ATTORNEY GENERAL FOR CIVIL AFFAIRS

To the European Court
of Human Rights

OSLO, 05 December 2022

Third party intervention
by the Kingdom of Norway

represented by Henriette Busch, advocate at the Office of the Attorney General for Civil Affairs, acting as agent, in

app. no. 53600/20 Verein Klimaseniorinnen Schweiz and Others v. Switzerland

cf. the Court's letter of 24 October 2022, in which the President of the Grand Chamber granted leave to make written submissions to the Court by 5 December 2022.

1 INTRODUCTORY REMARKS

(1) The Norwegian Government is deeply committed to reduce national emissions and contribute to the global long-term target in the Paris Agreement Article 2. The third party intervention should be understood against this background, and the purpose of the third party intervention is by no means to downplay the effects of climate change.

(2) Meeting both long-term and short-term climate targets requires broad considerations and a balancing between individual and societal interests – it involves all parts of society. Establishing climate and energy policy should be predominantly a political and democratic exercise. Political decisions regarding the choice of climate targets and policies are within a state's sovereignty to decide.

(3) For Norway's case, meeting climate target and transforming Norway into a low emission society by 2050 will be challenging and involve the whole Norwegian society. It will involve decisions made by the Norwegian Government, the Norwegian parliament, and by municipalities and counties, the business sector and individuals in Norway – for example on resource use, spatial management and how and where to build and travel. To ensure a fair and just transition to a low emission society it requires a wide variety of solutions within a stable long-term framework. This situation is not unique for Norway, and every country has its own national system it needs to transform to limit greenhouse gas emissions. The choice

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of regulations, solutions, when to implement them and how should be up to sovereign states to decide.

(4) There are no legal bases in relevant sources of law for the expansion the applicants seek in the territorial, personal, and material scope of the obligations under the European Convention on Human rights in the present case as well as in other pending climate cases before the Court, cf. the Vienna Convention on the Law of Treaties Articles 30-33. The Convention is not an instrument for the protection of collective interests, and the Court is not a supervisor of society-wide policy decisions. Expanding the Convention would also stand in contrast to Protocol no 15 to the Convention (in force 1 August 2021), emphasising the margin of appreciation enjoyed by the Member States.

(5) In the following, the Government will present its views regarding the Court's question B (section 2) and question 5.3.2 (section 3).

2 JURISDICTION, CF THE COURT'S QUESTION B

(6) According to Article 1 of the Convention, High Contracting Parties shall secure to everyone *within their jurisdiction* the rights and freedoms defined in Section I of this Convention" (emphasis added). 'Jurisdiction' within the meaning of Article 1 is a threshold criterion for the Convention to be applicable in a specific case, see *Güzelyurtlu and Others v. Cyprus and Turkey*, [GC], no. 36925/07, 29 January 2019, § 178.

(7) In question 2.1, the Court poses the question if "the current case-law need to be further developed in order to take account of the specific characteristics of climate change".

(8) The Norwegian Government holds that the relevant sources of law do not provide a legal bases to expand the notion of 'jurisdiction' in order to take account of the specific characteristics of climate change. As Article 1 is determinative of the very scope of the Contracting States' obligations and, as such, of the scope of the entire Convention system of human rights protection, it is not subject to interpretation according to the 'living instrument' doctrine, see *Banković and others v. Belgium and Others* (dec.), [GC] no. 52207/99, ECHR 2001-XII §§ 63–65. Expanding the notion of 'jurisdiction' in Article 1 based on what is 'needed', would represent an expansive interpretation of the Treaty, in contravention of the intention of the Contracting States reflected in the preparatory works.

(9) The Court has repeatedly reiterated that the jurisdictional competence of a State pursuant to the Convention is primarily territorial, see, inter alia, *Banković* [GC] § 59; and *Catan and Others v. the Republic of Moldova and Russia* [GC], nos. 43370/04, 8252/05 and 18454/06, 19 October 2012, § 104. In line with Article 32 of the Vienna Convention, the Court has recalled that the preparatory works of the Convention confirm that it was not the intention of the Contracting States to undertake an obligation to secure to persons not residing within or being present on their territory the rights and freedoms of the Convention, see *Banković §§* 19–21, 63 and 65; and *M.N. and Others v. Belgium* (dec.) [GC], no 3599/18, 5 May 2020, § 100. As referenced in these judgments, the Committee on Legal and Administrative Questions of the Consultative Assembly of the Council of Europe replaced the words 'all

persons residing within their territories' with 'within their jurisdiction' with a view to expanding the Convention's application to others who may not 'reside', but who are, nevertheless, on the territory of the Contracting States.

(10) With regard to overseas activities, the Government also recalls that the Grand Chamber in *Banković* (§§ 56 and 59) and *M.N.* (§ 99) observed that extra-territorial exercise of jurisdiction is "as a general rule, defined and limited by the sovereign territorial rights of the other relevant States".

(11) State practice supports the primarily territorial meaning of "jurisdiction" in Article 1. As recalled by the Grand Chamber in *Banković* §§ 56 and 62, the Court should consider "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation", see Article 31 § 3 b of the Vienna Convention. The Government is not aware of any state practice in which states consider that they have an obligation to secure persons outside their territory the rights and freedoms of the Convention in circumstances such as in the present case.

(12) Further, the Government takes the position that to the extent that the Paris Agreement of 2015 is to be considered "a relevant rule of international law applicable in the relations between the parties" (Article 31 (3) c of the Vienna Convention), it is not a rule conducive to broadening the concept of "jurisdiction" in Article 1 of the Convention. Rather, the Paris Agreement is founded on the general notion of territorial jurisdiction in international law and is a clear indication that the international community of states does *not* support extra-territorial jurisdiction based on greenhouse gas emissions.

(13) The Court has accepted only in exceptional cases that acts or omissions of Contracting States performed, or producing effects, outside their territories may constitute an exercise of jurisdiction within the meaning of Article 1, see, *inter alia*, *Banković* § 67. The categories of extra-territorial jurisdiction recognised in the Court's case law were exhaustively summarized by the Grand Chamber in *M.N.* §§ 98–100, recognising that jurisdiction may arise where i) a Contracting State exercises effective control over an area outside its national territory (§ 103); ii) an agent of a Contracting State uses force outside its territory (§ 105); iii) the diplomatic or consular officials of a Contracting State, in their official capacity, exercise abroad their authority in respect of that State's nationals or property (§ 106); and "specific circumstances of a procedural nature" provide grounds for extra-territorial jurisdiction (§ 107).

(14) A "cause and effect" notion of 'jurisdiction' under Article 1 has been thoroughly rejected by the Grand Chamber, see *Banković,* § 75; and *M.N.* § 112. Establishing jurisdiction based on domestic climate change policy and legislation would be tantamount to introducing universal jurisdiction under the Convention, with wide-ranging consequences, creating a situation of unacceptable uncertainty as to the scope of States' obligations and the reach of the entire Convention system. The Government is also concerned that an interpretation of Article 1 suggesting that the engagement in international cooperation or the adoption of policies or legislation pertaining to a global problem could entail a correspondingly global jurisdiction, could cause a "chilling effect" with regard to continued climate change efforts.

(15) The Government is aware that the Court has expanded the notion of jurisdiction in cases concerning the procedural limb of Article 2 under the Convention based on the presence of "special features", see *Güzelyurtlu* (concerning circumstances within the *espace juridique* of the Convention) and *Hanan v. Germany* [GC], no. 4871/16, judgment 16 February 2021 (concerning circumstances outside of the *espace juridique* of the Convention). In the Government's view, it transpires from the Court's case law that the expansive interpretation in these cases is limited to the procedural limb of Article 2 of the Convention, which is not at issue in the present case. It remains clear that there are no grounds for a "cause and effect" notion of jurisdiction, see also *Hanan*, the joint partly dissenting opinion of judges Grozev, Ranzoni and Eicke, § 30.

3 THE RELEVANCE OF OTHER INSTRUMENTS OF INTERNATIONAL LAW, CF. QUESTION 5.3.2

3.1 The common normative approach to global climate change does not include individual rights, but obligations on states

(16) The Government recalls at the outset that it is the Convention which the Court can interpret and apply, as it does not have authority to ensure respect for international treaties or obligations other than the Convention, and, moreover, that the Court is not bound by interpretations given to similar instruments by other bodies, having regard to the possible difference in the contents of the provisions of other international instruments and/or the possible difference in role of the Court and the other bodies, see *Caamaño Valle v. Spain*, no. 43564/17, 11 May 2021, §§ 53–54.

(17) Recent years, a variety of instruments of international law have been negotiated, in order to address the effects of climate change. Based on thorough negotiations, informed by the reports by the Intergovernmental Panel on Climate Change (IPCC), states have expressed their common normative approach to global climate change in the UNFCCC of 1992 and its Kyoto Protocol of 1997, and in the Paris Agreement of 2015. The Government holds that these instruments have no bearing on the interpretation of the Convention: rather they reflect that the sovereign state parties in the context of climate change have retained their competence.

(18) Through the UNFCCC, its Kyoto Protocol, and the Paris Agreement of 2015 agreements, the international community of sovereign states have agreed on obligations *on states* – not individual rights – as the approach to global climate change. The treaties comprehensively regulate how the implementation of the agreement is to be supervised, reviewed and enhanced. The sovereign state parties have not agreed on establishing an individual complaint mechanism nor any other form of tribunal. Instead, the High Contracting Parties have retained their competence of authority through the established Conference of the Parties, serving as the meeting of the Parties to the UNFCCC, the Kyoto Protocol and the Paris Agreement, supplemented by Expert Committees.

(19) The international agreements confirm the fundamental principle of international law that each state is responsible for its own territory, including in the context of greenhouse gas emissions. Neither the text of the agreements, nor state practice in the ensuing periods, provide any grounds for construing legal norms restricting the export of energy sources, legal responsibility for offsetting emissions from another state's territory in connection with imports, or regulating emissions from another state's territory.

(20) Within the context of the Council of Europe the Member States may choose to introduce enforceable rights pertaining directly to the environment and climate, and design them in a manner conducive to the adjudication of the specific issues arising within the context of global issues. This may be done either through a new, independent instrument or as Protocols to the Convention or the Social Charter. Such developments belong, however, with the competence of the legislators. The CDDH Drafting Group on Human Rights and Environment (CDDH-ENV) is currently considering the need and feasibility of a further instrument or instruments in the field of human rights and the environment, following an invitation from the Committee of Ministers to conduct such a study (1416th meeting of the Committee of Ministers, 3 November 2021).

3.2 The right to a healthy environment is not a rule of customary international law

(21) None of the referenced treaty material in the question by the Court (the United Nations Framework Convention on Climate Change (1992); the Paris Agreement (2015); the International Law Commission's Draft Articles on Prevention of Transboundary Harm from Hazardous Activities (2001). Regulation EU 2021/1117 of the European Parliament and the Council of 30 June 2021 ("the European Climate law)", the UN Human Rights Council Resolution 48/13 of 18 October 2021 or the UN General Assembly Resolution A/RES/76/300 of 28 July 2022) evidence a right to a healthy environment as a rule of customary international law.

(22) When voting in favour of the adoption of the UN General Assembly resolution on the human right to a clean, healthy and sustainable environment of 28 July 2022, Norway stated in the explanation of vote inter alia that:

> *"This resolution sends a strong and important message on the necessity of a clean, healthy and sustainable environment for the enjoyment of existing human rights. It is Norway's view that the political recognition through this resolution does not have any legal effects and thus cannot be used as a legal argument."*

Annex 1: Explanation of vote by First Secretary Katrine Ørnehaug Dale to the General Assembly after adoption of the resolution on clean, healthy, sustainable environment, 28 July 2022

(23) Norway's position is also reflected in the statement made by Ambassador Smith, permanent Representative of Norway, on behalf of the outgoing Government, at the Human Rights Council 48th session regarding the UN Human Rights Council resolution 48/13 of 8 October 2021. The statement included Norways' view that this political recognition does not have

legal effects and thus cannot be used as a legal argument. Similar statements were made on behalf of other countries, such as the UK.[1]

Annex 2: Statement by Ambassador Smith 8 October 2021

(24) Accordingly, these resolutions cannot be seen as a reflection of customary international law, and do not have any bearing on the content of the obligations arising from the Convention.

4 CONCLUSION

(25) There is not a lacuna in the international climate change framework which could or should be filled by the Court trough the means of a regional individual human rights treaty such as the European Convention on Human Rights.

(26) Within the context of the Council of Europe the Member States may choose to introduce enforceable rights pertaining directly to the environment and climate, and design them in a manner conducive to the adjudication of the specific issues arising within the context of global issues. This may be done either through a new, independent instrument or as Protocols to the Convention or the Social Charter. Such developments belong, however, with the competence of the legislators.

(27) In this regard, it should be noted that in Recommendation CM/Rec (2022)20 of the Committee of Ministers to member States on Human Rights and the Protection of the Environment, the Committee recommends that the governments of the Member States "reflect on the nature, content and implications of the right to a clean, healthy and sustainable environment and, on that basis, actively consider recognising at the national level this right as a human right that is important for the enjoyment of human rights and is related to other rights and existing international law". It is also evident from the explanatory report that the present recommendation "does not have any effect on the legal nature of the instruments on which it is based, or on the extent of States' existing legal obligations; nor does it seek to establish new standards or obligations".

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[1] https://www.gov.uk/government/speeches/un-human-rights-council-48-explanation-of-vote-on-the-right-to-a-safe-clean-healthy-and-sustainable-environment