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The EU's Attitude towards the ECHR's System in Light of the EU's Climate Ambition²

Despite several attempts to access the European Convention on Human Rights (ECHR), the EU is still not a Party to the Convention. However, this does not mean there is no interaction between the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU). This article will analyse this interaction in cases related to environmental issues, primarily from the EU's perspective. This objective includes the examination of the Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland case where the so-called 'Bosphorus criteria' was declared according to which the EU law should provide the same level of protection of human rights as the ECHR in environmental protection. Furthermore, the article considers the EU's ambitious climate goals and commitment to the Paris Agreement, the Carvalho and Others v. European Union case and the third-party intervention of the European Commission in the Duarte Agostinho and Others v. Portugal and Others case before the ECtHR.

Keywords: European Court of Human Rights, Court of Justice of the European Union, environmental cases, Paris Agreement, the EU's climate targets

Introduction

There are two determining regional entities in Europe, the Council of Europe (CoE) and the European Union (EU), which are linked by several aspects. One prominent form of this connection is the field of human rights and the related case law, which considers the interaction between the courts of the two organisations, the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU). This field also includes environmental rights cases before the two Courts.

This article examines the possibilities of human rights protection within the EU, including the introduction of the ECtHR's approach to this, which is decisively shaped by the Bosphorus presumption developed by the ECtHR. Then we will continue the analysis

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with a particular emphasis on the environmental rights cases, which also involves a brief outlook on declaring the right to a healthy environment.

Finally, the article focuses on the human rights approach to climate cases, particularly the Duarte Agostinho and Others v. Portugal and Others case³ before the ECtHR, which not only questions the Member States' related obligations but the EU's – now highly prioritised – climate ambitions. Furthermore, the case of the Portuguese youth directly or indirectly considers all the areas mentioned above that define the relationship between the EU and the Council of Europe in human and environmental rights.

Human rights within the EU

From case law to recognition in the primary law

Initially, the Community concerned the human rights through the CJEU's case law, as Takis Tridimas highlights. However, this tendency changed when the TEU referred directly to human rights. He also points out that realising the importance of fundamental freedoms and human rights emerged around the millennium within the EU as essential components of transparency, accountability and legitimacy. This realisation was undoubtedly motivated by the commitment of the universal international law to protecting human rights.⁴

In the *Stauder v. Stadt Ulm* case⁵ in 1969, the CJEU declared that fundamental human rights are part of the Community's general principles for the first time.⁶ Shortly after, in 1970, the Court repeatedly confirmed in the *Internationale Handelsgesellschaft*⁷ that the general principles of Community Law include protecting fundamental human rights inspired by the Member States' constitutional traditions.⁸ Tridimas emphasises that the constitutional traditions serve in this light only as inspiration and the expression of the shared values' significance, but the protection of human rights should be provided within the Community's legal framework.⁹

In 1974, the CJEU expressed in the *Nold* case¹⁰ that fundamental rights are integral to the general principles, and the national constitutional traditions shall inspire the CJEU while safeguarding the rights and cannot uphold measures incompatible with this. Moreover, international human rights treaties – which are the results of the Member

³ Duarte Agostinho and Others v. Portugal and Others (communicated case) – 39371/20 (hereinafter: the Portuguese Youth Case).

⁴ TRIDIMAS 2006: 298–299.

⁵ CJEU, C-29/69, *Stauder v. Stadt Ulm*. Judgment of the Court of 12 November 1969 (hereinafter: *Stauder* case).

⁶ *Stauder* case. Grounds of judgment, para 7. 424.

⁷ CJEU, C-11/70, *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*. Reference for a preliminary ruling: *Verwaltungsgericht Frankfurt am Main – Germany*. Judgment of the Court of 17 December 1970 (hereinafter: *Internationale Handelsgesellschaft* case).

⁸ *Internationale Handelsgesellschaft* case, para 4.

⁹ TRIDIMAS 2006: 302.

¹⁰ CJEU, C-4/73, *J. Nold, Kohlen- und Baustoffgroßhandlung v. Commission of the European Communities*. Judgment of the Court of 14 May 1974 (hereinafter: *Nold* case).



States' collaborations or in which they are signatories – serve as guidelines within the framework of Community Law.¹¹ After the Nold decision, the European Parliament, the Council and the European Commission adopted a joint declaration in which they ensured their commitment to protecting human rights and added that this could be derived from the Member States' constitutional traditions and the ECHR. Therefore, the three institutions called for accession to the ECHR.¹² In the *Liselotte Hauer v. Land Rheinland-Pfalz* case,¹³ the CJEU reaffirmed the approach to international human rights treaties developed in the Nold case.

The Single European Act¹⁴ reflected on human rights in its Preamble with direct reference to the ECHR and the United Nations framework. The Treaty of Maastricht¹⁵ stated in Article F that the EU should respect human rights as guaranteed in the ECHR and consider that they are part of the general principles motivated by constitutional traditions. The Treaty of Amsterdam¹⁶ replaced this provision by the reference that the EU is founded on “the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States”. The Treaty of Nice¹⁷ introduced in Article 181a the requirement that during the economic, financial and technical cooperation with third countries, the EU's policy should contribute to – among others – the promotion of human rights. After the adoption of the Lisbon Treaty, Article 2 of the TEU listed the respect for human rights as one of the Union's values the realisation of which is part of the EU's main objectives according to Article 3(1) that are also prioritised in the EU's external relations, in light of Article 3(5). Moreover, Article 7(3) allows the Council to suspend the Member States' rights in case of a severe and persistent breach of the EU's values.

The European Council indicated the idea of the EU Charter of Fundamental Rights¹⁸ in 1999 to promote human rights, considering the ECHR, the Member States' constitutional traditions and the CJEU's case law. In 2000, the European Parliament, the Council and the Commission declared the Charter, followed by an attempt to incorporate it into the draft constitution of Europe, which failed because of the negative French and Dutch referenda. Finally, the Charter came into force by adopting the Treaty of Lisbon.¹⁹ According to Article 51 of the Charter, it is only addressed to the EU institutions, bodies, offices and agencies, and the Member States only in case of the EU law's implementation.

¹¹ Nold case, para 13.

¹² Joint Declaration by the European Parliament, the Council and the Commission, adopted on 5 April 1977.

¹³ CJEU, C-44/79, *Liselotte Hauer v. Land Rheinland-Pfalz*. Judgment of the Court of 13 December 1979.

¹⁴ Single European Act. *Official Journal of the European Communities*, L 169, 29 June 1987.

¹⁵ European Union, Treaty on European Union (Consolidated Version), Treaty of Maastricht, 7 February 1992. *Official Journal of the European Communities*, C 325/5, 24 December 2002.

¹⁶ European Union, Council of the European Union, Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Related Acts, 10 November 1997.

¹⁷ European Union, Treaty of Nice, Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, 11 December 2000. *Official Journal of the European Communities*, C 80 of 10 March 2001, 2001/C 80/01.

¹⁸ European Union, Charter of Fundamental Rights of the European Union, 26 October 2012, 2012/C 326/02.

¹⁹ FRIEDERY-HORVÁTHY 2018: 248–249; CRAIG – DE BÚRCA 2015: 394–400.



Sir Nicolas Bratza highlights two aspects of how the relationship between the Charter and the ECtHR can manifest. First, the Charter can serve as a *source of inspiration* for the ECtHR's inspiration, just like it happened in the *Schalk and Kopf v. Austria* case.²⁰ Moreover, in particular cases, like in *Christin Goodwin v. the United Kingdom*,²¹ the ECtHR based its departure from the settled case law on the Charter as a reference point.²²

In light of the EU's approach to human rights, the EU's possible accession to the European Convention on Human Rights (ECHR) is also noteworthy. The aspiration started in 1979 when the European Commission issued a memorandum on the possible accession to adequately protect human rights and fundamental freedoms with the aid of the developed mechanism of the ECHR's implementation.²³ The Council requested an opinion from the CJEU in 1994 on accessibility; in *Opinion 2/94*,²⁴ the Court pointed out that there is no legal basis under the Treaties to the accession. After adopting the Treaty of Lisbon,²⁵ the possibility of the accession gained legally binding force as Article 6 (2) of the Treaty on European Union (TEU)²⁶ declared that the EU shall accede to the ECHR, which shall not affect the EU's competencies. In light of this provision and Article 218 of the Treaty on the Functioning of the European Union (TFEU)²⁷ that identifies how the EU's international agreements should be negotiated and adopted, in 2013, a Draft Accession Agreement²⁸ was concluded.²⁹ According to Kristi Raba, the accession is significant because if the violation occurs related to powers transformed to the EU, it cannot be brought before the ECtHR without the accession that could enhance transparency and accountability of the EU and strengthen the judicial interaction between the two courts.³⁰

Despite the possible advantages of the accession,³¹ the CJEU found its opinion 2/13³² that the draft agreement was not compatible with the EU law as – among others – it

²⁰ ECtHR, *Schalk and Kopf v. Austria*, no. 30141/04, 24 June 2010.

²¹ ECtHR, *Christin Goodwin v. the United Kingdom*, no. 28957/95, 11 July 2002.

²² BRATZA 2013: 171–172.

²³ The Commission of the European Communities' memorandum on the accession of the European communities to the Convention for the Protection of Human Rights and Fundamental Freedoms. 1–2.

²⁴ Court of Justice of the European Union, *Opinion 2/94*. ECR I-1795, 28 March 1996 (hereinafter: *Opinion 2/94*).

²⁵ European Union, Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, 13 December 2007, 2007/C 306/01.

²⁶ European Union, Consolidated version of the Treaty on European Union, 13 December 2007, 2008/C 115/01 (hereinafter: TEU).

²⁷ European Union, Consolidated version of the Treaty on the Functioning of the European Union, 26 October 2012, OJ L. 326/47-326/390 (hereinafter: TFEU).

²⁸ Draft Accession Agreement of the EU to the ECHR between the 47 Member States of the Council of Europe and the EU, finalised on 5 April 2013.

²⁹ For further reading of the negotiations see CRAIG – DE BÚRCA 2015: 419–422.

³⁰ RABA 2013: 559–560.

³¹ Advocate General Juliane Kokott highlighted in her general opinion that the EU would have the possibility to participate in proceedings as co-respondents; therefore, these would be informed about the cases, and these requests would not be subjected to any plausibility assessment by the ECtHR. According to Advocate General Kokott, this practice is in line with international law and EU law and does not compromise the CJEU's role in interpreting the EU law. See *View of Advocate General Kokott delivered on 13 June 2014 to Opinion procedure 2/13*. ECLI:EU:C:2014:2475.

³² Court of Justice of the European Union, *Opinion 2/13*. ECLI:EU:C:2014:2454, 18 December 2014 (hereinafter: *Opinion 2/13*).



could adversely affect the autonomy, and specific characteristics of EU law,³³ the advisory opinions³⁴ by the ECtHR can circumvent the preliminary ruling procedure,³⁵ and compromise the CJEU's exclusive interpretation of the secondary EU law.³⁶

With this opinion, the CJEU did stand against the intention of the Member States, the other EU institutions and the Council of Europe. Piet Eeckhout proposed in 2015 that the opinion could adversely affect the relationship of the two courts; furthermore, the CJEU compromised the EU legislators' aim manifested in Article 6 (2) of the TEU. Moreover, the CJEU was wrong when it anticipated undermining the autonomy of EU law because, according to the draft, the ECtHR could have examined the relationship between EU law and the Member States' national law, which is not involving the ECtHR would be placed above the CJEU.³⁷ Paul Craig and Gráinne de Búrca summarised the academic comments about Opinion 2/13. They concluded that most literature negatively evaluated it as a barrier to protecting human rights in Europe.³⁸ The accession is still an issue; in 2019, the President and the First Vice-President of the European Commission informed the Secretary General of the Council of Europe that the EU intended to continue the negotiations. At the time of writing this article, the negotiations are ongoing.³⁹

Therefore, it can be concluded that the legally binding recognition of human rights within the EU took a long time within the EU and at the beginning, the CJEU's case law developed it. However, the founding treaties and the Charter provide a legal basis for this area, and the EU's accession to the ECHR remains an open question.

The ECtHR's approach to the EU's human rights protection: The Bosphorus presumption

From the ECtHR's perspective, the *Bosphorus v. Ireland* case⁴⁰ laid down the determining principles that expressed its views on its relationship with the EU by developing the presumption of equivalent protection. The case resulted from the impounding of an aircraft leased by a Turkish airline company from Yugoslav Airlines by Irish authorities who were implementing EU law, namely Council Regulation (EEC) No 990/93⁴¹ that reflected the United Nations Security Council's decisions related to the civil war in the

³³ Opinion 2/13, paras 170–177.

³⁴ Council of Europe, Protocol No. 16 to the ECHR made the ECtHR's advisory opinion possible if the interpretation or application of the rights declared in it should be clarified (Protocol No. 16 to the Convention on the Protection of Human Rights and Fundamental Freedoms, 2 October 2013).

³⁵ Opinion 2/13, para 193.

³⁶ Opinion 2/13, para 246.

³⁷ EECKHOUT 2015: 989–992.

³⁸ CRAIG – DE BÚRCA 2015: 421–422.

³⁹ Council of Europe: EU Accession to the ECHR (www.coe.int/en/web/human-rights-intergovernmental-cooperation/accession-of-the-european-union-to-the-european-convention-on-human-rights).

⁴⁰ ECtHR, *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland*, no. 45036/98, 30 June 2005 (hereinafter: *Bosphorus v. Ireland* case).

⁴¹ Council Regulation (EEC) No. 990/93 of 26 April 1993 concerning trade between the European Economic Community and the Federal Republic of Yugoslavia (Serbia and Montenegro).



Federal Republic of Yugoslavia.⁴² It should also be mentioned that the CJEU examined the case before and found that fundamental rights, like freedom of property or pursuing a commercial activity, can be restricted by reaching the community's general interest.⁴³

By creating the so-called 'Bosphorus presumption', the ECtHR considered that behind the State's action was that its obligations came from its EU membership implementing the EU's general interests.⁴⁴ The Court reminded that it has already addressed that the Parties can transfer their powers to a supranational organisation like the EU. On the one hand, the organisation cannot be held responsible for the Party's alleged breach of the ECHR. However, on the other hand, the Contracting Parties are responsible for their acts or omissions to comply with the Convention.⁴⁵ Although this does not mean that the Parties are exempted from respecting and implementing the Convention, its actions are justified as long as they comply with the above-mentioned legal order. With this consideration, the Court developed the core of the presumption of equivalent or comparable protection,⁴⁶ which also involves that the States' particular activity should be derived from a non-discretionary implementation of EU law,⁴⁷ and all the supervisory mechanisms of the EU should be used.⁴⁸ The presumption can be rebutted if the protection of particular fundamental rights is deficient.⁴⁹

Shortly after the Bosphorus decision, Kathrin Kuhnert stated that it represented the age's political environment, where the EU has not acceded to the ECHR, and the Constitutional Treaty failed, which aimed to facilitate this accession. On the one hand, the ECtHR admitted that it is not competent to review the EU law, but on the other hand, it also expressed its role as the 'final arbiter' on European human rights issues. This two-sided situation also makes the EU's accession to the ECHR more urgent.⁵⁰ Tobias Lock points out that the Bosphorus case proves that the ECtHR stepped further from the traditional approach of international law that the Member States of international organisations cannot be found responsible for acts or omissions by the organisations as they do not share the same legal personality.⁵¹

As we have seen, the issue of human rights is highly complex in light of the relationship between the two European forums. However, there was and still is a political will to facilitate the EU's access to the ECHR. The CJEU's negative opinion – which can be considered the protection of its powers – delayed the accession. Nonetheless, the Bosphorus presumption and the following similar cases⁵² highlighted that: First, the ECtHR cannot pass to take into account EU law in particular cases. Second, the ECtHR presumes that if a Member State implements EU law, that cannot violate the ECHR as protecting human rights is one of the EU's general interests. Third, it acknowledged that it could examine

⁴² Bosphorus v. Ireland case, paras 11–24.

⁴³ CJEU, C-84/95, Judgment of the Court of 30 July 1996, paras 21–27.

⁴⁴ Bosphorus v. Ireland case, para 150.

⁴⁵ Bosphorus v. Ireland case, paras 152–154.

⁴⁶ Bosphorus v. Ireland case, para 155.

⁴⁷ Bosphorus v. Ireland case, para 157.

⁴⁸ Bosphorus v. Ireland case, paras 159–165.

⁴⁹ Bosphorus v. Ireland case, para 156.

⁵⁰ KUHNERT 2006: 188–189.

⁵¹ LOCK 2010: 544–545.

⁵² For cases similar to the Bosphorus v. Ireland case, see GERARDS 2018: 333–339.



the Member States' responsibility; therefore, the ECtHR expressed its significance in Europe's human rights issues. Nevertheless, the two forums' relationship manifests in other forms; in the following, we will examine this, particularly in the cases related to environmental rights.

Environmental rights cases and the recognition of the right to a healthy environment

Before observing the case law on environmental rights, it is essential to clarify what it means in this context. To this, we should examine the right to a healthy environment declaration in the first place. In its 2019 report, David R. Boyd, United Nations (UN) special rapporteur, revealed that more than a hundred states addressed the right to a healthy environment in their national constitution.⁵³ However, at the universal level, there was no direct recognition of the right till 2021, when the UN Human Rights Council declared it as an individual human right,⁵⁴ followed by a similar UN General Assembly resolution in 2022.⁵⁵ However, it shall be stressed that these resolutions are both legally non-binding. Before these milestone resolutions, universal international law only focused on the connection between human rights and the environment,⁵⁶ which led to the so-called "green interpretation" of other, already recognised human rights, like the right to life or health. The conclusion can be drawn that environmental rights are a broader category than the right to a healthy environment, despite their strong connections.⁵⁷

However, no legally binding universal international instrument addresses the right to a healthy environment, but in light of regional and national legislation, the right contains two main aspects: substantive and procedural. The latter is generally more accepted, according to the Aarhus Convention⁵⁸ and the Escazú Agreement⁵⁹ it is constituted by

⁵³ OHCHR, Good Practices on the Right to a Safe, Clean, Healthy and Sustainable Environment. David R. Boyd, Special Rapporteur on Human Rights and the Environment, 30 December 2019, A/HRC/43/53 (hereinafter: A/HRC/43/53).

⁵⁴ United Nations Human Rights Council resolution 48/13, The Human Right to a Clean, Healthy and Sustainable Environment, 8 October 2021.

⁵⁵ United Nations General Assembly resolution 76/300, The Human Right to a Clean, Healthy and Sustainable Environment, 26 July 2022, A/76/300.

⁵⁶ As it was recognised in the Stockholm Declarations Principle 1: "Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations" (Report of the United Nations Conference on the Human Environment, A/CONF.48/14/Rev.1, Stockholm, 5–16 June 1972, New York, United Nations, 1973).

⁵⁷ For the concept of 'greening the existing human rights' and the definition of environmental rights see WOLFE 2003: 45–58.

⁵⁸ Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, adopted in Aarhus, Denmark, 25 June 1998 (hereinafter: Aarhus Convention).

⁵⁹ Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean, adopted in Escazú, 4 March 2018 (hereinafter: Escazú Agreement).



‘three pillars’: the right to information, public participation in decision-making and access to justice in environmental matters. David R. Boyd identified the following elements that cover the substantive aspect of the right: clean air, a safe climate, healthy and sustainably produced food, access to safe water and adequate sanitation, a non-toxic environment, healthy ecosystems and biodiversity.⁶⁰

With this in mind, we should examine the environmental rights and the situation of the right to a healthy environment in the Council of Europe and the EU, focusing on the human rights perspective of environmental issues.

The right to a healthy environment within the Council of Europe’s system

While the ECtHR developed a coherent and detailed environmental case law, neither the ECHR, its additional protocols, nor other instruments of the Council of Europe include the human right to a healthy environment. Notably, the Parliamentary Assembly (PACE) had several attempts to incorporate the right in the Convention – which, understandably, from the time of its adoption, did not recognise the influence of environmental factors on human rights – with an additional protocol.

PACE recommendation 1614⁶¹ proposed the inclusion of the individual procedural environmental rights identified in the Aarhus Convention. The Committee of Ministers replied⁶² that the system indirectly contributes to environmental protection with the ECtHR’s related case law. The PACE also raised the issue in recommendation 1862⁶³ and recommended adding a new protocol to the Convention that declares the right to a healthy environment because the “concept of human rights” has evolved since the ECHR’s adoption.⁶⁴ The Committee of Ministers dismissed the idea again primarily based on the arguments explained earlier.⁶⁵

In 2021 the PACE adopted resolution 2396.⁶⁶ In this document, the PACE took a step further. It proposed an additional protocol addressing the right to a healthy

⁶⁰ A/HRC/43/53, 8–18.

⁶¹ Council of Europe, Parliamentary Assembly, Recommendation 1614, Environment and Human Rights. Text adopted by the Assembly on 27 June 2003 (24th Sitting).

⁶² Council of Europe, Committee of Ministers, Reply to PACE Recommendation 1614(2003). Adopted at the 869th meeting of the Ministers’ Deputies (21 January 2004).

⁶³ Council of Europe, Parliamentary Assembly, Recommendation 1862, Environmentally Induced Migration and Displacement: A 21st-Century Challenge. Text adopted by the Assembly on 30 January 2009 (9th Sitting).

⁶⁴ Ibid. Para 6.3.

⁶⁵ Council of Europe, Committee of Ministers, Joint Reply to Recommendations 1883(2009) and 1885(2009), adopted at the 1088th meeting of the Ministers’ Deputies on 16 June 2010 (third part-session).

⁶⁶ Council of Europe, Parliamentary Assembly, Resolution 2396(2021), Anchoring the Right to a Healthy Environment: Need for Enhanced Action by the Council of Europe. Text adopted by the Assembly on 29 September 2021 (27th Sitting).



environment to the ECHR and the revised European Social Charter.⁶⁷ In its answer for 2022,⁶⁸ the Committee of Ministers seemed to be slightly less negative about the proposals. First, the additional protocol to the ECHR referred again to the environmental case law but also informed the PACE that the Steering Committee for Human Rights will continue to work on the issue and prepare a study on the need for further instruments.⁶⁹ The Committee will take appropriate steps in light of this document. Second, related to the European Social Charter, the Committee of Ministers took into account that the European Committee for Social Rights has already expressed its support for the additional protocol and based on the work of the Ad hoc Working Party on improving the European Social Charter system, the Committee will examine the related – procedural and substantive – issues.⁷⁰

In this light, it can be concluded that – at the time of this paper's writing – no legally binding instrument declares the right to a healthy environment in the CoE's system. Nevertheless, despite the Committee of Ministers' rejections, the Parliamentary Assembly consistently keeps the issue on the agenda. This approach addresses the importance of the ECtHR's case law but does not accept that creative interpretation replaces direct recognition.

The right to a healthy environment in the EU

The EU's environmental law is based – among others – on the provisions of the TFEU. Article 11 sets the requirement of integrating environmental protection into other policies and actions, mainly promoting sustainable development. On the one hand, the EU has not recognised the right to a healthy environment. However, Article 191(1) of the TFEU declares that the EU's environmental policy should contribute to preserving, protecting and improving the environment's quality, protecting human rights, strengthening the prudent and rational use of natural resources, and promoting international measures dealing with regional and global environmental problems. Remarkably, the CJEU declared in the 'ADBHU' case⁷¹ in 1985 that the principle of freedom of trade is not absolute; it can be subject to particular limitations justified by the general interest objectives of the Community.⁷² It also clarified that the directive in question should be examined from the environmental protection perspective, which is 'one of the Community's essential objectives'.⁷³

Likewise, the ECHR, the European Social Charter, and the EU Charter of Fundamental Rights also exclude the right to a healthy environment by promoting environmental

⁶⁷ Council of Europe, European Social Charter (Revised), 3 May 1996, ETS 163.

⁶⁸ Council of Europe, Committee of Ministers, Reply to Recommendation 2211(2021), Anchoring the Right to a Healthy Environment: Need for Enhanced Action by the Council of Europe. Adopted at the 1444th meeting of the Ministers' Deputies on 27 September 2022 (fourth part-session).

⁶⁹ Ibid. Para 4.

⁷⁰ Ibid. Para 5.

⁷¹ CJEU, Case 240/28, Procureur de la République v. Association de défense des brûleurs d'huiles usagées (ADBHU). Judgment of the Court of 7 February 1985.

⁷² Ibid. Para 12.

⁷³ Ibid. Para 13.



protection in Article 37 instead of the individual right. The provision requires a high level of environmental protection and the integration of environmental quality improvement to other EU policies in line with the principle of sustainable development, but – even though the document itself is dedicated to particular human rights – there is no mention of environmental rights. Interestingly, similar to the PACE, the European Parliament also proposed the explicit recognition of the right to a healthy environment, in this case, by modifying Article 37 of the Charter.⁷⁴ We shall add that the Charter relies heavily on the provisions of the TFEU mentioned above.

Additionally, the EU secondary law has already addressed the procedural aspect of the right to a healthy environment which can be caused by the fact that besides all the Member States, the EU is a Party of the Aarhus Convention. In order to pursue its obligations under the Convention, the EU adopted several legally binding instruments primarily based on the two pillars of the Aarhus Convention, for example, the right to environmental information and the participation in environmental decision-making: Directive 2003/4/EC on public access to environmental information,⁷⁵ Directive 2003/35/EC on providing for public participation in respect of the drawing up of specific plans and programmes relating to the environment and amending with regard to public participation and access to justice,⁷⁶ Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment,⁷⁷ Directive 2014/52/EU amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment.⁷⁸ However, the third pillar – access to justice in environmental matters – seems missing; although the Commission proposed a directive on the issue in 2003,⁷⁹ it withdrew in 2014.⁸⁰

Overview of the two Courts' environmental rights cases

As can be seen, neither the ECHR nor the European Social Charter or other relevant instruments declared the right to a healthy environment or at least directly connected the environmental factors to human rights issues. We shall remark that this tendency

⁷⁴ European Parliament resolution of 9 June 2021 on the EU Biodiversity Strategy for 2030, Bringing nature back into our lives [2020/2273(INI)], para 143.

⁷⁵ Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC. OJ L 41/26.

⁷⁶ Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 provides for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice OJ L 156/17.

⁷⁷ Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment Text with BEA relevance OJ L 26, 28.1.2012. 1–21.

⁷⁸ Directive 2014/52/EU of the European Parliament and of the Council of 16 April 2014 amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment, OJ L 124, 25.4.2014. 1–18.

⁷⁹ Commission, Commission Proposal for a Directive of the European Parliament and the Council on Access to Justice in Environmental Matters, COM (2003) 624 final.

⁸⁰ Official Journal of the European Union, C 153, 21 May 2014.



fits into the approach of universal international law. Nevertheless, the ECtHR succeeded in taking into account the environmental causes behind the possible breach of the ECHR and developed a comprehensive environmental case law without a particular environmental provision. This comes from the Court's 'evolutive interpretation', introduced in the *Tyrer v. United Kingdom* case,⁸¹ where the ECtHR called the Convention a 'living instrument' that requires its interpretation in the light of present days.

Environmental cases before the ECtHR

Two determining Articles of the Convention are generally invoked in the most influencing environmental cases. First is Article 8, which protects the right to respect private and family life.⁸² In the *López Ostra v. Spain* case,⁸³ the ECtHR declared that the environmental interference with the persons' homes and, therefore, the quality of life, so the states are required to take positive measures to prevent the violation of rights. In the *Guerra and others v. Italy* case,⁸⁴ the Court relayed its considerations of the *López Ostra* case and acknowledged that the states have a margin of appreciation for creating a fair balance between the interest of the individuals and a community that shall be examined case-by-case. The *Moreno Gomez v. Spain* case⁸⁵ revealed what the term 'home' covers in this context, a physical place where private and family life can develop and which can be violated by concrete and physical actions – like unauthorised entry – and by other factors like noise, emissions, smells and other interference. The ECtHR explained in the *Fadeyeva v. Russia*⁸⁶ case that the harmful interference should directly affect the applicants' home and reach a certain severity. The *Tătar v. Romania*⁸⁷ judgment firmly focused on procedural environmental rights as the states are obliged to provide adequate information about the potential effect of particular facilities on their life, health and the environment, the precautionary measures, and the plan in case of emergency. The states should also facilitate participation in environmental decision-making and access to justice in environmental cases.

Not all environmental complaints based on Article 8 led to success; in the *Hatton v. United Kingdom* case,⁸⁸ the Court found that the state created a fair balance between the individuals' and the community's interests. The applicants claimed that the noise

⁸¹ ECtHR, *Tyrer v. The United Kingdom* no. 5856/72, 15 March 1978.

⁸² ECHR Article 8, The right to respect for private and family life: "1. Everyone has the right to respect for his private and family life, his home and his correspondence; 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

⁸³ ECtHR, *López Ostra v. Spain* no. 16798/90, 9 December 1994.

⁸⁴ ECtHR, *Guerra and others v. Italy* no. 116/1996/735/932, 19 February 1998.

⁸⁵ ECtHR, *Moreno Gómez v. Spain* no. 4143/02, 16 November 2004.

⁸⁶ ECtHR, *Fadeyeva v. Russia* no. 55723/00, 9 June 2005.

⁸⁷ ECtHR, *Tătar v. Romania* no. 67021/01, 27 January 2009.

⁸⁸ ECtHR, *Hatton and others v. the United Kingdom* no. 36022/97, 8 July 2003.



pollution from the night traffic of Heathrow Airport seriously affects their home and family life. However, according to the ECtHR, an international airport represents a major national interest, and the state's measures were appropriate to protect the individuals and serve this national interest.

Article 2 on the right to life is the other significant provision in this light.⁸⁹ The *Öneryıldız v. Turkey*⁹⁰ case highlighted that the right to life could be violated by environmental causes too; thus, the fulfilment of the right to life greatly depends on the conditions of the facilities that inherently carry a potential risk, like landfills. The states, therefore, have positive and negative obligations to protect the individuals' life. This was stressed in the *Budayeva and others v. Russia*⁹¹ case, where the Court emphasised the importance of environmental planning.

Besides Articles 2 and 8, other provisions were also invoked in environmental cases; for example, in the *Rovshan Hajiyev v. Azerbaijan* case,⁹² the Court found the violation of Article 10, freedom of expression, as the applicant – a journalist – required environmental information, and the state did not provide it. The Court clarified that the judgment is not based on the right to information because there is no such provision in the ECHR. However, without adequate environmental information, the rights derived from the freedom of expression cannot be effectively exercised.

To sum up the ECtHR's environmental case law, it can be concluded that the Court also realises the green interpretation of the already addressed human rights, like the right to home and family life or the right to life. On the one hand, the ECtHR's creative interpretation technique is essential to actualise a document adopted in 1950. Kanstantsin Dzehtsiarou points out that this interpretation technique also helps to clarify the Convention's vague and generally worded provisions. Mariana T. Acevedo adds that the states' margin of appreciation constrains the excision of the Court's powers.⁹³ On the other hand, the explicit recognition of the right to a healthy environment could, even more, emphasise the role of environmental factors in the enjoyment of human rights and could represent a broader protection scope, as Gyula Bándi expresses, the Convention without the right to a healthy environment protects individual rights of today's generation, but the possible declaration could stretch this.⁹⁴

⁸⁹ ECHR Article 2, The right to life: "1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law; 2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary: (a) in defence of any person from unlawful violence; (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; (c) in action lawfully taken for the purpose of quelling a riot or insurrection."

⁹⁰ ECtHR, *Öneryıldız v. Turkey* no. 48939/99, 30 November 2004.

⁹¹ ECtHR, *Budayeva and others v. Russia* nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, 20 March 2008.

⁹² ECtHR, *Rovshan Hajiyev v. Azerbaijan* nos. 19925/12 and 47532/13, 9 March 2022.

⁹³ ACEVEDO 2000: 447–448.

⁹⁴ BÁNDI 2021: 203.



Environmental rights cases before the CJEU

When discussing the environmental cases before the ECtHR, it is straightforward that this only concerns human rights cases, as the whole system of the ECHR is based on its protections. However, in case of the EU, we can distinguish between cases related to the EU's environmental legislation without particular mention of human rights⁹⁵ and cases that concern human rights aspects related to environmental issues. The examination of the first type would overstretch the objectives of this article, and therefore, in the following, we are focusing on the latter category of cases, which are most associated with procedural environmental rights.

In the *Flachglas Torgau GmbH* case,⁹⁶ the CJEU examined the alleged breach of Directive 2003/4 and concluded that the instruments aimed to ensure that natural or legal persons of the Member States could access environmental information – the CJEU uses the expression “right of access to environmental information” – that are possessed by or on behalf of public authorities without the need to prove the applicants’ interests. The Court also pointed out that this obligation remains if the requested information meets Article 2(1) requirements of the Directive.⁹⁷ The CJEU also adds that public authorities are obliged to make environmental information progressively available to the public.⁹⁸

The CJEU primarily focused on implementing the Aarhus Convention in the *Marie-Noëlle Solvay and Others v. Région wallonne* case,⁹⁹ per the Aarhus Convention Implementation Guide¹⁰⁰ and Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment.¹⁰¹ The CJEU found that the Interpretation Guide can lead the interpretation of Directive 85/337 and the Aarhus Convention; however, this does not change its legally non-binding characteristics. Moreover, the instruments require an assessment of particular public and private projects about their effect on the environment, except in those cases where the projects are based on legal acts adopted in a legal process that are in line with the Aarhus Convention and the Directive. However, a legal instrument that only ratifies pre-existing administrative acts cannot be automatically considered as this.¹⁰²

The Court expressed in the *Jozef Križan and others* case¹⁰³ that the Member States should guarantee access to urban planning decisions for the public concerned from the

⁹⁵ For a further reading of the CJEU's environmental law and the related cases see KRÄMER 2002.

⁹⁶ CJEU, C-204/09, *Flachglas Torgau GmbH v. Bundesrepublik Deutschland*, Judgment of the Court (Grand Chamber), 14 February 2012.

⁹⁷ *Ibid.* Paras 31–32.

⁹⁸ *Ibid.* Para 39.

⁹⁹ CJEU, C-182/10, *Marie-Noëlle Solvay and Others v. Région wallonne*, Judgement of the Court, 16 February 2012.

¹⁰⁰ United Nations, Economic Commission for Europe, *The Aarhus Convention: An Implementation Guide*, ECE/CEP/72.

¹⁰¹ Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, OJ L 175, 5.7.1985.

¹⁰² *Marie-Noëlle Solvay and Others v. Région wallonne*, para 80.

¹⁰³ CJEU, C-416/10, *Jozef Križan and Others v. Slovenská inšpekcia životného prostredia*, Judgment of the Court (Grand Chamber), 15 January 2013.



beginning of the authorisation procedure. The authorities are not allowed to refuse the request referring to protecting the confidentiality of commercial or industrial information if the Member State's or the EU law provides such confidentiality to protect a legitimate economic interest. According to the CJEU, the Member State can resolve this problem in an administrative procedure at the second level if the public concerned can effectively participate in the decision-making at this stage.¹⁰⁴

Dialogue between the two Courts in environmental matters

After examining the ECtHR's and the CJEU's approach to environmental rights, the question arises: how do the two courts influence each other? As we discussed above, even though the EU's accession to the ECHR has yet to succeed, its system significantly influenced and motivated the CJEU's approach to human rights in general, as highlighted in the Nold and the Hauer cases. This remained the same after the EU Charter of Fundamental Rights came into force. For instance, in the Melloni case,¹⁰⁵ the CJEU interpreted the right to an effective remedy to a fair trial (Article 47 of the Charter) and the presumption of innocence and right to defence (Article 48) in the light of the ECtHR's relevant case law on Article 6 of the ECHR on the right to a fair trial.¹⁰⁶

Particularly in environmental cases, the ECtHR took into account the EU law or the documents concluded by EU organisations. This is illustrated by the Cordella and others v. Italy case,¹⁰⁷ where the ECtHR's reasoning contained a reference to the case before the CJEU,¹⁰⁸ where the Member State's failure was addressed to implement Directive 2008/1/EC¹⁰⁹ by not adopting the necessary measures that allow the competent authorities to ensure that industrial facilities can operate with the necessary permits.¹¹⁰ In the Tătar v. Romania case, the Court considered and directly cited a soft law communication¹¹¹ of the European Commission that revealed that the Baia Mare accident proved that the public knowledge and understanding of the inherent risk of the particular operation was really low. The communication of the concerned authorities was insufficient.¹¹²

Despite these examples, the dialogue between the two courts in environmental matters could be more coherent and has a lower volume than the interaction about human rights in general. The lack of dialogue can result from the two Courts' different environmental rights approaches. While the ECtHR could improve a coherent case law

¹⁰⁴ Ibid. Para 117.

¹⁰⁵ CJEU, C-399/11, Stefano Melloni v. Ministerio Fiscal, Judgment of the Court (Grand Chamber), 26 February 2013.

¹⁰⁶ Ibid. Paras 48–50.

¹⁰⁷ ECtHR, Cordella and others v. Italy nos. 54414/13, 54264/15, 24 June 2014.

¹⁰⁸ CJEU, C-50/10, European Commission v. Italian Republic, Judgment of the Court (Seventh Chamber) of 31 March 2011.

¹⁰⁹ Directive 2008/1/EC of the European Parliament and of the Council of 15 January 2008 concerning integrated pollution prevention and control (Codified version), OJ L 24, 29.1.2008.

¹¹⁰ Cordella and others v. Italy, paras 83–84.

¹¹¹ European Commission, Safe Operation of Mining Activities: A Follow-Up to Recent Mining Accidents. Brussels, 23.10.2000. COM(2000) 664 final.

¹¹² Tătar v. Romania, para 69. B. Le droit et la pratique internationaux pertinents, subpara f).



on other, initially not environmental-specific human rights, the CJEU mainly focused on procedural aspects. Iliana Cenevska highlights that the CJEU's approach to substantive environmental rights can be considered cautious. At the same time, the ECtHR conducted brave judicial activism and showed openness to a progressive approach that can even support the declaration of the right to a healthy environment. On the contrary, the CJEU never made any similar gesture or explicitly expressed the substantive right to a healthy environment. Cenevska suggests that if the CJEU acknowledged the ECtHR's proactive approach to environmental rights – without altering its jurisprudence that primarily focuses on environmental protection – it could facilitate the dialogue between the two forums.¹¹³

The Portuguese Youth case – A precursor for addressing human rights in light of climate change

About the application

In 2020, six Portuguese youths and children submitted a complaint¹¹⁴ to the ECtHR, referring to the alleged breach of the ECHR's Articles 2, 8 and 14 caused by the states' failure to protect their rights from the adverse effect of climate change. According to the applicants, all 33 states contributed significantly to climate change, and they pointed out that if the ECtHR would acknowledge this violation, that could also contribute to reaching the objectives of a significant international treaty, the Paris Agreement¹¹⁵ that aims to keep the increase of the global average temperature well below 2°C above pre-industrial levels and to limit its increase to 1.5°C because realising these aspirations would significantly reduce the harmful impacts of climate change. This requires states to introduce and execute effective mitigation measures and significantly reduce their greenhouse gas (GHG) emissions while implementing the precautionary and intergenerational equity principle. The Portuguese youth also claimed that they were discriminated against on their age because of an 'other status' described in Article 14 of the ECHR¹¹⁶ because compared to the older generation – who made decisions affecting the applicants' life – are expected to live a shorter amount of time in the damaged environment than them, members of the youth.¹¹⁷

¹¹³ CENEVSKA 2016: 319–324.

¹¹⁴ ECtHR, Request No. 39371/20, Cláudia Duarte Agostino and others v. Portugal and 33 other States. Submitted 7 September 2020 (hereinafter: Request No. 39371/20).

¹¹⁵ United Nations Framework Convention on Climate Change (2015) Adoption of the Paris Agreement, 21st Conference of the Parties. Paris, 12 December 2015 (hereinafter: the Paris Agreement).

¹¹⁶ ECHR, Article 14, Prohibition of discrimination: "The enjoyment of the rights and freedoms outlined in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status".

¹¹⁷ The entire complaint is available online: <https://youth4climatejustice.org/wp-content/uploads/2020/12/Application-form-annex.pdf>



The complaint was filed against all the EU Member States and Switzerland, the United Kingdom, Norway, the Russian Federation, Turkey and Ukraine because these countries are the major emitters within Europe even though Article 34 of the ECHR declares that the Court receives complaints from individual applicants in case of the Convention's violation by one of the Parties. However, there is already examples of complaint against more than one state, like the complaint in the *Ilaşcu and others case*¹¹⁸ against two states. The applicants stated that climate change is a global phenomenon, so only the Portuguese courts cannot effectively solve the problem as several countries emit GHGs. Furthermore, their age and their families' modest means indicate that exhausting all the effective domestic remedies would cause them an unreasonable or disproportionate burden. Moreover, states shall take quick measures to fight against climate change. They also claimed the application was within the required six-month time limit because the violation is continuous.

The complaint was atypical against more than one particular country, the applicants did not exhaust any domestic remedy, and they aimed to broaden the scope of Articles 2 and 8 in environmental matters to future generations, so moving the determining approach from individual right protection to collective. Despite all these unusual features, the Court made an unquestionably progressive step when it found the complaint admissible and proposed the following questions to the parties. First, whether the applicants are subjected to the states' jurisdictions also considering their obligations from the Paris Agreement. If the answer is yes, are the applicants current or possible victims of human rights violations caused by GHG emissions? In case of an affirmative answer to the second question, did the Parties realise their obligations in the light of their margin of appreciation with particular attention to the principle of precaution and intergenerational equity?¹¹⁹

How could the case concern the European Union?

It should not go unnoticed that the list of the Parties against which the application is directed includes all Member States of the EU named as major emitters of Europe. These considerations provide new insight into the EU's climate ambitions with the Paris Agreement at its heart.

On 11 December 2019, the European Commission adopted a soft law communication entitled *The European Green Deal*.¹²⁰ This communication serves as a roadmap for the Commission's action to fight against the adverse effect of climate change and environmental-related challenges. It proposes a new legally binding act, too. After the proposal of the Commission, the European Parliament and the Council adopted the first European

¹¹⁸ ECtHR, *Ilaşcu and others v. Moldova and Russia* no. 48787/99, 8 July 2004.

¹¹⁹ Request No. 39371/20. Questions to the Parties. 4–5.

¹²⁰ European Commission, *The European Green Deal*. Brussels, 11 December 2019. COM(2019) 640 final (hereinafter: the European Green Deal).



Climate Law,¹²¹ which reassures in its Preamble the EU's commitment to implement the Paris Agreement¹²² and expresses its respect for human rights in the light of the EU Charter of Fundamental Rights' Article 37.¹²³ The European Climate Law gives legally binding force to the EU's climate ambitions to achieve climate neutrality by 2050.¹²⁴ This requires the balance of the GHG emission and removals within the EU and the zero reduction of the GHGs. Therefore, the EU institutions and the Member States should take all the necessary measures to reach this goal¹²⁵ by promoting fairness and solidarity among the Member States and cost-effectiveness.¹²⁶ Besides the long-term goal, the Law binding identifies intermediate targets, like reducing GHGs by at least 55% compared to 1990 by 2030.¹²⁷

From these soft and hard law instruments, it can be concluded that fighting against climate change, achieving climate neutrality by 2050 and implementing the Paris Agreement are the EU's top ambitions. It is also evidenced by the fact that the 8th Environmental Action Programme¹²⁸ – which instrument creates the framework of the EU environmental policy and identifies the main priorities for a certain period – is also based on these goals and introduces a long-term vision by 2050 where climate neutrality is achieved.¹²⁹ Despite these strong commitments, it is interesting to note that the CJEU was negative about a possible climate case that concerned human rights, too. The *Carvalho and others v. European Parliament and Council of the European Union* is also known as the People's Climate Case.¹³⁰ The application was submitted to EU and non-EU citizens who operate in the agricultural or tourism sector and an association representing young indigenous Samis. They claimed that failing to adopt effective measures that reduce GHGs could violate fundamental human rights and cause material damage.

Moreover, it is scientifically accepted that climate change could lead to a drastic increase in temperature throughout Europe and other parts of the World, increased droughts, and declining crop yields which contribute to the rise of sea level.¹³¹ The

¹²¹ Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 OJ L 243, 9.7.2021 (hereinafter: European Climate Law).

¹²² European Climate Law, para (1).

¹²³ European Climate Law, para (6).

¹²⁴ European Climate Law, Article 1.

¹²⁵ The study of Klaas Lenaerts, Simone Tagliapietra and Guntram B. Wolff suggests that to realise the goals of the European Climate law, the clear division of the Member States' governments' tasks and facilitate the information flow between the relevant concerned levels (EU, national, regional and local). The EU's institutions should ease the spread of scientific knowledge. They also emphasise that binding national adaptation plans could be useful, even though the present Climate Law does not require it (LENAERTS et al. 2022: 318–319).

¹²⁶ European Climate Law, Article 2.

¹²⁷ European Climate Law, Article 4, para 1.

¹²⁸ Decision (EU) 2022/591 of the European Parliament and the Council of 6 April 2022 on a General Union Environment Action Programme to 2030, PE/82/2021/REV/1, OJ L 114, 12.4.2022.

¹²⁹ Ibid. Article 2, para 1.

¹³⁰ CJEU, C-565/19 P, *Armando Carvalho and Others v. European Parliament and Council of the European Union*, Judgment of the Court (Sixth Chamber) of 25 March 2021.

¹³¹ Case 338/18 T, resubmitted, paras 292–295 (<https://peoplesclimatecase.caneurope.org/wp-content/uploads/2018/08/application-delivered-to-european-general-court.pdf>).



applicants asked the CJEU to declare that the EU's acts on GHG emissions are unlawful, indicate more ambitious targets, and order the defendants to adopt more effective measures.¹³² Gerd Winter concluded that the application's key goal was to make the EU more active in environmental protection while taking into account fundamental rights. This could also be seen as representing the loss of citizens' trust in the EU.¹³³

Moving back to the Portuguese Youth case, concerning the reasons described above, it was quite unsurprising that the European Commission intervened in the case – besides the UN special rapporteurs, the European Commissioner for Human Rights and NGOs – as a third party. The Commission explained the EU's climate ambitions under the Paris Agreement, the adopted and implemented measures, and the proposed legislative package serving the purpose of climate neutrality.¹³⁴ It also stressed that the EU set binding climate targets, the Member States should develop integrated national energy and climate plans under the Regulation on the Governance of the European Union,¹³⁵ and are required to conclude long-term national strategies while the EU track their progress.¹³⁶ The Commission also stated that the 27 Member States' GHG emissions decreased by 24% in 2019, compared to the levels of 1990 and achieved the relevant UN targets by reaching its lower emission level since 1990. Besides this achievement, the combined GDP of the EU increased by 60%.¹³⁷

The Commission also argues that by adopting the European Climate Law, the EU created legally binding objectives to fight against climate change, and before its proposal, the Commission conducted a comprehensive impact assessment and carried out a public consultation. The Commission plans further legislative acts and will also propose a package ("Fit for 55").¹³⁸ In delivering the intervention, the Commission was particularly concerned with the Bosphorus principle and stated that according to the presumption, the Member States' actions that comply with EU law could not violate the ECHR. Moreover, the EU law safeguards the protection of human rights in the environment, constituting an equivalent level of protection. In addition, a complete system of legal remedies is available. Therefore, according to the Commission, it is unanimous that the Member States can be presumed not to have violated the Convention implementing their obligations derived from their EU membership.¹³⁹

We can assess that when the ECtHR declared the Portuguese youth application admissible, it took a bold step independently from the possible outcome of the case. On

¹³² Ibid. Para 311.

¹³³ WINTER 2020: 163–164.

¹³⁴ European Commission, Written observations – Case Duarte Agostinho and Others v. Portugal and Others (Application 39371/20). Brussels, 19 May 2021. SJ.I/MCC/sj.i(2021)3776047 (hereinafter: Third Party Intervention of the European Commission), paras 4–20.

¹³⁵ Regulation (EU) 2018/1999 of the European Parliament and of the Council of 11 December 2018 on the Governance of the Energy Union and Climate Action, amending Regulations (EC) No 663/2009 and (EC) No 715/2009 of the European Parliament and of the Council, Directives 94/22/EC, 98/70/EC, 2009/31/EC, 2009/73/EC, 2010/31/EU, 2012/27/EU and 2013/30/EU of the European Parliament and of the Council, Council Directives 2009/119/EC and (EU) 2015/652 and repealing Regulation (EU) No 525/2013 of the European Parliament and of the Council.

¹³⁶ Third Party Intervention of the European Commission, paras 21–27.

¹³⁷ Third Party Intervention of the European Commission, para 40.

¹³⁸ Third Party Intervention of the European Commission, paras 41–64.

¹³⁹ Third Party Intervention of the European Commission, paras 65–72.



the one hand, it extended its evolutive interpretation to the admissibility criteria. Helen Keller and Corina Heri recall negative opinions about the ECtHR's flexibility regarding the extraterritorial application of human rights. However, the current approach of the Court seems to focus on the object and purpose, based on the universality of human rights that can facilitate the protection of the individual's human rights from the adverse effect of climate change.¹⁴⁰ On the other hand, the admission raised the possibility of rebutting the Bosphorus presumption. In addition, when the ECtHR examines whether the Parties violated the Convention indirectly, it would evaluate the Member States' compliance with the EU's climate targets. Therefore, the EU's legislation and its priorities and even the implementation would play a determining role by deciding the Parties' compliance with the ECHR. Of course, one of the possible outcomes of the case is that the ECtHR will find no breach of the Convention, which could be interpreted as the efficient functioning of the EU's policy-making, legislation and implementation. However, even the admission of the complaint concerns the EU as the Commission's intervention evidenced it. We should add that international development – the universal recognition of the right to a healthy environment by the UN – could motivate the ECtHR to constitute a progressive approach to the substance of the case.

Conclusion

This article examined the EU's climate ambitions in light of the Portuguese Youth's climate case. At first sight, this case could be an example and milestone within the ECtHR's environmental cases as it concerns 33 states and aims to protect the next generations. Nevertheless, the connection between this case and the EU law also reflects the relationship of the EU to the ECHR's system, which indicates the examination of several factors.

First, the EU's prolonged accession to the ECHR can be considered indirectly. On the one hand, the complaint that concerned all the EU Member States proves there is an intention to hold the Member States liable collectively. This is in line with the fact that not only one state is responsible for the GHG emission; therefore, not only one state can solve the problem of climate change. Nevertheless, the admission of the complaint cannot be directly considered the explicit evaluation of the EU's action – or its absence – itself. However, it raises an opportunity to examine the Member States' actions against climate change influenced by the EU law. Admission could be welcomed from the perspective of human rights' adequate protection from climate change. However, it should not overlook the possibility that there is a risk that this case will cause the CJEU's more negative approach to accession.

Secondly, the case could concern protecting and promoting human rights within the European Union and the ECtHR's approach to the issue. It is a logical deduction that the Bosphorus presumption will be analysed, which assumes that the Parties cannot violate the ECHR by implementing EU law. As the Commission pointed out in its intervention, the Member States' fight against climate change is determined by binding obligations derived from their EU memberships. Of course, the two further conditions

¹⁴⁰ KELLER-HERI 2022: 162–163.



can determine its examination outcome: the requirement of the absence of any margin of manoeuvre and the full potential of EU supervisory mechanisms.

Thirdly, the case considers environmental rights cases before the two Courts, where the dialogue could be more coherent and strong. While the ECtHR was creative and served as an example of judicial activism, the CJEU mostly focused on procedural environmental law. The ECtHR evolutive approach can be reasoned by the fact that this helps the ECHR to keep in step with the changing conditions. The universal recognition of the right to a healthy environment can shape this area, according to the future reaction of the two organisations that could clearly influence their legislation and the case law of the Courts. If their reaction were similar, that could facilitate a fruitful dialogue between the two Courts.

This article relied on the legal development in recent years and highlighted how the Portuguese Youth case could influence the relationship between the EU and the Council of Europe by the question of the EU's top priority climate change objectives. However, the future judgment of the case and the assessment of its effect could give a more detailed answer to the raised issues. Nevertheless, it can already be stated that the ECtHR has shown openness with the admission of the complaint to address that the adverse effects of climate change cannot be effectively handled without addressing its impact on fundamental human rights. This can also serve as a reminder to the EU that tackling climate change also requires strong human rights protection besides focusing on pollution reduction – which is undoubtedly essential. This realisation will hopefully bring together the two systems and not separate them.

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