8 July 2014), para 262; *Matiošaitis and others v Lithuania* App nos 22662/13, 51059/13, 58823/13, 59692/13, 59700/13, 60115/13, 69425/13 and 72824/13 (ECtHR, 23 May 2017), para 180.

children and young people facing climate catastrophe within their lifetimes in circumstances effectively outside of their control.

The likely future impacts of climate change for children and young people are well-documented. As multiple studies make clear, children and young people, as well as future generations, will bear the brunt of climate change.[79] UNICEF's Executive Director has stated that 'there may be no greater, growing threat facing the world's children — and their children — than climate change'.[80] In the most recent report of the Intergovernmental Panel on Climate Change, the 'climate futures' predicted on the basis of current State (in)action for the coming decades involve catastrophic rises in temperature and the rapid escalation and spread of extreme weather phenomena.[81] The vast body of scientific research on climate change demonstrates that, unless the most drastic and concerted State action is taken to contain it, climate change is likely to expose many children, young people and subsequent generations to grave harm. Recall that the real risks arising out of climate change for the applicants in *Agostinho* and others in a similar situation include the prospect of loss of life or serious harm through extreme weather events and other 'sudden-onset' impacts of climate change, escalating physical impacts, anxiety and distress arising out of the 'slow-onset' impacts of climate change, loss of their home, livelihood and access to basic resources, and the psychological trauma and mental health deterioration emanating from such events.[82]

Besides establishing that the subjection of someone to serious physical or mental harm can cross the Article 3 'threshold',[83] the jurisprudence of the ECtHR has also specifically acknowledged that the destruction of one's home, as well as loss of one's most essential belongings and livelihood, and consequent anguish, can in some circumstances reach the minimum level of severity under Article 3.[84] Moreover, Strasbourg doctrine – such as the Court's findings in the landmark judgment in *MSS v Belgium and Greece*[85] – includes the recognition that situations of serious deprivation, such as 'living in the street, with no resources or access to sanitary facilities, and without any means of providing for…essential needs',[86] can cross the Article 3 threshold. These are circumstances that many children and young people stand to face in future, as the gradual and sudden impacts of climate change spread and accelerate. The case for recognising this as amounting to the prospect of degrading treatment is buttressed by the fact that such living conditions will be

[79] UNICEF, *Unless we act now: The impact of climate change on children* (2015) 8; United Nations Office of the Secretary-General's Envoy on Youth, '#YouthStats: Environment and Climate Change', available at: https://www.un.org/youthenvoy/environment-climate-change/; Ann V. Sanson and Susie E. L. Burke, 'Climate Change and Children: An Issue of Intergenerational Justice' in Nikola Balvin and Daniel J. Christie (eds), *Children and Peace: From Research to Action* (SpringerOpen 2020).
[80] UNICEF, *Unless we act now: The impact of climate change on children* (2015) 6.
[81] IPCC, *Climate Change 2021: The Physical Science Basis* (2021).
[82] See above, text from n 18 to n 27.
[83] See the analysis above.
[84] *Selçuk and Asker v Turkey* (1998) 26 EHRR 477, paras 72-80.
[85] Ibid.
[86] *MSS* (n 53) para 263.

accompanied by 'prolonged uncertainty' and a 'lack of any prospects of [the] situation improving',[87] which was the case – and informed the Court's finding of degrading treatment – in *MSS*.

The increasingly likely prospect of continuously escalating as well as sudden catastrophic harms that children and young people are facing includes the 'real risk of dying under most distressing circumstances',[88] something which has led the ECtHR to bar the removal of persons to places where this stands to occur.[89] The present and future are enmeshed: many children and young persons such as the applicants are bound for years to experience the 'mental anguish of anticipating the violence' (to quote the ECtHR's description of the experience of awaiting corporal punishment[90] and of being on death row[91]) that climate change will unleash upon them and their loved ones. Viewing the Court's statements as conveying relevant principle, rather than merely pronouncements isolated to individual facts, the experience of children and young people experiencing climate-related distress and facing the prospect of climate catastrophe maps onto what the ECtHR has been prepared to recognise as raising an issue under Article 3 ECHR.

B. Power and Powerlessness

As highlighted above, those set to bear the brunt of climate change are themselves effectively powerless to avert it. Many of them, being children, are disenfranchised and lack effective access to, and a meaningful say within, the institutions that are in a position to drive the changes needed to prevent the worst climate outcomes. To recognise this relative powerlessness is not to deny the tireless activism of children and young people across the world, but rather to acknowledge that the radical recalibration of societies (particularly in the 'developed' world) that is required to prevent or contain the worst climate outcomes cannot be achieved without robust and concerted State action. States – particularly wealthy ones such as (most of) the respondent States in *Agostinho* – hold the key: their individual and concerted (in)actions shape, and are central to remedying, the current and prospective situation faced by children and young adults such as the applicants.

This dynamic of power and powerlessness is important in relation to the application of the right not to be subjected to torture or to inhuman or degrading treatment under Article 3 ECHR. Torture typically occurs in circumstances where the perpetrator holds (near)

[87] Ibid.
[88] *D v UK* (1997) 24 EHRR 423, para 53; *Paposhvili v Belgium* App no 41738/10 (ECtHR, 13 December 2016), para 177.
[89] Ibid.
[90] *Tyrer v UK* (1979–80) 2 EHRR 1, para 33.
[91] *Soering* (n 74) para 100.

complete power over the victim,[92] whether that is in a situation of custody[93] or in a context where an individual is faced with law enforcement authorities.[94] The ECtHR also more readily recognises inhumanity or degradation in circumstances where individuals are relatively powerless, or in a vulnerable position, notably where their welfare is wholly or largely dependent on State authorities: from circumstances of detention to circumstances of destitution.[95] The Court acknowledges, for example, that in situations of profound power asymmetry, such as when a person is in State custody or confronted by the State's law enforcement authorities, 'any recourse to physical force which has not been made strictly necessary by his own conduct diminishes human dignity and is, in principle, an infringement of the right set forth in Article 3'.[96] This approach disregards the question of the degree of harm caused and deems any harm inflicted by State authorities in such circumstances severe enough to reach the Article 3 'threshold'. Acknowledging the substantial power imbalance present when individuals are in the control of State authorities, the ECtHR requires authorities to guarantee a 'safe environment' for persons in their control.[97] The Court has also indicated that 'State responsibility could arise for "treatment" where an applicant, in circumstances wholly dependent on State support, found herself faced with official indifference when in a situation of serious deprivation or want incompatible with human dignity'.[98] The Court's reasoning is relevant and, arguably, transposable to a situation in which considerable suffering is being experienced and anticipated by persons in a vulnerable position, where the alleviation of the conditions causing this suffering is out of their hands and in the hands of State bodies.

It is worth underlining that the dynamic of power and powerlessness both shapes the wrongfulness of State (in)action *and* contributes to the degree of distress experienced by those victimised by said (in)action. The ECtHR acknowledges that a sense of powerlessness can deepen feelings of fear, anxiety, inferiority, or injustice, which can contribute towards reaching the 'minimum level of severity' and lead to a finding of a violation of Article 3.[99] It is well-established that climate anxiety often involves feelings of helplessness and powerlessness, which are underscored by people's understanding that

[92] See M Nowak and E McArthur, *United Nations Convention against Torture: A Commentary* (Oxford University Press 2008) 76–77; see also the Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, A/HRC/13/39, 9 February 2010, para 60. See also M Nowak, 'Powerlessness as a Defining Characteristic of Torture' in M Başoğlu (ed), *Torture and Its Definition in International Law: An Interdisciplinary Approach* (Oxford University Press 2017) 437.
[93] Such as, for example, *Aksoy v Turkey* (1997) 23 EHRR 553.
[94] Such as, for example, *Cestaro v Italy* App no 6884/11 (ECtHR, 7 April 2015).
[95] See the vulnerability-framed account in Heri, 'Climate Change Before the European Court of Human Rights' (n 13); and more broadly in Heri, *Responsive Human Rights* (n 14) ch. 3.
[96] *Bouyid* (n 39) paras 88 and 100.
[97] *Premininy v Russia* (2016) 62 EHRR 18, para 90.
[98] *Budina v Russia* (Admissibility) App no 45603/05 (ECtHR, 18 June 2009), para 3; see also *MSS* (n 53) para 253; *Tarakhel v Switzerland* (2015) 60 EHRR 28, para 98.
[99] See above, n 54, n 61 and n 62.

they as individuals 'simply do not have the political power to do what…needs to be done'.[100]

C.

D. Callousness, indifference, and disregard by State authorities

The idea of the 'minimum level of severity' may appear at first sight to set a quantitative standard for the application of the right not to be ill-treated. Yet the question of whether *ill-treatment* contrary to Article 3 ECHR has occurred or will occur is not determined purely on the basis of the extent of suffering (to be) experienced. Rather, severity concerns the character of the *treatment* to which a person is subjected.[101] The severity of a treatment is shaped not only by the suffering or harm it causes, but by the wrongfulness of the (in)action(s), intent(s) and/or attitude(s) of the wrong-doer(s).[102]

The ECtHR's case law establishes that callousness[103] or indifference[104] by State authorities towards the serious or potentially irreparable suffering faced by a person in a position of relative powerlessness, where the State is both aware of and in a position to take action to alleviate this suffering, reaches the minimum level of severity. In particular, the ECtHR has indicated that official indifference or callous disregard towards a situation of serious deprivation,[105] abuse at the hands of non-State actors,[106] or a loved one's disappearance[107] falls foul of Article 3 ECHR.

In *Varnava v Turkey*, in which the ECtHR recognised that State authorities' callousness in respect of the fate of a person who has disappeared can amount to ill-treatment of the missing person's next-of-kin, the Court emphasised that the 'essence of the violation [in relation to the relatives of the missing person]…lies in the authorities' reactions and attitudes to the situation when it has been brought to their attention'.[108] It found that 'the attitude of official indifference in face of [the applicants'] acute anxiety to know the fate of their close family members disclose[d] a situation attaining the requisite level of severity'.[109] The inhumanity identified in cases such as *Varnava*[110] and *Cyprus v Turkey*[111] in respect of the relatives of missing persons arose from their continued subjection to 'a prolonged state of acute anxiety' through the authorities' silence and inaction in respect of

[100] Panu Pihkala, 'Anxiety and the Ecological Crisis: An Analysis of Eco-Anxiety and Climate Anxiety' (2020) 12(19) *Sustainability* 7836, https://doi.org/10.3390/su12197836, 11.
[101] Mavronicola, *Torture, Inhumanity and Degradation* (n 14) chapters 4-5.
[102] Ibid 94. On the nexus between (in)dignity and attitudes of disrespect, see Webster (n 14) 99.
[103] See, for example, *RR v Poland* (2011) 53 EHRR 31, para 151.
[104] See, for example, *Budina v Russia* (Admissibility) App no 45603/05 (ECtHR, 18 June 2009), para 3.
[105] *Budina*, ibid; see also *MSS* (n 53).
[106] *Members of the Gldani Congregation of Jehovah' s Witnesses v Georgia* (2008) 46 EHRR 30.
[107] *Varnava* (n 63).
[108] *Varnava*, ibid, para 200; see also *Çakici* (2001) 31 EHRR 5, para 98.
[109] *Varnava*, ibid para 202.
[110] *Varnava*, ibid para 201.
[111] *Cyprus v Turkey* (2002) 35 EHRR 30, para 157.

their loved ones' fate.[112] The violation can be located at least in part in 'an attitude of disrespect',[113] as Elaine Webster puts it, one which cuts to the core of the deontic humanity encapsulated by human dignity. The Court locates inhumanity and degradation in authorities' 'flagrant, continuous and callous disregard of an obligation to account for the whereabouts and fate of a missing person'[114] and in their lack of concern in relation to the emotional distress their behaviour is producing or compounding. Analogous principles emerge from the case law on official indifference to interpersonal violence: a refusal by State officials 'to take action promptly to end the violence [of which they had been alerted] and to protect the victims'[115] and subsequent 'official indifference'[116] in pursuing redress has been recognised as falling foul of Article 3 ECHR. In respect of the distress emanating from anthropogenic climate change and the prospect of climate catastrophe, we may speak of State authorities' systemic indifference or even systematic disregard towards those experiencing escalating suffering and fearing for the fate of their loved ones in relation to climate change.

Lastly, the ECtHR has indicated that 'State responsibility could arise for "treatment" where an applicant, in circumstances wholly dependent on State support, found herself faced with official indifference when in a situation of serious deprivation or want incompatible with human dignity',[117] a principle that has been applied to make a finding of an Article 3 violation in a situation where an asylum-seeker had been left in systemically degrading conditions.[118] Climate change and imminent climate catastrophe may be understood to give rise to systemically degrading circumstances that are incompatible with human dignity, encompassing among other things both extreme events and gradually deteriorating conditions that are bound to involve serious deprivation and the physical, mental, and interpersonal toll such phenomena doubtlessly entail. The fact that such a phenomenon is met with official indifference or even callous disregard on a large scale, understood as a refusal to carry out the necessary action that the relevant States are in a position to take to avert this degradation, brings the situation within the purview of principled reasoning issued in other contexts by the ECtHR in delimiting Article 3 ECHR. This is relevant to cases such as *Agostinho*, where the applicants are effectively arguing that there is a continuing refusal by the respondent States to take appropriate action to avert a fate that threatens them and their loved ones in the profound ways outlined above.

3. ON WHAT BASIS CAN STATES BE HELD RESPONSIBLE FOR THE DISTRESS ASSOCIATED WITH CLIMATE CHANGE?

[112] Ibid.
[113] Webster (n 14) 99.
[114] *Varnava* (n 63) para 200.
[115] *Members of the Gldani Congregation of Jehovah' s Witnesses v Georgia* (2008) 46 EHRR 30, para 111.
[116] Ibid para 124.
[117] *Budina v Russia* (Admissibility) App no 45603/05 (ECtHR, 18 June 2009), para 3; see also *MSS* (n 53) para 253; *Tarakhel v Switzerland* (2015) 60 EHRR 28, para 98.
[118] *MSS* (n 53).

We may, on the basis of the analysis provided above, understand climate change to give rise to circumstances that could in principle be seen as coming within the purview of Article 3 ECHR. But what are the precise contours of States' responsibility vis-à-vis these circumstances? If we may once again return to *Agostinho*, it is possible to understand there to be three 'axes' of State wrong-doing in relation to climate change and the harms flowing therefrom.

First, it can be argued that the respondent States are failing to take the reasonable and adequate steps they are compelled to take in accordance with their positive obligations to protect persons such as the applicants in *Agostinho* from serious and escalating distress at present, and the real likelihood of catastrophic harm and suffering in the future. Second, it is also possible to reason that the relevant States are violating their negative obligation not to subject persons to inhuman or degrading treatment. The negative obligation to refrain from subjecting persons to ill-treatment may be understood as being violated through State policy and practice that is causing and/or compounding anthropogenic climate change. Finally, it may be argued that through a confluence of actions and inactions, States are subjecting people such as the applicants in *Agostinho* to a real risk of irreparable harm, thereby falling foul of the principle that underpins the duty of non-refoulement under Article 3 ECHR, which prohibits the removal of persons to places where they face a real risk of torture or inhuman or degrading treatment or punishment.

An overarching consideration shaping my analysis in this section is that it is the acts and omissions of State authorities – including in terms of regulating the activities of corporate actors and private individuals – that are the predominant cause[119] of the humanitarian crisis being faced.[120] Nonetheless, it is important to stress from the outset that each individual State's conduct need not, in isolation, be the sole cause of the distress emanating from the impacts of anthropogenic climate change. In terms of causation, as the applicants in *Agostinho* underlined in their arguments to the Court, there is no 'but for' test for causation in the ECtHR's doctrine.[121] Indeed, where State omissions are concerned, it suffices for the Court that the State failed to adopt 'reasonably available measures which could have had a real prospect of altering the outcome or mitigating the harm'.[122]

In terms of attribution, States can be taken to bear – and share – responsibility for subjecting persons to the deleterious effects of anthropogenic climate change if States engage in

[119] This reflects the test outlined in *Sufi and Elmi v UK* (2012) 54 EHRR 9, para 282. See Matthew Scott, 'Natural Disasters, Climate Change and Non-Refoulement: What Scope for Resisting Expulsion under Articles 3 and 8 of the European Convention on Human Rights?' (2014) 26(3) *International Journal of Refugee Law* 404.

[120] On the States' responsibility in this respect, see *State of the Netherlands v Urgenda Foundation* ECLI:NL:HR:2019:2007, para 5.7.2. See, further, Margaretha Wewerinke-Singh, *State Responsibility, Climate Change and Human Rights under International Law* (Hart 2019) chapter 6.

[121] See, in this respect, the analysis of the doctrine on positive obligations in Laurens Lavrysen, 'Causation and Positive Obligations under the European Convention on Human Rights: A Reply to Vladislava Stoyanova' (2018) 18 *Human Rights Law Review* 705.

[122] *O'Keeffe v Ireland* (2014) 59 EHRR 15, para 149.

conduct attributable to each of them separately, which violates one or more of their international obligations and which contributes individually, collectively, or cumulatively to the indivisible injury of any person. This is in line with Principles 2 and 4 of the 'Guiding Principles on Shared Responsibility in International Law',[123] and is a normatively appropriate position as a matter of principle. In contrast, an interpretation of States' obligations which absolved States in circumstances of collective and cumulative responsibility would be contrary to the fundamental tenets of the Convention and the Court's interpretive approach, which is premised on the idea of making rights guarantees 'practical and effective'.[124] The ECtHR has attributed responsibility to more than one State in respect of the same harm, for example in the context of *refoulement.*[125] It is possible[126] (and arguably in line with the Convention's object and purpose) for the Court to do the same in respect of the infliction, through the diffuse actions of various State authorities, of widespread, transboundary harm stemming from anthropogenic climate change.

A. Violation of positive obligations through State inaction

Both academic arguments and litigation on climate change and human rights have typically focused on identifying failure to take appropriate climate action as a violation of States' positive obligations under certain rights.[127] For example, in its landmark *Urgenda* judgment, the Dutch Supreme Court ruled that the State of the Netherlands had not taken the climate action necessary to fulfil its positive obligations under Articles 2 and 8 ECHR.[128]

The right not to be subjected to torture or inhuman or degrading treatment gives rise to positive obligations that require States to take action to protect persons from torture as well as inhuman and degrading treatment. States' positive obligations may be categorised as follows:
(a) general, or framework, obligations require States to establish adequate legal provisions, implementation mechanisms, and other relevant structures towards preventing, and

[123] André Nollkaemper, Jean d'Aspremont, Christiane Ahlborn, Berenice Boutin, Nataša Nedeski, Ilias Plakokefalos, collaboration of Dov Jacobs, 'Guiding Principles on Shared Responsibility in International Law' (2020) 31(1) *European Journal of International Law* 15.
[124] *Svinarenko and Slyadnev v Russia* App nos 32541/08 and 43441/08 (ECtHR, 17 July 2014), para 118; *Ali and Ayşe Duran v Turkey* App no 42942/02 (ECtHR, 8 April 2008), para 59. On the centrality of the principle of effectiveness to the ECHR, and its implications, see Georgios A. Serghides, *The Principle of Effectiveness and its Overarching Role in the Interpretation and Application of the ECHR: The Norm of All Norms and the Method of All Methods* (Strasbourg 2022).
[125] See, for example, *MSS* (n 53).
[126] Keller and Heri (n 12) 166-167.
[127] See, for example, the analysis in Katharina Franziska Braig and Stoyan Panov, 'The Doctrine of Positive Obligations as a Starting Point for Climate Litigation in Strasbourg: The European Court of Human Rights as a Hilfssheriff in Combating Climate Change?' (2020) 35 *Journal of Environmental Law and Litigation* 261; Keller and Heri (n 12) 163-167; Monica Feria-Tinta, 'Climate Change Litigation in the European Court of Human Rights: Causation, Imminence and other Key Underlying Notions' (2021) 3 *Europe of Rights & Liberties/Europe des Droits & Libertés* 52; and the analysis in *Urgenda*, ibid, especially paras 5.1-5.10.
[128] *Urgenda*, ibid.

protecting individuals from, inhumanity and degradation, and to ensure that they are effectively implemented;[129]
(b) operational obligations require targeted action in respect of persons facing a real and immediate risk of torture, inhumanity or degradation which the authorities knew or ought to have known about;[130] and
(c) investigative obligations require States to investigate credible complaints or suspected incidents of ill-treatment, and to provide for and pursue redress for individuals who have suffered the proscribed treatment.[131]

In relation to climate change, the positive obligations upon States may be understood as consisting chiefly of obligations to legislate adequately for, and implement effectively, the regulation and reduction of activities – whether by State or non-State actors – that contribute to climate change. Primarily, this engages States' general, or framework, duties, which require the mobilisation of the State's regulatory tools and enforcement mechanisms towards suppressing the causes of the human rights violation(s) at issue. States' operational duties can also be implicated, demanding that operational measures be taken to protect persons facing a real and immediate risk of torture, inhumanity, or degradation where the authorities know or ought to know of said risk. As recognised by the Dutch Supreme Court in *Urgenda*, the term 'real and immediate risk' is to be understood as referring to a risk that is both genuine and imminent.[132] Imminence, the Dutch Supreme Court underlined,[133] is not to be construed as meaning that the risk must materialise within a short period of time, but rather as requiring that the risk in question is clearly established[134] and directly threatening the persons involved.[135] This approach is grounded in the ECtHR's jurisprudence, which duly recognises that where the risk of harm falling within the purview of the right is present, clearly established, and posing direct threats to the persons involved – including a substantial group of people[136] or indeed the public at large[137] – the timing of its materialisation is not important; indeed, an undue focus on timing would tend towards excessive speculation and potential arbitrariness.

[129] See, for example, *MC v Bulgaria* (2005) 40 EHRR 20, paras 167–87; *Volodina* (n 54) paras 78–85.
[130] See, for example, *Z and others v UK* (2002) 34 EHRR 3, paras 69–75; *E v UK* (2003) 36 EHRR 31, paras 88–101; *Volodina* (n 54) paras 86–91.
[131] *Assenov v Bulgaria* (1999) 28 EHRR 652, paras 101-106; *Volodina* (n 54) paras 92-101.
[132] *Urgenda* (n **Error! Bookmark not defined.**) para 5.2.2.
[133] Ibid.
[134] *Taşkin v Turkey* (2006) 42 EHRR 50, para 113.
[135] See, in this respect, relevant Article 2 cases including: *Öneryildiz v Turkey* (2005) 41 EHRR 20 (long-standing risk of gas explosion at landfill); *Budayeva v Russia* (2014) 59 EHRR 2 (long-standing danger of mudslides); *Kolyadenko v Russia* (2013) 56 EHRR 2 (reservoir outflow due to heavy rain). See also the Article 8 case *Taşkin v Turkey* (2006) 42 EHRR 50, paras 113, 133.
[136] See *Cordella and others v Italy* App nos 54414/13, 54264/15 (ECtHR, 24 January 2019), para 172.
[137] See *Mastromatteo v Italy* App No 37703/97 (ECtHR, 24 October 2002), para 74.

How are States' Article 3 positive obligations in respect of climate change to be delineated? According to the ECtHR, States are bound to take *reasonable*[138] and *adequate*[139] measures to prevent, deter, or otherwise suppress human rights violations. The criterion of reasonableness carries the implication that positive obligations are determined, and bounded, by what may be reasonably expected of State authorities in the particular context at issue. At the same time, the term 'adequate' conveys that, although not boundless, the State's positive obligations must reach a level of effort *and* efficacy that can be considered adequate in view of the imperative of securing 'practical and effective protection'[140] and in light of the importance of what Article 3 is meant to safeguard. Therefore, although the ECtHR is not prepared to make impossible or unreasonable demands of State authorities,[141] it requires them to take measures that will adequately and therefore effectively address the general and particular incidence and risk(s) of torture or inhuman or degrading treatment.

Indicating its application of a degree of institutional restraint, the ECtHR has mentioned the margin of appreciation in a number of Article 3 positive obligations cases,[142] suggesting that 'the choice of means to secure compliance with Article 3' may in principle fall 'within the domestic authorities' margin of appreciation'.[143] Nonetheless, even though the Court may not always readily dictate the specific means by which the State is to secure protection from ill-treatment,[144] it does not tend to use the margin of appreciation as a basis on which to refrain from rigorous scrutiny of the adequacy of measures taken. It does not, that is, simply carve out a space in which the delimitation of positive obligations is simply left to the judgement or sovereign will of the State.[145]

---

[138] *Opuz v Turkey* (2010) 50 EHRR 28, para 162.

[139] See, for example, *Opuz*, ibid para 165. For a thorough account of terms and principles employed by the EctHR to delimit positive obligations, see Laurens Lavrysen, *Human Rights in a Positive State: Rethinking the Relationship between Positive and Negative Obligations under the European Convention on Human Rights* (Intersentia 2016) ch 3, particularly at 158–66.

[140] *Valiulienė v Lithuania* App no 33234/07 (ECtHR, 26 March 2013), para 75; *Rantsev v Cyprus and Russia* (2010) 51 EHRR 1, para 284. On the primacy of the principle of effectiveness under the ECHR, see Serghides (n 124).

[141] The Court insists that its interpretation of positive obligations must 'not impose an impossible or disproportionate burden on the authorities' – see, for example, *Edwards v UK* (2002) 35 EHRR 19, para 55.

[142] See, for instance, *Beganović v Croatia* App no 46423/06 (ECtHR, 25 June 2009), para 80; *Valiulienė* (n 140) para 85; *Wenner v Germany* (2017) 64 EHRR 19, para 61.

[143] *Valiulienė* (n 140) para 85.

[144] On the operation of the margin of appreciation in this manner in positive obligations case law, see Jan Kratochvíl, 'The Inflation of the Margin of Appreciation by the European Court of Human Rights' (2011) 29 *Netherlands Quarterly of Human Rights* 324, 333–34. The nuanced operation (encompassing merits reasoning and non-merits reasoning) of the margin of appreciation in such contexts is considered in Oddný Mjöll Arnardóttir, 'Rethinking the Two Margins of Appreciation' (2016) 12 *European Constitutional Law Review* 27, 44–45, citing *Beganović* (n 142) para 80. See, too, the consideration of the margin's application and the operation of deference in relation to positive obligations under Arts 2 and 3 ECHR in Janneke Gerards, 'Margin of Appreciation and Incrementalism in the Case Law of the European Court of Human Rights' (2018) 18 *Human Rights Law Review* 495, 501.

[145] Indeed, this leads Jan Kratochvíl to suggest that reference to the margin of appreciation in such contexts may even be redundant: Kratochvíl (n 144) 334. On the broader function of the margin of appreciation in ECtHR doctrine see, among many, Howard Charles Yourow, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence* (Martinus Nijhoff 1996); Yutaka Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Intersentia 2002); Andrew Legg, *The Margin of*

Although the ECtHR may therefore, in line with the dynamics of relative institutional competence at play, allow States some leeway to determine the specific measures to be taken, it conducts a robust check on effort, procedure and both the potential and actual effectiveness of the measures taken – as well as, often implicitly, good faith[146] – under the reasonableness and adequacy criteria. There is considerable scope, in such an appraisal, for finding that the respondent States in *Agostinho* have not taken adequate legislative, administrative, and operational measures to reduce harmful emissions and thereby fulfil their positive obligations under Article 3 (as well as, arguably, Articles 2 and 8) ECHR.[147]

An important dimension of what is at issue in respect of State inaction on climate change is the concept of 'dangerous activities'. In circumstances involving what the ECtHR terms 'dangerous activities', States' duties are engaged on both the general and operational level, and the required actions must be responsive to the particular nature and degree of risk involved in the relevant activity. As the Court has put it in relation to Article 2 ECHR,

> The positive obligation to take all appropriate steps to safeguard life for the purposes of Article 2…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… This obligation indisputably applies in the particular context of dangerous activities, where, in addition, special emphasis must be placed on regulations geared to the special features of the activity in question, particularly with regard to the level of the potential risk to human lives. They 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 ensure the effective protection of citizens whose lives might be endangered by the inherent risks.[148]

The principles that the Court has set out in respect of Article 2 can be taken to apply also in relation to activities that place persons at risk of torture or inhuman or degrading treatment or punishment, given that the Court recognises these harms as irreparable and acknowledges the close connections between Articles 2 and 3 ECHR.[149] According to the ECtHR, 'dangerous activities' include the maintenance of a landfill in the vicinity of people's residences,[150] the running of a factory producing potentially toxic emissions,[151]

Appreciation in International Human Rights Law (Oxford University Press 2012). But note the nuanced account of the margin of appreciation in Arnardóttir (n 144).

[146] Mavronicola, *Torture, Inhumanity and Degradation* (n 14) 28, 146.

[147] The arguments put forward in this respect by the applicants in *Agostinho* can be accessed in the application form, available at: https://youth4climatejustice.org/wp-content/uploads/2020/12/Application-form-annex.pdf/.

[148] *Öneryildiz v Turkey* (2005) 41 EHRR 20, paras 89-90.

[149] The close connection between Articles 2 and 3 ECHR is repeatedly acknowledged by the Court. See, for example, *Tehrani v Turkey* App nos 32940/08, 41626/08, 43616/08 (ECtHR, 13 April 2020), para 55; *Ilaşcu v Moldova and Russia* (2005) 40 EHRR 46, para 334.

[150] *Öneryildiz v Turkey* (2005) 41 EHRR 20.

[151] *Cordella* (n 136).

and the sale and purchase of firearms.[152] On the basis of the Court's reasoning, we may deduce that activities which are capable of precipitating serious climate-related suffering are in principle to be treated as dangerous activities – that is, as activities that endanger human life and bodily and mental integrity. Accordingly, the release of emissions contributing to climate change, as well as the use, purchase, and sale of fossil fuels, can be recognised as dangerous activities that attract positive obligations corresponding to the particular risks to which these activities give rise.

The applicants in *Agostinho* are arguing that the Paris Agreement can form the basis for delineating the measures States are duty-bound to undertake under the relevant Convention rights to protect persons such as the applicants. The Paris Agreement was built on an assessment that hinged on both the feasibility and the effectiveness of pathways to contain the most deleterious impacts of climate change.[153] This makes the Paris Agreement goals align with the criteria of reasonableness and adequacy by which positive obligations are delimited. Moreover, the Paris Agreement accommodates a diversity of approaches across States in determining the *precise* mitigation measures by which the Paris goals are to be met, in line with the (bounded) leeway afforded to Contracting States in the concretisation of their positive obligations. The measures that the respondent States in *Agostinho* would thereby be expected to pursue would include robust – indeed, drastic – legislative and implementation efforts that trigger changes capable of effectively reducing and ultimately eliminating harmful emissions on territory over which they have jurisdiction. They would also include, as the applicants in *Agostinho* argue, restrictions or indeed a ban on the export of fossil fuels, mitigation measures in respect of the import of goods whose production involves harmful emissions, and limits on multinational entities' emissions overseas. Such steps are essential and urgent if anything approximating the key Paris goal of limiting temperature rise to 1.5°C in comparison with pre-industrial levels is to be achieved.[154]

In delineating the obligations owed by the respondent States in *Agostinho*, judges are faced with what is often referred to as the 'fair share' question – or what the Dutch Supreme Court in *Urgenda* referred to as each State doing 'its part'[155] to prevent climate catastrophe. In particular, given that any State bears only *partial* responsibility for the impacts of anthropogenic climate change, and that only collective efforts to mitigate climate change can effectively contain it, the 'share' of the burden to be properly placed on any particular State is a matter of considerable contention. Nonetheless, as the Dutch Supreme Court in *Urgenda* underlined, neither the contestation surrounding each State's share of the burden nor the fact that shouldering that share of the burden is inadequate unless other States do

[152] *Kotilainen and others v Finland* App no 62439/12 (ECtHR, 17 September 2020).
[153] See, in this respect, P. B. Holden, N. R. Edwards, A. Ridgwell, R. D. Wilkinson, K. Fraedrich, F. Lunkeit, H. Pollitt, J.-F. Mercure, P. Salas, A. Lam, F. Knobloch, U. Chewpreecha and J. E. Viñuales, 'Climate–Carbon Cycle Uncertainties and the Paris Agreement' (2018) 8(7) *Nature Climate Change* 609.
[154] Note the latest IPCC report (IPCC, *Climate Change 2021: The Physical Science Basis* (2021)), which indicates that limiting global heating to 1.5°C is increasingly unlikely.
[155] *Urgenda* (n **Error! Bookmark not defined.**) para 5.7.1.

their part vitiates the obligations at issue.[156] Moreover, it is possible to rely on relevant research to determine what amounts to a State doing 'its part': as Gerry Liston argues, States should be taken to bear 'individual mitigation obligations which are collectively consistent with the Paris Agreement'.[157] To determine what these might amount to in broad terms, the Climate Action Tracker, which provides an independent scientific analysis tracking States' climate action and assessing it against the Paris Agreement,[158] provides a helpful 'fair share range'. This range is premised on the temperature rise that would come about if all other countries were to adopt mitigation efforts of equivalent ambition, and shaped by a vast corpus of research that takes into account considerations of equity including historical responsibility, capability, and equality.[159] The Climate Action Tracker's findings enable the characterisation of States' mitigation measures as 'critically insufficient', 'highly insufficient', 'insufficient', '2°C compatible', and '1.5°C Paris Agreement compatible'. None of the respondent States in *Agostinho* is currently found to be acting compatibly with the 1.5°C Paris target, and most of the respondent States' climate action is deemed at best 'insufficient'. While it is not for the ECtHR to second-guess every detail of States' climate change mitigation measures, it remains possible for the Court to find that the enduring failure of the respondent States (along with many others globally) to set up and implement a bundle of measures that are objectively assessed as being at least effectively *capable* of averting climate catastrophe is a failure to fulfil their positive obligations.

An additional, and crucial, parameter of States' positive obligations is the requirement that they be discharged without discrimination.[160] The profound intergenerational injustice underlying State (in)action in respect of climate change can implicate the prohibition on discrimination under Article 14 ECHR, which provides that the enjoyment of rights set out in the ECHR is to be secured without discrimination. With climate change already impacting most profoundly on vulnerable and marginalised people, the discriminatory dimensions of State (in)action in the face of climate catastrophe are manifold. The main argument in *Agostinho*, however, and the one I am focusing on here, relates to the differential impact of climate change across generations (age falls within the category of 'other status' under Article 14 ECHR[161]). It is well established that climate change disproportionately affects children and young people,[162] and that younger – and future – generations are going to face largely worse climate change impacts for a greater proportion of their lives than older generations, particularly following the crossing of irreversible

[156] *Urgenda* (n **Error! Bookmark not defined.**) paras 5.7.1 – 5.8.
[157] Gerry Liston, 'Enhancing the Efficacy of Climate Change Litigation: How to Resolve the "fair share question" in the Context of International Human Rights Law' (2020) 9(2) *Cambridge International Law Journal* 241.
[158] Climate Action Tracker, 'About', https://climateactiontracker.org/about, accessed 8 October 2021.
[159] Climate Action Tracker, 'Fair Share', https://climateactiontracker.org/methodology/cat-rating-methodology/fair-share/, accessed 8 October 2021.
[160] On the requirement to discharge positive obligations without discrimination, see J-F Akandji-Kombe, *Positive obligations under the European Convention on Human Rights: A guide to the implementation of the European Convention on Human Rights* (Council of Europe 2007) 58.
[161] *Schwizgebel v Switzerland* App no 25762/07 (ECtHR, 10 June 2010).
[162] See UNICEF, *Unless We Act Now: The Impact of Climate Change on Children* (2015).

climate tipping points.[163] Moreover, as long as States delay taking the urgent action needed to prevent the most catastrophic climate scenarios, the burden for younger – and future – generations grows exponentially: the more time passes, the more drastic the measures required to avert the worst climate outcomes will become, and the more detrimental their impact will be on those who have to endure them. The latter issue was at the heart of a recent judgment of the German Federal Constitutional Court, which found Germany's legislation on climate change did not sufficiently specify plans to reduce greenhouse gas emissions from 2031.[164] The intergenerational injustice involved is deepened by the disenfranchisement and lack of meaningful agency that children in particular often experience on a matter so central to their life, livelihood and bodily and mental integrity, and by the hopelessness and sense of betrayal they often feel in view of the relative passivity of the authorities in the face of (impending) climate catastrophe.[165]

The ECtHR has found violations of Article 14 ECHR, in conjunction with Article 3 ECHR, in circumstances where discrimination – or 'large-scale structural bias'[166] – could be attached to shortcomings in protective measures,[167] or where the ill-treatment's (suspected) discriminatory motive had been inadequately investigated.[168] ECtHR case law establishes that repeated and/or systemic failure or refusal to protect members of an already vulnerable or marginalised group from inhumanity or degradation amounts to discrimination. In particular, the Court has found that systemic failure to take adequate measures – including by legislative, operational, and investigative means – to protect (potential) victims of domestic abuse, which impacts disproportionately upon women, contradicts the State's responsibility to uphold gender equality, and thus violates Article 14 in conjunction with Article 3 ECHR. It has emphasised that attitudes of disregard, passivity or unresponsiveness towards, as well as practices of downplaying, complaints of domestic abuse amount to discrimination.[169] At the same time, the Court has also made clear that the systemic failure to protect women against domestic violence – including through failure to fully appreciate the seriousness and extent of the problem of domestic violence and its discriminatory effect on women[170] – breaches their right to equal protection of the law even if it is *not* intentional.[171] These elements of ECtHR doctrine are transposable to the climate change context, particularly as concerns the situation faced by children and young adults,

[163] Institute of Development Studies, *Climate Change, Child Rights and Intergenerational Justice* (2009)
[164] *Neubauer et al v Germany* 1 BvR 2656/18, 1 BvR 288/20, 1 BvR 96/20, 1 BvR 78/20.
[165] Hickman et al, 'Young People's Voices on Climate Anxiety' (n 66).
[166] *Volodina* (n 54) para 114.
[167] See, for example, the domestic violence cases of *Opuz* (n 138) paras 177–202; *Talpis v Italy* App no 41237/14 (ECtHR, 2 March 2017), paras 133–49; *Volodina* (n 54) paras 103–33; see also the Court's findings in respect of a religiously motivated attack in *Members of the Gldani Congregation of Jehovah's Witnesses v Georgia* (2008) 46 EHRR 30, paras 138–42.
[168] See, for example, *Petropoulou-Tsakiris v* Greece (2009) 48 EHRR 47, paras 56–66; *Škorjanec v Croatia* (2018) 66 EHRR 14, paras 50–72.
[169] See, for example, *Munteanu v Moldova* App No 34168/11 (ECtHR, 26 May 2020); *Volodina* (n 54); *Eremia v Moldova* (2014) 58 EHRR 2.
[170] *Eremia v Moldova* (2014) 58 EHRR 2, para 89; *Mudric v Moldova* App No 74839/10 (ECtHR, 16 July 2013), para 63; *Opuz* (n 138) para 191.
[171] *Eremia v Moldova* (2014) 58 EHRR 2, para 85; *Opuz* (n 138) para 191.

who are and will be disproportionately impacted upon by anthropogenic climate change. Finally, another key element of the Court's case law on this matter is its clear denunciation of practices that place the responsibility on victims themselves to deal with the dangerous situation in which they find themselves, for example by placating the person harming them.[172] This is particularly significant given a tendency to place the onus of climate mitigation measures on individuals as citizens and consumers.[173]

The ECtHR has made it clear that 'once an applicant has shown that there has been a difference in treatment it is then for the respondent Government to show that that difference in treatment could be justified'.[174] In the context of domestic violence, the Court has indicated that 'if it has been established that it affects women disproportionately, the burden shifts onto the Government to demonstrate what kind of remedial measures the domestic authorities have deployed to redress the disadvantage associated with gender and to ensure that women can exercise and fully enjoy all human rights and freedoms on an equal footing with men'.[175] If such an approach is applied to climate change, it falls to States to demonstrate that they have taken adequate remedial measures to redress the disadvantages faced by children and young people such as the applicants in *Agostinho* through States' (in)action on climate change, and to ensure that they can fully enjoy their human rights on an equal footing with preceding generations. Given the insufficient – often critically insufficient – measures they have so far undertaken to stem climate change, it is difficult for States such as the respondents in *Agostinho* to demonstrate this.

B. Violation of the negative obligation through State policies and practices

The negative obligation under Article 3 ECHR requires States to refrain from subjecting persons to torture or to inhuman or degrading treatment or punishment. In the context of climate change, the negative obligation may be taken to be engaged because States are taking action that is causing and/or compounding circumstances incompatible with Article 3 ECHR.

There is a body of case law establishing States' responsibility for creating and maintaining diffuse systems and structures that inflict inhumanity or degradation, such as inhuman or degrading prison conditions[176] or systemically degrading reception conditions for asylum-seekers,[177] as well as legal regimes that inflict dehumanisation, such as a legal regime extinguishing life-imprisoned persons' hope of release.[178] Anthropogenic climate change

[172] *Munteanu v Moldova* App No 34168/11 (ECtHR, 26 May 2020), paras 78-83.
[173] Morten Fibieger Byskov, 'Climate change: focusing on how individuals can help is very convenient for corporations', *The Conversation*, 10 January 2019.
[174] *Volodina* (n 54) para 111. See also *DH and others v Czech Republic* App No 57325/00 (ECtHR, 13 November 2007), paras 188-189.
[175] *Volodina* (n 54) para 111.
[176] See, for example, *Peers v Greece* (2001) 33 EHRR 51.
[177] *MSS* (n 53).
[178] *Vinter* (n 76).

is being caused and/or significantly compounded by the laws, policies and practices of States including the respondents in *Agostinho*. The distress and harm experienced by persons such as the applicants stems in large part from States' actions and attitudes in relation to climate change, including actions that individually and collectively contribute to maintaining and exacerbating the phenomenon, as well as attitudes of indifference or callousness that deepen the anguish and despair experienced in respect of it. Accordingly, there is scope for arguing that, through some of their policies and practices, States are subjecting persons like the applicants in *Agostinho* to ill-treatment. Such a finding would necessitate that States cease to undertake the actions at issue, as continuing to pursue them would be conclusively unlawful, in light of Article 3's absolute character.

C. The future is a foreign country: how States are subjecting (children and young) people to a real risk of torture, inhumanity, and degradation

We are on the brink of tipping points that lead to a world in which extreme climate phenomena will expose people to unprecedented devastation. The most recent report of the Intergovernmental Panel on Climate Change (IPCC) corroborates David Attenborough's warnings, with which this article began, in its identification of the likely outcomes of current and projected State (in)action on climate change. The 'climate futures' predicted in the report encompass both more intense and more frequent 'hot temperature extremes', 'extreme precipitation events', and 'agricultural and ecological drought events' likely to inflict grave suffering and deprivation all over the world.[179] This is the future that younger and future generations are being propelled to. Children and young people such as the applicants in *Agostinho* are facing a real risk that is rapidly hardening into a certain prospect of widespread, grave, and far-reaching harm. Effectively averting or mitigating such a future is ultimately not in the hands of individuals like the applicants but in the hands of the State authorities that regulate our societies.

Given the very real risks of grave harm faced by today's youth, it is appropriate to revisit the principle underpinning States' *non-refoulement* duty under the ECHR. The absolute prohibition on removing a person or persons to a place where they face a real risk of torture or inhuman or degrading treatment or punishment is well established in the ECtHR's Article 3 ECHR doctrine.[180] The prohibition on *refoulement* is, however, arguably an instantiation of a broader principle: that a State must not (knowingly[181]) place someone at real risk of torture or inhuman or degrading treatment or punishment,[182] or, more broadly, irreparable harm.[183] The idea of bringing this principle to bear on the circumstances of

[179] IPCC, *Climate Change 2021: The Physical Science Basis* (2021).
[180] See, for example, *Chahal v UK* (1997) 23 EHRR 413, paras 79-80.
[181] This includes constructive knowledge. See, further, *Torture, Inhumanity and Degradation* (n 14) chapter 7.
[182] See, for example, *Salah Sheekh v Netherlands* (2007) 45 EHRR 50, para 136. See the analysis in Mavronicola, *Torture, Inhumanity and Degradation* (n 14) chapter 7.
[183] The ECtHR premised its intervention in *Soering v UK* on the 'irreparable nature' of the suffering at issue: *Soering* (n 74) para 90; on the use of the concept of 'irreparable harm' in *non-refoulement* by other international human rights

children and young people such as the applicants in *Agostinho* may appear dubious, but the wrong at issue is meaningfully analogous in three key respects: first, the real risk of irreparable harm falling within the purview of Article 3 ECHR; second, the subjection by States of effectively powerless persons to this real risk; and third, the fact that it is State authorities' *current* (in)actions that are subjecting persons to this future risk. It is these three elements that have – rightly – driven the ECtHR to intervene in *refoulement* cases, and to do so before the risk actually materialises.

In its decision on whether to establish the principle that removing persons to places where they face a real risk of torture or inhuman or degrading treatment is prohibited under Article 3 ECHR, the ECtHR was faced with the question of whether it would be appropriate for it to pronounce, and intervene, on potential or prospective violations of the Convention. The ECtHR's reasoned basis for finding that it was appropriate – indeed, imperative – for it to do so was that such an intervention was the only way to provide effective protection from irreparable harm:

> It is not normally for the Convention institutions to pronounce on the existence or otherwise of potential violations of the Convention. However, where an applicant claims that a decision to extradite him would, if implemented, be contrary to Article 3 by reason of its foreseeable consequences in the requesting country, a departure from this principle is necessary, in view of the serious and irreparable nature of the alleged suffering risked, in order to ensure the effectiveness of the safeguard provided by that Article.[184]

This rationale has led the Court to establish that 'where substantial grounds have been shown for believing that the person concerned faces a real risk of being subjected to torture or inhuman or degrading treatment or punishment in the receiving country', Article 3 entails an obligation not to remove that person to that country.[185] Moreover, the ECtHR has made clear that 'the importance which the Court attaches to art.3 of the Convention and the irreversible nature of the damage which may result if the risk of torture or ill-treatment materialises' necessitate a prompt response effectively capable of averting the irreversible damage being faced. [186]

A situation which, although factually distinct, is meaningfully analogous in terms of principle also warrants a pre-emptive intervention. The prospective crossing of irreversible tipping points means that States contributing to climate change are similarly subjecting children and young people to real risks of irreparable harm. Recall that what they are facing includes risks of serious harm through extreme weather events, natural disasters, infectious

bodies, see Başak Çalı, Cathryn Costello and Stewart Cunningham, 'Hard Protection through Soft Courts? Non-Refoulement before the United Nations Treaty Bodies' (2020) 21(3) *German Law Journal* 355.

[184] *Soering* (n 74) para 90 (emphasis added).

[185] *MSS* (n 53) para 365.

[186] *MSS* (n 53) para 293 (citations omitted).

diseases and other 'sudden-onset' impacts of climate change, as well as the prospect of escalating physical and mental suffering arising out of 'slow-onset' impacts of climate change such as increased heat, drought, sea-level rise, water scarcity, food insecurity and air pollution, and, ultimately, the likelihood of widespread loss of life, violence, conflict and displacement in an increasingly inhospitable planet. The future is a foreign country, one might say: a dystopian place to which younger generations are currently being propelled through the collective (in)actions of those with the power to shape the course of the climate crisis.

Importantly, the ubiquity of a threat does not dilute the State's responsibility. As the Court clarified in *MSS*, '[the] fact that a large number of asylum seekers in Greece find themselves in the same situation as the applicant does not make the risk concerned any less individual where it is sufficiently real and probable'.[187] It is the reality of the danger, rather than its uniqueness, that is key to the question of whether individuals face a real risk – and are thereby a potential victim[188] – of inhumanity or degradation.

4. CONCLUSION

At the moment of writing, the ECHR does not contain express provisions relating to environmental protection or climate action. Accordingly, the outcomes of climate litigation before the ECtHR hinge on whether the Court establishes that State (in)actions on climate change violate existing Convention rights.[189] This paper attempts to address this question with specific focus on Article 3 ECHR. Within the space available, I have sought to sketch out a principled basis for considering State (in)action on climate change to be contrary to the right not to be subjected to torture or to inhuman or degrading treatment. While other international legal norms may be relevant to concretising the demands of Article 3 in this context – as in others[190] – the arguments offered here are focused on and grounded in Article 3 jurisprudence.

What would be the significance of a finding that State (in)action on climate change violates Article 3 ECHR? It is important to ask the 'so what' question – after all, the applicants in *Agostinho* did not consider it necessary to make a complaint under Article 3 ECHR, relying instead on two of the rights more typically invoked in environmental contexts,[191] the right to life and the right to private and family life, under Articles 2 and 8 ECHR respectively. Nonetheless, recognising the applicability of the right not to be subjected to torture or

[187] *MSS* (n 53) para 359.
[188] On the 'potential victim' status of applicants in climate change-related human rights litigation, see Keller and Heri (n 12) 155-158.
[189] Tim Eicke, 'Climate Change and the Convention: Beyond Admissibility' (2022) 3(1) *European Convention on Human Rights Law Review* 8, 13.
[190] See, for example, *Vinter* (n 76) paras 59-81, where the Grand Chamber examined both international and national norms surrounding life imprisonment; see also *Volodina* (n 54) paras 51-59.
[191] See European Court of Human Rights Press Unit, 'Environment and the European Convention on Human Rights' Factsheet, July 2022, available at: https://www.echr.coe.int/documents/fs_environment_eng.pdf.

inhuman or degrading treatment in the context of climate change would be significant in a number of ways. First, such recognition would have substantial expressive significance, in establishing that State (in)action on climate change amounts to a denial of human dignity, which is at the heart of human rights. Second, in concrete terms, Article 3 carries a wider and stronger imperative than Articles 2 and 8 – wider than Article 2 in that it goes beyond (risks of) loss of life to encompass threats and harms to bodily and mental integrity, and stronger than Article 8 in that it implicates an absolute, as opposed to a qualified, right. The absolute character of the right means that States bear unqualified, non-displaceable obligations to take the necessary actions that are within their power to avert the real risk – indeed, the very concrete prospect – of irreparable harm to which they are currently subjecting younger generations. In an area where State action seems infinitely negotiable in spite of the gravity of what is at stake, the application of an absolute right could be significant and potentially transformative.

More fundamentally, the recognition of State (in)action on climate change as implicating the right against inhuman and degrading treatment is about nothing less than that: recognition of the ultimately abusive character of governmental equivocation, callous indifference, or active contribution towards the single most pressing threat to the life and dignity of children and young people. The full scope of the climate catastrophe being unleashed upon younger generations is becoming clearer every day. Not only is this future less and less obscure and distant, but it is being shaped today, by the governments of today. The *Agostinho* case before the ECtHR offers an opportunity for this to be recognised and acted upon as a violation of one of the most fundamental rights in the here and now.