Research Article

Seeking Climate Justice in the European Court of Human Rights: Reflections on the Duarte Agostinho Case

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Natale Serón Arizmendi

Abstract

The increasing recognition of the individual as the ultimate subject of law has facilitated the articulation of this international subjectivity into legal capacity. Although not automatically conferred, such *locus standi* allows individuals to bring forward complaints before regional human rights courts and United Nations quasi-judicial bodies. These legal mechanisms, particularly when employed strategically, provide recourse for addressing urgent environmental and climate justice concerns, compelling States to confront their responsibilities. The article explores the potential of such mechanisms to challenge legal norms and contribute to climate accountability, with a focus on the ECtHR *Duarte Agostinho and Others v. Portugal and 32 Others* judgment. Through this case, the paper examines how individuals leverage international legal avenues to demand action on climate change and environmental degradation. In meeting this research goal, the article begins by tracing the historical development of the individual's status in international law, then delves into the definition of strategic litigation and the shifting perception regarding court victory v. defeat dichotomy. To conclude, the case study assesses individual's effective capacity to influence environmental and climate change outcomes through the international legal system, regarding the courtroom as a means rather an end in itself.

Keywords

climate justice, strategic litigation, environmental accountability, international legal action, european court of human rights

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Introduction

On 7 September 2020, six Portuguese nationals filed an individual application under article 34 of the European Convention on Human Rights (hereinafter, ECHR),[1] against Portugal and 32 other States, before the European Court of Human Rights (henceforth, ECtHR), seeking to uphold effective environmental protection measures. The significance of this case lies not only in the fact that it was brought by six young individuals against a considerable number of States, but also in the litigation strategy they adopted and the substantial impact it generated, despite not resulting in a favourable court ruling. Indeed, this lawsuit illustrates the international judicial fora's potential to influence the discourse on climate change and lay the legal foundations for future precedents, by means of new legal protest mechanisms such as strategic litigation.[2]

Building on a growing academic interest on defining and better understanding strategic litigation, this paper seeks to examine the extent to which individuals can bring about structural change through emerging advocacy mechanisms, even in the absence of a formal legal victory. In addressing the potential impacts of individual complaints beyond the judicial outcome of the case, this paper begins by providing a historical overview of the shift in the international legal attitudes towards the individual. This is followed by an analysis that delves into the conceptualisation of strategic litigation and changing view on the court win-lose debate. Finally, this paper looks at the specific case of *Duarte Agostinho and others against Portugal and*

[1] European Convention on Human Rights, as amended by Protocols Nos. 11, 14 and 15 (1950) ETS 005.

[2] Anna Kunz, 'Eradicating hunger through climate litigation? – An assessment of the opportunities and challenges of enforcing the human right to food through courts' (2024) 12 *European Journal of Futures Research* 1, 8.

University of Deusto, Gipuzkoa, Spain

Corresponding Author:
Natale Serón Arizmendi, University of Deusto, Mundaiz street, 50, San Sebastian, Gipuzkoa, Spain, 20012.
Email: seron.natale@deusto.es

32 others[3], in a bid to assess the individual's potential to effect meaningful impact on environmental protection through international legal mechanisms, regardless of the ultimate judicial outcome.

The legal action undertaken by these youths against Portugal and other States provides clear evidence of the expanding scope of individuals' *locus standi* to influence both international and national legal frameworks that, in turn, govern these very same individuals. This case serves as a compelling illustration of a paradigm overhaul that has gradually brought the human being to the centre of human rights law and challenged the object-subject dichotomy.[4] Such breakthrough has been a matter of active concern for decades and has been broadly analysed by important scholars such as Antônio Augusto Cançado Trindade[5], Rosalyn Higgins[6], Solomon E. Salako[7], and Mark Weston Janis[8]. Upon this review, it can be upheld that the subjectivity of the individual under international law is not *per se* a new insight. Accordingly, the central focus of this contribution will not be the rights and duties conferred on individuals as subjects, but rather the exercise of the legal capacity that results from such international personality, along with its overall impact.

The individual has greatly benefited from the adoption of an increasing number of international obligations owed by States towards the civil society. Yet, these do not always manifest in tangible expressions such as legal norms, policies or judicial decisions. In this regard, authors including Helen Duffy[9], Jeff Handmaker[10] and Gesine Fuchs[11] have suggested strategic litigation as a means to pressure States into meeting their commitments and ensuring proper interpretation and enforcement of international law. Certainly, the relevance of this topic rests on the critical role that strategic litigation has the potential to play in the *de facto* emancipation of the individual from the State.[12]

The Individual in International Law

The traditional view of international law was defined by an inter-State structure that endorsed the nation-state as the sole subject of the global legal system. That being said, the growing international concern for human rights in the late twentieth century led to the proliferation of legal subjects, ultimately granting individuals international rights and obligations.[13] Such *legitimatio ad causam* materialised in a wide range of universal and regional legal mechanisms. These provide, today, the individual judicial and quasi-judicial forums to stand for itself, albeit contingent on prior exhaustion of internal remedies and ratification of the legal instruments that enable these courts to operate.[14]

Under international law, the United Nations system encompasses two distinct types of human rights mechanisms: those founded on human rights treaties and those created within the framework of the Human Rights Council. The second category is frequently referred to as 'non-conventional mechanisms,' 'Charter-based mechanisms,' or 'non-treaty procedures.' Moreover, the latter typology can be further divided into procedures at the Council level and special procedures. Whereas the Universal Periodic Review, as part of the Council's procedures, allows for a comprehensive periodic and State-driven appraisal of human rights practices in every United Nations Member States, the special procedures involve independent experts or working groups for addressing

[3] *Duarte Agostinho and others v Portugal and 32 others,* App no 39371/20 (ECtHR, 9 April 2024).

[4] Kate Parlett, *The Individual in the International Legal System Continuity and Change in International Law* (Cambridge University Press 2011) 338–339.

[5] Antônio Augusto Cançado Trindade, 'The Emancipation of the Individual from his own State: the Historical Recovery of the Human Person as Subject of the law of Nations' in Luzius Wildhaber and Stephan Breitenmoser (eds), *Human rights, democracy and the rule of law* (Nomos 2007).

[6] Rosalyn Higgins, 'Conceptual Thinking about the Individual in International Law' (1978) 4 *British Journal of International Studies* 1.

[7] Solomon E. Salako, 'The Individual in International Law: "Object" versus "Subject"' (2019) 8 *International Law Research* 132.

[8] Mark Weston Janis 'Individuals and the International Court' in A.S. Muller, David Raič and Johanna M. Thuránszky (eds), *The International Court of Justice. Its Future Role after Fifty Years* (Martinus Hijhoff Publishers 1997) 205.

[9] Helen Duffy, *Strategic Human Rights Litigation. Understanding and Maximising Impact* (Hart Publishing 2018).

[10] Jeff Handmaker, 'Researching legal mobilisation and lawfare' (2019) 641 *International Institute of Social Studies.*

[11] Gesine Fuchs 'Strategic litigation for gender equality in the workplace and legal opportunity structures in four European countries' (2013) 28(2) *Canadian journal of Law and Society* 189.

[12] In addition to the contributions of Helen Duffy, Jeff Handmaker and Gesine Fuchs, along with the numerous sources that will be cited in the section on 'Strategic Litigation and Individual Rights', the following works further enrich the academic discourse on strategic litigation: Aryeh Neier, *Only Judgment: The Limits of Strategic Litigation in Social Change* (Wesleyan University Press 1982); Helen Hershkoff and Aubrey McCutcheon, 'Public Interest Litigation: An International Perspective', in Mary McClymont and Stephen Golub (eds), *Many Roads to Justice: the Law Related Work of Ford Foundation Grantees Around the World* (The Ford Foundation 2000); Michael Ramsden, 'Strategic Litigation before the International Court of Justice: Evaluating Impact in the Campaign for Rohingya Rights' (2022) 20(20) *European Journal of International Law*; César Rodríguez Garavito and Diana Rodríguez Franco, *Cortes y Cambio social: Cómo la Corte Constitucional transformó el desplazamiento forzado en Colombia* (Centro de Estudios de Derecho, Justicia y Sociedad, Dejusticia 2010); and Aoife Nolan, Ann Skelton and Karobo Ozah, 'Advancing Child Rights-Consistent Strategic Litigation Practice' (2022) *Advancing Child Rights Strategic Litigation Project*.

[13] Juan Pablo Pérez León, 'El Individuo como Sujeto de Derecho Internacional. Análisis de la Dimensión Activa de la Subjetividad Jurídica Internacional del Individuo' (2008) 8 *Anuario Mexicano de Derecho Internacional* 599, 600–603.

[14] Marc Limon, *Reform of the UN human rights petitions system: An assessment of the UN human rights communications procedures and proposals for a single integrated system* (Universal Rights Group 2018) 20.

specific human rights issues or monitor conditions in individual countries.[15]

Complementing non-conventional mechanisms, the United Nations Human Rights Treaty Body system consists of several committees responsible for overseeing compliance with human rights standards. To be more precise, there are eight quasi-judicial bodies that allow for the submission of an individual communication, upon a human rights violation foreseen in the treaties they are bound to monitor and enforce compliance. These bodies include: Committee on Economic, Social and Cultural Rights; Human Rights Committee; Committee on the Elimination of Racial Discrimination; Committee on Elimination of Discrimination against Women; Committee against Torture; Committee on the Rights of the Child; Committee on Enforced Disappearances; Committee on the Rights of Persons with Disabilities; and Committee on Migrant Workers.[16]

Regionally, international mechanisms are reinforced by protection systems across Africa, Europe, and America.[17] Of particular relevance, however, is the European continent, which has seen its human rights commitments take effect in two distinct but complementary courts: the Court of Justice of the European Union (CJEU) and the ECtHR. Both tribunals allow individuals to submit complaints under articles 263, 265 and 268 of the Treaty on the Functioning of the European Union and article 34 of the ECHR,[18] respectively. In the former court, nevertheless, stricter criteria preclude direct individual complaints against a European Union Member State.

The variety of national and international systems available to individuals demonstrates the wide range of international forums accessible as avenues for protest. Despite increasing means for individual agency, it remains an undeniable reality that considerable resistance persists from States, with regard to the smooth functioning of these mechanisms and effective implementation of the decisions that result from them.[19] In truth, State reluctance to refrain from liability is by no means unprecedented; the individual is overly accustomed to dealing with such resistance. As throughout history, individuals have, yet, devised new strategies to adapt to this context, compelling States to uphold the international rights granted to them by the international community as subjects of law. Herein, this paper explores one such techniques, given the recent scholarly focus it has attracted: strategic litigation.[20]

Strategic Litigation and Individual Rights

Characterised by its interdisciplinary perspective, this mechanism seeks to bring about, through the filing of an individual complaint, structural changes that transcend the purely judicial sphere.[21] This advocacy means, unlike traditional law, blends legal and paralegal processes together, in pursuit of engaging with the factors that lie at the heart of the social cause underlying the legal complaint.[22] All in all, a long-lasting reform calls for a holistic strategy that targets social, political and legal spheres, challenging the *status quo* from an all-encompassing outlook.[23] Strategic litigation, therefore, functions as a complementary mechanism to conventional judicial complaints, leveraging less traditional, but very effective tools, including social media, community-based organisations and academia.[24]

Further, scholars have identified essential components that define this mechanism, which may be grouped into two distinct categories:[25] on the one hand, a structural impact that exceeds not only the individual case but also the legal domain;[26] and, on the other hand, a cross-sectional approach of the term 'litigation'[27] that addresses, comprehensively, the wide range of social causes driving legal complaints.[28]

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[15] Takhmina Karimova, Gilles Giacca and Stuart Casey-Maslen, *United Nations Human Rights Mechanisms and the Right to Education in Insecurity and Armed Conflict* (Protect Education in Security and Conflict 2013) 27–30.

[16] Navanethem Pillay, *Strengthening the United Nations human rights treaty body system. A report by the United Nations High Commissioner for Human Rights* (Office of the United Nations High Commissioner for Human Rights 2012) 16.

[17] Michelo Hansungule, 'Protection of Human Rights under the Inter-American System: An Outsider's Reflection' in Gudmundur Alfredsson, Jonas Grimheden, Bertrand G. Ramcharan and Alfred de Zayas (eds), *International Human Rights Monitoring Mechanisms* (Martinus Nijhoff Publishers 2009) 680, 684; and, Manisuli Ssenyonjo, 'Responding to Human Rights Violations in Africa Assessing the Role of the African Commission and Court on Human and Peoples' Rights (1987–2018)' (2018) 7 *International Human Rights Law Review* 1, 4.

[18] Consolidated Version of the Treaty on the Functioning of the European Union (2012) OJ C 326/47.

[19] Kate Fox Principi, *Implementation of decisions under Treaty Body complaints procedures – Do states comply? How do they do it?* (Office of the United Nations High Commissioner for Human Rights 2017) 50.

[20] Marion Guerrero, *Strategic litigation in EU gender equality law* (Publications Office of the European Commission 2020) 44.

[21] Lukasz Mirocha, 'Strategic Litigation: The Problem of the Abuse of Law and Other Critiques' (2019) 3(53) *Forum Prawnicze* 76, 77.

[22] Richard J. Wilson and Jennifer Rasmusen, *Promoting Justice. A Practical Guide to Strategic Human Rights Lawyering* (International Human Rights Law Group 2001) 55.

[23] Ben Schokamn, Daniel Creasey and Patrick Mohen, *Short Guide – Strategic Litigation and its Role in Promoting and Protecting Human Rights* (Advocates for International Development 2012) 1.

[24] Macarena Sáez, *Impact Litigation: An Introductory Guide. American University* (Washington College of Law 2016) 1.

[25] Michael Ramsden and Kris Gledhill, 'Defining Strategic Litigation' (2019) 38 *Civil Justice Quarterly* 407, 410

[26] Cesar Duque, '¿Por qué un litigio estratégico en Derechos Humanos?' (2014) 35 *Revista de Derechos Humanos* 9, 12.

[27] Whereas litigation refers to the legal process of resolving disputes between parties, strategic litigation is a legal advocacy means that employs both legal and paralegal mechanisms aiming at generating an impact after the legal decision, building a community behind the client, and advancing a cause beyond the court case. See Redress, *Holistic Strategic Litigation Against Torture. Practice Note 2* (2021) 5 and Vaughan Lowe, 'The Function of Litigation in International Society'(2012) 61(1) *International and Comparative Law Quarterly* 209, 212.

[28] Kris van der Pas, 'Conceptualising strategic litigation' (2021) 11(6) *Oñati Socio-Legal Series* 116, 121.

With regard to the first of these elements, strategic litigation provides, via the filing of an individual complaint, the framework to engage with concerns that impact on the entire community to which the complainant belongs.[29] Drawing upon this potential, this methodology capitalises on the many possibilities offered by international judicial proceedings to trigger social mobilisations, capture media attention, and catalyse policy reforms.[30] This relates to the fact that judicial forums alone have proven to fall short in the integral tackling of social matters.[31] Responding to this shortcoming, a growing consensus exists on the need to regard litigation as a means to an end, as opposed to an end in itself.[32] Elaborating on this premise, litigation facilitates a court decision that may lead to a social discussion which, translated into political pressure, has the potential to materialise in a public norm or policy towards achieving a structural change.[33]

This naturally brings us to the second element concerning the wide-ranging notion of litigation. Upon maximisation of the term strategic, this legal technique differs from other advocacy means by setting precedents that transcend conventional legal boundaries.[34] Pertaining to this, paralegal actors, including media, civil society and academics play a critical role through supporting tools, notably, political lobbying, awareness raising, social mobilisation and capacity building.[35] As a result, beyond an improved insight into the target concern, this contemporary form of law-making affords a window of action to address the many constrains that have been long criticised from traditional litigation, such as high costs, judicial delays, unaccountability and other risks.[36]

In short, strategic litigation broadens its reach by widening its intervention from courts to other areas that exceed them.[37] Aiming to consolidate a court precedent through norms and policies, this advocacy means complements the legal strategy with a paralegal one, engaging non-traditional actors and empowering individuals.[38] Leveraging this holistic approach, the individual seizes the gaps within the system and strategically capitalises them to reshape the system itself. Within the scope of this strategy, the judiciary provides the individual with the means to call into question the legislative monopoly of the State, via the submission of legal complaints and civilian-driven political pressure.[39] Ultimately, when the civil population is made aware of the mechanisms at their disposal and the strength of coming together, outcomes are striking and lasting.[40] In Tocqueville's words, individuals "look for mutual assistance and as soon as they have found one another out, they combine. From that moment, they are no longer isolated men, but a power seen from afar."[41]

Developing prior considerations, strategic litigation exploits the disruptive effect that individuals' *locus standi* may have on a traditionally State-centric system, not as an end in itself, but precisely as a means to advance structural change.[42] The underlying logic of this premise is that a legal impact may spill over other domains, i.e., social, political and institutional.[43] That being said, a legal outcome, in this context, does not necessarily imply a favourable ruling, since it can also relate to the act of engaging in litigation as will be further explained in the following epigraph.[44]

Redefining Success in Legal Action

As detailed in the preceding section, strategic litigation is defined, among other aspects, by the incorporation of paralegal actors into its strategy, whom traditional law has historically tended to overlook. Involving these stakeholders in the course of action, beyond yielding a more comprehensive response to the cause behind the case, challenges the long claimed direct correlation between court victory and success.[45] Conventionally, there were only two possible

[29] Ann Skelton, *Strategic Litigation Impacts: Equal Access to Quality* Education (Open Society Foundations 2017) 58.

[30] Juan Carlos Gutiérrez Contreras, Silvano Cantú Martínez and Tatiana Rincón Covelli, *Litigio Estratégico en Derechos Humanos. Modelo para armar* (Comisión Mexicana de Defensa y Promoción de los Derechos Humanos A.C. 2011) 15.

[31] Susan Hansen, *Atlantic Insights: Strategic Litigation* (The Atlantic Philanthropies 2018) 81.

[32] Scott Cummings, S. and Deborah L. Rhode 'Public Interest Litigation: Insights from Theory and Practice' (2009) 36 *Fordham Urban Law Journal* 604, 615.

[33] Lucas Correa Montoya, 'Litigo de Alto Impacto: Estrategias alternativas de ejercer el Derecho' (2008) 30 *Revista de derecho: División de Ciencias Jurídicas de la Universidad del Norte* 247, 249–250.

[34] Catherine Corey Barber, 'Tackling the evaluation challenge in humans rights: assessing the impact of strategic litigation organisations' (2012) 16(3) *The International Journal of Human Rights* 411, 411.

[35] Redress (n 27) 7.

[36] Open Society Foundations, *Strategic Litigation Impacts. Insights From Global Experience* (2018) 33.

[37] Mónica Roa and Barbara Klugman, 'Considering strategic litigation as an advocacy tool: a case study of the defence of reproductive rights in Colombia' 22(44) *Reproductive Health Matters* 31, 33–34.

[38] Fabián Sánchez Matus and Jan Perlin, 'Introducción' in Fabián Sánchez Matus (coord), *El Litigio Estratégico en México: la aplicación de los derechos humanos a nivel práctico* (Office of the United Nations High Commissioner for Human Rights 2007) 5, 10.

[39] Vera Shikhelman, 'Access to Justice in the United Nations Human Rights Committee' (2018) 39 *Michigan Journal of International Law* 453, 458–459.

[40] Hanna Arendt, *Crisis of the Republic: Lying in Politics, Civil Disobedience on Violence, Thoughts on Politics, and Revolution* (Houghton Mifflin Harcourt 1972).

[41] Alexis de Tocqueville, *Democracy in America, vol. 3* (Saunders and Otley 1840) 227.

[42] Centro de Estudios Legales y Sociales, *Litigio estratégico y derechos humanos. La lucha por el derecho* (Siglo XXI Editores Argentina S.A. 2008) 269.

[43] Duffy (n 9) 50–77.

[44] Jules Lobel, *Success Without Victory. Lost Legal Battles and the Long Road to Justice in America* (New York University Press 2004) 3–4.

[45] Douglas NeJaime, *Winning Through Losing* (2011) 96 *Iowa Law Review* 941, 962.

outcomes resulting from a judicial process: losing or winning, with the former alone being the one that could be classified as the 'good' or positive result. Such a dichotomy of victory v. defeat ran hand in hand with the additional division between law and politics. Under this rationale, success could only be measured by favourable judicial resolutions that bear no relation to the political dimension. Increasing calls from the civil population to participate in decision-making has, nonetheless, water down the split between public and private spheres, facilitating politics to be reconsidered as a prelude and consequence of the legal norm or the judicial resolution.[46]

In bringing the legal discussion from the limited walls of the courtroom to the general public as a whole, a lawsuit lodged before a court or committee has the potential to not only increase the chances of a favourable judicial or quasi-judicial outcome, but also to boost public awareness and exert political pressure, aiming for law and policy reforms that ensure continuity to the legal process. Building on this logical progression, courts and committees provide a forum for silenced groups to voice their demands, alongside a means to engage with media to amplify their claims.[47] In this vein, it is worth noting that extending the reach of such message and enhancing the presence of these marginalised groups[48] does not necessarily require a court victory, but rather the submission of an individual complaint. Upon this reasoning, to 'win' and 'lose' categories, the category 'play' is added. The underlying idea of this last dimension is that, regardless of whether the final outcome is favourable or unfavourable, the very and mere act of playing and engaging in trial may, in fact, contribute to raise awareness, draw media attention and increase funding.[49]

Based on the foregoing, in assessing the impact of a case filed before national or international judicial or quasi-judicial bodies, attention should not only be drawn to the specific resolution rendered by the legal forum, but also to its impact, which albeit not immediately observable, happens to be as important, if not more. Overcoming the binary approach of losing and winning requires, moreover, delving into the grey areas of 'playing' the game and analysing those outcomes that transcend the legal sphere. In this scenario, it may be that, even though a judicial impact is pending, or a negative ruling has been handed down, there are still parallel positive effects in other areas, such as social or institutional spheres. This reflects an expansion of the intended audience for the case, meaning it is addressed not just to the court but also to the broader community. Meeting this goal, however, entails devoting particular attention to social mobilisation. By making an issue appealing to the media and the public, the chances of awareness-raising are enhanced, not only among the general public, but also among the judiciary that rule on the case and the legislators drafting regulations on the cause.[50]

Accordingly, a strategy that, far from limiting its resources to legal tools, diversifies its repertoire with paralegal means is able to set legal precedents before courts, trigger enforcement and change legislation. In so doing, strategic litigation promotes new legal standards, while exposing to the public problems that need to be addressed.[51] This paradigm shift allows a single individual, with a sole complaint, to bring a victory, in the broadest of its scope, for the community as a whole, rather than for a litigant alone. All factors weighed, a decision in favour of the international corpus of subjective rights empowers the civil society and contributes to social change, by lobbying for legal reforms, as well as by paving the way for other individuals to stand for their rights in the courtroom, on the basis of precedent-setting.[52]

In brief, by resorting to lawyering and non-lawyering means, strategic litigation has the potential to have a long-lasting impact through social, legal, and political changes. Such a comprehensive approach provides a holistic response that enables structural transformation. Drawing upon the ideas outlined above, impact litigation differs from the traditional understanding of lawyering and transcends the client-centred perspective to focus on a wider picture and a public interest. Indeed, strategic litigation strives to try a case not only in the courtroom but in the court of the public opinion. It is, thus, about bringing litigation together with advocacy, in a joint effort of shaping the political agenda and influencing public's view.[53]

Case Study: Duarte Agostinho v. Portugal and Others

Under the ECHR, young Portuguese nationals filed in 2020 an individual application (no. 39371/20) against 33 European States, exercising the *locus standi* that the international law has conferred on individuals in materialisation of their subjectivity.[54] Although this individual lawsuit was

[46] Lobel (n 44) 3–4.
[47] NeJaime (n 45) 954–955.
[48] In the scope of this article, marginalised groups relate to those pushed to the edges of society by dominant powers, often experiencing exclusion, disadvantage, or lack of recognition. See David Gurnham, 'Introduction: marginalisation in law, policy and society' (2022) 18 *International Journal of Law in Context* 1, 2.
[49] Catherine Albiston, 'The Dark Side of Litigation as a Social Movement Strategy' (2011) 96 *Iowa Law Review Bulletin* 61, 66–67.
[50] Open Society Foundations (n 36) 78.
[51] Duffy (n 9) 59–62.
[52] Guerrero (n 20) 50.
[53] Gesine Fuchs, 'Using strategic litigation for women's rights: Political restrictions in Poland and achievements of the women's movement' (2013) 20 *European Journal of Women's Studies* 21, 22.
[54] Articles 34 and 35 of the ECHR.

ultimately rejected by the decision ruled on 9 April 2024, on *Duarte Agostinho and others against Portugal and 32 others* judgment (hereinafter "the Decision"),[55] the case has sparked considerable debate. Expanding on the notion of moving beyond the win v. lose paradigm, the discussion below aims to assess whether, despite its dismissal, the Decision has had an impact on the legal and social domains and, if so, to what extent. In answering this question, this section begins by examining the facts pleaded by the parties, continues with the merits of the court's decision and concludes by analysing the impact it has had on legal and social spheres.

Factual Facts and Legal Basis

On 7 September 2020, six applicants aged between 8 and 21, filed a claim alleging violations of articles 2 (right to life), 3 (prohibition of inhuman and degrading treatment), 8 (right to respect for private and family life) and 14 (prohibition of discrimination) of the ECHR. As they claim and the Decision upholds, State-attributable actions, including the release of emissions, the extraction and export of fossil fuels, as well as the import of goods, resulted in heatwaves and wildfires, compromising claimants' physical and mental well-being. Applicants arguing their grievance further, reported, drawing upon the findings of the Intergovernmental Panel on Climate Change and other scientific analysis, that failure of States to act on climate change was resulting in lower energy levels, sleep deprivation and limitations on their ability to enjoy time outdoors.[56]

Once the complaint was filed and jurisdiction was referred in favour of the Grand Chamber, applicants and respondent governments were afforded the opportunity to submit their briefs on admissibility and merits. Pertaining to this, it is worth noting that, prior request of the applicants, the ECtHR withdrew the application in so far as it concerned Ukraine, given the ongoing war in the country.[57] As per Russian Federation, the Court contended that upon the principle *ratione temporis*, its jurisdiction was limited to events occurring before 16 March 2022, date on which the State ceased to be a party of the Council of Europe.[58]

The remaining 30 Governments questioned claims raised by young litigants, notably, the direct correlation between the impacts reported and the acts imputable to relevant States on climate change. Elaborating on the scrutiny of the application, States argued the lack of documentary evidence proving these individuals to be victims of any of the fires recorded in 2017 in Portugal, and the absence of medical reports attesting to their health conditions. Beyond the content of the application filed, governments, additionally, remarked the issue of the unmet admissibility criteria both in terms of jurisdiction and exhaustion of domestic remedies.[59]

Along with applicants and respondent Governments, third party reports were also allowed in the written procedure, among which Amnesty International, Greenpeace, Save the Children, United Nations Special Rapporteurs and Oxfam submitted amicus briefs. In support of claimants' rationale, the legal arguments put forward by these third parties drew upon the growing scientific consensus that children are more vulnerable than adults to the adverse effects of climate change. Consequently, under the principle of the best interests of the child, third parties urged the Court not to be overly strict on admissibility criteria or the burden of proof. By invoking these claims, NGOs and non-profit entities aimed to highlight the intrinsic link between human rights and the environment, as well as the cross-border consequences of climate change. Their goal was to underscore the importance of the European tribunal's intervention and the necessity of a response that transcends national boundaries.[60]

After a detailed analysis of third parties' amicus briefs and the arguments presented by the litigants, i.e., individuals and the respondent Governments, the ECtHR rendered its decision on jurisdiction, exhaustion of domestic remedies and victim status, as detailed by the sections that follow.

Territorial Scope and Jurisdiction

Expanding on the *M.V. and Others v. Belgium* case and article 1 of the ECHR, the Court recalled, in the Decision under analysis, the *sine qua non* condition that the exercise of jurisdiction entails, in holding States responsible for actions or omissions that are imputable to them. Consistent with article 31 of the Vienna Convention on the Law of Treaties of 1969, the ECtHR interpreted jurisdiction in the limited terms of territorial sovereignty.[61] That said, case law, namely case of *Ukraine and the Netherlands v. Russia,* provided that exceptions to the general rule may be made where the State exercises extra-territorial jurisdiction, in the form of *rationae loci* or "effective control" and *rationae personae* or "State agent authority and control".[62]

Since the application was filed by Portuguese nationals, there was no disputed concurrence of territorial jurisdiction as it related to Portugal. Over other States, however, no basis, nor exception, whatsoever was argued by litigants

[55] *Duarte Agostinho* (n 3).
[56] Ibid 12–15.
[57] Ibid 158–160.
[58] Ibid 161–164.
[59] Ibid 31–38.
[60] Ibid 137–157.
[61] Ibid 97–214.
[62] *Ukraine and The Netherlands v. Russia,* Apps no 8019/16, 43800/14 and 28525/2 (ECtHR, 30 November 2022) 548.

in support of the territorial jurisdiction. Still, reaching a clear conclusion as far as the extraterritorial aspect was concerned proved to be difficult. In this regard, the European Network of National Human Rights Institutions argued that rather than to geographical limits, the Court should have been attentive to its *espace juridique* (or jurisdictional space). According to the not-for-profit association, a more holistic perspective on jurisdiction would be beneficial not only for the case at hand, but also for the broader environmental protection cause. On the one hand, such an outlook would facilitate holding Contracting States accountable for violations committed in all Convention-obligated territory.[63] On the other hand, this comprehensive view on jurisdiction would allow for the development of a common reading of human rights on the important subject of climate change, under what Professor Christel Cournil and Notre Affaire à Tous regarded as the "principle of the harmonious interpretation."[64] By and large, hidden beneath these third parties' interventions is the fact that a narrow interpretation of jurisdiction risks creating a void in the effective protection of human rights.

Despite preceding arguments, the Court considered that there were insufficient grounds to plead in favour of territorial an extraterritorial jurisdiction, as there was no proven direct relationship between litigants and the countries other than Portugal. Although it reflected upon the criterion of "control over the applicants' Convention interests", the ECtHR dismissed the standard, on the premise that its application would have caused high degree of uncertainty for Member States.[65] Given the aforementioned, the Court recognised the territorial jurisdiction over Portugal, while rejecting any other jurisdiction over other respondent States. Accordingly, the ECtHR found applicants' complaint against Portugal admissible but declared the action against other States to be inadmissible under article 35 of the ECHR.[66]

Admissibility: Remedies and Victim Status

In close consideration of the principle of subsidiarity, article 35 of the ECHR outlines among its admissibility criteria the prior exhaustion of all domestic remedies. Although special circumstances may dispense the individual lodging the complaint to meet this criterion, overall, applicants are required to avail themselves of the normal legal remedies that are both available and adequate at national level to address Convention-related matters. Since every complaint, but the one filed against Portugal, was found inadmissible on the grounds of territorial jurisdiction, the Court confined its ruling strictly to the examination of compliance or lack thereof of the admissibility criteria concerning Portugal.[67]

On the premise that the broad constitutional provision foreseen in the Portuguese legislation fell short for a comprehensive protection on climate change, applicants failed to pursue any internal legal path prior to the submission of the application before the ECtHR. At odds with this argument, the Court stated that, in examination of these internal remedies, the available system of recourse under the Portuguese national framework was sufficient, first, to mitigate parties' financial constraints in securing legal representation; and, second, to ensure remedial measures against unduly prolonged proceedings. [68]

Further in the analysis of this criteria, the Court raised the implications of skipping the necessary national steps. According to the ECtHR, failure to undertake required legal proceedings at the national level prevented domestic courts assessing whether applicants were, in fact, directly harmed, and if so, whether there was a clear causal link between the actions, as well as omissions, of respondent governments.[69] Despite the compelling nature of the victim condition, the Court refrained from further examination and confined itself to concluding that the individual application against Portugal was rejected, pursuant of article 35.1 and 35.4 of the ECHR, since the non-exhaustion of Portuguese national remedies had not been questioned and the rationale behind the failure to exhaust these had been grounded insufficient.[70]

Case Outcomes

In view of the above analysis, the Court declared that applicants fell within Portugal's jurisdiction, whereas the competence of other respondent States remained unsubstantiated. Despite acknowledging Portugal's authority, the ECtHR ruled the individual complaint inadmissible for failure to exhaust national remedies. Having been rejected on formal or procedural grounds, the Court did not undertake an analysis of the merits. While the Court restricted its deliberation to jurisdictional and admissibility criteria, thereby refraining from a substantive evaluation of whether the respondent States committed a violation, its reasoning implicitly suggested a potential attribution of responsibility, even if such a finding remained unstated.[71]

The Court drew a clear distinction between jurisdiction and liability, which supported the inference that a lack of jurisdiction did not necessarily absolve responsibility. Moreover, the ECtHR acknowledged that climate change was a global challenge that required a unified international

[63] *Duarte Agostinho* (n 3) 144.
[64] Ibid 156.
[65] Ibid 208.
[66] Ibid 214.
[67] Ibid 216.
[68] Ibid 224–228.
[69] Ibid 229–230.
[70] Ibid 227.
[71] Ibid 231.

response, nonetheless, the Court pointed out that each State bore responsibility to protect the environment, independent of other States' actions. Considering the foregoing, it would be inaccurate to assert that there is a vacuum in the protection or impunity, since there are means to hold States accountable, except these cannot be exercised collectively. On redress mechanisms, the Court chose to take its analysis beyond the limits of the Convention and noted that there were other complaint channels under international law, notably within the United Nations legal framework, providing individuals with the means to demand the enforcement of climate-change commitments by States.[72]

At its core, the Court's decision, grounded on the doctrine of "margin of appreciation",[73] exceeded the mere assessment of admissibility by explaining that the inability to examine or conclude such liability, as a matter of lack of jurisdiction, did not necessarily imply that responsibility did not arise. Additionally, while the ECtHR failed to rule on the merits of the application, the judicial body suggested individuals other alternative complaint mechanisms, under the United Nations umbrella, to call for the upholding of their rights.

The Duarte Case's Broader Impact

Regardless of the analysed legal examination undertaken by the Court, the mere review of the admissibility criteria foreseen in articles 34 and 35 of the ECHR is sufficient to realise that the odds of the Court accepting the case for review were exceptionally low, if not non-existent. Beyond jurisdiction, which, as discussed in the prior section, raises complications, the Convention clearly states in article 35.1 that "the Court may only deal with the matter after all domestic remedies have been exhausted." The chances of these applicants lodging a complaint before 33 Member States, including two at war, Russia and Ukraine, to exhaust every domestic avenue and, eventually, file an individual complaint before the European judicial body, was extremely unlikely, due to constraints of time and financial resources.[74]

As a matter of fact, applicants did not engage in any legal proceeding at the State level. Given the ambitious nature of the application and the number of States involved, litigants could have sought to find a legal loophole to bypass the failure to meet the admissibility requirement, arguing the exhaustion of remedies to be "unduly burdensome for them, unreasonably prolonged and unlikely to bring effective relief."[75] Yet, since exceptions are rarely allowed and the admissibility criteria of the ECHR were not met, it is safe to argue that the dismissal of the case was very much foreseeable. If the result was, however, predictable, why bother filing a complaint that was bound to be rejected?

In answering this question, it is important to recall the already examined paradigm that advocates for the questioning of the long-sustained dichotomy of win v. lose, as well as the narrow perspective that posits a direct correlation between a favourable trial outcome and ultimate success.[76] Applicants addressed the judicial process as a means, rather than an end in itself. Upon leveraging litigation, the ECtHR was not perceived as a forum to rule justice *per se,* but as a platform for case and cause discussion. Indeed, litigants regarded the courtroom as a forum to introduce their claims to the community, thereby drawing attention to the subject of climate change. As per this, it can be anticipated that the strategy proved effective, as following sections will explain. What initially involved relatively unknown individuals seeking to raise awareness about the risk of harm from climate change to which they were exposed, gradually evolved into a case that attracted considerable media attention. These individuals not only became subjects of public interest but also served as catalysts for broader societal change, a phenomenon that warrants a comprehensive analysis from both social and legal perspectives, as will be elaborated upon in subsequent sections.

Legal Setbacks and Public Discourse

Drawing upon the preceding analysis, this legal process spilled over the social domain. By sparking public discussion, litigants sought to trigger reform. Under the hashtag #Youth4ClimateJustice, individuals took the conversation about the case to twitter, Instagram, LinkedIn and Facebook.[77] Beyond social media, Portuguese youth told their story to the traditional media, in an attempt to spread the word about the lawsuit, spark a social debate on the subject of climate change, get civil society involved and make the protection of the environment part of the political agenda. From Portuguese national newspapers, such as Jornal de Notícias[78] and 20 min,[79] to other international

[72] Ibid 202.
[73] Howard C. Yourow's book, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence* (Martinus Nijhoff Publishers 1996), offers a comprehensive analysis of the development and application of this doctrine.
[74] Open Society Foundations (n 36) 33.
[75] *Sacchi and Others v. Argentina,* App no 104/2019 (CRC, 22 September 2021) 10.18.
[76] Helen Hershkoff and Aubrey McCutcheon, 'Public interest litigation: an international perspective' in Mary McClymount and Stephen Golub (eds), *The Law-related Work of Ford Foundation Grantees Around the World* (Ford Foundation 2000) 283, 295.
[77] Global Legal Network, 'Media'<https://youth4climatejustice.org/media/> accessed 11 February 2025.
[78] João Vasconcelos e Sousa, 'Jovens portugueses levam alterações climáticas ao Tribunal Europeu' *Jornal de Notícias* (3 September 2020).
[79] Albane Ythier 'Climat: Six jeunes Portugais poursuivent en justice 32 pays pour inaction climatique' *20 minutes* (8 September 2023).

newspapers, including The Guardian,[80] DW, [81]Aljazeera,[82] Voice of America,[83] BBC,[84] or Associated Press News[85] among others, media echoed news on the case and engaged the general public on the updates of the lawsuit lodged by "Portuguese Gen Z" before the ECtHR.[86]

By regarding the case as "unprecedented"[87] or "historic"[88], media underscored this David v. Goliath[89] case's significance in framing environmental protection as a fundamental legal right.[90] In effect, a thorough analysis of the coverage's impact reveals its effectiveness, since the parallel crowdfunding initiative associated with the publicity campaign managed to raise £144,789, demonstrating its success in mobilising civil society, as well as financial support.[91]

On the whole, regardless of its legal dismissal, the overall social impact of the ECtHR decision on the *Duarte Agostinho* case should not be underestimated. In the words of Aoife Nolan, professor of human rights law at the University of Nottingham and President of the Council of Europe's European Committee of Social Rights, "the litigation and the advocacy surrounding it [the Portuguese case] has fundamentally changed European climate justice discourse and the landscape of climate justice efforts."[92]

This statement succinctly illustrates how legal developments possess the capacity to shape the public discourse and *vice versa*. When legal action is carefully deployed in coordination with other advocacy tactics, it becomes what Scheingold and Sarat refer to as an "ancillary tactic".[93] Litigation acts as a complementary, yet powerful, tool capable of catalysing substantial legal change in parallel with social needs. Historically, law and social transformation have moved in relative alignment, with the legal system offering responses, albeit imperfect, to emerging societal demands.[94] Accelerating tempo of contemporary social change threatens, however, as noted by Friedmann, to outpace the validity of assumptions that are held today.[95] As a response to nowadays' rapidly evolving context, judicial and quasi-judicial forums have increasingly been called upon to provide more immediate outputs than those generated by legislative processes.[96] By providing individuals *locus standi*, the legal system has been able thought jurisprudence to better keep pace with shifting social realities.[97] Acknowledging the capacity of courts to shape the law, as well as the social context in which those norms are applied, it becomes essential for lawyers and litigants engaged in strategic litigation to reflect on the kind of society they aspire to build.[98]

Impact Despite Dismissal

Without overly dwelling on the legal aspects already mentioned in the section on the review of the *Duarte Agostinho* case, it is important to emphasise, once again, the distinction between jurisdiction and responsibility, as rightly pointed out by the ECtHR. This distinction drawn by the European Court does, in some way, reflect a pronouncement by the judicial body and hints at the outcome of a second ruling issued on the very same day: case of *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*.[99]

This second application was filed by four women and a Swiss association of elderly women, Verein KlimaSeniorinnen Schweiz, on the grounds of inadequate measures to combat climate change. Under articles 2 (right to life) and 8 (right to respect for private and family life) of the ECHR, applicants argued that their national State, Switzerland, had failed to adopt effective policies in

[80] Sandra Laville, 'Girl, 11, among six young people taking on 32 nations in historic climate case' *The Guardian* (27 September 2023).
[81] DW, 'Climate change: Young people sue 32 European nations' (27 September 2023).
[82] Isabella Kaminski, 'Six Portuguese youth take 32 nations to European court over climate change?' *Aljazeera* (21 September 2023).
[83] Associated Press, '6 Young Climate Activists Take on 32 European Nations' *Voice of America* (27 September 2023).
[84] Selin Girit, 'Climate change: Six young people take 32 countries to court' *BBC* (27 September 2023).
[85] Barry Hatton and Helena Alves, 'Six young activists devote years to climate fight with 32 governments. Now comes their day in court' *Associated Press News* (26 September 2023).
[86] Paul Love and Alice Hancock, 'Portuguese Gen Z and Swiss boomers await pivotal court rulings on climate change' *Financial Times* (9 April 2024).
[87] Stuti Mishra, 'Six young people suing 32 countries in 'unprecedented' climate action lawsuit' *Independent* (27 September 2023); Catarina Demony, 'Youth vs Europe: "Unprecedented" climate trial unfolds at rights court' *Reuters* (28 September 2023).
[88] Rosie Frost and Lottie Limb, '"Historic" European Court of Human Rights ruling backs Swiss women in climate change case' *EuroNews* (9 April 2024).
[89] Laura Paddison and Vasco Cotovio, 'Truly a David and Goliath case': Six young people take 32 countries to court in unprecedented case' *CNN* (27 September 2023).
[90] Federica Di Sario, 'Climate protection is now a human right — and lawsuits will follow' *Politico* (9 April 2024).
[91] Global Legal Action Network, 'Support unprecedented youth climate case against 32 European countries' (*Crowd justice,* 2020) <https://www.crowdjustice.com/case/youth4climate
justice/> accessed 15 February 2025.
[92] Bianca Castro, 'Strasbourg throws out two climate change cases - but finds Swiss authorities at fault' *The Law Society Gazette* (9 April 2024).
[93] Austin Sarat and Stuart Scheingold, *Cause Lawyering: Political Commitments and Professional Responsibilities* (Oxford University Press 1998) 267.
[94] Steven Vago, *Law and Society* (Prentice Hall 1993) 242–243.
[95] Wolfgang Friedmann, *Law in a Changing Society* (Columbia University Press 1972) 513.
[96] Vago (n 94) 244–248.
[97] Antônio Augusto Cançado Trindade, *El Acceso Directo de los Individuos a los Tribunales Internacionales de Derechos Humanos* (Universidad de Deusto 2001) 32.
[98] Mark V. Tushnet, *Making Civil Rights Law: Thurgood Marshall and the Supreme Court,* 1936–1961 (Oxford University Press 1994) 6.
[99] *Verein Klimaseniorinnen Schweiz and Others v. Switzerland,* App no 53600/20 (ECtHR, 9 April 2024).

addressing women's right to life and health. Additionally, applicants claimed that Swiss Federal Supreme Court's arbitrary dismissal of their case, without ruling on its merits, constituted a breach of articles 6 (right to a fair trial) and 13 (right to an effective remedy) of the ECHR.[100] Upon review of these legal provisions, the ECtHR adopted a decision in favour of applicants and held Switzerland responsible of failing to meet its international commitments in relation to climate change. While acknowledging domestic authorities' discretion concerning the application of the Convention, the European Court ruled that authorities neglected to take timely and appropriate action in designing, drafting, and implementing the necessary legislation and remedies to protect the environment.

In reaching this conclusion, the Court relied on the *Duarte Agostinho* case. Concerning this, the ECtHR acknowledged that although climate change was, certainly, a global phenomenon that called for an international response, global climate governance system was structured around the notion that States share common, yet differentiated, responsibilities. By invoking the *Duarte Agostinho* case, the ECtHR stated that "each State has its own share of responsibilities to take measures to tackle climate change and that the taking of those measures is determined by the State's own capabilities rather than by any specific action (or omission) of any other State."[101]

It follows from the previous quote that the latter case was, to a great extent, built upon the first examined judgment. The legal reasoning raised by the *Duarte Agostinho* decision challenged conventional legal boundaries, redefining expectations of State accountability in climate change. Elaborating on this reasoning, regardless of the ultimate dismissal of the first of the individual complaints, the legal rationale developed by the *Duarte Agostinho* case can, in itself, be regarded as a persuasive precedent that will be referenced in subsequent claims before the ECtHR regarding environmental protection matters. As such, it can be asserted that the *Duarte Agostinho* case is a binding argumentative case-law that will underpin future individual grievances in climate litigation.

Conclusion

Building on the paradigmatic *Duarte Agostinho* case, this article has sought to delve into the individual's object-to-subject shift and the *locus standi* that results from the eventually granted legal personality. It has, thereby, assessed individual's capacity to elicit structural reform via legal and paralegal means, regardless of the ultimate court ruling. While far from straightforward, in light of the out-of-court findings, it is safe to argue that individuals can hold great potential for impact through strategic litigation, irrespective of States' reservations and the final court's verdict.

This new way of practicing law empowers individuals to assert their place within an international system originally designed by and for States. The State-centric understanding of global dynamics resulted in the marginalisation of the individual for decades. The inherent deficiencies of this traditional paradigm, however, were exposed by two World Wars, compelling States to acknowledge the legal personality of other international actors, including individuals. This proliferation of subjects led to the consequent *legitimatio ad causam* and the subsequent development of international and regional complaint mechanisms, allowing individuals to file complaints after exhausting domestic remedies and upon prior ratification of the relevant treaty by the State of which they are nationals.

Codification marking the eventual recognition of the individual as a *de jure* subject, was, nevertheless, significantly at odds with the material reality. *De facto*, States remained reluctant to accept international rulings that resulted from the questioning of their domestic action or omission. Such State resistance urged individuals to pursue new avenues aimed at holding States accountable for their international commitments. Among these alternative means for ensuring compliance, strategic litigation emerged. Intended to trigger a structural change that transcends the limited scope of the judicial domain, this interdisciplinary advocacy means brings both, legal and paralegal aspects, together. Unlike the traditional conception of law, this new approach to legal practice incorporates other aspects, such as social and political dimensions, into the judicial strategy. The resulting broader and more integrated vision of law not only challenges the orthodox outlook to strategy design, within the narrow confines of the courtroom, but also transcends the limited perspective of impact measured solely in terms of judicial rulings.

A growing awareness of law's multifaceted character, which intersects with social, political and moral spheres, allows for a reconfiguration of the parameters of success. The direct correlation between a favourable ruling and overall positive outcome is increasingly challenged by the scholarly doctrine articulated in this article, which argues that success should not be measured solely by court judgments, but also by their impact. When the community behind the client is factored in, it could be argued that losing a case does not necessarily equate to losing a cause, as demonstrated by the *Duarte Agostinho* case. All in all, if the attention is confined to the judicial outcome, it is easy to interpret this particular case as unsatisfactory. Yet, if attention shifts beyond the judicial domain, can the same assessment be made?

The *Duarte Agostinho* complaint compelled 33 Member States to account for the claims raised against them by six young individuals and called the ECtHR to adopt a stance on climate change to, ultimately, issue a ruling that has set

[100] Ibid 43.
[101] Ibid 442.

an argumentative precedent. Today, this legal reasoning is susceptible of being invoked in forthcoming individual complaints and has been, already, relied upon in reaching a subsequent favourable ECtHR resolution, i.e., *Verein KlimaSeniorinnen Schweiz* case. Transcending the legal scope, the *Duarte Agostinho* judgment has, moreover, triggered public discussion through media engagement. In so doing the case has catalysed the social mobilisation that has facilitated raising money for lobbying, as well as for structural reform. This complaint may have been dismissed by the ECtHR, still, declaring this case unsuccessful merely due to the lack of a favourable resolution is bold and unreasonable. The *Duarte Agostinho* case represents the outset of a new form of climate litigation that does not necessarily regard the courtroom as the final destination, but rather as a functional instrument that serves a bigger and long-lasting goal.

Ethical Considerations

This article does not involve human or animal participants; therefore, ethical approval and informed consent are not required. The analysis is based exclusively on publicly available materials, including the official judgment of the European Court of Human Rights, as well as academic and media commentary on the case. No interviews were conducted with the litigants or any other individuals, and all information used is properly referenced and cited.

Consent to Participate

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Consent for Publication

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