2021-2022

Team: 16

HELGA PEDERSEN MOOT COURT COMPETITION

Velez

vs

Norland

Submission of the Respondent

ELSA International
email: academicactivities@elsa.org
tel.: +32 2 646 2626
helgapedersenmoot.elsa.org

The European Law Students' Association

COUNCIL OF EUROPE
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C. List of Abbreviations

- A1	Ms. Elsa Velez / Applicant 1
- A2	Mr. Rafael Velez / Applicant 2
- A3	Mr. David Velez / Applicant 3
- app. no(s).	Application number(s)
- Art(s).	Article(s) of the Convention
- ARSIWA	Draft Articles on the Responsibility of States for Internationally Wrongful Acts
- BVerfG	Bundesverfassungsgericht, German Federal Constitutional Court
- CM	Committee of Ministers, Council of Europe
- the Court / ECtHR	European Court of Human Rights
- Dec.	Decision
- CRC	United Nations Convention on the Rights of the Child
- ECHR / the Convention	European Convention on Human Rights
- ECS	European Social Charter
- *et al.*	and Others
- GC	Grand Chamber
- (G)t	(giga)tonnes
- ICCPR	International Covenant on Civil and Political Rights
- IEA	International Energy Agency
- ILC	International Law Commission
- NGO	Non-governmental organisation
- PACE	Parliamentary Assembly, Council of Europe
- Prot.	Protocol
- PTSD	Post-traumatic stress disorder
- Rec.	Recommendation
- sect.	section
- UK	United Kingdom
- UDHR	Universal Declaration of Human Rights
- UN	United Nations

- UN HRC	United Nations Human Rights Council
- UNFCCC	United Nations Framework Convention on Climate Change
- VCLT	Vienna Convention on the Law of Treaties
– WRI	World Resources Institute

D. Summary of Submissions

- Mr. Rafael Velez' (A2) application under Art. 2 is inadmissible insofar as it relates to the concrete events on 14 June 2020 because he lacks victim status.
- The Respondent raises a preliminary objection against all parts of the application that relate to future climate change, on the grounds that the Applicants lack victim status.
- All parts of the application that invoke state responsibility for the flood are inadmissible *ratione personae*, on the grounds that Norland cannot be held responsible for a natural disaster which cannot be attributed to any act or omission on Norland's part.
- In addition, Mrs. Elsa Velez' (A1) and Mr. David Velez' (A3) applications under Art. 2, with respect to the danger to their lives in the flood, are manifestly ill-founded, as such danger arose due to their own imprudent conduct.
- Art. 2 is not applicable to future risks caused by climate change, as the threat is not real and immediate. This part of the application would invoke a right to a healthy environment unknown to the ECHR and is therefore inadmissible *ratione materiae*.
- The Respondent fulfilled its positive obligations under Arts. 2, 3, 8 and Art. 1 of Prot. No. 1 in relation to (1) the prevention of the flood on 14 June 2020 (2) the concrete response to the flood, and (3) future dangers resulting from climate change.
- The flood and its consequential damage cannot be attributed to any dangerous activity. Therefore, both Arts. 2 and 8, if applicable, only compelled Norland to take measures to increase its capacity to deal with natural disasters and adequately respond to the flood – both of which it did.
- Additionally, the Respondent needs to be awarded a wide *margin of appreciation* under both Arts. 2, 8 and Art. 1 of Prot. No. 1, as climate change is a complicated and technical matter. Norland remained within that *margin of appreciation* in balancing the competing interests.
- The Applicants do not have an arguable claim under Art. 8, as the flood which caused the damage is an inherent environmental risk for modern cities.
- Regarding future harm, Norland has the time and potential measures with which to combat the harm of future floods and effectively protect the Applicants' rights under Arts. 2, 8 and Art. 1 of Prot. No. 1. Art. 3 is not applicable to future climate change, as there is no treatment from which Norland ought to protect the Applicants. Alternatively, the severity threshold has not been reached.
- The interference by the Respondent with Art. 1 of Prot. No. 1 concerning the Applicants'

enjoyment of their possession is justified.

E. Legal Pleadings

I. Admissibility

1. INADMISSIBILITY *RATIONE PERSONAE*

1.1 Victim status

1.1.1 Mr. Velez lacks victim status under Art. 2 with respect to the flood

[1] The Respondent challenges the admissibility of Mr. Velez' application under Art. 2, insofar as it concerns the flood on 14 June 2020, on the grounds that he lacks victim status. Art. 2 applies to a risk to life posed by a flood only if an applicant's life is actually endangered. No such danger is found if he is absent when his home is flooded and he does not provide evidence that he was similarly endangered in his actual location.[1] In the present case, Mr. Velez was away at work when the Applicants' house was flooded. His workspace was never in peril. Thus, he was never personally endangered by the flood. The Respondent therefore invites the Court to declare Mr. Velez' application under Art. 2 relating to the flood inadmissible as incompatible with the Convention *ratione personae* within the meaning of Art. 35 § 3 (a).

1.1.2 All Applicants lack victim status as regards future harm

[2] Furthermore, all Applicants lack victim status with respect to all alleged violations under Arts. 2, 3, 8 and Art. 1 of Prot. No. 1 pertaining to future climate change. The Court has repeatedly held that Art. 34 does not allow applications that allege *in abstracto* violations of the ECHR and does not provide for an *actio popularis*.[2] In other words, applicants may not complain about a provision of domestic law, practice or public act simply because they regard it as contrary to the ECHR.[3] Nor does the ECHR, in principle, allow complaints against potential future violations.[4] In the rare event that such complaints are allowed, applicants "must produce reasonable and convincing evidence of the likelihood that a violation affecting them personally will occur; mere suspicion or conjecture is insufficient in this respect."[5]

[3] Future harm due to climate change – if attributable to the State – constitutes a very general threat that may affect people all over the world. To avoid rendering Art. 34 meaningless,[6] the Applicants must provide evidence that they, in particular, will be

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1 *Kolyadenko et al. v Russia*, app. nos. 7423/05 *et al*., § 152.

2 *Burden v UK* [GC], app. no. 13378/05, § 33; *İlhan v Turkey* [GC], app. no. 22277/93, § 52; *Cordella v Italy*, app. nos. 54414/13; 54264/15, § 100; *Klass et al. v Germany*, app. no. 5029/71, § 33.

3 *Centre for Legal Resources on behalf of Valentin Câmpeanu v Romania* [GC], app. no. 47848/08, § 101; *Klass et al. v Germany*, app. no. 5029/71, § 33; *Monnat v Switzerland*, app. no. 73604/01, § 31.

4 *Berger-Krall et al. v Slovenia*, app. 14717/04, § 258.

5 *Centre for Legal Resources on behalf of Valentin Câmpeanu v Romania* [GC], app. no. 47848/08, § 101; *Asselbourg et al. v Luxembourg* (dec.), app. no. 29121/95, The Law § 1.

6 Brænden (2021), pp. 29-31.

specifically affected by climate change more than the next person. They have failed to do so. The only evidence they have provided is that natural disasters, in general, could potentially happen with increased frequency at some indeterminate point in the future.[7] While Leti has seen a dangerous flood on 14 June 2020, no evidence has been raised which shows a specific increase in the risk of floods of such magnitude in this region. That potential future disasters may affect the Applicants under circumstances yet unknown is not conclusive of an actual future violation of their rights. Although A3 is more likely to live to see the full consequences of climate change than A1 and A2, the above is true for A3 just as much as for them. At this point in time, future violations of the Applicants' rights are thus mere speculation. Accordingly, they lack victim status under Art. 34. Their claims under Arts. 2, 3, 8 and Art. 1 of Prot. No.1 constitute an *actio popularis*. and ought to be rejected as incompatible with the Convention *ratione personae*, Art. 35 § 3 (a).

1.2. State responsibility

[4] The Respondent submits that the applications under all Articles are inadmissible *ratione personae*, Art. 35 § 3 (a), insofar as they invoke state responsibility for harm induced by the flood on 14 June 2020. State liability under the ECHR requires that the alleged violation of the Applicants' human rights be attributable to an act or omission on the part of the State.[8] Since the conduct complained of is Norland's alleged failure to take action against climate change,[9] the issue is one of omission. That omission must be causally linked to the harmful event.[10]

[5] In the present case, the alleged violations were caused by the flood on 14 June 2020. The Applicants rely on a two-step link to establish state responsibility for that harmful event:[11] they claim first, a causal connection between Norland's alleged failure to enact environmental legislation and climate change and second, a causal connection between climate change and the flood. The Respondent denies that either climate change or the flood can be attributed to it.

[6] While causation in the context of the ECHR does not adhere to a strict "but for" test,[12] it still requires evidence that state action would have had a real prospect of avoiding or at least

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7 *Cf.* The Case, § 40.

8 *Cf.* Art. 1 ECHR; *Sejdic and Finci v Bosnia and Herzegovina* [GC], app. nos. 27996/06, 34836/06, § 30; *Gentilhomme, Schaff-Benhadji and Zerouki v France*, app. nos. 48205/99 *et al*., § 20; *M.A. et al. v Lithuania*, app. no. 59793/17, § 70; Harris, O'Boyle, Warbrick (2018) pp. 83 f.; Milanovic (2020), p. 346.

9 The Case, §§ 21, 27.

10 *L.B.C. v UK*, § 40; Conforti, (2004), pp. 134-7.

11 The Case, §§ 21, 27.

12 *O'Keeffe v Ireland* [GC], app. no. 35810/09, § 149; *Bljakaj et al. v Croatia*, app. no. 74448/12, § 124; *Opuz v Turkey*, app. no. 33401/02, § 136; *Premininy v Russia*, app. no. 44973/04, § 84.

minimising the risk of harm.[13] However, such evidence cannot be found here. First, climate change is a complex, global phenomenon, to which emissions of countries all over the world contribute. Global GHG emissions in 2019 amounted to 34.2 Gt.[14] Norland's emissions amounted to 100 million t,[15] i.e. 0.2924 %, an overall negligible contribution. If Norland had reduced its emissions, climate change would still be taking place due to the emissions of other states for which Norland cannot be held responsible. The ECHR only recognises responsibility for conduct within a state's own jurisdiction, Art. 1 ECHR.[16] Even Art. 47 ARSIWA does not establish joint and several liability but only responsibility for the state's own conduct.[17] At best, the Applicants can thus establish a 0.2924 % partial responsibility for climate change.

[7] Second, it is questionable whether one NGO report[18] provides sufficient and reliable evidence to prove causation between climate change and floods in general, especially given that even reputable NGOs are not necessarily impartial and often follow their own agenda in providing reports.[19] Third, even if one accepted the report as evidence that climate change generally increases the likelihood of floods, no evidence has been provided that this particular one on 14 June 2020 was indeed its consequence. Floods have happened before climate change, and were not previously unknown to Leti.[20] Even though the flood on 14 June 2020 was exceptional in its magnitude, hundred-year floods occurred before climate change as well.[21]

[8] Last, even if climate change caused the flood on 14 June 2020, there is no evidence that an enactment of laws to reduce emissions by Norland would have impacted climate change to such a degree as to prevent that specific flood from happening. Not even the Applicants argue that the Respondent was under a duty to prohibit all emissions within Norland's boundaries. Thus, any reasonable reduction of Norland's already negligible emissions contribution would, at best, only have had a minimal effect on climate change overall. As such, it would have had no impact on the occurrence or severity of this particular flood. Thus, any partial responsibility for climate change does not render Norland responsible for the flood or its

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13 *O'Keeffe v Ireland* [GC], app. no. 35810/09, § 166; *E. et al. v UK*, app. no. 33218/96, § 100.
14 IEA (2021).
15 The Case, § 37.
16 *Cf. Catan et al. v Moldova and Russia* [GC], app. no. 43370/04 *et al*., § 103.
17 ILC, Commentaries on ARSIWA (2001), Art. 47 §§ 3, 6.
18 The Case, § 40.
19 *Cf.* Sadeghi (2009), pp. 134, 142 f.
20 The Case, § 3.
21 *E.g.* in 1342, see Lingenhöhl (17/06/2013); Glaser (2008), pp. 230 f.; Weikinn (1958), pp. 202-216; in 1501, see Rohr (2009); Weikinn (1960), pp. 4-15 and in 1784, see Glaser (2008), pp. 236-238.

consequences.

[9] In conclusion, Norland had no real means of avoiding or mitigating the flood and thus cannot be held responsible for it. Accordingly, the Respondent invites the Court to declare the applications inadmissible under Art. 35 § 3 (a) with regard to the alleged violations of Arts. 2, 3, 8 and Art. 1 of Prot. No. 1 insofar as they invoke Norland's responsibility for the flood.

2. INADMISSIBILITY *RATIONE MATERIAE*

[10] Even if the Applicants are granted victim status, all three applications under Art. 2 relating to a potential risk to their lives posed by future climate change, which Norland is allegedly failing to mitigate, are incompatible with the ECHR *ratione materiae*.

[11] While Art. 2 is applicable to some risks to life, not every remote or potential danger is sufficient to engender to protection of the provision.[22] Instead, a positive obligation under this Article requires a real and immediate risk to the Applicants' lives.[23] The current danger, as it stands, is not immediate enough to qualify as such. The Applicants rely on the NGO Green World report to establish that the GHG emitted in Norland may, at some point in the future, manifest in the form of extreme weather events.[24] However, they fail to specify when, where and under what circumstances that is supposed to happen. In light of such vagueness, the alleged threat to life can hardly be qualified as a "real and immediate" risk.[25]

[12] Furthermore, any actual future danger to the Applicants' lives caused by floods or other natural disasters connected to climate change depends on multiple factors aside from Norland's alleged contribution to climate change. First and foremost, it depends on the Applicants' own decision on whether to live in a disaster-prone area in the future,[26] and, if they do, on whether they disregard the warnings of the Department of PSEP again. Norland's decision not to enforce radical reductions of GHG emissions, even if regarded as causal for climate change and consequently for natural disasters such as floods, still cannot be said to constitute an immediate, not even in the sense of direct, actual danger to the Applicants' lives. Therefore, Art. 2 is not applicable to the situation complained of in this part of the application.

[13] A different conclusion cannot be reached by interpreting Art. 2 in light of international agreements on climate change and/or member state practice either. As shown above, such interpretation would include a drastic extension of the concept of a "real and immediate"

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22 *Tauira et al. v France* (Commission dec.), app. no. 28204/95; *cf. Brincat et al. v Malta*, app. nos. 60908/11 *et al*., § 84.

23 *Osman v UK* [GC], app. no. 23452/94, § 116; *Öneryıldız v Turkey* [GC], app. no. 48939/99, § 101.

24 The Case, § 40.

25 *Cf*. Leijten (19/10/2018), sect. 'Human Rights as a Toolkit?'.

26 *Cf. Fadeyeva v Russia*, no. 55723/00, § 120; *Ledyayeva et al. v Russia*, app. nos. 53157/99 *et al*. § 97.

threat to life. In contrast to previous cases which utilised Art. 2 with respect to environmental dangers to life,[27] environmental protection would no longer be incidental to the protection of life but the primary purpose. It would, in effect, amount to a right to a healthy environment or nature protection – a right not contained in the ECHR,[28] which was not originally intended to enforce measures against climate change.[29] And while historical interpretation is admittedly of limited value, given the Court's reading of the ECHR as a living instrument which develops over time, interpretation cannot go so far as to introduce a new right which was not included in the ECHR from the outset.[30] The fact that, despite numerous attempts,[31] no right to a healthy environment has been included in the ECHR or one of its protocols[32] is evidence that including such a right requires a change of the ECHR on which the member states have not yet been able to agree. If the Court were to interpret the ECHR's existing provisions as granting such a right, it would assume the function of an international legislator – a role that, in a democratic society which adheres to the rule of law and the principles of separation of powers or, in an international context, subsidiarity, is reserved for the members states' legislatures and executives.[33]

[14] Furthermore, the international obligations to which the Applicants point – i.a. the Paris Agreement, the Kyoto Protocol, the Montreal Protocol and the general *no harm principle* – are duties which, if they are even binding, Norland owes not to the Applicants, but only to other states. As a general principle of international law, individuals can only enforce international agreements if those agreements expressly confer that power upon them.[34] No such provision is contained in any of the agreements in question. To render them enforceable by individuals under the guise of interpretation of the ECHR would thus run counter to the intention of the member states. Therefore, the mentioned treaties cannot be used to expand, by way of interpretation under Art. 31 § 3 (c) VCLT, the scope of Art. 2 ECHR to cover potential risks to life that may at some indeterminate point in the future be caused by climate change.

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[27] *E.g. Budayeva et al. v Russia*, app. nos. 15339/02 *et al*., §§ 128-165; *Kolyadenko et al. v Russia*, app. nos. 7423/05 *et al*., §§ 157-203; *M. Özel et al. v Turkey*, app. nos. 14350/05 *et al*., §§ 169-200.

[28] *Cordella v Italy*, app. nos. 54414/13, 54264/15, § 100; *Fadeyeva v Russia,* app. no. 55723/00, § 68; *Kyrtatos v Greece*, app. no. 41666/98, § 52; *X and Y v Germany* (Commission dec.), app. no. 7407/76.

[29] *Cf.* Reply from the CM to Rec. 1614 (2003), Doc. 10041, 24 January 2004, § 4.

[30] *Johnston v Ireland*, app. no. 9697/82, §§ 53, 57.

[31] PACE, Doc. 8560 (10/1999); PACE, Rec. 1431 (1999); PACE, Doc. 9791 (04/2003); PACE, Rec. 1614 (2003); PACE, Doc. 12003 (09/2009); PACE, Rec. 1885 (2009).

[32] CM, Reply to Rec. 1431 (1999), Doc. 8892, 20/11/2000; CM, Reply to Rec. 1614 (2003), Doc. 10041, 24/01/2004, § 4; CM, Joint reply to Rec. 1883 (2009) and 1885 (2009), Doc. 12298, 19/06/2010, § 9.

[33] *Cf.* Eicke (2021), §§ 5, 43 f.

[34] *Danzing Railway Officials*, PCIJ, Series B, No. 15 (1928); 4 AD, p. 289; *US v Noriega*, 746 F.Supp. 1506, 1533 (1990); 99 ILR p. 175; Shaw (2017), p. 205.

[15] Finally, while domestic courts of some member states are moving towards the recognition of states' legal responsibility for mitigating climate change,[35] it is too early to find a clear practice or consensus between members states on the issue. That such a legal – as opposed to political – duty is far from accepted among member states is made amply clear by the failed Norwegian climate change claim[36] and the rejection an NGO claim by the Swiss Federal Court in May 2020.[37] The PACE's latest Resolution and Recommendation on including a right to a healthy environment into the ECHR[38] cannot be said to reflect member state consensus either given that in the past, such proposals have been continuously rejected by the Committee of Ministers.[39] In fact, they constitute only further proof that including such a right into the ECHR is a matter reserved for a treaty amendment, as opposed to overly extensive interpretation. Neither can such consensus be established by relying on the UN Human Rights Council's resolution[40] to recognise such a right: as the HRC's resolutions are not legally binding, they can only provide evidence for a political commitment to recognise said right, not a commitment to accept legal responsibility in the face of lawsuits based on it.

[16] The Respondent therefore respectfully asks the Court to reject the applications under Art. 2, insofar as they concern Norland's alleged failure to mitigate future climate change, as incompatible with the Convention *ratione materiae* and thus inadmissible under Art. 35 § 3 (a).

3. MANIFESTLY ILL-FOUNDED

[17] Regardless of the Court's findings on state responsibility for the flood, the respective claim under Art. 2 is still manifestly ill-founded since the danger to the lives of A1 and A3 is attributable to their own imprudent behaviour.

[18] While Norland recognises that positive obligations arise under Art. 2 even with respect to natural disasters,[41] such obligations are by no means absolute.[42] Art. 2 does not guarantee an absolute level of security in any activity in which the right to life may be at stake, particularly when the person concerned bears a degree of responsibility for the accident due

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35 See *Urgenda*, Case N°19/00135; BVerfG, Order of 24/03/2021 – 1 BvR 2656/18 *et al*.; *Friends of the Irish Environment*, [2020] IESC 49.

36 *Greenpeace Nordic Association and Nature and Youth v Ministry of Petroleum and Energy*, 2 December 2020.

37 *Verein KlimaSeniorinnen Schweiz et al. v Federal Department of the Environment, Transport, Energy and Communications*, Judgment 1C_37/2019 of 5 May 2020.

38 PACE, Res. 2396 (2021); PACE, Rec. 2211 (2021).

39 CM, Reply to Rec. 1431 (1999), Doc. 8892, 20/11/2000; CM, Reply to Rec. 1614 (2003), Doc. 10041, 24/01/2004, § 4; CM, Joint reply to Rec. 1883 (2009) and 1885 (2009), Doc. 12298, 19/06/ 2010, § 9.

40 UN HRC, Res. 48/13, A/HRC/RES/48/13.

41 *M. Özel et al. v Turkey*, app. nos. 14350/05 *et al*., § 170.

42 *Cf. Nicolae Virgiliu Tănase v Romania* [GC], app. no. 41720/13, § 136; *Osman v UK* [GC], app. no. 23452/94, § 116.

to having exposed him or herself to unjustified danger.[43]

[19] Thus, even if Norland was partially responsible for the flood, it is not responsible for the danger to the lives of A1 and A3. Mrs. and Mr. Velez first received a warning of the impending flood via television about 8 a.m. on 14 June 2020. They received another, personalised warning recommending evacuation at 9 a.m. Between the receipt of that text message and the flood at 1 p.m., they had more than sufficient time (4 h) to leave the house and get both themselves and their son safely to the state-provided emergency shelter. Instead A2 drove to work while A1 and A3 stayed at home despite the obvious risk. This failure to evacuate breaks the chain of causation between any alleged responsibility of Norland for the flood and the subsequent risk to the lives of A1 and A3.[44] That risk is entirely and solely attributable to the Applicants' own decision to blatantly disregard the evacuation recommendation. The severity of the situation was made clear by the State's personalized warnings via text message, which is sent only when the floods present a risk to the local population,[45] so that the failure to heed it was unjustified. That applies double to their subsequent failure to head the immediate evacuation order given at 12:20 pm. That order, which was communicated both by text message and an audio warning system, still left the A1 and A3 with half an hour to leave the house.[46] The risk to the lives of A1 and A3 is thus not attributable to the State but to themselves and does not fall within the scope of Art. 2. Therefore, the flood-related complaint under Art. 2 is manifestly ill-founded.

II. Merits

1. NO VIOLATION OF ARTICLE 2 ECHR

[20] Even if Art. 2 is considered applicable to either the events on 14 June 2020 or future climate change or both, no violation of Art. 2 has occurred.

1.1 The Flood

[21] Should the Court find Art. 2 applicable and not manifestly ill-founded, there was nonetheless no violation of Art. 2, as Norland's legislative and administrative framework sufficiently safeguards the right to life, and its concrete response to the flood was adequate.

1.1.1 Legislative and Administrative Framework

[22] Positive obligations under Art. 2 are twofold:[47] First, they include a general, primary

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[43] *Çakmak v Turkey* (dec.), 34872/09, § 35; *Gökdemir v Turkey* (dec.), app. no. 66309/09, § 17; *Koseva v Bulgaria* (dec.), app. no. 6414/02; *Molie v Romania* (dec.), 13754/02, § 44; *cf. Fadeyeva v Russia*, app. no. 55723/00, § 120; *Ledyayeva et al. v Russia*, app. nos. 53157/99 *et al*., § 97.

[44] *Cf.* The Case, §§ 7-10.

[45] Clarification Questions, Part II, No. 22.

[46] *Cf.* The Case, § 9.

[47] *Fernandes de Oliveira v Portugal* [GC], app. no. 78103/14, § 103; Brænden (2021), pp. 38-40.

obligation to establish a legislative and administrative framework in order to protect the lives of those within a state's jurisdiction in every activity where lives may be at stake.[48] Second, where the state knows or ought to know of the existence of a real and imminent risk to the life of an identified individual, it is under an obligation to take measures within the scope of its powers which, judged reasonably, might be expected to avoid that risk.[49] The exact scope of those obligations depends on the origin of the threat and the extent to which the risk in question is susceptible to mitigation.[50] With natural disasters, as opposed to dangerous industrial activities, the general preventive obligation comes down to adopting measures to reinforce the state's capacity to deal with the unexpected and violent nature of such natural phenomena.[51]

[23] The present case is not comparable to the cases in which a dangerous industrial activity was found. Thus, while *Kolyadenko* also concerned the risk to people's lives caused by a flood, the operation of a water reservoir in the affected area constituted a dangerous industrial activity.[52] In the present case, on the other hand, the flood was merely a natural disaster due to heavy rainfalls, with no particular man-made activities that heightened the risk involved (*force majeure*). Similarly, it has nothing in common with the operation of waste-collection site[53]; the operation of a test site for nuclear weapons[54], toxic emissions from a fertiliser factory[55] or exposure to asbestos at a workplace which was run by a public corporation owned and controlled by the government[56]. Those cases are all similar in that they concerned the operation of an industrial site which posed a specific, concrete and obvious risk to the people of a limited region. Being confined to a particular site within the state's territory, the activities were susceptible to regulation and control by that state. Such dangerous industrial activities cannot be likened to a natural disaster like a flood which was not the consequence of the operation of a specific water reservoir or waterpower plant within Norland's jurisdiction. The irresistibility of floods and the state's lack of ability to control them is also recognised by the ILC, which considers them an example of *force majeure*.[57] Neither can the

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48 *Öneryıldız v Turkey* [GC], app. no. 48939/99, § 89; *Budayeva et al. v Russia,* app. nos. 15339/02 *et al*., § 129; *Kolyadenko et al. v Russia*, app. nos. 17423/05 *et al*., § 157; *Vardosanidze v Georgia*, app. no. 43881/10, § 54.

49 *Öneryıldız v Turkey* [GC], app. no. 48939/99, § 101; *Osman v UK* [GC], app. no. 23452/94, § 116.

50 *Budayeva et al. v Russia*, app. nos. 15339/02 *et al*., § 137; *Kolyadenko et al. v Russia*, app. nos. 17423/05 *et al*., § 161; *Vilnes et al. v Norway*, app. nos. 52806/09, 22703/10, § 220.

51 *M. Özel et al. v Turkey*, app. nos. 14350/05 *et al*., § 173.

52 *Kolyadenko et al. v Russia*, app. nos. 17423/05 *et al*., § 164.

53 *Öneryıldız v Turkey* [GC], app. no. 48939/99, § 71.

54 *L.C.B. v UK*, app. no. 23413/94, § 46.

55 *Guerra et al. v Italy* [GC], app. no. 14967/89, §§ 60, 62.

56 *Brincat et al. v Malta*, app. nos. 60908/11 *et al*., § 81.

57 ILC, Commentaries on the Draft Articles on State Responsibility (2001), Art. 27 § 3.

mentioned dangerous industrial activities be likened to the undefined multitude of activities which contribute to climate change: These include every-day acts such as the driving of cars or consumption of meat and/or dairy products that can hardly be equated to aforementioned dangerous activities. They may or may not affect people all over the world. Norland's control over them is very limited as only a negligible amount of the contributing activities take place within its territory.[58]

[24] Accordingly, there is nothing in the present case which could be classified as a "dangerous industrial activity" which would require the state to control its licensing, setting up, operation, security and supervision and to take practical measure to reduce inherent risks.[59] Hence, Art. 2 cannot logically support the claim that Norland ought to have enacted legislation to reduce GHG emissions. Thus, Norland's only obligation was to adopt measures to reinforce its capacity to deal with the unexpected and violent nature of events, such as the flood in question.

[25] Norland plainly fulfilled this obligation in the present case. Its laws include a rapid emergency-response plan that clearly outlines measures to be taken in response to natural disasters as well as the institutions responsible for adopting them.[60] The present situation can be distinguished from cases where a violation was found. In *Budayeva*,[61] authorities had failed to repair a dam and establish an emergency warning system even though potentially dangerous mudslides occured annually. In *Kolyadenko*,[62] the region at issue clearly stood within the flood zone of the river in question. In both cases,[63] the state had received multiple warnings, over a period of years, that if nothing was done about the mudslides/dam and clogged river respectively, the lives of the local population would be endangered upon heavy rainfalls. In contrast, floods in Leti were never a threat to the local population. The flood on 14 June 2020 was caused by the highest rainfalls officially recorded in Leti.[64] As such, they could not have been foreseen by the authorities. Scientific evidence about a potential increase in floods did not include warnings or indications of a threat to Leti's population. The weather forecast on 7 June 2020 predicted heavy rain but contained no warnings about flooding,[65] let

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58 *Cf. supra*, § 6.
59 *Cf. Öneryıldız v Turkey* [GC], app. no. 48939/99 §§ 71, 90; *Kolyadenko et al. v Russia*, app. nos. 17423/05 *et al*., § 157.
60 The Case, § 33.
61 *Budayeva et al. v Russia*, app. nos. 15339/02 *et al*., §§ 147-160.
62 *Kolyadenko et al. v Russia*, app. nos. 17423/05 *et al*., §§ 162-187.
63 *Budayeva et al. v Russia*, app. nos. 15339/02 *et al*., §§ 19-24; *Kolyadenko et al. v Russia*, app. nos. 17423/05 *et al*., §§ 15-23.
64 The Case, §§ 2 f.
65 *Cf.* The Case, §§ 5-6.

alone of a magnitude which could threaten the lives of the local population. Thus, there was no reason for the Norlandic authorities to designate it as a safety zone or build flood protection more extensive than the existing embankments.[66] All that could be expected of them was an adequate response to the flood once its potential magnitude and the potential danger to parts of Leti's population became foreseeable on 14 June 2020 so as to engage the *Osman* duty of individual protection.

[26] Alternatively, should the Court classify the GHG emissions transpiring within Norland's territory as dangerous industrial activities, Norland's legislative and administrative framework is nonetheless sufficient to fulfil its obligation under Art. 2, and Norland's delay in enacting more ambitious climate change regulations is justified. The Court has repeatedly held that "an impossible or disproportionate burden must not be imposed on the authorities without consideration being given […] to the operational choices which they must make in terms of priorities and resources."[67] In so holding, the Court drew on its earlier *Hatton* judgement.[68] There, the Court recognised that, in the context of Art. 8, within the inevitable balancing exercise between competing social and policy interests, environmental protection does not inevitably trump all other concerns and that a country's economic welfare may legitimately be taken into account.[69] That *margin of appreciation* the state enjoys in this balancing exercise cannot be restricted too far by the *precautionary principle* either. Thus, in *Hardy and Maile*,[70] the Court did not expand on its earlier use of the principle in *Tătar*[71] to find a violation of Art. 8 in the consequences of potential accidents with two liquefied natural gas terminals that were built at a harbour, despite being specifically invited to do so by the applicants. Instead, the Court specifically emphasised that states must be allowed a wide *margin of appreciation* with respect to environmental issues.[72] As the positive obligations with respect to environmental protection under Art. 8 and Art. 2 largely overlap,[73] the mentioned considerations ought to apply equally in assessing Norland's compliance with its *margin of appreciation* under Art. 2.

[27] Another important consideration is that Norland has not been entirely idle with respect to

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66 Clarification Questions, Part II, No. 11.

67 *Öneryıldız v Turkey* [GC], app. no. 48939/99, § 107; *Budayeva et al. v Russia*, app. nos. 15339/02 *et al*., § 135; *Kolyadenko et al. v Russia*, app. nos. 17423/05 *et al*., § 160.

68 *Cf. Öneryıldız v Turkey* [GC], app. no. 48939/99, § 107; *Budayeva et al. v Russia*, app. nos. 15339/02 *et al*., § 135.

69 *Hatton et al. v UK* [GC], app. no. 36022/97, §§ 121 f.

70 *Hardy and Mailie v UK*, app. no. 31965/07, §§ 186, 222-232.

71 *Tătar v Romania*, app. no. 67021/01, §§ 93-97.

72 *Hardy and Mailie v UK*, app. no. 31965/07, § 218.

73 *Budayeva et al. v Russia*, app. nos. 15339/02 *et al*., § 133; *Brincat et al. v Malta,* app. nos. 60908/11 *et al*., § 85; *cf. Öneryıldız v Turkey* [GC], app. no. 48939/99, §§ 90, 160.

climate change. It has anchored the right to a healthy environment in its constitution.[74] The adoption of an effective environmental legislation and policy constitutes a national objective under the protection of Norland's constitution.[75] A Law on Environment, which regulates issues of waste management, pollution and the protection of flora and fauna was adopted as early as 1995.[76] Norland has already started to implement adaptation measures, in particular a functioning emergency response plan to natural disasters.[77] Thus, a legal framework in Norland does exist which ensures the protection of the right to life, in connection to environmental issues. Norland's government understands the value of updating the aforementioned law and its strategy on climate change. For that reason, a draft national strategy on climate change has been under discussion since 2018. To allow concerns of individuals and health protection organisations to be raised, a public general consultation on the issue has been held.[78] The justifying reason for the delay in the implementation of the proposed strategy lies in the tension between environmental protection and other rights equally worthy of protection, such as that of just remuneration for work and a decent standard of living inherent to the notion of human dignity.[79] Four of Norland's six main sectors of economy[80] belong to the top ten most emission rich economic sectors, according to the WRI's allocation of global emissions.[81] To reduce such emissions while ensuring constant employment rates in those industries would require funds that could not be allocated to other important government objectives, in particular the increase of the net monthly salary which stood at EUR 1,200 at the time.[82] The government submits that in the light of the various important interests at stake and the legislative and administrative framework Norland has established to safeguard the lives of its population with respect to natural disasters, its decision to afford precedence to raising the standard of living before implementing measures to combat climate change is within its *margin of appreciation*.

[28] It follows that the alleged violation of Art. 2 depends on the actions of Norland's authorities on 14 June 2020.

1.1.2 Concrete Response on 14 June 2020

[29] Norland's concrete response to the flood complied with Art. 2. In contrast to *Budayeva*,

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74 Art. 54.1 Norlandic Constitution (The Case, § 31).
75 Art. 54.2 Norlandic Constitution (The Case, § 31).
76 The Case, § 38.
77 The Case, § 33.
78 *Cf.* The Case, § 37.
79 Art. 23 § 3 UDHR; Art. 4 § 1 ESC.
80 The Case, § 32.
81 Herzog (2005), p. 2.
82 The Case, §§ 32, 39.

where the residents received a warning only after the first mudslide, and *Kolyadenko*, where there was no warning at all, Norland had established and executed a functioning early warning system. Warnings and evacuation recommendations were sent out immediately on 14 June 2020 when the risk of a flood in Leti became obvious, well in advance of the actual flood (5 h). The warnings were broadcasted widely over a broad range of media to reach as many people as possible. People whose homes could be affected – including the Applicants – were contacted personally via text messages to ensure that the warnings would reach them. Even people who received the text messages with a one-hour delay had ample time (4 h) to evacuate.[83]

[30] When it became apparent that the Leti river was rising very quickly at 12.30 p.m. and that not all residents had left their homes despite the earlier recommendation, the Department for PSEP ordered immediate evacuation, again using two means of communication – text messages and an audio warning system – to ensure that all residents would receive the order. At the same time, rescue teams were pre-emptively dispatched to safeguard the lives of those who could not or would not heed the evacuation order in time. Those efforts allowed A1 and A3 to be rescued by a helicopter merely 20 minutes after they had made it to the rooftop of their home. The rescue efforts were well coordinated, as evidenced by the emergency surgery performed on A3 immediately upon transport to the hospital.[84]

[31] For these reasons, the Respondent submits that it did everything that could reasonably be expected to safeguard the right to life of Leti's population. Thus, the fact that the lives of A1 and A3 were endangered despite these efforts does not lead to a violation of Art. 2.

1.2 Future Risk due to Climate Change

[32] Should Art. 2 apply to future risks to life posed by climate change, it is submitted that Norland nonetheless fulfilled its positive obligations under that Article.

[33] In fulfilling their positive obligations, states enjoy a wide *margin of appreciation*. Whenever there are multiple ways to safeguard convention rights, it is for the state to decide how it complies with its positive obligations.[85] With regard to climate change, this especially means that as long as Norland takes adaption measures to ensure that the lives of those under its jurisdictions are not endangered by the possible consequences of climate change, Norland does not need to take mitigation measures, such as the reduction of GHG emissions,[86] to

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[83] *Cf.* The Case, §§ 7-10.
[84] The Case, §§ 9-12.
[85] *Budayeva et al. v Russia*, app. nos. 15339/02 *et al*., § 134; *Kolyadenko et al. v Russia*, app. nos. 17423/05 *et al.,* § 160.
[86] Gouritin (2011), p. 135.

comply with Art. 2. Thus, the UN HRC, in *Ionae Teitiota*,[87] deciding on Art. 6 § 1 ICCPR, denied the existence of imminent danger as the potential consequences of climate change were only expected to arise in 10 to 15 years and there was still time left to take adaption measures. Similarly, it is far too early to find a violation in the present case based on possible future risks to the Applicants' lives, especially given that Norland is already in the process of taking adaption measures, still has time to intensify those and, as mentioned above, is already working on a strategy to mitigate climate change, the delay in the implementation of which is justified by conflicting interests.[88] While it is true that A3 is more likely to experience the potential consequences of climate change than adults, those considerations apply to him with equal force.

[34] It follows that no violation of Art. 2 has occurred.

2. NO VIOLATION OF ARTICLE 3 ECHR

[35] Norland submits that it has not breached its obligations under Art. 3 by either insufficiently supporting the Applicants in dealing with the loss of their home and their physical and psychological injuries, or by causing the Applicants permanent stress and anxiety by failing to mitigate future climate change.

2.1. Reducing the burden of the flood on the Applicants

[36] The Respondent did not violate Art. 3 as it adequately supported the Applicants in dealing with the loss of their home as well as their physical and psychological injuries. It asserts that the threshold for inhuman and degrading treatment has not been reached.

[37] Norland recognises that Art. 3 may, in special circumstances, be violated where the state bears some responsibility for the applicants' loss of their home and subsequently failed to assist them in acquiring adequate new homes.[89] However, the present situation is not comparable to those in which the applicants were deprived of their homes by deliberate state action. The Applicants' home was not deliberately set on fire or otherwise destroyed by Norlandic security forces.[90] Instead, it fell victim to a natural disaster.[91] Furthermore, in *Moldovan*, Art. 3 was mainly violated due to the lack of any assistance by the state, the dismissive attitude of the authorities towards the applicants' plight and the severely overcrowded and unsanitary conditions in which they were forced to live for ten years. Taken together, the Court found that this "must have caused them considerable mental suffering,

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87 *Ionae Teitiota v New Zealand*, No. 2728/2016, CCPR/C/127/D/2728/2016, § 9.12.

88 *Supra*, §§ 26 f.

89 As in *Moldovan et al. v Romania (No. 2)*, app. nos. 41138/98, 64320/01, §§ 103 f., 110 f., 113.

90 As occurred in *Bilgin v Turkey*, app. no. 23819/94, §§ 16 f., 70, 96, 99-103; *Dulaş v Turkey*, app. no. 25801/94, §§ 15-18, 50-55; *Selcuk and Asker v Turkey*, app. nos. 23184/94, 23185/94, §§ 27 f., 30, 57, 77 f.

91 *Supra*, § 23.

thus diminishing their human dignity and arousing in them such feelings as to cause humiliation and debasement."[92]

[38] The present case, however, is not comparable to the situation in *Moldovan*. The attitude of the Norlandic authorities towards the Applicants' plight differs fundamentally from that of the authorities in *Moldovan*. While A3's injuries were severe, and all three Applicants suffer from PTSD, Norland assisted them from the outset. A3 received emergency surgery immediately upon his rescue.[93] The Applicants, like every other resident of Leti affected by the flood, were offered accommodation in the designated emergency shelter. The state thus took it upon itself to ensure they were not left without a home. In regard to the living conditions at the shelter, warehouses are not uncommonly used as emergency shelters. Food, water, hygiene products, mattresses and sleeping bags were provided. People with medical needs were treated at the local hospital, away from danger. A certified psychologist as well as ten Red Cross volunteers provided psychological aid in dealing with survivor's the traumatic experiences.[94] These conditions can hardly be qualified as degrading or inhuman. Furthermore, in *Moldovan*, the racial discrimination to which the authorities subjected the Roma applicants was essential to the violation of Art. 3.[95] Such discrimination is entirely absent in the present case.

[39] It is true that the money the Applicants received is insufficient to enable them to buy or build a new home on their own. However, not every tragic stroke of fate involves an obligation on the part of the state to re-instate the unfortunate victims' previous position. It has never been suggested that states are under a positive obligation to finance the rebuilding of every house that was ever hit by a lightning strike, burnt due to a spontaneously ignited cable, or crumbled due to an unforeseen earthquake. It is for everyone to protect themselves against such accidents by acquiring adequate insurance. That the Applicants, who had the opportunity to insure their property against natural disasters, chose not to do so and are therefore unable to rebuild it[96] is unfortunate. However, it does not constitute inhuman or degrading treatment by Norland.

[40] Regarding their physical and mental suffering, the Applicants were reimbursed for their medical expenses the same as every other member of the regular compulsory state health insurance. While this insurance does not cover all expenses necessary for the treatment of

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92 *Moldovan et al. v Romania (No. 2)*, app. nos. 41138/98, 64320/01, § 110.
93 The Case, § 12.
94 The Case, §§ 13 f.
95 *Moldovan et al. v Romania (No. 2)*, app. nos. 41138/98, 64320/01, §§ 111, 113.
96 The Case, § 20.

their PTSD, the Respondent's positive obligation under Art. 3 can hardly be this extensive. Thus, the Court declared an application under Art. 2 inadmissible when an applicant with a very rare and fatal disease was refunded only 70 % of his treatment costs under the general sickness insurance scheme.[97] An issue of Art. 3 was raised neither by the parties nor by the Court under *iura novit curia*. Thus, it appears that a general health insurance which refunds only part of an applicant's expenses for a particular treatment does not, as such, constitute degrading or inhuman treatment. Accordingly, Norland did not breach its positive obligations under Art. 3.

2.2. Future risk due to climate change

[41] Norland breached neither its negative nor positive obligations under Art. 3 with respect to the effects of future climate change. This applies to both the anxiety the Applicants may feel due to future climate change and any alleged future ill-treatment by the consequences thereof.

[42] First, Norland committed no act which could constitute a treatment – inhuman, degrading or otherwise – of the Applicants. Second, the emissions by private individuals in Norland do not constitute a treatment from which the state ought to protect its population. Art. 3 is applicable only to the intentional acts.[98] The Velez family may seek to argue that emitting GHG qualifies as such, as those who produce emissions know what they are doing. However, so does driving a car. Yet, when an intentional decision to drive a car led to an accident that caused bodily injuries and physical and mental suffering, the Court rightly denied finding a "treatment" to which the injured individual was "subjected" within the meaning of Art. 3. When people emit GHGs in order to uphold or improve their standard of living, to do their daily work or for any other reason GHG emissions are generally based on, the typical characteristics[99] of such a treatment are missing: there is no intention to harm, humiliate, or debase those who may, by a stroke of ill luck, find themselves the victims of a natural disaster to which such emissions may have contributed. Neither are those acts aimed at breaking the Applicants' moral or physical resistance or disrespectful of the Applicants' human dignity. In fact, the Applicants themselves, being part of Norland's society, have likely both contributed to and profited from the emission of GHGs in Norland. The lack of consideration that some people afford to others when emitting GHGs may be morally questionable, but it does not constitute a "treatment" to which others are "subjected". This

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97 *Nitecki v Poland* (dec.), app. no. 65653/01, The Law § 1.
98 *Nicolae Virgiliu Tanase v Romania*, app. no. 41720/13, §§ 121, 123.
99 *Nicolae Virgiliu Tanase v. Romania*, app. no. 41720/13, §§ 123 f.

lack of intention is also why a parallel to refoulement cases[100] is misconceived: the duty in those cases relates to preventing the *intentional* ill-treatment in the place to which the person would be returned, such as the alleged risk of being arrested and tortured by security forces;[101] the alleged risk of being arrested and tortured by the police,[102] or the risk of detainment under inhuman conditions and being subjected to racist acts.[103] Furthermore, those cases involve an actual *act* on part of the state, namely that of refoulement or – similar in this context – extradition.[104] This again distinguishes them from the present case of an alleged omission. Thus, Art. 3 is inapplicable.

[43] Third, even if the Court found a treatment, the threshold imminent in Art. 3 would not be met. The Applicants' PTSD was caused by the traumatic events on 14 June 2020, not by fear of future climate change. Any potential future suffering is just as remote as the risk to life under Art. 2 and can likewise be dismissed.[105] Any current stress and anxiety due to fear of potential future natural disasters allegedly caused by climate change do not meet the severity threshold. Uncertainty about the future has always been a part of human life. For example, uncertainty about pension funds, fear of a nuclear power plant exploding or war erupting in one's country of residence are all capable of causing anxiety, stress and even despair. Yet, it has never been suggested that not alleviating those fears by eradicating either of those possibilities constitutes a failure of the state to prevent inhuman or degrading treatment. Not even in relation to vulnerable groups such as children (A3) or under the CRC does a general duty to remove all obstacles and insecurities of life exist. Uncertainty about the future is simply an inevitable part of life. Hence, the threshold for Art. 3 has not been met with respect to future climate change. For these reasons, Norland requests that this part of the application under Art. 3 be dismissed.

3. NO VIOLATION OF ARTICLE 8 ECHR

[44] The Respondent submits that all aspects of Art. 8 are inapplicable to the case at hand. If the Court differs, there is still no violation as no direct interferences took place and all positive obligations to protect the Applicants' home, private and family life from natural disasters and future harm were upheld.

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[100] Mavronicola (19/10/2021), sect. 'The refoulement parallel'.
[101] *Vilvarajah et al. v UK*, app. nos. 13163/87 *et al*., § 104.
[102] *Cruz Varas et al. v Sweden*, app. no. 15576/89, §§ 69-71.
[103] *Hirsi Jamaa et al. v Italy* [GC], app. no. 27765/09, §§ 126 f.
[104] *Hirsi Jamaa et al. v Italy* [GC], app. no. 27765/09, § 115; *Cruz Varas et al. v Sweden*, app. no. 15576/89, §§ 69 f., 76; *Soering v UK*, app. no. 14038/88, § 91; *Vilvarajah et al. v UK*, app. no. 13163/87 *et al*., § 107 (2).
[105] *Supra*, §§ 11 f., 33.

3.1. Art. 8 is inapplicable

[45] There is no arguable claim under Art. 8 if the cause of harm is negligible in comparison to environmental hazards inherent to life in every modern city.[106] The Applicants live in an age where city floods are a ubiquitous environmental risk, as evidenced by scientific writings.[107] Even the NGO Report on which the Applicants rely shares this conclusion.[108] Norland is not trying to marginalise the effects of the flood. However, considering the scientific data, it seems inevitable to classify floods, even such with a heightened magnitude as seen in Leti on the 14 June 2020, as common hazards for modern cities on a global scale. Labelling the flood in Leti as a globally inherent risk does not, however, render it foreseeable for the Respondent given Norland's history of flooding. The Applicants thus have no arguable claim under Art. 8.

3.2. The Respondent acted within its *margin of appreciation*

[46] If the Court nevertheless considers Art. 8 to be applicable, there is still no violation to be found. Norland fulfilled its positive obligations in fighting climate change and protecting the Applicants' home against natural disasters. First, States have a wide *margin of appreciation* when balancing varying interests, in particular when the accused state is dealing with a technical and complicated problem. [109] If airplane noise pollution can be deemed a complicated problem,[110] climate change, which is arguably the much more intricate issue, is *a fortiori* also deserving of this label.[111] Furthermore, mitigating climate change is very difficult for Norland as its economy is reliant on emission heavy sectors. For the reasons discussed under Art. 2, the delay in implementing mitigation measures is therefore justified.[112]

[47] Second, even if the Respondent did not acutely prioritise combating the risks of climate change and its consequences, it also did not completely neglect them. First, a relevant legal framework existed.[113] Furthermore, the regulatory system included the State Meteorological Service and the Department for PSEP which cooperated to prepare and warn the population of any incoming flooding dangers.[114] Norland responded to the flood on 14 June 2020 with due diligence.[115] These legal, scientific, and executive measures combined form an extensive

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[106] *Cf. Hardy and Maile v UK*, app. no. 31965/07, § 188.
[107] Ochoa-Rodríguez, § 1; Park / Lee (2019), p. 1; O'Donnell / Thorne (03/04/2020), p. 1.
[108] The Case § 40.
[109] *Powell and Rayner v UK*, app. no. 9310/81, § 44.
[110] *Hatton et al. v UK* [GC], app. no. 36022/97, § 100; *Powell and Rayner v UK*, app. no. 9310/81, § 44.
[111] Ostrom (2010), p. 2.
[112] *Supra*, §§ 26 f.
[113] *Supra*, §§ 26 f.
[114] The Case, §§ 6, 7.
[115] *Supra*, §§ 29 f.

and functioning framework which suitably tackled all foreseeable risks. The damage to the Applicant's home was not to be expected. Hence, the positive obligations could not have included preventive measures such as the building of extensive flood protection.[116] Both academics and the Court agree that the existence of a regulatory framework is indicative for the striking of a fair balance.[117] The Respondent hence invites the Court to recognise the presence of the Norlandic regulations and therefore apply its aforementioned principle, in reaching the conclusion that a fair balance between all interests was struck.

[48] Furthermore, in the context of natural disasters and the destruction of a home which is simultaneously a possession, Art. 8 and Art. 1 of Prot. 1 can be examined together and decided with similar reasoning.[118] This suggests that case law on Art.1 of Prot. No.1 can also be applied to Art. 8 in this context. In *Vladimir Slavov Vladimirov*, the Court outlined that a state is not expected to take preventive measures in all areas prone to floods as this would create a "disproportionate burden".[119] In Norland, floods were known in the urban region of Leti but none that warranted preventive measures as no serious threats to the population or homes were ever caused by them in the past.[120] If the Court found a violation of Art. 8 in this case, it would run contrary to its previous ruling and would imply that states have positive obligations to provide specific protections for all flood-prone areas. In a flood-frequent future, this would create an unjust burden on member states, exactly what the Court previously sought to avoid.

3.3 Adequate response to the flood

[49] Norland's response to the flood on 14 June 2020 was sufficient to fulfil its positive obligations under Art. 8 with respect to private and family life. As established in *M. Özel*, in the context of natural disasters, to fulfil its positive obligations under Art. 2, the Respondent must adopt measures to keep their catastrophic impact to a minimum.[121] As the positive obligations with respect to environmental protection under Art. 8 and Art. 2 largely overlap, the state must also have adopted measures geared to minimise the catastrophic impact for the rights under Art. 8.[122] Norland fulfilled the positive obligations under Art. 8 by introducing a plethora of measures consisting of evacuation plans, emergency shelters, financial donations,

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116 *Cf. supra*, § 25.
117 Pedersen (2018), p. 5; *Ashworth et al. v UK* (dec.), app. no. 39561/98, The Law § 1.
118 *Cf. Kolyadenko et al. v Russia*, app. nos. 17423/05 *et al*., §§ 212-217.
119 *Vladimir Slavov Vladimirov v Bulgaria*, app. no. 58043/10, § 41.
120 The Case, § 3; *e contrario* Clarification Question Part II Nr.1.
121 *Cf. M. Özel et al. v Turkey,* app. no. 14350/05 *et al*., § 173.
122 *Budayeva et al. v Russia*, app. nos. 15339/02 *et al*., § 133; *Brincat et al. v Malta,* app. nos. 60908/11 *et al*., § 85.

and psychological treatment all aimed at protecting the Applicants' private and family life. [123]

[50] The State also complied with its *duty to inform* citizens about potential risks.[124] It sent all the relevant information in time for the Applicants to evacuate if willing to do so.[125] Yet, disregarding all warnings by the State, A1 and A3 were still in the house when the flood hit. This caused physical injuries to A3 and PTSD to all Applicants, negatively impacting their private and family life.[126] However, this impact cannot be attributed to the State, as the decision to stay in the danger zone was made by the Applicants despite knowing all relevant information.

[51] All these measures were suitable for the protection of private and family life under Art. 8.

[52] In conclusion, Norland and its citizens fell victim to a destructive *force majeure* event. While it is impossible for the State to prevent such events, it exceeded its duties to reduce the negative effects of this flood. Thus, the positive obligations required to protect the Applicants home, private and family life under Art. 8 were fulfilled and no violation can be recognised.

3.4 Future Harm

[53] The Applicants' argument[127] that Norland has failed to take timely action against climate change and hence has missed the chance to prevent similar events in the future is unjustified for two reasons. First, preventing catastrophic floods in the future would be possible through measures aimed at combatting the severity of the flood and its consequences, as highlighted by the UN Strategy Guideline.[128] Second, within the scientific sphere the majority agrees that the point of no return has not yet been reached with regard to climate change.[129] This enables Norland, in cooperation with other nations, to effectively mitigate future climate change. In fact, the Respondent is preparing research into the causes of extreme weather events and their mitigation and has updated its national strategy.[130] The outlined strategy of combatting natural disasters at the source in combination with practical flood preventive measures is suitable to secure the Applicants' rights under Art. 8 in the future.

[54] Accordingly, Norland has not violated Art. 8 concerning both present and future harm.

4. NO VIOLATION OF ARTICLE 1 OF PROTOCOL NO. 1

[55] Norland violated neither its positive nor negative obligations under Art. 1 of Prot. No. 1.

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[123] The Case §§ 7, 14, 19.
[124] *Cf. Guerra et al. v. Italy*, app. no. 14967/89, § 60.
[125] *Supra*, §§ 19, 29.
[126] The Case §§ 12, 17.
[127] The Case, § 27.
[128] UN, Pilon (2004), p. 24.
[129] Aengenheyster *et al*. (2018), sect. 'Summary, discussion and conclusions', § 6; Fischetti (27/11/2021), § 5.
[130] Clarification Questions, Part II No. 10.

4.1 Access to property

[56] The Respondent concedes that it interfered with the Applicants' enjoyment of possessions by blocking access to their house.[131] However, this restriction was justified, as it was done in alliance with the public interest.[132] The Velez' house "completely collapsed" after the flood, rendering it unsafe for anyone to enter or visit.[133] Denying them access was therefore in both their own and the public's interest. Thus, as the interference was justified, the Respondent respected its negative obligations under Art. 1 of Prot. No. 1.

4.2 Protection of house and possessions

[57] The State enjoys a *margin of appreciation* when deciding by which measures to protect people's possessions and their peaceful enjoyment, as outlined by Art. 1 of Prot. No. 1.[134] In case law, the Court has demanded government measures which are reasonable under the circumstances.[135] In the context of natural disasters, as such events are out of the States control, the positive obligations which are deemed reasonable are less extensive than in cases of dangerous activities.[136] The flood on 14 June 2020 qualifies as the former.[137] Norland has acted within its *margin of appreciation* as floods which endangered possessions were not to be expected in Leti.[138] This contrasts *Kolyadenko* where, even though the flood was foreseeable, the State failed to introduce measures to protect the population's possessions.[139] Given the difference with regard to foreseeability, no such measures could be expected of Norland.

[58] With respect to compensation, there has been no deprivation of the Applicants' possessions including both the house and any possessions inside it, as the legal rights to ownership have not been extinguished by a Norlandic Law. As a claim to compensation requires such deprivation, the Applicants *e contrario* do not have a claim to compensation.[140] Alternatively, similar to *Budayeva*, the negligence of the state cannot be fully linked to the damage suffered by the Applicants.[141] Therefore, the terms of compensation must be assessed in consideration of the situation and all other measures taken by Norland. The flood on 14 June 2020 was not foreseeable and the response to it was conducted with due diligence. That

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131 The Case, § 15.
132 *Cf. Béláné Nagy v Hungary* [GC], app. no. 53080/13, § 113.
133 The Case, § 15.
134 *Broniowski v. Poland*, app. no. 31443/96 [GC], § 144.
135 *Vladimir Slavov Vladimirow v Bulgaria,* app. no. 58043/10, § 35.
136 *Hadzhiyska v Bulgaria* (dec.), app. no. 20701/09, § 15.
137 *Supra*, §§ 23 f.
138 *Cf. supra*, § 25.
139 *Kolyadenko et al. v Russia,* app. no. 17423/05 *et al*., § 215.
140 *Cf*. Harris, O'Boyle, Warbrick (2018), pp. 875-878.
141 *Budayeva et al. v Russia*, app. nos. 15339/02 *et al*., § 182.

the Applicants lack sufficient funds to build a new home is due to their own failure to acquire insurance. The State cannot be expected to act as an emergency insurance company, it is not bound to compensate the full market value of the property.[142] Therefore, the EUR 7,000 which Norland paid to the Applicants despite not bearing responsibility for the flood, in combination with the free emergency housing, reveal that no disproportionate burden was placed on them.

[59] Regarding potential future harm, Art. 1 of Prot. No. 1 does not contain a right to the enjoyment of possessions in a healthy environment.[143] Furthermore, the State still has time to implement measures and infrastructure designed to protect the possessions of its population.[144] The claim regarding future harm under this Article should thus be dismissed.

[60] In conclusion, hindsight is a helpful tool for the Applicants to claim a shortcoming of the Respondent's measures. However, through the ex-ante perspective Norland could not have foreseen the occurrence of a flood of this magnitude. Therefore, the Respondent politely request that the Court deny any violation of Art. 1 of Prot. No. 1.

III. Conclusion

[61] In light of the arguments presented above, the Respondent respectfully requests that the Court dismiss all applications in their entirety and award the costs to the Applicants.

[142] *Cf. Budayeva et al. v Russia*, app. nos. 15339/02 *et al*., § 182.
[143] *Flamenbaum v France*, app. nos. 3675/04, 23264/04, § 184.
[144] *Supra*, § 53.