The ECtHR's Pending Climate Change Case: What's Ill-Treatment Got To Do With It?

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By Corina Heri December 22, 2020

On 30 November, the Court made headlines when it communicated its first climate change case. The application was brought by six Portuguese children and young people, with the crowd-funded support of the Global Legal Action Network (GLAN). The respondents are 33 Member States of the Council of Europe, and the case – which was taken directly to the Court without exhausting domestic instances in the respondent jurisdictions – has many hoping for a landmark ruling on climate change to succeed the Dutch *Urgenda* case.

This application, dubbed *Duarte Agostinho and Others v. Portugal and Others* by the Court, is innovative in a number of ways. It was brought against all 27 EU countries, plus Norway, Russia, Switzerland, Turkey, the UK, and Ukraine. It alleges that the contribution by each of these States to global greenhouse gas (GHG) emissions means that they share responsibility for the existing and impending harms caused by global warming and climate change. Furthermore, the applicants make an argument based on extraterritorial jurisdiction for significant transboundary environmental harm, and call on the Court determine whether the respondent States are doing their 'fair share' towards mitigation efforts.

In their application form, the applicants invoked States' positive obligations under Articles 2 and 8 ECHR (life and respect for private and family life, respectively), read in the context of the 2015 Paris Agreement, and also made a discrimination claim, arguing that their generation will particularly suffer the effects of climate change. The application has already been discussed here and here. However, since those discussions, something rather unexpected has occurred.

The surprise is this: when the Court communicated the case, it asked the parties to comment not only on the alleged violations of Articles 2, 8 and 14. Instead, it also invoked Article 3 ECHR, the prohibition of torture and inhuman and degrading treatment, as well as the right to property in Article 1 of Protocol No. 1 to the Convention. The former, the Article 3 issue, is the subject of this post. Leaving aside other questions with undeniable relevance to this case, such as victim status, admissibility, shared responsibility, and the interplay between the Strasbourg court and domestic actors, this post will therefore ask: what is the potential role of the prohibition of ill-treatment in the context of a climate case?

The fact that the Court raised the Article 3 issue here of its own accord is not ground-breaking in and of itself. This is in line with established case-law whereby the Court deems itself to be the 'master of the characterisation to be given in law to the facts of the

case'. In other words, by virtue of the *jura novit curia* principle, the Court can – and here, did – raise an issue *proprio motu*.

However, it is the context here that makes the invocation of Article 3 noteworthy. That is because, in relation to climate change litigation, Article 3 is *not* a commonly invoked provision. For example, it was not raised in the Dutch *Urgenda* judgment, which has served as a source of inspiration to climate litigation efforts around the world and is cited in the application form. Neither was it raised in the domestic proceedings concerning the Swiss *Klimaseniorinnen* (Union of Swiss Senior Women) case, or in the recent application taking that case to the ECtHR.

So, there is an element of novelty to the Article 3 claim here. But what are some of the key Article 3 issues that could be raised in this case?

Climate Refugees and Non-Refoulement

What springs to mind immediately is the context of expulsion and the non-*refoulement* obligations that are part of the prohibition of torture. This is relevant to the protection of people displaced by the effects of climate change, such as in the Human Rights Committee's recent *Teitiota* Communication.

The key here is whether there are substantial grounds for establishing a real and immediate risk of ill-treatment on climate-related grounds if removed. In the Court's case-law, this risk assessment is rigorous, relative, and depends on a number of factors. However, the Court's non-*refoulement* jurisprudence is not always particularly applicant-friendly, and the Court has not examined climate-related contestations of expulsion orders, so at the very least we should place a question mark around this approach to Article 3 ECHR. In any event, *Duarte Agostinho* is not an expulsion case, and so this aspect will not be discussed further here.

The Scope of Article 3

A key question here is whether the threshold of severity test has been met. This test determines whether a given act of ill-treatment is sufficiently severe to fall under the absolute Article 3. Whether something constitutes ill-treatment under the ECHR is relative and context-dependent. It can depend on the nature and context of the treatment in question as well as its duration and its physical and mental effects. The Court may also take into account the sex, age, and state of health of the victim. And while, as the Court clarified in *Bouyid v. Belgium*, ill-treatment that reaches the minimum level of severity usually involves 'actual bodily injury or intense physical or mental suffering', in the absence of these elements the threshold can still be met by 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' (see also Natasa Mavronicola's excellent discussion here).

Under the ECHR, claims related to pollution or environmental hazards are usually heard under Articles 2 or 8, and there is no strong body of case-law to support the recognition of GHG emissions as raising an Article 3 issue. That is not to say that related harms or risks thereof could not violate Article 3: there are undeniably ways in which climate change could lead to 'actual bodily injury or intense physical or mental suffering'. But it does make it all the more interesting that the Court raised the Article 3 issue *proprio motu* here.

Physical harms aside, the case-law on feelings of fear and anxiety may be of relevance. Thus, the applicants in *Duarte Agostinho* raised their fear of natural disasters such as forest fires as well as of the prospect of living in an increasingly hot climate throughout their lives. The Court has previously found, albeit in very different circumstances, that a permanent state of anxiety and uncertainty about one's future can violate Article 3, as can a sense or feeling of vulnerability.

Positive Obligations under Article 3

Assuming that an Article 3 issue is found to arise here, this will likely be a question of States' compliance with their extensive positive obligations to adequately and effectively protect those in their jurisdictions from ill-treatment, including violations of their physical and mental integrity. This requires an adequate legal framework affording protection against ill-treatment by private individuals and reasonable measures to avert real and immediate risks of ill-treatment of which the authorities knew or ought to have known, as well as a procedural (investigative) obligation. Hypothetically, this could mean requiring adequate legislative and administrative measures to curb carbon emissions, including by corporate actors. This might even – as the applicants have suggested – mean looking at whether the respondent States have done their 'fair share' in terms of emissions reductions. After all, while it is not the Court's role 'to replace the national authorities', the principle of guaranteeing practical and effective rights requires it to ensure that the State has adequately discharged its positive obligation to protect.

Vulnerability and Climate Change

Lastly, the issue of vulnerability is an important one to consider in this context. The Court uses vulnerability reasoning to interpret rights effectively in practice. Invoking the vulnerability of an applicant, either as an individual or as a member of a particular group, allows for a more context-sensitive assessment of factors that shape their experience or situation.

In the context of Article 3, vulnerability can mean a number of things. For one, it means that, for applicants who are wholly dependent on the State for support, for example because they are incarcerated or seeking asylum, situations of want or deprivation incompatible with human dignity can violate Article 3. Other types of nexuses to the State can also fall under this construct, for example when a child is ill-treated while under the care of a state-run school. Vulnerability can also stem for example from victimization, from membership in a marginalized group, or from being a minor.

When it comes to minors specifically, the Court has regularly held that States must give adequate weight to their vulnerability, protect them, and take adequate measures to protect them from ill-treatment. In addition, because minors are vulnerable, treatment that might not reach the threshold of severity required for a violation of Article 3 if inflicted on adults may nevertheless reach that threshold if inflicted on a child. Given that the applicants in this case are minors and dependent on State-enacted measures if climate change is to be mitigated, the Court could consider whether they are in a particularly vulnerable situation when it comes to GHG emissions.

Conclusion

Although this case has been accorded priority treatment by the Court (supposing that a friendly settlement is not reached and the Court examines the merits of the complaints), a judgment in *Duarte Agostinho* is still a long way off. But the mere prospect of a judgment concerning a climate-related Article 3 claim is a remarkable one. That prospect becomes even more remarkable in the context of a treaty that does not contain a right to a healthy environment and a Court that has issued no guidance in this context. The *Urgenda* case showed the potential of Articles 2 and 8 ECHR for climate litigation in the domestic context. This case raises some of the same issues in Strasbourg, and with the inclusion of Article 3 it adds some new ones as well. In any event, this case is one to watch as it progresses before the ECtHR.