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Team: 34

HELGA PEDERSEN
MOOT COURT COMPETITION

Velez v Norland

Velez

vs

Norland

Submission of the Applicant

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48. Tănase v Moldova [GC], app. no. 41720/13.
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<u>National Courts</u>

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Others

- Council of Europe Parliamentary Assembly, Anchoring the right to a healthy environment: need for enhanced action by the Council of Europe, Provisional Version, Resolution 2396, 29 Sep. 2021.

List of Abbreviations

Term	Abbreviation
Article of the Convention	Article
Committee on the Rights of the Child	CRC
Council of Europe	CoE
Euro	EUR
European Convention of Human Rights	The Convention
European Court of Human Rights	The Court
Greenhouse gas(es)	GHG
Intergovernmental Panel on Climate Change	IPCC
Protocol	Prot.
Post-Traumatic Stress Disorder	PTSD
United Nations	UN

Summary of Submissions

- The Applicants allege violations of their rights under Articles 2, 3 and 8 of the European Convention on Human Rights (the Convention) and Article 1 of Prot. No. 1.
- The Applicants respectively satisfy the admissibility criteria under the Convention. They qualify as victims, have exhausted all domestic remedies, and have respected the six-month time limit. The application is by no other means inadmissible.
- The first and third Applicants claim that the Respondent violated their right to life under Article 2 as it failed to meet its positive obligations under that Article, in the absence of any legislative or administrative framework for risk mitigation measures, on the one hand, and the absence of natural disaster management measures, on the other.
- The Applicants submit that the Respondent State has violated their right not to be subjected to ill-treatment under Article 3. Firstly, the violation falls within the scope of the Article in that the threshold of severity is satisfied considering the intense physical and mental suffering, caused by the State's omissions on the one hand, and of the assessment of the relevant circumstances of the case, on the other. Secondly, the positive obligations to ensure that individuals under its jurisdiction are protected from all forms of ill-treatment, were not fulfilled by Norland, as it failed to take reasonable steps to address real and immediate risk of ill-treatment within the knowledge of the authorities.
- The Applicants argue that the national authorities failed to protect their right to respect for private and family life, home, and correspondence, as their private and family life was seriously disrupted due to the Respondent State's failure to take the same practical measures as those expected in the context of their positive obligations under Article 2.
- The Applicants submit that the State has infringed their rights to property and peaceful enjoyment of possession protected under Article 1 of Prot. No. 1. The violation falls within the scope of the present Article in that the Applicants lost their homes and belongings. The State furthermore failed to comply with its positive obligations by not adequately protecting their right to peaceful enjoyment of property through mitigation, adaptation, or crisis management measures, and by not providing adequate compensation for their losses.

Submissions

I. Admissibility

The requirements set out in Article 34 and Article 35 of the Convention concerning the admissibility of their application are fulfilled on the basis of the subsequent considerations.

1. Victim status

In accordance with Article 34 of the Convention, the Applicants are direct victims of the violation, as Elsa Velez, Rafael Velez and David Velez have been "directly affected" by the omissions complained of[1]. The violation of Articles 2, 3 and 8 of the Convention, as well as Article 1 of Prot. 1, has caused pecuniary and non-pecuniary damages, including physical and mental suffering, to the victims as a result of the floods, health care spending, and loss of their home and property.

Admittedly, whilst the Applicants were awarded the modest sum of EUR 7,000 from the Government following the events, in application of Article 12 of the Compensation Law, it is argued by the Court that a "decision or measure favourable to the applicant is not, in principle, sufficient to deprive him of his status as a 'victim' for the purposes of Article 34 of the Convention unless the national authorities have acknowledged, either expressly or in substance, and then afforded redress for the breach of the Convention"[2]. Indeed, even if the Court were to consider that sufficient and appropriate compensation was granted, the Court considers that such a compensation "cannot remedy the lack of acknowledgment of the alleged violations"[3].

In the present case, the compensation does not stem from a recognition of violations of the Convention, but from an emergency fund distributed to the population in Meganissia. Therefore, the Applicants respectfully ask the Court to affirm their victim status at the present stage of the procedures.

[1] Tănase v Moldova [GC], app. no. 41720/13, §104; Burden v the United Kingdom [GC], app. no. 13378/05, §33.

[2] Gäfgen v Germany [GC], app. no. 22978/05, §115.

[3] Centro Europa 7 S.R.L. and Di Stefano v Italy [GC], app. no. 38433/09, §88.

2. Exhaustion of domestic remedies

The Applicants submit they comply with Article 35 §1 since they exhausted all the available and effective domestic remedies[4] and that the subsidiary machinery of protection established by the Convention[5] applies to their complaint.

Even though the Applicants did not explicitly raise Convention rights during domestic proceedings under the articles of the Convention, the complaint was however raised in substance[6] before the domestic courts. In the compensation proceedings before the Leti City Court, they invoked their right to life claiming that the State's inaction had endangered their lives. In the final instance before the Supreme Court, the Applicants alleged the infringement of the right to a healthy environment, deducted from Article 8, as well as the rights protected under Article 3 and Article 1 of Prot. No. 1. The Supreme court of Norland has rejected the appeal of the Applicants. This decision cannot be subject to further appeal before a national jurisdiction.

Therefore, in the present case, all domestic remedies have been exhausted.

3. Compliance with the six-month time-limit

The Applicants lodged their complaint with the Court on the 12th of September 2021, that is, less than six months after the final decision which ended the domestic proceedings. This final decision was rendered by the Supreme Court of Norland on 1 July 2021. As this final decision within the meaning of Article 35 of the Convention was rendered prior to the date of entry into force of Article 4 of Prot. No. 15 (1st of August 2021), the Applicants' claim complies with the six-month time-limit as set out by Article 35 §1 and Article 8 §3 of Prot. No. 15.

II. Preliminary remarks

As a preliminary matter, the Applicants request the Court's attention to its consistent

[4] Selmouni v France [GC], app. no. 25803/94, §76; Karácsony and Others v Hungary [GC], app. nos. 42461/13 and 44357/13, §76.
[5] Kudła v Poland [GC], app. no. 30210/96, §152; Brincat v Malta, app. nos. 60908/11 and 4 others, §55.
[6] Selmouni v France [GC], app. no. 25803/94, §74; Platini v Switzerland (dec.), app. no. 526/18, §40.

acknowledgment in the past that “the Convention cannot be interpreted in a vacuum”[7]. As the Court explained in *Demir and Baykara v Turkey*, “in order to define the meaning of the terms and concepts contained in the text of the Convention”, it “can and must take into account elements of international law other than the Convention, the interpretation of those elements by the competent organs and the practice of European States reflecting their common values. The consensus emerging from specialised international instruments and the practice of the Contracting States may be a relevant consideration for the Court when interpreting the provisions of the Convention in specific cases”[8].

In environmental matters, the Court has developed a body of case-law based largely on the principles enshrined in various international instruments. In *Tătar v Romania*[9], the Court referred, in law, to international sources such as, *inter alia*, the Aarhus Convention of the UN Economic Commission for Europe on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters. Moreover, it should also be noted that expert reports may be relevant to its assessment of the case, as was found in *Fadeyeva v Russia*, where the Court relied on publicly available reports produced by the applicant during the proceedings[10].

In considering the present case, the Applicants respectfully ask the Court to take into consideration all relevant instruments that will later be addressed.

III. **Merits**

The Applicants argue that the Respondent has violated Articles 2, 3 and 8 of the Convention as well as Article 1 of Protocol No. 1.

1. Violation of Article 2 of the Convention

The first and third Applicants argue that their claim falls within the ambit of Article 2 (i). Moreover, they submit that the State of Norland failed to protect their right to life provided by the same provision (ii) and that, on this basis, the Respondent violated their right.

[7] Magyar Helsinki Bizottsag v Hungary [GC], app. no. 18030/11, §123.
[8] Demir and Baykara v Turkey [GC], app. no. 34503/97, §85.
[9] Tatar v Romania, app. no. 67021/01, §93.
[10] Fadeyeva v Russia, app. no. 55723/00, §31.

(i) The Applicants' claim falls within the ambit of Article 2 of the Convention

The first and third Applicants' right to life has been violated on two counts: the absence of any legislative or administrative framework to put into place risk mitigation measures, on the one hand, and the lack of natural disasters management measures, on the other. They argue that their claim falls within the ambit of Article 2 §1.

The well-established case-law of the Court provides that, even though the victims did not suffer an actual loss of life, they can prevail themselves from the violation of this provision[11]. The complaint falls to be examined under Article 2 *inter alia* if the victim "has suffered injuries that appear life-threatening as they occur"[12]. In the light of the Court's jurisprudence, the fact that an Applicant was not physically injured does not constitute an imperative criterion as long as his life was subject to a serious[13] and an imminent[14] risk.

During the instant case's floods, the quickly rising water destroyed a part of the staircase and the external wall of the Applicants' home while they were trying to leave through the first-floor balcony. This severely harmed the at the time five-year old third Applicant, who had to undergo an emergency surgery for both his legs and his right arm immediately after they were rescued and suffered a concussion. As for the first Applicant, she was very close to being injured. The events therefore represented a clear risk to their physical integrity and a threat to their lives. These circumstances can be compared to those in *Kolyadenko and Others v Russia*, where the Court considered that the complaint of a mother leaving her house "with her 21-month-old child in her arms, in seething, breast-deep, turbid water full of floating debris" [15] fell under the application of Article 2. Consequently, Article 2 is applicable in the present case.

[11] Fergec v Croatia, app. no. 68516/14, §§21-24; Makuchyan and Minasyan v Azerbaijan and Hungary, app. no. 17247/13, §89; Brincat v Malta, app. nos. 60908/11 and 4 others, §79.
[12] Nicolae Virgiliu Tănase v Romania [GC], app. no. 41720/13, §140.
[13] Brincat v Malta, app. nos. 60908/11 and 4 others, §82.
[14] Kolyadenko and Others v Russia, app. nos. 17423/05 and 5 others, §155.
[15] Kolyadenko and Others v Russia, app. nos. 17423/05 and 5 others, §154.

(ii) The State failed to protect the right to life by law

The Court holds that the State's responsibility is not required to be direct in the threat to an individual's life[16] as the first sentence of Article 2 §1 does not only impose negative obligations on the State. Positive obligations to protect the right to life further derive from this provision. The first and third Applicants allege the infringement of these positive obligations in that no appropriate framework has been adopted or implemented to protect their right to life.

Article 2 of the Convention entails the positive obligation for the State to "take appropriate steps to safeguard the lives of those within their jurisdiction"[17] and to do "all that could have been required of it to prevent the applicant's life from being avoidably put at risk"[18]. The Court's case-law establishes *inter alia* in *Öneryıldız v Turkey* that Member States need to this end to put into place a legislative and administrative framework that responds to the Court's requirements which emphasises the importance of the public's right to information as well as the existence of "appropriate procedures, taking into account the technical aspects of the activity in question"[19].

In the circumstances of this case, the Government's obligation could be apprehended as encompassing two different types of measures: a regulatory and an effective administrative framework protecting individuals from the risk of natural disasters (risk mitigation measures) and one aimed at handling actual natural disasters (crisis management measures). The Applicants complain about the lack and the insufficiency of such reasonable measures taken by the Respondent, resulting in a breach of its substantive positive obligation.

a. Lack of risk mitigation measures

The Applicants claim that risk mitigation measures that should have been adopted by the Respondent include a regulatory framework protecting individuals in the long run, adopted to

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[16] Nicolae Virgiliu Tănase v Romania [GC], app. no. 41720/13, §135.

[17] Brincat v Malta, app. nos. 60908/11 and 4 others, §79; L.C.B. v the United Kingdom (dec.), app. no. 23413/94, §36.

[18] L.C.B. v the United Kingdom (dec.), app. no. 23413/94, §36.

[19] Öneryıldız v Turkey [GC], app. no. 48939/99, §§89-90.

avoid or attenuate the occurring of natural disaster (climate change mitigation measures), on the one hand, and one protecting individuals in the short run from the impact of the natural disaster (security measures), on the other hand.

Climate change mitigation measures

The Court's interpretation of Article 2 of the Convention developed in *Öneryıldız v Turkey* requires for the Respondent State "to make regulations compelling institutions, whether private or public, to adopt appropriate measures for the protection of people's lives"[20].

The Applicants submit that the State should have stopped increasing its GHG emissions or planned to do so. As it will be explained below, due to their unavoidable adverse effects, the State's inaction in this regard constitutes a breach of their right to life. In is true that the Norlandic authorities initiated a draft national strategy on climate change in 2018 within the context of Action 13 (Climate Change) of the UN Sustainable Development Goals. However, since this draft is still under discussion, no measures have been adopted so far to reduce or plan to reduce its GHG emissions while scientific evidence and the Paris Agreement state that timely action and strategic planning are necessary to this end. Due to Norland's inaction, reported by the NGO Green World[21], its quantity of emitted GHG has not shifted for at least the past ten years, standing around 100 million tons per year. This incurs the State's liability on the basis of four main considerations.

Firstly, in accordance with the Court's stance in *Öneryıldız v Turkey*, the Norlandic Government knew or ought to have known of the issue's imminence considering concurring scientific evidence, on the one hand, and the Paris Agreement of 2015 stating that the parties, including the State of Norland, which ratified the treaty, "recogniz[e] the need for an effective and progressive response to the urgent threat of climate change on the basis of the best available scientific knowledge", on the other hand. As recognised by a number of organizations – namely the NGO Green World in its study titled "Comparative research on climate change" of 2020, the parties to the Paris Agreement of 2015, the Parliamentary

[20] Öneryıldız v Turkey [GC], app. no. 48939/99, §§71 and 90; Kolyadenko and Others v Russia, app. nos. 17423/05 and 5 others, §158; Nicolae Virgiliu Tănase v Romania [GC], app. no. 41720/13, §135.

[21] NGO Green World study, "Comparative research on climate change", 2020, Case, §40.

Assembly of the CoE in Resolution 2396[22] and the IPCC in its report of the 9th of Augustus 2021 –, the influence of human-related activities on climate change, in general, and on the intensity and frequency of river floods is unequivocal.

Secondly, the Applicants acknowledge that besides Norland, other countries share responsibility for the global climate change issue. Nevertheless, in the light of *Urgenda* case held before the Hoge Raad der Nederlanden, a recent decision of the Committee on the Rights of the Child[23] and the Court's case-law according to which States may be declared to be co-responsible for the same violation of a human right[24], this does not exempt the Respondent from its individual obligation to mitigate the adverse impacts of climate change, such as floods threatening the Applicants' life.

Thirdly, the aforementioned study from the NGO Green World states that "the climate system respond[s] to the emissions of GHG over an extended period of time", which can reach 30 years. Even though the environmental disasters could derive from the decisions of past Norlandic Governments, the Applicants consider that the Respondent bears responsibility for its past inaction that impacts the population today on two different grounds. First of all, "from the ratification date onwards", which took place 30 years ago in the instant case, "all of the State's acts and omissions must conform to the Convention"[25] in the light of the Court's competence *ratione temporis*. The Court may therefore take into account Norland's previous inaction which possibly led to the floods affecting the Applicants. Besides, the Montreal Protocol of 1987 was finalised more than 30 years ago and followed by several international treaties. The current Government is further to be held responsible for the future natural disasters that the non-compliance with its obligations will provoke in the light of the principle of intergenerational equity recognised by the previously mentioned CRC's decision and Resolution of the CoE[26], and because the Applicants' life is threatened by the State's failure to act concerning climate strategies as their remaining life expectancy is

[22] Council of Europe Parliamentary Assembly, Anchoring the right to a healthy environment: need for enhanced action by the Council of Europe, Provisional Version, Resolution 2396, 29 Sep. 2021.
[23] CRC, Chiara Sacchi and Ramin Peja and Others v Argentina, app. no. CRC/C/88/D/108/2019, §10.10.
[24] Guadagnino v Italy and France, app. no. 2555/03, §33.
[25] Blečić v Croatie, app. no. 59532/00, §81.
[26] Council of Europe Parliamentary Assembly, Anchoring the right to a healthy environment: need for enhanced action by the Council of Europe, Provisional Version, Resolution 2396, 29 Sep. 2021, §12.

expected to exceed 30 years. Not only floods are predicted by the abovementioned reports but also fires, tornadoes, drought, meaning that current pollution is certainly going to affect them, no matter what area they live in.

Finally, Norland has shown no sign, at present, that it has reduced or intends to reduce its GHG emissions, failing to fulfill its positive obligation despite its effective control over the sources of the emissions. The Applicants acknowledge that "an impossible or disproportionate burden must not be imposed on the authorities without consideration being given, in particular, to the operational choices which they must make in terms of priorities and resources"[27]. However, mitigation measures are as important to the future population's well-being in the long-term, according to the aforementioned reports and rulings, as short-term budgetary policies. Adaptation measures to climate change are not sufficient. Indeed, the agriculture industry is one of the main industry sectors of Norland. Damages from fires, tornadoes and flooding polluting the farmed land with stones, mud and garbage will undoubtedly be considerably significant in the long-term. Moreover, the Norlandic Government did not establish that the burden of taking positive action in the field of climate change mitigation was incompatible with the adoption of the allegedly conflicting budgetary policies, on the one hand, or disproportionate in comparison with the other State's results, which certainly made concessions to reach a lower quantity of GHG emissions, on the other hand.

In the light of a number of national and international jurisdictions' case-law finding a breach of Article 2 of the Convention due to the State's inaction concerning climate change mitigation measures – namely the Hoge Raad in *Urgenda Foundation v State of the Netherlands*, the Bundesverfassungsgericht[28] and the CRC in its above-mentioned decision –, the Applicants consider that the State failed to fulfil its obligations.

[27] Budayeva and Others v Russia, app. nos. 15339/02 and 4 others, §135.

[28] German Bundesverfassungsgericht, Order of 24 March 2021 on constitutional complaints against the Federal Climate Change Act, 1 BvR 2656/18, 1 BvR 78/20, 1 BvR 96/20, ECLI:DE:BVerfG:2021:rs20210324.1bvr265618.

Security measures

A “duty to do everything within the authorities' power in the sphere of disaster relief”[29] in order to protect individuals from weather hazards derives from the State’s positive obligation under Article 2 of the Convention. In view of adaptation to the adverse effects of the changing climate in the short-term, the Kyoto Protocol insists on the need of security measures and policies[30]. In *Öneryıldız v Turkey*, the Court points out that “the positive obligation to take all appropriate steps to safeguard life for the purposes of Article 2 [...] entails above all a primary duty on the State to put in place a legislative and administrative framework designed to provide effective deterrence against threats to the right to life”[31]. In *Budayeva and Others v Russia*, the omission of the State concerning the implementation of land-planning and emergency relief policies in the concerned hazardous area was deemed unjustified[32]. According to the Applicants, the Norlandic authorities committed a similar failure, putting their life at risk.

Indeed, the Court also found in the *Budayeva* case that its case-law concerning dangerous activities applies in cases of adaptation measures to potential natural disasters “where the State is directly involved in the protection of human lives through the mitigation of natural hazards”[33], on the assumption that “the imminence of [the] natural hazard that had been clearly identifiable, [...] especially where it concerned a recurring calamity affecting a distinct area developed for human habitation or use”[34].

In the present case, the risk of recurring and imminent floods was clearly identifiable. Considering the past meteorological events and scientific evidence, the international agreements ratified by the Respondent State and scientific evidence, the possibility of heavy rainfalls causing flash floods damaging houses and other infrastructures should have been anticipated in the light of the Court’s opinion in *Budayeva and Others v Russia*[35]. Admittedly,

[29] Budayeva and Others v Russia, app. nos. 15339/02 and 4 others, §175.
[30] Budayeva and Others v Russia, app. nos. 15339/02 and 4 others, §131.
[31] Öneryıldız v Turkey [GC], app. no. 48939/99, §89.
[32] Budayeva and Others v Russia, app. nos. 15339/02 and 4 others, §159.
[33] Budayeva and Others v Russia, app. nos. 15339/02 and 4 others, §137.
[34] Budayeva and Others v Russia, app. nos. 15339/02 and 4 others, §137.
[35] Budayeva and Others v Russia, app. nos. 15339/02 and 4 others, §148.

the previous floods affecting the riverbank of Leti were less intense. However, in *Kolyadenko and Others v Russia*, the Court notes that the unexpected character of the events – in the latter case, it was the fact that "such heavy rainfall as on that day had never occurred in that region before"[36] – cannot absolve the State from its responsibility. As a result, except for embankments around water surfaces which have proven ineffective in holding back water from past minor floods, the State failed to fulfil its obligation to build or implement preventive arrangements that could avoid future floods to threaten the lives of Leti's population, including the Applicants.

The Applicants therefore submit that the existing adaptation measures are not sufficient to guarantee the rights set forth in Article 2 for the two subsequent reasons.

On the one hand, the measures taken were not sufficiently adapted to the urgency of the situation and to the individual situations of its population. The threat represented by a river located right next to housing, particularly the main street of the town, could have been compensated by effective and permanent preventive arrangements, such as dikes, flood-protection facilities and similar technical measures, or changes in the urban development and in the spatial planning. This reduces the vulnerability of the local population towards effects of climate change. Aside from the embankments, which did not prove to be highly effective, such measures could feasibly have been implemented prior to the catastrophic events and would certainly have minimised the damaging impact of the floods to which Leti's inhabitants were subjected, especially the 200 injured ones, including the first and third Applicants.

On the other hand, the Court points out in *Brincat v Malta* that "the competent authorities must act with exemplary diligence and promptness"[37] and adds in *Taskin and Others v Turkey* that "where a State must determine complex issues of environmental and economic policy, the decision-making process must firstly involve appropriate investigations and studies in order to allow them to predict and evaluate in advance the effects of those activities which might damage the environment and infringe individuals' rights and to enable

[36] Kolyadenko and Others v Russia, app. nos. 17423/05 and 5 others, §165.
[37] Brincat v Malta, app. nos. 60908/11 and 4 others, §121.

them to strike a fair balance between the various conflicting interests at stake"[38]. The Applicants argue that the State did not conduct any investigation concerning the threats of the environmental issue: never did the State investigate in what measure more intense floods could affect the local population and the risks of the occurrence of such a flood. Besides, the State itself did not release clear information about the risks it represents being accessible to the public. The aforementioned draft national strategy on climate change provides that "the Prime Minister to lay reports before Parliament containing an assessment of the national risks relating to the current and predicted impact of climate change". However, neither this draft nor any other risk analysis measure were adopted. The Respondent State did therefore not do all that could have been required of it to prevent the Applicant's life from being avoidably put at risk.

b. Lack of natural disasters management measures

Additionally, the Applicants assert that the first warning was not sufficiently indicative of the dangerousness of the situation, in a staggered manner, and that the second one was issued too late, thus causing them to lose precious time. Article 2 of the Convention entails that preventive measures have to ensure the public's right to information in cases of life-threatening emergency[39]. The availability of information concerning the threat for physical integrity to which the population is subject is considered as "a decisive factor for the assessment of the circumstances of the case"[40] when the legal framework at hand calls for criticism. Aside from the effective establishment of administrative and legislative regulations, the compliance with the relevant regulations to that end by the national authorities also has to be assessed[41] in order to determine if the State complied with its substantive positive obligation.

In the instant case, about five hours before the events, the Department for PSEP of the Norlandic Ministry of Defense received an urgent storm warning predicting possible floods. The warning as well as information on designated emergency shelters for evacuation were broadcasted to the population through various means (the national television, the

[38] Taskin and Others v Turkey, app. no. 46117/99, §119.
[39] Budayeva and Others v Russia, app. nos. 15339/02 and 4 others, §132.
[40] Öneryıldız v Turkey [GC], app. no. 48939/99, §98.
[41] Öneryıldız v Turkey [GC], app. no. 48939/99, §97.

Government's internet portals, social media and text messages). These means were determined by the Law on Emergency Situations, which establishes a rapid emergency response plan for natural disasters. In compliance with this law and its by-laws, a system of early warning through media, social media and telecommunication providers was put into place by the Department of PSEP after they received the warning from the State Meteorological Service.

The Applicants consider that this information did not enable them to evaluate the risk that they were facing, as it is required by the Court in *Öneryıldız v Turkey*. Messages and warnings were sent to the Leti population on 14 June 2020 at two different times. At 9 a.m., the Applicants received a first text message with a one-hour delay, consisting of a warning and a recommendation to evacuate to the nearest emergency shelter. Given the weak floods the Applicants had experienced in the past, the notice was inappropriate because it was of a recommendatory nature and it did not indicate the intensity of the forecasted floods. Therefore, while Mr. Velez went to work, the other Applicants did not leave their home to take shelter in the provided local warehouse as suggested by the authorities because they doubted about the seriousness of the communication and concluded that it was certainly sent by precaution. It is noteworthy that other residents acted similarly. It is only at 12.30, that is more than three hours later and with no message in the meantime, that an immediate evacuation was ordered by means of text messages and an audio warning system, expressed in imperative and more severe terms, providing adequate information about the danger of the weather. However, as the water was rising, and while it is unknown whether the malfunction of the warning system had been fixed, it put the first and third Applicants in a dangerous situation and left very little time for them to leave their home before it was inundated. Even though a catastrophe of this scale and nature can not totally be avoided, the State has the responsibility to reduce its disastrous effects and the duty to prevent them with appropriate emergency warnings and clear information regarding the inherent threat of the flooding, such as the Court decided in *Budayeva and Others v Russia* in the event of mudslides[42]. Consequently, the State of Norland failed to provide essential information enabling the population of the danger zone to correctly evaluate the risk that the river incurs for the houses

[42] Budayeva and Others v Russia, app. nos. 15339/02 and 4 others, §153.

along the riverbank[43]. Article 2 has therefore been violated by the Respondent.

2. Violation of Article 3 of the Convention

Article 3 of the Convention states that "no one shall be subjected to torture or to inhuman or degrading treatment or punishment". As the Court repeatedly ruled, the prohibition of torture and other ill-treatment is absolute[44], even in the most difficult circumstances[45]. While admittedly, this Article is rarely referred to in environmental matters, its relevancy must be appreciated in the light of the application of *Duarte Agostinho and Others v Portugal*[46], as the Court itself has raised its relevance in addressing the parties. Furthermore, the Applicants highlights that "the Convention is a living instrument which must be interpreted in the light of present-day conditions and that the increasingly high standard of protection of human rights and fundamental freedoms inevitably calls for greater firmness in the assessment of violations of the fundamental values of democratic societies"[47],

In the present case, the Applicants submit to have been subjected to ill-treatment in that Norland did not establish a legislative and/or administrative establishing mitigation and adaptation to climate change, nor did it provide a suitable crisis management response framework to address the events. In addition, and continuing, the State has not taken the necessary measures to prevent climate change and its consequences.

(i) The Applicants' claim falls within the ambit of Article 3

The Applicants argue that there has been a violation of Article 3, given the treatment they have and continue to suffer. According to the Court, "ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. An assessment of whether this minimum has been attained depends on many factors, including the nature and context of the treatment, its duration, and its physical and mental effects, […]"[48]. As the Court pointed out in *Bouyid v Belgium*, the threshold of severity "usually involves actual bodily injury or

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[43] Brincat v Malta, app. nos. 60908/11 and 4 others, §102; Guerra and Others v Italy [GC], app. no. 14967/89, §60.

[44] Ireland v the United Kingdom, app. no. 5310/71, §163.

[45] Selmouni v France [GC], app. no. 25803/94, §95.

[46] Duarte Agostinho and Others v Portugal, app. no. 39371/20.

[47] A. v Croatia, app. no. 55164/08, §67.

[48] Volodina v Russia, app. no. 41261/17, §73.

intense physical or mental suffering. However, even in the absence of these aspects, where treatment 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, it may be characterised as degrading and also fall within the prohibition set forth in Article 3"[49].

In assessing the threshold of severity under Article 3, it is important to recall the cumulative effect[50] of the acts of the case, which taken together amount to achieving the threshold. In the present development, the threshold of severity is met in light of the intense physical and mental suffering, including a high state of anxiety, caused by the State's omissions on the one hand, and of the assessment of the relevant circumstances of the case, on the other.

Regarding the intensity criterion, the Court has established in *Benzer and Others v Turkey* that subjecting citizens to the consequences of the destruction of their homes (namely: deprivation of their shelter and support; forced desertion of the place where they and their friends lived; loss of their homes and possessions; and subjection to anguish and distress[51]) is sufficient in itself to consider inhumane the exposure of the citizens to these events. In the present case, the aftermath of the floods, the circumstances of which are similar to the case cited, the aftermath of the floods have caused them suffering of sufficient severity to qualify as ill-treatment under Article 3.

Furthermore, although in dissimilar circumstances, the Court previously recognised in *Dulaş v Turkey* that the circumstances in which one was forced to leave their home, which was destroyed before their eyes, leaving them destitute and unsafe, constituted inhumane and degrading treatment[52]. In the present case, it is worth noting the significant psychological impact of witnessing their home being submerged under water for the second and third Applicant, as well as the related trauma of being forced to flee and the subsequent injuries that resulted therefrom. In addition, the first Applicant, Mr Velez, helplessly witnessed the painful images of his wife and child, visibly distressed, waiting for assistance on the balcony,

[49] Bouyid v Belgium [GC], app. no. 23380/09, §87.
[50] Aydin v Turkey [GC], app. no. 23178/94, §86.
[51] Benzer and Others v Turkey, app. no. 23502/06, §207.
[52] Dulaş v Turkey, app. no. 25801/94, §50.

and of his house being swept away a few minutes later.

As mentioned above, the *duration* of the treatment is an additional factor to consider when determining the severity threshold[53]. The third Applicant, aged 5 at the time of the floods, suffered complicated fractures to both legs and his right arm as well as a brain injury. As a result, he had to undergo two surgical operations and is currently undergoing physical rehabilitation. All three Applicants have been diagnosed with post-traumatic stress disorder (PTSD), they suffer nightmares, panic attacks and extreme anxiety. They have been undergoing psychotherapy since the tragic events.

Concurrently, the Court has, in dissimilar circumstances, admitted that living in “a permanent state of anxiety owing to one's uncertainty about his fate”[54] could amount to an inhuman or degrading treatment. In the present case, the Applicants are still living with Mr. Velez's parents, as they do not have sufficient resources to purchase a new property. It is also necessary to note the psychological reports attesting to their stress and anxiety caused by the *past* and *future* danger to their lives. The Applicants fear the future effects of climate change, in that the above-mentioned inaction has already endangered their lives and the lives of Norlandic in anticipation of similar future events.

Regarding the circumstances of the case, the Applicants respectfully request the Court to assess, in line with its well-establised case-law, circumstances “such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim”[55] to establish the minimum level of severity. The Court furthermore attaches considerable importance to the status of the Applicants, particularly when they are “a member of a particularly underprivileged and vulnerable population group in need of special protection”[56]. In the present case, the Applicants were in a particularly vulnerable situation. In *M.S.S. v Belgium and Greece*, the Court has stated that “State responsibility [under Article 3] could arise for ‘treatment’ where an applicant, in circumstances wholly dependent on State support, found herself faced with official indifference when in a situation of serious

[53] Bouyid v Belgium [GC], app. no. 23380/09, §87.
[54] El-Masri v the Former Yugoslav Republic of Macedonia [GC], app. no. 39630, §202.
[55] Bati and Others v Turkey, app. no. 33097/96, §120.
[56] Oršuš And Others v Croatia [GC], app. no. 15766/03, §147.

deprivation or want incompatible with human dignity"[57]. When it comes to global warming, it should be stressed that citizens are entirely dependent on the decisions taken by the Government. In this case, it is also necessary to underline the vulnerability of the Applicants to being dependent on the State for both financial and psychological support, in that they are unable to provide for their human needs as a result of the floods. Under the current circumstances, the applicants did not receive sufficient psychological assistance on the day of the floods. Although ten Red Cross volunteers were present, who could only administer first aid, the Department for PSEP sent out only one certified psychologist to help survivors deal with the immediate aftermath of trauma for the entire emergency shelter. In financial terms, the Applicants are left with no prospects for the future, as they are currently forced to live with Mr. Velez's parents, given their inability to afford alternative accommodation due to their lack of funds. Moreover, the young age of the third Applicant must be seen in the light of the Court's case-law, according to which younger persons are all the more vulnerable[58].

Given that one of the Applicants in this case is minor and that all three are dependent on State measures to mitigate climate change, the Applicants respectfully ask the Court to assess their particularly vulnerable situation in relation to climate change.

(ii) Violation of State's positive obligations under Article 3

Given the absolute character of the right concerned, the Court stated that Article 3 of the Convention imposed "a number of positive obligations on the States Parties, designed to prevent and provide redress for torture and other forms of ill-treatment"[59]. Indeed, although in different circumstances, it affirmed that "Article 3 applied to inhuman and degrading treatment […] where a Contracting State had, through its acts or passivity, failed to comply with its duties under the Convention"[60]. As it has been substantiated that the treatment reached the threshold of severity triggering the protection of Article 3 of the Convention, the Applicants seek the Court's finding of a breach of the obligation to take reasonable steps to avert a real and immediate risk of ill-treatment of which the authorities were or should have

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[57] M.S.S. v Belgium and Greece [GC] app. no. 30696/09, §253.
[58] Bati and Others v Turkey, app. no. 33097/96, §122.
[59] Al-Adsani v the United Kingdom [GC], app. no. 35763/97, §38.
[60] H.L.R. v France [GC], app. no. 24573/94, §30.

been aware[61]. As per Article 2 of the Convention, the obligation under the Article 3 demands an adequate legal or administrative framework affording protection against ill-treatment[62]. The above development of Article 2 is therefore referred to in order to establish the grounds of the violation of Article 3.

3. Violation of Article 8 of the Convention

The Applicants submit that Article 8 applies to the present case (i) and that the domestic authorities failed to protect their right to respect for private and family life (ii).

(i) Applicability of Article 8 of the Convention

Article 8 provides in its first paragraph that "*everyone has the right to respect for his private and family life, his home and his correspondence*". The notion of private life has been given a broad interpretation by the Court, not only covering physical and psychological integrity of a person, but also a right to personal development *inter alia*[63].

In the present circumstances, the floods caused the total destruction of the Velez family's house. They successively slept a few nights at the hospital, lived for two weeks in an emergency shelter, moved in Ms. Velez' parents' house, where they are still staying more than one year after the events. They cannot afford to rent or buy a new property, despite the funds that they received. The events affected their private and family life in two ways.

Firstly, the Court stated in *Taskin and Others v Turkey* that "Article 8 applies to severe environmental pollution which may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely, without, however, seriously endangering their health"[64]. It found, for instance, that Article 8 was applicable in *Kolyadenko and Others v Russia*, where flash floods caused damages to the applicant's home. Consequently, the Applicants claim that the burden caused by the impediment to the enjoyment of their home as well as their physical and mental injuries raise an issue under Article 8.

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[61] Eremia v the Republic of Moldova, app. no. 3564/11, §58.
[62] Volodina v Russia, app. no. 41261/17, §77.
[63] Denisov v Ukraine [GC], app. no. 76639/11, §95.
[64] Taskin and Others v Turkey, app. no. 46117/99, §113.

Secondly, the loss of the Velez' home and all their belongings has been emotionally distressing; their two-weeks stay in an emergency shelter and their move in Ms. Velez' parents' house greatly destabilised them in that they lacked a steady and fixed place to live; they have to live with the latter on a day to day basis, which can reveal itself complicated on a domestic level; the events physically injured the third Applicant; the three Applicants suffer from PTSD, nightmares, panic attacks and extreme anxiety. As physical and psychological integrity are included in the notion of "private life"[65], they consider that Article 8 is applicable.

On the applicability of Article 8 in general, the Court stated in *Brincat v Malta* that it has examined complaints under Article 8 "where the circumstances were not such as to engage Article 2, but clearly affected a person's family and private life under Article 8"[66]. Therefore, the Applicants submit that the State' failure to comply with its obligations falls under the scope of Article 8 even if the Court were to declare the inapplicability of Article 2 in the present case.

(ii) The State failed to protect the right to respect for private and family life

Article 8 of the Convention imposes both positive and negative obligations. Positive obligations arising from Article 8 are defined by the Court as the duty "to take reasonable and appropriate measures to secure the Applicant's rights under paragraph 1 of Article 8"[67]. This obligation "requires the national authorities to take the same practical measures as those expected of them in the context of their positive obligation[s] under Article 2"[68]. This has been explicitly acknowledged by the Court in the context of dangerous activities according to the case-law developed in *Budayeva and Others v Russia*, where it has stated that "in the context of dangerous activities the scope of the positive obligations under Article 2 of the Convention largely overlap with those under Article 8 "[69].

[65] Medžlis Islamske Zajednice Brčko and Others v Bosnia and Herzegovina [GC], app. no. 17224/11, §76.
[66] Brincat v Malta, app. nos. 60908/11 and 4 others, §85.
[67] López Ostra v Spain, app. no. 16798/90, §51; Powell and Rayner v the United Kingdom, app. no. 9310/81, §41.
[68] Kolyadenko and Others v Russia, app. nos. 17423/05 and 5 others, §216; Brincat v Malta, app. nos. 60908/11 and 4 others, §102.
[69] Budayeva and Others v Russia, app. nos. 15339/02 and 4 others, §133.

As regards to the present case, the Applicants point out that the positive obligation enshrined in Article 8 was not complied with. Indeed, they had to endure the aforementioned harm resulting from the devastation of their house and personal belongings due to the State's inaction concerning the adoption of risk mitigation measures. The Applicants respectfully refer to the developments under Article 2 on that point.

Furthermore, regarding specifically Article 8, the Court emphasises in its case-law the importance for the State to strike a fair balance between the conflicting interests at stake. Accordingly, the absence of risk assessment was all the more important here in order to examine the different interests. Additionally, in *Hatton and Others v the United Kingdom*, the Court states that a "relevant factor in assessing whether the right balance has been struck is the availability of measures to mitigate the effects"[70] of the issue at hand, noting that such measures were effectively available and implemented concerning aircraft noise. In the present case, no mitigation measures were put into place by the Norlandic authorities and the adaptation measures are not sufficient, while it could have had a major impact on the course of the events and protection of the private and family life and home of the Applicants, as developed hereinabove.

Admittedly, the Applicants submit that they suffered a breach of their rights protected under Article 8.

4. Violation of Article 1 of Protocol 1

Article 1 of Prot. No. 1 declares that "every natural or legal person is entitled to the peaceful enjoyment of his possessions". This article is admissible as the Applicants lost their home (i). The Applicants claim that the State has failed to comply with the positive obligations inherent to this provision, by not sufficiently protecting the right to peaceful enjoyment of property through mitigation, adaptation or crisis management measure (ii), nor has it provided them with adequate compensation for their losses (iii).

[70] Hatton and Others v the United Kingdom [GC], app. no. 36022/97, §127.

(i) Applicability of Article 1 of Protocol 1

In *Budayeva and Others v Russia*[71], the Court stated that it has to be established that the Applicants were the owners and occupants of a property that was destroyed by the flood, and of all of the destroyed belongings comprising their household to consider the admissibility of Article 1 of Prot. No.1. In the present case, the Applicants were the owner of a house in Meganissia. Therefore, the claim based on this article is admissible.

(ii) Violation of the State's positive obligations

According to the Court, under Article 1 of Protocol No. 1, the State has a positive obligation to take reasonable measures to protect the right to the peaceful enjoyment of possessions. This obligation, as confirmed in *Hadzhiyska v Bulgaria*, is not absolute and cannot extend further than what is reasonable in the circumstances[72].

The Court stated in *Budayeva and Others v Russia*, that in a situation where lives and property were lost as a result of events occurring under the responsibility of the public authorities, the scope of measures required for the protection of dwellings was indistinguishable from the scope of those to be taken in order to protect the lives of the residents[73].

As mentioned in the submission under Article 2, the State did not take reasonable measures to tackle climate change and avoid the loss of the property of the Applicants.

Furthermore, in cases where the Court has found a violation of Article 8 on the ground of the absence of an effective response by the authorities[74] it decided that it was not necessary to examine whether in this case there had been a violation of Article 1 of Proto. No. 1. It is therefore not necessary to argue if Article 1 of Prot. No.1 was eventually breached.

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[71] Budayeva and Others v Russia, app. nos. 15339/02 and 4 others, §171.
[72] Hadzhiyska v Bulgaria, app. no. 20701/09, §15-16.
[73] Budayeva and Others v Russia, app. nos. 15339/02 and 4 others, §174.
[74] Surugiu v Romania, app. no. 48995/99, §67-69.

(iii) Insufficient compensation of the State

The Court, in *Turgut and Others v Turkey*, stated that "in the case of deprivation of property, in order to determine whether the contested measure strikes the appropriate balance and, in particular, whether it does not impose a disproportionate burden on the Applicants, account must be taken of the compensation arrangements provided for under domestic law"[75]. More specifically, in *Nastou v Greece* case, the Court held that "without payment of a sum reasonably commensurate with the value of the property, a deprivation of property will normally constitute undue interference"[76]. While considering the State's national margin of appreciation, they must not reimburse the entire value of their property, as the Court stated in *Papachelas v Greece*[77].

In the present case, the Norlandic Law on Emergency Situations includes an emergency fund to provide swift and urgent monetary relief based on the exigencies of individual situations. Following this law, the State has disbursed EUR 5,000,000 evenly to the affected population in Meganissia. The Applicants only received EUR 7,000 of the State. Thanks to the fundraising of the local population and celebrities, they received an additional EUR 1,000.

However, the house of the Velez family had a value of EUR 300, 000. Therefore, the EUR 7,000 granted (2,33% of the value of the Applicant's home) by the State is not reasonably commensurate with the value of the property. In a similar case, *Budayeva and Others v Russia*[78], the Court itself raised that, concerning Article 1 of Prot. No. 1., the State must proportionally compensate for the loss. The State could have offered a better compensation than only reimburse approximately 2% of the value of their home.

As the State was unable to take reasonable measures to mitigate the risk and the effects of the natural disaster - the Applicants refer to the submission under Article 2 to that regard-, it violated the right of the Applicants to protection of property. The Applicants therefore ask the Court to conclude that the housing compensation provided to the Applicants was manifestly

[75] Turgut and Others v Turkey, app. no. 1411/03, §91.
[76] Nastou v Greece (no 2), app. no. 16163/02, §33.
[77] Papachelas v Greece [GC], app. no. 31423/96, §48.
[78] Budayeva and Others v Russia, app. nos. 15339/02 and 4 others, §180.

out of proportion to their lost accommodation.

IV. Conclusion

For all the above-mentioned reasons, the Applicants respectfully request the Court:

- To declare the complaint admissible, and
- To declare that the Respondent has violated the Applicants' rights under Articles 2, 3 and 8 of the European Convention on Human Rights (the Convention) and Article 1 of Protocol 1.