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# Climate Change as Inhuman Treatment

**Abstract:** Do the effects of anthropogenic climate change amount to the ill-treatment of children and young adults? This is what the European Court of Human Rights asked the responding states in one of the most recent climate litigation cases. Some legal scholars give an affirmative answer concerning inhuman and degrading treatment as, in their view, the applicants' suffering passes the necessary threshold of severity. In the paper, I differentiate between inhuman and degrading treatment, and I argue that inhuman treatment cannot be defined by the severity of suffering, but by the kind of wrong it constitutes. Inhuman treatment is about a substantial diminishment of autonomy through the undermining of planning agency as well as significantly limiting the range of options to choose from by either making the existing types of options unsafe or by taking them away altogether. I show that anthropogenic climate change can indeed have such effects not only on adults but on children too. In the case of children, it is the capacity to develop such an ability that is undermined, as well as the options that they otherwise would have. Taken together, the two amount to closing the future for children and young adults. Those whose interests are set back in this way are subjected to inhuman treatment by virtue of states not complying with their share of mitigation measures as well as not adopting more ambitious policies.

**Keywords:** *autonomy; climate change; climate litigation; human rights; planning agency; prohibition of torture; inhuman and degrading treatment*

## Introduction

In one of the most recent climate litigation cases, Duarte Agostinho and Others v. Portugal and Others, the European Court of Human Rights (ECtHR) asked the responding states to consider whether their inaction concerning climate change affects the applicants' rights under Article 3 of the European Convention of Human Rights (ECHR) (i.e. the prohibition of torture or inhuman or degrading treatment or punishment).<sup>1</sup> This is one of the newest developments

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<sup>1</sup> ECtHR, Duarte Agostinho and Others v. Portugal and Others, Appl. no. 39371/20. The applicants, six Portuguese youth, allege that the responding states violate their right to life and to private and family life as well as the prohibition of discrimination by not taking sufficient action to tackle climate change. The case was referred to the Grand Chamber on the 29th of June 2022. So far, the ECtHR has assessed environmental cases mostly within the scope of the rights to life and to private and family life (Keller and Heri, 2022).

in the human rights approach to climate change, which is evaluating the effects of climate change in terms of its impact on the enjoyment of human rights. Scholars and practitioners have already claimed that anthropogenic climate change violates at least several human rights including the right to life, private and family life, health, subsistence, and culture (Adelman, 2009; Bell, 2011; Caney, 2010; Schapper, 2018; Shue, 2020). What makes the invocation of Article 3 distinctive compared to the violation of other rights is that it involves a very narrow set of absolute rights – the rights that are not subject to the proportionality test, and which correlate with legal obligations that are non-derogable and non-negotiable even in times of war or other public emergencies (Arai-Yokoi, 2003; Mavronicola, 2012; Nowak, 2014).<sup>2</sup> Should governments declare a state of emergency due to climate change, the absolute obligations would still be in force (Bodansky, 2010).<sup>3</sup> Therefore, finding that anthropogenic climate change violates the rights against being subjected to torture, or inhuman or degrading treatment may have significant legal consequences and accordingly, may further strengthen the human rights approach to climate change.<sup>4</sup>

Finding the violation of the said prohibitions, however, is easier said than done for two major reasons. The first reason concerns the human rights approach to climate change as such. It is said that it may be hard to establish the rights' violations since it is difficult to attribute particular injuries of individuals to actions of identifiable agents as no one's emissions on their own cause climate change (Bodansky, 2010; Humphreys, 2009; Leib, 2011; Sinnott-Armstrong, 2010; Vanderheiden, 2008). The second reason is more directly related to the prohibitions included within Article 3: while the prohibition of torture has received significant legal and philosophical attention, the other two prohibitions lack specified normative foundations. In judicial practice, the prohibitions are typically defined in terms of the descriptions of prohibited practices, but there is no consensus regarding what makes these practices wrong (Boulos, 2019; Mavronicola, 2012; Murtagh, 2012; Waldron, 2010). For this reason, it may be very difficult to show how practices that are emerging in new and

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2 Similar formulations can also be found in international human rights instruments, including the Universal Declaration of Human Rights (article 5), the International Covenant on Civil and Political Rights (article 7), The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), as well as other regional human rights instruments, including the American Convention on Human Rights (article 5), and the African Charter on Human and People's Rights (article 5).

3 An additional legal significance of invoking an absolute right is that it merits a higher level of scrutiny by the ECtHR and thus a lesser degree of deference to domestic decision-making (Keller and Heri, 2022).

4 While many think that the legal right against being subjected to ill-treatment is absolute, things get more complicated once we turn to the moral realm. The question of whether a moral right not to be subjected to ill-treatment is absolute raises too many issues that I cannot adequately deal with here. Instead, I will assume that the prohibition protects from being subjected to grave moral wrongs and this suffices to establish a great moral weight of the right. For the debate about the existence of absolute rights see the exchange between Gewirth and Levinson (Gewirth, 1981; 1982; Levinson, 1982)

very different contexts, such as the context of climate change, fit these descriptions. As we can see, there are significant conceptual, moral, and legal obstacles standing in the way of establishing that the effects of climate change amount to the violation of any of these prohibitions. In this paper, I mostly focus on tackling the second problem concerning the normative foundations of these prohibitions. In particular, I focus on the prohibition of inhuman treatment that, despite being the least explored of all the forms of ill-treatment, is the most suitable candidate for capturing harm resulting from climate change, or so I will argue here.

The paper argues that the right not to be subjected to inhuman treatment protects the fundamental interest in autonomy understood as the ability to pursue a life of one's own choosing. Anthropogenic climate change poses a new and serious threat to this interest in a twofold way. First, it can directly undermine the ability to make and pursue plans or the capacity to develop such ability by inducing harmful mental states. It can also significantly diminish the range of options by either making the existing types of options unsafe or by taking them away altogether. Those whose interest in autonomy is thwarted in this way experience an ongoing, rather than prospective harm. Since the harm is induced by states' inadequate climate actions, it can be concluded that states subject these people (especially children) to inhuman treatment.<sup>5</sup>

I start by problematizing some of the recent legal arguments that the effects of climate change amount to inhuman and degrading treatment. I then proceed by making conceptual and normative distinctions between these two forms of ill-treatment. In particular, I argue that the prohibition of inhuman treatment cannot be defined by establishing the threshold of suffering, but by identifying the kind of wrong it prohibits, and I argue that the wrong concerned is the one of substantially diminishing individual autonomy. In the fourth section, I show how anthropogenic climate change poses a new and serious threat to the fundamental interest in the autonomy of both adults and youth, and I draw some implications for state obligations. I end by examining whether taking away or making unsafe future-oriented options that relate to future generations also constitutes inhuman treatment.

### **Climate change and inhuman or degrading treatment: a legal approach**

From a legal point of view, whether a treatment amounts to ill-treatment is relative and context-dependent in the sense that it depends on the *nature, duration, and*

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5 Since under the international human rights law states are the main duty bearers, I focus on their duties concerning climate change. This does not imply that other agents, especially the corporate ones, do not bear any duties.

*physical and mental effects of treatment* in a given situation (Heri, 2020; Mavronicola, 2021b). According to the recent legal commentaries concerning the *Agostinho* case, the suffering the applicants (i.e. children and young adults) experience due to climate change, such as climate anxiety and the fear for their own future as well as the future of their loved ones, passes the threshold of severe mental suffering and thus falls within the scope of the prohibition of inhuman or degrading treatment.<sup>6</sup> In particular, it is argued that the applicants experience ongoing harm by watching the climate crisis unfolding before their eyes, and they also face *a risk of future harm* (Heri, 2020; Mavronicola, 2021b). Taking into account prospective harm is important since if it materializes, the harm will very likely be *catastrophic* (Mavronicola, 2021b) and *irreparable* (Keller and Heri, 2022). Moreover, the prospective harm is also avoidable since states can adopt different climate policies which would not lead to such outcomes. The reference to the prospective harm is an important legal step in a new direction since it concerns human rights violations that will take place in the future unless states take appropriate preventive actions in the present.

It is further argued that the second criterion concerning the lack of control over one's situation is also met since the applicants are powerless and unable to change the course of climate (in)action. They are below voting age and thus cannot influence the decision-making process in the way adults can despite those decisions significantly and disproportionately affecting them. Considerations such as these have led at least some legal scholars to conclude that climate change induced harm 'dehumanizes and degrades persons' (Mavronicola, 2021b). Consequently, states have the positive obligations under Article 3 of ECHR to take measures that protect against future harm, such as, to reduce greenhouse gas emissions in accordance with their commitments under the Paris Agreement (Heri, 2020; Mavronicola, 2021b).

These far-reaching legal interpretations notwithstanding, legal scholars also point out that the claim concerning prospective harm may face admissibility challenges since the existing rules on legal standing require litigants to show a particular and direct injury that is difficult to show if a significant portion of harm may take place in the future (Humphreys, 2009; Keller and Heri, 2022; Leib, 2011).<sup>7</sup> From a more substantive point of view, it is also not clear in what sense the youth's suffering, as well as their powerlessness, are relevantly similar

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6 Commentaries are limited to the jurisdiction of the ECtHR since the *Agostinho* case is the only climate case at the time of writing where the prohibition of all three forms of ill-treatment has been invoked.

7 Heri enumerates numerous hurdles for climate litigation before ECtHR, but argues that many of these can be overcome (Heri, 2022).

to suffering and powerlessness typically considered to be constitutive of ill-treatment. While it is undeniable that the youth cannot do much regarding climate change, the lack of control over their situation is surely different from the lack of control in contexts in which inhuman and degrading treatment has been typically found, such as incarceration. As opposed to incarceration where the victim is directly subjected to someone else's control, in the context of climate change, the victims arguably retain some degree of control over their lives. I will come back to this.

The reason why it is not clear that the youth's suffering and powerlessness fall within the scope of Article 3 stems from a more general problem. As Waldron points out, 'inhuman' and 'degrading' are highly evaluative and indeterminate predicates and determining them necessitates making normative judgments that judicial bodies have been refraining from doing (Boulos, 2019; Mavronicola, 2021a; Waldron, 2010). Instead, they have taken a more practical route of defining the list of descriptive rules that identify which practices amount to ill-treatment. The problem with focusing on describing practices is that the connection between abstract norms and their practical instantiations is not clear, and in the absence of defined evaluative criteria, it is also not clear what makes these practices similar. This may lead to incoherent jurisprudence that, in turn, can offer little guidance as to how to adjudicate in contexts that are very different from those where ill-treatments have been typically found (Boulos, 2019). Therefore, to establish whether the effects of anthropogenic climate change amount to some form of ill-treatment, we cannot solely rely on the description of practices and try to establish analogies between very different contexts; rather, it is necessary to examine the normative foundations of these prohibitions and understand what wrongs they prohibit.

I undertake such an investigation here. I focus on unpacking what legal scholars define as *prospective harm*. Again, the harm is said to be prospective in the sense that potential victims are at risk of experiencing a great deal of it in the future unless climate policies take a different direction from the one currently taken. The notion of prospective harm does capture something important – namely, that anthropogenic climate change can induce a distinctive type of harm. However, whether the harm is *prospective* depends on what interests are affected by it. Therefore, to examine the nature of such harm as well as what, if anything, makes it wrongful, we need to identify the interests that the prohibition of ill-treatment aims to protect.

### **The prohibition of inhuman or degrading treatment: conceptual distinctions**

To start our inquiry, it is necessary to briefly revisit the scarce conceptual clari-

fications concerning the prohibition of inhuman and degrading treatment. Before doing so, let me note that the legal view that the suffering the applicants experience now or will experience in the future due to climate change does not amount to torture is plausible since the core features of torture are the intention to inflict very intense pain or suffering for a specific purpose, such as to obtain information or confession.<sup>8</sup> It is hard to see how anthropogenic climate change involves any of this. For it is implausible to claim that the responding states are deliberately causing climate change to inflict extreme suffering on the innocent, let alone that this is done for the sake of achieving one of the specified purposes.<sup>9</sup>

Do the effects of climate change on youth amount to inhuman or degrading treatment? Although legal commentaries tend to lump the two forms of ill-treatment together, they should not be conflated (Vorhaus, 2002). If anything, the very disjunctive wording in which these prohibitions are formulated in various legal instruments, including Article 3 of ECHR, suggests that they need to be differentiated.<sup>10</sup> And this is where we run into difficulties: as opposed to torture, which has been broadly discussed, a conceptual and normative distinction between the other two forms of ill-treatment is lacking. Establishing the distinction is significant in both a moral and a legal sense. From a moral point of view, the distinction can help us identify which of the two constitutes a graver moral wrong. The distinction can also have important legal consequences concerning the nature of sanctions (Murtagh, 2012).

So, what are the similarities and differences between inhuman and degrading treatment? As opposed to torture, it is broadly accepted that the intention to inflict severe pain or suffering is not necessary to establish that the treatment is inhuman and degrading as it may be an unintended effect of the structural regulations such as the governance of prisons. Therefore, instead of the intentionality of inflicting bodily or mental suffering, the focus is typically on the intensity of suffering (Mavronicola, 2012).<sup>11</sup> Call this *the threshold view*. According to the threshold view, inhuman and degrading treatment take place if the suffering they induce passes the minimal (typically very high) threshold of severity.

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8 For instance, the ECtHR has defined torture as 'deliberate inhuman treatment causing very serious and cruel suffering'. Ireland vs United Kingdom, Judgment of 18 January 1978, A 25, para. 167.

9 Article 1(1) of the Convention Against Torture identifies five possible purposes of torture: to obtain information or confession, to punish, to coerce, to intimidate, or to discriminate.

10 Vorhaus (2002) argues that the lack of differentiation is surprising given that the ECtHR has placed inhuman treatment 'at the heart' of Article 3.

11 This is not to say that the intention to inflict suffering is never involved; all this means is that the intention is not necessary to establish that this form of ill-treatment is taking place.

Although intuitive, the threshold view faces two problems. First, many think that inhuman treatment involves a greater degree of physical and mental suffering and as such is more similar to torture than to degrading treatment.<sup>12</sup> If so, the conceptual undifferentiation between inhuman and degrading treatment appears unsubstantiated. Setting the conceptual nitpicking aside, focusing on the threshold of suffering faces problems on its own. Namely, the threshold presupposes that it is possible to differentiate between different degrees of suffering, but it is not clear what the basis of such differentiation is. It cannot solely be about the victims' subjective experiences since persons have different levels of sensitivity and resistance to pain and suffering, and they may respond to the same stimulus in different ways (Vorhaus, 2002). Moreover, the victims may not have a clear view of their suffering and they may even adjust to a new situation, such as coming to terms with spending years or perhaps their whole life in prison. Not only that some victims may adjust to their situation, but some may not even subjectively experience suffering at all. Think about a person who has been raped while being in a coma. Even if the person has not been aware of what has happened to them, it is hard to deny that they have been wronged. Finally, the feelings of fear, anxiety and anguish that are taken as paradigmatic of mental suffering may also be felt by, for instance, someone who is waiting for the results of a test for a serious disease. It is hard to say that they are subjected to inhuman or degrading treatment. Therefore, attempting to establish whether ill-treatment is taking place by examining whether a person's suffering is serious enough risks being underinclusive or overinclusive. For this reason, the prohibitions of inhuman or degrading treatment can better be characterized by identifying the wrong(s) they aim to prohibit.

But what are these wrongs? We could see earlier that legal scholars invoke the notion of 'powerlessness' as the lack of control over one's situation. In legal theory and practice, powerlessness has often been associated with torture. For instance, Nowak defines powerlessness as a *total* subjection to someone else's will that typically can take place in detention. These are situations in which the victim is extremely vulnerable to the actions of the person in charge of those facilities and cannot resist the treatment in any way (Nowak, 2014). Miller vividly describes this as 'breaking the victim's will', which is the precondition for achieving any of the specified purposes of torture (Miller, 2017). However, there are situations in which the victim retains some degree of control over at least some of their functionings but is still significantly subjected to someone else's

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12 Some even think that degrading treatment is characterized by distinctive experiences of humiliation and debasement rather than by the severity of the suffering (Nowak, 2014; Vorhaus, 2002).

will. Think of a detainee who is waiting to be extradited to a state where there is a real risk of them being subjected to torture or inhuman or degrading treatment.<sup>13</sup> Many would think that such treatment is wrongful too even if the detainee can meet their basic needs and thus has a (very) limited control over their life. But what exactly makes it wrong? Proponents of the threshold view would submit that it is about subjectively experiencing the feelings of fear, anxiety and anguish that are intense enough to pass the threshold of severity. Earlier I argued that the reliance on the subjective experience of suffering alone does not help us determine that a wrong is taking place. What if, for whatever reason, the detainee does not subjectively experience such mental states? Surely, we would still think that they should not be treated this way. That said, such mental states can help us identify the nature of the wrong. Namely, experiencing intense fear, anxiety and anguish can significantly undermine one's ability to pursue an autonomous life and consequently set back one's fundamental interest in autonomy.<sup>14</sup> As opposed to a tortured person who is deprived of liberty, the detainee waiting for extradition may have some degree of liberty to take actions to satisfy their basic needs, but their ability to decide even about these actions may be undermined due to the mental states described. For instance, the detainee may be served food but due to the fear for their future, they may not be able to eat. Therefore, what makes subjecting a person to the prospects of a very bad future wrongful is not the total subjection to someone else's will, but the serious undermining of one's ability to make choices and act upon them. I will expand on this point shortly.

As we can see, powerlessness can concern the deprivation of more than one value. On the one hand, the total subjection to another's will in order to achieve specific purposes can be characterized (as it often is) as the deprivation of *liberty*. On the other hand, powerlessness can also be characterized as the substantial diminishment of *autonomy*.<sup>15</sup> For the sake of argument, I will proceed by assuming that torture is about powerlessness in the liberty-depriving sense. What about inhuman and degrading treatment? Do both involve powerlessness in the autonomy-depriving sense?

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13 Mavronicola (2021) uses this example to draw parallels with the mental suffering the applicants in the Agostinho case experience due to anthropogenic climate change.

14 I understand autonomy in the Razian sense. Pursuing a worthwhile life, following Raz (1988), involves the ability (as a set of mental faculties) to do so, an adequate range of options to choose from as well as the freedom to make and pursue such choices.

15 I borrow the distinction between liberty and autonomy from Griffin (2008). Although he defines the two values as the 'highest level human rights' that are protected by other human rights, it seems that on his account autonomy is more fundamental than liberty since liberty (i.e. freedom from interference by others) is defined as the necessary condition for a person to develop and pursue their conception of a worthwhile life.



I do not think so. For, it is broadly accepted that the prohibition of degrading treatment aims to protect dignity (Tasioulas, 2015; Vorhaus, 2002; Waldron, 2010). To be sure, the prohibition of inhuman treatment as well as many other human rights also aim to protect the dignity of human beings (Heri, 2022; Mavronicola, 2012; 2021; Murtagh, 2012; Webster, 2016), but as opposed to the violation of other human rights, degrading treatment always violates dignity (Nowak, 2014; Vorhaus, 2002). Since dignity is closely related to the equal moral status of human beings, denying such status to some people by, for instance, discriminating against them on racial grounds, significantly affects their self-respect and degrades them.<sup>16</sup> Thus, degrading treatment can be defined as the imposition of *symbolic wrong* (i.e. attitudes and conduct that express the idea that some humans are of lesser value) (Tasioulas, 2015). In as much as one's self-respect is related to one's sense of agency, we surely do not think that the denial of equal moral status substantially curtails the victim's autonomy. Therefore, what makes degrading treatment wrong is not its effects on the victims' autonomy, but the very attack on their dignity. While the prohibition of inhuman treatment also aims to protect dignity, the terminological distinction seems to suggest that 'humanity' is more than human dignity.<sup>17</sup> In rare legal and philosophical discussions, inhuman treatment is vaguely defined as the treatment that *no human should be expected to endure* (Vorhaus, 2002; Waldron, 2010).<sup>18</sup> We can think of many things that no human should be expected to endure,<sup>19</sup> but it is unlikely that many would dispute that one such thing is the substantial diminishment of autonomy given its importance for human agency.<sup>20</sup>

When is the diminishment of autonomy substantial and normatively relevant? What makes answering the question difficult is that individual autonomy is often interfered with by virtue of living in a society, being subjected to various rules and regulations and also by interacting with others. All these regulations and interactions can and often do substantially limit personal autonomy, but it is difficult to say that all of them are wrong. So, when is the diminishment of autonomy wrongful? To answer this, let us go back to the situation of the detained

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16 This is not to say that degrading treatment is limited to subjective experiences of humiliation (See Waldron, 2010).

17 This suggests that any inhuman treatment is also degrading, but it does not hold the other way around (Murtagh, 2012). Thus, inhuman treatment is in some sense morally worse than degradation.

18 Waldron (2010) argues that it is also about what no human should do, which indicates that inhuman treatment can be defined from the perspective of the wrongdoer as well. I do not have space to develop the point here.

19 For instance, Waldron argues that no person should be expected to endure the deprivation of basic human functioning such as the need to sleep, defecate or urinate, the need for daylight and exercise, and maybe the need for human company (2010: 280; Cf. Busou, 2019).

20 This does not imply that the interest in autonomy is the only interest that the prohibition of inhuman treatment protects. But I focus on this one in particular given the future-oriented aspect of personal autonomy. I explain this below.

person waiting for extradition to a place where there is a real risk that they will be subjected to ill-treatment. I argued earlier that what makes this wrongful is that it sets back the fundamental interest in autonomy. Again, autonomy is not only about the range of options and the freedom to choose among them but it also includes the very ability to make choices. The ability is constituted by a range of mental faculties such as being able to form complex intentions and plan their execution.<sup>21</sup> As such, the ability to plan is central to understanding human agency. Human agency is temporally extended in the sense that people pursue complex forms of cross-temporal and social organization and coordination and they do so by utilizing planning attitudes (Bratman, 2005). Therefore, planning attitudes are central attitudes as they help us constitute and support our agency over time. Although the planning framework is not strictly necessary for the agency, it is a ‘deeply entrenched framework for us [...] and one we may well not have the capacity to change at will’ (Bratman, 2018: 15). When a person faces very bad prospects, this can trigger a range of mental states that can undermine the mental faculties that constitute planning agency. As said earlier, the detainee awaiting a potentially terrible future may not be able to decide about and execute even a trivial activity such as having a meal. Therefore, no person should be expected to endure intense fear, anxiety and anguish concerning their future given that this can undermine their planning agency.

There is another aspect of planning agency that is just as important for the present discussion. Following Bratman (2015), planning agency is inherently related to what he calls ‘future-directed projects’ that provide a framework within which our practical thinking proceeds. The projects are not limited to full-blown, comprehensive plans but can be something as mundane as deciding when to have one’s meal. To be able to form and pursue future-directed projects, we need a range of options to choose from. Raz plausibly argues that the range of options is adequate if it includes both ‘options with long-term pervasive consequence as well as short-term options of little consequence, and a fair spread in between’ (1988: 374). To live an autonomous life, a person needs to be able not only to make and pursue short-term plans but also to develop and pursue long-term projects and commitments. A substantial diminishment of one’s autonomy will also involve taking away the options that persons can choose from, including those necessary to form long-term plans. Note that options can be taken away not only by literally removing them but also by making them unsafe. The options become unsafe when exercising them may lead to experiencing

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<sup>21</sup> Raz further argues that this presupposes some minimal degree of rationality and the ability to comprehend the means necessary for the realization of one’s ends (1988: 372–73).

material harm (Oberdiek, 2012). Going back to the detainee awaiting extradition, their options are clearly significantly limited. Note, however, that the adequacy of options is a function of context; that is, whether the range of options is adequate needs to be judged relative to the context in which the person finds themselves.<sup>22</sup> While it is debatable what range of options is adequate in the conditions of detention, many would agree that it needs to include at least some options related to long-term planning. The detainee who faces the risk of being extradited to a country where they may experience ill-treatment has all of the options necessary to plan in the long-term made unsafe. In short, their *whole future* is made unsafe.

One may worry that defining the wrong of inhuman treatment through the diminishment of the range of options opens the door for an implausibly expansive right against inhuman treatment. But since we want to define a grave moral wrong, we'd better limit its scope. We can do so by distinguishing between the *types* of options and *token* options. Types of options concern important spheres of one's life, such as family or profession. On the account defended here, the wrongful interference with options concerns only the type of option: inhuman treatment takes place when the existing types of options are made unsafe or foreclosed, that is when the person is left without choices concerning the important spheres of life that they had before. To wit, a person is treated in an inhuman way when their future is seriously undermined. Having one's future undermined is not a prospective harm, but it is a harm that a person faces here and now.<sup>23</sup>

It may appear that it is still not clear what makes this wrong as it is not clear what actions lead to such outcomes. Earlier I mentioned that many agree that the intentionality of subjecting a person to inhuman treatment is not among its defining features; rather, the treatment often results from structural conditions. Structural conditions typically depend on and are created by the state institutions. Going back to the detainee awaiting extradition, their autonomy is interfered with by the range of state laws, including those that regulate extradition. The account developed here helps us see what is wrong with this – the state institutions wrongfully subject people to inhuman treatment when they

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22 Although Raz is not clear on this, I take it that the adequate range of options is the one that includes a certain number of adequate options. Clearly, much more can be said about this.

23 I will remain agnostic on whether the interest in autonomy so defined is protected by other rights too. For instance, Oberdiek argues that the adequate range of options, as an important aspect of autonomy, is protected by the right against risk. Since I think that the harm described here constitutes an ongoing, materialized harm, I do not think that the right against risk is applicable here as it protects from non-material harms. For the difference between material and non-material harms see (Oberdiek, 2009; 2012).

generate conditions that undermine people's planning agency and take away or make unsafe types of options that were previously available. The emphasis on the previous availability of options is important as it allows us to further limit the scope of the right. The right against being subjected to inhuman treatment does not demand providing a person with an adequate range of options; rather, it demands that the person is not being deprived of the types of options they have had.<sup>24</sup> If this analysis is correct, then the wrong of inhuman treatment is more similar to the wrong of torture than to the wrong of degrading treatment (cf. Murtagh, 2012; Vorhaus, 2002). The difference is that a victim of inhuman treatment may be able to retain their liberty in the sense a victim of torture cannot, but their autonomy is substantially diminished.<sup>25</sup>

Before I move to examine what this means in the context of climate change, let me make a final remark. In the previous paragraph, I implied the reliance on the interest theory of rights.<sup>26</sup> Although the theory is not bulletproof, one of its central features makes it particularly suitable for the present discussion. This feature is what Raz (1988) terms the 'dynamism' of rights; that is, rights are dynamic in the sense that core rights may lead to new derivative rights as well as new duties under changed circumstances.<sup>27</sup> According to the proponents of the interest theory of rights, the function of fundamental interests is not limited to justifying particular rights, but they can also serve to create new rights as well as correlative duties if circumstances change. It is hard to deny that climate change constitutes a (massively) changed circumstance in many respects. What does the prohibition of inhuman treatment demand in the context of climate change? I turn to this now.<sup>28</sup>

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24 According to Raz, the government has an obligation to create an environment that provides individuals with an adequate range of options and opportunities to choose among those (Raz 1988: 418). However, such obligations do not follow from the right against being subjected to inhuman treatment.

25 Whether a victim of torture can retain their autonomy depends on the duration of the treatment.

26 To say that an individual or a group has a right is to say that some of their interests are sufficiently important to ground a duty of another to do or not do something to further those interests (Raz, 1988; Tasioulas, 2015). These interests are 'objective' in the sense that they are independent of whether human beings believe they are their interests or actually desire their fulfilment (Tasioulas, 2015: 51).

27 Core rights are based on interests, and derivative rights only indirectly protect those interests (Raz, 1988). The distinction is relevant for the present discussion since non-derogable rights are often regarded as core rights (Koji, 2001).

28 That is not to say that climate change has no degrading effects, but it does imply that we need to look elsewhere than the threshold of suffering and powerlessness to establish this. For instance, Mavronicola (2021b) plausibly argues that states' indifference towards the fear of young people amounts to degrading treatment as the state does not take their fear seriously.

### **Many facets of climate change-induced harm**

The increasingly grim facts about climate change are becoming broadly known. In its recently released Synthesis Report (AR6), the Intergovernmental Panel on Climate Change states with ‘high confidence’ that the ‘widespread and rapid changes in the atmosphere, ocean, cryosphere and biosphere have occurred. Human-caused climate change is already affecting many weather and climate extremes in every region across the globe’ (2023: 5). Anthropogenic climate change has caused substantial damage and increasingly irreversible losses in terrestrial, freshwater and coastal and open ocean marine ecosystems. The impacts on human systems do not lag as many people are already experiencing serious negative effects of climate change not only concerning their livelihoods but also concerning their very lives. To make it worse, the risks are unevenly distributed and are much greater for disadvantaged people and communities in countries at all levels of development (IPCC, 2022). The risks are also unevenly distributed across age groups as the *Agostinho* case shows. It is very likely that the situation will only get worse since there is a greater than 50% likelihood that global warming will reach or exceed 1.5°C in the near term (2021 – 2040) even in the low emissions scenario (IPCC, 2021).

While much attention has been paid to the impacts all of this may have on human physical health, the American Psychological Association’s research shows that the impact on mental health is just as significant. The study shows how both extreme weather and slow onset climate events affect mental health in numerous ways by generating feelings of fear, anxiety, depression, and a sense of loss of control over one’s life, to name a few. Psychologists even coined the term *eco-anxiety* for the distress and feeling of sadness due to ‘watching the slow and seemingly irrevocable impacts of climate change unfold and worrying about the future for oneself, children, and later generations’ (Clayton et al., 2021: 37). Importantly, the research also shows that distress is worsened by the awareness that climate change is mostly caused by human activities, and it is insufficient mitigation measures that lead to the sense of helplessness.

What, if anything, is inhuman about these effects? We could see earlier that the legal commentaries concerning the *Agostinho* case argue that experiences such as these are so severe in the case of the applicants (i.e. children and young adults) that they pass the threshold of mental suffering necessary to establish that inhuman and degrading treatment is taking place (Heri, 2020; Mavronicola, 2021b). In the previous section, I argued that no human should be expected to endure such harmful mental states since these can undermine one’s ability to make plans, including long-term ones. I also suggested that the wrong of

inhuman treatment occurs when the person's planning agency is undermined and when the existing types of options are being taken away from them or made unsafe.

Before examining how this applies to children and young adults, there is a larger issue to consider. Even if we agree that the right against being subjected to inhuman treatment protects the interest in autonomy, it is not clear how this applies to youth, especially children. For many think that instead of the ability to make autonomous choices, children possess the capacity to develop such ability. In other words, children are not autonomous planning agents in the sense adults are. Thus, it may appear that the account of inhuman treatment developed here offers no protection to children. However, there is no reason to think that the interest in autonomy is limited to possessing planning agency but does not include the capacity to develop this ability.

Going back to anthropogenic climate change, with the decreasing regularity in environmental processes, people are becoming increasingly anxious about an unreliable future and consequently, decreasingly able to plan even in the relatively short-term (Albrecht, 2011: 47). Thus, the feeling of anxiety is often accompanied by feelings of paralysis and helplessness.<sup>29</sup> In addition, extreme emotional responses to climate change events can interfere with the ability to process information and make decisions, thus rendering people unable to consider alternative courses of action and plan their actions accordingly (Clayton et al., 2021: 16).<sup>30</sup> The effects of mental distress on children are just as significant since they may jeopardize the development of the capacity to lead an autonomous life and become planning agents altogether. Therefore, legal commentaries are right in pointing out that emotional and mental distress amounts to material harm, but what makes it wrongful is not how particular children experience it but how it undermines the development of the abilities necessary for an autonomous life.

Besides directly undermining the planning agency or its development thereof, anthropogenic climate change undermines it indirectly too by significantly affecting the range of options, especially those necessary for long-term planning.

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29 Such feelings are more intense for those who witness direct changes in their home environments. Albrecht coined a term 'solastalgia' to capture the condition of the emotional and existential distress due to the recognition that one's home environment is subject to chronic physical desolation (2011: 50).

30 The situation mirrors Raz's example of a 'Hounded Woman' – a woman who finds herself trapped on a small island where she is constantly hunted by a dangerous, carnivorous animal. As Raz pointed out, the woman's mental stamina, intellectual capacities, willpower and physical resources are all used to save her from the animal. Thus, she cannot do or even think about anything else other than how to escape from the animal (1988: 374). While he uses the example to illustrate the importance of the range of adequate options, the example also clearly illustrates how the woman's ability to make autonomous choices is undermined too.

For instance, the applicants in the Agostinho case claim that climate change threatens their choices concerning family life once they become adults able to make such choices.<sup>31</sup> While in legal terms this is considered prospective harm within the scope of Article 8 of ECHR (the right to private and family life), making such an option unsafe amounts to harm here and now. Current actions that foreclose or make unsafe some of the key options that would otherwise be open to youth once they become adults amount to the substantial diminishment of their autonomy.<sup>32</sup> Again, this is not to say that the youth is autonomous, but they are potential adults and ‘it is that adult who is the person whose autonomy must be protected now (in advance)’ (Feinberg, 1992: 78). Earlier I differentiated between types and tokens of options and I argued that it is only the diminishment of the former that is relevant for defining inhuman treatment. Take the option concerning choices about family life as a type of option and options to start a family at any point in life as token options. On the account defended here, the wrongful interference with options concerns only the type of option – inhuman treatment takes place when the option concerning family life is made unsafe or foreclosed, that is, when the person is left with no choices concerning their family life that they had before. In addition, should the person decide to go for an unsafe option and say, have children, they risk experiencing significant harm due to being concerned about how the lives of their children under the conditions of a significantly worsened climate will go. By contrast, taking away particular tokens such as the option to start a family early in life, would not amount to wrongful diminishment of autonomy for the person may still have a token option to do that later in their life<sup>33</sup>.

Foreclosing of options by anthropogenic climate change is not limited to children, but adults can be affected too. Think about the population of the small island states. By now, it is well-established that there is a real risk of the islands falling below the sea level due to the sea level rise. Under such conditions, it is hard to argue that the affected people’s autonomy is not substantially diminished *at present*. Depending on the time horizon of the sinking, does it make sense for them to, for instance, build their homes on the islands? Even if they decide to do so, exercising such an option may lead to substantial material harm. As opposed to children whose at least some options would be diminished

31 Duarte Agostinho and Others v. Portugal and Others 39371/20 (ECtHR, 7 September 2020)

32 I borrow this point from Feinberg (1992). He argues that children have the right to open future that belongs to the class of ‘rights-in-trust’ that are similar to the autonomy rights of adults. Rights in trust are those rights that are saved for the child until they become an adult. Although children will exercise these rights in the future (once they become adults), Feinberg argues that the rights can be violated by the present actions that foreclose options in the future.

33 This is not to say that this is morally irrelevant altogether; all I am saying here is that it does not constitute inhuman treatment.

or foreclosed in the future, these adults (as well as the youth on the islands) are deprived of the options at present. Moreover, this is not about the deprivation of any option previously available, but about the deprivation of the types of options. If a resident of a sinking island would be able to build a home at some other location on the same island, this would not count as taking away the option to build a home in the sense developed here.

As we can see, anthropogenic climate change undermines the interest in autonomy in a twofold way. First, it may destabilize mental states to the extent that they undermine the planning agency or its development. Second, it may make types of options necessary for long-term projects and commitments either unsafe or take them away altogether.<sup>34</sup> To establish that this diminishment of autonomy amounts to inhuman treatment, it also needs to be shown that it is wrongful in some sense. We saw earlier that following legal accounts, inhuman treatment results from structural conditions generated by state institutions. One may be skeptical of applying such considerations to the context of climate change for in the typical instances of inhuman treatment, it is possible to define wrongful actions and to establish a more direct relationship between the state's actions and impacts on victims. Both conditions may seem to be missing in the context of anthropogenic climate change: not only that particular emissions are not wrong in themselves (although this does depend on their amount), but it is also difficult to establish a direct relationship between injuries and possible wrongdoers. Therefore, it seems that actions leading to anthropogenic climate change are not wrong in the sense the actions leading to typical instances of inhuman treatment are. It is easier to establish the wrongfulness of a state's inadequate detention conditions than to establish the wrongfulness of its climate policies. But to say that there is no prior standard of wrongfulness does not absolve these actions of evaluation altogether. Legal scholars have proven creative in this respect by arguing that human rights violations result from states not complying with their legal obligations under the Paris Agreement.<sup>35</sup> This suggests that when it comes to anthropogenic climate change, wrongful actions are those that are unlawful – that is, the standard of wrongfulness is the one defined by law. Therefore, instead of searching for prior standards of wrongfulness in the spirit of the harm principle, wrongfulness can be defined as unlawfulness.<sup>36</sup> States act wrongly when they do not adhere to their legal obligations concerning anthropogenic climate change. To be sure, moral arguments need not stop here for the

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34 This is not to say that this is the only form of harm it causes.

35 Not only that countries' targets as pledged under the Paris Agreement do not suffice to limit global warming, but countries fail to meet even these insufficient targets (International Panel on Climate Change 2023).

36 Feinberg makes a similar point concerning air pollution (Feinberg, 1984).



right not to be subjected to inhuman treatment is not limited to the legal obligation to adhere to one's share of emission reductions.<sup>37</sup> Rather, it also extends to moral obligations to set up a scheme for more ambitious reductions. This brings me to the final point that concerns the specification of duties that the prohibition of inhuman treatment as defined here entails. At the very general level, it could be said that the interest in autonomy generates a duty not to undermine or even destroy people's planning agency and not to take away or make unsafe the existing types of options necessary for future-directed projects. Therefore, the prohibition of inhuman treatment demands securing the environment such that the range of type options people could choose from, especially those necessary for long-term planning, is not drastically diminished. In the context of anthropogenic climate change, such an environment can be secured by taking sufficient mitigation and adaptation measures.

Here one may object that the individual interest in autonomy cannot ground the duty of states not to significantly diminish the range of available options as these are inherently connected to collective goods, and collective goods cannot be justified on individualistic grounds (Meyer, 1997; Raz, 1988). This does not mean that autonomy is not important, but it does mean that such entitlements cannot be conceptualized in terms of individual rights. Therefore, one may think that the argument developed here essentially concerns the value of autonomy rather than the individual right against inhuman treatment. In response, here I argued that inhuman treatment is not only about the diminishment of the range of options, but it is also about undermining one's planning agency. Experiencing both of these does amount to individualized harm. Therefore, although the availability of the range of options undeniably has a collective dimension, the impact of its substantial (and wrongful) diminishment on human agency can be conceptualized as a violation of individual rights.<sup>38</sup>

### **Autonomy and future-oriented options**

I would like to end the discussion by examining the significance of a particular type of options that I will call *future-oriented options*. The future-oriented options are distinctive type of options that concerns long-term projects and commitments aimed at benefitting nearer and more remote future people. Such projects can range from preserving cultural artefacts to conducting scientific research, to investing in long-term infrastructural projects, to more mundane

<sup>37</sup> Indeed, this echoes some of the existing accounts of the human rights violations by climate change. For instance, Bell argues that anthropogenic climate change violates human rights because it results from our collective failure to fulfill our duty to promote effective institutions for controlling greenhouse gas emissions (Bell, 2011).

<sup>38</sup> This raises an interesting question of whether individual and collective interests are becoming congruent in the context of climate change. Due to space limitations, I cannot pursue the matter here.

ones such as planting trees, to name a few. Many think that such projects are significant as they at least partly give meaning to the lives of those who pursue them. In the words of David Heyd, people ‘fill their lives with a creative activity that is not only life-serving but also *life-justifying*’ (1992: 211, my emphasis). While such projects give a great deal of meaning to the lives of those who pursue them, the meaning of the projects themselves is partly constituted by the considerations of whether they will benefit future people or whether future people are likely to continue them (Meyer, 1997). Therefore, the considerations related to future people are constitutive of the meaning of future-oriented projects. The importance of the existence of future people for the meaning of future-oriented projects shows that the relationship between the present and future generations is not one of separation, but one of mutual dependence – while they depend on us in a causal and existential way, we depend on them in an emotional and evaluative way (Scheffler, 2021). While future generations are indeed vulnerable to the effects of actions we take today, we are vulnerable regarding future generations too in the sense that their future existence and possible engagement with our long-term projects give meaning to the projects and thus make them more valuable for us.<sup>39</sup> Therefore, the prospect of future people living very bad lives or even going extinct decreases our ability to find value and meaning in many of our present activities (Davidson, 2008; Meijers, 2020; Scheffler, 2021).<sup>40</sup> Given such a significance of future-oriented projects, it is plausible to say that the adequate range of options needs to include the type of options to develop such projects too.

If anthropogenic climate change endangers the range of interests of future generations (including the interest in survival), then this makes the future-oriented options unsafe. If inhuman treatment is about the undermining of planning agency and taking away or making unsafe the type of options to choose from, does making the future-oriented type of options unsafe amount to inhuman treatment? The answer is a qualified yes. Those who emphasize future-oriented projects point out that their significance stems from a broader conception of human life that extends beyond biological life (Feinberg, 1984; Heyd, 1992; Meyer, 1997). Our lives have a historical dimension that is much wider than typically assumed and it includes concern for both past and future

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39 Another reason why the existence of future people is important is that without them, the act of valuing itself will disappear. In Scheffler’s words ‘the future of humanity is the future of value’ (2018: 70).

40 Although Meijers points out that this overlooks the point that not all long-term projects concern humans; people can have meaningful projects even in the face of humanity’s extinction (Meijers, 2020).

generations.<sup>41</sup> We can consider thwarting the interests related to this broader conception of human life as non-material harm. However, the effects can be materialized too since taking away or making unsafe future-oriented options can induce harmful mental states that also undermine one's planning agency. For instance, the thought that there may not be future people or that they may live suboptimal lives may induce depression and indifference toward pursuing any kind of projects at present, not only those that are future-oriented.<sup>42</sup> Therefore, taking the future-oriented options away or making them unsafe does amount to the substantial diminishment of autonomy in the sense developed here.

But here comes a problem. One may think that the claim that the right against inhuman treatment includes the right not to have future-oriented options removed or made unsafe entails implausibly demanding obligations. For instance, if future-oriented projects are so important for present people, does society have a duty to secure them? Do future generations have a duty to continue them?<sup>43</sup> Considerations such as these show that the qualification of the right is necessary. The first qualification is based on the distinction I made between types of options and token options. On the account defended here, inhuman treatment would occur only if future-oriented options as a type of option were to be taken away or made unsafe; taking away or making unsafe any particular token of this option does not constitute inhuman treatment. For the same reason, the right against being subjected to inhuman treatment does not entail the obligation to continue future-oriented projects as these are token rather than type options.

That said, it remains unclear what obligations the right not to have the type of future-oriented options taken away or made unsafe correlates with. For instance, Meyer argues that a society has the obligation to provide future-oriented options by securing social conditions such that future people can understand long-term projects developed by the previous generations, value them, and also continue them if they wish to. Future-oriented projects can be successful if society sustains the opportunities for future people such that they can benefit from their predecessors' efforts and continue pursuing the projects if they wish

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41 The notion of an inter-generational chain is very much present in non-Western philosophical traditions. For instance, in various African traditions, there is the notion that there is a continuum between human groups, and generational proximity is considered irrelevant. At least some Latin American traditions go a step further and believe that there are no different generations at all, but there is only one transcendent community (Hourdequin and Wong, 2021; Mbonda and Ngosso, 2021; Vidiella and García Valverde, 2021).

42 Gheaus (2015) makes a similar point.

43 I'm grateful to an anonymous reviewer for pressing me on this point.

to. In short, to continue doing valuable things, future people need to have flourishing lives.<sup>44</sup> If they struggle for survival in terms of securing food and water, it is unlikely that they will be able to pursue e.g. space research.<sup>45</sup> Although generally plausible, Meyer's account is of a limited application to the prohibition of inhuman treatment for the following reason. The obligation is grounded in the interest of members of the community in the existence of goods that serve as the basis for individual future-oriented projects. Thus, as opposed to the right against being subjected to inhuman treatment that is grounded in individual interests, Meyer's account of collective responsibility is grounded in some form of collective interests. In addition, the account centres on the importance of the continuation of the future-oriented projects that shapes the nature of collective responsibility; on his account, it is about collective responsibility to take actions that would increase the chance of such projects being continued. However, I argued earlier that when it comes to the right against being subjected to inhuman treatment, what matters is that the type of future-oriented options is not taken away or made unsafe; the continuation of particular projects is not morally relevant in this context. This suggests that the collective responsibility generated by the right is much weaker. It would involve securing certain conditions, but those conditions do not have to be such that they increase the chance of the continuation of future-oriented projects. Rather, they need to be such so that future people (as being central to future-oriented options) can come into existence.<sup>46</sup> Note that this does not correlate with the individual duty to procreate since in the foreseeable future there is no significant risk that humanity will go extinct. Therefore, at present the future-oriented options are not threatened in the way other options we have discussed so far are. Should circumstances change to the extent that this becomes very probable, then the duty can correspondingly change too.<sup>47</sup> Finally, should such a duty emerge, it would be a *pro tanto* duty, meaning that it could be overridden by weightier considerations, such as that conditions may be too bad to bring future people into existence.

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44 On Meyer's account, the duty does not correlate with the rights of future people against present people to pursue such projects; instead, the duty is grounded in the interest in respecting valuable projects shared by contemporaries.

45 Note that the interest in valuable projects does not necessarily entail the continuation of existing projects. To the extent it does, then indeed, this generates a duty to secure conditions which at least do not fall short of the conditions under which such projects are initially developed.

46 Here I am assuming that for future oriented options it is irrelevant who future people will be. To this one may object that it matters who they will be – e.g. whether they will be members of one's community. I cannot engage with this debate here.

47 For instance, Gheaus (2015) argues that under the circumstances of severe depopulation, there is a collective responsibility to secure that there will be future people that may even entail an enforceable although defeasible individual duty to procreate.

## Conclusion

In summary, we can see how the dynamism of rights works in practice. The old interest in autonomy generates new duties under the conditions of anthropogenic climate change. The interest in autonomy generates the duty not to undermine people's agency and take away or make unsafe the existing types of options that they can choose from in order to develop and pursue short-term and long-term projects and commitments. In the paper, I argued that similar considerations apply to youth that may not possess full-blown planning agency but does have the capacity to develop it. This general duty entails a set of more specific ones including the duty of states to mitigate emissions to the extent necessary to preserve the planet as livable for everyone. The failure to comply with the duty leads to leaving an increasing number of adults as well as youth with no prospects for their future, thus subjecting them to inhuman treatment.<sup>48</sup>

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