Human rights in the face of disaster

To what extent do member states have a positive obligation under the European Convention on Human Rights with regard to natural disasters?

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1 Introduction

1.1 Research question and topic

This thesis will look at how the European Convention on Human Rights ("ECHR" or "the Convention") and the European Court of Human Rights ("ECtHR" or "the Court") address natural disasters within member states. On several occasions, as you will see later in this thesis, the ECtHR has had to consider the human rights implications caused by natural disasters, and the trend does not seem to decrease. This thesis will examine how natural disasters can infringe upon the fundamental rights set out in the European Convention on Human Rights and how the European Court of Human Rights tends to handle such occurrences. It will also look at how Norway has implemented Environmental Impact Assessment legislation and if this legislation contains the tools needed to fulfil the positive obligation set out in the Convention.

The Convention affirms the fundamental human rights that member states are to respect and protect, such as the right to life under Article 2, the right to liberty and security under Article 5, and the right to respect for private and family life under Article 8, amongst others. Since its establishment in 1950, the ECHR has bound 46 nations to comply with the Convention. This does not include Russia, who in 2022 was excluded from the Council of Europe due to the aggression towards Ukraine.[1]

1.1.1 Scope and limitations

This thesis will provide the reader with an overview of how natural disasters have been, and will be, treated in relation to human rights by the European Court of Human Rights and how member states should act in accordance with these. The thesis will consist of a methodical chapter explaining how the interpretation of the ECHR differs from national law in some instances and what fundamental principles to apply to human rights law when interpreting the ECHR. From there, I will use relevant case law to show how principles like the margin of appreciation are applied in environmental cases and how the member states have a positive

[1] Council of Europe – Newsroom, *Secretary General: Millions of Russians no longer protected by the European Convention on Human Rights*

obligation to safeguard human rights per Article 1 of the Convention. Articles 2 and 8 of the Convention are the ones most often claimed to be violated, and relevant case law from the ECtHR will be presented. The case law will be used to derive what principles and legal guidelines apply in cases of emergencies, such as natural disasters. The thesis will then examine how Norway has complied with the principles and guidelines laid out by ECtHR by reviewing the Environmental Impact Assessment legislation and implementation. Lastly, there will be a chapter with concluding remarks attempting to tie everything together.

There exists a number of different human rights conventions, treaties and charters outside of the ECHR. The Organization of American States has established the American Convention on Human Rights to hold the signatory states to a certain standard regarding human rights. The African Union has implemented a similar charter in the form of The African Charter on Human and People's Rights. The African Charter states that "[a]ll peoples shall have the right to a general satisfactory environment favourable to their development".[2] The UN has also established numerous human rights-related declarations, including the Universal Declaration of Human Rights, the Convention on the Rights of the Child, and the Convention on the Rights of Persons with Disabilities. This thesis will be limited to the European Convention on Human Rights and how it tackles natural disaster-related issues in human rights law.

The thesis will also be limited to natural disasters in human rights law, as opposed to other climate and environmentally related issues. There have been cases where the complainant argues that their human rights have been violated due to noise pollution, odours, and other nuisances. In the cases of *Hatton and Others v. the United Kingdom* and *Powell and Rayner v. the United Kingdom,* the complainants lived close to Heathrow Airport. They complained about the aeroplane traffic causing unacceptable amounts of noise. In the case of *Brânduşe v. Romania*, the issue was foul odour seeping in from outside a prison. These are cases that lie on the outskirts of what this thesis will touch on.

There have also been a few cases where climate change as a whole has been claimed as a violation of human rights. In the case of *Duarte Agostinho and Others v. Portugal and Others,* filed in 2020, the applicants claim that Portugal and 32 other member states have failed to comply with the Paris Agreement regarding limiting the increase in average global temperature. The applicants claim that this has led to the breach of Articles 2, 3, 8, 14, and 34

[2] African Charter on Human and People's Rights, Article 24

of the Convention and Article 1 of Protocol No. 1 of the Convention. The Court still needs to determine the outcome of this case. *Carême v. France* is another climate change-related case that has not yet been given a verdict. *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* was a case about older women suffering from health problems significantly worsened by heat waves attributed to climate change. The Grand Chamber heard the case on 29 March 2023, but a decision has not yet been made. These are questions far too big and comprehensive to be examined in this thesis and will not be discussed further.

1.2 The relationship between human rights and the climate

The impact of natural disasters can be devastating. Earthquakes, landslides and mudslides, droughts and floods can all lead to loss of life, displacement and destruction of homes and property. The Gjerdrum landslide is an example of how Norway has been affected by devastating natural disasters in previous years.

In the middle of the night in late December 2020, a landslide hit a residential area in Gjerdrum, eastern Norway. More than 1600 people were immediately evacuated, and eleven people died. In the aftermath of the disaster, the Norwegian government decided to establish a committee of experts to determine the cause of the catastrophe and evaluate how to handle similar incidents better in the future and if there is a need for improved legislation. This committee was named the Gjerdrum Committee (Gjerdrum-utvalget). The Committee submitted a report to the Norwegian Ministry of Petroleum and Energy on 29 September 2021 with their findings.[3]

For a landslide this big to occur, there needs to be a big enough height difference in the terrain, and the ground needs to consist of quick clay. Calculations show that the soil in the surrounding areas was poor, and a map highlighting hazardous zones indicated that this was known to the authorities. However, the site had laid undisturbed over a long period and had not shown any indicators of being unsafe. Something had to have set the landslide off.[4]

[3] Olje- og Energidepartementet, *Årsakene til kvikkleireskredet i Gjerdrum 2020*
[4] Ibid, p. 8 – 10

The leading cause for setting off the landslide is thought to be erosion from Tistilbekken, a nearby stream of water. Erosion can be a natural process, but the erosion in Tistilbekken was unusually powerful and fast. The Gjerdrum Committee has attributed this to the area's urbanisation. The report states that the landslide most likely would not have occurred if the stream had been secured or protected from erosion earlier. The precipitating cause triggering the landslide is thought to be the heavy downpour of rain in the days prior to the disaster. The autumn of 2020 had been the rainiest season in the area since 2000, and the fact that the landslide happened in 2020 and not in 2000 is attributed to the increasing erosion that had occurred in the meantime, as well as the unusually warm weather.[5]

In August of 2021, the World Meteorological Organization released a report saying that natural disasters have increased by 500% over the last 50 years.[6] This involves the increase of lives and homes lost and poses a significant threat to many of the human rights enshrined within the ECHR. These statistics show that climate change and the accompanying natural disasters pose a significant danger towards human rights. The report indicates that the most lethal natural disasters are droughts, storms and floods, all extreme weathers that can be attributed to some degree to climate change.[7]

Article 2 about one's right to life is one of the most basic human rights to protect and one of the most likely to be violated in the case of natural disasters. In addition to the direct impacts of natural disasters, people risk being displaced from their homes, family, and safety. This will, in many cases, violate Article 8 of the Convention regarding the right to family life and a home. Numbers from 2016 show that more than 19 million people were displaced by disasters in 2015.[8]

Furthermore, it is important to recognise that the impacts of a natural disaster might be experienced differently by everyone.[9] Marginalised communities, including low-income communities, might be struck by natural disasters when the more privileged communities can afford to live elsewhere. An example is when a map showing areas more prone to landslides, avalanches, or flooding might lower the value of the housing market in the area, higher

[5] Olje- og Energidepartementet, *Årsakene til kvikkleireskredet i Gjerdrum 2020*, p. 8 – 10
[6] World Meteorological Organization, *Atlas of Mortality and Economic Losses from Weather, Climate and Water Extremes (1970 – 2019), p. 16*
[7] Ibid.
[8] Internal Displacement Monitoring Centre, *Global Report on Internal Displacement*
[9] Hans Chr. Bugge. *Lærebok i miljøforvaltningsrett*, p. 108

income families can afford to live elsewhere. At the same time, lower-income families might have to settle for a riskier life.

In *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland,* the applicants alleged that the right not to be discriminated against under Article 14 was violated. This was because the women affected by health issues were older women and seniors. They felt disproportionally affected and therefore felt discriminated against because of their age. While the case has not been decided by the Court yet, it still goes to show that natural disasters, such as heat waves, affect people differently.

The case of *Turgut and Others v. Turkey* concerned more than 100 000 m^2 of land that the applicants claimed had been in their family for many generations. The Turkish government had expropriated the land without compensation for the applicants, stating that the land was part of the public forest estate and could not be privately owned.[10] The Turkish government meant they could "legitimately intervene to protect the environment and forest land" when this was "in the public interest" due to the wide margin of appreciation.[11] The applicants contended that this was a breach of Article 1 of Protocol no. 1 of the ECHR, and the Court held that the applicants were correct in their allegations. The Court stated that "certain fundamental rights, such as ownership, should not be afforded priority over environmental protection considerations".[12]

This suggests that environmental issues may supersede economic rights, such as the right to property under Article 1 of Protocol No. 1 but gives no further guidelines as to which rights can be set aside in favour of environmental rights. The starting point is that the Turkish government acted in accordance with ECHR. The Court states that however "a total lack of compensation could be considered justifiable only in exceptional circumstances", and since the Turkish government had not relied on any such circumstances, Article 1 of Protocol No. 1 had been violated.[13] The Court stated that "the fair balance that had to be struck between the demands of the general interest of the community and the requirements of the protection of individual rights" had not been met.[14] One can draw from the case of *Turgut and Others v.*

[10] *Turgut and Others v. Turkey*, paras. 11 – 14
[11] Ibid, para. 85
[12] Ibid, para. 48
[13] Ibid. para. 91
[14] Ibid, para. 92

Turkey that in the case of environmental rights versus personal, economic rights, there needs to be a “fair balance”.

The relationship between climate change, natural disasters, and human rights is complex and multifaceted. Climate change is not just an environmental issue but also a social and economic issue that requires action at all levels. International human rights law provides a framework for protecting and promoting human rights in the context of climate change. This thesis will look at how ECHR and ECtHR contribute to this framework.

2 Methodology

2.1 The interpretation of the ECHR

Under customary international law, it is clear that the Vienna Convention on the Law of Treaties ("VCLT" or "the Vienna Convention") also applies to nations that have not signed nor ratified it. Article 31 of the VCLT states that treaties "shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and the light of its object and purpose." This means that a common linguistic understanding should be applied when interpreting convention texts and that the "object and purpose" of the convention in question may provide guidance when there is no clear, shared understanding of the wording.

The European Court of Human Rights has established that the European Convention on Human Rights must also be interpreted according to these guidelines, for example, in the case of *Golder v. the United Kingdom*. In the Golder case from 1975, ECtHR stated that the ECHR "should be guided by Articles 31 to 33 of the Vienna Convention of 23 May 1969 on the Law of Treaties" and has continuously upheld this standard.[15] In the case of *Hassan v. the United Kingdom* from 2014, ECtHR expressed that "[t]he starting point for the Court's examination must be its constant practice of interpreting the Convention in the light of the rules set out in the Vienna Convention" and referenced the Golder judgement of 1975.[16]

Article 33, paragraph 1 of the VCLT states, "[w]hen a treaty has been authenticated in two or more languages, the text is equally authoritative in each language". Because the ECHR is authenticated in both the French and English languages, both of these are equally authoritative. The ECHR will be cited in English in this dissertation.

Under Article 31, paragraph 3 (c) in the VCLT, it is clearly stated that "any relevant rules of international law applicable in the relations between the parties" must "be taken into account". This demonstrates that the ECHR does not have to be interpreted by itself, but can be supplemented with other international treaties, case law and legal sources the Court finds

[15] *Golder v. the United Kingdom*, para. 29
[16] *Hassan v. the United Kingdom*, para. 100

relevant to the case. In the case of *Taşkın and Others v. Turkey*, the Court relied partly on principles obtained from the United Nations Economic Commission for Europe (UNECE)'s Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, even though Turkey had not signed the Aarhus Convention.[17] This rule contributes to a more monogamous jurisprudence throughout Europe and seeks to unite the member states in their shared objective of securing human rights. It can also contribute to supplementing the Convention with other climate-related and environmental conventions that provide principles related to the positive obligation concerning the environment.

2.2 The relationship between ECHR and national law

The relationship between the European Convention on Human Rights and national law is a complex and evolving one. On the one hand, the ECHR is an international convention that lays down fundamental human rights that all member states are bound to maintain. This entails that national laws and practices must align with the requirements of the ECHR, and national courts must interpret and apply domestic law in a manner consistent with ECHR principles.[18]

At the same time, the ECHR recognises the principle of subsidiarity, which means that the primary responsibility for protecting and promoting human rights rests with national authorities.[19] National courts are therefore the first line of defence against human rights violations, and they are expected to give due weight to ECHR jurisprudence when interpreting and applying domestic law. In some cases, national courts may be required to depart from established domestic law in order to comply with ECHR standards. For example, the Norwegian Human Rights Act of 1999 states that ECHR must prevail in cases of contradiction between The European Convention on Human Rights and national law.[20]

Overall, the relationship between ECHR law and national law is one of dynamic interaction, characterised by a constant tension between the need to protect human rights at the international level and the need to respect national legal traditions and maintain the autonomy

[17] *Taşkın and Others v. Turkey*, para. 99
[18] European Convention on Human Rights, Article 1
[19] European Convention on Human Rights, introductory text, p. 6
[20] Human Rights Act § 3 cf. § 2

of domestic legal systems. This thesis will briefly present some essential methodical principles in interpreting ECHR, such as the margin of appreciation, the subsidiarity principle and the dynamic development of jurisprudence.

2.2.1 The margin of appreciation

The margin of appreciation is a legal doctrine developed by the European Court of Human Rights which acknowledges that, in certain circumstances, national authorities are better placed than an international court to decide on the appropriate balance between competing interests.[21] In the case of *Gillow v. the United Kingdom*, the Court stated that the national authorities were "better placed" than the ECtHR in assessing the effects in the area.[22] The case tackled an issue regarding the Guernsey Housing Laws and their operation in the local area, allegedly depriving the complainant of their residence rights. This case shows that the margin of appreciation is more comprehensive than in other regions where proximity to the actual issue is of great benefit.

In HR-2013-2200-P, a case presented to the Norwegian Supreme Court, the Court allowed themselves a wide margin of appreciation when the applicant alleged the breach of Article 1 of Protocol No. 1 of the ECHR. They justified this by saying that the "national authorities have greater insight into the special conditions that might obtain in the individual country".[23] This shows that the margin of appreciation is considered in the courts of member states when issues related to the ECHR arise.

Otto-Preminger-Institut v. Austria is a case in which the ECtHR considered the margin of appreciation in relation to the right to freedom of expression. The margin of appreciation is narrower regarding the right to life, integrity and personal freedom. The applicant was an Austrian media outlet and licensed cinema. The applicant had announced a viewing of a Werner Schroeter film depicting the scandalous play by Oskar Panizza of 1894 and the criminal proceedings the following year.[24]

[21] Aall, Jørgen. *Rettsstat og menneskerettigheter*, p. 154
[22] *Gillow v. the United Kingdom*, para. 56
[23] HR-2013-2200-P, para. 257
[24] *Otto-Preminger-Institut v. Austria*, paras. 19 – 20

The announcement read

> "Oskar Panizza's satirical tragedy set in Heaven was filmed by Schroeter from a performance of the Teatro Belli in Rome and placed in a frame story which reconstructs the trial of the writer for blasphemy in 1895 and his conviction. Panizza starts from the assumption that syphilis was God's punishment for the lasciviousness and sinfulness of mankind at the time of the Renaissance, especially at the court of the Borgia Pope Alexander VI. In Schroeter's film, God's representatives on Earth carrying the insignia of worldly power resemble to a hair the heavenly protagonists.
>
> In a caricatural mode trivial imagery and absurdities of the Christian creed are targeted and the relationship between religious beliefs and worldly mechanisms of oppression is investigated".[25]

Before the public saw the film, the public prosecutor at the request of the Innsbruck diocese of the Roman Catholic Church, put criminal proceedings against the applicant association's manager into action. This was on suspicion of attempted blasphemy under Section 188 of the Austrian Penal Code. Only two days later, the Regional Court of Innsbruck allowed the prosecution to seize the film, for it not be shown in public. At this time, it had only been shown once in a private showing.[26]

The ECtHR noted that the Austrian government had a margin of appreciation in deciding whether to restrict the film's screening, given the importance of the issues at stake and the potentially sensitive nature of the film. However, the ECtHR ultimately held that the Austrian authorities had exceeded their margin of appreciation by imposing a blanket ban on the movie without considering its artistic merits or potential value to the public debate and that the restrictions were disproportionate.[27]

In conclusion, the margin of appreciation is a crucial concept in interpreting and applying the ECHR. It allows national authorities to have some discretion in implementing human rights obligations in light of their particular circumstances while still providing a level of protection for fundamental rights. As shown, the margin of appreciation is not unlimited, and the extent of the margin varies depending on what rights are being infringed upon and what rights they

[25] *Otto-Preminger-Institut v. Austria*, para. 23
[26] Ibid, paras. 25 – 26
[27] Ibid, para. 79

are being challenged by. The European Court of Human Rights retains a supervisory role to ensure that national authorities stay within the boundaries of their discretion.

The cases of *Gillow v. the United Kingdom* and *Otto-Preminger-Institut v. Austria* demonstrate the importance of balancing the competing interests at stake and considering the circumstances of each case when applying the margin of appreciation. The extent of the margin of appreciation regarding environmental issues will be discussed further in chapter 3.

2.2.2 The principle of subsidiarity

The principle of subsidiarity is closely related to the margin of appreciation. The ECHR states that "the High Contracting Parties, under the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention", and in doing so, they enjoy a margin of appreciation.[28] The principle of subsidiarity entails that the member states hold the primary responsibility for upholding the convention within their jurisdiction and that the European Court of Human Rights is more of a supervisory body that ensures that the member states do this in a satisfactory manner.

In the case of *Scordino v. Italy*, the Court expressed that "the primary responsibility for implementing and enforcing the rights and freedoms guaranteed by the Convention is laid on the national authorities. The machinery of complaint to the Court is therefore subsidiary to national systems safeguarding human rights. This subsidiary character is articulated in Articles 13 and 35 § 1 of the Convention".[29] Article 13 of the Convention states that everyone has the right to "an effective remedy before a national authority". Article 35 states that the Court may only deal with cases where "all domestic remedies have been exhausted". These support the principle of subsidiarity by indicating that member states cannot rely on ECtHR to set precedents when facing challenging matters such as climate-related cases but have to decide on the matter unaided.[30]

[28] European Convention on Human Rights, introductory text, p. 6 of the Convention
[29] *Scordino v. Italy*, para. 140
[30] Norges institusjon for menneskerettigheter, *Klima og menneskerettigheter*, p. 78

2.2.3 A dynamic approach

A dynamic approach to the ECHR entails that the Court is open to interpreting the Convention in light of societal development, present-day situations, and ever-changing circumstances. In the case of *Demir and Baykara v. Turkey*, ECtHR affirmed that "[t]he Court further observes that it has always referred to the "living" nature of the Convention, which must be interpreted in the light of present-day conditions, and that it has taken account of evolving norms of national and international law in its interpretation".[31] This upheld the principle of a dynamic approach that the Court has laid down in previous cases.

In *Tyrer v. the United Kingdom,* the Court asserted that "the Convention is a living instrument which […] must be interpreted in the light of present-day conditions" and that "the Court cannot but be influenced by the developments and commonly accepted standards".[32] This maintains that while there may be existing precedent applicable to the relevant case, completely overlooking present-day conditions is not justifiable in the eyes of the Court. In the case of *Vilho Eskelinen and Others v. Finland*, ECtHR upholds that "[w]hile it is in the interests of legal certainty, foreseeability and equality before the law that the Court should not depart, without good reason, from precedents laid down in previous cases, a failure by the Court to maintain a dynamic and evolutive approach would risk rendering it a bar to reform or improvement".[33] In the case of *Christine Goodwin v. the United Kingdom*, the Court expressed that it is "of crucial importance that the Convention is interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory".[34]

A dynamic approach may lead to a less predictable jurisprudence, but ensuring that human rights evolve in line with societal standards is also essential. The principle of a dynamic approach is held in high regard in the European Court of Human Rights and is upheld and maintained countless times. This contributes to sustaining predictability in some form. It also means that while the ECtHR has only decided on cases regarding climate change topics like natural disasters and more local pollution, more significant issues like greenhouse gas emissions might also be found to violate human rights.[35] This will become clearer when the Court determines the outcome of cases like *Duarte Agostinho and Others v. Portugal and*

[31] *Demir and Baykara v. Turkey*, para. 68
[32] *Tyrer v. the United Kingdom*, para. 31
[33] *Vilho Eskelinen and Others v. Finland*, para. 56
[34] *Christine Goodwin v. the United Kingdom*, para. 74
[35] Norges institusjon for menneskerettigheter, *Klima og menneskerettigheter*, p. 78

Others, *Carême v. France*, and *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, as previously mentioned.

3 A positive obligation in the face of emergencies

3.1 Article 1: a positive obligation

Article 1 of the Convention states that "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention". This means that member states have a duty not only to refrain from violating human rights, but also to take positive steps to ensure that human rights are protected and respected. The positive obligation is also reflected in other articles of the Convention, such as Article 2 (the right to life), Article 3 (the prohibition of torture), Article 5 (the right to liberty and security) and Article 8 (the right to respect for private and family life). This part of the thesis will explore what a positive obligation entails in the eyes of the Court and what minimum requirements the Court expects from contracting parties regarding fulfilling their positive obligation.

The positive obligation is a central principle of the ECHR, which requires states to take proactive measures to protect human rights and simultaneously refrain from violating them. The ECHR recognises that more than the mere absence of state interference is needed to ensure respect for human rights.[36] Therefore, states have an obligation to adopt positive measures to protect the rights enshrined in the Convention.

Chapter 3 of this thesis will look at a selection of cases that address the question of a positive obligation under Articles 2 and 8 of the Convention.

One of the most prominent examples of the "positive obligation" principle in action on a national level is *Urgenda v. Netherlands*. This case, which the Dutch Supreme Court heard in 2015, concerned the Dutch government's failure to reduce greenhouse gas emissions to a level limiting global warming to no more than 2°C above pre-industrial levels. The Urgenda Foundation argued that this inaction was a violation of Article 2 (the right to life) and Article 8 (the right to respect for private and family life) of the ECHR. The Supreme Court agreed,

[36] Aall, Jørgen. *Rettsstat og menneskerettigheter*, p. 59

holding that the Dutch government had a positive obligation under ECHR to actively protect the lives and well-being of its citizens by taking action to reduce greenhouse gas emissions. The court ordered the government to reduce emissions by at least 25% by the end of 2020, compared to 1990. While the case is not one of ECtHR, it is an example of how the principle of a positive obligation is applied in national courts.

An important ECHR case that illustrates the positive obligation principle is *Tagayeva and Others v. Russia*. The applicants alleged that Russia had violated their rights under Article 2 (right to life) and Article 3 (prohibition of torture or inhuman or degrading treatment) of the European Convention on Human Rights due to its failure to take appropriate preventive measures and its conduct during a rescue operation.

In 2004 there were several terrorist attacks in Russia, all claimed by or blamed on the leader of the Chechen separatist movement. Events included a suicide bomber on an underground train killing over 40 people in February, a bomb going off in a stadium in May, killing several senior officials and the President of Chechnya, a significant attack on Nazran, Ingushetia's most prominent town in June, where over 90 people died, and two hijacked aeroplanes blowing up mid-air, killing 90 people, mostly civilians, in late August. There were also other occurrences of similar character, and people suffered and died in large numbers.[37]

On the 27th of August 2004, the North Ossetian Ministry of the Interior issued Decree No. 500 ahead of the Day of Knowledge. The Day of Knowledge is on 1 September in Russia and signals the beginning of the traditional school year. Decree No. 500 addressed the need for protection and security on the Day of Knowledge in all educational facilities of North Ossetia. It was sent directly to all police stations in the area. The plan contained several measures to take ahead of the day, such as an increase of police officers near large gatherings, as well as increasing mobile posts and more. The measures aimed to prevent terrorist attacks in general, but also hostage situations along the border to Ingushetia. Furthermore, each head of the district departments of the Interior was to inform the possibly affected educational facilities, make the police aware of their responsibilities, make sure plans were set in place, conduct hourly check-ins and give feedback to the North Ossetian Ministry of the Interior immediately. In the surrounding days, the North Ossetian Ministry of the Interior issued three more documents regarding security on the Day of Knowledge. It made light of a heightened

[37] *Tagayeva and Others v. Russia*, paras. 9 – 15

risk of terrorist attacks. The North Ossetian Ministry of the Interior personnel were put on high alert.[38]

Investigation showed that a large group of separatists had gathered for training in the Malgobek District of Ingushetia. Early on 1 September, they crossed the border to North Ossetia, disarming and capturing the one person on the border before driving to the city of Beslan.[39]

A ceremony marking the Day of Knowledge commenced at 9 a.m. on 1 September in the school courtyard in Beslan. The police station was just next door to the school. Still, due to police officers being set to transport the North Ossetian president at the time, only one unarmed police officer was at the ceremony. After only minutes of the ceremony, around 30 armed terrorists surrounded the courtyard. The terrorists rounded up as many people as possible and forced them into the school. In the process, there was opened fire amongst both terrorists, police, and civilians, and at least two civilians were killed, and both terrorists and civilians were harmed in the process. The group of terrorists managed to round up more than 1100 people inside the school, with more than 800 of them being children. The rest were teachers, parents, and other on-lookers. Around 100 people managed to escape from the courtyard. The captured hostages were taken to a gymnasium measuring about 250m^2 and stripped of phones, cameras, and other personal belongings.[40]

In the first two hours, the terrorists forced some hostages to help them improvise a system of explosive devices around the room, on walls, the ceiling, the floor, and attached to basketball hoops. These were connected to a dead man's switch that two terrorists took turns controlling. There were also two suicide bombers wearing explosive belts in the gymnasium.[41]

The terrorists turned several rooms in the building into firing points and kept shooting out towards the security personnel and the civilian crowd outside during the day. The Ministry of the Interior in Vladikavkaz was notified about the situation at 9.25 a.m. and immediately informed the Federal Security Service.[42]

[38] *Tagayeva and Others v. Russia*, paras. 17 – 18
[39] Ibid, paras. 19 – 20
[40] Ibid, paras. 21 – 26
[41] Ibid, para. 27
[42] Ibid, paras. 28 – 29

From the beginning, most men were separated from women and children and forced to help terrorists with various tasks. On the first day, 16 men were executed for disobedience or not being needed anymore. An explosion that killed many of them also claimed the lives of several terrorists.[43]

Around 11 a.m. on the first day, an attempt to establish contact between the government and the hostage takers was unsuccessful until around 4 p.m. the same day. The Russian negotiator tried to better the hostages' conditions and to free as many as possible but failed in both regards. The attackers refused to let a doctor inside the building unless the four people they had requested also came at the same time, and also refused to accept medicine, food, or water. On the second day of the siege, the former president of Ingushetia arrived in Beslan. After having talked to the terrorists over the phone, he was allowed into the building and to meet the leader of the group. After the meeting, he was allowed to take 26 women and children to leave the premises with him. He also brought a message for Russian President Vladimir Putin, demanding "troops be pulled out of Chechnya and official recognition of Chechnya as an independent State". In return, terrorist attacks on Russian soil would cease for "ten or fifteen years". He had also been given a videotape showing the conditions inside the school. A prerequisite for negotiations to proceed was that Aslan Maskhadov, President of the self-proclaimed independent Chechen State and in hiding at the time, was to be involved.[44]

In the afternoon on the first day, military forces arrived in Beslan. Several military vehicles and tanks were positioned around the school on the second day. On the third day, Federal Security Service special units prepared to storm the building by training with the Ministry of the Interior and the Ministry of Defence.[45]

At around 1 p.m. on the third day, an explosive device in the gymnasium went off. The explosion created a hole in the roof, and fire spread throughout the room. Seconds later, another device exploded, and this caused the death and injury of numerous people. The reason for detonation is not clear. People still able to move headed for the hole in the wall, trying to escape the school. The terrorists reacted by shooting at them, triggering a gunfire exchange

[43] *Tagayeva and Others v. Russia*, paras. 35 – 39
[44] Ibid, paras. 41 – 49
[45] Ibid, paras. 54 – 55

between terrorists and armed forces outside. This was when an order to storm the building was issued.[46]

The hostages still able to move after the explosions in the gymnasium were led by terrorists to the kitchen, canteen and meeting room. They were used as human shields, standing in the windows and waving their clothes, creating a barrier between the terrorists and Russian military forces. Around 2 p.m., tanks and military vehicles rolled into the courtyard and opened fire against the building. In addition, large calibre machine guns were used, and troops were positioned around the school firing with grenades and flame-throwers. According to some sources, one helicopter launched a rocket at the school. By around 3 p.m., the gymnasium and close-by buildings were engulfed in flames, and water cannons were ordered to intervene. Special forces entered the building but found no survivors in the gymnasium. Servicemen were able to evacuate the surviving hostages from the canteen. Around 5 p.m., a security perimeter was established around the school, and anyone but Federal Security Service special forces was ordered to leave. In the following hours, shots were fired, tanks decimated parts of the building, flame-throwers were utilised, and explosions transpired. In the early hours on 4 September, one terrorist had been captured alive while the rest died during the storming.[47]

The European Court of Human Rights states in its assessment that the positive obligation in Article 2 requires that for the Court to find "a violation of the positive obligation to protect life, it must be established that the authorities knew, or ought to have known at the time, of the existence of a real and immediate risk to the life of identified individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk". In the previous ten years, at least three massive terrorist attacks similar to this one occurred at a hospital, a maternity ward, and a theatre. In all cases, there were monumental losses of lives. The Court indicated that the information the authorities had about previous attacks, the heightened terrorist threat, and the geographical location of the threat must be seen as "confirming the existence of a real and immediate risk to life". Although the authorities did not have all the information, it "should have been available" through extensive intelligence

[46] *Tagayeva and Others v. Russia*, paras. 74 – 77
[47] Ibid, paras. 84 – 97

operations. The Court found it reasonable to expect "preventative and protective measures" to be in place regarding all educational facilities in the area.[48]

The Court could not find any evidence suggesting the threat in Ingushetia had been taken seriously, even though this was where the terrorist group trained for several days beforehand. In North Ossetia, there had been taken "certain preventive security measures", but the lack of police resources led to gaps in security. The group of terrorists made it from the administrative border in Khurikau to the top school in the largest town in the district without encountering more than one armed police officer, whom they overpowered without being noticed. At the school, only one police officer was present; she was unarmed and unable to communicate with other police forces. Compared to the usual standard, the school had a lower level of security, not heightened as envisioned. The local police force "did not take sufficient preventive or preparatory measures to reduce the inherent risks" by failing to act in a way that was in accordance with "their zone of responsibility". The Court found no evidence that a warning was given to the school administration, even though this was required by Decree No. 500 ahead of the attack.[49]

In conclusion, the ECtHR holds that the intelligence and information the authorities possessed shared numerous similarities with previous terrorist attacks leading to heavy casualties, and "clearly indicated a real and immediate risk" of an attack resulting in severe destruction. As the authorities had comprehensive knowledge of the situation, the Court expected them to "undertake any measures within their powers that could reasonably be expected to avoid, or at least mitigate this risk". The measures taken qualified as "inadequate".[50]

The Court notes that in circumstances like these, law-enforcement services must be "afforded a degree of discretion" because they usually are the best-equipped institution to make decisions based on intelligence that is not open to the public. A tactical choice made by local law enforcement will seldom be subject to criticism, but "such measures should be able, when judged reasonably, to prevent or minimise the known risk". The Court holds that the positive obligation regarding Article 2 of the Convention has been violated for these reasons.[51]

[48] *Tagayeva and Others v. Russia*, paras. 482 – 486
[49] Ibid, paras. 488 – 489
[50] Ibid, para. 491
[51] Ibid, paras. 492 – 493

Tagayeva and Others v. Russia is not a natural disaster or climate-related case. However, it still presents some guidelines as to what is expected from a member state regarding the positive obligation under Article 1 of the Convention. The parameters set in the *Tagayeva and Others v. Russia* case contribute to the jurisprudence relevant to this thesis, as the following will show.

In summary, the "positive obligation" principle in the ECHR requires states to take proactive measures to protect human rights and refrain from violating them. This principle is reflected in cases such as *Urgenda v. Netherlands*, where the Dutch government was required to take action to reduce greenhouse gas emissions, and *Tagayeva and Others v. Russia*, where the Russian government was held responsible for failing to protect the lives of hostages during a terrorist attack. These cases demonstrate the importance of the positive obligation to ensure the effective protection of human rights in member states, both in national Courts and in ECtHR.

3.2 Case law on natural disasters

There have been several ECtHR judgments regarding the positive obligation of states to protect individuals in the context of natural disasters, such as *Budayeva and Others v. Russia* and *Özel and Others v. Turkey*.

Budayeva and Others v. Russia is a landmark case the European Court of Human Rights determined in 2008. Tyrnauz is a Russian town in the mountain district near Mount Elbrus. Two tributaries of the Baksan River pass through the town, and they are known to cause mudslides frequently. This is known to the authorities and the public, as the town and surrounding area are hit by mudslides almost yearly. In the 1950s, several proposals were made regarding protection against mudslides, and the chosen method was completed and operational in 1965. The mudslides in this case were the most destructive in the town's history, but the years 1960, 1977 and 1999 also saw devastating mudslides.[52]

In addition to the mud retention collector, which had been operational since 1965, a dam was constructed upstream of the collector to enhance the city's protection. In August 1999, the dam took severe damage due to a mud and debris flow. Following this incident, the director of

[52] *Budayeva and Others v. Russia*, paras. 13 – 16

the Mountain Institute alerted the Minister responsible for Disaster Relief that an inspection was necessary. He also called for emergency clean-up work to secure the dam in case of impending mudslides. The Prime Minister of the Republic of Kabardino-Balkariya stated that the dam had taken severe damage and that the only way to avoid loss of life and further damage was to have observation posts on the lookout for mudslides and to have them warn the local population in the event of an emergency. In March 2000, the prime Minister was notified again about the record losses that may come from an impending mudslide. In a meeting on 7 July 2000, the Ministry for Disaster Relief was again reminded that the risk of disaster was imminent and that a watch post would be the best solution. Three days later, the assistant director of the Mountain Institute communicated to the agency director that the Ministry for Disaster Relief had been warned and that an observation post had been requested. The Court found no evidence that any requested measures had been implemented before the mudslides hit the town in July 2000. The Finance Department of the Elbrus District reported in February 2001 that there had not been any allocation of funds for restoration work on the dam.[53]

Around 11 p.m. on 18 July 2000, a minor mudslide hit the town. Officially no one died in this mudslide, although witnesses claim otherwise. The Government ordered an evacuation of everyone living in Tyrnauz following the first mudslide, and personnel and vehicles drove around town, urging and helping people evacuate their homes. The morning after, people returned home, unaware of the ongoing danger. No warning signs or barriers were set up to keep them from their homes, electricity and water were back up, and police were nowhere to be seen. Around 1 p.m. on the second day, a much larger mudslide hit the dam, demolished it, and swept across the town. Continuous mudslides hit Tyrnauz for six more days. The number of casualties the mudslides led to is disputed, but the official number is eight.[54]

The Court reiterated that “where the State is required to take positive measures, the choice of means is in principle a matter that falls within the Contracting State's margin of appreciation”.[55] This shows that a member state enjoys some discretion when exercising positive obligations. This margin of appreciation is not without limits and must, as always, benefit from careful consideration. The Court states that the numerous warnings and demands

[53] *Budayeva and Others v. Russia*, paras. 17 – 25
[54] Ibid, paras. 25 – 33
[55] Ibid, para. 134

for action "were not given proper consideration by the decision-making and budgetary bodies".[56] ECtHR also maintains that "the Government gave no reasons why no such steps were taken".[57] The Court finds no justification for why no defence infrastructure was set in place ahead of the disastrous event. The authorities "could reasonably be expected" to be aware of the present danger and that "informing the public about inherent risks was one of the essential practical measures needed to ensure effective protection of the citizens concerned".[58]

While a margin of appreciation is present in deciding what measures should be taken to secure the rights under the Convention, the Court holds that "in exercising their discretion as to the choice of measures required to comply with their positive obligations, the authorities ended up by taking no measures at all up to the day of the disaster" because of how the demands for action prior to the incident "were simply ignored".[59] It is clear to the Court that there has been a violation of Article 2 of the Convention due to the authorities' failure to fulfil their positive obligation to "establish a legislative and administrative framework" to secure the right to life effectively.[60]

Another case concerning natural disasters brought before ECtHR is *Özel and Others v. Turkey*. In August 1999, one of Turkey's deadliest earthquakes hit the Izmit region with a magnitude of 7,4 on the Richter scale. More than 17.000 people died, and almost 50.000 were injured. Inspection reports show that some collapsed buildings were made partly of concrete made from sea sand and mussel shells. This severely weakened the concrete's capacity and could have contributed to the devastation.[61]

The Court explained that while natural disasters like earthquakes are rarely something a state can control, the positive obligation must entail "adopting measures geared to reducing their effects to keep their catastrophic impact to a minimum".[62] Such preventive measures include "appropriate spatial planning and controlled urban development".[63] The spatial planning in the area was characterised by being in a "disaster zone" prone to earthquakes and thus had to comply with special conditions and specific standards when it came to erecting new buildings.

[56] *Budayeva and Others v. Russia*, para. 149
[57] Ibid, para. 149
[58] Ibid, paras. 151 – 152
[59] Ibid, paras. 154 – 156
[60] Ibid, paras. 159 – 160
[61] *Özel and Others v. Turkey*, paras. 16 – 20
[62] Ibid, para. 173
[63] Ibid, para. 174

The local authorities were responsible for ensuring building permits were granted only in cases where the building standards complied with relevant zoning plans and must also bear the consequences for not doing so.[64] The Court finds it clear that "the local authorities which should have supervised and inspected those buildings had failed in their obligations to do so".[65] The Court noted that the government had not taken reasonable steps to prevent the foreseeable risk of loss of life posed by the earthquake, hereunder failing to enforce building codes and zoning regulations. Having said this, the Court found that "that part of the complaint was submitted out of time and must be rejected pursuant to Article 35 §§ 1 and 4 of the Convention".[66] This does not, however, take away from what the Court previously stated concerning positive preventative obligations in light of natural disasters, and they remain essential guidelines for similar cases that will undoubtedly appear.

The cases of *Budayeva and Others v. Russia* and *Özel and Others v. Turkey* are significant because they established that states have a positive obligation to take reasonable steps to protect their citizens from natural disasters. Failure to do so can constitute a violation of their human rights under the ECHR.

3.3 Other relevant case law

Fadeyeva v. Russia is a case from 2005 where the applicant lived in Cherepovets, Russian capital for steel production. Her apartment was approximately 450 meters from the city's steel plant, and thousands of others also lived within the "sanitary security zone". In September 1974, the Council of Ministers of the Russian Soviet Federative Socialist Republic determined that the Ministry of Black Metallurgy, which owned and ran the steel plant, had to relocate inhabitants of some regions of the sanitary security zone. This order was not carried out.[67]

In 1990, the government entered into a programme meant to improve the environmental situation in the city. This was due to "the concentration of toxic substances in the town's air exceed[ed] the acceptable norms many times", and the steel plant was imposed upon several specific measures to better the circumstances, including funding residences that would be

[64] *Özel and Others v. Turkey*, para. 174
[65] Ibid, para. 175
[66] Ibid, para. 178
[67] *Fadeyeva v. Russia*, paras. 10 – 11

used for relocating people within the sanitary security zone.[68] In 1996, the government adopted another programme to improve the city's environmental situation and public health. The decree made light of much worse health issues in the town and presented measures for the steel plant and the city. This included the relocation of thousands of people. The applicant claimed that living in her apartment was hazardous and potentially dangerous. She demanded to be resettled outside the unsafe area but was not granted allocation.[69]

The Court holds that while Russia enjoys a margin of appreciation when weighing the interests of the community against the interests of the individual, the government had not struck a fair balance, thus violating Article 8 under the Convention. The government "did not offer the applicant any effective solution to help her move away from the dangerous area" and, at the same time "operated in breach of domestic environmental standards".[70] The community's interests could not be proved protected in a manner that justified the breach in the applicant's right to private life and home.

Overall, cases like *Fadeyeva v. Russia* demonstrate the growing recognition by the ECtHR of the positive obligation of states to protect the environment as a way of safeguarding human rights under the Convention.

3.4 Summarizing the case law

The specific measures that the state must take in response to a real and immediate danger naturally vary depending on the circumstances of each case. The ECtHR typically does not specify exact measures that must be taken but rather consider the reasoning, balancing of interests, and how comprehensive measures have been taken. However, the Court has provided some guidance in its judgments.

Tagayeva and Others v. Russia maintain that authorities must "undertake any measures within their powers that could reasonably be expected to avoid, or at least mitigate this risk".[71] This shows that a certain threshold must be exceeded for the positive obligation to be seen as fulfilled. In this case, the measures taken were deemed inadequate.

[68] *Fadeyeva v. Russia*, para. 12
[69] Ibid, paras. 15 – 20
[70] Ibid, paras. 133 – 134
[71] *Tagayeva and Others v. Russia*, para. 491

In the case of *Budayeva and Others v. Russia*, the Court found that the state had failed to take adequate measures to protect the applicants' lives during a natural disaster, simply ignoring numerous warnings ahead of the mudslides. The Court emphasised that "adopting measures geared to reducing their effects in order to keep their catastrophic impact to a minimum" and that developing a well-functioning system for planning, approving, licensing, and building in areas prone to natural disasters is necessary.[72]

Overall, the ECtHR's jurisprudence suggests that in cases of real and immediate danger, the state must take specific and effective measures to prevent or mitigate harm and take those measures in a timely, reasonable, and proportionate manner.

[72] *Budayeva and Others v. Russia*, para. 173

4 A Norwegian approach

Norway has implemented numerous acts and regulations related to natural disasters and climate-related issues, such as The Climate Target Act, the Biodiversity Act, the Pollution Act, and the Planning and Building Act. The Planning and Building Act is by many regarded as the most important environmental Act in Norway as it aims to promote sustainable development and must consider environmental consequences in doing so.[73] Because of the comprehensive legislation relevant to environmental matters in Norway, this thesis will examine how the EU's Environmental Impact Assessment legislation corresponds with ECHR stipulations. This coincides with the guidelines held by the ECtHR in *Özel and Others v. Turkey*, as presented earlier. A satisfactory spatial and zoning developmental legislation makes up a pivotal element in fulfilling a member state's positive obligation under ECHR when it comes to natural disasters.

4.1 The Environmental Impact Assessment

The Environmental Impact Assessment ("EIA") is a process established by the European Union ("EU") in Directive 85/337/EEC and has been amended several times. The most recent amendment is Directive 2014/52/EU of 16 April 2014. As the amendment only specifies the changes to Directive 2011/92/EU of 13 December 2011, it is essential to read the two simultaneously to get the full extent.[74]

The EIA legislation aims to ensure that any proposed projects that are "likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location are made subject to a requirement for development consent and an assessment with regard to their effects on the environment" per Article 2 paragraph 1 of the Directive. A "project" is defined in Article 1 para. 2 (a) as "the execution of construction works or of other installations or schemes" or "other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources". Article 1 also lists definitions of other terms used in the Directive.[75]

[73] Planning and Building Act § 1
[74] Stuart Bell et al., *Environmental Law*, p. 453
[75] See Directive 2011/92/EU Article 1 para. 2

Article 3 para. 1 states that the EIA shall “identify, describe and assess in an appropriate manner” the “direct and indirect effects of a project” considering “population and human health”, “biodiversity, with particular attention to species and habitats protected under Directive 92/43/EEC and Directive 2009/147/EC”, “land, soil, water, air and climate”, “material assets, cultural heritage and the landscape”, and “the interaction between the factors”. There are many factors to consider when assessing a potential project using an EIA.

Each member state is responsible for implementing the EIA Directive in their national legislation per Article 2, and Article 4 lays down specific guidelines for how this is to be implemented. Article 4 presents Annexes I and II, both containing different types of projects that must or could be subject to EIA regulations.

Annex I projects are considered to have the potential to cause significant environmental impacts and therefore always require an EIA. Examples of Annex I projects include nuclear power stations (para. 2 (b)), installations for disposal of radioactive waste (para. 3 (b)(iv)), construction of motorways and express roads (para. 7 (b)) and of lines for long-distance railway traffic (para. 7 (a)), industrial plants for producing pulp from timber or similar fibrous materials (para. 18 (a)) and installations for storage of petroleum, petrochemical, or chemical products with a capacity of 200 000 tonnes or more (para. 21).

Annex II projects are considered to have less potential to cause significant environmental impacts. Examples of Annex II projects include intensive fish farming (para. 1 (f)), underground mining (para. 2 (b), wind farms (para. 3 (i)), dairy farms (para. 7 (c)), ski runs, ski lifts and cable cars and associated developments (para. 12 (a)), permanent campsites (para. 12 (d)), and theme parks (para. 12 (e)). Still, the final decision on whether an EIA is required for Annex II projects is left up to each member state. Determining the need for an EIA in Annex II cases must be through either “case-by-case examination” or “thresholds or criteria set by the Member State” per Article 4 paragraph 2 (a) and (b).

It's important to note that the above examples are not exhaustive, and neither are the Annexes. Each member state may have its specific list of projects that require an EIA in addition to those listed in the Annexes. It's therefore essential to check the domestic legislation of the relevant member state to determine whether an EIA is required for a particular project. This thesis will examine how Norway has implemented the EIA regulations in Chapter 4.2 and onwards.

Some assessment must be done to determine whether a proposed project falls into a category mentioned in either Annex I or Annex II. This assessment is smaller than an EIA and has no formal requirements other than determining whether an EIA is necessary. Annex III lists several criteria to be used in this assessment. Examples of criteria to be taken into consideration are the size of the project (para. 1 (a)), risk of accidents (para. 1 (f)), quality and regenerative capacity of natural resources in the area (para. 2 (b)), and the duration, frequency and reversibility of the impact (para. 3 (e)). These criteria help determine whether a project is likely to have significant environmental impacts and, therefore, whether an EIA is required, per Article 4 para. 3.

The EIA process is based on a set of guidelines established by the EU that outlines the steps that must be taken to conduct an EIA. The process is typically initiated by the developer or project sponsor, who is responsible for preparing an Environmental Impact Assessment. The EIA must contain a detailed description of the proposed project and an analysis of the potential environmental impacts of the project. Annex IV of the EIA Directive provides a closer description of what an EIA requires. Once the EIA has been submitted, a public consultation process is initiated, during which the public is invited to provide feedback and comments on the proposed project. This feedback is considered by the competent authorities when deciding whether to approve the project or not. Public participation was implemented through Directive 2003/35/EC, as the EU considered it important for the EIA Directive to be aligned with the Aarhus Convention.[76]

One of the key objectives of the EIA process is to identify and assess the potential environmental impacts of a proposed project and to offer measures to mitigate or avoid those impacts. This may involve the development of alternative proposals, implementing environmental management plans, or using the best available techniques to reduce the project's potential effects per Article 9. The EIA process is also designed to ensure that the public can participate in the decision-making process.[77] This includes the right to provide feedback and comments on the proposed project and request a public hearing or inquiry into the project.

[76] Directive 2003/35/EC, para. (5)
[77] Directive 2011/92/EU, Article 6

The EIA process has been an essential tool for promoting sustainable development and protecting the environment in the EU.[78] The EIA process has helped prevent or mitigate many potential environmental impacts by ensuring that proposed projects are assessed transparently and comprehensively.

In addition to the EIA process, the EU has established several additional strategies to foster sustainable development and safeguard the natural environment. These include the Water Framework Directive, the Waste Framework Directive, and the Air Quality Directive, among others.[79] Overall, the EU has established comprehensive measures to promote sustainable development and protect the environment. The EIA process is an essential component of this framework, as it ensures that proposed projects are assessed transparently and comprehensively, considering their potential environmental impacts.

4.2 Implementing EIA regulations into Norwegian legislation

4.2.1 Grounds for implementing EU law in Norway

In 1992 the European Union and its member states entered into the Agreement on the European Economic Area (EEA) with European Free Trade Association (EFTA) members Iceland, the Principality of Liechtenstein, and the Kingdom of Norway. The EEA Agreement seeks to "promote a harmonious development of the European Economic Area" and includes obligations and benefits for the contracting parties.[80] Article 1 of the EEA Agreement states that to create "a homogeneous European Economic Area", it is essential to allow for the free movement of "goods", "persons", "services", and "capital", as well as ensure a system that respects healthy competition and closer cooperation in fields like "research and development, the environment, education and social policy".

[78] Stephen Tromans QC, *Environmental Impact Assessment*, p. 7
[79] Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy, and
Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives, and
Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe
[80] Agreement on the European Economic Area, p. 5

As a contracting party to the EEA Agreement, Norway is therefore required to adopt EU regulations relating to the internal market, with exceptions like common trade policy and common foreign and security policy.[81] This means that Norway is obligated to implement and enforce EU legislation in areas such as competition law, consumer protection, and environmental protection, per Article 1 para. 2 of the EEA Agreement. This entails that EIA legislation must be implemented into Norwegian legislation, as Norway qualifies as a "Member State" per the EIA Directive through the EEA Agreement.

4.2.2 The actual implementation

Norway has implemented EIA regulations through its Planning and Building Act ("PBA") in Chapter 14 about consequence assessments for projects and plans pursuant to other legislation. EU Directive 2011/92/EU and amending Directive 2014/52/EU is attached at the beginning of the chapter and makes it clear that these create the foundation for the chapter's impact assessments. PBA § 4-2 additionally establishes that an impact assessment is required for zoning plans that could have significant effects on the environment. This further upholds the principle outlined in Article 1 of the EIA Directive. PBA § 4-2 (3) establishes that additional regulations on planning programmes, plan descriptions and impact assessments can be imposed through regulation, which has been implemented through The Impact Assessment Regulation ("IAR").[82]

The IAR provides supplementary rules to chapter 14 of PBA and contains a list of requirements for impact assessments regarding projects under PBA, sectoral Acts such as the Petroleum Act, and other legislation such as EU directives. The IAR gives a more comprehensive overview of the projects subject to an impact assessment and what authorities are the relevant authorities in each case. Relevant authorities are often the Planning authority, but sectoral Acts commonly require more specialised authoritative bodies, such as the Ministry of Petroleum and Energy, the Directorate of Water Resources and Energy, or the local municipality. The relevant authority is listed next to all projects registered in Annexes I and II of IAR.

[81] Norway and the EU, *The EEA Agreement*
[82] Carl Wilhelm Tyrén, Plan- og bygningsloven. *Lovkommentar, § 4-2. Planbeskrivelse og konsekvensutredning*

Annex I of IAR contains a list of projects requiring Environmental Impact Assessments and a planning programme because of its considerable size and assumed impact on the environment. This Annex corresponds to Annex I of the EIA Directive, thus fulfilling the implementation obligation under EEA. Annex II of IAR contains a similar list of projects to Annex II of the EIA Directive. It defines projects that require an environmental impact assessment but not a planning programme if they, after a separate evaluation, are determined to have a significant impact on the environment.[83] The substantial evaluation must consist of an analysis of the criteria set forward in IAR § 10 are similar to the ones set out in Annex III of the EIA Directive but differ in the way that it takes into account conflicting interests, such as endangered species living in the area, areas prone to outdoor activities, and areas critical to the indigenous people and their reindeer herding.[84]

While this thesis will not examine how the implementation of EIA legislation is controlled by the Court of Justice of the European Union ("CJEU"), it must be clear that weighing the criteria in IAR § 10 para. 2 against possible conflicting interests in para. 3 could fall within the margin of appreciation under ECHR. In the case of *Fadeyeva v. Russia*, as previously presented, the European Court of Human Rights constitute that to "strike a fair balance between the interests of the community and the applicant's effective enjoyment of [their] right" is within the state's margin of appreciation.[85] Therefore, this part of the implementation of EIA legislation does not constitute an immediate breach of human rights under the Convention. However, one can question whether the CJEU would see it similarly. It is up to the ECtHR to decide whether the state has balanced the opposing interests and rights fairly.

It must be noted that the margin of appreciation does not apply to national Courts, as is conveyed in *A. and Others v. the United Kingdom,* amongst others, as "the margin of appreciation has always been meant as a tool to define relations between the domestic authorities and the Court. It cannot have the same application to the relations between the organs of State at the domestic level". It must therefore be up to the European Court of Human Rights to determine whether the conflicting interests listed in IAR § 10 para. 3 falls within the Norwegian authority's margin of appreciation.

[83] Impact Assessment Regulation § 10
[84] Impact Assessment Regulation § 10 (2) b
[85] *Fadeyeva v. Russia*, para. 134

A weakness to the EIA process might be that it is the proposer of a project that is responsible for carrying out an Environmental Impact Assessment.[86] This has, however, been taken into account by stating in Chapter 5 of the IAR what an EIA must contain and how it should be carried out. This corresponds with Annex IV cf. Article 5(1) of the EIA Directive. Furthermore, the proposition is to be decided on by the responsible authority best suited to make the decision.[87] The EIA must also be available to the public on the overseeing authority's website and made directly available to affected stakeholders and interest organisations. This ensures that relevant feedback is available when the responsible authority decides on the proposition and is in line with Article 6 of the EIA Directive about public participation.

Ultimately, the implementation of the EIA Directive seems thorough. In addition to implementing the entire directive directly into the Norwegian Planning and Building Act, there is an additional regulation written in Norwegian where the contents of the EIA Directives are maintained. According to the European Court of Human Rights in *Özel and Others v. Turkey*, having an "appropriate spatial planning" and a well-regulated development plan is insufficient if the authorities responsible for upholding and inspecting fail "in their obligations to do so".[88] In *Fadeyeva v. Russia*, the Court held that it is not enough to have designed a satisfactory regulatory framework when there is a "breach of domestic environmental standards".[89] This thesis will examine how Norwegian case law has addressed questions related to upholding EIA legislation.

4.2.3 Relevant case law

In HR-2009-1093-A, the Norwegian Supreme Court heard a case concerning the validity of a decision to amend the zoning plan for constructing an embassy. In this case, the need for an environmental impact assessment was undisputed. The Supreme Court held that it would have been unjustifiable to amend the zoning plan without substantial decision-making groundwork. However, significant research was already justifying the decision through previous

[86] Impact Assessment Regulation § 4
[87] Impact Assessment Regulation § 25
[88] *Özel and Others v. Turkey*, paras. 174 – 175
[89] *Fadeyeva v. Russia*, para. 133

inspections performed by local authorities, stakeholders in the area, and the embassy itself. The Supreme Court held that there was no need for further examination.[90]

Although the Norwegian Supreme Court states that the EIA Directives contribute in a very small matter to solving the present case, the fact that the public was heard through more than 100 written letters, three town meetings, signature campaigns and newspaper articles, the requirement for transparency under Article 6 of the EIA Directive, pointed towards the decision being valid.[91] Ultimately, the Norwegian Supreme Court held that while there was a formal requirement for an impact assessment in the present case, the decision to amend the zoning plan was deemed valid. This was justified by the fact that an impact assessment would likely produce the same result and that the process's openness was satisfactory despite not having conducted a formal impact assessment.[92]

In HR-2017-2247-A, the Norwegian Supreme Court decided on a similar issue. Local authorities in Troms, Norway, had approved a zoning plan that allowed a road project to affect reindeer herding in the area. The reindeer farmers claimed the decision was invalid due to needing a formal impact assessment. While the assumed price point at the start of the project supported not carrying out an impact assessment, the Norwegian Supreme Court also found that since the local authorities knew of the consequences it would have for the reindeer farmers beforehand, a formal impact assessment would not have made a difference. The decision was deemed valid by the Supreme Court for this reason.[93] It must be noted that the case was rendered with a dissenting opinion and thus carries less judicial weight than a unanimous verdict would have.

There are very few Norwegian cases regarding EIA legislation, making it difficult to determine if it is a trend or coincidental that these cases have dismissed the importance of an impact assessment to some degree. The ECtHR has yet to decide on an EIA-related case where Norway is accused of breaching the ECHR but has touched on the subject in other cases.

One of those cases is the case of *Jugheli and Others v. Georgia,* where the ECtHR decided on an issue regarding a thermal power plant operating in Tbilisi from 1939 to 2001. The three

[90] HR-2009-1093-A, paras. 54 – 84
[91] Ibid.
[92] Ibid.
[93] HR-2017-2247-A, paras. 67 – 155

applicants had suffered from air, noise and electromagnetic pollution, and experts found in 1996 that no major repairs had been carried out during the previous ten years. The applicants brought an action against the power plant in 2000, and while they reached a settlement, the power plant never enforced its obligations.[94]

Georgia adopted EIA legislation on 1 January 2009, and the thermal power plant would have required an EIA under Annex I of the EIA Directive if it had still been operational at the time of implementation. The ECtHR notes that the obligation to submit an environmental impact assessment would be a "pertinent regulatory framework", thus confirming that ECtHR recognises EIA legislation as contributing to a well-functioning system for planning, approving, and licensing. The Court further observes that "such dangerous industrial activities were effectively left in a legal vacuum at the material time", demonstrating the importance of regulatory framework.[95]

The Court also finds that "[i]n the context of dangerous activities in particular, States have an obligation to set in place regulations geared to the specific features of the activity in question, particularly with regard to the level of risk potentially involved".[96] This phrase largely embodies what EIA legislation aims to provide. While the case of *Jugheli and Others v. Georgia* also addresses issues unrelated to EIA legislation, it establishes EIA legislation as pertinent and valuable regarding spatial planning and controlled development.

[94] *Jugheli and Others v. Georgia*, paras. 7 – 16
[95] Ibid, para. 74
[96] Ibid, para. 75

5 Final reflections

5.1 Notes on the Gjerdrum landslide

In light of the guidelines deduced previously in this thesis, I will quickly review how the situation in Gjerdrum relates to these.

Concerning the abundance of quick clay in the area, the municipality of Gjerdrum was well aware of this, according to the Gjerdrum Committee. In a ROS analysis (risk and vulnerability) conducted in the area, the amount of quick clay had not had a prominent role, something one might expect in an area with this many hazard zones. Despite this, the municipality has required geotechnical assessments where this has appeared relevant to the case and has assumed a cautious approach concerning zoning plans and construction matters.[97]

Renowned professionals conducted the geotechnical assessments, and the Committee did not find that the municipality or project proposer should possess such knowledge that they could detect errors in their assessments. This led the Committee to think that the damage done by erosion in Tistilbekken was unforeseeable by the municipality, as even the professionals assessing the area did not pick up on the impending danger.[98]

The Committee found that the assessment relating to the zoning plan had two major issues. The first is overlooking a decreased stability caused by construction in the nearby area. The other one is that the assessment gave little regard to the impacts outside the zoning area. A wider area being assessed could have contributed to a more detailed and comprehensive understanding of the potential danger.[99]

Tistilbekken lies within the zoning area under assessment, and the assessments done were in accordance with the regulations at the time. This included assessing stability, the quality of

[97] Olje- og Energidepartementet, *Årsakene til kvikkleireskredet i Gjerdrum 2020*, p. 137
[98] Ibid.
[99] Ibid, p. 138

the soil, and erosion. The Committee adds that a more extensive assessment concerning erosion would have been beneficial and questions why this was not carried out.[100]

Due to the assessment mentioned above and notices given to the local authority regarding the erosion of Tistilbekken, it is clear that the Gjerdrum municipality was aware of the area's condition. In the zoning plan, the municipality therefore laid down demands related to improvements in the stream that those benefitting from the zoning plan had to carry out if deemed necessary. The Committee was not presented with documentation explaining why this was never carried out or why additional assessments never took place.[101] It is highly unfortunate that it does not appear to have been followed up by the local authorities, as this could have minimised the risk and potentially the disastrous outcome.

In the case of *Özel and Others v. Turkey*, the European Court of Human Rights determined that "the local authorities which should have supervised and inspected […] had failed in their obligations to do so".[102] It is natural to compare the Gjerdrum landslide to the earthquake in Izmit, Turkey, as they both seemingly had appropriate spatial planning legislation and zoning plans in place in hazardous zones, but the authorities failed in their obligation to ensure that these were upheld. This constituted a violation of the European Convention on Human Rights, and it would be interesting to hear if the ECtHR would similarly decide on the Gjerdrum landslide.

5.2 Sufficiency of the current Convention text

This thesis has looked at how the European Convention on Human Rights sees a connection between natural disasters and human rights. In cases like *Fadeyeva v. Russia*, environmental degradation constituted a breach of the Convention's Article 8 on the right to private life and home. While the ECtHR has found violations in human rights when environmental issues have appeared, the Court "will only recognise a breach where the level of environmental damage is high, and where individuals are directly affected by it".[103] A high level of environmental degradation alone cannot constitute a breach of human rights. ECtHR has made it clear through case law that an environmental issue is only a breach of human rights if

[100] Olje- og Energidepartementet, *Årsakene til kvikkleireskredet i Gjerdrum 2020*, p. 138
[101] Ibid.
[102] *Özel and Others v. Turkey*, para. 175
[103] Stuart Bell et al., *Environmental Law*, p. 80

it seriously threatens an individual's health or right to exercise their freedoms in a particular area due to environmental deterioration.

As the name of the European Convention on Human Rights constitutes, the rights are limited to those of humans. The only aspect of natural disasters and climate-related issues the ECtHR currently recognise as a breach of the Convention are those capable of severely damaging humans. There is no apparent regard for the environment or flora and fauna affected by environmental degradation. The environment does not enjoy protection under the Convention where this is not necessary to humans. Where the Court finds such protection necessary, a "fair balance" must be struck between the community's and individual's interests. Examples of where the court has required a fair balance are the cases of *Turgut and Others v. Turkey* and *Fadeyeva v. Russia,* where both Turkey and Russia had neglected the rights of the individual in favour of the community's interests.

As part 2.2.3 of this thesis mentions, The European Court of Human Rights values a dynamic approach to the Convention. The Court expressed that it is "of crucial importance that the Convention is interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory" in the case of *Christine Goodwin v. the United Kingdom*.[104] The case law in this thesis has shown that environmental issues increasingly affect human rights, thus requiring practical and effective advancements to be taken by the Court.

In a speech in October 2020, the President of the European Court of Human Rights at the time, Robert Spano, stated that

> "we are present in a transformative moment in human history, a moment of planetary impact and importance. No one can legitimately call into question that we are facing a dire emergency that requires concerted action by all of humanity. For its part, the European Court of Human Rights will play its role within the boundaries of its competences as a court of law forever mindful that Convention guarantees must be effective and real, not illusory".[105]

[104] *Christine Goodwin v. the United Kingdom*, para. 74
[105] Robert Spano, *Should the European Court of Human Rights become Europe's environmental and climate change court?* p. 5

While still exercising caution, such as not assuming more than a supervisory and subsidiary role as a court of law, the President expresses a desire to take action against the climate change emergency effectively.

5.3 Challenges related to the limitations of the thesis

Several important matters were not prioritised in this thesis due to the comprehensive nature of the question. Relevant topics for further discussion could have been other ways Norway has implemented legislation in accordance with ECHR standards, such as the Petroleum Act, The Climate Target Act, the Biodiversity Act, the Pollution Act, and case law relating to this legislation. Impact assessments come in many forms, and how the EIA legislation relates to ECHR, other forms of legislation may not.

Recent cases of avalanches and landslides would have made interesting points for discussion, but the thesis had to be limited to the Gjerdrum landslide. This can be justified because the Gjerdrum incident is less recent, and thus more information about the landslide is available. This is also due to the magnitude of the incident, as Norway rarely sees natural disasters this severe. One challenge relating to the Gjerdrum incident is that no national or international court has given a verdict. The Norwegian government established a committee, publicised reports, learned, and improved. Still, there has yet to be an official statement regarding whether this breached the European Convention on Human Rights or national legislation. However, this does not take away from the importance of the situation, as it undoubtedly will remain a reminder that natural disasters will keep claiming lives.

Another interesting point for discussion would have been the Court's decision in the cases of *Duarte Agostinho and Others v. Portugal and Others*, *Carême v. France*, and *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* mentioned in the introduction. These are cases relating to the more significant impacts of climate change, which will positively establish a precedent for international climate and human rights law. These will indicate to what degree the Court wishes to adapt the contents of the Convention.

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